4-2002

"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses

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Michele Estrin Gilman 55 Vand. L. Rev. 799 (2002)

Since 1996, Congress has included charitable choice provisions in several social welfare statutes to encourage the participation of religious organizations in administering government-funded social service programs. The current administration has proposed expanding charitable choice programs to allow even greater public funding of private social service providers. In this Article, Professor Michele Gilman discusses the lack of accountability to beneficiaries that occurs when public funds are given to religious organizations for secular programs, and she proposes solutions to this problem. As Professor Gilman explains, doctrines that constrain abuses of governmental discretion, such as administrative procedure acts and constitutional restrictions, generally do not apply when public programs are privatized. Moreover, religious organizations are often insulated from public scrutiny by First Amendment concerns about entangling government in religion, as well as by special immunities from tort liability and limited fiduciary duties for directors. The mechanisms of privatization, such as contracts and vouchers, also fail to ensure that beneficiaries receive quality services.

To ensure that beneficiaries are receiving effective services, Professor Gilman proposes that charitable choice programs be required to adopt a set of measures to improve accountability. These measures enhance accountability by involving beneficiaries in setting clear standards, evaluating outcomes, and enforcing rights to quality services. Finally, Profes-

sor Gilman analyzes current Supreme Court case law on providing public funding to religious entities, and explains why requiring charitable choice programs to implement accountability measures does not violate the First Amendment Religion Clauses.

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INTRODUCTION

Charitable choice, or the use of federal money to fund social services provided by religious organizations, has engendered controversy and confusion since its inception in the 1996 welfare reform legislation. Under the welfare reform statute, entitled the Personal Responsibility and Work Opportunity Reconciliation Act ("PRA"), states may contract out administration of their welfare programs to private entities, including houses of worship.[1] President Bush is promoting the expansion of charitable choice into other federal social service programs as a major policy initiative of his administration.[2] Federal funding of faith-based organizations has supporters and opponents on both the left and the right.[3] Supporters argue that charitable choice ends discrimination against religious organizations in competing for federal funds, and that religious organizations provide more effective social services than governments because of the spiritual and moral guidance the religious organizations provide.[4] Opponents on the right counter that charitable choice will destroy the unique nature of religious organizations, make churches overly reliant on federal funds, and result in federal funding of objectionable groups.[5] Opponents on the left charge that charitable choice violates the separation of church and

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1. Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997)). There are also charitable choice provisions in the Welfare-to-Work block grant program, Community Services Block Grant ("CSBG") programs, and some Substance Abuse and Mental Health Services Administration ("SAMHSA") drug treatment funding. *See* http://www.welfareinfo.org/faithbase.asp (last visited Feb. 1, 2002). In this Article, the term "church" is used to refer to all types of houses of worship, such as synagogues, mosques, and the like.

2. Dana Milbank, *Bush Unveils 'Faith-Based' Initiative; Effort Will Team Agencies, Nonprofits on Social Issues*, WASH. POST, Jan. 30, 2001, at A1.

3. *See, e.g.*, Henry G. Brinton, *It's Tempting, But My Church Says No Thanks*, WASH. POST, Sept. 10, 2000, at B1; Dana Milbank, *Senators Slow Action on 'Faith-Based' Aid*, WASH. POST, Mar. 14, 2001, at A1 (summarizing arguments for and against charitable choice); *see also* http://www.cpjustice.org/charitablechoice.htm (last visited Feb. 1, 2002) (promoting charitable choice and providing guidance on the law's interpretation).

4. *See generally* CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES (2000) (presenting a study of faith-based organizations and arguing in favor of charitable choice).

5. *See, e.g.*, BAPTIST JOINT COMM. ON PUB. AFFAIRS & THE INTERFAITH ALLIANCE FOUND., KEEPING THE FAITH: THE PROMISE OF COOPERATION, THE PERILS OF GOVERNMENT FUNDING: A GUIDE FOR HOUSES OF WORSHIP 4, 6 (2001) (counseling against houses of worship accepting government funds for social services and listing arguments against charitable choice), *at* http://www.interfaithalliance.org/Initiatives/ktf.pdf (last visited Apr. 24, 2002); Melissa Rogers, *The Wrong Way to Do Right: Charitable Choice and Churches*, *in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS 61 (Derek Davis & Barry Hankins eds., 1999); Caryle Murphy, *Religious Leaders Cautious on Bush Plan: Some Fear Dependency and Too Much Scrutiny*, WASH. POST, Feb. 1, 2001, at B1.

state and federally subsidizes discrimination, because religious organizations are exempt from some antidiscrimination employment laws.[6]

Yet these arguments miss an equally vexing problem arising under charitable choice: How can government ensure accountability from its sectarian contracting partners? This has profound ramifications for all of the constituents involved, including government funding agencies, the tax-paying public, social service providers, program beneficiaries, elected officials, advocacy groups, foundations, agency administrators, and others affected by, or interested in, a particular human services program.[7]

The PRA aims to move welfare recipients into the workforce. Rather than handing out welfare checks, welfare administrators—whether public or private—are charged with putting people to work. As a result, under the PRA's charitable choice provision, faith-based organizations are providing a variety of social services designed to move welfare recipients towards self-sufficiency, including child care, substance abuse treatment, homeless services, English courses, parenting classes, mentoring, job training, mental health counseling, life skills training, affordable housing, domestic violence shelters, transportation to job sites, and fatherhood programs.[8] With President Bush's proposed expansion of charitable choice into other federally funded programs, churches can be expected to provide an even greater array of social services. Despite this proposed expansion, there is scant empirical evidence as to the effectiveness of the faith-based approach.[9] The existing anecdotal

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6. *See, e.g.*, DANIEL E. KATZ & JULIE A. SEGAL, CONSTITUTIONAL AND POLICY PROBLEMS WITH SENATOR ASHCROFT'S 'CHARITABLE CHOICE' PROVISIONS (1996), *available at* http://www.aclu.org/congress/ashcrft.btml (last visited Feb. 1, 2002).

7. LAWRENCE L. MARTIN & PETER M. KETTNER, MEASURING THE PERFORMANCE OF HUMAN SERVICE PROGRAMS 2 (1996) (listing the various stakeholders in human service programs).

8. AMY L. SHERMAN, THE GROWING IMPACT OF CHARITABLE CHOICE: A CATALOGUE OF NEW COLLABORATIONS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS IN NINE STATES 25-83 (2000) (cataloging the types of services being provided by faith-based organizations under contract with government); *see also* Rebecca Brown, *Emerging Issues and Opportunities for Community Based Organization Involvement in Welfare Reform*, WELFARE INFO. NETWORK ISSUE NOTES (Welfare Info. Network, Washington, D.C.), Mar. 2001, *at* http://www.welfareinfo.org/cboinvolve-mentinwelfarereformissuenote.htm (last visited Feb. 1, 2002).

9. President Bush's first head of the Office of Faith-Based and Community Initiatives, John J. DiIulio, Jr., acknowledged as much in a 1997 article: "[W]e remain a long way from a definitive body of research evidence on the actual extent and the efficacy of church-anchored and faith-based social programs." John J. DiIulio, Jr., *The Lord's Work: The Church and the "Civil Society Sector,"* BROOKINGS REV., Fall 1997, at 27, 27-30. *See generally* Martin Davis, *Faith, Hope, and Charity*, 33 NAT'L J. 1228 (2001) (discussing origins of Present Bush's charitable choice initiative in similar Texas program); Susan Hogan, *Scholars: Plan Relies on Faith, Not*

evidence points in both directions. For every claimed success story, such as the eighty-five percent drug rehabilitation success rate of a Christian treatment program called Teen Challenge,[10] there is a horror story, such as the alleged child abuse that occurred at Roloff Homes in Texas, a church-run home for troubled youths.[11] Given the lack of empirical evidence, ensuring accountability should be a paramount concern. Currently, it is not. To the contrary, several charitable choice proponents, including President Bush, advocate removing regulatory burdens from faith-based providers altogether to encourage their participation in federally funded programs.[12]

When government provides social services,[13] a mix of laws and legal doctrines operate to constrain official discretion and to provide openness and participation in the administrative process. For instance, under federal and state administrative procedure

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Facts: Standards Are Sought for Bush Aid Program, DALLAS MORNING NEWS, Feb. 4, 2001, at 1A (discussing need to study performance of faith-based charities in social services); Eyal Press, *Lead Us Not into Temptation*, AM. PROSPECT, Apr. 9, 2001 (discussing lack of evidence to support assertion that faith-based groups perform social services best), *available at* http://www.prospect.org/print/v12/6/press-e.html (last visited Feb. 1, 2002); *see also* Lewis D. Solomon & Matthew J. Vlissades, *Faith Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y, 265, 289-97 (2001) (reviewing empirical studies and concluding that religion can lessen deviant behavior where individuals have a structured environment, but that structure is lacking in many poor communities).

One of the few comprehensive studies on this issue found that people who consider religion and spirituality important are less likely than nonbelievers to abuse alcohol and drugs. *See* NAT'L CTR. ON ADDICTION & SUBSTANCE ADUSE AT COLUMBIA UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY (2001), *available at* http://www.casacolumbia.org/publications/456/publications-show.htm?doc_id=91513 (last visited Feb. 1, 2002). However, this study did not address whether secular or sectarian treatment programs are more effective, and it is not clear whether religion or other independent factors, such as family support, decrease socially undesirable behaviors.

10. *See* NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 9, at 26 (describing the claimed success rate of Teen Challenge and the critiques of the underlying study).

11. *See* John Gibeaut, *'Welcome to Hell'*, A.B.A. J., Aug. 2001, at 44.

12. *See* John Gibeaut, *A Question of Faith, Bush Considers Licensing Exemption for Religious-Based Social Services*, A.B.A. J., Aug. 2001, at 46. In an Executive Order issued on January 29, 2001, creating the White House Office of Faith-Based and Community Initiatives, Bush asked five federal agencies to identify and propose reforms to eliminate regulatory barriers that discourage faith-based providers from seeking federal funds. Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 31, 2001). The departments include: Health and Human Services, Housing and Urban Development, Justice, Labor, and Education. *Id.*

13. The term "social services" is usually defined in this country to mean "agencies that provide direct income and other material support, individual and family services, day care, residential care (except for nursing homes), job training, mental health and addiction services, nonhospital health care, as well as agencies that engage in community organizing, advocacy, or community development, including research and public education." Lester M. Salamon, *Social Services, in* WHO BENEFITS FROM THE NONPROFIT SECTOR? 134, 136 (Charles T. Clotfelter ed., 1992). Hospitals, schools, and arts, culture, and recreation organizations are excluded from this definition. *Id.*

acts, agencies must provide opportunities for notice and comment in issuing regulatory policies and must provide fair procedures before depriving persons of benefits. In addition, freedom of information acts and open meeting laws at both the federal and state levels open government decisionmaking to public review. Further, the government cannot violate the constitutional rights of social service beneficiaries, including their free speech rights, their rights against unlawful search and seizure, and their due process rights. By contrast, when private entities deliver social services, these doctrines generally do not apply. Simply put, the law has not caught up with the modern reality of public and private interconnectedness and interdependence that marks our social welfare state.[14]

Moreover, religious organizations are generally shielded from public review by First Amendment interpretations that protect religion from government interference. Like other nonprofits, most churches are organized as corporations, and thus, are run by boards of directors. While nonprofit directors owe fiduciary duties to the corporation, there are no teeth behind these requirements. Resource limitations also mean that state and federal officials do little to ensure that nonprofits are acting in accord with their purported charitable purposes. At the same time, many states provide charities, including churches, with some level of immunity from their torts, further insulating them from accountability. In brief, the law governing nonprofit organizations and churches tends to take a hands-off approach towards these entities, which provides scant accountability towards donors, funders, members, service beneficiaries, and other affected parties. When a charity is operating in the purely private sphere, these various constituents generally have a choice whether to donate to, volunteer for, or accept services from the charity. Yet when the charity is expending federal funds, taxpayers and beneficiaries do not always have the choice to opt out.

Accountability in the social service arena is essential. Not only are public dollars at stake, but the beneficiaries of these programs are some of our neediest and most vulnerable populations, including children, the disabled, and the elderly. Nevertheless, current accountability mechanisms are insufficient to ensure that service delivery goals are met. This Article describes the lack of accountability that accompanies the transfer of charitable choice dollars, and provides a proposal for remedying this gap. This Article

14. LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE 15 (1995) (describing the interdependent relationship between private sector and government in delivering human services).

urges state and local governments to put a variety of measures in place to prevent abuses by private social service providers, to monitor the performance of providers based on clearly articulated outcomes, and, as a last resort, to allow beneficiaries to enforce quality standards through legal remedies. These standards should apply to all social service providers, not just churches. Regulation of churches, however, raises First Amendment concerns not implicated by regulation of governmental and secular providers. Although the proposed measures may seem almost painfully obvious, few jurisdictions are implementing anything like them. To the contrary, most jurisdictions enter into boilerplate contracts with social service providers and lack the expertise, resources, or desire to monitor the actual services for which they have contracted.

Despite their common sense nature, the quality assurance proposals in this Article raise profound questions under the First Amendment's Religion Clauses, which mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] Specifically, the constitutional question arises: How far may government go in ensuring accountability from its sectarian contracting partners? Under the Religion Clauses, government can neither impose religion nor interfere with religious practices. Government regulation of charitable choice funds brings these two proscriptions into conflict. Some religious organizations argue that government oversight of their charitable choice programs will result in excessive entanglement between church and state and will cause them to lose their unique character. Accordingly, they seek exemption from otherwise generally applicable regulations—such as those proposed in this Article. This line of argument implicates both Free Exercise and Establishment Clause rights. Yet if government exempts religious organizations from regulations that apply to secular providers, the government may violate the Establishment Clause by favoring religion over nonreligion. The Supreme Court has never clarified where the tipping points lie between acceptable and unacceptable regulation, and between acceptable and unacceptable accommodation of religious practices. This Article attempts to clarify these battle lines and argues that regulating churches to ensure their accountability in delivering government-funded social services is not only necessary but also constitutionally permissible.

15. U.S. CONST. amend. I.

Part I explains the charitable choice legislation, its history, and how it differs from prior federal welfare funding schemes. Part II compares accountability mechanisms in government-run programs with those in nonprofit and religious organizations. This part also explains why contracting law and practice, as well as voucher programs, fail to ensure quality delivery of social services. This part concludes that there is a lack of meaningful protections for social service beneficiaries in privatized jurisdictions under current conceptions of corporate and contract law. Part III thus proposes a framework for increasing accountability in privatized social service programs, focusing on the inclusion of beneficiaries in the contracting and regulatory process. Finally, Part IV addresses the constitutional questions that inevitably arise when church and state join forces to solve social problems. Specifically, this part analyzes the First Amendment limitations on government's ability to regulate social service ministries and assesses whether the proposed accountability mechanisms would survive constitutional review. The Article concludes that not only are accountability measures sorely needed, but that they are also constitutional.

