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## **Public Aid and Faith-Based Organizations (Charitable Choice): Background and Selected Legal Issues**

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# Public Aid and Faith-Based Organizations (Charitable Choice): Background and Selected Legal Issues

## Summary

On July 19, 2001, the House passed H.R. 7, the “Community Solutions Act of 2001.” The Act is the primary legislative vehicle for President Bush’s faith-based initiative and contains tax incentives for charitable giving (Title I), the “Charitable Choice Act of 2001” (Title II), a modified re-authorization of individual development accounts for persons of limited income (Title III), and limitations on the liability of corporations for charitable donations of equipment and supplies (Title IV). In the Senate controversy over the civil rights and constitutional implications of the charitable choice title of H.R. 7 led to the introduction recently of the “CARE Act of 2002” (S. 1924), a bipartisan bill that excludes most of those provisions.

Government has long provided public aid to social services programs operated by faith-based organizations. But interpretations of the establishment of religion clause of the First Amendment have generally required such programs to be secular in nature. In recent years, however, a number of advocates have promoted the concept that the Constitution and public policy should allow faith-based organizations to receive public funds on the same basis as other entities that operate social services programs without abandoning their religious character. That view has had considerable effect. The Supreme Court has modified its establishment clause jurisprudence to allow a broader (although as yet ill-defined) scope to public aid to religious organizations; Congress has enacted four charitable choice measures into law; and President Bush’s initiative “to rally America’s armies of compassion” remains a centerpiece of his domestic agenda.

Nonetheless, questions abound about the constitutionality, efficacy, and public policy implications of charitable choice; and H.R. 7’s charitable choice provisions differ significantly from those previously enacted. This report provides background and analysis on some of the salient factual and legal issues about charitable choice in a question-and-answer format. The questions addressed are as follows:

- (1) What is charitable choice?
- (2) Aren’t religious organizations already eligible to receive public funds?
- (3) What initiatives has President Bush proposed to promote the involvement of religious organizations in publicly funded social services programs?
- (4) What charitable choice proposals have been enacted into law?
- (5) Have any hearings been held on charitable choice?
- (6) What legislative action has taken place on H.R. 7 and other charitable choice measures?
- (7) What does the charitable choice title of H.R. 7 provide and how does it differ from previous charitable choice statutes?
- (8) What legal framework governs the civil rights concerns about charitable choice?
- (9) Is charitable choice constitutional?
- (10) Have any court suits involving charitable choice or similar programs been filed or decided as yet?

The report concludes with an appendix giving a summary comparison of the provisions of the four charitable choice statutes that have been enacted and of Title II of H.R. 7, as approved by the House. This report will be updated as events warrant.

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# Public Aid and Faith-Based Organizations (Charitable Choice): Background and Selected Legal Issues

## Introduction

On July 19, 2001, the House gave its approval to H.R. 7, the “Community Solutions Act of 2001,” by a vote of 233-198. Until recently, the Act has been the primary legislative vehicle for President’s Bush’s faith-based initiative and consists of tax incentives for charitable giving (Title I), the “Charitable Choice Act of 2001” (Title II), an extension and modification of the authorization for individual development accounts for persons of limited means (Title III), and limitations on the liability of corporations for donations of equipment and supplies to charitable organizations (Title IV). Title II would extend modified charitable choice rules to nine new program areas and is the most (although not the only) controversial part of H.R. 7. In the Senate the bill has been referred to the Finance Committee.

In part because the controversy over charitable choice cast substantial doubt on H.R. 7's prospects in the Senate, Senators Lieberman (D.-Ct.) and Santorum (R.-Pa.) on February 8, 2002, introduced a bipartisan compromise bill that does not contain most of the charitable choice provisions of the House bill (S. 1924). Worked out in cooperation with the Administration and entitled the “Charity Aid, Recovery, and Empowerment Act of 2002” (the CARE Act), S. 1924 includes tax incentives for charitable giving and promotes the establishment of individual development accounts by persons of limited means. It is similar to H.R. 7 in that it would bar government from requiring non-governmental organizations involved in the delivery of social services to remove religious art and symbols from their premises, to change their names because they are religious, or to alter religious provisions in their charter documents.<sup>1</sup> But in lieu of the other charitable choice provisions of H.R. 7, S. 1924 provides for expedited consideration by the IRS of applications for tax exemption by nonprofit social services providers and authorizes \$150 million for a Compassion Capital Fund to enable several federal departments and agencies to provide technical and programmatic assistance to small providers. The CARE Act would also expand federal funding of the Social Services Block Grant and establish a new program providing federal support for maternity group homes. Like H.R. 7, S. 1924 has been referred to the Senate Finance Committee.<sup>2</sup>

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<sup>1</sup>Unlike H.R. 7, S. 1924 would also bar government from requiring providers to eliminate religious qualifications for membership on their governing boards.

<sup>2</sup>Initially, the Senate counterpart to H.R. 7 was S. 592, the “Savings Opportunity and Charitable Giving Act of 2001,” introduced on March 21, 2001, by Senators Santorum (R-  
(continued...)

Government has long provided public aid to social services programs operated by faith-based organizations (FBOs). But as the result of interpretations of the establishment of religion clause of the First Amendment<sup>3</sup> and policy decisions by administrators, such programs have generally been required to be secular in nature and pervasively sectarian entities have been deemed ineligible to participate. In recent years a number of advocates have promoted the concept that the Constitution and public policy should allow faith-based organizations to receive public funds on the same basis as other entities that operate social services programs without abandoning their religious character. That effort has had considerable effect. The Supreme Court has modified its establishment clause jurisprudence to allow a broader (although as yet ill-defined) scope to public aid to religious organizations; Congress has enacted four “charitable choice” measures into law; and President Bush has undertaken an initiative “to rally America’s armies of compassion” as a centerpiece of his domestic agenda.

Nonetheless, numerous questions have been raised about the constitutionality, efficacy, and public policy implications of charitable choice. While the legislative fate of the charitable choice provisions contained in H.R. 7 remains uncertain, similar provisions have been enacted in four previous statutes. With particular attention to H.R. 7 and S. 1924, this report provides background on, and analysis of, some of the salient factual, civil rights, and constitutional issues generated by charitable choice in a question and answer format, as follows:

- (1) What is charitable choice?
- (2) Aren’t religious organizations already eligible to receive public funds?
- (3) What initiatives has President Bush proposed to promote the involvement of religious organizations in publicly funded social services programs?
- (4) What charitable choice proposals have been enacted into law?
- (5) Have any hearings been held on charitable choice?
- (6) What legislative action has taken place on H.R. 7 and other charitable choice measures in the 107<sup>th</sup> Congress?
- (7) What does the charitable choice title of H.R. 7 provide and how does it differ from previous charitable choice statutes?
- (8) What is the legal framework for the civil rights concerns that have been raised about charitable choice?
- (9) Is charitable choice constitutional?
- (10) Have any court suits involving charitable choice or similar programs been filed or decided as yet?

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<sup>2</sup>(...continued)

Pa.) and Lieberman (D.-Conn.) and referred to the Finance Committee. That proposal does not include any of the charitable choice provisions of H.R. 7 nor that bill’s corporate liability reforms. It does contain comparable tax incentives for charitable giving and measures to promote the establishment of individual development account provisions.

<sup>3</sup>The First Amendment provides in pertinent part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....” The protections of both the establishment clause and the free exercise clause have been held applicable to the states as well as part of the liberty protected from undue state interference by the due process clause of the Fourteenth Amendment. *See* *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The report includes as well an appendix that compares the provisions of the four charitable choice measures that have been enacted into law and Title II of H.R. 7 as adopted by the House. This report will be updated as events warrant.<sup>4</sup>

## (1) What Is Charitable Choice?

First added to the welfare reform measure adopted in 1996,<sup>5</sup> charitable choice is a set of provisions in law intended to ensure that religious organizations can apply to participate in federally funded social services programs on the same basis as any other nongovernmental provider and can provide services pursuant to such programs without abandoning their religious character or infringing on the religious freedom of recipients. The underlying assumptions of charitable choice seem to be that religious organizations should be given greater access to public funding and should be allowed to employ their faiths in carrying out the publicly funded programs to a greater degree than has traditionally been the case.<sup>6</sup> Except for a small technical assistance authorization in H.R. 7, charitable choice does not contain new funding for faith-based organizations; and it applies only to programs designated by Congress. The four charitable choice measures that have been enacted, H.R. 7, and S. 1924 differ in some of their details, and sometimes significantly so (*see* question 7 and Appendix). But the major provisions of charitable choice include the following:

**(a) Protecting the religious character of the organization.** Charitable choice bars government from discriminating against an organization that applies to provide publicly funded social services on the basis of its religious character. To protect such organizations' religious character, charitable choice further provides that:

- (i) religious organizations which receive public funds remain independent of government and retain control over the definition, development, practice, and expression of their religious belief;
- (ii) government may not require such organizations to change their form of internal governance or to remove religious art and other symbols as a condition of participation; and
- (iii) religious organizations which receive federal funds may discriminate on religious grounds in their employment practices as allowed under Title VII of the Civil Rights Act of 1964.<sup>7</sup>

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<sup>4</sup>For more detailed information on the charitable choice provisions that have been proposed or enacted into law prior to the 107<sup>th</sup> Congress and additional analysis of the constitutional framework governing charitable choice, see CRS Report RL30388, *Charitable Choice: Constitutional Issues and Developments Through the 106<sup>th</sup> Congress*, and CRS Report RS20712, *Charitable Choice and TANF*.

<sup>5</sup>P.L. 104-193, Title I, § 104 (Aug. 22, 1996); 110 Stat. 2161; 42 U.S.C.A. 604a.

<sup>6</sup>The latter objective may raise constitutional questions about the initiative and may also have been undermined to some extent by modifications that have been added to the charitable choice title of H.R. 7. *See* the discussion under questions 8 and 9.

<sup>7</sup>42 U.S.C.A. 2000e-1.

Charitable choice states that a religious organization's use of public funds is subject to audit. But it allows – and often requires – the public funds to be segregated into a separate account and limits the government audit to that account.

**(b) Protecting the religious freedom of recipients.** Charitable choice specifies that a religious organization cannot discriminate against a beneficiary or potential beneficiary on the basis of religion or religious belief (and in some versions on the basis of a refusal to hold a religious belief and/or a refusal to actively participate in a religious practice as well). Charitable choice also requires that an alternate and accessible provider be made available to a recipient who objects to the religious character of a given provider and that the government give all beneficiaries notice of their right to an alternate provider. Title II of H.R. 7 adds to these provisions a requirement that participation by beneficiaries in any religious activity offered by a provider that receives direct governmental assistance be voluntary. But it also provides that this requirement of voluntariness does not apply if a religious organization receives funding indirectly, *i.e.*, in the form of vouchers; and in such programs it bars religious discrimination against beneficiaries only in admissions.

**(c) Protecting the constitutionality of charitable choice.** Charitable choice bars a religious organization from using direct government aid for sectarian worship, instruction, or proselytization (unless the aid is received in the form of vouchers, in which case this restriction does not apply). Moreover, charitable choice programs are explicitly required to be implemented in a manner “consistent with” the establishment of religion clause of the First Amendment to the Constitution (and in some versions with the free exercise clause as well). Title II of H.R. 7, although not the charitable choice statutes previously enacted into law, also requires that any religious activity offered by a religious organization be separate from the program that receives direct federal assistance and that participation in any religious activity that is directly funded be voluntary for the individuals receiving services. Charitable choice also does not appear to bar government from requiring that religious programs and entities receiving federal funds be incorporated separately from their sponsoring religious organizations.

