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## **Charitable Choice: Constitutional Issues and Developments Through the 106<sup>th</sup> Congress**

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## Summary

Charitable choice seeks to expand the universe of religious organizations that can participate in publicly funded social service programs. The establishment of religion clause of the First Amendment has long been construed to allow religious organizations to participate in such programs. But in the past it has generally been interpreted to require publicly funded religious social services providers to be incorporated separately from their sponsoring religious institutions, to forego religious activities and proselytizing in the publicly funded programs, and to remove religious symbols from the premises where the services are provided. Charitable choice attempts to allow religious organizations to retain their religious character and to employ their religious faith in carrying out publicly funded programs.

Four charitable choice provisions have been enacted into law (although two overlap), and in the 106th Congress either the House or the Senate or a committee approved an additional seven. All of these provisions state their purpose to be to allow religious organizations to participate as contractors or grantees in publicly funded social service programs “on the same basis as any other nongovernmental provider” without impairing their religious character. To protect their religious character, the provisions direct that a religious grantee or contractor “shall retain ... control over the definition, development, practice, and expression of its religious beliefs”; bar government from discriminating against an applicant “on the basis that the organization has a religious character”; prohibit government from requiring such an organization to alter its form of governance or to remove religious art and other symbols as a condition of eligibility; specify that religious contractors and grantees can discriminate on religious grounds in their employment practices; and (with two exceptions) allow such contractors and grantees to use their own funds to promote sectarian worship, instruction, and proselytization in the funded programs.

But in part as the result of amendments adopted on the Senate floor during the welfare reform debate, the charitable choice provisions also all require that the programs be implemented in a manner consistent with the establishment clause; bar the use of public funds received directly by religious organizations (but not indirectly, if the underlying program so allows) for “sectarian worship, instruction, or proselytization”; and permit government to require religious grantees to be separately incorporated from their sponsoring religious institution.

As a consequence of these various provisions, questions have been raised about the internal consistency of the charitable choice measures and whether administering agencies can, in fact, comply with all of their terms. Questions have also been raised about the constitutionality of charitable choice under the establishment clause.

This report provides background on the concept of charitable choice, summarizes the provisions and the legislative histories of the measures that have been approved, and examines the constitutional issues raised by such measures. It concludes with a chart comparing the provisions of the measures acted on to date. The report will not be updated.

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# Charitable Choice: Selected Legal Issues and Developments Through the 106<sup>th</sup> Congress

## Introduction

Charitable choice is the name given a burgeoning legislative effort to expand the universe of religious organizations that can participate in publicly funded social services programs. Under the establishment of religion clause of the First Amendment,<sup>1</sup> religious organizations have long been held to be eligible to participate as grantees or contractors in such programs. But the establishment clause has in the past generally been interpreted to bar government from providing direct assistance to organizations that are “pervasively sectarian.” As a consequence, government funding agencies have often required religious social services providers, as conditions of receiving public funds, to be incorporated separately from their sponsoring religious institutions, to refrain from religious activities and proselytizing in the publicly funded programs, and to remove religious symbols from the premises in which the services are provided. The establishment clause, in short, has been construed to require religious organizations to **secularize** their services and premises as conditions of obtaining public funding. As a concept, charitable choice challenges these restrictions and seeks to allow religious organizations to retain their religious character and to employ their faith in carrying out programs that are directly subsidized by government.

A charitable choice provision was first enacted into law in 1996 as part of the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996” (the welfare reform measure).<sup>2</sup> In 1998 Congress enacted into law a modified charitable choice provision as part of the reauthorization of the Community Services Block Grant Program.<sup>3</sup> In 2000 it added two overlapping charitable choice provisions to the drug abuse treatment and prevention titles of the Public Health Service Act by means of the “Children’s Health Act”<sup>4</sup> and the “Community Renewal Tax Relief Act of

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<sup>1</sup> The First Amendment provides in pertinent part that “Congress shall make no law respecting an establishment of religion ....”

<sup>2</sup> P.L. 104-193, Title I, § 104 (Aug. 22, 1996); 110 Stat. 2161; 42 U.S.C.A. 604a. The charitable choice provisions applied as well to the welfare-to-work grant program added to the Temporary Assistance to Needy Families (TANF) program in 1997. *See* P.L. 105-33, Title V, Subtitle A (Aug. 5, 1997); 111 Stat. 251, 577.

<sup>3</sup> P.L. 105-285, Title II, § 201 (Oct. 27, 1998); 112 Stat. 2749; 42 U.S.C.A. 9920.

<sup>4</sup> P.L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 42 U.S.C.A. 300x-65.

2000.”<sup>5</sup> A number of other charitable choice provisions also received favorable consideration in either the House or the Senate in the 106<sup>th</sup> Congress, although they were not enacted into law, as follows:

- Both the House and the Senate adopted charitable choice provisions in their versions of the juvenile justice bill (H.R. 1501 and S. 254).
- The House passed an additional four measures that included charitable choice provisions – the “Fathers Count Act” (H.R. 3073), which was subsequently passed again as part of the “Child Support Distribution Act of 2000” (H.R. 4678); the “American Homeownership and Economic Opportunity Act of 2000” (H.R. 1776), and the “Literacy Involves Families Together Act” (H.R. 3222).
- The House Committee on Education and the Workforce reported one additional measure that included a charitable choice section – the “Education Opportunities To Protect and Invest in Our Nation’s Students (Education OPTIONS) Act” (H.R. 4141).

The provisions of two of these measures – the “American Homeownership and Economic Opportunity Act” and the “Literacy Involves Families Together Act” – were ultimately enacted into law as parts of other bills. But in both instances the charitable choice provisions were eliminated.<sup>6</sup>

These charitable choice provisions differ in some details, but they all share a number of common provisions. The charitable choice measures all, explicitly or by reference, state their purpose to be

(1) to allow religious organizations to participate as contractors or grantees in publicly funded social service programs “on the same basis as any other nongovernmental provider” without impairing the religious character of such organizations.

To that end the provisions all

(2) direct that a religious grantee or contractor “shall retain ... control over the definition, development, practice, and expression of its religious beliefs”;

(3) bar government from discriminating against an applicant “on the basis that the organization has a religious character”;

(4) prohibit government from requiring such an organization to alter its form of internal governance or to remove religious art and other symbols as a condition of eligibility; and

(5) specify that receipt of public funds does not alter the exemption religious organizations have under Title VII of the Civil Rights Act of 1964 allowing them to discriminate on religious grounds in their employment practices.

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<sup>5</sup> P.L. 106-554 (December 21, 2000). The measure was enacted as part of the omnibus “Consolidated Appropriations Act, 2001.”

<sup>6</sup> See *infra* at 20-23.

But, partly as the result of amendments adopted on the Senate floor during the welfare reform debate in 1995-96, the charitable choice provisions also all

(6) require that the programs be implemented in a manner consistent with the establishment clause (and, in two cases, with the free exercise clause as well);

(7) bar the use of public funds received directly by religious organizations (but not indirectly in the form of vouchers, if the underlying program provides for vouchers) for “sectarian worship, instruction, or proselytization”; and

(8) implicitly permit government to require religious grantees to be separately incorporated from their sponsoring religious institution.

In addition, most, but not all, of the charitable choice provisions that have been enacted or approved so far

(9) implicitly allow such contractors and grantees to use their own resources to promote sectarian worship, instruction, and proselytization in the funded programs;

(10) bar religious organizations that receive funds under the pertinent programs from discriminating against beneficiaries “on the basis of religion, a religious belief, or refusal to actively participate in a religious practice”;

(11) require that beneficiaries who object to the religious character of an organization providing services be afforded an alternate and accessible provider and;

(12) provide for government audits of the religious organizations’ use of the federal funds provided.

A smaller number of the charitable choice measures

(13) provide that the charitable choice provisions do not preempt state constitutions or statutes “that prohibit[] or restrict[] the expenditure of State funds in or by religious organizations”;

(14) specify that receipt of financial assistance constitutes receipt of federal financial assistance for purposes of applying federal civil rights statutes, and

(15) bar religious organizations from using their own funds to engage participants in religious worship, instruction, or proselytization in the funded program.

Finally, two additional elements proposed in some of the charitable choice initiatives which, with one exception, have generally been rejected would have

(16) barred public agencies from requiring a religious organization to form a separate nonprofit entity to receive and administer funds under the bill, and

(17) allowed participating religious organizations to require employees to adhere to their religious tenets and to abide by any rules regarding the use of drugs or alcohol.

As a consequence of these various provisions, questions have been raised about the internal consistency of the charitable choice measures, whether some of the provisions undermine and contradict the intent of charitable choice to allow religious organizations to employ their faith in carrying out publicly funded social services programs, and whether administering agencies can, in fact, comply with all of their terms. Questions have also been raised about the constitutionality of charitable

choice under the establishment of religion clause of the First Amendment. The latter two issues of administrative feasibility and constitutionality are interrelated, and both have been further complicated by recent Supreme Court decisions that appear to loosen the restrictions the Court has previously imposed on direct aid to sectarian institutions pursuant to the establishment clause.<sup>7</sup> Indicative of the questions surrounding the constitutionality of charitable choice, it should be noted that at least one suit has now been filed challenging the constitutionality of a charitable choice program in Texas,<sup>8</sup> and another relevant suit has been filed in Kentucky. The latter suit does not involve a charitable choice program as such but challenges the constitutionality of one of its central provisions, namely, religious discrimination in the employment practices of a religious organization that receives public funds to provide child welfare services.<sup>9</sup>

The following sections (1) summarize the legislative histories of the four charitable choice measures that have been enacted into law as well as the seven that were passed by either the House or the Senate or committee in the 106<sup>th</sup> Congress, and (2) set forth the framework of the constitutional issues. To simplify comparison of the various charitable choice measures in these laws and bills, an Appendix lays out their provisions in table form.

## Charitable Choice Measures Enacted into Law

**(1) Welfare Reform (P.L. 104-193).** In 1996 Congress enacted the first charitable choice provision as part of the “Personal Responsibility and Work Opportunity Reconciliation Act,” which reformed the welfare system.<sup>10</sup> **That provision included all of the elements in ## 1-13 above, but not those in ## 14-17.**

Charitable choice had first surfaced during the Senate’s consideration of welfare reform in 1995. It was not in the welfare reform bill (H.R. 4) initially passed by the House that year,<sup>11</sup> nor was it in the version subsequently reported by the Senate Finance Committee.<sup>12</sup> But a charitable choice provision had been part of a welfare

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<sup>7</sup> The pertinent decisions are *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 120 S.Ct. 2530 (2000).

<sup>8</sup> *American Jewish Congress and Texas Civil Rights Project v. Bost*, No. \_\_\_ (Travis County, Texas, filed July 24, 2000). The lawsuit charges that a job training and placement program funded by the Texas Department of Human Services and operated by the Jobs Partnership of Washington County is “permeated” by Protestant evangelical Christianity in violation of both the Texas and U.S. constitutions.

<sup>9</sup> *Pedreira v. Kentucky Baptist Homes for Children*, Case No. \_\_\_ (E.D. Ky., filed April 17, 2000). The lawsuit charges that the dismissal of an employee whose position was funded by state funds on the grounds her sexual orientation was contrary to the employer’s religious tenets violates the establishment of religion clause

<sup>10</sup> P.L. 104-193, Title I, § 104 (Aug. 22, 1996); 110 Stat. 2161; 42 U.S.C.A. 604a.

<sup>11</sup> 141 CONG. REC. H 3790 (daily ed. March 24, 1995).

<sup>12</sup> S.Rept. No. 104-96, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (June 12, 1995).

reform bill which had previously been introduced by Sen. Ashcroft (R-Mo.)<sup>13</sup>, and it re-emerged in August, 1995, as part of a leadership substitute proffered by the Majority Leader, Sen. Dole (R.-Kn.), for the bill that had been reported by the Senate Finance Committee.<sup>14</sup> The provision was included, reportedly, at the initiative and urging of Sen. Ashcroft.

After further modification a few days later by Sen. Dole,<sup>15</sup> the charitable choice section in the leadership substitute specified that the states could make grants to, or contracts with, religious organizations to administer elements of the “Temporary Assistance for Needy Families” program (TANF). The measure contained the first five provisions noted above protecting the religious character and independence of religious grantees and contractors, a truncated version of the limitation noted in # 7 above barring the use of direct assistance (but not assistance in the form of vouchers and not the organizations’ own funds) for “sectarian worship or instruction,” and the protections for beneficiaries in ## 10 and 11 above. In addition, the leadership substitute included the provisions in ## 16 and 17 above barring funding agencies from requiring a religious organization to form a separate nonprofit entity to receive and administer funds under the bill and allowing participating religious organizations to require employees to adhere to their religious tenets and to abide by any rules regarding the use of drugs or alcohol.