I. CHARITABLE CHOICE IN CONTEXT

The term "charitable choice" first entered the national lexicon in 1996, when it was enacted as part of the massive reform of the federal welfare system, entitled the Personal Responsibility and Work Opportunity Reconciliation Act.[16] The Act eliminates open-ended federal welfare funding and the guarantee of assistance to all eligible persons[17] and adopts instead a capped block grant to the states called Temporary Assistance to Needy Families ("TANF"). The PRA also restructures the delivery of welfare benefits by devolving authority over welfare administration to the states and giving them the option to contract with private entities for service delivery or to provide vouchers for beneficiaries to redeem for welfare services at private entities.[18] Although state and local governments have long purchased discrete social services from nonprofit providers, the PRA expands this relationship by allowing governments to contract out the administration of entire welfare programs, includ-

16. Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997))

17. The prior welfare law was called Aid to Families with Dependent Children. 42 U.S.C. § 601 (repealed 1996).

18. § 104, 110 Stat. at 2161-63.

ing eligibility determinations. Since enactment of the PRA, both nonprofit and for-profit social service providers have competed vigorously for these government funds.[19] Charitable choice is one component of this privatization initiative.

Under charitable choice, faith-based organizations can vie with other private entities for government contracts to deliver welfare benefits and related services such as eligibility determinations, job training, employment placement, emergency housing, parenting classes, life skills training, substance abuse treatment, and child care.[20] Then-Senator Ashcroft, the chief sponsor of charitable choice, argued that inclusion of religious groups was necessary to combat the "miserable failure" of governmental programs.[21] As one supporter defined the need for charitable choice:

> People and communities in crisis need assistance that is challenging and inspiring, that connects them to social networks and resources, that invites them to examine their approach to life and if necessary to cast away attitudes and patterns that are unproductive. Such relational, morally compelling, and even openly religious help is not the province of government's own programs.[22]

The charitable choice provision contains several requirements designed to ease First Amendment church-state separation concerns while simultaneously preserving the religious character of

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19. The PRA has spurred the large-scale entry of for-profit competition into the welfare field. *See* DEMETRA SMITH NIGHTINGALE & NANCY M. PINDUS, URBAN INST., PRIVATIZATION OF PUBLIC SOCIAL SERVICES: A BACKGROUND PAPER 5 (1997), *available at* http://www.urhan.org (last visited Feb. 1, 2002); WELFARE LAW CTR., THE ROLE OF THE COURTS IN SECURING WELFARE RIGHTS AND IMPROVEMENTS IN WELFARE AND RELATED PROGRAMS 56 (1999), *available at* http://www.welfarelaw.org/welfare.htm (last visited Feb. 1, 2002); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 591-94 (2001).

20. *See* Gretchen M. Griener, *Charitable Choice and Welfare Reform: Collaboration Between State and Local Governments and Faith-Based Organizations*, WELFARE INFO. NETWORK ISSUE NOTES (Welfare Info. Network, Washington, D.C.), Sept. 2000, *at* http://www.welfareinfo.org/issuenotecharitablechoice.htm (last visited Feb. 1, 2002).

21. Ashcroft stated:

> There is a real reason to employ the services of nongovernmental charitable organizations in delivering the needs of individuals who require the welfare state. Despite our good intentions, our welfare program and delivery system have been a miserable failure. Yet, America's faith-based charities and nongovernmental organizations, from the Salvation Army to the Boys and Girls Clubs of the United States have been very successful in moving people from welfare dependency to the independence of work and the dignity of self-reliance.

142 CONG. REC. S8507 (daily ed. July 23, 1996) (statement of Sen. Ashcroft); *see also* 141 CONG. REC. S13500-02 (daily ed. Sept. 13, 1995) (statement of Sen. Ashcroft) (discussing the problems of the welfare system and the benefits of faith-based charities); 141 CONG. REC. S12924-25 (daily ed. Sept. 8, 1995) (statement of Sen. Ashcroft) (same).

22. Stanley Carlson-Thies, *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, *in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 5, at 29, 30.

the grantees.[23] Religious organizations have several rights under the statute. First, governmental entities cannot discriminate against religious organizations in awarding contracts,[24] nor can they interfere with the religious organization's "control over the definition, development, practice, and expression of its religious beliefs."[25] In addition, religious organizations receiving charitable choice funds need not alter their internal governance structures or remove religious art, icons, or other symbols from their premises.[26] Finally, religious organizations are exempt from Title VII's nondiscrimination in employment requirements.[27]

Beneficiaries also have defined rights. States must provide nonsectarian alternatives for beneficiaries who object to the religious character of their provider,[28] although they are not required to provide notice informing beneficiaries of this right.[29] Moreover, religious organizations cannot discriminate against beneficiaries on the basis of religion or religious beliefs.[30] In addition, religious organizations cannot use charitable choice funds for proselytizing or worship.[31] With regard to accountability, the statute provides that religious organizations are subject to the same regulations as other contractors "to account in accord with generally accepted auditing principles for the use of such funds," although the organization can segregate federal funds into separate accounts and limit any audit to those accounts.[32] Finally, the statute provides that any party

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23. The provision states:

> The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

§ 104(b), 110 Stat. at 2162 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997)).

24. *Id.* § 104(c).

25. *Id.* § 104(d)(1).

26. *Id.* § 104(d)(2).

27. *Id.* § 104(f).

28. *Id.* § 104(e)(1).

29. The lack of a notice requirement has been criticized. "As a class, welfare beneficiaries are not the most legally empowered group of people. Legislation that gives them rights without notifying them makes these rights virtually useless." Julie A. Segal, *A 'Holy Mistaken Zeal': The Legislative History and Future of Charitable Choice, in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 5, at 9, 15.

30. § 104(g), 110 Stat. at 2163.

31. *Id.* § 104(j).

32. *Id.* § 104(h).

seeking to enforce its rights under section 104 may file a civil suit for injunctive relief in state court.[33]

Despite the constitutional issues arising under charitable choice and despite the fact that the PRA marked the first major governmental initiative for direct funding of churches, charitable choice received scant attention in either the legislative process or in the media. Rather, most of the debate over the PRA focused on the lifetime limits on the receipt of welfare benefits (no one can get welfare benefits for more than five years) and other provisions designed to alter the perceived behavior of welfare recipients.[34] Yet attention has subsequently turned to charitable choice for two main reasons. First, a scattering of lawsuits has challenged various aspects of charitable choice. For instance, a therapist who was fired by a government-funded, religiously affiliated charity after it became public that she was homosexual is suing her former employer, alleging that government-funded charitable organizations cannot engage in religious discrimination.[35] In January 2002, a federal district court struck down a Wisconsin funding program that awarded grants to a nonprofit organization called Faithworks, which provided long-term residential treatment to male drug and alcohol addicts.[36] The court concluded that the sectarian and secular aspects of the program could not be separated and that, therefore, the program violated the Establishment Clause.[37] Second, during the 2000 presidential campaign, both candidates, then-Vice President Gore and then-Governor Bush, endorsed the charitable choice concept and argued for its expansion into other government programs.[38] Once he became President, Bush quickly announced the formation of the Office of Faith-Based and Community Initiatives, designed to

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33. *Id.* § 104(i). This is the only express right of enforcement for beneficiaries in the entire PRA. Thus, while the statute claims to provide fair procedures and objective standards for eligibility, these provisions are likely unenforceable. *See* Gilman, *supra* note 19, at 625-31.

34. *See* GWENDOLYN MINK, WELFARE'S END 103-08 (1998); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 234-35 (2000).

35. The lawsuit brought by Alicia Pedreira, *Pedreira v. Kentucky Baptist Homes for Children*, No. 3:00CV-210-S, 2001 U.S. Dist. LEXIS 10283 (W.D. Ky. Jul. 23, 2001), is described in detail in Eyal Press, *Faith-Based Furor*, N.Y. TIMES, Apr. 1, 2001, § 6 (Magazine), at 62. The status of other lawsuits is described in Elbert Lin et al., Note, *Faith in the Courts? The Legal and Political Furture of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 191 n.54 (2002).

36. Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 954 (W.D. Wis. 2002). This case is discussed in greater detail *infra* note 342.

37. *Freedom from Religion Found.*, 179 F. Supp. 2d at 978.

38. *See e.g.*, Ceci Connolly, *Gore Urges Role for 'Faith-Based' Groups*, WASH. POST, May 25, 1999, at A4; E.J. Dionne, Jr., *A Shift Looms: The President Sees Consensus, While Religious Leaders Disagree About the Church-State Divide*, WASH. POST, Oct. 3, 1999, at B1.

expand charitable choice into other federal programs by boosting funding and eliminating federal regulations that inhibit the participation of religious groups.[39] Shortly thereafter, several members of the House and Senate drafted legislation designed to expand charitable choice into more than 100 programs in the Departments of Labor, Justice, Education, and Housing and Urban Development.[40]

Almost immediately, the proposed legislation attracted controversy. Voices that had been silent during the 1996 enactment of the PRA quickly raised concerns about church-state separation, the potential bureaucratization and co-optation of religious organizations, federally funded discrimination, and the funding of objectionable sects. Most surprisingly to the administration, heated opposition to the program was spearheaded by various evangelical organizations that feared they would be discriminated against in favor of more mainstream religions.[41] Facing the maelstrom of objections, the Senate responded by delaying introduction of the legislation for up to a year while program kinks were worked out.[42] A House bill was subsequently passed on July 19, 2001, with some changes designed to meet public objections.[43] Nevertheless, the bill remained mired in debates over the proposed exemption of faith-based providers from nondiscrimination laws. Late in 2001, Senators Lieberman and Santorum began to work with the White House on compromise legislation that focuses on improving tax incentives for charitable giving rather than on expanding charitable choice.[44] Yet even if charitable choice is not expanded through the legislative process, President Bush has stated that he will pursue identical goals through executive orders and administrative changes.[45]

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39. Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 31, 2001).

40. H.R. 7, 107th Cong. (2001); *see also* Dana Milbank & Thomas B. Edsall, *Faith Initiative May Be Revised; Criticism Surprises Administration*, WASH. POST, Mar. 12, 2001, at A1.

41. Milbank & Edsall, *supra* note 40. At the same time, some religious groups opposed potential funding of nonmainstream religions. Don Lattin, *Bush Courts Right to Back Program: But Falwell Urges President to Withhold Social Service Funding from Islamic Groups*, S.F. CHRON., Mar. 8, 2001, at A4.

42. *See* Elizabeth Becker, *Senate Delays Legislation on Aid to Church Charities*, N.Y. TIMES, May 24, 2001, at A22; Richard Benedetto, *Bush's 'Faith-Based' Initiative Draws Foes from Several Sides*, USA TODAY, May 8, 2001, at A9.

43. H.R. 7; *see* Juliet Eilperin, *Faith-Based Initiative Wins House Approval*, WASH. POST, July 20, 2001, at A1.

44. Mary Leonard, *Faith Bill Advances Amid Religious Mood; Administration Yields on Expanding Grants*, BOSTON GLOBE, Nov. 18, 2001, at A1.

45. Mike Allen, *'Faith Based' Backup Plan; Agencies to Lower Barriers to Social Services Contracts*, WASH. POST, Aug. 17, 2001, at A2; Dana Milbank, *Bush Urges Senators to Act on Faith Bill*, WASH. POST, Aug. 19, 2001, at A4.

The idea of relying on religious groups to alleviate poverty and other social problems is not new. Religious groups have a long history of aiding the disadvantaged, and their efforts have shaped modern bureaucratic notions of relief for the poor.[46] In addition, throughout Western history, governments and private entities, including religious groups, have had an intertwined, and sometimes collaborative, relationship in providing social welfare.[47] In the twentieth century, government has extensively funded religiously affiliated nonprofit groups, as long as those groups were not "pervasively sectarian."[48] For instance, government funding accounts for 39% of the budget of Lutheran Services, 62% of Catholic Charities, and 18% of the Salvation Army.[49] Indeed, government relies on private entities of all types to deliver the bulk of this country's human services.[50] However, charitable choice takes this public/private relationship to a new level by allowing direct government funding of sectarian organizations.[51] That is, religious organizations no longer need to set up separate, secular nonprofits to receive federal funds. Churches, synagogues, mosques, and the like can receive funds directly.[52]

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46. *See* STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX 7-9 (1996) ("Religiously motivated and religiously based organizations have historically played a vital role in one area of public service after another."); Donald T. Critchlow & Charles H. Parker, *Introduction* to WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE 2 (Donald T. Critchlow & Charles H. Parker eds., 1998) ("Despite all the waves of welfare reform in Europe from the sixteenth century to the present day, religious charity has continued to play an important role in social provision for the poor. Even though the aim of helping the poor move out of poverty is often expressed today as a moral (if not religious) obligation, this ideal comes from a long tradition of Christian religious charity.").

47. *See* SALAMON, *supra* note 14, at 33-34; Critchlow & Parker, *supra* note 46, at 3 (noting that "a strict dichotomy between public assistance and private charity is far too simplistic").

48. *See* Griener, *supra* note 20, at 1-2; Murphy, *supra* note 5. The "pervasively sectarian" standard is discussed *infra* notes 321-29 and accompanying text.

49. *See* MONSMA, *supra* note 46, at 1; Mark Silk, *Old Alliance, New Ground Rules*, WASH. POST, Feb. 18, 2001, at B3.

50. SALAMON, *supra* note 14, at 15, 41-43.

51. Historically, churches and other religious congregations have not been eligible to provide federally funded welfare services. *See* Griener, *supra* note 20, at 1-2. As of 1998, the National Congregations Study found that only three percent of the country's 300,000 congregations run government-funded programs, although almost all of them provide some form of social service such as feeding the hungry or building houses for the poor. Silk, *supra* note 49. However, in the wake of charitable choice, many churches have expressed interest in applying for government funds, and several states and cities have begun aggressive campaigns to educate religious groups about available government funds. States with particularly active collaborations with faith-based organizations include Indiana, Texas, and Wisconsin. Griener, *supra* note 20, at 3.

52. Prior to the PRA, there were some federal programs with charitable choice-type provisions, i.e., provisions that allowed for federal funding without requiring the grantee to alter its religious character. For instance, since 1990, houses of worship have been eligible to accept federal funds to provide day care to low-income children. The federal refugee settlement program

Charitable choice is the result of several converging trends, all of which are breaking down the already blurry boundaries between public and private, religious and secular. As already noted, government funding of private entities to provide social services has been a dominant model in this country since at least the 1960s. Religious organizations, with their long history of charitable works, are demanding equal treatment and equal access to government funds. Their demands fit within the Supreme Court's recent doctrinal shift towards equal treatment of sectarian and nonsectarian groups in interpreting the First Amendment's Religion Clauses.[53] In addition, America is a religious country. Over ninety percent of Americans say they pray at least once a week, and forty percent attend church weekly.[54] The public thus views religious organizations as viable mechanisms for creating social change.[55]

Layered on top of these trends is the burgeoning privatization movement,[56] which promises lower costs and greater efficiencies[57] and which has become an increasingly popular method of state and local governance. Privatization is controversial and marked by sharp philosophical differences over the proper scope and role of government.[58] Privatization advocates claim that in addition to cost savings, contracting out social services puts services closer to the people served and allows private providers to act as

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and the overseas emergency relief and development assistance program also have provided funds to religious organizations. Carlson-Thies, *supra* note 22, at 47.

53. *See infra* Part IV.

54. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 9, at 6.

55. Nevertheless, a poll of the public about charitable choice revealed that while Americans favor the idea of charitable choice, they are opposed to specific portions of the plan, including allowing funding of nonmainstream religions and permissible hiring discrimination on the basis of religion. Laurie Goodstein, *Support for Religion-Based Plan Is Hedged*, N.Y. TIMES, Apr. 11, 2001, at A14.