## **(2) Aren't Religious Organizations Already Eligible to Receive Public Funds?**

Yes. Some federal programs, such as the Child Care and Development Block Grant program,<sup>8</sup> explicitly specify that religious organizations are eligible to participate. More commonly, federal grant and cooperative agreement programs<sup>9</sup> provide that private entities or nonprofit entities are eligible to participate, and these categories include religious as well as secular organizations. Such entities as Catholic

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<sup>8</sup>42 U.S.C.A. 9858 *et seq.*

<sup>9</sup>“Cooperative agreement” is the legal phrase used to refer to funding agreements between the federal government and social services providers that involve substantial interaction between the government agency and the provider, while the term “grant” refers to funding agreements that do not involve substantial interaction. The term “contract” is limited to agreements for the provision of property or services to the government itself. *See* 31 U.S.C.A. 6303-6305.

Charities USA, Lutheran Services in America, the Salvation Army, United Jewish Communities, and numerous other religiously affiliated or religiously sponsored organizations at the national, state, and local levels have long participated in publicly funded social services programs. These organizations are commonly incorporated separately from their sponsoring religious organizations and usually have tax-exempt status under § 501(c)(3) of the federal tax code.<sup>10</sup>

But interpretations and applications of the establishment of religion clause of the First Amendment as well as policy decisions by administrators have in the past generally required programs operated by religious organizations that receive direct public funding to be essentially secular in nature. Religious symbols and art have often had to be removed from the premises; and religious worship, instruction, and proselytizing have been forbidden. Moreover, religious entities that have been found to be “pervasively sectarian,” *i.e.*, entities in which religion is a pervasive element of all that they do, have in the past generally been constitutionally ineligible to participate in direct funding programs, because they have been deemed unable to separate their secular functions from their religious functions and thus unable to meet the constitutional requirement that direct aid be limited to secular use.

The courts have applied these constraints most strictly in the context of direct aid programs benefiting sectarian elementary and secondary schools.<sup>11</sup> But the same standards have been held to apply with respect to direct aid to religiously affiliated colleges and social services programs.<sup>12</sup> Although recent decisions by the Supreme

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<sup>10</sup>Section 501(c)(3) of Title 26 of the U.S. Code provides an exemption from federal income taxes to the following:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes ..., no part of the net earnings of which inures to the benefit of an private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ..., and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

One of the primary benefits of tax-exempt status, and a major incentive for obtaining such status, is that donations to such organizations may be claimed as a tax deduction by the donors. *See* 26 U.S.C.A. 170.

<sup>11</sup>*See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (subsidy of teachers of secular subjects in sectarian elementary and secondary schools held unconstitutional); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (grants for maintenance and repair of sectarian school facilities and tuition subsidies for the parents of children attending private sectarian elementary and secondary schools held unconstitutional); and *Wolman v. Walter*, 433 U.S. 229 (1977) (public subsidy of field trip transportation for children in sectarian elementary and secondary schools held unconstitutional).

<sup>12</sup>*See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672 (1971) (public subsidy of the construction of academic buildings at sectarian colleges held constitutional, subject to the restriction that the buildings be limited to secular use) and *Bowen v. Kendrick*, 487 U.S. 589 (1988) (provisions (continued...))



Court seem to be loosening these constitutional constraints to some degree, charitable choice is a **legislative** attempt to move beyond these restrictions and allow faith-based organizations to participate in publicly funded social services programs while in some manner still retaining their religious character. (See question # 9 for a fuller discussion of the constitutional issues raised by charitable choice.)

### **(3) What Initiatives Has President Bush Proposed to Promote the Involvement of Religious Organizations in Publicly Funded Social Services Programs?**

The promotion of faith-based and community organization initiatives has been a centerpiece of President's Bush's domestic agenda. On January 29, 2001, President Bush issued two executive orders establishing federal offices to define and promote these initiatives. Executive Order 13199 created an Office of Faith-Based and Community Initiatives in the White House to take the lead responsibility in enhancing and promoting government's partnership with faith-based and community organizations.<sup>13</sup> Executive Order 13198, in turn, established centers for faith-based and community initiatives in each of five federal agencies – the Departments of Health and Human Services, Housing and Urban Development, Labor, Justice, and Education.<sup>14</sup> These centers are mandated to work with the White House office in order to make their agencies “as open and supportive as possible to successful faith-based and grassroots organizations” and, more particularly, to identify and eliminate regulatory, statutory, and administrative barriers to the participation of such groups. On August 16, 2001, the White House issued the first of what it said will be annual reports summarizing the initial findings of the departmental centers – *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*.<sup>15</sup>

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<sup>12</sup>(...continued)

in Adolescent Family Life Act allowing grants to be made to religious organizations held constitutional so long as particular grants were not made to pervasively sectarian entities).

<sup>13</sup>66 Fed. Reg. 8499 (Jan. 31, 2001). Initially, that office was headed by Catholic scholar John J. DiIulio, Jr. But on August 17, 2001, the White House announced his resignation. On February 2, 2002, President Bush announced the selection of James Towey, an attorney with an extensive background in working with social services organizations, as the head of the office and also designated him as a Deputy Assistant to the President.

<sup>14</sup>*Id.* at 8497.

<sup>15</sup> The report summarizes the initial findings of the five departmental centers as including the following:

- (i) small faith-based and secular groups receive “very little” federal support relative to the scope of the services they provide;
  - (ii) there is a “widespread bias” against such groups reflected in “cumbersome” regulations and prohibitions on religious activities that go beyond constitutional requirements;
  - (iii) regulations often impose requirements beyond what the legislation mandates;
  - (iv) the existing charitable choice statutes have been “almost entirely ignored” by
- (continued...)

These executive orders were part of a document released by President Bush on January 30, 2001, entitled “Rallying the Armies of Compassion.” The document detailed his agenda “to enlist, equip, enable, empower, and expand the heroic works of faith-based and community groups across America” and set forth the following initiatives:

(a) encouraging and helping states to create their own versions of the White House Office of Faith-Based and Community Initiatives;

(b) a commitment to fully implement the charitable choice measures that have been enacted into law;

(c) a recommendation that pilot programs incorporating charitable choice be established to help the children and families of prisoners, to improve inmate rehabilitation prior to release, to establish maternity group homes, and to provide after-school programs for low-income children; and

(d) an expansion of incentives for private giving to religious and charitable enterprises by such means as allowing a charitable gift tax deduction to those who do not itemize on their federal income tax returns, permitting individuals to take tax-free withdrawals from their IRAs for the purpose of making charitable contributions, limiting the liability of corporations for the donation of equipment and supplies to charitable organizations, encouraging the states to adopt a charitable gift tax credit, increasing the charitable donation deduction for corporations from 10 percent to 15 percent of taxable income, and creating a Compassion Capital Fund from both federal and private funds to provide technical assistance to small community and faith-based organizations and to provide start-up capital to such enterprises.

In the House the Administration supported H.R. 7, the “Community Solutions Act of 2001,” as the primary legislative vehicle for a number of these initiatives.<sup>16</sup> In the Senate President Bush has heralded the bipartisan compromise reflected in S. 1924 as “a great accomplishment” and urged its adoption, notwithstanding its deletion of most of the charitable choice provisions in the House bill.<sup>17</sup>

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<sup>15</sup>(...continued)

federal administrators;

(v) there is very little evaluation of the results that are achieved in federally funded social services programs; and

(vi) the Government Performance and Results Act of 1993, which was enacted to promote performance-based management, has had “little discernible impact.”

The report is available on the White House web site at [<http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html>]

<sup>16</sup>As noted above, S. 584 was originally the Senate counterpart to H.R. 7. Like S. 1924, that measure also does not include the charitable choice title or the corporate liability reform provisions of H.R. 7. It has now been superseded by H.R. 1924.

<sup>17</sup>White House Office of the Press Secretary, “Remarks by the President and Senator Lieberman in Photo Opportunity After Meeting on Armies of Compassion” (Feb. 7, 2002).

#### **(4) What Charitable Choice Proposals Have Been Enacted into Law?**

Prior Congresses have enacted four charitable choice measures into law. Charitable choice was first enacted in 1996 as part of the “Temporary Assistance for Needy Families” program (TANF) and applies as well to the welfare-to-work grant program added to TANF in 1997.<sup>18</sup> The 105<sup>th</sup> Congress included selected charitable choice provisions in its reauthorization of the “Community Services Block Grant Program” in 1998.<sup>19</sup> In 2000 the 106<sup>th</sup> Congress adopted two measures adding charitable choice to the substance abuse treatment and prevention services provided under both the block grant and discretionary grant provisions of Titles V and XIX of the Public Health Services Act.<sup>20</sup>

The language in the 1996 welfare law has been the basic model for charitable choice. That law authorizes the states, at their option, to administer and provide TANF services or benefits through contracts with nongovernmental entities or through the provision of certificates or vouchers to TANF beneficiaries redeemable with private entities. The law said that if a state exercised this option, it had to allow religious organizations to participate on the same basis as any other private entity, subject to the requirements of charitable choice regarding the religious character of such organizations, the religious freedom of beneficiaries, and the use of funds (*see* question 1). Subsequent enactments and proposals have varied some of these requirements, but the basic framework of the welfare reform enactment has been retained.

#### **(5) Have any Hearings Been Held on Charitable Choice?**

Notwithstanding the enactment of four charitable choice measures in the 104<sup>th</sup>, 105<sup>th</sup>, and 106<sup>th</sup> Congresses, no congressional committee had held a hearing on charitable choice prior to the first session of the 107<sup>th</sup> Congress. So far in this Congress five hearings have been held, as follows:

- (1) Two hearings have been held by the Subcommittee on the Constitution of the House Judiciary Committee, chaired by Rep. Chabot (R.-Oh). The first, on April 24, 2001, examined “State and Local Implementation of Existing Charitable Choice Programs.” The second, on June 7, 2001, focused on “The Constitutional

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<sup>18</sup>P.L. 104-193, Title I, § 104 (August 22, 1996); 110 Stat. 2161; 42 U.S.C.A. 604a.

<sup>19</sup>P.L. 105-285, Title II, § 201 (Oct. 27, 1998); 112 Stat. 2749; 42 U.S.C.A. 9920.

<sup>20</sup>P.L. 106-310, Title XXXIII, § 3305 (Oct. 17, 2000); 114 Stat. 1212; 42 U.S.C.A. 300x-65 (West Supp. 2001) and P.L. 106-554, § 1 (Dec. 21, 2000); 114 Stat. 2763; 42 U.S.C.A. 290kk (West Supp. 2001). The charitable choice provisions in the latter act were part of H.R. 5662, the “Community Renewal Tax Relief Act of 2000,” which was incorporated and enacted by reference in the “Consolidated Appropriations Act, 2001.” *See* 114 Stat. 2763I-1, at 2763I-33.

Role of Faith-Based Organizations in Competitions for Federal Social Service Funds.”<sup>21</sup>

(2) On April 26, 2001, the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform, chaired by Rep. Souder (R.-Ind.) held a hearing on “The Role of Community & Faith-Based Organizations in Providing Effective Social Services.”<sup>22</sup>

(3) On June 6, 2001, the Senate Committee on the Judiciary, chaired by Sen. Leahy (D.-Vt.), held a hearing on “Faith-Based Solutions: What Are the Legal Issues?”

(4) On June 14, 2001, two subcommittees of the House Ways and Means Committee – the Subcommittee on Human Resources, chaired by Rep. Herger (R.-Ca.), and the Subcommittee on Select Revenue Measures, chaired by Rep. McCrery (R.-La.) – held a joint hearing on H.R. 7.<sup>23</sup>

## **(6) What Legislative Action Has Occurred on H.R. 7 and Other Charitable Choice Measures in the 107<sup>th</sup> Congress?**

**(a) H.R. 7, the “Community Solutions Act of 2001”.** H.R. 7, the “Community Solutions Act of 2001,” was introduced with the support of the White House on March 29, 2001, by Rep. Watts (R.-Ok.), Rep. Hall (D.-Oh.), and Speaker Hastert (R.-Ill.).<sup>24</sup> The tax provisions of Title I and the individual development account provisions of Title III were referred to the Committee on Ways and Means, while the corporate liability provisions of Title I and the charitable choice provisions contained in Title II were referred to the Committee on the Judiciary. After an all-day markup session on June 28, 2001,<sup>25</sup> the Judiciary Committee approved, 20-5, a substitute version of the corporate liability and charitable choice sections offered by its chairman, Rep. Sensenbrenner (R.-Wis.), which had been developed in extensive discussions with the Administration. The Democratic minority proposed numerous modifications to the substitute, but most of these were rejected.<sup>26</sup> The Ways and

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<sup>21</sup> *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (April 24, 2001) (Serial No. 13) and *The Constitutional Role of Faith-Based Organizations: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (June 7, 2001) (Serial No. 17).