During floor debate in September, 1995, on the leadership substitute, Sen. Cohen (R.-Me.) proposed two amendments to the charitable choice section. The first proposed to add language requiring the programs to be “implemented consistent with the Establishment Clause of the United States Constitution” and to delete the language precluding funding agencies from requiring the recipient organizations to be incorporated separately from their sponsoring religious organizations.<sup>16</sup> His second amendment proposed the deletion of the language barring funding agencies from requiring the recipient organization to remove religious art, icons, scripture, and other symbols.<sup>17</sup> Sen. Kennedy (D.-Ma.), in turn, offered an amendment to delete the charitable choice provisions in their entirety.<sup>18</sup> But only Sen. Cohen’s first amendment was acted upon by the Senate.

Sen. Cohen contended that “the bill in its present form does too little to restrain religious organizations from using Federal funds to promote a religious message.”<sup>19</sup> He also contended that prohibiting the states from asking a religious organization to set up a separate nonprofit corporation to receive the money and administer the programs would actually inhibit the participation of religious organizations. The Supreme Court, he said, has held the establishment clause to be violated by

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<sup>13</sup> See S. 842, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995).

<sup>14</sup> 141 CONG. REC. S 11640, 11648 (daily ed. August 5, 1995).

<sup>15</sup> *Id.* at S 12428, 12437-38 (daily ed. August 11, 1995).

<sup>16</sup> *Id.* at S 24189 and, as slightly modified, at S 24214 (Sept. 8, 1995).

<sup>17</sup> *Id.* at S 24233-34.

<sup>18</sup> *Id.* at S 24247.

<sup>19</sup> *Id.* at S 24845 (daily ed. Sept. 13 1995).



government grants to religious organizations that are “permeated with sectarianism”; and states will, if they do not have the separate nonprofit corporation option, avoid dealing with some religious organizations because they “are not going to want to walk into a lawsuit ... that will challenge the program as being violative of the first amendment.”<sup>20</sup> Sen. Ashcroft (R.-Mo.) opposed the second part of the amendment on the grounds it provided no certain protection against lawsuits and placed a barrier to the participation of religious organizations that was imposed on no other kind of organization. “What we really ask for,” he stated, “is that there be a level playing field here” for religious and nonreligious organizations.<sup>21</sup> After a division of Sen. Cohen’s amendment, the part requiring programs to be implemented consistent with the establishment clause was adopted by voice vote; and the other part giving funding agencies the discretion to require the recipient organization to be separately incorporated from its sponsoring religious organization was adopted by a vote of 59-41.<sup>22</sup> Several days later the Senate approved H.R. 4, as amended.<sup>23</sup>

The House, as noted above, had previously adopted a welfare reform measure that did not include a charitable choice provision. In the subsequent House-Senate conference, both parts of Sen. Cohen’s amendment were retained. But the conference agreement deleted the provision in the Senate substitute which permitted recipient organizations to require their employees to adhere to the organizations’ religious tenets and their rules regarding the use of alcohol or drugs (# 17 above) while retaining the other provision noted in # 5 above allowing such organizations to discriminate on religious grounds in their employment practices.<sup>24</sup> The conference agreement also slightly amended the provision barring direct assistance received by such organizations (but not assistance received indirectly in the form of vouchers, or their own funds) from being used for religious worship or instruction, adding a prohibition on proselytizing as well. Finally, the agreement added the non-preemption provision summarized in # 13 above.

**Thus, the conference agreement resulted in a charitable choice section in H.R. 4 that included all of the provisions in ## 1-13, but not those in ## 14-17, above.** Both the House and the Senate approved the conference agreement and sent the bill to the President. However, on January 9, 1996, President Clinton vetoed the measure for reasons having nothing to do with charitable choice.<sup>25</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at S 24848.

<sup>22</sup> *Id.* at S 24851.

<sup>23</sup> *Id.* at S 13802 (daily ed. Sept. 19, 1995).

<sup>24</sup> H.Rept. 104-430 (Dec. 20, 1995). See text at 141 CONG. REC. H 15317, 15328, 15406 (daily ed. December 21, 1995).

<sup>25</sup> See text of the veto message at 142 CONG. REC. H 342 (daily ed. Jan. 22, 1996). On December 6, 1995, the President had also vetoed H.R. 2491, a massive reconciliation bill that contained the provisions of welfare reform providing budgetary savings. But that bill did not include a variety of other provisions that were included in H.R. 4, including the charitable choice section.

Welfare reform re-emerged during the second session of the 104<sup>th</sup> Congress in 1996, and this time a modified version was enacted into law. **Both the House and the Senate included the charitable choice provisions that had been included in the conference agreement during the first session in their revised welfare reform measures without substantive change.**<sup>26</sup> The only action on charitable choice occurred on a motion in the Senate to waive a point of order under the Budget Act that would have excluded this section from the bill. After brief debate the motion to waive the point of order (and thus to retain charitable choice in the bill) was adopted, 67-32.<sup>27</sup>

On August 22, 1996, President Clinton, without any comment on the charitable choice provision, signed the welfare reform bill into law.<sup>28</sup> In December, 1996, the Department of Health and Human Services sent a package of proposed technical corrections to the statute to Congress which included several changes to the charitable choice section. The primary recommendation was to change references to “religious organizations” in the charitable choice section to “religious organizations that are not pervasively sectarian.” But Congress, reportedly due to the opposition of Sen. Ashcroft, did not include that proposal in the technical and other amendments to the program it adopted in 1997.<sup>29</sup> As noted above, those amendments included the addition of a welfare-to-work grant initiative to the TANF program which was automatically subject to the charitable choice provisions previously enacted.

**(2) Community Services Block Grant Program (P.L. 105-285).** The second charitable choice measure was enacted by the 105<sup>th</sup> Congress in 1998 as part of the re-authorization of the “Community Services Block Grant Act.”<sup>30</sup> **As enacted, the charitable choice section contained all of the provisions in ## 1-9 and # 12 plus a generalized version of # 10, but not the ones summarized in ## 11 and 13-17 above.**

Both as introduced by Sen. Coats (R.-Ind.)<sup>31</sup> and as reported by the Senate Committee on Labor and Human Resources on July 21, 1998,<sup>32</sup> the re-authorization measure for the Community Services Block Grant program (S. 2206) included a charitable choice section. But the bill did not fully replicate the charitable choice provisions that had been contained in the welfare reform bill. Instead, it included only the general provision stating that faith-based organizations should be considered

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<sup>26</sup> See 142 CONG. REC. H 7989-90 (daily ed. July 18, 1996) and S 8582 (daily ed. July 23, 1996).

<sup>27</sup> 142 CONG. REC. S 8507-08 (daily ed. July 23, 1999). Subsequently, the measure was retained by the House-Senate conference committee (see H.Rept. 104-725 at 142 CONG. REC. H 8829, 8910 (daily ed. July 30, 1996)) and, thus, was part the bill when signed into law.

<sup>28</sup> P.L. 104-193, Title I, § 104 (Aug. 22, 1996); 110 Stat. 2161; 42 U.S.C.A. 604a.

<sup>29</sup> P.L. 105-33, Title V (Aug. 5, 1997); 111 Stat. 251, 577.

<sup>30</sup> P.L. 105-285, Title II, § 201 (Oct. 27, 1998); 112 Stat. 2749; 42 U.S.C.A. 9920.

<sup>31</sup> S. 2206, 105<sup>th</sup> Cong., 2d Sess. (June 23, 1998).

<sup>32</sup> S.Rept. 105-256, 105<sup>th</sup> Cong., 2d Sess. (July 21, 1998), at 33 and 114.

as eligible providers of services “on the same basis as other nongovernmental organizations” (# 1 above) and ## 3, 4 (in part), 6, 7, and 12 above barring government from discriminating against applicant providers “on the basis that the organization has a faith-based character”; prohibiting funding agencies from requiring faith-based organizations to remove religious art, icons, scriptures, or other symbols as a condition of eligibility; requiring that programs operated by faith-based organizations be “implemented in a manner consistent with the Establishment Clause ...”; barring such organizations from using public funds received in the form of grants or contracts “for sectarian worship, instruction, or proselytization”; and allowing a limited audit of the organizations’ use of the federal funds. By its silence the bill as introduced and reported also incorporated ## 8 and 9 above permitting government to require religious grantees to be separately incorporated from their sponsoring religious institution and allowing such grantees to use their own funds for sectarian worship, instruction, and proselytization. Finally, the bill as introduced and reported contained a requirement broader than # 10 barring discrimination against any person on the basis of race, color, national origin, sex, age, disability, and religion. The committee report described these provisions and then stated:

The committee notes the historical importance of such entities in serving the poor and believes that they should not be precluded from participating in this program either as a grant recipient or as an eligible entity. This language is consistent with provisions included in the 1996 Welfare Reform legislation.<sup>33</sup>

Before the bill came up for debate on the Senate floor, however, the charitable choice section was modified. Added to the provisions in the bill as introduced and reported were ## 2, 4 (in part), and 17 above affirming that faith-based organizations “shall retain ... control over the definition, development, practice, and expression of [their] faith-based beliefs”; barring funding agencies from requiring faith-based organizations to alter their form of internal governance; and allowing faith-based organizations to “require that employees adhere to the [organizations’] religious tenets and teachings and ... to rules forbidding the use of drugs or alcohol.” The modified bill also deleted the broad prohibition barring discrimination against beneficiaries. Floor debate on the bill was brief, and no controversy emerged on charitable choice or any other aspect of the bill prior to its adoption on a voice vote.<sup>34</sup> Thus, as adopted by the Senate, the charitable choice section included ## 1 - 9 plus ## 12 and 17 above.

In the House a comparable bill (H.R. 4271) had been introduced and reported by the House Committee on Education and the Workforce.<sup>35</sup> That bill had a charitable choice provision identical to the one in the Senate bill as originally introduced and reported. But controversy developed over unrelated amendments that had been added in the committee. As a consequence, the committee chairman, Rep. Goodling (R.-Pa.), brought a modified version of S. 2206 to the floor instead of H.R. 4271 under a suspension of the rules procedure. His version of S. 2206 retained

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<sup>33</sup> *Id.* at 33.

<sup>34</sup> 144 CONG. REC. S 9067-9087 (daily ed. July 27, 1998). For the one justification of the charitable choice provision, *see* S 9084 (statement of Sen. Jeffords).

<sup>35</sup> H.Rept. 105-686 (August 7, 1998).

intact the charitable choice provisions that had been in H.R. 4271 and did not replicate the changes made in the Senate. After brief debate, the House adopted S. 2206 by a vote of 346-20.<sup>36</sup> Thus, the House-passed version of S. 2206 included ##1 and 3, part of # 4, ## 6-9, a broader version of # 10, and # 12 above.

The House-Senate conference on the two versions of S. 2206 largely acceded to the Senate's version of charitable choice. It accepted the Senate's additions regarding a faith-based organization's control over the definition and expression of its religious beliefs and barring government from requiring such an organization to alter its form of internal governance as well as the Senate's deletion of the prohibition on religious discrimination. But it replaced the Senate addition allowing faith-based organizations to "require that employees adhere to the [organizations'] religious tenets and teachings and ... to rules forbidding the use of drugs or alcohol" with the Title VII provision allowing such organizations to discriminate on religious grounds in their employment practices that had been in the welfare reform measure.<sup>37</sup> **Thus, as reported by the conference committee and as enacted, the charitable choice section of the Community Services Block Grant program contained all of the provisions in ## 1-9 and # 12 above but not the ones summarized in # 11 and ## 13-17. A separate section of the bill contained a general nondiscrimination provision broader than # 10.** Both the House and the Senate approved the conference report.<sup>38</sup>

On October 27, 1998, President Clinton signed S. 2206 into law.<sup>39</sup> With respect to the charitable choice provision, however, he said that its implementation would be subject to the following limitation:

The Department of Justice advises, however, that the provision that allows religiously affiliated organizations to be providers under CSBG would be unconstitutional if and to the extent it were construed to permit governmental funding of "pervasively sectarian" organizations, as that term has been defined by the courts. Accordingly, I construe the Act as forbidding the funding of pervasively sectarian organizations and as permitting Federal, State, and local governments involved in disbursing CSBG funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian.<sup>40</sup>

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<sup>36</sup> 144 CONG. REC. H 7620-7643, H 7671 (daily ed. Sept. 14, 1998).