56. The term "privatization" can have many meanings, from complete load-shedding, in which a government divests itself completely from performing a service, to contracting out, in which the government pays a private provider to provide a former government function. In this Article, privatization is used in the latter sense. Other types of privatization initiatives include long-term leases, franchises, joint ventures, vouchers, and volunteerism. *See* Adrian Moore & Wade Hudson, *The Evolution of Privatization Practices and Strategies*, *in* LOCAL GOVERNMENT INNOVATION: ISSUES AND TRENDS IN PRIVATIZATION AND MANAGED COMPETITION 17, 18-20 (Robin A. Johnson & Norman Walzer eds., 2000).

57. *See, e.g.*, EMMANUEL SAVAS, PRIVATIZATION 288 (1987) (arguing that privatization satisfies "society's needs . . . more effectively, and equitably").

58. *See, e.g.*, Paul Starr, *The Meaning of Privatization*, *in* PRIVATIZATION AND THE WELFARE STATE 15, 42-44 (Sheila B. Kamerman & Alfred J. Kahn eds., 1989) (arguing that privatization proponents "call into doubt the nation's capacity and will for collective provision").

mediating forces between government and citizens.[59] Especially with regard to faith-based organizations, advocates contend that "congregations are value-generating and value-maintaining . . . because they foster strong supportive affiliations and networks within communities across the nation."[60] Opponents challenge these empirical notions about cost and efficiency and question whether the government should contract out services for its most vulnerable and voiceless citizens.[61] For the actual state and local officials making the decisions to privatize, the issues are less philosophical and focus more on pragmatic concerns such as the cost pressures engendered by shrinking municipal budgets.[62]

Social service privatization has boomed since the 1960s, when federal funds for poor relief programs began to bypass state and local governments and go directly to private providers.[63] Later, in the late 1970s and the 1980s, state and local governments became interested in contracting out their own functions in response to shrinking budgets.[64] They started by privatizing various municipal services such as trash hauling, asphalt paving, and road construction, but soon privatized various health and human services, as they gained comfort with this form of management.[65] The increase in privatization initiatives, coupled with a growing sense

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59. Sheila B. Kamerman & Alfred J. Kahn, *Continuing the Discussion and Taking a Stand, in* PRIVATIZATION AND THE WELFARE STATE, *supra* note 58, at 261, 261-62 (summarizing view of privatization proponents); Starr, *supra* note 58, at 26 (same).

60. Greiner, *supra* note 20, at 2.

61. Kamerman & Kahn, *supra* note 59, at 262-65.

62. Ruth Hoogland DeHoog & Lana Stein, *Municipal Contracting in the 1980s: Tinkering or Reinventing Government, in* CONTRACTING OUT GOVERNMENT SERVICES 26, 32 (Paul Seidenstat ed., 1999).

63. SALAMON, *supra* note 14, at 221-22; *see also* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 267 (1996) (describing the federal government's "community action" strategy of bypassing local politicians and funding community agencies directly). Starting with the New Deal, the federal government began to fund massive social programs, but largely contracted with the states to carry them out. Funding of private entities began in earnest in the 1960s. SALAMON, *supra* note 14, at 223; Arnold Gurin, *Governmental Responsibility and Privatization: Examples from Four Social Services, in* PRIVATIZATION AND THE WELFARE STATE, *supra* note 58, at 179, 180-81.

64. Robin A. Johnson & Norman Walzer, *Introduction and Overview, in* LOCAL GOVERNMENT INNOVATION: ISSUES AND TRENDS IN PRIVATIZATION AND MANAGED COMPETITION, *supra* note 56, at 1, 5. "Among cities reporting a study of the feasibility of privatization in the past five years, 90.7% said internal attempts to decrease costs of service delivery was the main factor causing them to consider privatization. The second most important factor, reported by 49.6% of respondents, is external fiscal pressures such as restrictions placed on the ability to raise taxes." Robin A. Johnson & Norman Walzer, *Privatization and Managed Competition: Management Fad or Long-Term Systemic Change for Cities?, in* LOCAL GOVERNMENT INNOVATION: ISSUES AND TRENDS IN PRIVATIZATION AND MANAGED COMPETITION, *supra* note 56, at 169, 177.

65. Moore & Hudson, *supra* note 56, at 17-18.

that religious groups have valuable resources to offer in solving human and public crises, have converged in the push for expanding charitable choice throughout government programs.

II. ACCOUNTABILITY IN GOVERNMENT, NONPROFIT, AND RELIGIOUS ORGANIZATIONS

Accountability is generally understood to mean that one entity has the power to reward or punish another entity for the latter's performance.[66] In the social service context, the vast number of stakeholders results in a complex web of interrelationships, with each stakeholder demanding fealty to differing goals. In the welfare context, the rhetoric of accountability usually centers on holding welfare recipients accountable to the taxpaying public that supports them. That is, clients are expected to work and are denied welfare benefits if they fail to do so. The government and direct service providers are also deemed accountable to the public for achieving "results" in the form of lower welfare rolls. There is far less focus on holding government and providers accountable to recipients to ensure that these "clients" receive quality services, whether they be job training services, mental health counseling, or the like. However, without quality social services, the underlying goals of the PRA and other social welfare statutes cannot be achieved. Thus, it is imperative that social service providers be held accountable to clients and the public for delivering meaningful and effective services.

As a matter of law, the legal tools that can be used to improve service quality differ radically based on whether the provider is a government agency, for-profit corporation, nonprofit entity, or religious organization. The mission of administrative law is to hold government agencies accountable to the public, given that agencies are not democratically elected bodies. Thus, administrative law centers on limiting agency discretion by enforcing norms of fairness, openness, and judicial review. By contrast, corporate law has never embodied these norms because corporations have never been deemed accountable to the public at large, but rather, only to their own shareholders. In corporate law, accountability comes largely

66. *See* William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 301-02 (2001) (proposing a strategy to hold states and schools accountable to communities, parents, and students for achieving the goals of standards-based reform). "[A]n accountability system must answer the question of 'accountability of whom to whom for what and how.' " *Id.* at 303.

through a fiduciary model. The law governing nonprofits is based on the corporate law model, even though nonprofits do not share the hallmark of ownership interests. This inexact fit is one reason why nonprofits have long faced an accountability challenge. Religious organizations have even fewer external and internal constraints on their discretion. This is particularly troubling when religious organizations are managing public funds.

As described in the remainder of this part, different accountability mechanisms apply to government agencies, nonprofits and religious organizations. This part concludes that no one legal form is a guarantee of quality service delivery, although there are more avenues of recourse for wronged beneficiaries of governmental programs and fewer for beneficiaries of church-based programs. Thus, as this part demonstrates, in spending public money, governments need to put in place measures to promote accountability regardless of who is delivering the services.

A. Holding Government Agencies Accountable

The law treats public and private actors differently, as the two following cases illustrate. In *Boulet v. Cellucci*, a proposed class of mentally retarded persons sued Massachusetts state officials charged with administering the Medicaid program.[67] The plaintiffs alleged that the officials had failed to provide them with statutorily required residential habilitation services, for which the plaintiffs had been on a waiting list for as many as ten years, in violation of the Medicaid statute's "reasonable promptness" requirement. The court certified the class and ordered the state to provide the class members with the required services within ninety days.

In *Graves v. Narcotics Service Counsel, Inc.*, the plaintiff sued a nonprofit halfway house and its employees for failing to properly treat him for his drug addiction and for prematurely releasing him from a drug detoxification program.[68] The court held that the suit could not go forward because the defendants were not state actors and thus could not be charged with any constitutional or federal statutory violations. Even though federal and state funding supported the nonprofit, and even though the state regulated the nonprofit, these connections were insufficient to deem the nonprofit's actions as having arisen "under color of law."

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67. 107 F. Supp. 2d 61, 82 (D. Mass. 2000).
68. 605 F. Supp. 1285, 1287 (E.D. Mo. 1985).

The results in these two cases hinged solely on the fact that government actors were the defendants in the first case, while ostensibly private actors were the defendants in the second. This public/private distinction drives the analysis not only in the area of alleged constitutional and federal statutory violations, but also in the application of administrative laws and other doctrines designed to constrain official discretion. As a result, when private actors administer public funds, they face far fewer constraints upon their discretion than do their governmental counterparts. As this section explains, the public/private divide is built upon a fiction that is no longer appropriate in today's mixed social service delivery network.

1. Section 1983: Holding Government Accountable to Constitutional Norms and Statutory Requirements

Section 1983,[69] the statute invoked in both *Boulet* and *Graves*, protects individuals from violations of constitutional and federal statutory rights committed by state actors. It reaches only those deprivations of federal rights that occur "under color of law," and excludes " 'merely private conduct no matter how discriminatory or wrongful.' "[70] Under current Supreme Court doctrine, private actors are rarely deemed to be acting under color of state law. In analyzing alleged state action, the Supreme Court primarily considers two factors: the degree of state involvement with the challenged private action and whether the private actor is carrying out a public function. Thus, state action exists where the state " 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State' "[71] (the nexus analysis) or where a private entity is carrying out a function traditionally and exclusively performed by the state (the public function analysis).[72]

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69. 42 U.S.C. § 1983 (1994).

70. Blum v. Yaretsky, 457 U.S. 991, 1002 (1982) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)). The Court has justified the state action requirement as necessary to preserve a sphere of individual freedom and to avoid holding states liable for conduct "for whicb they cannot fairly be hlamed." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

71. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974)).

72. *Id.* at 55-56. More recently, the Court announced yet another possible avenue for finding state action—entwinement. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001) (holding that state interscholastic athletic association whose members are mostly public school personnel and that is governed by board consisting of state officials is state actor because "relevant facts show pervasive entwinement to the point of largely overlapping identity"). The Court, however, distinguished the facts of the case from those involving "mere public

With regard to the nexus question, the courts have long held that not only is government regulation insufficient to convert private action into public action, but also that "the mere existence of a contract between a governmental agency and a private party is insufficient to create state action."[73] Indeed, two Supreme Court cases in which state and local government agencies contracted with private providers to offer educational or health services held that state action did not exist even where the government extensively regulated and almost exclusively funded the private entities.[74] As a result, for state action to arise in a contracting scheme, the government agency essentially must direct a specific course of action from the private provider. Yet because social service privatization is designed to increase innovation and efficiency, government agencies generally have a hands-off approach, which allows for substantial independence by front-line workers.[75] Thus, the nexus test is unlikely to provide relief for plaintiffs wronged by violations of federal statutory or constitutional law committed by private, government-funded social service entities. As for the public function test, the Court has held that the function at issue must be one *traditionally and exclusively* performed by government.[76] In the social services area, an intertwined network of governmental, nonprofit, and religious providers has long provided benefits,[77] thus seemingly foreclosing this avenue for finding state action. In sum, private so-

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buyers of contract services, whose payments for services rendered do not convert the service providers into public actors." *Id.* at 299. Thus, it is unlikely an entwinement analysis would apply to a contracting scenario. *See infra* note 74.

73. Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1227 (5th Cir. 1982); Simescu v. Emmet County Dep't of Soc. Servs., 942 F.2d 372, 375 (6th Cir. 1991).

74. *Blum*, 457 U.S. at 1002; Rendell-Baker v. Kohn, 457 U.S. 830, 831-34 (1982). In *Blum*, the Court held that nursing homes that accepted Medicaid funding were not state actors, even though the state subsidized the costs of the nursing homes, extensively regulated the operation of the nursing homes, required the nursing homes to periodically assess the appropriate level of care for residents, paid the medical expenses of more than ninety percent of the patients, and licensed the facilities. 457 U.S. at 1004-09. The Court reasoned that the state could not be liable for the independent, professional judgments of the nursing home doctors. *Id.* at 1008. In *Rendell-Baker*, the Court held that a private, nonprofit school which served special needs students under contract with the local public school district was not a state actor even where public funds accounted for ninety percent of the school's funding, the school was regulated by the state and local school districts, and the school operated pursuant to a written contract with the local school system and state agencies. 457 U.S. at 831-34.

75. This devolution of discretion to front-line workers is a hallmark of the PRA, regardless of whether the front-line workers are public or private. *See* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126-27 (2000); Gilman, *supra* note 19, at 579-81.

76. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 55-56; *Rendell-Baker*, 457 U.S. at 842.

77. *See infra* note 93 and accompanying text.

cial service contractors are unlikely to be deemed state actors under current contracting arrangements.[78]

2. Holding Government Agencies Accountable Through Administrative Law

Administrative law doctrines are also of limited help to social service beneficiaries in privatized jurisdictions. The bulk of our administrative law is focused on restraining abuses of the discretionary power held by administrative agencies, in recognition of the fact that agencies are run by nonelected officials who are not directly accountable to citizens.[79] Thus, the federal Administrative Procedure Act[80] and its state counterparts[81] (an "APA") focus on ensuring that government decisions are fairly and consistently made, with opportunities for public input—whether these decisions are implemented through individualized hearings or broad regulatory provisions.[82] However, APAs generally apply only to agencies, and the definitions of "agency" do not include private entities.[83]

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78. For some criticisms of the Court's state action doctrine—and there are many—see generally Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Gilman, *supra* note 19, at 614-20; Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 318 (1995); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

79. *See* 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.1, at 1231 (4th ed. 1994) ("Much of administrative law is a response to the existence of broad discretionary power in government officials."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000) ("Unsurprisingly, administrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy, principally by emphasizing mechanisms that render agencies *indirectly* accountable to the electorate, such as legislative and executive oversight and judicial review.").

80. 5 U.S.C. § 551 (1994).

81. 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2.31(2) (2d ed. 1997) ("Today every state has a body of legislation dealing with administrative procedure and control.").

82. Diller, *supra* note 75, at 1189.

83. The definition of agency in the federal APA is "each authority of the Government of the United States." § 551(1). The definitions of "agency" in the various state APAs also have been interpreted not to include private entities. *See, e.g.*, Graham v. Baker, 447 N.W.2d 397, 399 (Iowa 1989) (holding that a nonprofit organization that contracted with state to perform farm mediation services was not an agency); League Gen. Ins. v. Catastrophic Claims, 458 N.W.2d 632, 639 (Mich. 1990) (holding that an unincorporated, nonprofit association of private insurers was not an agency under state's APA); Dorris v. Mo. Substance Abuse Counselors' Certification Bd., Inc., 10 S.W.3d 557, 560-61 (Mo. Ct. App. 1999) (holding that a private substance abuse counselors' certification organization was not an agency under state Administrative Procedures Act); Ins. Premium Fin. Assoc. v. N.Y. State Dep't of Ins., 668 N.E.2d 399, 403 (N.Y. 1996) (holding that a

Thus, when a private contractor conducts individualized hearings or establishes generally applicable policies, the contractor need not abide by administrative law requirements for notice, comment, or hearings in the absence of contrary statutory or contractual language. In addition, when government agencies choose to contract out services, that decision itself is usually exempted from review, as is any regulatory guidance or contract terms governing the private contractors.[84] In short, contracting out has long been viewed as an internal, housekeeping matter with few ramifications on the public at large. While this rationale may have had validity when governments were buying paper clips or copy machine maintenance contracts, it lacks legitimacy when governments are buying complex social services. Nevertheless, it is the governing paradigm in this area. Additionally, even if contracting fell within the scope of state APA laws, most local governments—the locus of most social service contracting—do not have APA equivalents and are not subject to state APA laws.[85] Thus, even a more expansive conception of "agency" in state APA law would play little role in social service privatization.