<sup>22</sup> The hearing is not yet printed but is available at the subcommittee’s web site at [www.house.gov/reform/cj/hearings/01.05.23/index.html](http://www.house.gov/reform/cj/hearings/01.05.23/index.html)

<sup>23</sup> *H.R. 7 -- The Community Solutions Act of 2001: Hearing Before the Subcommittee on Human Resources and the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means*, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (June 14, 2001) (Serial 107-34).

<sup>24</sup> An identical bill, H.R. 1284, was introduced by the same sponsors on March 28, 2001.

<sup>25</sup> The transcript of the Committee’s markup is reproduced in the committee’s report on H.R. 7, *infra*, n. 24.

<sup>26</sup> See H. Rept. 107-138, Part I, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 12, 2001). As noted, the report (continued...)

Means Committee, in turn, marked up the tax and individual development account provisions on July 11, 2001, and approved a version substantially reducing the amount of the tax incentives by a vote of 23-16.<sup>27</sup> On July 19, 2001, the House debated another substitute proposal proffered by Rep. Sensenbrenner, rejected two minority proposals, and adopted the substitute, 233-198.<sup>28</sup>

**(i) Judiciary Committee report.** In its report on the bill the Judiciary Committee stressed that charitable choice is “not new” and has previously been enacted four times. It stated that the bill is a response to the decline in private

<sup>26</sup>(...continued)

includes a transcript of the markup. Amendments rejected by the committee included

(i) proposals by Rep. Scott (D.-Va.) to strike the Title VII exemption allowing religious organizations to discriminate on religious grounds in their employment practices (11-19), to exclude all ESEA programs from the purview of charitable choice (10-17), to require an alternative provider to be “at least as accessible” as the original provider (voice vote), to define a religious organization as a “pervasively sectarian” entity (voice vote), and to require funding decisions to be made on the basis of the “objective merits of the applications submitted” (7-20);

(ii) proposals by Rep. Nadler (D.-N.Y.) to broaden the judicial relief provision by allowing suits against religious organizations as well as governmental agencies and permitting the award of damages as well as injunctive relief (voice vote); to require as a condition of eligibility that a religious organization be incorporated separately from its pervasively sectarian parent or affiliate (voice vote), to bar a religious organization from engaging any beneficiary in religious activity while that person is receiving assistance (7-22), and to require that a secular alternative provider be provided to an individual who objected to the religious character of an initial provider (voice vote);

(iii) a proposal by Rep. Frank (D.-Mass.) to bar religious organizations receiving assistance indirectly from discriminating against an individual on the basis of a religious belief (7-15);

(iv) a proposal by Rep. Lofgren (D.-Cal.) to strike the liability reform section concerning corporate donations to charitable organizations (7-13); and

(v) a proposal by Rep. Jackson-Lee (D.-Tex.) to strike the section concerning the autonomy of religious organizations (7-19).

Amendments accepted by the committee included one by Rep. Scott to increase the authorization for technical assistance to \$50 million and to allow such assistance to include help in creating a 501(c)(3) organization (accepted by unanimous consent) and another to add a provision to the subsection stating that funds are not to be considered aid to the religious organization saying that Title VI still applies (voice vote); a modified amendment by Rep. Watt stating that religious organizations that receive public funds, notwithstanding their partial exemption from Title VII, still must comply with its nondiscrimination provisions (accepted by unanimous consent); and an amendment by Rep. Frank stating that nothing in the section alters the duty of a religious organization to comply with Title VI, Title IX, section 504, and the Age Discrimination Act of 1975 (voice vote).

<sup>27</sup>See H. Rept. 107-138, Part II, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 16, 2001). The committee reduced the cost of the tax incentives for charitable giving from the \$84.4 billion originally proposed to \$6.4 billion (estimated over ten years). See Congressional Quarterly, *Ways and Means Scales Back Bush Plan for Fostering Charitable Donations* (July 14, 2001), at 1688.

<sup>28</sup>147 CONG.REC. H 4222 - H 4281 (daily ed. July 19, 2001)

philanthropy caused by “higher and higher taxes” as well as to “misguided understandings of the Constitution” which have prevented government from working more closely with religious organizations; that support for public funding of social services programs operated by religious organizations is strong, “particularly ... among African-Americans”; that “[e]xisting charitable choice programs have had a significant impact on social welfare delivery”; and that H.R. 7 has been modified to respond to some of the criticisms that have been made about charitable choice.

The report gave an extended defense of the constitutionality of charitable choice and of the provision allowing religious organizations to discriminate on religious grounds in their employment practices. It emphasized that the bill ensures that aid to social services organizations is distributed in a religiously neutral way and that it respects the “individual choices, whether religious or nonreligious, of the needy who are served by these programs.” Recent decisions by the Supreme Court, it said, have abandoned the notions that public aid cannot be provided directly to pervasively sectarian organizations and that employees of such organizations “cannot be trusted to follow guidelines preventing the use of Government funds for proselytizing activities ....” The bill, it said, contains “constitutionally adequate safeguards” for monitoring how public funds are used. Moreover, with respect to the new provision in H.R. 7 authorizing social services programs to be converted to voucher programs if deemed “feasible and efficient” by the Secretary of the administering department, the report asserted that “[c]haritable choice programs administered through the use of vouchers or certificates to individuals, who may then choose to give them to nonreligious or religious organizations in return for services, enjoy the widest constitutional berth”:

So long as the initial beneficiaries have a choice about where to redeem the vouchers or certificates, and a range of choices are available including religious and nonreligious social service organizations, such programs do not violate the First Amendment.<sup>29</sup>

With respect to employment discrimination, the committee report contended that “one of the most important charitable choice principles is the guarantee of institutional autonomy that allows faith-based organizations to select staff on a religious basis .... This guaranteed ability is central to each organization’s freedom to define its own mission according to the dictates of its faith.” That is the reason, the report stated, that Congress wrote an exemption for religious organizations into Title VII of the Civil Rights Act of 1964; and that exemption, it asserted, “is not waived or forfeited when a religious organization receives Federal funding.” “Staffing on a religious basis,” it said, does not constitute “invidious discrimination; and constitutionally the exemption is a “permissible religious accommodation.” Moreover, it stated, this exemption should apply “even when State or local laws provide otherwise.” Both the autonomy provision and the provision stating that the charitable choice rules apply to state funds that are commingled with federal funds, the report stated, serve to preempt state and local civil rights laws that would intrude on the right of religious organizations to employ persons of their own faiths. The report noted that under H.R. 7 the right is judicially enforceable.

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<sup>29</sup>H. Rept. 107-38, Part I, *supra*, at 28.

Twelve Democrats filed “Dissenting Views” in the committee report stating that “[w]e cannot support legislation which seeks to enlarge the role of religious institutions by sanctioning government-funded discrimination and by breaking down the historic separation between church and state.” Contending that the bill not only allows religious organizations to discriminate on the basis of a prospective employee’s religion but also on the basis of “a failure to adhere to religious doctrine (*e.g.*, being pregnant and unmarried, being gay or lesbian)” and that it preempts conflicting state and local nondiscrimination laws as well, the dissenters asserted that “it is unacceptable for any group or entity to discriminate with taxpayer funds.” Given that the federally funded services to be provided by such organizations must be wholly secular under H.R. 7, they said, employment discrimination on the basis of religion is simply unnecessary.

With respect to the separation of church and state, the dissenters contended that the safeguards in the bill are inadequate. They noted that H.R. 7 provides no funds to ensure that a beneficiary’s right to a secular alternative to a faith-based service – “the most critical Establishment Clause safeguard included in the legislation” – can be honored and said the requirement constitutes “an unfunded and unenforceable mandate.” They contended as well that the other “key religious protections in the bill” – the ban on the use of government funds for sectarian proselytization and the requirements that religious activity be separate from the funded program and that participation in such activity be voluntary -- are “largely left to self enforcement.” They questioned as well whether participation in such programs by children or, perhaps, even drug addicts could ever be truly voluntary. The dissenters further argued that the nondiscrimination provisions in the bill still allow religious organizations to discriminate not only on grounds of religion but also on the grounds of “sex, pregnancy status, marital status, or sexual orientation.” Moreover, they asserted, in indirectly funded programs the ban on religious discrimination applies only to admissions and the requirements that religious activities be separate and voluntary do not apply at all. The dissenters further charged that the funding process contemplated by H.R. 7 would diminish religion’s “independent voice of compassion,” support only those religious groups able to muster sufficient lobbying power to obtain government grants, precipitate intense religious competition for funds, and lead to government discrimination against unpopular groups. Finally, the dissenters expressed “concern that H.R. 7 would fail to pass constitutional muster.”

**(ii) Rules Committee report.** On July 17, 2001, the House Rules Committee adopted a rule which provided that in lieu of the bill as reported by the two committees, a substitute amendment sponsored by Rep. Sensenbrenner which consolidated and reordered their recommendations would be deemed the pending bill upon adoption of the rule.<sup>30</sup> The rule also made in order a minority substitute measure that proposed to (1) delete the Title VII exemption allowing religious organizations to discriminate on grounds of religion in their employment practices, (2) add a provision making clear that state and local civil rights laws remain applicable to

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<sup>30</sup>See H. Rept. 107-144, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 17, 2001), accompanying H. Res. 196. The Sensenbrenner substitute was printed in the *Congressional Record* on July 16 and again on July 19. See 147 CONG.REC. H 4014-H4019 (daily ed. July 16, 2001) and H 4239-H 4243 (daily ed. July 19, 2001).

religious organizations receiving funds under charitable choice, (3) bar religious activity from taking place at the same time and place as a government funded program, (4) delete the provision allowing programs to be converted to vouchers if deemed “feasible and efficient” by the Secretary of the pertinent department, (5) eliminate the liability reform provisions regarding corporate contributions of equipment and supplies to charitable organizations, and (6) provide a revenue offset for the cost of the charitable giving tax incentives. Finally, the rule made in order one motion to recommit.<sup>31</sup>

**(iii) House floor debate.** After some delay because of concerns raised by a *Washington Post* article that disclosed an apparent agreement between the Salvation Army and the Administration concerning the issuance of a regulation to preempt state and local laws barring discrimination on the basis of sexual orientation in exchange for support for H.R. 7,<sup>32</sup> the House took up the measure on July 19, 2001, and adopted the rule, 228-199. After several hours of vigorous debate, the House then rejected the minority substitute described above, 168-231; rejected as well a motion to recommit offered by Rep. Conyers (D.-Mich.) incorporating the first two provisions of the rejected substitute which would have barred religious discrimination in employment as well as the preemption of state and local nondiscrimination statutes, 195-234; and adopted the bill, 233-198.<sup>33</sup> Prior to the vote on the minority substitute and in response to concerns raised during the debate about the preemption of state and local civil rights laws, Rep. Watts (R.-Ok.) made a commitment for himself and the other primary sponsor of H.R. 7, Rep. Hall (D.-Oh.) to “more clearly address this issue in conference.”<sup>34</sup>

In the Senate H.R. 7 has been referred to the Finance Committee.