<sup>37</sup> See H.Rept. 105-788 (Oct. 6, 1998), *reprinted at* 144 CONG. REC. H 9697 *et seq.* (daily ed. Oct. 6, 1998). The employment discrimination section provided that "[a] religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in section (a)." Section 702 affords religious organizations a complete exemption from Title VII's ban on religious discrimination in employment.

<sup>38</sup> See 144 CONG. REC. S 11865-11872 (daily ed. Oct. 8, 1998) and H 10201-10207 (daily ed. Oct. 9, 1998).

<sup>39</sup> P.L. 105-285, Title II, § 201 (Oct. 27, 1998); 112 Stat. 2749; 42 U.S.C.A. 9920.

<sup>40</sup> 134 Weekly Compilation of Presidential Documents 2148 (Nov. 2, 1998) (Statement on (continued...))

**(3) Substance Abuse Prevention and Treatment Programs under Titles V and XIX of the Public Health Services Act (P.L. 106-310 and P.L. 106-554).** The 106<sup>th</sup> Congress enacted two overlapping charitable choice provisions applicable to the substance abuse prevention and treatment programs authorized by Titles V and Part B of Title XIX of the Public Health Services Act.<sup>41</sup> The first one, enacted as part of the “Children’s Health Act of 2000”<sup>42</sup> in October, 2000, amended Part B of Title XIX, which authorizes the Substance Abuse and Mental Health Services Administration (SAMHSA) in the Public Health Service to make block grants to the states for substance abuse prevention and treatment programs. But it stated that it is also applicable to the discretionary grant programs concerning substance abuse administered by SAMHSA under Title V. The provision **included all of the charitable choice elements in ## 1-12 listed above plus limited versions of ## 13 and 17.** The modification of # 13, instead of saying that more restrictive state laws regarding the public funding of religious organizations are not pre-empted, mandates that the charitable choice provisions apply to any state funds contributed to the federally funded substance abuse program **unless** the state opts to segregate its funds from the federal funds. The modification of # 17 permits religious organizations to require employees providing services in publicly funded substance abuse programs to “adhere to rules forbidding the use of drugs or alcohol.”

The second charitable choice provision, enacted as part of the “Community Renewal Tax Relief Act of 2000,”<sup>43</sup> amended Title V of the Public Health Services Act, which primarily authorizes discretionary grant programs for substance abuse prevention and treatment administered by SAMHSA. But this provision also stated that it is applicable to the block grants to the states authorized by Part B of Title XIX. This provision **included all of the elements in ## 1-12 above, although ## 5, 6, 10, and 11 are somewhat modified.** The employment practices section (# 5) includes, in addition to the usual Title VII language, a provision stating:

Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment.

The provision requiring conformity with the establishment clause (# 6) also requires conformity with the free exercise clause, while the section barring discrimination

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<sup>40</sup> (...continued)

Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998).

<sup>41</sup> Title V of the PHSA (42 U.S.C.A. 290aa *et seq.*) establishes the Substance Abuse and Mental Health Services Administration (SAMHSA) and authorizes a number of federally-administered grant, contract, and cooperative agreement programs related, *inter alia*, to the prevention and treatment of substance abuse. Part B of Title XIX (42 U.S.C.A. 300w *et seq.*), in turn, authorizes block grants to the states, *inter alia*, for the prevention and treatment of substance abuse.

<sup>42</sup> P.L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 42 U.S.C.A. 300x-65.

<sup>43</sup> This Act was part of the omnibus “Consolidated Appropriations Act, 2001.” See P.L. 106-654 (December 21, 2000). The charitable choice provision is codified at 42 U.S.C.A. 290kk *et seq.*

against beneficiaries (# 10) excludes the phrase “or refusal to participate in a religious practice.” The modification of # 11 imposes the burden of referring a client to an alternate provider on the provider whose religious character the client has deemed objectionable rather than on a public entity. The charitable choice section of this law also included special provisions allowing the personnel of a religious provider to be exempted from state and local education and training requirements so long as their education and training is “substantially equivalent.”

Thus, both charitable choice statutes are fully applicable to the discretionary grant and the block grant programs authorized by Titles V and XIX of the Public Health Services Act. But they are not wholly congruent. The following subsections detail the legislative history of each provision:

***Children’s Health Act.*** The Children’s Health Act emerged late in the 106<sup>th</sup> Congress and pulled together a number of health related initiatives initially proffered in other bills. As introduced in, and passed by, the House, the Children’s Health Act (H.R. 4365) did not contain a charitable choice provision. But a broader substitute amendment adopted on the Senate floor included a section adding a charitable choice provision to the drug abuse prevention and treatment programs authorized by Titles V and XIX of the Public Health Service Act. The House agreed to the Senate amendment without a conference; and on October 17, 2000, President Clinton signed the bill into law.<sup>44</sup>

There was no committee report on the bill in either the House or the Senate. The House adopted H.R. 4365 (without a charitable choice provision) under a suspension of the rules on May 9, 2000, by a vote of 419-2.<sup>45</sup> In the Senate the bill was initially referred to the Senate Committee on Health, Education, Labor, and Pensions. But on September 22, 2000, that committee was discharged, and on the floor Sen. Frist (R.-Tenn.) proposed a bipartisan substitute amendment containing a charitable choice provision. The section of the bill that included the charitable choice provision essentially incorporated a bill that the Senate had passed a year earlier, the “Youth Drug and Mental Health Services Act” (S. 976). In its consideration of that bill, the Senate had a fair amount of debate on the charitable choice provision.<sup>46</sup>

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<sup>44</sup> P.L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 42 U.S.C.A. 300x-65.

<sup>45</sup> 146 CONG. REC. H2698-2711 (daily ed. May 9, 2000).

<sup>46</sup> The Senate had approved S. 976 on November 3, 1999. That measure would have re-authorized and modified a number of substance abuse and mental health treatment programs under titles V and XIX of the Public Health Services Act, both to give the states greater flexibility in implementing the programs and to provide a sharper focus on the needs of children and adolescents. Section 305 of the bill provided that the states could administer their substance abuse programs under either title by means of grants, contracts, and cooperative agreements with nongovernmental organizations and specified that religious organizations were to be deemed eligible on the same basis as other organizations. The charitable choice section stated that it was applicable to grants made under both Title V and Title XIX without regard to whether they were state-administered. The charitable choice section of the bill was identical to that eventually enacted in the Children’s Health Act.

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<sup>46</sup> (...continued)

As originally introduced, S. 976 had not contained a charitable choice section. Instead, the section was part of an amendment in the nature of a substitute offered by Sen. Frist (R.-Tn.) during the markup of the bill by the Senate Committee on Health, Education, Labor, and Pensions on July 28, 1999. The charitable choice provision included in the substitute differed from the one ultimately approved by the Senate in one respect: In addition to allowing religious organizations to retain their Title VII privilege to discriminate on religious grounds in their employment practices notwithstanding the receipt of public funds, the Frist substitute also provided that such organizations could require employees to adhere to their tenets and teachings as well as to rules forbidding the use of drugs or alcohol (#17 above). During the markup Sen. Reed (D.-RI) and Sen. Kennedy (D.-Ma.) proposed an amendment to delete **both** of these employment discrimination provisions, but that amendment was rejected on a rollcall vote of 8-10. The Committee then approved the Frist substitute by a vote of 17-1.

The Committee report on S. 976 cited the apparent success of several faith-based substance abuse programs and stated that “[b]ecause of the effectiveness of these organizations, the Committee believes that greater participation of faith-based programs in treating substance abuse problems is critical ....” The report said that “[r]eligious organizations have often been unwilling to accept government funds to provide social services for fear of having to compromise the[ir] religious character ...” and that government ought to “exercise neutrality when inviting the participation of non-governmental organizations to be services providers by considering all organizations – even religious ones – on an equal basis ....” The charitable choice provision, the report stated, “clarifies the constitutional framework for enabling cooperation between the government and religious organizations,” assures religious organizations that “they will not have to compromise their religious character upon receiving government funds,” maintains their “autonomy” over employment decisions by permitting them to “make employment decisions based upon religious reasons,” and protects the free exercise rights of beneficiaries. While “religious organizations are expected to use government funds for the secular purpose of the legislation,” the report stated, “nothing prohibits religious organizations from using monies received from other sources ... for inherently religious activities, as long as participation is voluntary.” *See* S.Rept. 106-196 (Oct. 19, 1999), at 32-33.

Seven Democrats who voted to report the bill filed “Additional Views” in the committee report criticizing the charitable choice section. The provision, they stated, is “Constitutionally suspect” and lacks “clear and strict safeguards ... to ensure that the dividing line between church and state is not erased.” Moreover, they asserted, there is as yet no documented evidence of the efficacy of faith-based substance abuse programs; and recent research, they said, has emphasized that addiction is a chronic illness rather than a moral failing. In addition, they stated, it provides “a new avenue for employment discrimination,” and they decried the Committee’s rejection of the Reed-Kennedy amendment to strike the employment discrimination provisions:

[Religious discrimination] may be acceptable when the organization is using its own money, but when it is using federal funds, with explicit prohibitions against proselytization, this kind of discrimination is objectionable.

The dissenting Senators said that “we believe religious organizations are helpful allies in the battle against substance abuse” but that such organizations should be enlisted “without undermining constitutional principles and civil rights laws.” The charitable choice section, they concluded, “though laudable in concept, would have disturbing practical and  
(continued...)

The Senate floor debate on Sen. Frist's substitute generally focused on its various health initiatives. But Senators Frist and Ashcroft (R.-Mo.) spoke in support of the charitable choice provision while Sen. Reed (D.-R.I.) spoke in opposition. Sen. Frist stated:

We know that no one approach works for everyone who needs and wants substance abuse treatment and that faith-based programs have strong records of successful rehabilitation. This provision will allow faith-based programs to continue to offer their assistance and expertise.<sup>47</sup>

Sen. Ashcroft noted that he had authored the first charitable choice provision as part of the welfare reform legislation in the 104<sup>th</sup> Congress and asserted:

Under Charitable Choice ... churches and other faith-based providers are able to compete on an equal footing with other non-governmental organizations in providing services to disadvantaged Americans .... Charitable Choice calls our nation to its highest and best in our effort to help those in need. It meets the tests of compassion and common sense that count for so much in Missouri. When people of faith extend compassionate help to those in need, the results can be stunningly successful .... [T]he bipartisan support for Charitable Choice is overwhelming in Congress. In addition, both Presidential candidates ... strongly support the program. It is my hope that this broad national consensus will continue to grow and that soon [we] will be able to enact a comprehensive expansion of Charitable Choice to all federally-funded social services programs.<sup>48</sup>

Sen. Reed (D.-R.I.) reiterated his criticism of the charitable choice provision:

... [It] allows all religious institutions, including pervasively religious organizations, such as churches and other houses of worship, to use taxpayer

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<sup>46</sup> (...continued)  
constitutional consequences.” *Id.* at 43-45.

When S. 976 came to the Senate floor, much of the brief debate centered on the charitable choice provision, with Senators Frist and Ashcroft praising it and Senators Kennedy, Dodd, and Reed criticizing it. The only amendment offered was one by Sen. Frist to add an authorization for programs to prevent substance abuse in high risk families to the bill. That amendment also included a modification of the employment discrimination provisions in the committee-reported bill; it deleted the provision allowing religious organizations to require employees to adhere to their tenets and teachings (part of # 17 above). The amendment still retained in the bill the Title VII exemption and the provision regarding the use of drugs and alcohol by employees (the other part of # 17). The amendment and the bill were approved by the Senate on a single voice vote on November 3, 1999.

In the House the bill was referred to the Committee on Commerce, but no further action occurred.

<sup>47</sup> 146 CONG. REC. S 9095 (daily ed. Sept. 22, 2000).