In addition to the APAs, a variety of other administrative law statutes ensure openness in the government decisionmaking

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privately operated automobile insurance plan was not a state agency); *cf.* MeriWeather Inc. v. Freedom of Info. Comm'n, 778 A.2d 1038 (Conn. Super. Ct. 2000), (holding that a nonprofit community economic development corporation was an agency because it was the alter ego of a public agency), *aff'd*, 778 A.2d 1006 (Conn. App. Ct. 2001); Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd., 571 N.W.2d 851, 853 (S.D. 1997) (holding that a nonprofit certification board was an agency where state APA defined "agency" as including an "agent of the state vested with the authority to exercise any portion of the state's sovereignty").

84. This is because the contracts themselves are not treated as "rules" under the APAs. The federal APA broadly defines a "rule" as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." § 551(4). Rules are subject to public notice and consideration of public comment. *Id.* § 553. However, the federal APA exempts all matters "relating to agency management or personnel or to public property, loans, grants, benefits or contracts," from notice and comment requirements. *Id.* § 553(a)(2).

The 1981 *Model State APA* has a similar definition of "rule." MODEL STATE ADMIN. PROCEDURE ACT § 1-102(10) (1981) ("[T]he whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency."). The *Model State APA* also exempts from notice and comment requirements those rules relating solely to agency internal management, *id.* § 3-116(1), and rules for establishing criteria for negotiating commercial arrangements. *Id.* § 3-116(2).

85. 1 KOCH, *supra* note 81, § 2.32(3) (stating that local government agencies have both legislative and administrative characteristics).

process. These include freedom of information acts,[86] which require governments to make their files available to the public, and sunshine laws,[87] which open agency meetings to the public. Here too, however, private entities rarely fall within the definition of "agency."[88] To the contrary, "[i]n most situations, private economic or social conduct is not subject to procedural or substantive constraint akin to the procedural due process norms and the arbitrary and capricious standards that apply to government action."[89]

Clearly, the divide in administrative and constitutional law between public and private bears little resemblance to the reality of modern governance. Boundaries between public and private are quickly disappearing as a result of current market-oriented reforms in which the "private sector [is substituted] for regulatory regimes" and "public agencies use market approaches, structures and incentives to achieve their regulatory goals."[90] Welfare reform, prison privatization, charter schools, and privatized child welfare services are only some of the more high-profile delegations of public functions to the private sector.[91] Particularly in the social services field, the government relies more on private entities to carry out publicly

86. The federal Freedom of Information Act ("FOIA") is at 5 U.S.C. § 552 (1994). There are nine statutory exemptions to the open records requirement. *Id.* § 553(b). All states and the District of Columbia also have open records statutes. 1 KOCH, *supra* note 81, § 3.40.

87. The federal law is called the Government in the Sunshine Act, and is found at 5 U.S.C. § 552b (1994). It gives the public access to observe agency meetings, although it does not provide a basis for public participation in those meetings. Every state also has a similar law. *See* 1 KOCH, *supra* note 81, § 3.61(1).

88. The FOIA definition of "agency" is found in the APA at 5 U.S.C. § 551(1). The definition of agency in the "Government in the Sunshine Act" is found at 5 U.S.C. § 552b(a)(1). In *Forsham v. Harris*, the Court held that the definition of agency under FOIA did not include private parties contracting with the government. Federal grants "generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." 445 U.S. 169, 180 (1980). *See generally* Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21 (1999) (discussing the impact of FOIA on private entities and the public's ability to gather information from them).

89. Jack Beerman, *The Reach of Administrative Law in the United States*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 171, 186 (Michael Taggart ed., 1997).

90. *See* Alfred C. Aman, Jr., *Administrative Law for a New Century*, *in* THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note 89, at 90, 90. For an example of the attempts of public agencies to adopt market-oriented strategies to improve accountability, see the Gore Commission's National Performance Review published in September 1993. VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (Report of the National Performance Review, 1993).

91. *See generally* Susan Vivian Mangold, *Protections, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295 (1999) (discussing the need for regulatory reform for private foster care); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989) (discussing legal issues in the incarceration area).

funded programs than it directly provides itself, and these private entities rely more on government funds than monies from any other source.[92] Moreover, lines are not only blurring between private and public, but also between for-profit and nonprofit, and religious and secular.[93] The law, however, remains steadfastly committed to outdated boundaries.

3. The Effectiveness of Expanding Government-Constraining Doctrines to Private Parties

The question obviously arises whether constitutional and administrative law constraints should be extended to private entities. Preliminarily, it should be noted that even in the purely public sphere, the discretion-constraining mechanisms provided by § 1983 enforcement and administrative law are far from foolproof. The case law analyzing § 1983 is riddled with often-insurmountable hurdles for plaintiffs. For instance, in § 1983 law, there is no respondeat superior liability,[94] negligence is not grounds for liability,[95] governmental officials have various immunities from suit,[96] and states cannot be sued.[97] In addition, the Constitution only protects individuals from affirmative governmental acts, while governmental negligence that results in private harm is not actionable.[98] Moreover, while state action doctrine can enforce constitutional procedural due process norms against state actors, it does not reach substantive issues of service quality.[99]

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92. SALAMON, *supra* note 14, at 15. "Indeed, piecing together research on the private role in social service provision as well as private contributions to standard setting and to implementation and enforcement produces a picture of governance strikingly at odds with the hierarchical, agency centered model of decision making that now dominates administrative law." Freeman, *supra* note 79, at 592-93.

93. *See generally* Martha Minow, *Lecture: Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000) (discussing the ever-shifting lines between private and nonprofit prganizations). For a description of the increasing ties between the nonprofit and for-profit sectors, see generally TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR (Burton A. Weisbrod ed., 2000).

94. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

95. Daniels v. Williams, 474 U.S. 327, 328 (1986) (holding that negligence is not enough for deprivation of property claim).

96. *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 chs. 7 & 8 (4th ed. 1999).

97. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

98. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201-02 (1989).

99. Freeman, *supra* note 79, at 602.

Likewise, the utility of APAs to constrain the discretion of governmental actors is lessened in the current social service environment, in which discretion is pushed downward to front-line workers.[100] Regulations are playing less of a role in defining substantive program standards and, as a result, individualized hearings have less force because standards are not clearly articulated. Further, while APAs open the door for the public to participate in decisionmaking processes, they do not encourage participation. That is, they provide no incentives or assistance for the public to participate.[101] Thus, extension of these doctrines to private entities would not necessarily solve the accountability challenge.[102] However, the basic principles underlying these doctrines—fairness, equality, openness, and consistency—are surely principles we want in a social service delivery system, regardless of the legal form of the entity providing the service.

B. The Limited Accountability Inherent in Nonprofit Organizations

In analyzing the accountability dilemma, it is not sufficient simply to note the lack of government-constraining doctrines in privatized social service systems. Rather, it is essential to analyze what, if any, accountability mechanisms inhere in the various legal structures of private entities. Just as government entities are subject to various public-ordering doctrines, private entities are subject to their own doctrinal constraints. Accordingly, this part explores the legal and nonlegal constraints on nonprofit entities in general, and religious organizations in particular, to examine the accountability mechanisms that apply to these organizations and to gauge their effectiveness. This part concludes that nonprofits and, to even a greater degree, religious organizations operate with a remarkable

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100. Under the PRA, states are expressly granting front-line workers increased discretion in awarding benefits. Diller, *supra* note 75, at 1147-48. "Under the administrative framework emerging today, many important policy determinations are not embodied in written rules of general applicability" and thus "notice and comment requirements do not provide an effective avenue for public input." *Id.* at 1196.

101. *See* Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 269 (1999) ("[The APA] was conservative in that it forced the public to take steps to become involved in the decisionmaking process.").

102. Extension of APA requirements to private parties might end up being so costly as to eliminate any of the supposed benefits of privatization in the first place. "On a more philosophical level, the question that also arises is whether the kinds of values protected by public law are capable of being translated primarily into an efficiency discourse." Aman, *supra* note 90, at 100.

degree of freedom that comes at a cost to public accountability, especially when these entities are providing publicly-funded services.

1. The Scope of the Nonprofit Sector

The nonprofit sector is huge. There are over one million nonprofit organizations in this country, more than 700,000 of which are classified by the Internal Revenue Service ("IRS") as religious or charitable.[103] Their annual aggregate revenues constitute about 15% of the nation's gross national product, and they employ 6.9% of the work force.[104] In the social service arena, nonprofits and government are intertwined and interdependent. Social service nonprofits, which constitute the largest component of the nonprofit sector, "deliver a larger share of the services government finances than do government agencies themselves."[105] Indeed, government is not, and never has been, the primary deliverer of social services, despite the rhetoric of government downsizing. Rather, there is an "extensive pattern of government-nonprofit cooperation in the delivery of human services, with government functioning as the financier and the nonprofit sector as the deliverers of the services."[106]

What does "nonprofit" mean? While nonprofits are allowed to make money, they are bound by the nondistribution constraint: they must use any profits for their charitable purposes and may not distribute profits to their members or other individuals with control over the organization.[107] Not all nonprofits are exempt from federal income taxes; rather, tax exemption is a determination made by the IRS under federal tax law.[108] In addition to exemptions from federal income taxes, tax-exempt charities are also usually exempt from various state and local income, property, sales, use, excise, payroll,

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103. INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 55B, INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC IN BRIEF: FACTS AND FIGURES ON THE INDEPENDENT SECTOR (2001); NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE, at vii (Victor Futter & George W. Overton eds., 1997).

104. *See* NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE, *supra* note 103, at vii; LESTER M. SALAMON & HELMUT K. ANHEIER, THE EMERGING NONPROFIT SECTOR 34 (1996).

105. SALAMON, *supra* note 14, at 134. Social service organizations make up the largest component of the nonprofit sector at fifty-two percent. *See* Salamon, *supra* note 13, at 136-37.

106. Salamon, *supra* note 13, at 141; *see also* STEVEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 4 (1993) ("[M]ost nonprofit service organizations depend on government support for over half of their revenues: for many, government support comprises their entire budget.").

107. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

108. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 3-4 (7th ed. 1998).

and other forms of taxation.[109] Also, contributions to many types of tax-exempt organizations are themselves deductible by donors, thus fueling much of the financing of nonprofit work.[110]

In light of their favored status, nonprofits have long had to account to the public for their conduct. During the 1990s, accountability concerns increased following a string of high-profile scandals within the nonprofit community. For instance, in 1991, William Aramony, the head of the United Way, was convicted of theft after the press revealed that he used United Way funds for his personal benefit, including renting limousines and flying on the Concorde. He was also accused of rewarding friends and family members with jobs, board memberships, and consulting contracts.[111] Similarly, in 1997, the New York State Board of Regents removed eighteen of nineteen trustees of Adelphi University for unreasonably compensating the University's president; he earned $523,000 and was given trips abroad and the use of a Manhattan apartment.[112]

Most recently, the Red Cross faced intense public criticism in the wake of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. Following the attacks, the Red Cross collected over $543 million from donors who intended that the funds be used for victim relief.[113] However, the Red Cross decided to reserve a large portion of the funds for future emergencies.[114] In addition, the Red Cross refused to participate in a computerized database established to coordinate charitable efforts, moved slowly to disburse funds to victims, and was forced to destroy part of its

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109. Bazil Facchina et al., *Privileges and Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85, 85-86 (1993). Other benefits include: exemptions in trade regulation laws that permit nonprofits to purchase goods on terms not available to others; exemptions from Federal Trade Commission scrutiny; exemptions from certain labor regulations concerning collective bargaining and workers' compensation; and preferred postal rates. *Id.* In addition, bankruptcy, copyright, civil rights, and criminal laws allow nonprofits to engage in certain forms of conduct prohibited for others. *Id.* at 86.

110. However, the major sources of nonprofit funding (for nonmembership charities) are funds derived from fees, dues, and charges for services provided. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 11 (2d ed. 2000). Government funding is the next major source, with private funding third. *Id.*

111. Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 593-94 (1999); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 633 (1998).

112. Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1401 (1998); Gary, *supra* note 111, at 593-94.

113. Diana B. Henriques & David Barstow, *A Nation Challenged: The Red Cross; Red Cross Pledges Entire Terror Fund to Sept. 11 Victims*, N.Y. TIMES, Nov. 14, 2001, at A1.

114. *Id.*

blood bank after overcollecting blood donations.[115] On top of this, the media was awash in stories of victims' families being forced to navigate an unwieldy maze of relief efforts.[116] Public scrutiny and threats from the New York Attorney General resulted in the resignation of the charity's chief executive officer, a decision to participate in the computer database, a recommitment of funds for direct assistance to victims, and a frenzied public relations campaign to repair the charity's tattered image.[117]

Some religious organizations have been rocked by scandals as well. Pat Robertson was accused of improperly using funds from his Christian Broadcast Network to promote his 1988 bid for the presidency.[118] Jim and Tammy Bakker were ordered to repay the PTL Club for several million dollars they misappropriated and spent on excessive salaries.[119] The Christian Science Church lost $325 million in a misguided attempt to diversify, prompting calls for the board's resignation.[120] Given that most nonprofits enjoy exemption from federal and state income and other taxes, and given that they are the recipients of vast sums of monetary donations and volunteer services, pressure has mounted on nonprofits to justify their favored status in light of these and other serious fiduciary breaches.[121]

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115. Katharine Q. Seelye & Diana B. Henriques, *A Nation Challenged: The Charity; Red Cross President Quits, Saying that the Board Left Her No Other Choice*, N.Y. TIMES, Oct. 27, 2001, at B9; Lena H. Sun, *Red Cross to Give All Funds to Victims; Contrite Charity Changes Course on Sept. 11 Donations*, WASH. POST, Nov. 15, 2001, at A1.

116. David Barstow & Diana B. Henriques, *A Nation Challenged: The Charities; Charity Abundant, But So Is Red Tape, After Terror Attack*, N.Y. TIMES, Oct. 28, 2001, at A1.

117. David France & David Noonan, *Blood and Money*, NEWSWEEK, Dec. 17, 2001, at 52, 53; Sun, *supra* note 115, at A1.

118. Nina J. Crimm, *Why All Is Not Quiet on the 'Home Front' for Charitable Organizations*, 29 N.M. L. REV. 1, 26 (1999).

119. *In re* Heritage Vill. Church & Missionary Fellowship, 92 B.R. 1000, 1010-11, 1016-22 (Bankr. D.S.C. 1988).

120. Regina E. Herzlinger, *Effective Oversight: A Guide for Nonprofit Directors*, *in* NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE, *supra* note 103, at 13, 13.

121. Crimm, *supra* note 118, at 1-4. Two other constituencies challenging the favored status of nonprofits are state and local governments and small businesses. Local governments are looking at nonprofits as potential revenue sources and are considering eliminating their exemptions from a variety of taxes. *Id.* at 2-3. Also, small businesses who often compete directly with nonprofits for customers are also seeking to revoke some of the tax advantages of nonprofit status. TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR, *supra* note 93, at 4.