**(b) S. 1924, the “CARE Act of 2002”.** In the Senate concerns about the legal and policy implications of charitable choice cast doubt on the prospects for H.R. 7. As a consequence, Senators Lieberman (D.-Cn.) and Santorum (R.-Pa.) led efforts to develop a bipartisan bill that would have more promising prospects. On February

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<sup>31</sup>The Rules Committee refused to allow three other amendments to be offered – one to bar religious groups receiving assistance from exempting themselves from state and local civil rights laws (defeated 4-9), another to prohibit direct funding of pervasively sectarian organizations (defeated 3-10), and a third to bar the tax provisions from taking effect if the Director of OMB projects a deficit outside of the Social Security and Medicare Trust Funds (defeated 3-10). *See id.* at 2.

<sup>32</sup>Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays*, *Washington Post*, July 10, 2001, at A1. Later that same day the White House Press Office issued a statement saying “The White House will not pursue the OMB regulation proposed by the Salvation Army and reported today.”

<sup>33</sup>For the full debate on the bill, *see* 147 CONG.REC. H 4222 - H 4281 (daily ed. July 19, 2001). For the votes, *see id.* at H 42778-78, H 4280-81, and H 4281, respectively.

<sup>34</sup>*Id.* at H 4274 (statement of Mr. Watts of Oklahoma).



8, 2002, they introduced S. 1924, the “CARE Act of 2002.”<sup>35</sup> President Bush immediately endorsed the bill and urged its adoption.<sup>36</sup>

S. 1924 is similar to H.R. 7 in several respects. It contains tax incentives for charitable giving and provisions to promote the establishment of individual development accounts by and for low-income persons (although these provisions are both more expansive and more detailed than those in H.R. 7). It also would bar government at all levels from requiring religious organizations participating in publicly funded social services programs to remove religious art and icons from their premises or to change the religious elements of their names or charter documents. But S. 1924 does not contain the other charitable choice provisions of H.R. 7 nor its limitations on corporate liability. Instead, S. 1924 would

- mandate that nongovernmental organizations not be disadvantaged in applying to participate in publicly funded social services programs simply because they have not previously participated;
- authorize social services grants or cooperative agreements to be awarded to intermediate organizations that could facilitate the participation of small nongovernmental providers;
- direct the IRS to adopt expedited procedures for acting on applications for tax-exempt status by social services providers (the EZ Pass system);
- authorize \$150 million for a “Compassion Capital Fund” to enable several federal departments to provide technical and programmatic assistance to small community-based social services providers;
- restore funding for the Social Services Block Grant program established under Title XX of the Social Security Act; and
- authorize funding for a new program to support maternity group homes.

S. 1924 has also been referred to the Senate Finance Committee.

**(c) Other measures.** Another measure pending in the Senate that once contained charitable choice provisions is S. 304, the “Drug Abuse Education, Prevention, and Treatment Act of 2001.” As introduced on February 13, 2001, by Senators Hatch (R.-Ut.) and Leahy (D.-Vt.) and four co-sponsors, the bill would have extended charitable choice rules to a number of new programs, such as jail-based substance abuse programs, residential treatment programs for juveniles, programs to prevent delinquency through character education, and programs to help the children of prisoners. But in reporting the measure to the Senate on November 29, 2001, the Senate Judiciary Committee by voice vote approved a substitute measure that does not contain the charitable choice provisions. (The committee did not issue a report.)

In addition, it might be noted that, as introduced, Title V of H.R. 1, the “No Child Left Behind Act of 2001,” would have applied a charitable choice provision to drug and violence prevention programs and before- and after-school programs for

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<sup>35</sup>148 CONG. REC. S 546 (daily ed. February 8, 2002). The full title of the bill is the “Charity Aid, Recovery, and Empowerment Act of 2002.”

<sup>36</sup>See n. 17.

school-age youth. But that provision was not included in the bill as reported<sup>37</sup> or as adopted by the House.<sup>38</sup> Nor was charitable choice part of the counterpart measure adopted by the Senate re-authorizing the Elementary and Secondary Education Act (S. 1, the “Better Education for Teachers and Students Act”).<sup>39</sup> As a consequence, no charitable choice provisions were included in the measure as signed into law by President Bush on January 8, 2002.<sup>40</sup>

Finally, it might be noted that the fiscal 2002 appropriations act for the Departments of Justice, Commerce, and State<sup>41</sup> includes a directive that \$5 million be used to start five faith-based pilot programs in prisons to help inmates prepare for release. The report of the House Appropriations Committee had stated as follows:

In addition, the Committee supports the request to establish a multi-faith based prison pre-release pilot program. The Committee directs that a fifth pilot be added, and that it be located at the Petersburg, VA, facility.<sup>42</sup>

The conference report on the legislation, in turn, stated that “[t]he conference adopts by reference House language regarding drug treatment programs and establishment of faith-based and other pilots ....”<sup>43</sup>

## **(7) What Does the House-Passed Version of Title II of H.R. 7 Provide and How Does It Differ from Previous Charitable Choice Statutes?**

The charitable choice section of H.R. 7, as approved by the Judiciary Committee and by the House, contains a more expansive purposes section than prior enactments stating that the Act is intended not only to prohibit discrimination against religious organizations on the basis of their religious character and to protect the religious freedom of beneficiaries but also to provide assistance to individuals and families “in the most effective and efficient manner” and to facilitate the entry of religious and other community organizations in the administration and distribution of government assistance. In addition, with the provisions that differ from the previously enacted charitable choice statutes highlighted in italics, Title II of H.R. 7 would:

(a) *extend charitable choice rules to federally funded activities in nine program areas – (a) the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system; (b) the prevention of crime and*

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<sup>37</sup>H. Rept. 107-63, Part I (May 14, 2001)).

<sup>38</sup>147 CONG. REC. H 2421- H 2516 (daily ed. May 22, 2001).

<sup>39</sup>147 CONG. REC. S 6305 (daily ed. June 14, 2001).

<sup>40</sup>P.L. 107-110 (January 8, 2002).

<sup>41</sup>P.L. 107-77 (Nov. 28, 2001).

<sup>42</sup>H. Rept. 107-139, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 13, 2001), at 35.

<sup>43</sup>H. Conf. Rept. 107-278 (Nov. 9, 2001), *reprinted at* 147 CONG. REC. H 8008 (daily ed. Nov. 9, 2001).

*assistance to crime victims; (c) the provision of assistance under the federal housing statutes; (d) workforce investment under subtitles B or D of title I of the Workforce Investment Act of 1998<sup>44</sup>; (e) the Older Americans Act of 1965<sup>45</sup>; (f) intervention in and prevention of domestic violence; (g) hunger relief; (h) the Job Access and Reverse Commute grant program<sup>46</sup>; and (i) after-school and GED programs.*

*(b) state that funds received by religious organizations are to be deemed aid to individuals and families and not to religion, and are not to be deemed “an endorsement by the government of religion or of the organization’s religious beliefs or practices”;*

*(c) bar government from discriminating against religious organizations that seek to provide federally funded services because of their religious character;*

*(d) specify that a religious organization providing assistance “retain[s] its autonomy from Federal, State, and local governments”;*

*(e) bar government from requiring religious organizations, as a condition of eligibility, to change their form of internal governance or to remove religious symbols or, in new prohibitions, to change “provisions in [their] charter documents” or “to change [their] name[s]”;*

*(f) make clear that the Title VII exemption allowing religious organizations to discriminate on religious grounds in their employment practices is not affected by their receipt of federal funds;*

*(g) provide that the Title VII exemption and the provisions of charitable choice generally override any contrary mandates in the programs to which charitable choice is extended by the bill;*

*(h) state explicitly that religious organizations receiving federal financial assistance pursuant to H.R. 7 must still comply with the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964,<sup>47</sup> Title IX of the Education Amendments of 1972,<sup>48</sup> section 504 of the Rehabilitation Act of 1973,<sup>49</sup> and the Age Discrimination Act of 1975<sup>50</sup>;*

*(i) bar discrimination against beneficiaries generally “on the basis of religion, a religious belief, or a refusal to hold a religious belief” but, in a new distinction, limit this nondiscrimination mandate only to admissions in programs funded by vouchers;*

*(j) require that beneficiaries that object to the religious character of a provider be afforded an alternative provider of equal value which, in modified language, is “unobjectionable to the individual on religious grounds”;*

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<sup>44</sup>29 U.S.C.A. 2801 *et seq.*

<sup>45</sup>42 U.S.C.A. 3001 *et seq.*

<sup>46</sup>49 U.S.C.A. 5309 note.

<sup>47</sup>42 U.S.C.A. 2000d *et seq.* (barring discrimination on the bases of race, color, or national origin).

<sup>48</sup>20 U.S.C.A. 1681 *et seq.* (barring discrimination on the basis of gender in federally assisted education programs).

<sup>49</sup>29 U.S.C.A. 794 (barring discrimination on the basis of handicap).

<sup>50</sup>42 U.S.C.A. 6101 *et seq.* (barring discrimination on the basis of age).

(k) require that government ensure that notice is given to beneficiaries of their right to an alternative provider;

(l) require that the programs be implemented in a manner that is consistent with the establishment clause *and, as is also provided by one of the existing charitable choice statutes, the free exercise clause;*

(m) bar the use of funds provided directly (but not funds provided indirectly ) to a religious organization for “sectarian instruction, worship, or proselytization”;

(n) *require that religious activities offered by a religious organization receiving direct funding be “separate from the program funded under this subpart” and “voluntary for the individuals receiving services,” and mandate that religious organizations certify that they will abide by these requirements;*

(o) *allow assistance under all of the programs to which the charitable choice provisions of Title VII would apply to be distributed in the form of vouchers or certificates, if the Secretary of the administering department determines that to be “feasible and efficient”;*

(p) give the states a choice of commingling their own funds with the federal funds in the pertinent program or of keeping them separate but require that charitable choice rules apply to all commingled funds;

(q) require that religious organizations providing assistance be subject to the same regulations as other nongovernmental organizations and that their use of funds be subject to audit by the government, but allow, and in the case of direct assistance require, that public funds be kept in a separate account and that any audit be limited to that account;

(r) *require organizations providing services to conduct an annual self-audit;*

(s) *in a provision that is also in one of the drug abuse charitable choice statutes, impose on nongovernmental entities that make subgrants the same charitable choice obligations imposed on government and, if such entities are religious in nature, extend to them the same rights otherwise afforded religious organizations;*

(t) allow parties who believe their rights have been violated to bring suit in state and federal courts for injunctive relief, *but in contrast to existing charitable choice statutes, allow suits only against the federal, state, or local governments and not against the service providers;* and

(u) *authorize \$50 million to provide training and technical assistance to small nongovernmental organizations “in procedures relating to potential application and participation” in the pertinent programs, including assistance in setting up a 501(c)(3) organization, in applying for grants, and in complying with the federal nondiscrimination mandates.*

## **(8) What Is the Legal Framework for the Civil Rights Concerns That Have Been Raised About Charitable Choice?**

Several civil rights concerns have been raised in the debates on charitable choice. The primary one has been whether the religious exemption in Title VII of the Civil Rights Act of 1964, which allows religious organizations to discriminate on religious grounds in their employment practices, should apply to religious organizations that receive public funds under the rubric of charitable choice. There has also been some

concern over the protections from discrimination afforded beneficiaries and, in an issue that has only become apparent in the debates on H.R. 7, on whether charitable choice should preempt state and local civil rights laws that go beyond federal nondiscrimination requirements and bar employment discrimination on such bases as sexual orientation and marital status.

These issues arise in the context of a complex panoply of civil rights mandates and exemptions that already exist. The following subsections explicate charitable choice with respect to (1) existing mandates barring discrimination in programs and activities that receive federal financial assistance, (2) existing mandates barring discrimination in employment practices, particularly Title VII of the Civil Rights Act of 1964 and its religious exemption, and (3) the preemption of state and local nondiscrimination laws that go beyond federal law. The question of the constitutionality of public aid going to organizations which discriminate on religious grounds in their employment practices is discussed in question 9.