<sup>48</sup> *Id.* at S 9109.



dollars to advance their religious mission .... [T]he inclusion of charitable choice in this legislation is particularly disturbing since, unlike its application to the intermittent services provided under Welfare Reform and CSBG, SAMHSA funds are used to provide substance abuse treatment which is ongoing, involves direct counseling of beneficiaries and is often clinical in nature. In the context of these programs it would be difficult if not impossible to segregate religious indoctrination from the social service .... The charitable choice provision creates a disturbing new avenue for employment discrimination and proselytization in programs funded by SAMHSA .... [P]artnerships with faith-based organizations ... should respect First Amendment protections and not allow taxpayer dollars to be used to proselytize or to support discrimination.<sup>49</sup>

Nonetheless, the Senate passed the bill by unanimous consent.<sup>50</sup>

The Senate substitute had been developed in consultation with House members. As a consequence, upon the bill's return to the House, the House simply accepted the Senate amendment without taking the measure to a House-Senate conference, 394-25.<sup>51</sup> Most comments on the floor supported various aspects of the legislation; but Representatives Scott (D.-Va.), Jackson-Lee (D.-Tex.), Edwards (D.-Tex.), Norton (D.-D.C.), Waxman (D.-Cal.), and Pelosi (D.-Cal.) criticized the charitable choice provision. Rep. Edwards expressed the most comprehensive critique:

First, what it says is Federal tax dollars can go directly to churches, synagogues, and houses of worship. I believe that is clearly unconstitutional and for good reason. Federal subsidies of our churches and houses of worship is something we have not done for 200 years in our country. The second point: It mentions language under the guise of not wanting to have discrimination against religious organizations. That might be cute marketing but it is faulty logic .... The reason ... our Founding Fathers set up a distance between government and religion and church and state was to protect religion, not to discriminate against it .... The third point is it talks about stopping discrimination. Charitable choice language in this bill actually subsidizes religious discrimination. Very clearly it says you can take ... Federal tax dollars ... and put out a government paid-for sign that says "No Catholics, no Jews, no Protestants need apply here for this federally subsidized job." That is wrong .... The fourth point is that charitable choice language in the name of helping religion is actually going to bring government auditing on our churches .... I am not sure our religious entities are helped in America by having Uncle Sam come in and audit. This language is unnecessary, it is harmful, it is unconstitutional, and it should not be in this bill.<sup>52</sup>

President Clinton signed the bill into law on October 17, 2000. But he reiterated, with some modification, the constitutional concern about charitable choice that he had expressed in signing the Community Services Block Grant Act (*supra* at 9) as well as the limitation he would impose in implementing the law:

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<sup>49</sup> *Id.* at S. 9106-07.

<sup>50</sup> *Id.* at S 9110 (daily ed. Sept. 22, 2000).

<sup>51</sup> *Id.* at H 8264-65 (daily ed. Sept. 27, 2000).

<sup>52</sup> *Id.* at H 8250.

This bill includes a provision making clear that religious organizations may qualify for SAMHSA's substance abuse prevention and treatment grants on the same basis as other nonprofit organizations. The Department of Justice advises, however, that this provision would be unconstitutional to the extent that it were construed to permit governmental funding of organizations that do not or cannot separate their religious activities from their substance abuse treatment and prevention activities that are supported by SAMHSA aid. Accordingly, I construe the Act as forbidding the funding of such organizations and as permitting Federal, State, and local governments involved in disbursing SAMHSA funds to take into account the structure and operations of a religious organization in determining whether such an organization is constitutionally and statutorily eligible to receive funding.<sup>53</sup>

**Community Renewal Tax Relief Act.** This measure (H.R. 5662) was introduced on December 14, 2000, and was immediately rolled into the omnibus "Consolidated Appropriations Act, 2001." The latter Act incorporated by reference the final four appropriations bills for fiscal 2001 as well as five authorization bills for various initiatives, including H.R. 5662. Both the House and the Senate, without any debate about the charitable choice provision, gave their assent to the conference report on the Act on December 15, 2000; and President Clinton signed the measure into law on December 21, 2000.<sup>54</sup>

As did the Children's Health Act, the Community Renewal Tax Relief Act incorporated measures considered previously in the 106<sup>th</sup> Congress. More particularly, some of its provisions, including its charitable choice provision, were drawn from a bill passed previously by the House but not acted upon by the Senate – the "Community Renewal and New Markets Act of 2000" (H.R. 4923). The charitable choice provision of H.R. 4923 was identical to that contained in H.R. 5662 and had been the focus of an earlier House debate.<sup>55</sup> The provisions of H.R. 4923,

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<sup>53</sup> *Weekly Compilation of Presidential Documents* (Oct. 23, 2000) (Statement on Signing the Children's Health Act of 2000), p. 2504.

<sup>54</sup> P.L. 106-554, Title I, § 144 (Dec. 21, 2000); 114 Stat. 2763, 2763A-622.

<sup>55</sup> H.R. 4923 was the result of an agreement between Speaker Hastert and President Clinton in November, 1999, to develop legislation to benefit distressed communities. The House adopted the bill on July 25, 2000, without prior referral to committee by a vote of 394-27. *See* 146 CONG. REC. H 6840 (daily ed. July 25, 2000).

H.R. 4923 provided a variety of tax incentives and other initiatives to promote the renewal of distressed communities. The charitable choice provision amended Titles V and XIX of the Public Health Service Act to allow religious organizations to receive grants and contracts to administer substance abuse prevention and treatment programs on the same basis as other private nonprofit organizations.

During the floor debate Rep. Scott (D.-Va.) complained that the bill was being considered hastily and under a procedure (suspension of the rules) that precluded amendments and that it should be defeated because of the charitable choice provision:

This bill ... ought to be opposed because it is unconstitutional, because it funds pervasively sectarian organizations. It ought to be opposed because it insults  
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including the charitable choice provision, had, in turn, been included in H.R. 5542, introduced on Oct. 25, 2000. That bill, along with several others, had, in turn, been incorporated by reference in the conference report on an unrelated bill, H.R. 2614,<sup>56</sup> which was adopted by the House<sup>57</sup> but not acted upon by the Senate. Finally, the provisions were included in H.R. 5662, which was incorporated by reference in the omnibus appropriations bill passed at the end of the 106<sup>th</sup> Congress.

During the House debate on the conference report on H.R. 4577, Rep. Jackson (D.-Ill.) made the only comment on charitable choice, as follows:

Although I support the New Markets initiative attached to this omnibus conference report, I object to the charitable choice language because it allows for federally funded employment discrimination. Despite the fact that charitable choice provisions were included in legislation signed in October, I still believe civil rights and constitutional problems exist, and we should not overlook them.<sup>58</sup>

In signing the measure into law, President Clinton reiterated the same constitutional limitation on the implementation of the charitable choice provision that he had voiced in signing the Children's Health Act:

This bill includes a provision making clear that religious organizations may qualify for substance abuse prevention and treatment grants from the Substance Abuse and Mental Health Services Administration (SAMHSA) on the same basis as other nonprofit organizations. The Department of Justice advises, however, that this provision would be unconstitutional to the extent that it were construed to permit governmental funding of organizations that do not or cannot separate their religious activities from their substance abuse treatment and prevention activities that are supported by SAMHSA aid. Accordingly, I construe the bill as forbidding the funding of such organizations and as permitting Federal, State, and local governments involved in disbursing SAMHSA funds to take into account the structure and operations of a religious organization in determining

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<sup>55</sup> (...continued)

professional drug counselors by denigrating their professional credentials. And the bill ought to be opposed because it brings back separate but equal in drug programs and specifically provides for religious bigotry in hiring with taxpayers' money.

*Id.* at H 6821.

Rep. Souder (R.-Ind.) responded that the House had previously debated and adopted such provisions five times, that the concept had been endorsed not only by President Clinton but also by Governor Bush and Vice-President Gore, and that "at the minimum, faith-based organizations are as effective as other programs in alcohol and drug abuse." *Id.* at H 6828.

In the Senate the bill was placed directly on the calendar rather than being referred to committee, but no further action occurred on this bill.

<sup>56</sup> See H.Rept. 106-1004 (Oct. 26, 2000).

<sup>57</sup> 146 CONG. REC. H 11263-64 (daily ed. Oct. 26, 2000).

<sup>58</sup> 146 CONG. REC. H12493 (daily ed. Dec. 15, 2000).

whether such an organization is constitutionally and statutorily eligible to receive funding.<sup>59</sup>

## Other Charitable Choice Measures Adopted by the House, Senate, or Committee in the 106<sup>th</sup> Congress

**(1) Juvenile Justice (S. 254, H.R. 1501).** In the 106<sup>th</sup> Congress both the Senate and the House included identical charitable choice provisions in their versions of the juvenile justice legislation. In the Senate the provision was included in S. 254, the “Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999,” as introduced by Sen. Hatch (R.-Ut.) on January 20, 1999,<sup>60</sup> and remained in the bill as passed by the Senate on May 20, 1999.<sup>61</sup> **The provision incorporated by reference all aspects of the charitable choice section of the welfare reform statute (## 1-13 above) and applied to Title II of the “Juvenile Justice and Delinquency Prevention Act of 1974”<sup>62</sup> as it would have been amended by the bill.** As amended, Title II would have authorized a broad range of programs for the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system.

On June 17, 1999, the House approved a floor amendment adding a charitable choice section to H.R. 1501, the “Child Safety and Protection Act.” More specifically, Rep. Souder (R.-Ind.) on June 16 proposed adding a charitable choice provision to the bill’s version of Title II of the “Juvenile Justice and Delinquency Prevention Act of 1974,”<sup>63</sup> which, like the Senate bill, authorized a variety of programs for the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system. Like the Senate bill, his proposal did not spell out the elements of charitable choice but simply **incorporated by reference all of the elements of the charitable choice section in the welfare reform bill (## 1-13 above).**<sup>64</sup> After some debate the House approved his amendment by a vote of 346-83.<sup>65</sup>

Rather than substituting the text of H.R. 1501 for S. 254 and asking for a conference, however, the House subsequently returned S. 254 to the Senate on the grounds it contained a revenue provision that did not originate in the House, in violation of Art. I, § 7, of the Constitution.<sup>66</sup> Consequently, the Senate substituted the text of S. 254 for the House-passed version of H.R. 1501 and requested a

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<sup>59</sup> White House Office of the Press Secretary, “Statement of the President Upon Signing H.R. 4577, the Consolidated Appropriations Act, FY 2001” (December 22, 2000), at 8.

<sup>60</sup> See S. 254, § 292, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999).

<sup>61</sup> 145 CONG.REC. S 5725 (daily ed. May 20, 1999).

<sup>62</sup> 42 U.S.C.A. 5611 *et seq.*

<sup>63</sup> *Id.*

<sup>64</sup> 145 CONG. REC. H 4461 (daily ed. June 16, 1999).

<sup>65</sup> *Id.* at H 4461-4468 (daily ed. June 16, 1999) and H 4487 (daily ed. June 17, 1999).

<sup>66</sup> *Id.* at H5680 (daily ed. July 15, 1999).

conference.<sup>67</sup> Largely because of ongoing controversy over the gun control provisions in the Senate version, H.R. 1501 never emerged from the House-Senate conference.

**(2) Fathers Count Act (H.R. 3073).** On November 10, 1999, the House rejected two amendments to modify a charitable choice provision in Title I of H.R. 3073, the “Fathers Count Act,” and then adopted the bill. Title I of H.R. 3073 would have authorized the federal government to make grants to public and private entities for projects to promote marriage, promote successful parenting, and help fathers and their families move from welfare to work. **The charitable choice provision would have made the charitable choice section of the welfare reform act applicable in its entirety (## 1-13 above) to such grants.** The provision had been included in the bill as introduced by Rep. Johnson (R.-Ct.) on October 14, as reported by the House Ways and Means Committee on October 28,<sup>68</sup> and as modified in a substitute floor amendment by Rep. Johnson on November 4.<sup>69</sup>

During the floor debate two amendments were proposed regarding charitable choice, and most of the debate on the bill concerned that issue. Rep. Edwards (D.-Tex.) proposed adding language to the charitable choice section providing as follows:

Notwithstanding any other provision of law, funds shall not be provided under this section to any faith-based institution that is pervasively sectarian.

His amendment was defeated, 184-238.<sup>70</sup> Rep. Scott (D.-Va.), in turn, offered a motion to recommit the bill with instructions to remove the provision in the charitable choice section of the welfare reform bill allowing religious organizations receiving funds under the designated programs to discriminate on religious grounds

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<sup>67</sup> *Id.* at S 9459 (daily ed. July 28, 1999).