2. Fiduciary Duties of Nonprofit Directors

Most nonprofits organize under state law as corporations in order to gain the benefits of corporate status, such as limited liability and flexible governance.[122] Like for-profit corporations, charitable corporations are typically governed by a board of directors and managed on a day-to-day basis by officers.[123] In addition, the twin fiduciary duties of care and loyalty that govern for-profit corporate decisionmakers also govern nonprofit corporate decisionmakers.[124]

The duty of care concerns director and officer competence.[125] Pursuant to the duty of care, directors and officers must act (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interest of

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122. FISHMAN & SCHWARZ, *supra* note 110, at 60, 63. The corporate form is also preferred because it is recognized as an acceptable legal form by the IRS for tax-exempt status. *Id.* at 60. The state laws governing the formation of nonprofit corporations vary widely. *Id.* at 65-66. For instance, some states set up specific categories of nonprofits, and others subsume nonprofits into their general corporate law. *Id.* The nondistribution constraint, however, remains the defining feature of nonprofits. *Id.* at 63.

123. All boards, both for-profit and nonprofit, have six principal purposes:

> (1) to select, encourage, advise, evaluate and, if need be, replace the chief executive officer; (2) to review and adopt long-term strategic directions and to approve specific objectives, financial and other, such as reviewing the basic mission of the organization in light of changed circumstances; (3) to ensure to the extent possible that the necessary resources, including human resources, will be available to pursue the strategies and achieve the organization's objectives; (4) to monitor the performance of management; (5) to ensure that the organization operates responsibly as well as effectively; and (6) to nominate suitable candidates for election to the board, and to establish and carry out an effective system of governance at the board level, including evaluation of board performance.

Id. at 145-46.

124. REVISED MODEL NONPROFIT CORP. ACT ("RMNCA") introductory cmt. at xxxv (1987). Fiduciary duties are governed by state law. In general, the fiduciary duties of nonprofits are derived from corporate principles rather than trust principles. GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 21 (George W. Overton ed., 1993) ("The Duties of Care and Loyalty are the common terms for the standards which guide all actions a director takes. These standards are derived from a century of litigation principally involving business corporations and are equally applicable to nonprofit corporations."); Brody, *supra* note 112, at 1426-27.

However, some have argued that these corporate doctrines do not fit the nonprofit world. *See, e.g.*, Avner Ben-Ner, *Who Benefits from the Nonprofit Sector? Reforming Law and Public Policy Towards Nonprofit Organizations*, 104 YALE L.J. 731, 756 (1994). This is because for-profit board members have a defined goal of maximizing shareholder profits, whereas in the nonprofit world, it is far less clear "whose objectives they should pursue [and] whom they should represent." *Id.* at 756-57.

125. RMNCA, *supra* note 124, §§ 8.30, 8.42 & cmts. These fiduciary duties also apply to officers, those individuals who carry out the day-to-day missions of the organization. *Id.* § 8.42 & cmt.

the corporation.[126] A director "need not exhaustively research every issue personally" to meet this standard.[127] Rather, directors may rely on information, opinions, reports, or statements of other board members, employees, and legal counsel as long as the directors believe the source to be reliable and competent.[128] Moreover, directors are protected from honest mistakes of judgment. Pursuant to the business judgment rule (sometimes called the best judgment rule in the nonprofit context), directors are protected from liability for decisions that are rational, without a conflict of interest, and reasonably informed.[129] As a result, "[i]f a director acts in good faith, with the requisite degree of care, and within her authority, a court will not review the action, even if it proves disastrous to the organization."[130] Thus, the duty of care encourages attention to decision-making processes, but it does nothing to ensure the substantive quality of the resulting decision. While it may serve to check serious financial abuses such as improper loans or distribution of corporate assets,[131] it has little role in ensuring that the delivery of social services is held to any measurable quality standard or that employee abuses do not occur.[132] Moreover, in the nonprofit context, courts apply the standard with particular leniency, fearing that too tough a standard will deter volunteers from serving on nonprofit boards.[133]

The duty of loyalty is designed to ensure that directors serve the interests of the organization rather than personal or other in-

126. *Id.* § 8.30. The comment notes that directors of a nonprofit organization have different goals and resources than directors of a business corporation. *Id.* § 8.30 cmt. Thus, the drafters intend that the fiduciary duties imposed on nonprofit directors be applied in a manner that considers the differences between nonprofits and business corporations as well as the variations within the nonprofit sector. *Id.*

127. DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 29 (1988).

128. RMNCA, *supra* note 124, § 8.30.

129. *Id.* § 8.30 cmt. The business judgment rule thus supposedly "encourages rational risk taking and innovation, limits litigation and unfair exposure, encourages service by quality directors, and limits judicial intrusiveness." Goldschmid, *supra* note 111, at 644. The business judgment rule does not apply to instances involving bad faith, criminal activity, fraud, or willful and wanton misconduct. FISHMAN & SCHWARZ, *supra* note 110, at 178.

130. FISHMAN & SCHWARZ, *supra* note 110, at 155. The authors call the duty of care standard "quite low," and note that it makes "liability improbable except in the most egregious cases such as improper loans or distribution of corporate assets." *Id.* at 179. However, Harvey Goldschmid argues not that the standards are low, but rather that enforcement efforts are meager. Goldschmid, *supra* note 111, at 643. Enforcement is discussed *infra* at notes 141-55 and accompanying text.

131. FISHMAN & SCHWARZ, *supra* note 110, at 179.

132. In fact, directors are not personally liable for their agents' acts or omissions. GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS, *supra* note 124, at 24-25.

133. FISHMAN & SCHWARZ, *supra* note 110, at 161. Moreover, many nonprofit board members are inattentive and play only a figurehead role in management. *Id.* at 180.

terests. It requires directors to avoid obtaining more favorable financial benefits than they would in an open market or as against competitors[134] and from usurping corporate opportunities.[135] Nevertheless, directors may engage in self-interested or conflict of interest transactions if the transaction is fair, the conflict is disclosed to other board members, and the board approves the transaction upon a "reasonable belief" of its fairness. However, "given the structure of many charitable boards and the lack of attentiveness of the directors, disinterested directors may be unlikely to challenge the interested director's characterization that the transaction is fair."[136] In addition, directors can reasonably believe that a conflict of interest transaction is fair without subjecting it to detailed scrutiny and without choosing instead to approve a superior option.[137] As with the duty of care, the duty of loyalty focuses on ensuring accountability to the nonprofits' bottom line. It does little to prevent poor performance of the nonprofits' goals and mission.

The duty of obedience is a third fiduciary duty, related to the duty of care, which has occasionally arisen in connection with nonprofits. It requires directors to abide by the purposes and powers of the charity as expressed in its organizing documents, such as the articles of incorporation.[138] Directors cannot act outside of the organization's permissible purposes; that is, they cannot engage in ultra vires acts. This protects donors from unforeseen uses of contributed donations, and thus, limits how the purposes of the organization can be modified.[139] Such a duty would ensure that directors of a social services nonprofit devoted to homelessness could not simply change its mission to serving another population without notifying the appropriate state officials and amending its organizational documents. Yet the duty does not address the means by which the nonprofit delivers services that are within the broad scope of its defined purposes. Thus, from a programmatic perspective, this doctrine has limited utility in increasing accountability. In sum, nonprofit corporate management has vast discretion to

134. *Id.* at 190.
135. *Id.* at 217.
136. Gary, *supra* note 111, at 614.
137. *Id.*
138. Jaclyn A. Cherry, *Update: The Current State of Nonprofit Director Liability*, 37 DUQ. L. REV. 557, 562 (1999).
139. *Id.*

structure and manage operations without independent oversight, well above and beyond that allowed in administrative law.[140]

3. Enforcement of Nonprofit Director Fiduciary Duties

Regardless of the standards set by nonprofit fiduciary duties, these duties have only a limited role in policing charitable organizations for abuses because they are rarely enforced. Historically, state attorneys general have been responsible for monitoring charitable organizations.[141] In all states, the attorney general has the authority to bring civil actions "to remove directors and officers for self-dealing, waste, diversion of a charitable organization's assets, or other breaches of fiduciary duty."[142] However, personnel and budgetary constraints have limited the effectiveness of the attorneys general, as have informational deficiencies, the lack of public complaints, and political pressures to focus on more "politically remunerative areas of law enforcement."[143] Even if they were well staffed and funded, the attorneys general have no power or ability to exercise day-to-day control over charitable organizations, or to question their contractual undertakings.[144]

Directors are the only group other than the attorneys general with acknowledged standing to challenge fiduciary abuses—yet they are usually reluctant to sue one another.[145] In some states, members of nonprofits have the right to bring a derivative suit to enforce the purposes of the organization,[146] but most nonprofits do not have members; rather, they have self-perpetuating boards.

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140. "There is no general corporate law standard for evaluating whether corporate action is in the puhlic interest the way that agency action is tested under the arbitrary and capricious standards." Beerman, *supra* note 89, at 180. "[T]he level of deference in administrative law does not approach the level of deference afforded directors' decisions in corporate law." *Id.* at 181.

141. Mary Grace Blasko et al:, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 38 (1993). "State enforcement of charities is based upon the role of the Crown (or, in America, the state) as *parens patriae*, imposing an exclusive duty to enforce charitable trusts." *Id.* at 40.

142. Crimm, *supra* note 118, at 2 n.3.

143. *Id.* at 24-25; Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 251.

144. Blasko et al., *supra* note 141, at 47; Manne, *supra* note 143, at 251. Some states allow relator actions, in which persons can proceed in the name of the attorney general with the attorney general's permission. Blasko et al., *supra* note 141, at 49. The relators bear the costs of the proceeding while the attorney general retains control of the action. *Id.* Not surprisingly, such actions are rare. Manne, *supra* note 143, at 250.

145. Gary, *supra* note 111, at 625.

146. The RMNCA provides that directors may bring derivative suits. RMNCA, *supra* note 124, § 6.30. In addition, "any member or members having five percent or more of the voting power or . . . fifty members, whichever is less," may also bring a derivative suit. *Id.* "Derivative suits allow a member to protect these interests [in the purposes of the corporation as set forth in

As for beneficiaries, courts rarely grant them standing to sue, because of concerns over charities having to fend off expensive and vexatious litigation.[147] There have been a few exceptions to this no standing rule in cases where the courts have found beneficiaries to have "special interests."[148] These special interests are most likely to be found in cases complaining of extraordinary acts, where there is the presence of fraud or misconduct by directors, and in jurisdictions with minimal attorney general oversight.[149] Yet a court is unlikely to find that day-to-day quality-of-service issues amount to extraordinary acts implicating fraud. Rather, extraordinary acts generally arise only with violations of a charity's express philanthropic purpose.[150] Moreover, the remedy in such cases is a benefit to the charity itself, and not monetary damages to the beneficiaries. Thus, the limited standing rules for charities and the lack of effective state enforcement mean that "the law plays little role, other than aspirational, in assuring accountability in the nonprofit sector."[151]

Clearly, the fiduciary standards governing nonprofits, developed in the for-profit realm, are not an effective constraint. In for-profit corporations, directors are judged by their ability to maximize shareholder profits. There are thus observable yardsticks by which to evaluate the effectiveness of directors' decisions. Moreover, various forces keep for-profit directors focused on their mission, includ-

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its charter] and to enforce the charity's purpose." Blasko et al., *supra* note 141, at 55. For instance, in *Cross v. Midtown Club, Inc.*, the court ruled that members of a nonprofit club had standing to sue the club over its refusal to admit women, in violation of its charter. 365 A.2d 1227, 1230 (Conn. Super. Ct. 1976). However, the right to bring derivative suits may be limited in case of religious organizations. RMNCA, *supra* note 124, § 6.30 cmt. 8.

147. Blasko et al., *supra* note 141, at 42.

148. *Compare* Hooker v. Edes Home, 579 A.2d 608, 609 (D.C. Cir. 1990) (holding that residents of free home for elderly indigent widows were members of identifiable beneficiary class with standing to challenge decision of trustees to close home), *with* Russell v. Yale Univ., 737 A.2d 941, 946 (Conn. App. Ct. 1999) (holding that alumni donors and students did not have standing to contest reorganization of Yale's divinity school).

149. Blasko et al., *supra* note 141, at 61-78.

150. *See, e.g.*, Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 755-56 (N.Y. 1985) (holding that employees had standing to challenge drastic change in the nature of a foundation whose original purpose was to aid them); Valley Forge Historical Soc'y v. Wash. Mem'l Chapel, 426 A.2d 1123, 1127-28 (Pa. 1981) (holding that historical society had standing to challenge trustee's attempt to evict them in alleged violation of trust instrument).

151. Goldschmid, *supra* note 111, at 632; *see also* Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 467 (1996) ("[F]iduciary duty is really a legal obligation without a legal sanction."). Rob Atkinson points out that the degree to which standing rules to sue charities should expand hinges on one's theory of the purposes of charities and what one wants them to be. Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655 (1998).

ing the threat of shareholder derivative suits, the easy public access to corporate information under the securities reporting laws,[152] global competition, increased activity by institutional investors, financial press coverage, and hostile takeover attempts.[153] By contrast, in the nonprofit sector, the organization's goals are more amorphous, and directors are accountable to a broader set of constituencies, including the public, members, donors, customers, beneficiaries, and other directors.[154] Yet these constituents generally lack the ability or incentive to enforce the fiduciary duties of directors and officers. Simply put, in the nonprofit realm, there is "no clear category of principals" and thus the nonprofit firm, as the agent, has no clear entity to whom it owes accountability.[155]

This is not to say that for-profit entities provide greater accountability to beneficiaries in social service programs. They do not. For the reasons noted above, in for-profit firms there is adequate enforcement of fiduciary duties vis-à-vis profit maximization goals. However, social service beneficiaries of for-profit firms have no standing to enforce these fiduciary duties (even if those duties applied for their benefit, which they largely do not), and unlike most consumers, they cannot pick up and take their money elsewhere. While corporate management may consider the interests of individuals affected by corporate decisions, "they owe fiduciary duties of care and loyalty only to shareholders."[156] Moreover, the profit-maximization goal is often inconsistent with the goals of social service programs, where costs are often high while budgets are low.[157] Thus, the shareholder profit-maximization goal is often inconsistent with the goals of social service programs, but the former goal must take precedence under corporate law.

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152. Cherry, *supra* note 138, at 571.

153. Ben-Ner, *supra* note 124, at 754; Gary, *supra* note 111, at 595-96; Goldschmid, *supra* note 111, at 636; Manne, *supra* note 143, at 238.

154. Manne, *supra* note 143, at 227-28. In the nonprofit world, "[t]here is no market for corporate control; there are no proxy battles, no shareholder derivative suits, and there is very little market competition." *Id.* at 228.

155. Brody, *supra* note 151, at 465.

156. Cheryl L. Wade, *For-Profit Corporations that Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323, 324 (1999). She notes that while several states have enacted corporate constituency statutes that allow corporate decisionmakers to consider nonshareholder interests affected when a takeover is threatened, these statutes do not cover social service beneficiaries. *Id.* at 334-35, 350-51. Rather, they are focused on employees, creditors, and other constituencies. *Id.*

157. Aman, *supra* note 90, at 102 ("[T]here will be problems of translation when one balances the needs of our poorest individuals with the efficiency concerns of a private firm whose primary task is to determine the eligibility of welfare applicants as efficiently as possible and within the constraints of a relatively small budget."); *see also* Wade, *supra* note 156, at 327-30 (explaining the incompatibility between maximizing shareholder profits and serving poor populations).