**(a) Nondiscrimination in federally assisted programs.** Federal law imposes a number of civil rights obligations on the provision of services in programs and activities that receive federal financial assistance. Title VI of the Civil Rights Act of 1964 bars discrimination on the bases of race, color, or national origin.<sup>51</sup> Title IX of the Education Amendments of 1972 bars discrimination on the basis of sex and on the basis of blindness (in admissions) in education programs.<sup>52</sup> Section 504 of the Rehabilitation Act of 1973 bars discrimination on the basis of handicap.<sup>53</sup> The Age Discrimination Act of 1975 bars discrimination on the basis of age.<sup>54</sup> All of these prohibitions on discrimination are triggered by the receipt of federal funds, but most of them apply only to the delivery of services and not to the employment practices of the entities that receive federal funds. The applicability of these statutes is not altered by charitable choice.<sup>55</sup>

In contrast, there is no comparable federal statute that generally bars **religious** discrimination in federally funded programs and activities. Individual programs sometimes contain such a prohibition,<sup>56</sup> but there is no general statutory prohibition.

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<sup>51</sup>42 U.S.C.A. 2000d *et seq.*

<sup>52</sup>20 U.S.C.A. 1681 *et seq.*

<sup>53</sup>29 U.S.C.A. 794.

<sup>54</sup>42 U.S.C.A. 6101 *et seq.*

<sup>55</sup>Because H.R. 7 contains a provision stating that any funds received under the rubric of charitable choice “constitute[] aid to individuals and families in need” and not aid to the organization, there was some concern in the House about whether Title VI, Title IX, Section 504, and the Age Discrimination Act would be applicable. Consequently, an amendment was agreed to in the committee markup and retained in the House-passed bill referencing these statutes and clarifying that “nothing in this section” affects their applicability.

<sup>56</sup>*See, e.g.,* the nondiscrimination prohibition attached to the Head Start program at 42 U.S.C.A. 9849(a).

Nonetheless, charitable choice has, since its inception as part of the welfare reform bill, included provisions that bar religious organizations from discriminating against beneficiaries on religious grounds and that require government to make an alternate provider available to any beneficiary who objects to the religious character of a given provider. But there have been some distinctions in the types of religious discrimination that are prohibited, and H.R. 7 has drawn a new distinction based on whether the religious organization receives funding directly or indirectly. With respect to indirect assistance, H.R. 7 would bar religious discrimination against individuals only in admissions.

All of the existing charitable choice statutes as well as H.R. 7 bar a religious organization that receives assistance from discriminating against beneficiaries on the basis of “religion” or “a religious belief.” Three of the four statutes also bar such discrimination on the basis of a “refusal to actively participate in a religious practice.” But H.R. 7 and one of the substance abuse statutes do not include this latter prohibition (although H.R. 7’s requirement that participation in a religious activity must be voluntary is arguably equivalent). Moreover, H.R. 7 and the other drug abuse statute also bar discrimination on the basis of “a refusal to hold a religious belief.” Finally, H.R. 7 applies its religious nondiscrimination mandates to all aspects of programs that are directly funded but only to admissions in programs that are indirectly funded. Given that H.R. 7 also allows the Secretaries of the appropriate department to convert the programs to which the charitable choice provisions would be applied to vouchers if they find it to be “feasible and efficient,” this distinction may be significant.

**(b) Nondiscrimination in employment.** Federal statutes impose a number of employment nondiscrimination requirements on public and private employers, and generally these are not dependent on whether or not the entity receives federal financial assistance, *i.e.*, they are regulatory requirements that apply regardless of whether an entity receives federal assistance. With the exception of Title IX, none of the nondiscrimination statutes described in the previous subsection applies to the employment practices of entities that receive federal funds (unless a primary objective of the federally funded program is to provide employment). But most public and private employers that employ more than a specified number of employees are barred by the Americans with Disabilities Act from discriminating in their employment practices on the basis of disability,<sup>57</sup> by the Age Discrimination in Employment Act on the basis of age,<sup>58</sup> and by Title VII of the Civil Rights Act of 1964 on the bases of race, color, national origin, sex, and religion.<sup>59</sup>

A number of these statutes contain special provisions with respect to the employment practices of religious institutions. Religious educational institutions are exempt from the sex nondiscrimination requirement of Title IX, for instance, if “the application of this subsection would not be consistent with the religious tenets of such

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<sup>57</sup>42 U.S.C.A. 12201 *et seq.*

<sup>58</sup>29 U.S.C.A. 621 *et seq.*

<sup>59</sup>42 U.S.C.A. 2000e *et seq.*

organization.”<sup>60</sup> The Americans with Disabilities Act, while barring religious organizations from discriminating on the basis of disability in employment, specifically provides that they may still give preference in their employment practices on the basis of religion and may require their employees to conform to their religious tenets.<sup>61</sup> Most important, Title VII specifically exempts religious employers from its ban on religious discrimination in employment.

***Title VII and the religious exemption.*** It is the Title VII exemption that has generated extensive debate in the discussion of charitable choice, because all of the charitable choice statutes and proposals so far, including H.R. 7, have explicitly provided that the Title VII exemption “shall not be affected by the religious organization’s provision of assistance under, or receipt of funds from, a program described in ....”<sup>62</sup> (S. 1924, it should be noted, contains no such provision.)

Title VII bars most public and private employers with 15 or more employees from discriminating in their employment practices on the bases of race, color, national origin, sex, and religion. This threshold requirement of 15 employees means that many churches, synagogues, and other congregational entities, as well as small religious social services providers, are not large enough to be covered by any of the nondiscrimination mandates of Title VII. But Section 702 of Title VII specifically exempts those religious employers that are large enough to be covered from its prohibition on religious discrimination, as follows:

This title shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.<sup>63</sup>

Thus, religious organizations otherwise covered by Title VII may use religion as a criterion in their hiring, firing, promotion, and other employment practices; and they may do so not only with respect to employees engaged in religious activities but also

<sup>60</sup>20 U.S.C.A. 1681(a)(3).

<sup>61</sup>42 U.S.C.A. 12113(c).

<sup>62</sup>Title II of H.R. 7 as introduced included as well a provision that would have allowed religious entities receiving public funds to require their employees to adhere to their “religious practices.” Given the broad construction that has been given the Title VII exemption, that provision likely added nothing to the Title VII exemption. But in any event, the provision was not part of the manager’s substitute for Title II proposed at the beginning of the markup of H.R. 7 by the House Judiciary Committee and was not part of the bill as approved by the committee or by the House.

<sup>63</sup>42 U.S.C.A. 2000e-1. Title VII also contains two other exemptions, now largely redundant, allowing religious employers to discriminate on religious grounds. The first allows educational institutions that are religiously controlled or that are “directed toward the propagation of a particular religion” to discriminate on religious grounds in their employment practices. The second allows all employers, not just religious organizations, to use religion, sex, or national origin as a criterion in their employment practices if religion, sex, or national origin “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” See 42 U.S.C.A. 2000e-2(e).

those engaged in purely secular activities. This exemption has been unanimously upheld as constitutional by the Supreme Court with respect to the nonprofit activities of religious organizations<sup>64</sup> and has been applied to allow a wide variety of religious entities to discriminate on religious grounds in a wide variety of circumstances.<sup>65</sup>

As noted, Title VII is a regulatory statute. Nothing in its language generally or in the religious exemption provision (§ 702) suggests that either is limited to situations in which an employer does not receive public funds. The case in which the Supreme Court upheld § 702 as constitutional did not involve any public funding,<sup>66</sup> but several lower federal courts have held the exemption to be applicable to religious organizations receiving public funds.<sup>67</sup> Nonetheless, apparently to eliminate any possible misunderstanding, all four charitable choice statutes as well as Title II of H.R. 7 state explicitly that the religious exemption in Title VII is not lost simply because a religious employer receives public funds.

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<sup>64</sup>Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). The Court offered no comment with respect to the constitutionality of the exemption as it might be applied to any profit-making activities of religious organizations.

<sup>65</sup>See, e.g., Corporation of the Presiding Bishop v. Amos, *supra* (church fired a building engineer employed in a church-owned gymnasium open to the public because he failed to qualify for a “temple recommend”); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (Catholic school fired a teacher who had remarried without first seeking an annulment of her first marriage in accord with Catholic doctrine); Porth v. Roman Catholic Diocese of Kalamazoo, 209 Mich.App. 630, 532 N.W.2d 195 (Mich. App. 1995) (Catholic school refused to renew the contract of a Protestant teacher after it had decided to hire only Catholics as faculty members); Walker v. First Orthodox Presbyterian Church, 22 FEP Cases 761 (Cal. 1980) (church fired its organist on the grounds his homosexuality conflicted with the church’s beliefs); Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6<sup>th</sup> Cir. 1996) (Christian school fired an unmarried female teacher after she became pregnant because of its beliefs opposing extramarital sex); Maguire v. Marquette University, 814 F.2d 1213 (7<sup>th</sup> Cir. 1987) (Catholic university refused to hire a female professor because her views on abortion were not in accord with Catholic doctrine); EEOC v. Presbyterian Ministries, Inc., 788 F.Supp. 1154 (W.D. Wash. 1992) (a Christian retirement home fired a Muslim receptionist because she insisted on wearing a head covering as required by her faith); Piatti v. Jewish Community Centers of Greater Boston, Mass. LEXIS 733 (1993) (a Jewish community center refused to hire a Catholic as a youth director); Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D. Mass. 1983) (a newspaper owned by the Christian Scientist Church refused to hire applicants of other faiths); and Hall v. Baptist Memorial Health Care Corporation, 215 F.3d 618 (6<sup>th</sup> Cir. 2000) (a Baptist health care corporation fired an employee because she had assumed a leadership role in a church that welcomed and supported gay and lesbian individuals).

<sup>66</sup>Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, *supra*, n. 6.

<sup>67</sup>See, e.g., Hall v. Baptist Memorial Health Care Corporation, *supra*, n. 10 (student assistance); Siegel v. Truett-McConnell College, *supra*, n. 11 (student assistance); Young v. Shawnee Mission Medical Center, Civ. No. 88-2321-S (D. Kan., decided Oct. 21, 1988) (Medicare payments); Dodge v. Salvation Army, 1989 U.S. Dist. LEXIS 4797, 48 Empl. Prac. Dec. (CCH) P38,619 (S.D. Miss. 1989) (unspecified public funding of a Victims Assistance Coordinator position).



Religious organizations that meet the minimum size requirement of Title VII (*i.e.* 15 or more employees) are **not** exempt from the other employment nondiscrimination requirements of Title VII regarding race, color, national origin, and sex; and charitable choice does not alter, or propose to alter, the applicability of these requirements. Thus, religious organizations have in a number of instances been held liable under Title VII for discrimination on the bases of race, sex, or national origin.<sup>68</sup> It can sometimes be a close question, however, whether the alleged discrimination by a religious employer is based on religion or one of the prohibited bases of discrimination.<sup>69</sup>

**Ministerial exception.** It should be noted that the Title VII exemption overlaps to some degree with a constitutionally-based employment discrimination exemption for religious organizations that has been labeled the “ministerial exception.” This exception exempts religious organizations from **all** statutory prohibitions on discrimination with respect to the employment of ministers and other ecclesiastical personnel. The free exercise of religion clause of the First Amendment, it has been held, bars the government from interfering in any way with the relationship between a religious institution and its ministers. The ministerial exception has been held to apply to the employment of ministers (including youth ministers, probationary ministers, and ministers of music), seminary faculty, and hospital chaplains.<sup>70</sup> It has

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<sup>68</sup>*See, e.g.*, EEOC v. Pacific Press Publishing House, 676 F.2d 1272 (9<sup>th</sup> Cir. 1982) (publishing house had fired a female employee after she complained that she had been denied monetary allowances paid to similarly situated male employees); EEOC v. Lutheran Family Services in the Carolinas, 884 F.Supp. 1033 (E.D. N.C. 1994) (a religious social services provider had refused to give a pregnant employee a leave of absence but gave extended leaves of absence to male employees for a variety of reasons); and EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5<sup>th</sup> Cir. 1981), *cert. den.*, 456 U.S. 905 (1982) (seminary held to be subject to filing information reports on its employment practices with respect to staff in its non-academic departments).