<sup>68</sup> H.Rept. 106-424 (Part 1) (Oct. 28, 1999). The committee explained its inclusion of the charitable choice provision as follows:

The Committee believes that religious organizations have an important role to play in the nation’s social policy. We oppose any action that would provide an advantage in funding to faith-based organizations, but it seems unwise to eliminate them from the competition between entities that can design and conduct the best projects to promote marriage, promote better parenting, and help fathers increase their earnings. In fact, promoting marriage and better parenting, as well as solving some of the barriers to employment such as addictions, are issues that would seem to be reasonable for churches and other faith-based organizations to address. The goal of the Committee in adopting this provision is simply to level the playing field so that faith-based entities can have their applications considered on the same basis as secular entities.

*Id.* at 33.

<sup>69</sup> For the text of her amendment, *see* 145 CONG. REC. H 11557-63 (daily ed. Nov. 4, 1999) and H 11880-86 (daily ed. Nov. 10, 1999).

<sup>70</sup> *Id.* at H 11899 (daily ed. Nov. 10, 1999).

in their employment practices. That motion was also rejected, 176-246.<sup>71</sup> The House then adopted the bill, 328-93.<sup>72</sup>

In the Senate H.R. 3073 was referred to the Finance Committee but no further action occurred on that bill.

**(3) Child Support Distribution Act of 2000 (H.R. 4678).** The provisions of H.R. 3073, including the charitable choice provision, reappeared in H.R. 4678, the “Child Support Distribution Act of 2000,” which was passed by the House on September 7, 2000. H.R. 4678 contained a variety of measures to enhance the collection and distribution of child support and, because of Senate inaction on H.R. 3073, incorporated the provisions of that measure as well. **As was true with H.R. 3073, the charitable choice provision included in the fatherhood grant section of H.R. 4678 simply incorporated by reference the charitable choice section of the welfare reform act (## 1-13 above).**

The fatherhood grant program and its charitable choice provision were included in H.R. 4678 as introduced by Rep. Johnson (R.-Conn.) on June 15, 2000; as reported by the House Committee on Ways and Means on July 26, 2000; and as adopted by the House on September 7, 2000. In reporting the measure, the Ways and Means Committee explained the rationale for charitable choice by replicating the pertinent section of its report on the “Fathers Count Act.”<sup>73</sup>

The rule adopted to govern debate on the bill slightly modified the child support provisions of H.R. 4678, made in order a three-part amendment by Rep. Scott (D.-Va.) to the charitable choice section, and permitted one motion to recommit.<sup>74</sup> The Scott amendment proposed to add ## 14 and 15 above, barring entities from subjecting participants in funded programs “to sectarian worship, instruction, or proselytization” and providing that receipt of financial assistance under the fatherhood grant program would constitute receipt of federal financial assistance for purposes of federal, state, and local civil rights laws. His amendment also proposed to delete language in one provision of charitable choice that seemed to create a loophole in its ban on religious discrimination against beneficiaries in a funded program. That provision barred religious discrimination against beneficiaries “except as otherwise permitted in law.”

During floor debate Rep. Scott contended that the bill only barred federal funds from being used to proselytize participants in the fatherhood programs but allowed “privately paid employees or volunteers [to] use the Federal-funded program to

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<sup>71</sup> *Id.* at H 11900-01.

<sup>72</sup> *Id.* at H 11902.

<sup>73</sup> S.Rept. 106-793, 106<sup>th</sup> Cong., 2d Sess. (July 26, 2000), at 45. For the text of the duplicated portion of the Committee’s report on the “Fathers Count Act,” *see* p. 17, n. 62.

<sup>74</sup> H.Res. 566, adopted by voice vote on September 7. *See* 146 CONG.REC. H 7294-7296 (daily ed. Sept. 7, 2000). The modifications to the bill and the amendment made in order by the rule were explained in the report of the Rules Committee. *See* H.Rept. 106-798 (July 27, 2000).

promote their sectarian agenda.” Participants in effect, he said, would become a “captive audience.” He further contended that his amendment would close the apparent loophole allowing religious discrimination against participants and would also “make it clear that in cases of insidious discrimination, the Department of Justice could use enforcement procedures under title VI of the Civil Rights Act to enforce civil rights of beneficiaries and employees.”<sup>75</sup> Opponents argued, on the other hand, that the Scott amendment was broader than the similar one added to the Even Start bill because it precluded proselytizing “in” the funded program and not just “during” the program. They also contended that the civil rights element of the amendment was “unnecessary to enforce title VI” and that the amendment would “frighten churches away from being willing to participate in this program.”<sup>76</sup> On a roll-call vote, Rep. Scott’s amendment was rejected, 163-257.<sup>77</sup>

Rep. Scott then offered a motion to recommit with instructions to delete the section of the charitable choice provision allowing participating religious organizations to discriminate in their employment practices on religious grounds. He and others contended that “federally funded religious bigotry is wrong” and that “it is wrong to take the American people’s tax dollars and put out a sign that says no Jews, no Protestants, or no Catholics, no Muslims need apply for this federally funded job.” Rep. Souder (R.-Ind.) and others argued in opposition that the motion would “say that churches, if they are going to participate in any Federal program, can no longer be churches” and that its adoption would eliminate the participation of churches in the program, because they would refuse to give up their existing Title VII exemption. The motion to recommit was rejected, 175-249.<sup>78</sup>

The bill was then adopted by a vote of 405-18.<sup>79</sup> In the Senate it was referred to the Finance Committee, but no further action occurred on the measure.

#### **(4) American Homeownership and Economic Opportunity Act (H.R. 1776).**

On April 6, 2000, the House approved a charitable choice amendment proposed by Rep. Souder (R.-Ind.) to H.R. 1776, the “American Homeownership and Economic Opportunity Act of 2000,” by a vote of 299-124<sup>80</sup>; but the provisions of that bill were eventually enacted without the charitable choice provision. **The amendment incorporated the first nine elements detailed above plus # 12, and also included a new requirement that the programs be implemented in a manner consistent with the free exercise clause of the First Amendment.** The latter provision resulted from a colloquy on the House floor between Rep. Frank (D.-Ma.) and Rep.

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<sup>75</sup> 146 CONG.REC. H 7317 (daily ed. Sept. 7, 2000).

<sup>76</sup> *Id.* at H 7317-18.

<sup>77</sup> *Id.* at H 7318-19.

<sup>78</sup> *Id.* at H 7320-21.

<sup>79</sup> *Id.* at H 7321.

<sup>80</sup> 146 CONG. REC. H 1940 (daily ed. April 6, 2000).

Souder and was adopted by unanimous consent.<sup>81</sup> The charitable choice amendment applied to all housing programs administered by the Department of Housing and Urban Development under which the federal or state governments make funds available to nongovernmental organizations.

H.R. 1776 did not include a charitable choice provision either as introduced or as reported by the House Committee on Banking and Financial Services.<sup>82</sup> Upon offering the amendment during floor debate on the bill, Rep. Souder summarized it as follows:

Charitable choice makes it clear that religious organizations receiving Federal funds to provide services may not discriminate against those who would receive those services. It makes it clear that they will not be forced to change their identity or the characteristics which make them unique and effective. These protections include their religious character, independence, and employment practices. The goal here is to allow faith-based organizations to compete without handicapping them by eliminating the characteristics which make them effective in improving lives and restoring communities.<sup>83</sup>

As noted, a colloquy with Rep. Frank about protecting participants in programs operated by faith-based organizations resulted in a unanimous consent agreement to add language making clear that the programs have to be implemented in a manner consistent not only with the establishment clause but also the free exercise clause of the First Amendment. Further debate focused on the desirability and constitutionality of providing public funds to faith-based organizations which are pervasively sectarian and which discriminate on religious grounds in their employment practices, but the rule under which the bill was debated precluded any further amendment to the charitable choice provision.<sup>84</sup> Rep. Souder's amendment was adopted by a vote of 299-124, and the bill was then approved by a vote of 417-8.<sup>85</sup>

In the Senate H.R. 1776 was referred to the Committee on Banking, Housing, and Urban Affairs but received no further action.<sup>86</sup> Late in the second session,

<sup>81</sup> *Id.* at H 1922-23. As proposed and approved, the amendment added the words "and the Free Exercise Clause" after "Establishment Clause" in the provision requiring programs to be implemented "in a manner consistent with the Establishment Clause of the first amendment to the Constitution." For unknown reasons the engrossed version of the bill substituted the word "of" for "and," so that the phrase reads "implemented in a manner consistent with the Establishment Clause **of** the Free Exercise Clause of the first amendment to the Constitution."

<sup>82</sup> *See* H.Rept. 106-553 (March 29, 2000). A charitable choice provision was also not part of H.R. 710 as introduced, which was incorporated into H.R. 1776 by the Committee.

<sup>83</sup> 146 CONG. REC. H 1920 (daily ed. April 6, 2000).

<sup>84</sup> *Id.* at H 1920 - H 1935. For the text of the rule governing debate on the bill, *see* H. Res. 40, reprinted at H 1855.

<sup>85</sup> *Id.* at H 1940-41.

<sup>86</sup> On June 20, 2000, the Subcommittee on Housing and Transportation held a hearing on the general subject of promoting homeownership. *See Hearing Before the Subcommittee on* (continued...)



however, many of the provisions of H.R. 1776, along with several other housing and banking bills, were incorporated into a new bill with the same title, H.R. 5640. That bill was quickly approved by both the House and the Senate<sup>87</sup> and sent to the President on December 15, 2000. H.R. 5640 did not include the charitable choice provision that had been part of H.R. 1776, and no comment was made about that deletion in the brief floor discussions of H.R. 5640.

**(5) Even Start Family Literacy Programs (H.R. 3222).** On September 12, 2000, the House passed under suspension of the rules an education bill that included a charitable choice provision,<sup>88</sup> but the provisions of that bill were eventually enacted without that provision. H.R. 3222, the “Literacy Involves Families Together Act,” would, *inter alia*, have re-authorized and amended the “Even Start” program under the Elementary and Secondary Education Act, which provides grants to the states to conduct family literacy projects.<sup>89</sup> The program allows the states to carry out these projects through partnerships between local education agencies and institutions of higher education, nonprofit community-based organizations, and other public agencies. The charitable choice section of H.R. 3222 provided that religious organizations could participate while retaining their religious character. **The section replicated ## 1-8, 10, 12, 14, and 15 of the provisions noted at the beginning of this report, specified that no funding could be provided in the form of vouchers, provided that religious organizations cannot serve as fiscal agents for partnerships receiving a subgrant under the program, and stated that # 15 should not be construed to affect any other program conducted by an eligible entity.**

As originally introduced on November 4, 1999, H.R. 3222 did not include a charitable choice section; nor was the section included in the amendment in the nature of a substitute offered by Rep. Goodling (R.-Pa.) at the beginning of the committee markup on February 16, 2000. Instead, it resulted from an amendment to the substitute offered in committee by Rep. Souder (R.-In.). As proposed, the amendment replicated many of the charitable choice provisions that had been in the welfare reform act, including all of the elements in ## 1-10 detailed above as well as # 12. But the committee approved several modifications of Rep. Souder’s amendment. It accepted by voice votes an amendment by Rep. Kildee (D.-Mi.) making clear that “no services under this part may be provided by voucher or certificate”; one by Rep. Scott (D.-Va.) reversing # 9 and providing that no eligible entity can “subject a participant [in an Even Start program] to sectarian worship or instruction or proselytization” (# 15 above); and another one by Rep. Scott specifying that the receipt of funds under the program constitutes receipt of federal financial assistance (# 14 above). By a vote of 15-23, the committee rejected another amendment offered by Rep. Scott to delete the provision permitting religious

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<sup>86</sup> (...continued)

*Housing and Transportation of the Senate Banking Committee on Proposals to Promote Affordable Housing* (June 20, 2000) (unprinted).

<sup>87</sup> 146 CONG. REC. H 11996 (daily ed. Dec. 5, 2000) and S 11681 (daily ed. Dec. 7, 2000).

<sup>88</sup> 146 CONG.REC. H7470 (daily ed. Sept. 12, 2000).