4. Open Records Requirements Applicable to Nonprofits

Nonprofits have a duty to keep accurate financial records and share them with the public. Any tax-exempt charity with annual gross receipts normally over $25,000 is required to file an annual financial disclosure form, called a Form 990, with the IRS.[158] Form 990 requests information concerning the organization's exempt activities, its income-producing activities, its payments, gross income, expenses, disbursements for exempt purposes, assets and liabilities, net worth, contributions, and compensation paid to certain employees.[159] State agencies also require various tax reports, which usually entail attaching a copy of Form 990, and failure to file these reports is subject to a penalty.[160]

Yet the use of Form 990 as an accountability tool is limited. The form asks for financial data and responses to yes or no questions that are targeted at ensuring compliance with the tax-exempt laws. However, "when trying to measure or evaluate how successful an organization has been in achieving its substantive program goals, it is doubtful whether any kind of a report which relies on text can be useful."[161] Moreover, even if Form 990 can alert officials of financial wrongdoing, neither the state nor federal enforcement agencies have the resources to fully analyze these filings to identify abuses.[162] At most, Form 990 can be helpful when independent sources call official attention to alleged abuses.[163] Thus, the open records requirements may put an interested person in a position to spot abuses and report them to officials, but it is unlikely that social service beneficiaries would have the interest, background, or ability to analyze the reports to spot abuses in the first place. Beneficiaries would likely be more interested in obtaining quality ser-

158. I.R.C. § 6033(a) (1994); Internal Revenue Service, *2001 Instructions for Form 990 and Form 990-EZ*, *at* http://www.irs.gov.

159. Internal Revenue Service, *2001 Form 990, Return of Organization Exempt from Income Tax*, *at* http://www.irs.gov. The charity must make its three most recent Form 990s, along with its tax-exempt application, available to anyone requesting the information. 26 C.F.R. § 301.6104(d)-1 (2001).

160. Peter Swords, *The Form 990 as an Accountability Tool for 501(c)(3) Nonprofits*, 51 TAX LAW. 571, 576-78 (1998).

161. *Id.* at 575. Burton Weisbrod proposes that the form eliminate questions that have proven to be of little use and focus instead on "outputs" to aid in assessment of nonprofits' efficiency and social contribution. Burton A. Weisbrod, *Conclusions and Public-Policy Issues: Commercialism and the Road Ahead*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR, *supra* note 93, at 287, 301-02.

162. Swords, *supra* note 160, at 578-79.

163. *Id.* at 578.

vices than in monitoring financial dealings between the organization and its insiders, and federal tax laws give them no standing to challenge those aspects of an organization's program.

5. Federal Fiduciary Requirements Imposed on Nonprofits

Section 501(c)(3) of the Internal Revenue Code ("IRC") also imposes fiduciary duties on board members, and thus the IRS plays a role in policing self-dealing in charitable organizations. To qualify for tax exemption, an organization must be organized and operated exclusively for religious, charitable, scientific, educational, or other purposes specified in the IRC.[164] Under the IRC, a 501(c)(3) organization is absolutely banned from allowing net earnings to inure to the benefit of any private shareholder or individual.[165] Accordingly, excessive salaries or self-dealing transactions can result in the IRS revoking an organization's tax-exempt status. This remedy, however, is rarely imposed for fear of penalizing an entire organization for the misdeeds of a single actor.[166]

In 1996, in an effort to modify this extreme penalty, Congress enacted an "intermediate sanction" scheme that imposes an excise tax penalty on "excess benefit transactions" between the exempt organization and a "disqualified person," or insider.[167] A "disqualified person" is someone in a position to exercise substantial influence over the affairs of the organization,[168] and an excess benefit transaction is one in which the value of the economic benefit conferred exceeds the value of the consideration received. Under this scheme, the penalty starts at twenty-five percent of the excess benefit and falls on the insider, rather than the organization.[169] Thus, the intermediate sanctions regime attempts to ensure that the exempt organization's assets are used for public purposes rather than for private benefits, but without the harsh penalty of

164. I.R.C. § 501 (1994).

165. *Id.* § 501(c)(3); *see also* Treas. Reg. § 1.501(c)(3)-1(a), (b), (c) (2001). Section 501(c)(3) organizations are also limited in the amount of lobbying they can conduct, and they are barred from participating in political campaigns. I.R.C. § 501(c)(3).

166. Gary, *supra* note 111, at 630.

167. I.R.C. § 4958(a), (c) (1994).

168. The "substantial influence" category is potentially broad and includes persons without formal titles within the organization. FISHMAN & SCHWARZ, *supra* note 110, at 513.

169. Violations that are not remedied result in increased penalties of 200% of the excess benefit. I.R.C. § 4958(b). Managers who knowingly permit the organization to engage in an excess benefit transaction face lesser penalties. *Id.* § 4958(a)(2), (d)(2). The penalty is a tax equal to ten percent of the excess benefit, with the tax capped at $10,000.

revocation.[170] Again, however, this scheme is aimed at protecting the charity from unscrupulous insiders and bad deals, but it plays scant role in policing the substantive work of the charity.

6. Tort Immunities of Nonprofits and Their Agents

Part of organizational accountability derives from an entity's exposure to liability for the negligence or wrongdoing of its agents. Thus, tort liability plays a role in deterring firms from taking actions that create costlier risks than benefits.[171] However, because nonprofits generally receive preferential treatment in the area of tort liability, they may be underdeterred from engaging in risky behavior. This could affect social service beneficiaries in several ways. Beneficiaries are relying on nonprofits to provide them with services ranging from job training to addiction counseling to life skills training.[172] Given the intense interpersonal aspects of these services, beneficiaries could be subject not only to garden variety personal injuries sustained from unsafe premises, but also to torts such as negligent counseling, infliction of emotional distress, and defamation.

Courts in the nineteenth and early twentieth centuries awarded charities full immunity from tort liability for the acts of their members, directors, or employees.[173] However, by the 1940s, courts were quickly eroding the charitable immunity doctrine in order to broaden tort recovery to compensate victims for harm.[174] By

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170. As a result, revocation is likely only in the extreme circumstance in which the organization can no longer be considered charitable. FISHMAN & SCHWARZ, *supra* note 110, at 513.

171. *See* Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 425 (1991). Tort law serves other purposes as well. "Tort liability rules seek to deter injurious behavior, compensate victims, and spread an activity's losses among the beneficiaries of that activity. In addition, the tort system manifests societal judgments about the value of various types of activity, the acceptability of causing injury, and the nature of obligations to assist those who suffer harm, thereby manifesting fundamental principles of justice." *Id.* at 422-23.

172. *See supra* note 8 and accompanying text.

173. There were four main rationales for this charitable immunity. Courts reasoned that (1) applying charitable trust assets to damage awards would divert them from the donor's purposes; (2) respondeat superior should not apply because charities did not profit from their employees' work; (3) charitable beneficiaries assumed the risk of harm because they did not pay consideration for services received; and (4) imposing liability on charities could result in their bankruptcy and a loss of donors and volunteers. Paul T. O'Neill, *Charitable Immunity: The Time to End Laissez-Faire Health Care in Massachusetts Has Come*, 82 MASS. L. REV. 223, 227-30 (1997).

174. *Developments in the Law—Nonprofit Corporations: Special Treatment and Tort Law*, 105 HARV. L. REV. 1581, 1680 (1992) [hereinafter *Developments in the Law*]. The wall began to crumble with the decision in *President of Georgetown College v. Hughes*, in which the court re-

the 1980s, the doctrine was either fully or partially abolished in almost every state, either by case law or by statute.[175] Yet the pendulum soon began to swing back towards providing some protection for charities, because of a series of large monetary judgments awarded against some charities,[176] the lack of available insurance liability coverage,[177] and the increase in personal liability for those working in the nonprofit sector.[178]

The resulting protections vary widely from state to state. To protect organizations, several states provide partial immunity or limited liability for charitable organizations through statutory damage caps, caps on recovery to insurance coverage limits, or complete protection of certain assets. A few states have even retained some form of common law charitable immunity for organizations. To protect individuals, most states have enacted legislation that protects a variety of charitable actors, such as volunteers and unpaid directors, and even employees.[179] In general, these statutes protect charitable actors from personal liability for negligent acts, but do not immunize them for liability for actions which are "willful and wanton," ultra vires, or taken in bad faith.[180] In light of the lack of state uniformity, Congress passed the Federal Volunteer Protection Act of 1997 ("FVPA").[181] This Act protects charitable vol-

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jected the charitable immunity of a hospital sued for negligence of a hospital employee. 130 F.2d 810, 823-25 (D.C. Cir. 1942).

175. *Developments in the Law*, *supra* note 174, at 1680.

176. *See, e.g.*, Daniel L. Kurtz, *Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices*, *in* NOT-FOR-PROFIT ORGANIZATIONS: THE CHALLENGE OF GOVERNANCE IN AN ERA OF RETRENCHMENT 263, 269 (ALI-ABA Course of Study, 1992), WL C726 ALI-ABA 263 (citing Thomas Heath, *$45,000 Award to Molested Va. Youth Hailed as Victory by Scouts*, WASH. POST, Jan. 12, 1989, at D1; Lisa Green Markoff, *A Volunteer's Thankless Task*, NAT'L L.J., Sept. 19, 1988, at 1; Gary Taylor, *Goodwill Must Pay $5M in Murder by Parolee-Employee*, NAT'L L.J., June 8, 1987, at 22.)

177. David O. Weber, *A Thousand Points of Fright?*, INS. REV., Feb. 1991, at 40, 40 (stating that between 1984 and 1989 "the cost of liability coverage for local [little league] programs shot up from $75 to $795 a year").

178. *Developments in the Law*, *supra* note 174, at 1680-82.

179. For statutes that cover employees, see, for example, D.C. CODE ANN. § 29-301.114(b) (2001) (placing a statutory limit on employees' personal liability arising from acts or omissions in providing services or performing duties on behalf of a nonprofit corporation); N.J. STAT. ANN. § 2A:53A-7 (West 1999); and TEX. CIV. PRAC. & REM. CODE ANN. § 84.002(7) (Vernon 1997) (establishing that charitable immunity extends to employees).

180. Kurtz, *supra* note 176, at 270-71. However, these laws are complex, confusing, and there is a paucity of cases interpreting them. As a result, this patchwork of protections "creates grave uncertainty for insurance underwriters, . . . and, therefore, vitiat[es] the certainty of reduced liability that leads to reduced rates and wider availability of D&O insurance." *Id.* at 289. For a discussion of the various state laws, see *id.* at 279-89.

181. Kenneth W. Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want to Play Ball?*, 23 SETON HALL LEGIS. J. 319, 335 (1999) (discussing legislative history of the Act).

unteers from liability "for harm caused by an act or omission of the volunteer on behalf of the organization or entity."[182]

The various immunities that result from state and federal law encourage volunteerism, a worthy goal, but put the costs of negligent conduct on the victims of negligent behavior. Because charitable organizations do not have to internalize certain accident costs, they have less incentive than for-profit entities to prevent or monitor negligent behavior.[183] Some might argue that having victims carry the costs of negligence is balanced by the fact that the charitable entity then has more resources available to assist other beneficiaries. Yet the justifications for protecting charities are arguably lessened in the government-contracting arena where charities are acting in a quasi-commercial capacity and competing in an open market with governmental and for-profit entities. From the victims' perspective, they have little or no choice as to what type of entity delivers the needed services. While it is outside the scope of this Article to address what the tort liability rules should be in this context—from full tort liability to full immunity to something in between[184]—it is important to note that tort law does treat nonprofits differently. This difference affects accountability and suggests that preventative measures need to be implemented to counterbalance the preferential treatment afforded to nonprofits.

C. Religious Organizations and Accountability

There are over 300,000 religious congregations in the United States,[185] almost all of which are organized as nonprofit corpora-

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182. 42 U.S.C. §§ 14503-14505 (Supp. IV 1998). Volunteers are entitled to protection if the following conditions are met: (1) "the volunteer was acting within the scope" of their responsibilities; (2) "the volunteer was properly licensed . . . by the appropriate authorities for the activities" in the state where the harm occurred; (3) the injury "was not caused by willful or criminal misconduct"; and (4) the volunteer was not operating a motor vehicle or vehicle required by State law to carry insurance. *Id.* § 14503. The Act does not protect volunteers from liability for various crimes, including hate crimes, civil rights violations, and crimes of violence. *Id.* § 14503(a)(3), (f). Although the FVPA preempts inconsistent state law, it allows states to provide additional protection from liability for volunteers, and also permits states to opt out of the scheme altogether. *Id.* § 14502.

183. Tremper, *supra* note 171, at 403-04 ("Although the approach serves the goals of reducing payments, increasing certainty, and encouraging settlements, the resultant denial of recovery to negligently injured individuals cannot be justified on any principled basis.").

184. *See id.* at 444-66. He advocates a system in which tort recovery would become a backup for individuals who would not receive compensation from first-party insurance or a proposed governmental assistance program.

185. Jeff E. Biddle, *Religious Organizations, in* WHO BENEFITS FROM THE NONPROFIT SECTOR? 92, 92 (Charles T. Clotfelter ed., 1992). There are more than one thousand religious

tions.[186] Together, they collect and spend more than fifty billion dollars each year.[187] Religious organizations have a long history of providing social services in this country, often working side by side with government. "Typically, religiously motivated persons have been the first into areas of societal need. Secular agencies and government have followed."[188] As a subset of nonprofits, religious organizations generally share the same fiduciary obligations and immunities as other charitable organizations. However, lawmakers have long been wary of regulating religious organizations for fear of running afoul of the First Amendment's proscription on excessive entanglement with religion.[189] As a result, religious organizations have freedoms from regulation and liability above and beyond that of other charitable organizations. This section discusses the accountability doctrines that govern religious organizations.

1. Fiduciary Duties Applicable to Religious Organizations

The Revised Model Nonprofit Corporation Act ("RMNCA") recognizes three types of nonprofit organizations: public benefit (corporations formed for charitable or public purposes), mutual benefit (member-oriented corporations such as social clubs and trade associations), and religious (operating primarily or exclu-

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denominations in the United States. *See* 1 WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW, at xi (1999).

186. Eighty-seven percent of religious organizations organize in the nonprofit corporate form. Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 B.Y.U. L. REV. 439, 441-42. Most churches incorporate for advantages of limited liability, organizational continuity, and administrative convenience. *Id.* at 444; Catherine M. Knight, Comment, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721, 724 (1993). However, the business model of members and a board of directors does not necessarily fit the structural form of religious denominations. 1 BASSETT, *supra* note 185, § 1:1; Knight, *supra*, at 725-27 (describing different denominational forms of church governance). Other organizational forms a church might choose include an unincorporated association, a trust or foundation, a religious corporation, a nonprofit mutual benefit corporation, or a nonprofit charitable organization. 1 BASSETT, *supra* note 185, § 3:7.

187. Biddle, *supra* note 185, at 92, 93. They receive the largest share of Americans' annual donations of money and volunteer labor. Ben-Ner, *supra* note 124, at 742-43.