<sup>69</sup>In several cases the courts have refused to grant summary judgment in favor of Christian schools that had each fired an unmarried female teacher who had become pregnant, saying that if the dismissals were due to the teachers’ adultery the Title VII religious exemption would apply but that dismissal for pregnancy alone would constitute forbidden sex discrimination. *See Vigars v. Valley Christian Center of Dublin, Cal.*, 805 F.Supp. 802 (N.D. Cal. 1992); *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D. N.Y. 1998); and *Cline v. Catholic Diocese of Toledo*, 199 F.3d 853 (6<sup>th</sup> Cir. 1999).

<sup>70</sup>*See McClure v. Salvation Army*, 460 F.2d 553 (5<sup>th</sup> Cir.), *cert. den.*, 409 U.S. 896 (1972) (firing of a female officer in the Salvation Army after she claimed she was given a lower salary and fewer benefits than male officers held to be within the scope of the ministerial exemption); *Bryce v. Episcopal Church in the Diocese of Colorado*, 121 F.Supp.2d 1327 (firing of youth minister by her church after she participated in a commitment ceremony with her partner held to be a constitutionally exempt act); *Young v. Northern Illinois Conference of the United Methodist Church*, 21 F.3d 184 (7<sup>th</sup> Cir. 1994), *cert. den.*, 513 U.S. 929 (1994) (conference of churches’ refusal to change the probationary status of an African-American minister held to be constitutionally exempt); *EEOC v. The Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4<sup>th</sup> Cir.), *cert. den.*, 69 U.S.L.W. 3206 (2000) (church fired its minister of music); *EEOC v. Southwestern Baptist Theological Seminary*, *supra* (seminary’s criteria for its faculty held to be constitutionally exempt from monitoring and examination by

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been held **not** to apply, however, with respect to the employment by religious organizations of persons who are not engaged in a religious ministry or in the training of persons for such ministries, such as the administrative and support staff in religious institutions.<sup>71</sup> Because the ministerial exemption is constitutionally based, it is not modified by charitable choice in any way.

Thus, under the Title VII exemption a religious organization can discriminate on religious grounds with respect to all of its employees; but if it meets the minimum size requirement, it is otherwise subject to the statute's employment nondiscrimination mandates. With respect to the employment of its spiritual leaders, however, a religious organization, pursuant to the ministerial exception, is unconstrained by **any** nondiscrimination requirement

**(c) Preemption of state and local civil rights laws.** An issue that received only slight attention in previous debates on charitable choice gained substantial visibility during House consideration of H.R. 7. That issue concerns the preemptive effect of charitable choice on state and local civil rights laws that bar forms of discrimination that are not barred by federal law, such as discrimination based on sexual orientation or marital status. All of the charitable choice statutes that have been enacted, as well as Title II of H.R. 7, provide that a religious organization that is a program participant "shall retain its independence from Federal, State, and local government, including such organization's control over the definition, development, practice, and expression of its religious beliefs." But prior to the House debate on H.R. 7, there has been no legislative history explicating the meaning of this provision. Similarly, all of the charitable choice statutes and proposals have barred government from requiring that a religious provider "alter its form of internal governance" and, as noted above, have explicitly provided that a religious organization's exemption under Title VII "shall not be affected by its participation in, or receipt of funds from, a designated program." But with the exception of a provision added to the charitable choice statute concerning substance abuse programs,<sup>72</sup> little attention has been paid to whether these provisions might have a preemptive effect on state and local civil rights laws.

The House debate on H.R. 7 made clear that these provisions, and particularly the first one concerning the independence of religious organizations, are intended to preempt state and local civil rights laws. The report of the House Judiciary Committee stated:

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<sup>70</sup>(...continued)

the EEOC); and *Sharon v. St. Luke's Presbyterian School of Theology*, 713 N.E.2d 334 (Ind. Ct. App., 1<sup>st</sup> Dist., 1999) (firing of a chaplain by a religiously affiliated hospital held to be constitutionally protected).

<sup>71</sup>*See, e.g.*, *EEOC v. Southwestern Baptist Theological Seminary*, *supra* (administrative and support staff in a seminary) and *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9<sup>th</sup> Cir. 1982) (editorial support staff in a religious publishing house).

<sup>72</sup>P.L. 106-554, which added charitable choice provisions to Title V of the Public Health Services Act, prefaced the Title VII exemption language with the following sentence: "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."

Because H.R. 7 expands charitable choice principles to cover many new Federal programs, one uniform rule should apply to all programs and allow religious organizations to retain their autonomy over the definition, development, practice, and expression of their religious beliefs, including through hiring staff. This is so even when State or local laws provide otherwise .... Wherever federal funds go, this statutory right of religious organizations to staff on a religious basis should follow ....<sup>73</sup>

The report similarly made clear that if state and local funds are commingled with federal funds in an applicable program, state and local civil rights laws will not apply to those funds.<sup>74</sup>

Under the supremacy clause of the Constitution,<sup>75</sup> it seems clear that Congress has the power to preempt state and local laws pursuant to charitable choice. What has been the subject of debate has been the desirability of doing so in this case.

## **(9) Is Charitable Choice Constitutional?**

As noted in question 1, the charitable choice statutes and Title II of H.R. 7 contain a number of provisions that seem intended to ensure their constitutionality. All of these measures require that they be implemented “consistent with the Establishment Clause of the United States Constitution.” All require that public funds that are disbursed directly to religious organizations not be used for purposes of religious worship, instruction, or proselytization. All have provisions to protect those who receive services from religious organizations from religious discrimination. All require equal treatment, but not preferential treatment, for religious organizations seeking to participate in government social services programs. Title II of H.R. 7, although not the charitable choice statutes previously enacted into law, also requires that any religious activity offered by a religious organization be separate from the program that receives direct federal assistance and that participation in any religious activity that is directly funded be voluntary for the individuals receiving services.

On the other hand, all of the statutes as well as H.R. 7 also allow religious organizations that receive public funds to discriminate on religious grounds with respect to their employees, to display religious symbols on the premises where

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<sup>73</sup>H. Rept. 107-138, Part I, *supra*, at 37.

<sup>74</sup>*Id.* at 38. During the markup of the bill, Rep. Sensenbrenner responded to a question from Rep. Frank about the preemptive effect of the measure on state and local laws by stating that “Federal law applies where Federal funds go, and State law does not apply.” *Id.* at 176. The committee also rejected an amendment by Rep. Frank to bar religious organizations receiving assistance from discriminating against any individual “on any basis prohibited under applicable Federal, State, or local law ....” *Id.* at 249-254. It rejected as well an amendment by Rep. Jackson-Lee specifying that religious organizations receiving assistance would not be exempt from state and local laws. *Id.* at 258-266. Floor debate during House consideration of H.R. 7 also made clear the preemptive effect of the bill on state and local laws.

<sup>75</sup>U.S. Constitution, Art. VI, cl. 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.”

services are provided, and to practice and express their religious beliefs independent of any government restrictions. None of them, moreover, require the publicly funded program to be separately incorporated from its sponsoring religious organization. In addition, the measures allow religious organizations that receive public funds indirectly, *i.e.*, by means of vouchers, to engage in religious worship, instruction, and proselytization in the funded program and to impose religious requirements on beneficiaries after they are once admitted to a program. Finally, all of the proposals seem premised on the assumption that charitable choice will in some manner allow religious organizations to employ their faiths in carrying out the publicly funded programs, regardless of whether they are directly or indirectly funded.

As a consequence, questions have been raised about whether charitable choice on its face or in its implementation is consistent with the establishment of religion clause of the First Amendment. One aspect of this issue concerns whether it is constitutional for public funds to go to organizations that discriminate on religious grounds in their employment practices. More generally, the question is whether it is constitutional for public funds to go to religious organizations that have the characteristics detailed in the previous paragraph and that in some manner employ their faiths in carrying out the funded programs.

These questions of constitutionality, in turn, have at least two dimensions. The charitable choice statutes and proposals govern public aid that is given **directly** to religious organizations by means of grants or cooperative agreements in the specified programs and, at least in the cases of TANF and Title II of H.R. 7, public aid that is 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 differ; and as a consequence, the form in which the public aid is provided to religious organizations under charitable choice has implications for the constitutionality of the aid.

These questions are further complicated by the fact that the Supreme Court's interpretation of the establishment clause appears to be shifting, at least with respect to direct aid. The Court's past decisions have made it difficult, if not impossible, for religious organizations that are deemed pervasively sectarian to receive aid directly from the government, even for avowedly secular purposes, and have required that programs receiving direct public aid be essentially secular in nature. But the Court's recent decisions in *Agostini v. Felton*<sup>76</sup> and *Mitchell v. Helms*<sup>77</sup> appear to relax the strictures on direct aid to an as-yet indeterminate degree.

The following subsections detail the constitutional frameworks that appear to govern direct and indirect aid and apply them to H.R. 7:

**(a) Direct aid.** In general terms the establishment clause has been construed by the Supreme Court to “absolutely prohibit government-financed or government-

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<sup>76</sup>521 U.S. 203 (1997).

<sup>77</sup>530 U.S. 793 (2000).

sponsored indoctrination into the beliefs of a particular religious faith.”<sup>78</sup> “[G]overnment inculcation of religious beliefs,” the Court has stated, “has the impermissible effect of advancing religion.”<sup>79</sup> To guard against that effect, public assistance which flows **directly** to religious institutions in the form of grants or cooperative agreements has in the past been required to be limited to aid that is “secular, neutral, and nonideological...”<sup>80</sup> That is, 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>81</sup>

Thus, under this interpretation of the establishment clause, religious organizations have not automatically been disqualified from participating in public programs providing direct assistance. 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.

This interpretation of the establishment clause has also generally meant that it has been 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>82</sup> But

<sup>78</sup>Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1973).

<sup>79</sup>Agostini v. Felton, 521 U.S. 203, 223 (1997).

<sup>80</sup>Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

<sup>81</sup>Committee for Public Education v. Nyquist, *supra*; Lemon v. Kurtzman, 403 U.S. 602 (1971); Bowen v. Kendrick, 487 U.S. 589 (1988).

<sup>82</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 ... 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 useful 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 Columbia Union

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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. (It might be noted that one important element in the Court’s determination of whether a religious entity is pervasively sectarian has often been whether it discriminates on religious grounds in its employment practices.<sup>83</sup> But the Court has never looked exclusively at that factor in making its constitutional determination; and in some of its decisions regarding the constitutionality of direct aid, it has not looked at that factor at all.<sup>84</sup>)

The Court crystallized this understanding of the establishment clause in what is known as the tripartite *Lemon* test. That test, named after the case of *Lemon v. Kurtzman*<sup>85</sup> in which it was first given full expression, originally required public aid to meet all of the following requirements:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster “an excessive entanglement with religion.”<sup>86</sup>

The secular purpose test has rarely posed a serious obstacle, but in the past both the primary effect and entanglement tests have often proved fatal to public aid programs directly benefiting sectarian institutions. As noted above, the primary effect test has been construed to mean that direct public aid be limited to secular use; and as a consequence the courts have applied this test to strike down programs in which the

<sup>82</sup>(...continued)

*College v. Clark*, 159 F.3d 151 (4<sup>th</sup> Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), *on remand sub nom* *Columbia Union College v. Oliver*, 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), *aff’d*, 2001 U.S. App. LEXIS 14253 (4<sup>th</sup> Cir. decided June 26, 2001).