<sup>89</sup> 20 U.S.C.A. 6361 *et seq.*

organizations receiving funds under the program to discriminate on religious grounds in their employment practices. **Thus, as reported by the committee, the charitable choice section of H.R. 3222 contained §§ 1-8, 10, 12, 14, and 15 of the provisions noted above and specified as well that no funding can be provided in the form of vouchers and that religious organizations cannot serve as fiscal agents for partnerships receiving a subgrant under the program.**

The committee report on the bill<sup>90</sup> noted that religious organizations are already providing services under the Even Start program but stated that “the Committee thought it was important to amend current definitions to clarify that such providers may not be barred from providing services in the future, because of their religious nature.” “Under the amendment,” the committee stated, “the government may not discriminate against religious organizations that seek to participate in the local partnership and may not require those religious organizations to ‘secularize’ or eliminate their religious character in order to participate.” The report noted the other charitable choice provisions that had previously been approved by the House as indicating Congressional support for the concept and quoted both President Clinton and Vice-President Gore as favoring greater involvement by faith-based organizations. Finally, the committee observed that, contrary to warnings that adoption of charitable choice would lead to “endless litigation,” no federal court decisions on charitable choice had as yet been reported.<sup>91</sup>

Rep. Scott filed “Additional Views” to detail his “grave concerns about the constitutional and policy implications of the ‘charitable choice’ provision ....” The committee’s rejection of his amendment to bar religious organizations participating in the Even Start program from discriminating on religious grounds in their employment practices meant, he said, that “religious bigotry may take place with federal funds ....” The Title VII exemption, he asserted, “was intended to apply to the use of private funds for the religious organization and it was never expected to be applied to the use of federal funds.” The exemption also raised questions, he stated, with respect to its interplay with the precepts of religions that may mandate or ordain observance of beliefs based on race, gender, sexual orientation, marital status, or behavior; and it was to ensure that federal nondiscrimination statutes would continue to apply in such situations, he explained, that he proposed an amendment to make clear that any receipt of Even Start funds would constitute receipt of federal financial assistance. The Committee’s acceptance of his second amendment barring proselytizing in Even Start programs even with a religious organization’s own funds, he said, “increases the possibility [that the program can] be implemented consistent with the Constitution.” Finally, he contended, the purpose of charitable choice to allow government funding of pervasively sectarian organizations conflicts with the requirements of the Constitution.

Similar contentions were voiced in the brief floor debate on the measure. Rep. Scott expressed his “reluctant” opposition to the bill because it “allows the government to give taxpayer money to religious institutions and then allows those religious institutions to refuse to hire certain taxpayers for taxpayer-funded positions

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<sup>90</sup> H.Rept. 106-503, 106<sup>th</sup> Cong., 2d Sess. (Feb. 29, 2000).

<sup>91</sup> *Id.* at 15-17.

because they are not of the right religion.”<sup>92</sup> Rep. Edwards (D.-Tex.) agreed with that view and also expressed concern that the measure would allow public funding of pervasively sectarian institutions and open the door to federal audits of churches and other houses of worship.<sup>93</sup> Rep. Goodling (R.-Pa.) asserted that religious organizations “who should really be participating when one is dealing with families and are trying to improve family life” would not participate if they had to give up their Title VII exemption to do so.<sup>94</sup> Mr. Souder (R.-Ind.) voiced consternation that anyone would object to the participation of faith-based organizations.<sup>95</sup>

As noted, the bill was brought up under suspension of the rules, a procedure which allowed no floor amendments. But two modifications had been made in the charitable choice section of the bill after it was reported from committee. The words “Except as otherwise provided in law” had been struck from the provision barring religious discrimination against beneficiaries, and Rep. Scott’s amendment barring eligible entities from subjecting program participants to sectarian worship, instruction, or proselytizing had been supplemented by the following:

(2) CONSTRUCTION.—Paragraph (1) shall not be construed to affect any program that is not an Even Start program (regardless of whether it is carried out before, after, or at the same time as an Even Start program).

After brief debate, H.R. 3222 was adopted by voice vote.

In the Senate the bill was referred to the Committee on Health, Education, Labor, and Pensions; but no further action occurred on that bill. Instead, most of the provisions of H.R. 3222 were incorporated into H.R. 5666 which was, in turn, incorporated by reference in the omnibus appropriations bill (H.R. 4577) enacted at the end of the second session.<sup>96</sup> The charitable choice provision of H.R. 3222, however, was not included in that version and was not enacted.

**(6) Education OPTIONS Act (H.R. 4141).** On May 4, 2000, the House Committee on Education and the Workforce reported another bill containing a similar charitable choice provision – H.R. 4141, the “Education Opportunities to Protect and Invest in Our Nation’s Children (Education OPTIONS) Act.” Title II – labeled the “Safe and Drug-Free Schools and Communities Act” -- authorized grants for drugs and violence prevention and education programs and specified that states could carry out the title, if they chose, by means of grants to, and contracts with, “charitable, religious, or private organizations.” As introduced on March 30, 2000, by Rep. Goodling (R.-Pa.), the charitable choice provision of H.R. 4141 included the elements specified above in ## 1-10 and #12. During markup the Committee

<sup>92</sup> 146 CONG.REC. H 7464 (daily ed. Sept. 12, 2000) (statement by Rep. Scott).

<sup>93</sup> *Id.* at H 7465.

<sup>94</sup> *Id.* at H 7466.

<sup>95</sup> *Id.* at H 7468.

<sup>96</sup> P.L. 106-554, Title XVI (Dec. 21, 2000). For the text of the “Literacy Involves Families Together Act,” see the text of the conference report on H.R. 4577 at 146 CONG. REC. H 12300-12302 (daily ed. Dec. 15, 2000).

accepted by voice vote an amendment proposed by Rep. Scott (D.-Va.) that had also been accepted in the markup of H.R. 3222. The amendment reversed # 9 and barred program sponsors from “subject[ing] a participant ... to sectarian worship, instruction, or proselytization”; it also provided that “[f]or purposes of any Federal, State, or local law, receipt of financial assistance under this title shall constitute receipt of Federal financial assistance” (## 14 and 15 above). The Committee rejected two other amendments proposed by Rep. Scott, one to strike the words “except as otherwise provided by law” from the provision barring religious discrimination against clients, by a vote of 21-25, the other to override the Title VII exemption for religious discrimination with respect to positions funded under the Act, this one by a vote of 18-28. **Thus, as reported, H.R 4141 included the charitable choice elements listed in ## 1-8, 10, 12, 14, and 15 above.**

The committee’s report on H.R. 4141 retraced many of its comments on H.R. 3232, the Even Start bill. The report noted that religious organizations can currently participate in federally funded drug and violence prevention programs but stated that it “thought it was important to ... clarify that such providers may not be barred from providing services in the future because of their religious nature.”<sup>97</sup> “[U]nder the provision,” the report said, “the government may not discriminate against religious organizations that seek to participate and may not require those religious organizations to ‘secularize’ or eliminate their religious character in order to participate.”<sup>98</sup> The report noted that the House had supported charitable choice provisions on a number of prior occasions, and that the concept had been supported by both President Clinton and Vice-President Gore.

Rep. Scott filed dissenting views reiterating many of his objections and expressing “grave concern about the constitutional and policy implications of charitable choice.”<sup>99</sup> The provision, he stated, would allow “religious bigotry ... [to] take place with federal funds,” because it specifies that religious organizations can retain their exemption from Title VII’s prohibition of religious discrimination in employment even when they receive public funds. Thus, he asserted, “a religious organization using federal funds under Charitable Choice could fire or refuse to hire a perfectly qualified employee because of that person’s religion.” Moreover, he argued, the purpose of charitable choice “is to provide government funding to ‘pervasively sectarian’ organizations,” notwithstanding the likelihood that public funding of such entities is unconstitutional. Quoting Rev. Wanda Henry of the American Baptist Churches, USA, Rep. Scott suggested that charitable choice may also do harm to the recipient organizations as their missions become intertwined with the quest for public money. He quoted Rev. Henry as saying not only that religious organizations will become subject to government audit and regulation but also that “the prophetic voice of the church will be silenced or threatened with silence due to their inability to criticize the main source of their funding for meeting social needs.” Public funding may also heighten religious animosities, Rep. Scott stated, as citizens

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<sup>97</sup> H.Rept. 106-608, 106<sup>th</sup> Cong., 2d Sess. (May 4, 2000), at 91.

<sup>98</sup> *Id.* at 93.

<sup>99</sup> *Id.* at 406.

come to realize their tax dollars are being used for the support of religions different from their own.

H.R. 4141 was not brought up for consideration by the full House.

## **Other Charitable Choice Measures That Were Introduced in the 106<sup>th</sup> Congress**

A number of other charitable choice proposals were made in the 106<sup>th</sup> Congress. Several measures were similar to the charitable choice provisions of S. 976, H.R. 4923, and H.R. 4365 noted above (now enacted as P.L. 106-310 and P.L. 106-654) and would have allowed religious organizations to receive funding for substance abuse prevention and treatment programs under the rubric of charitable choice (S. 289, S. 463, S. 899, and H.R. 815). Two bills would have attached charitable choice to programs providing alternatives to abortion (H.R. 2901, S. 1605). Two bills would have done so with respect to programs promoting adoption counseling (H.R. 2511, S. 1382). Finally, four bills would have made charitable choice applicable to most federally funded social service programs (S. 997, S. 1113, S. 2779, and H.R. 1607).

## **Constitutional Framework**

One of the issues that has been raised about the charitable choice measures is whether it is possible to implement all of their provisions or whether some necessarily have to be ignored, *i.e.*, whether the various provisions of charitable choice are internally contradictory. But that issue of the administrative feasibility of implementing charitable choice is, in fact, a question of its constitutionality. On the one hand, all of the charitable choice provisions enacted or approved to date require that they be implemented “consistent with the Establishment Clause of the United States Constitution” and that federal funds received in the form of grants or contracts not be used for purposes of religious worship, instruction, or proselytization. But on the other hand, they also all allow the religious organizations that receive grants or administer contracts under the pertinent programs to hire only adherents of their own faith, to display religious symbols and scripture on the premises where services are provided, to practice and express their religious beliefs “independent” of any government restrictions, and (with two exceptions) to invite the participants in their publicly funded programs to take part in religious activities funded with the organizations’ own funds. The provisions also allow federal funds received indirectly in the form of vouchers (if the underlying program allows for vouchers) to be used for sectarian worship, instruction, and proselytization. Recipient organizations also need not, although they may, be incorporated separately from a sponsoring religious entity. Administratively, the question is whether the programs can be implemented in full compliance with all of these provisions. But more fundamentally, the question is whether it is “consistent with the Establishment Clause” for the government to fund religious organizations with these characteristics.<sup>100</sup>

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<sup>100</sup> The question of the constitutionality of charitable choice under the establishment clause, (continued...)

This question, in turn, has at least two dimensions. The charitable choice measures govern public aid that is given **directly** to religious organizations by means of grants or contracts and, at least in the case of the welfare reform statute, public aid given **indirectly** in the form of vouchers that can be redeemed with religious (as well as nonreligious) organizations. The constitutional strictures that apply to these two forms of aid, however, differ; and as a consequence, the form in which the public aid is provided to religious organizations has implications for the compatibility of the “consistent with the Establishment Clause” phrase with the other provisions of charitable choice.

It should also be noted that recent Supreme Court decisions appear to be moving away from the “no direct aid” principle that has characterized much of its jurisprudence. Four Justices have expressed the view that the establishment clause should be interpreted and applied in accordance with a principle of formal neutrality, *i.e.*, that direct public aid programs benefitting religious institutions pass constitutional muster so long as the aid is distributed evenhandedly to religious and nonreligious institutions alike according to secular criteria, regardless of whether the aid is subsequently diverted to religious use by the recipient organizations. This is not the majority view on the Court as yet, and the other Justices still require that direct public aid be limited to secular use by the recipient institutions. But a majority of the Justices have abandoned the presumption that some religious institutions are so pervasively sectarian that direct public aid is inevitably unconstitutional because of the impossibility of limiting it to secular use in such institutions. Thus, the Court’s recent decisions appear to be opening the door to a greater degree of direct public aid than formerly, although those decisions have left the full scope of what the establishment clause requires indeterminate.

The following subsections detail the constitutional framework that appears to govern these two types of aid:

**(1) Direct aid.** As noted, recent decisions by the Supreme Court appear to have loosened somewhat the constitutional strictures placed on direct public aid programs benefitting religious institutions, albeit to an indeterminate degree. Under the tripartite test first articulated fully in *Lemon v. Kurtzman*,<sup>101</sup> the Court has long held that to pass muster under the establishment clause, a public aid program “must have a secular legislative purpose ..., a principal or primary effect ... that neither advances nor inhibits religion ..., [and] not foster `an excessive government entanglement with religion.’”<sup>102</sup> These requirements continue to apply, but the primary effect and excessive entanglement prongs of this tripartite test have now been modified.