188. MONSMA, *supra* note 46, at 8.

189. GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS, *supra* note 124, at 14 ("The directors of religious corporations are generally subject to the foregoing considerations [concerning accountability]. However, because American constitutional law generally restricts the role of government in dealing with religious corporations to a minimum enforcement of basic fiscal integrity, oversight is more limited, lest the government intrude on freedom of religion."); HOPKINS, *supra* note 108, § 8.1.

sively for religious purposes).[190] Although directors and officers of religious organizations share the same fiduciary duties as their counterparts in other nonprofit corporations, the RMNCA provides religious organizations with greater flexibility in structure and operation.[191] The comment explains, "By applying fewer rules to religious corporations, . . . and limiting the attorney general's jurisdiction, the Revised Act recognizes the need to avoid unconstitutional intrusions into the activities of religious corporations."[192] Thus, for instance, religious organizations can remove members and directors with greater ease than can other nonprofits.[193] Also, with regard to open records, religious organizations need not provide members with rights to inspect membership lists or receive financial statements.[194]

Given this framework, it is not surprising that external oversight of religious nonprofits is less rigorous than the already minimal oversight of other nonprofits. For instance, under the RMNCA, provisions allowing courts to appoint receivers and custodians to dissolve nonprofits do not apply to religious organizations, nor do requirements that dissolving nonprofits report the names and addresses of individuals receiving assets to the attorney general. The RMNCA also provides that, unlike other nonprofits, religious organizations need not notify the attorney general of any derivative suits—and it cautions that constitutional provisions may in fact prevent courts from considering derivative suits brought on behalf of religious organizations in the first place. In sum, religious organizations have greater flexibility in structuring their form than do other nonprofits and less oversight from external bodies.[195] Much

190. RMNCA, *supra* note 124, at xxii-xxix. As of 1999, the RMNCA had been adopted by eight states, although many other states have assumed sections of the Act into their own nonprofit corporations statutes. 1 BASSETT, *supra* note 185, § 3:7 & n.4.

191. RMNCA, *supra* note 124, at xxx.

192. *Id.* The same corporate flexibility for churches is usually found even in those states not using the RMNCA. Gerstenblith, *supra* note 186, at 447-60. It is not clear, however, that the Constitution actually mandates such preferential treatment. Knight, *supra* note 186, at 742-45.

193. Under the RMNCA, requirements imposing fair procedures for terminating members are not applicable to religious organizations, and religious groups can opt out of provisions relating to the removal of directors, including provisions allowing for court removal of directors under certain circumstances. RMNCA, *supra* note 124, §§ 8.08, 8.10. In addition, religious organizations can define the procedures for how members call special meetings, whereas other nonprofits must call a special meeting upon the written demand of at least five percent of the voting power of any corporation. *Id.* § 7.02(a)(2).

194. *Id.* § 7.20(f).

195. In addition, religious organizations have various privileges at common law and by statute, for instance: (1) religion enjoys the favor of tbe law in interpreting wills and trusts containing bequests of private money property to charity; (2) clergy are exempt from conscription and

of this flexibility works to the advantage of the organization as opposed to its constituents. For members, who have the freedom to move to a new congregation, the organizational protections for churches may be harmless. But for social service beneficiaries, these protections further hinder accountability.

2. Federal Oversight of Nonprofit Religious Organizations

The IRC exempts from taxation corporations "organized and operated exclusively for religious . . . purposes."[196] Corporations within this category include churches[197] and "conventions or associations of churches,"[198] "integrated auxiliaries of churches,"[199] and the "exclusively religious activities" of religious orders.[200] As with other 501(c)(3) charitable organizations, contributions to churches are deductible from federal income taxes.[201] Yet churches and their integrated auxiliaries need not file an application for determination of tax-exempt status from the IRS to claim their exemption or to accept deductible donations.[202] Rather, they are presumed to be ex-

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their work is exempt from government regulation such as the National Labor Relations Act; (3) "canvassing and door-to-door solicitation of contributions for religious societies cannot be subjected to state discretionary licensing requirements, but . . . [can] only be regulated as to time, manner, and place"; and (4) "conscience clauses to provide ethical accommodations are inserted into state and federal funding programs," and religious exceptions are carved out of civil rights legislation. *See* 1 BASSETT, *supra* noto 185, § 1:10.

196. I.R.C. § 501(a), (c)(3) (1994).

197. The Internal Revenue Code does not define the terms "religion" or "church." As the Supreme Court has stated, "[T]he great diversity in church structure and organization among religious groups in this country . . . makes it impossible, as Congress perceived, to lay down a single rule to govern all church-related organizations." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 782 n.12 (1981). However, the IRS looks at fourteen criteria, none of which are controlling, to determine whether an entity qualifies as a church: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) religious congregations; (12) regular worship services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of ministers. INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, INTERNAL REVENUE MANUAL § 321.3; Rev. Rul. 59-129, 1959-1 C.B. 58.

198. I.R.C. § 6033(a)(2)(A)(i) (1994).

199. *Id.* Integrated auxiliaries include schools, missions societies, or youth groups that are affiliated with a church, internally supported, and meet one of the tests for avoiding private foundation status. 26 C.F.R. § 6033-2(h)(1) (2001).

200. I.R.C. § 6033(a)(2)(A)(iii).

201. *Id.* § 170(b)(1)(A)(i), (c)(2)(B).

202. *Id.* § 508(a), (c)(1)(A). Nevertheless, religious groups often seek formal determinations of their tax-exempt status to assure donors and grantors of the deductibility of contributions. *See* FISHMAN & SCHWARZ, *supra* note 110, at 446.

empt. Moreover, churches need not file the annual financial information return, called the Form 990, required of secular nonprofits,[203] and they have various immunities and protections from IRS audits.[204] Thus, under federal law, religious organizations receive preferential treatment not available to other nonprofits.[205] The lack of openness in financial records is particularly troublesome in the context of contracting out, as it eliminates one of the very few ways in which independent members of the public can get some sort of snapshot of what the organization is doing.[206]

3. Limitations on Tort Liability of Religious Organizations and Their Agents

While the tort liability of nonprofits and their agents is more limited than that of for-profit entities, the tort liability of religious organizations is even further complicated by First Amendment considerations.[207] The Supreme Court has long held that the First Amendment bars courts from adjudicating religious questions.[208] As

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203. I.R.C. §§ 508(c)(1)(A), 6033(a)(2)(A)(i), (iii). Churches must file a financial return if they generate unrelated business income tax ("UBIT"). UBIT is profits derived from commercial activities unrelated to the religious purpose of the organization. *Id.* § 511.

204. The IRS can only audit churches and affiliated organizations if the Regional Commissioner has independent information from a third party that the church may not qualify for tax exemption as a church, may be carrying on an unrelated trade or business, or otherwise be engaged in taxable activities. *Id.* § 7611(a)(1)(A), (a)(2). Prior to starting an investigation, the IRS must provide written notice to the church advising the church of its rights. *Id.* § 7611(a)(1)(B), (a)(3). The IRS must also provide advance notice of its intent to examine church records. *Id.* § 7611(b)(1), (b)(2)(A). The IRS may examine records only to the extent necessary to determine the tax amount. *Id.* § 7611(b)(1)(A). For a full description of the IRS audit procedures for churches, see HOPKINS, *supra* note 108, § 24.8(b), at 611-19.

205. A summary of the tax rules affecting churches can be found in Richard R. Hammar, *Federal Income Tax Issues, in* RELIGIOUS INSTITUTIONS AS NONPROFIT ENTITIES: ISSUES OF ACCESS, SPECIAL STATUS, AND ACCOUNTABILITY (N.Y.U. Sch. of Law, The Nat'l Ctr. on Philanthropy & the Law ed., 1983).

206. For other federal statutory privileges afforded to religious organizations, see 1 BASSETT, *supra* note 185, § 1:11, at 1-42 to 1-46.

207. As one scholar has noted, "[T]ort law and freedom of religion are in a significant way diametrically opposed. The former represents the enforcement of communitarian intolerance of antisocial acts; the latter represents the protection of unpopular, even antisocial, views and practices from the majority's tendency to want to squelch them." Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 597-98 (1993).

208. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-15 (1976) (holding that civil courts may not review ecclesiastical decisions); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (same); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871) (mem.) (concluding that courts must defer to judgment of highest religious authority in determining intrachurch property dispute); *cf.* Jones v. Wolf, 443 U.S. 595, 602-06 (1979) (concluding that courts may

a result, courts cannot inquire into the validity of religious beliefs, they cannot independently interpret religious texts, and they cannot examine the internal decisionmaking of religious entities.[209] Tort claims that implicate these proscriptions are usually dismissed. For instance, lawsuits challenging the standard of care of a church's or cleric's conduct run into the courts' reluctance to devise an "objective" standard of care for religious leaders (the "reasonable bishop," the "reasonable rabbi," and so forth).[210] Thus, claims of "clergy malpractice," such as claims that churches are responsible for the sexual misconduct of their clergy, have never succeeded.[211] Clearly, this reluctance to interfere with the management of religious groups raises issues in the charitable choice context because clergy may play an integral role in providing the contracted-for services to extremely vulnerable populations.

This reluctance to "embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions"[212] has also resulted in many courts rejecting other tort claims, including those for breach of fiduciary duty; negligent hiring and supervision; tortious interference with contract; negligent infliction of emotional distress; intentional infliction of emotional distress; and defamation.[213] Similarly, even above and beyond the statutory exemptions afforded to religious organizations from various antidiscrimination laws,[214] some courts have created common law exceptions that permit religious organizations to discriminate on the basis of race, sex, age, or disability in their employment decisions.[215] In addition, while every state regulates the practice of psychology and counseling, pastoral counseling within a church to members of the congregation does not fall within these

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adjudicate intrachurch disputes where they can be resolved on the basis of neutral principles of law).

209. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 221-23 (2000). The courts vary on whether they ground these principles in the Free Exercise Clause, the Establishment Clause, or the First Amendment in general. *Id.* at 223-25.

210. *See id.* at 231-34.

211. *See id.*

212. F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997).

213. *See* Idleman, *supra* note 209, at 234-37 nn.43-53. Idleman notes that while the courts "are far from uniform in their refusal to adjudicate tort actions against religious entities," the majority trend appears to be one of nonadjudicability. *Id.* at 239.

214. For example, under Title VII, religious organizations can fire or refuse to hire employees for religious reasons. *See* 42 U.S.C. § 2000e-1(a) (1994). The charitable choice legislation expressly preserves this exemption. Pub. L. No. 104-193, § 104(f), 100 Stat. 2105, 2163 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997)).

215. *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1079 (1996).

regulations.[216] It is not clear whether counseling by clergy as part of a social services program will fall within this exception, although given the secular purposes underlying social welfare programs, pastoral counselors should be required to follow the same licensing and certification requirements as their secular counterparts.

Under charitable choice, religious groups are expressly prohibited from using federal funds to engage in proselytizing or worship with beneficiaries.[217] As a result, it may be difficult for them to hide behind the religious nature of their activities in any tort suit arising out of social service provision under charitable choice. A series of counseling cases in which plaintiffs sued clergy for the tort of intentional infliction of emotional distress demonstrates this distinction. In *Destefano v. Grabrian*, a husband and wife sued their Catholic priest and local diocese after the priest had an affair with the wife while he was conducting marriage counseling for the couple.[218] The defendants raised the First Amendment as a barrier, arguing that "the performance of pastoral duties by a Catholic priest, including sacramental counseling of parishioners, is a matter of ecclesiastical cognizance and policy with which a civil court cannot interfere."[219] The Colorado Supreme Court rejected this defense, stating that the defendants had acknowledged that the priest's conduct did not fall within the practices or beliefs of the Catholic Church.[220] The court noted, however, that it might have a different question had the conduct been taken in accord with the priest's religious practices.[221]

Under this line of reasoning, the key question is whether the defendant's conduct is religiously motivated. An admission of religious motivation might well put a charitable choice defendant in the position of admitting that he or she has overstepped the statute's boundaries. Nevertheless, an argument might be made that any alleged tortious counseling was motivated and shaped by religious beliefs, even if it does not implicate proselytizing or worship.[222] This would present a more difficult question, but a foresee-

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216. *See* RICHARD R. HAMMAR, PASTOR, CHURCH & LAW § 4-10 (3d ed. 2000).

217. § 104(j), 110 Stat. at 2162.

218. 763 P.2d 275, 278 (Colo. 1988).

219. *Id.* at 283.

220. *Id.* at 284 (stating that defendants "recognize[ ] and admit[ ] that sexual activity by a priest is fundamentally antithetical to Catholic doctrine").

221. *Id.*

222. There remain complicated questions of whether liability for tortious conduct ascends from the individual who committed the act to the organization itself and even to coordinate and superior levels of the ecclesiastical entity. *See generally* Mark E. Chopko, *Ascending Liability of*

able one given that charitable choice aims to preserve the religious nature of grantees while protecting beneficiaries from indoctrination.[223] The legislation envisions that religious doctrine will motivate the service strategy undertaken by charitable choice grantees. In turn, this is likely to create complicated questions that delve into the interconnection between religious beliefs and service strategies, an area the courts have thus far indicated they prefer to avoid.

D. Limits on Obtaining Accountability Through Contract Law

Charitable choice is part of a larger societal movement towards privatization, or contracting out, of governmental functions.[224] A decision to outsource a government social service program generally results in a contract between the government and the private provider. Thus, contracts could provide a key vehicle for enforcing accountability.[225] Contract law is especially appealing for ensuring accountability in the charitable choice context, because unlike tort law and the statutes discussed previously, churches do not have any special immunities or other protections from contract claims. Rather, they are deemed to operate in the commercial world as any other entity. Yet legal doctrine as well as the procurement process fails to provide social service beneficiaries with adequate protections. First, contract law provides scant enforcement rights to third-party beneficiaries. Second, procurement processes at the state and local levels rarely involve beneficiaries. Third, as a practical matter, it is very difficult to monitor and measure contract performance in the realm of social services. Each of these current barriers to achieving accountability through contract is addressed in turn.

Religious Entities for the Actions of Others, 17 AM. J. TRIAL ADVOC. 289 (1993) (examining the potential bases of liability of religious organizations for the actions of its members, employees, or agents). Religious organizations may be able to avoid certain risks by separately incorporating different layers of hierarchy or separable functions. *See* Jill S. Manny, *Governance Issues for Non-Profit Religious Organizations*, 40 CATH. LAW. 1, 1-2 (2000).

223. Whether these goals are compatible is questionable. *See* Rogers, *supra* note 5, at 62 ("While one can separate the sacred from the secular in a religiously affiliated organization, there is no good way to do so in a church or similar entity. It is like trying to take vanilla flavoring out of a cake.").

224. *See supra* notes 56-65 and accompanying text.

225. *See generally* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) (discussing the accountability challenges raised by contracting out and how contract law could be used to enforce fairness norms embodied in administrative law).

1. Third-Party Beneficiary Doctrine

Contract law has the potential to promote accountability in an outsourcing regime, because it holds contractors to terms to which they have assented. For instance, participants in a drug treatment program run by a church under contract with a local municipality may want to challenge the quality of services rendered by the church. Perhaps an untrained volunteer conducts the counseling, or the methods are unduly coercive. If the contract sets forth performance specifications and objectives, the participants may be able to argue that they are third-party beneficiaries of the contract with the right to enforce its terms.