<sup>83</sup>*See, e.g.*, *Lemon v. Kurtzman*, *supra* (fact that most of the teachers in the Catholic schools were nuns and rest were largely lay Catholics found to support finding that schools were “an integral part of the religious mission of the Catholic church”); *Hunt v. McNair*, 413 U.S. 734 (1973) (fact that religiously affiliated college had no religious qualifications for faculty weighed in determining whether state could issue bonds to subsidize the construction of academic buildings); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (imposition of religious restrictions on faculty appointments found to be one element in rendering sectarian elementary and secondary schools constitutionally ineligible for state maintenance and repair grants); and *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976) (finding that religiously affiliated colleges did not make hiring decisions “on a religious basis” relied on in part in upholding direct public grants to colleges).

<sup>84</sup>*See, e.g.*, *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding construction of wing at a hospital run by an order of Catholic nuns on the condition the wing be used for the medical care of the poor) and *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (in finding several religiously affiliated colleges not to be so permeated by religion as to be ineligible for federal construction grants for academic buildings, the Court placed primary emphasis on the fact that the schools “were characterized by an atmosphere of academic freedom rather than religious indoctrination”).

<sup>85</sup>403 U.S. 602 (1971).

<sup>86</sup>*Id.* at 612-13.

aid was not limited to secular use either by its nature or by statutory or regulatory constraint.<sup>87</sup> This test has also been used to strike down programs providing direct aid to pervasively sectarian institutions due to the assumption that religious and secular functions in such institutions are “inextricably intertwined.”<sup>88</sup> Even if aid programs have been limited to secular use and, thus, have passed muster under the primary effect test, they still often foundered on the excessive entanglement test because the Court presumed that in pervasively religious entities the government would have to so closely monitor the use of the aid to enforce the secular use limitation that it would inevitably become excessively entangled with the religious enterprise.<sup>89</sup>

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>90</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. In the process it has also reformulated the *Lemon* test.

Three years ago in *Agostini v. Felton*<sup>91</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.<sup>92</sup> The earlier decision of *Aguilar v. Felton*, *supra*, had found the delivery of such services on the premises of sectarian elementary and secondary schools to be excessively entangling, because the pervasively sectarian nature of the institutions required government to engage in a very intrusive monitoring to be sure that the Title I employees did not inculcate religion. But in *Agostini* the Court stated that subsequent decisions had abandoned the presumption that “public employees will inculcate religion simply

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<sup>87</sup>See, e.g., *Committee for Public Education v. Nyquist*, *supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>88</sup>See, e.g., *Wolman v. Walter*, *supra*, and *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

<sup>89</sup>*Lemon v. Kurtzman*, *supra*; *Meek v. Pittenger*, *supra*; *Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>90</sup>See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

<sup>91</sup>521 U.S. 203 (1997).

<sup>92</sup>The *Agostini* decision overturned in its entirety the Court’s decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) but also overturned parts of *Meek v. Pittenger*, *supra*, and *City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

because they happen to be in a sectarian environment.”<sup>93</sup> As a consequence, it said, it had also to “discard the assumption that *pervasive* monitoring of Title I teachers is required.”<sup>94</sup> The Court also stated that

the factors we use to assess whether an entanglement is “excessive” are similar to the factors we use to examine “effect” .... Thus, it is simplest to recognize why entanglement is significant and treat it ... as an aspect of the inquiry into a statute’s effect.<sup>95</sup>

Most recently, the Court in *Mitchell v. Helms*<sup>96</sup> upheld as constitutional an ESEA program which subsidizes the acquisition and use of educational materials and equipment by public and private schools. 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. 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>97</sup> Although the Justices could not agree on a majority opinion, the plurality opinion by Justice Thomas and the concurring opinion by Justice O’Connor (joined by Justice Breyer) both appear to have eliminated pervasive sectarianism as a constitutionally preclusive characteristic regarding direct aid and modified the primary effect test accordingly. *Agostini* had hinted at this result but *Mitchell* confirmed it. As summarized by Justice O’Connor, the primary effect test now has three essential elements:

(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion.<sup>98</sup>

Thus, the Court now appears to construe the establishment clause to allow some forms of direct aid to religious entities that formerly were deemed constitutionally excluded because of their pervasively religious character. Under the reformulated *Lemon* test, direct public aid must still serve a secular purpose and not create an excessive entanglement. But the most critical elements appear to be that the aid is (1) distributed in a religiously neutral manner, *i.e.*, that it does not define its recipients on the basis of religion and provide an incentive for beneficiaries to undertake religious indoctrination, and (2) that it does not result in religious indoctrination which is attributable to the government.

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<sup>93</sup>*Agostini v. Felton, supra*, at 234.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 232-33.

<sup>96</sup>530 U.S. 793 (2000).

<sup>97</sup>Overturned in part were *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>98</sup>*Mitchell v. Helms, supra*, at 845 (opinion of O’Connor, J.).



**(b) Indirect aid.** Indirect aid in the form of tax benefits or vouchers, however, has been less constrained by the Court's decisions. If the programs have been designed in such a manner that the aid will inevitably be channeled primarily to sectarian institutions, the Court has held the programs to be unconstitutional.<sup>99</sup> But if such aid programs have been religiously neutral in design and the initial beneficiaries, *i.e.*, the taxpayers or voucher recipients, have had a genuinely independent choice about whether to use the aid at secular or sectarian institutions, the Court has held the programs constitutional and ruled that even pervasively sectarian entities are constitutionally eligible to participate.<sup>100</sup> Indeed, the Court has made clear that indirect aid which ultimately benefits religious institutions does not have to be restricted to secular use but can be used for all of the institutions' functions, including their religious ones.<sup>101</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>102</sup>

(It should be noted that in its present Term the Court is reviewing the constitutional standards that govern indirect aid programs. Before it is the case of *Zelman v. Simmons-Harris*,<sup>103</sup> which involves the constitutionality of an educational voucher program in Cleveland, Ohio. The Court heard oral argument on the case on February 20, 2002.)

**(c) Constitutionality of charitable choice.** Some aspects of the charitable choice proposals that have been enacted as well as Title II of H.R. 7 likely satisfy the foregoing requirements. Particularly with respect to indirect aid programs, the Court's interpretations of the establishment clause suggest that it poses no barrier

<sup>99</sup>Committee for Public Education v. Nyquist, *supra*, and Sloan v. Lemon, *supra*.

<sup>100</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>101</sup>For a more detailed examination of the constitutional standards governing indirect aid and for summaries of recent judicial developments, see CRS, *Education Vouchers: Constitutional Issues and Cases* (Report RL30165).

<sup>102</sup>Witters v. Washington Department of Services for the Blind, *supra*, at 490-91 (Powell, J., concurring).

<sup>103</sup>234 F.3d 945 (6<sup>th</sup> Cir. 2000), *cert. granted*, 70 U.S.L.W. 3232 (2001) (No. 00-1751).

with respect to indirect public aid to religious entities that discriminate on religious grounds in their employment practices. Indirect assistance, the Court has said, can ultimately flow even to pervasively sectarian institutions; and one of the criteria often used to identify such an institution is whether it discriminates on religious grounds in its employment practices. Thus, a number of recent lower court decisions have held that religious colleges and hospitals do not forfeit their Title VII exemption as a result of receiving public funds indirectly in the form of student aid and Medicare payments.<sup>104</sup>

Similarly, the Court's standards suggest that the establishment clause may pose no obstacle to the inclusion of religious worship, instruction, and proselytizing in programs that receive public funds indirectly pursuant to charitable choice. As noted, even pervasively sectarian entities have been held eligible to participate in such programs by the Court.

Nonetheless, there may still be a constitutional question raised about charitable choice with respect to indirect aid. The critical issue for indirect aid has been whether there is a genuinely independent decision-maker between the government and the entity that ultimately receives the assistance or whether the government has virtually dictated by the structure of the program that the aid ultimately goes to a religious entity. All of the charitable choice measures require that those who object to a particular religious provider be given an alternative that is either secular or, as in H.R. 7, not religiously objectionable. But they do not require that a voucher recipient have a choice of providers initially. Whether this is sufficient to meet the Court's standards does not seem certain.

Whether **direct** aid to religious entities that discriminate on religious grounds in their employment practices can pass constitutional muster seems more complex. Prior to *Mitchell* the Court's decisions had often used such employment discrimination as an indicator that an entity was pervasively sectarian and, hence, ineligible for direct assistance. But it had never relied on that factor alone; other factors always entered into the constitutional equation. Those rulings, consequently, seem to suggest that religious discrimination in employment, by itself, might not have been enough to render a direct aid program unconstitutional. *Mitchell* seems to strengthen that possibility, at least for certain kinds of direct aid. In that case, as noted, the Court upheld as constitutional a direct aid program providing educational supplies and equipment to entities that the Court had previously found to be pervasively sectarian

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<sup>104</sup>See, e.g., *Young v. Shawnee Mission Medical Center*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. 1988) (court held that the Title VII exemption applied to a religiously affiliated hospital's firing of a clerk-receptionist because she was not a Seventh Day Adventist, notwithstanding the hospital's acceptance of Medicare payments); *Siegel v. Truett-McConnell College, Inc.*, 13 F. Supp. 2d 1335 (N.D. Ga. 1994) (Baptist college's firing of a teacher because he was not a Christian held to be protected by Title VII notwithstanding college's receipt of public funds from a federal student assistance program); and *Hall v. Baptist Memorial Health Care Corporation*, 215 F.2d 618 (6<sup>th</sup> Cir. 2000) (Baptist college's firing of a student services specialist because she had become a lay minister in a community church that welcomed gay and lesbian members held to be protected by Title VII exemption notwithstanding the college's receipt of public funds by means of unspecified federal student assistance programs).

and had previously held to be constitutionally barred from receiving such aid – sectarian elementary and secondary schools. In so doing the Court shifted the constitutional focus from the nature of the organization receiving the aid to whether the aid is distributed in a religiously neutral manner and whether it is used for religious indoctrination. As a consequence, whether the entity receiving the assistance discriminates on religious grounds in its employment practices seems to have become of little or no concern, at least for in-kind direct assistance.

Nonetheless, the Court’s decisions make clear that direct public aid cannot be used for religious indoctrination. Notwithstanding the apparent assumption underlying charitable choice that religious entities will in some manner employ their religious faiths in carrying out the publicly funded programs, all of the charitable choice measures prohibit direct aid from being used for religious worship, instruction, or proselytizing. H.R. 7 buttresses this prohibition with requirements that any religious activity be entirely separate from the publicly funded program and that any participation in such activity be wholly voluntary. Arguably, these prohibitions and requirements go far to meet the requirements of the establishment clause with respect to the content of programs that receive direct aid. But given the assumption that underlies charitable choice and the various possibilities for how particular programs might be implemented, it also seems likely that constitutional questions will inevitably arise in the implementation of direct aid programs under charitable choice.

In addition, it should be emphasized that *Mitchell* involved an in-kind aid program – educational supplies and equipment. All of the Justices in *Mitchell* expressed doubt that direct grants of **money** to religious entities could pass constitutional muster, even under the Court’s revised standards; and direct grants of money are what seem contemplated in the programs to which charitable choice now applies or would be applied should H.R. 7 be enacted. Justice O’Connor, joined by Justice Breyer, stated both that “[t]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions” and that a direct subsidy “would be impermissible under the Establishment Clause.”<sup>105</sup> Justice Souter, joined by Justices Stevens and Ginsburg, stated:

[W]e have long held government aid invalid when circumstances would allow its diversion to religious education. The risk of diversion is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations, and so from the start we have understood the Constitution to bar outright money grants of aid to religion.<sup>106</sup>

Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, asserted that neutrality is the essential constitutional criterion governing public aid programs that benefit religious entities. But he, nonetheless, observed that “we have seen ‘special Establishment Clause dangers’ ... when *money* is given to religious

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<sup>105</sup>*Mitchell v. Helms, supra*, at 843 (quoting *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 842 (1995) and 841, respectively (O’Connor, J., concurring in the judgment).