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<sup>100</sup> (...continued)

it should be noted, does not depend on the presence of this phrase in the statutes enacted or the bills approved.

<sup>101</sup> 403 U.S. 602, 612-13 (1971).

<sup>102</sup> *Id.* at 612-13, quoting *Walz v. Tax Commission of New York*, 397 U.S. 664, 668 (1970).

The secular purpose prong of the *Lemon* test has rarely posed an obstacle to public aid programs directly benefitting sectarian entities. But the Court’s use of the primary effect and entanglement prongs have posed a substantial barrier.

In applying the primary effect prong the Court has made clear that the establishment clause “absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”<sup>103</sup> “[G]overnment inculcation of religious beliefs,” the Court has stated, “has the impermissible effect of advancing religion.”<sup>104</sup> To guard against that effect, public assistance which flows **directly** to religious institutions in the form of grants or contracts has been required to be limited to aid that is “secular, neutral, and nonideological...”<sup>105</sup> That is, under the primary effect prong of the *Lemon* test, government has been able to provide direct support to **secular** programs and services sponsored or provided by religious entities but it has been barred from directly subsidizing such organizations’ religious activities or proselytizing. Direct assistance, the Court has held, must be limited to secular use.<sup>106</sup>

Thus, under this interpretation of the establishment clause, religious organizations have not automatically been disqualified from participating as grantees or contractors in publicly funded programs. But in order to meet the secular use requirement, such organizations have had either to divest themselves of their religious character and to become predominantly secular in nature or, at the least, to be able to separate their secular functions and activities from their religious functions and activities. To the extent they have done so, it has been deemed constitutionally permissible for government to provide direct funding to their secular functions.

But under this interpretation of the establishment clause it has also been deemed constitutionally **impermissible** for religious organizations that are **pervasively sectarian** to participate in direct public aid programs. The Court has not laid down a hard and fast definition of what makes an organization pervasively sectarian.<sup>107</sup> But

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<sup>103</sup> *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

<sup>104</sup> *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

<sup>105</sup> *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

<sup>106</sup> *Committee for Public Education v. Nyquist*, *supra*; *Lemon v. Kurtzman*, *supra*; *Bowen v. Kendrick*, *supra*.

<sup>107</sup> The Court has looked at such factors as the proximity of the organization in question to a sponsoring church; the presence of religious symbols and paintings on the premises; formal church or denominational control over the organization; whether a religious criterion is applied in the hiring of employees or in the selection of trustees or, in the case of a school, to the admission of students; statements in the organization’s charter or other publications that its purpose is the propagation and promotion of religious faith; whether the organization engages in religious services or other religious activities; its devotion, in the case of schools, to academic freedom; *etc.* *See, e.g.*, *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Lemon v. Kurtzman*, *supra*; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, *supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); and *Bowen v. Kendrick*, 487 U.S. 589 (1988). But the Court has also made clear that “it is not enough to show that the recipient of a ...

(continued...)

it has described them generally as organizations permeated by a religious purpose and character and as entities whose secular functions and religious functions are “inextricably intertwined.” In such religion-dominated institutions it is simply impossible, the Court has stated, to limit public aid to secular use. As a consequence, it has, until recently, held that direct public subsidies inevitably have a primary effect of advancing religion.<sup>108</sup>

Thus, in the Court’s past decisions, the secular use limitation on direct public aid under the establishment clause has been deemed to have two dimensions. Direct public aid cannot be used for religious purposes, nor can it flow to institutions that are pervasively sectarian. As the Court summarized in *Hunt v. McNair*<sup>109</sup>:

Aid 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 or when it funds a specifically religious activity in an otherwise substantially secular setting.

The entanglement prong of the *Lemon* test has also, until recently, had fatal consequences for direct aid to pervasively sectarian institutions.<sup>110</sup> In institutions that are not pervasively sectarian, the Court has been willing to presume that a secular use limitation on direct aid can be honored without intrusive government monitoring.<sup>111</sup> But in institutions that are pervasively sectarian, the Court has, until recently, perceived a substantial risk that direct aid which is not limited by its nature to secular use may be used for religious purposes. Because of that risk it has stated that “[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that the[] restrictions [to secular use] are obeyed and the First Amendment otherwise respected.” But “these prophylactic contacts,” it has held, “will involve excessive and enduring entanglement between state and church.”<sup>112</sup>

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<sup>107</sup> (...continued)

grant is affiliated with a religious institution or that it is `religiously inspired.’” *Bowen v. Kendrick, supra*, at 621. Indeed, none of these factors, by itself, has been held sufficient to make an institution pervasively sectarian and therefore ineligible for direct aid. Such a finding has always rested on a combination of factors. For lower federal court discussions of the criteria bearing on whether an institution is pervasively sectarian or not, *see Minnesota Federation of Teachers v. Nelson*, 740 F.Supp. 694 (D. Minn. 1990) and *Columbian Union College v. Clark*, 159 F.3d 151 (4<sup>th</sup> Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999).

<sup>108</sup> *Committee for Public Education v. Nyquist, supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

<sup>109</sup> 413 U.S. 734, 743 (1973).

<sup>110</sup> *See Lemon v. Kurtzman, supra*; *Meek v. Pittenger, supra*; and *Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>111</sup> *Tilton v. Richardson*, 403 U.S. 672 (1971); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976).

<sup>112</sup> *Lemon v. Kurtzman, supra*, at 619.



As a practical matter, these interpretations of the establishment clause have had their most severe effects on programs providing direct aid to sectarian elementary and secondary schools, because the Court has presumed that such schools are pervasively sectarian. The Court has presumed to the contrary with respect to sectarian colleges, hospitals, and other social welfare organizations, although it has held open the possibility that some of these agencies might be pervasively sectarian.<sup>113</sup>

In its most recent decisions, however, the Court appears to have abandoned the presumption that some religious institutions, such as sectarian elementary and secondary schools, are so pervasively sectarian that they are constitutionally ineligible to participate in direct public aid programs. Three years ago in *Agostini v. Felton*<sup>114</sup> the Court for the first time overturned a prior establishment clause decision and held it to be constitutional for public school teachers to provide remedial and enrichment services on the premises of private sectarian schools to children attending those schools who were eligible for such services under Title I of the Elementary and Secondary Education Act. In *City of Grand Rapids v. Ball*<sup>115</sup> and *Aguilar v. Felton*<sup>116</sup> in the mid-1980s the Court had held such on-premises instruction to violate the establishment clause in several different ways. First, it said, the pervasive sectarianism that characterized the schools created a substantial risk that the teachers, even though they were employed by the public school system, would “subtly (or overtly) conform their instruction to the environment in which they teach ....”<sup>117</sup> Second, it held, the on-premises instruction by public employees created an appearance of a “symbolic union” between church and state. Third, it stated, the aid provided substantial support to the educational function of the sectarian schools and, thus, to its religious mission. Finally, in *Aguilar* it held that the on-site monitoring necessary to ensure that the services the teachers provided remained wholly secular in nature would create an excessive entanglement between church and state.

In *Agostini* the Court overturned all of these conclusions. It abandoned the presumption that a public school employee will inevitably be pressured by the pervasively sectarian surroundings of the private schools to inculcate religion. It rejected the symbolic union contention as “neither sensible nor sound.” It said the services did not supplant the schools’ regular curricula but were supplemental; and, in any event, they were provided to the students and not directly to the schools. Finally, it held that because the teachers were no longer presumed to be likely to inculcate religion, no excessively entangling monitoring of their services was necessary. The Court concluded:

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<sup>113</sup> *Id.*

<sup>114</sup> 521 U.S. 203 (1997).

<sup>115</sup> 473 U.S. 373 (1985).

<sup>116</sup> 473 U.S. 402 (1985).

<sup>117</sup> *City of Grand Rapids v. Ball*, *supra*, at 388.

Accordingly, contrary to our conclusion in *Aguilar*, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.<sup>118</sup>

Most recently, the Court in *Mitchell v. Helms*<sup>119</sup> upheld as constitutional an ESEA program which subsidizes the acquisition and use of educational materials and equipment by public and private schools. In the process the Court overturned parts of two prior decisions which had held similar aid programs to be unconstitutional and which had been premised on the view that direct aid to pervasively sectarian institutions is constitutionally suspect.<sup>120</sup> More particularly, the Court found the provision of such items as computer hardware and software, library books, movie projectors, television sets, tape recorders, VCRs, laboratory equipment, maps, and cassette recordings to private sectarian elementary and secondary schools not to violate the establishment clause.

The Justices could agree on no majority opinion in *Helms* but instead joined in three different opinions. Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, contended that the establishment clause ought to be interpreted to allow direct public aid to sectarian schools so long as it is provided in accord with the principle of neutrality. The clause prohibits religious indoctrination by government, he stated. But if aid is provided on a neutral basis to public and nonpublic schools alike, he argued, there is no violation of the establishment clause:

If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government .... If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose ..., then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

120 S.Ct. at 2530 (opinion of Thomas, J.).

For that reason, Justice Thomas argued, whether a religious institution is pervasively sectarian or not is constitutionally irrelevant and that factor ought to be disavowed. Even if public aid is or can be used for a religious purpose by a recipient school, he said, it is constitutionally immaterial so long as the public aid itself is secular in nature and is distributed on the basis of religiously neutral criteria.

Justice Souter, joined by Justices Stevens and Ginsburg, contended, on the other hand, that the establishment clause bars “aid supporting a sectarian school’s religious

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<sup>118</sup> *Agostini v. Felton*, *supra*, at 230.

<sup>119</sup> 120 S.Ct. 2530 (2000).

<sup>120</sup> Overturned in part were *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977).

exercise or the discharge of its religious mission.”<sup>121</sup> There is no single rule guiding the implementation of this “substantive principle of no aid,” he said. Instead, he argued, the Court has looked at a variety of factors – whether the entities benefitted are pervasively religious, whether the aid is provided directly by government or reaches the religious institutions only through genuinely independent choices of individuals, whether the aid is itself secular in nature or divertible to religious use, whether it is in the form of money or services and materials, whether it supplants or supplements “traditional items of religious school expense, and whether it is substantial. Neutrality is an important criterion but not a sufficient one, he argued, in part because it has had at least three different meanings in the Court’s jurisprudence. It has been used to mean the “median position between aiding and handicapping religion” required by the establishment and free exercise clauses considered together, a benefit to religious institutions that is secular and nonreligious in nature, and, most recently, evenhandedness in the distribution of public aid. To make the latter meaning the sole constitutional criterion, as Justice Thomas would, he contended, be a “sharp break with the Framers’ understanding of establishment and this Court’s consistent interpretive course.” Direct aid, he concluded, cannot, consistent with the establishment clause, be used for religious indoctrination; and he found that in this case it had been so used.

Justice O’Connor, joined by Justice Breyer, authored the determinative opinion in the case and the one that, as a consequence, provides the most authoritative guidance on the current meaning of the establishment clause.<sup>122</sup> She agreed that neutrality is an important criterion but disagreed with what she termed the “unprecedented” view of Justice Thomas that it is a constitutionally sufficient one. She disagreed as well with his view that “actual diversion of government aid to religious indoctrination is consistent with the establishment clause.” “Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule,” she stated, and individual cases require the courts “to draw lines, sometimes quite fine, based on the particular facts of each case.” Under the primary effect test, she argued, direct government aid programs cannot define their recipients on the basis of religious criteria or result in religious indoctrination. Moreover, she contended, the aid itself must be secular in nature, and it must be restricted to secular use by the recipients.

Justice O’Connor rejected the rationale of the earlier cases of *Meek* and *Wolman* that any aid to the educational function of sectarian elementary and secondary schools inevitably advances religion because of the schools pervasive sectarianism. “[P]resumptions of religious indoctrination,” she said, “are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.” For a program providing secular aid on a neutral basis, she contended, the question is whether the aid has, in fact, been diverted to religious use; and that is an issue, she said, requiring proof of violation. In this case she found such proof to be lacking.

Justice O’Connor also rejected the Court’s prior rule that intrusive government monitoring is necessary when public aid flows directly to a pervasively religious

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<sup>121</sup> Helms v. Mitchell, *supra*, at 2572 (Souter, J., dissenting).

<sup>122</sup> *Id.* at 2556 (O’Connor, J., concurring in the judgment).

entity. In the past that necessity had itself been sufficient to render an aid program unconstitutional, because it inevitably resulted in excessive entanglement between government and the religious institutions that were monitored. In this case both the statute and implementing state and local regulations required some oversight of the religious institutions' use of the government-provided instructional materials and equipment, and Justice O'Connor found these requirements to be sufficient to deter and detect religious use of the public aid and insufficient to render the program unconstitutional.

These decisions and opinions seem to make clear that for a majority of the Justices (those joining in the Souter and O'Connor opinions), direct public aid must still be limited to secular use by recipient religious institutions in order to pass muster under the establishment clause. It also seems clear that for a different majority of Justices (those joining in the Thomas and O'Connor opinions), the question of whether a recipient institution is pervasively sectarian is no longer a constitutionally determinative factor. Thus, there seems no longer to be a presumption that in some kinds of institutions (such as sectarian elementary and secondary schools) public aid will inevitably be used for purposes of religious indoctrination; to show that a particular aid program violates the establishment clause, the Court now appears to require proof that the aid has been used for religious purposes. Similarly, the Court also no longer appears to require an intrusive monitoring of the institutions' use of the public aid to be sure the limitation to secular use is honored, although some degree of review still seems to be required.

Certain aspects of the charitable choice provisions that have been enacted or received some legislative action clearly satisfy these requirements. The provisions do not give religious institutions any special entitlement to public aid, *i.e.*, eligibility is not determined on the basis of religious criteria. Charitable choice simply requires that religious entities be considered as eligible on the same basis as nonreligious institutions. In addition, the charitable choice provisions bar the use of public aid for sectarian worship, instruction, or proselytization, *i.e.*, they require that the aid be used only for secular purposes.

But it still appears to be the intent of charitable choice that the religious entities receiving direct public aid be able to employ their faiths in carrying out the subsidized programs; and to the extent they do so, a constitutional question seems to exist even under the Court's revised interpretation of the establishment clause. Moreover, it deserves mention that Justice O'Connor's opinion, which proved decisive in *Mitchell*, simply left open the possibility that other factors might be constitutionally necessary. In upholding the ESEA program at issue in the case, she cited not only the factors that the aid was distributed on the basis of neutral, secular criteria, that it was secular in nature, and that there was little evidence of diversion to religious use – all of which appear to be constitutional requirements for a majority of the Justices. She noted as well that the statute required the aid to supplement and not supplant the schools' own funds, that title to the instructional materials and equipment had to remain in the local educational agency, that no funds ever reached the coffers of religious schools, and that there were “adequate safeguards” to prevent the aid from being diverted to religious use. And then she simply concluded:

Regardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion.

120 S.Ct. at 2572 (O'Connor, J., concurring in the judgment).

This jurisprudential situation appears to leave charitable choice programs vulnerable to the possibility of litigation.

**(2) Indirect aid.** As noted, the charitable choice measures that have been enacted or approved also apply in some instances to aid under the pertinent programs that is received by participating religious organizations in the form of vouchers or certificates. For such indirect aid it appears more certain that the various provisions of charitable choice can be implemented coherently and consistently with the establishment clause, and recent decisions by the Court do not appear to have materially altered the constitutional framework.

Public aid that is received only **indirectly** by sectarian institutions has been given greater constitutional leeway by the Court than direct aid. Such programs still must be religiously neutral in their design and have been held unconstitutional by the Court where their structure has virtually guaranteed that the assistance flows largely to entities that it has presumed to be religion-pervasive, such as sectarian elementary and secondary schools.<sup>123</sup> However, where the design of the programs has not dictated where the assistance is channeled but has given a genuine choice to the immediate beneficiary (the taxpayer or voucher recipient), the Court has held the programs to be constitutional even though institutions it has presumed to be pervasively sectarian have benefitted.<sup>124</sup> Justice Powell, in a concurring opinion in *Witters*, summarized the critical factors as follows:

*Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. We noted the State's traditional broad taxing authority ..., but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children."<sup>125</sup>

Thus, with respect to aid in the charitable choice programs that might be received by religious institutions in the form of vouchers or certificates, the Court's

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<sup>123</sup> *Committee for Public Education v. Nyquist, supra*, and *Sloan v. Lemon*, 413 U.S. 825 (1973).

<sup>124</sup> *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Social Services*, 474 U.S. 481 (1986); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

<sup>125</sup> *Witters v. Washington Department of Services for the Blind, supra*, at 490-91 (Powell, J., concurring).

decisions suggest that it generally makes no difference whether the institutions are deemed to be pervasively sectarian or not. So long as the initial beneficiaries (TANF clients, for instance) have a genuine choice about where to redeem the vouchers or certificates, *i.e.*, they have a range of religious and secular institutions from which to choose, even pervasively sectarian institutions appear to be able to participate “consistent with the Establishment Clause.” If, on the other hand, charitable choice is implemented in such a manner that a religious entity is the only viable choice for a voucher recipient, the program risks being found to violate the establishment clause.

The Court’s apparent abandonment in *Mitchell v. Helms, supra*, of the presumption that some institutions are so pervasively sectarian that it is impossible to limit direct public aid to sectarian use does not seem to materially affect this framework for indirect aid.<sup>126</sup> As noted, for indirect aid the critical questions have been whether the aid is distributed on the basis of religiously neutral criteria and whether there is a genuinely independent intervening choice between the government’s initial distribution of the aid and its ultimate receipt by a religious entity.

## Conclusion

As noted at the beginning, charitable choice is an ongoing effort to widen the universe of religious organizations that can participate in publicly funded social welfare programs. More specifically, its intent appears to be to allow religious organizations to continue to practice and express their faith[s] in carrying out such programs rather than having to secularize their operations. Whether its provisions actually allow that to happen is a matter of debate. But to the extent that charitable choice does do so, charitable choice appears to push the envelope of existing judicial interpretations of the establishment of religion clause of the First Amendment concerning direct public funding of religious organizations, even as revised by the

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<sup>126</sup> Justices Thomas, O’Connor, and Souter all discussed the issue of indirect aid at length in *Mitchell*. Justice Thomas argued that there really is no difference between direct and indirect aid programs benefitting sectarian schools. He contended that even a per capita direct aid program does not necessarily implicate the government in religious indoctrination by the recipient institutions, not only because it was distributed on an evenhanded basis but also because all of the students in the private sectarian schools were there because of the independent decisions of their parents. Those decisions, he stated, meant that the aid was provided “pursuant to private choices.” Justices O’Connor and Souter rejected this blending of the Court’s direct and indirect aid cases. “A per capita aid program,” Justice Souter asserted, “is a far cry from awarding scholarships to individuals, one of whom make an independent private choice” to use it at a religious school. Justice O’Connor contended the distinction remained important, *inter alia*, for purposes of endorsement. When government provides aid to a school on a per capita basis and the school uses it for religious indoctrination, she said, “the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion.” Moreover, they both contended, under Justice Thomas’ view there would be nothing to preclude the government from making direct money payments to churches. “Under the plurality’s regime,” Justice Souter stated, “little would be left of the right of conscience against compelled support for religion.”

Supreme Court's recent decisions on the subject. As a consequence, charitable choice may, at least in some forms of its implementation, invite litigation that tests the continuing viability of those interpretations. As noted before, two such cases appear to have been filed to date.

## Appendix: Comparison of Charitable Choice Provisions That Have Received Legislative Action

	1. Requires gov. to allow rel. orgs. to participate on same basis as nonrel. orgs.	2. Requires that rel. orgs. retain control over expression of beliefs	3. Bars gov. from discriminating due to org.' religious character	4. Bars gov. interference with internal governance and religious symbols
<i>Welfare reform (P.L. 104-193)</i>	X	X	X	X
<i>CSBG (P.L. 105-285)</i>	X	X	X	X
<i>Children's Health Act (P.L. 106-310)</i>	X	X	X	X
<i>Community Renewal Tax Relief Act (P.L. 106-554)</i>	X	X	X	X
<i>Juvenile Justice (H.R. 1501, S. 254)</i>	X	X	X	X
<i>Fathers Count Act (H.R. 3073)</i>	X	X	X	X
<i>Child Support Distribution Act of 2000 (H.R. 4678)</i>	X	X	X	X
<i>American Homeownership Act (H.R. 1776)</i>	X	X	X	X
<i>Even Start (H.R. 3222)</i>	X	X	X	X
<i>Education OPTIONS Act (H.R. 4141)</i>	X	X	X	X



## Comparative Chart (cont.)

	<b>5. Retains Title VII exemption allowing religious discrimination in employment</b>	<b>6. Requires programs to be consistent with establishment clause</b>	<b>7. Bars use of direct aid for sectarian worship, instruction, or proselytization</b>	<b>8. Allows gov. to require separate corporation to administer public funds</b>
<i>Welfare reform (P.L. 104-193)</i>	X	X	X	X
<i>CSBG (P.L. 105-285)</i>	X	X	X	X
<i>Children's Health Act (P.L. 106-310)</i>	X	X	X	X
<i>Community Renewal Tax Relief Act (P.L. 106-554)</i>	X	X (also must conform with free exercise clause)	X	X
<i>Juvenile Justice (H.R. 1501, S. 254)</i>	X	X	X	X
<i>Fathers Count Act (H.R. 3073)</i>	X	X	X	X
<i>Child Support Distribution Act of 2000 (H.R. 4678)</i>	X	X	X	X
<i>American Homeownership Act (H.R. 1776)</i>	X	X (also must conform with free exercise clause)	X	X
<i>Even Start (H.R. 3222)</i>	X	X	X	X
<i>Education OPTIONS Act (H.R. 4141)</i>	X	X	X	X

## Comparative Table (cont.)

	<b>9. Permits use of orgs. own funds for worship, instruction, and proselytization</b>	<b>10. Bars rel. disc. against beneficiaries</b>	<b>11. Requires that objectors be given an alternate provider</b>	<b>12. Allows audits of rel. orgs. but permits federal funds to be segregated</b>
<i>Welfare reform (P.L. 104-193)</i>	X	X	X	X
<i>CSBG (P.L. 105-285)</i>	X	Act has general nondiscrimination provision	--	X
<i>Children's Health Act (P.L. 106-310)</i>	X	X	X	X
<i>Community Renewal Tax Relief Act (P.L. 106-554)</i>	X	X	X	X
<i>Juvenile Justice (H.R. 1501, S. 254)</i>	X	X	X	X
<i>Fathers Count Act (H.R. 3073)</i>	X	X	X	X
<i>Child Support Distribution Act of 2000 (H.R. 4678)</i>	X	X	X	X
<i>American Homeowner-ship Act (H.R. 1776)</i>	X	--	--	X
<i>Even Start (H.R. 3222)</i>	--	X	--	--
<i>Education OPTIONS Act (H.R. 4141)</i>	--	X	--	X

## Comparative chart (cont.)

	<b>13. Stricter state church-state provisions not preempted</b>	<b>14. Says that aid constitutes federal financial assistance</b>	<b>(15) Bars use of orgs. own funds for worship, instruction, or proselytization</b>	<b>16. Bars gov. from requiring separate corporation</b>	<b>17. Allows rel. orgs. to impose tenets and rules re drugs/alcohol on employees</b>
<i>Welfare reform (P.L. 104-193)</i>	<b>X</b>	--	--	--	--
<i>CSBG (P.L. 105-285)</i>	--	--	--	--	--
<i>Children's Health Act (P.L. 106-310)</i>	<b>Unless state funds are commingled</b>				<b>X (drugs and alcohol)</b>
<i>Community Renewal Tax Relief Act (P.L. 106-554)</i>	--	--	--	--	--
<i>Juvenile Justice (H.R. 1501, S. 254)</i>	<b>X</b>	--	--	--	--
<i>Fathers Count Act (H.R. 3073)</i>	<b>X</b>	--	--	--	--
<i>Child Support Distribution Act of 2000 (H.R. 4678)</i>	<b>X</b>	--	--	--	--
<i>American Homeownership Act (H.R. 1776)</i>	--	--	--	--	--
<i>Even Start (H.R. 3222)</i>	--	<b>X</b>	<b>X</b>	--	--
<i>Education OPTIONS Act (H.R. 4141)</i>	<b>X</b>	<b>X</b>	<b>X</b>	--	--

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