<sup>106</sup>*Id.* at 890 (Souter, J., dissenting).

schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly.”<sup>107</sup> These statements are all *dicta*, however, and do not indicate with any certainty how the Court might rule on a case involving a particular grant or cooperative agreement.

In addition, it deserves notice that one federal district court, in a decision handed down some years prior to *Mitchell*, held religious discrimination in employment by a religious organization in a position **specifically** funded by a government grant to be unconstitutional.<sup>108</sup> Neither *Agostini* nor *Mitchell* addressed that form of aid. On the other hand, it should also be noted that, although not in direct conflict, a federal appellate court recently upheld a state program providing general aid to colleges, including religiously affiliated ones, as applied to a Seventh Day Adventist college, notwithstanding that the college “gave an express preference in hiring ... to members of the Church.”<sup>109</sup> Another recent case that was thought to raise the question of the constitutionality of public funding of an agency that discriminated on religious grounds in its employment practices turned out not to do so. In *Pedreira v. Kentucky Baptist Homes for Children, Inc.*<sup>110</sup> the federal district court held that the firing of an employee because of her lesbian lifestyle by an organization whose Christian values abhorred homosexuality did not involve religious discrimination, because the organization’s policy did not require employees to accept or practice its religious beliefs but only to conform to a behavioral requirement.

As a final observation, it also deserves notice that formal neutrality as the controlling constitutional principle did gain the adherence of four Justices in *Mitchell v. Helms, supra* (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas). This perspective contends that the critical constitutional elements governing public aid to religious entities are whether the aid itself is secular and whether it has been distributed in a religiously neutral fashion, *i.e.*, without preference for religious entities. From this perspective it makes no difference whether the institutional entity eventually uses the aid for religious purposes or not. A slight shift in the membership of the Court, thus, could foreshadow further changes in the Court’s jurisprudence in this area.

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<sup>107</sup>*Id.* at 818-19, quoting Rosenberger, *supra*, at 842 (Thomas, J., plurality opinion) (emphasis in original).

<sup>108</sup>*Dodge v. Salvation Army*, 48 Empl.Prac.Dec. 38619, 1989 U.S. Dist.LEXIS 4797, 1989 WL 53857 (S.D. Miss. 1989) (establishment clause held to bar the Salvation Army from firing a Wiccan from her position as Victims Assistance Coordinator in a Domestic Violence Shelter, both of which were substantially funded by public grants, on the grounds that public funding of such discrimination would have a primary effect of advancing religion and would entangle the government in the religious purpose of the Salvation Army).

<sup>109</sup>*Columbia Union College v. Oliver*, 254 F.3d 496 (4<sup>th</sup> Cir. 2001).

<sup>110</sup>2001 U.S. Dist. LEXIS 10283, 86 FEP Cases 417 (W.D. Ky. 2001).

## (10) Have any Court Suits Involving Charitable Choice or Similar Programs Been Filed or Decided As Yet?

At least four pertinent suits have been initiated, three of which have been decided (at least in part). In *Freedom from Religion Foundation v. McCallum*<sup>111</sup> a federal district court on January 7, 2002, struck down as unconstitutional the public funding of a Wisconsin welfare-to-work program operated by an organization named Faith Works which employed a “faith-enhanced” version of the Alcoholics Anonymous 12-step program as a central element of its residential recovery services to male drug and alcohol addicts. The program was funded by \$600,000 in direct grants from the governor’s discretionary fund under the federally funded welfare-to-work program. Using the *Lemon-Agostini-Mitchell* test described above, the court found that the grants served a secular purpose, did not define their recipients on the basis of religion, and did not precipitate excessive entanglement. But it held that the grants resulted in religious indoctrination attributable to the government. It described Faith Works as a holistic program that sought to “indoctrinate[] its participants in religion” and concluded that “religion is so integral to the Faith Works program that it is not possible to isolate it from the program as a whole.” Safeguards in federal and state law barring the use of funds for religious purposes, it asserted, “exist only on paper” and are “insufficient to insure that public funding ... does not contribute to a religious end.” Although the state welfare-to-work program was funded under the federal welfare reform statute and thus was subject to the charitable choice provisions of that statute, the court found the suit not to challenge the constitutionality of charitable choice on the grounds that charitable choice itself bars the “direct funding of religious activities.” (The plaintiffs also challenged the constitutionality of a public subsidy given Faith Works by the Wisconsin Department of Corrections to operate a halfway house providing addiction recovery services to designated offenders. But the court found sufficient factual uncertainty about how the program operated to order a trial on that issue.) This decision seems likely to be appealed.

As noted in the preceding section, *Pedreira v. Kentucky Baptist Homes for Children*<sup>112</sup> did not involve a federally funded program but raised the question of whether the establishment clause allows the direct public funding of a religious entity that fired an employee who was found to be a lesbian on the grounds her sexual orientation violated the agency’s religious beliefs. On July 23, 2001, a federal district court held that the employee’s dismissal did not constitute religious discrimination, because her lifestyle was not premised on any religious beliefs and Baptist Homes did not require her to accept its religious beliefs. It only required conformity, the court said, with a behavioral requirement. The court held over for trial, however, a separate claim alleging that public funds were being used by Baptist Homes for the purpose of religious indoctrination in violation of the establishment clause. In so doing it rejected an argument that *Mitchell* dictated judgment for Baptist Homes, saying that “*Mitchell* is factually dissimilar from this case,” in part because this case involves “direct monetary assistance.” Thus, the case continues to have implications for charitable choice.

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<sup>111</sup>2002 U.S. Dist. LEXIS (W.D. Wis., decided January 7, 2002).

<sup>112</sup>See n. 110.

A third suit, *American Jewish Congress v. Bost* contended that a welfare-to-work training program funded under the TANF program in Brenham, Texas, was permeated with the teachings of Protestant evangelical Christianity and even used public funds to purchase Bibles for participants. The suit contended that the funding had been provided pursuant to directives promulgated by then-Governor George Bush that implemented the provisions of charitable choice. But the case was dismissed as moot in early February because the program was no longer being funded by the state. The plaintiffs have appealed that decision to the U.S. Court of Appeals for the Fifth Circuit and have asked that court to order a trial on the constitutional issue.

. *American Jewish Congress v. Bernick* charges that the California Employment Development Department gave an unconstitutional preference for religion by inviting only religious groups to submit proposals on how to use \$5 million in job training funds under TANF. The suit charges as well that the bid invitation violates the mandate of charitable choice that religious and non-religious providers be given equal treatment. The suit is pending in the California Superior Court for the County of San Francisco.

**Appendix: Comparison of Charitable Choice Statutes with Title II of H.R. 7,  
as Adopted by the House**

	<b>1. States purpose to be to allow FBOs to participate on same basis as secular organizations without impairing their religious character or religious freedom of beneficiaries</b>	<b>2. Bars gov. from discriminating on the basis of an FBO's religious character</b>	<b>3. Requires that FBOs remain independent of government and retain control over expression of religious beliefs</b>	<b>4. Bars gov. interference with FBOs' form of internal governance or displays of religious symbols</b>	<b>5. Provides that Title VII exemption allowing FBOs to discriminate on religious grounds in their employment practices is not affected by receipt of public funds under designated programs</b>
<i>Welfare Reform (42 USCA 604a)</i>	X	X	X	X	X
<i>Community Services Block Grant (42 USCA 9920)</i>		X	X	X	X
<i>Children's Health Act (42 USCA 300x-65)</i>	X	X	X	X	X (also allows FBOs to require adherence to rules forbidding the use of drugs or alcohol)
<i>Community Renewal Tax Relief Act of 2000 (42 USCA 290kk)</i>	X	X	X	X	X (also states that this does not affect the applicability of any other employment non-discrimination statute)
<i>Title II of H.R. 7, the "Charitable Choice Act of 2001"</i>	X (also to provide aid in most effective manner and to broaden the Nation's social services capacity)	X	X	X (also bars gov. from requiring changes in charter documents or in name)	X (also states that Title VII exemption and charitable choice override contrary provisions in program statutes, and specifies that Title VII continues to apply)

	<b>6. Bars discrimination against beneficiaries on basis of religion or a religious belief</b>	<b>7. Requires gov. to provide those who object to FBO's religious character an accessible alternate provider of equal value</b>	<b>8. Requires gov. to give notice to beneficiaries of right to an alternate provider</b>	<b>9. Requires programs to be consistent with the establishment clause</b>	<b>10. Requires programs to be consistent with the free exercise clause</b>	<b>11. Bars use of direct aid for sectarian worship, instruction, or proselytization</b>
<i>Welfare Reform (42 USCA 604a)</i>	X (also on the basis of a "refusal to actively participate in a religious practice")	X		X		X
<i>Community Services Block Grant (42 USCA 9920)</i>				X		X
<i>Children's Health Act (42 USCA 300x-65)</i>	X (also on the bases of a "refusal to hold a religious belief or a refusal to actively participate in a religious practice")	X	X	X		X
<i>Community Renewal Tax Relief Act of 2000 (42 USCA 290kk)</i>	X	X	X (imposes duty on "program participants" as well, and requires them to "ensure" individual makes contact with alternate provider)	X	X	X
<i>Title II of H.R. 7, the "Charitable Choice Act of 2001"</i>	X (also on the basis of "a refusal to hold a religious belief," and requires for direct aid programs that participation in religious activities be voluntary)	X (alternative must be "unobjectionable to the individual on religious grounds")	X	X	X	X



	<b>12. Requires FBOs to certify compliance with # 11</b>	<b>13. Requires FBOs to be subject to same accounting requirements as non-FBOs for use of funds</b>	<b>14. Allows audits of FBOs but requires public funds to be segregated from FBOs' own funds</b>	<b>15. States that public aid to FBOs is aid to the individual or family and not to religion or the organization's religious beliefs or practices</b>	<b>16. States that public funding is not to be deemed a government endorsement of religion or of an FBO's religious beliefs or practices</b>	<b>17. States that Title VI, Title IX, Section 504, and Age Discrimination Act remain applicable to FBOs receiving assistance or providing services</b>
<i>Welfare Reform (42 USCA 604a)</i>		X	X (allows, but does not require, funds to be segregated)			
<i>Community Services Block Grant (42 USCA 9920)</i>		X	X			X (bars discrimination on the basis of race, color, national origin, and sex, and states that Age Discrimination Act, Section 504, and Title II of the ADA are applicable)
<i>Children's Health Act (42 USCA 300x-65)</i>		X	X			
<i>Community Renewal Tax Relief Act of 2000 (42 USCA 290kk)</i>		X	X			
<i>Title II of H.R. 7, the "Charitable Choice Act of 2001"</i>	X (also with the voluntariness requirement of # 6)	X	X (requires segregation for direct aid, allows it for indirect aid, and mandates an annual self-audit)	X (specifies that Title VI still applies to direct aid programs)	X	X

	<b>18. States that an intermediate grantor has same duties as gov. in making subgrants but, if an FBO, retains all rights of FBOs</b>	<b>19. Allows suits for injunctive relief in state or federal court for alleged violations</b>	<b>20. Provides that charitable choice will apply to state funds that are commingled with federal funds</b>	<b>21. Requires states to accept training of drug counselors by FBOs that is “equivalent” to usual educational requirements</b>	<b>22. Directs Departments to disburse funds as indirect assistance where “feasible and efficient”</b>	<b>23. Authorizes training and technical assistance program for “small non-governmental organizations”</b>
<i>Welfare Reform (42 USCA 604a)</i>		X				
<i>Community Services Block Grant (42 USCA 9920)</i>	X (refers only to duties)					
<i>Children’s Health Act (42 USCA 300x-65)</i>	X	X	X			
<i>Community Renewal Tax Relief Act of 2000 (42 USCA 290kk)</i>		X (only against federal government in federal court)		X		
<i>Title II of H.R. 7, the “Charitable Choice Act of 2001”</i>	X	X	X		X	X