In general, third parties can enforce contracts that are "intended" to benefit them.[226] The "intent to benefit" standard is a malleable one, and it is difficult to say with certainty whether any particular category of beneficiaries fall within it. Clearly, if the contract grants express rights of enforcement to third parties, the courts will honor the intent of the contracting parties. Likewise, where the contract expressly denies enforcement to third parties, that intent will also be upheld.[227] Yet for contracts that do not address the enforcement status of third parties, the law is murkier.

Especially where government contracts are concerned, courts are hesitant to grant enforcement rights to the public at large, fearing a limitless class of plaintiffs.[228] Thus, for instance, where a pri-

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226. Under the *Restatement (Second) of Contracts*, only those third parties who are "intended" beneficiaries have rights under the contract. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). To qualify as an intended beneficiary, the third party must first show that "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." *Id.* § 302(1). In addition, the party must show that (a) "the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary" or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.* For a history of the development of the third party beneficiary doctrine, see Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1360-74 (1992), and Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

227. *See, e.g.*, Cobos v. Dona Ana County Hous. Auth., 908 P.2d 250, 225 (N.M. Ct. App. 1995) ("[T]he intent of the clause is clear, and our duty is to enforce the contract as written."), *rev'd on other grounds*, 970 P.2d 1143 (N.M. 1998).

228. *See* Eisenberg, *supra* note 226, at 1407. The *Restatement (Second) of Contracts* addresses third-party beneficiary law in the context of government contracts. It provides that:

> (2) a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the

vate water utility failed to supply water to a hydrant, and a private property owner's building was subsequently destroyed by fire, the court concluded that the property owner was a mere incidental, rather than intended, beneficiary.[229] Judge Cardozo stated that "[a] promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward."[230]

By contrast, where the beneficiaries constitute a more discrete and identifiable class, they have greater success in enforcing public contracts. For example, in *Fuzie v. Manor Care, Inc.*, a nursing home resident was deemed, under the Medicaid rules, a third-party beneficiary of a contract between the nursing home and the State of Ohio.[231] The plaintiff alleged that the nursing home intended to transfer or discharge her for nonmedical reasons, in violation of the Medicaid regulations.[232] The Court concluded that the contract incorporated federal regulations and that the plaintiff was a member of the class intended to be benefited by the statutory scheme.[233] Cases such as *Fuzie* are "an excellent example of the way in which plaintiffs can use the third party beneficiary rule to secure the private benefits of a public program."[234]

Yet, at bottom, there are two profound limits on the usefulness of third-party beneficiary theory to protect the rights of social service beneficiaries. First, the contracting parties can expressly

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terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981).

In accord with the *Restatement*, some courts look not only at intent to benefit, but also for an intent to grant standing to enforce the benefit. *See* Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 879 (1985). Other courts reject the latter requirement. *See, e.g.*, Holbrook v. Pitt, 643 F.2d 1261, 1270 n.17 (7th Cir. 1981). Adelson makes the point that intent should be divined not only from the underlying statute, but also from the intent of the agency entering into the contract. Adelson, *supra*, at 891-92.

229. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928).

230. *Id.* at 897-98. This seminal case is used as an illustration to section 313 of the *Restatement (Second) of Contracts*.

231. 461 F. Supp. 689, 697-98 (N.D. Ohio 1977).

232. *Id.* at 692.

233. *Id.* at 697-98.

234. Waters, *supra* note 226, at 1187. The third-party beneficiary theory has also had some success in the context of public housing programs, which generally involve a contract between the federal Department of Housing and Urban Development ("HUD") and either a local government or private landlord. *See, e.g.*, Holbrook v. Pitt, 643 F.2d 1261, 1269-76 (7th Cir. 1981) (holding that section 8 tenants were third-party beneficiaries of contracts executed between HUD and private landlords); Hurt v. Phila. Hous. Auth., 806 F. Supp. 515, 527 (E.D. Pa. 1992) (same); Henry Horner Mothers Guild v. Chi. Hous. Auth., 780 F. Supp. 511, 515-16 (N.D. Ill. 1991) (same); Ayala v. Boston Hous. Auth., 536 N.E.2d 1082, 1088-90 (Mass. 1989) (holding that tenants were third-party beneficiaries and could recover damages flowing from housing authority's breach of obligations under contract to inspect for lead paint hazards).

disclaim any third-party enforcement rights and thereby eliminate this method of enforcement. Governments have some inherent interest in allowing for third-party enforcement of contracts because it provides a "free" method of monitoring contract performance. Yet at the same time, both the government and the private contractors have strong financial incentives to limit the scope of their liability. Given that the program beneficiaries are not at the negotiating table, they have no input into how these competing incentives play out. This raises the second shortcoming of the third-party beneficiary theory. Without a role in contract negotiations, beneficiaries have no say in the terms of the contract and thus may be left with boilerplate contracts that provide them with no meaningful contract rights even to consider enforcing. In addition, local governments have little experience in performance contracting and rarely draft contracts with detailed specifications and objectives that would ensure accountability from private contractors.[235] Without meaningful, substantive terms to enforce, being a third-party beneficiary is a hollow victory indeed.

2. The Procurement Process and the Absence of Beneficiaries

As noted above, program beneficiaries have little voice in the government procurement process. The contracting process is lengthy, highly regulated, and includes the following phases: assessing needs; soliciting bids through a request for proposals; evaluating bids; negotiating with bidders; awarding, drafting, and signing a contract; and monitoring the contract.[236] This process does not include program beneficiaries and rarely provides for public input.[237] Rather, the procurement regime focuses on the rights of bidders and is aimed at ensuring a competitive, efficient, and ethical

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235. *See infra* notes 253-59 and accompanying text.

236. *See* JOHN A. O'LOONEY, OUTSOURCING STATE AND LOCAL GOVERNMENT SERVICES: DECISION-MAKING STRATEGIES AND MANAGEMENT METHODS 14 (1998).

237. Although the *Model Procurement Code for Local and State Governments* provides that procurement information shall he subject to a state's freedom of information act or similar open records law, MODEL PROCUREMENT CODE FOR LOCAL AND STATE GOVERNMENTS § 1-401 (2000) [hereinafter MODEL PROCUREMENT CODE], it also provides that certain types of information solicited in the bidding process shall remain confidential. *See, e.g., id.* § 3-401. Similarly, although the government must provide public notice of solicitations for bids and proposals, *id.*. §§ 3-202(3), 3- 203(3), the purpose of these requirements is "to permit potential bidders to prepare and submit their bids in a timely manner," *id.* § 3-202(3) cmt., and not for public input into the terms of the solicitation or who should be awarded the solicitation.

selection process.[238] For example, the 2000 *Model Procurement Code for State and Local Governments* provides that bid awards can be administratively challenged by "any actual or prospective bidder, offeror, or contractor who is aggrieved," but makes no provision for aggrieved program beneficiaries.[239] Procurement law, which grew out of the fairly straightforward procurement of goods, is simply not a satisfactory model for the procurement of human services. In the human services arena, more stakeholders exist, and the stakes for these constituents are higher—often involving basic human necessities such as shelter, clothing, food, and medical care.

3. Challenges to Defining, Monitoring, and Measuring Performance

The final challenge to using contracts to improve accountability is the complex nature of social service delivery. In the social services field, interactions between providers and beneficiaries are intensely interpersonal. For instance, in the area of welfare, government workers previously needed only to assess objective eligibility criteria and then issue checks. However, welfare providers are now charged with putting people to work, and thus they engage in a variety of counseling tasks.[240] These client assessments, "because

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238. *See id.* § 1-101 (stating that the purposes of the Code are, inter alia, "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [state] . . . ; to foster effective broad-based competition within the free enterprise system . . . ; and to provide safeguards for the maintenance of a procurement system of quality and integrity"); Joseph A. Cosentino, Jr., *New York City's Procurement System: Reversing the Cycle of Corruption and Reactionary Reform*, 42 N.Y.L. SCH. L. REV. 1183, 1183 (1998) (stating that the goals of government contracting are "efficiency, prevention of corruption, and fairness to the providers of goods and services").

239. MODEL PROCUREMENT CODE, *supra* note 237, § 9-101(1). The commentary provides that state law governs the availability of taxpayer suits. Taxpayer suits can provide a basis for citizens to challenge wrongful acts committed by local governments in the contracting process. *See* Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 PUB. CONT. L.J. 265, 291-93 (1996). However, taxpayers generally lack standing where the government has wide discretion in awarding contracts. *Id.* at 292. Moreover, some jurisdictions require proof of actual pecuniary loss to the taxpayer through increased taxation before finding taxpayer standing. *Id.* Because taxpayer suits are aimed at challenging the award of a contract to a particular bidder, such suits are of limited utility to social service beneficiaries challenging the quality of services received. For a discussion of third-party standing to challenge government contracts at the federal level, see Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 905-08 (2000).

240. These include educating applicants about the TANF program; assessing their work histories and attempts to obtain employment; reviewing their eligibility for entitlement benefits such as SSI, Medicaid, and Food Stamps; determining their eligibility for cash grants, loans, or other services to divert them from the TANF program; assisting them in securing child support from noncustodial parents; helping them with job searches; assessing their child care and trans-

they involve direct contact with clients, . . . are at least partially unpredictable, largely unobservable and difficult to evaluate."[241] In a contracting scheme based on such complex interactions, it is hard to define the tasks involved in advance and it is equally difficult to measure performance afterwards. Yet definition and measurement are exactly what are needed to obtain quality services.

Recognizing this, management professionals are urging governments to use performance contracting when privatizing social services.[242] Previously, social service contracts emphasized inputs; that is, governments evaluated performance by the procedures used, wages to be paid, or the amount or type of equipment or time and labor used.[243] By contrast, performance-based contracting focuses on results.[244] For instance, in the welfare context, perform-

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portation needs, as well as domestic violence problems or alcohol or drug abuse; drafting individualized plans to attain economic self-sufficiency; and assisting them in locating job training, GED, ESOL, and other skill building activities. RICHARD P. NATHAN & THOMAS L. GAIS, IMPLEMENTING THE PERSONAL RESPONSIBILITY ACT OF 1996: A FIRST LOOK 21 (1999).

241. Marcia K. Meyers, *Gaining Cooperation at the Front Lines of Service Delivery: Issues for the Implementation of Welfare Reform*, ROCKEFELLER REP. (Nelson A. Rockefeller Inst. of Gov't), June 12, 1998, at 4, *at* http://www.rockinst.org/publications/rockefeller_reports/rro7.html.

242. ELISA VINSON, GOVERNING-FOR-RESULTS AND ACCOUNTABILITY: PERFORMANCE CONTRACTING IN SIX STATE HUMAN SERVICES AGENCIES 1 (1999) ("Performance contracting, long used in such government services as highway maintenance and solid waste management, is becoming increasingly attractive to state human services agencies. Often frustrated by declining performance, rising costs, or both, they want to pay for results, not activities.").

There is a similar movement afoot to improve federal and state government accountability through performance management. *See, e.g.*, CALIFORNIA FRANCHISE TAX BOARD, PERFORMANCE BASED PROCUREMENT: ANOTHER MODEL FOR CALIFORNIA 1 (1998) (describing how the California Franchise Tax Board adopted an alternative procurement approach for technology expenditures); BARBARA DYER, THE OREGON OPTION: EARLY LESSONS FROM A PERFORMANCE PARTNERSHIP ON BUILDING RESULTS-DRIVEN ACCOUNTABILITY (1996) (describing a results-driven partnership between multiple levels of government and multiple entities within each level of government), *available at* http://aspe.os.dhhs.gov/progsys/oregon/lessons.htm; BLAINE LINER & ELISA VINSON, GOVERNING-FOR-RESULTS AND ACCOUNTABILITY: WILL STATES MEET THE CHALLENGE? 1 (1999) ("A major effort has been under way since 1993 to initiate reporting on the results of all major federal programs in response to the Government Performance and Results Act (GPRA) of 1993."); OUTCOME MEASUREMENT IN THE HUMAN SERVICES (Edward J. Mullen & Jenifer L. Magnabosco eds., 1997) (collecting essays); JESSICA YATES, PERFORMANCE MANAGEMENT IN HUMAN SERVICES (1997) (describing different state initiatives in performance management in human services).

243. *See* Moore & Hudson, *supra* note 56, at 21.

244. Outcome measurement is one aspect of overall performance measurement under which a provider measures "the benefits or results it has for its customers, clients, or participants." Margaret C. Plantz et al., *Outcome Measurement: Showing Results in the Nonprofit Sector, in* USING PERFORMANCE MEASUREMENT TO IMPROVE PUBLIC AND NONPROFIT PROGRAMS 15, 17 (Kathryn E. Newcomer ed., 1997). The authors state that "outputs are about the *program*, whereas outcomes are about the *participants*." *Id.*

> Welfare and related programs often have relied on measures of input (e.g., number of caseworkers), output (e.g., number of individuals completing job readiness classes or error rates in determining eligibility) and efficiency (e.g., program dollars spent per $1 child support collected). However, outcome meas-

ance contracting might result in the provider getting paid for putting someone in a job for a certain time period, but not for the time spent by the provider in training, counseling, and job searching.[245] In essence, performance contracting aims to measure how well the contractor is achieving program goals and the extent to which the program is alleviating the social problem at issue.[246] Importantly, a quantifiable assessment of outcomes helps to promote meaningful competition among contract bidders, which, in turn, spurs accountability.[247]

In addition to assessing efficiency and effectiveness, another important aspect of performance-based contracting is measuring the quality of the service delivery from the beneficiary's perspective. To some degree, "quality—like beauty—lies in the eye of the beholder."[248] However, a major study of service quality indicators concluded that the two most important dimensions of quality from the customers' point of view are reliability and responsiveness.[249] In the social service context, reliability means "providing services in a consistent fashion; always being friendly, polite, and considerate . . . [;] always attempting to understand client needs[; and] always speaking with clients in understandable language."[250] Responsiveness means providing services in a timely manner.[251] Ensuring quality delivery not only benefits clients, but also has been shown to improve productivity. That is, it results in fewer errors, less paperwork, lower processing times, happier funding sources, lower costs, and a better public image.[252]

Performance contracting, however, is easier said than done. The greatest difficulty arises in defining the hoped-for outcomes, especially when the stakeholders have varying goals. "Performance-based contracting only works when based on relevant and quantifiable performance measures; therefore, a first step is evaluating the

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ures (e.g., percentage of welfare caseload staying in jobs for six months) usually have a more direct relationship to the established performance goals.

YATES, *supra* note 242, at 2.

245. Moore & Hudson, *supra* note 56, at 22.

246. *See* YATES, *supra* note 242, at 2-3; *see also* MARTIN & KETTNER, *supra* note 7, at 3 ("Performance measurement combines three major accountability perspectives into one: 1. the efficiency perspective, 2. the quality perspective, and 3. the effectiveness perspective.").

247. *See* JOHN D. DONAHUE, THE PRIVATIZATION DECISION 79-98 (1989).

248. MARTIN & KETTNER, *supra* note 7, at 42.

249. *Id.* at 43. Other quality factors include accessibility, assurance, communication, competency, conformity, courtesy, durability, empathy, humaneness, performance, security, and tangibles. *Id.* at 42.

250. *Id.* at 43-44.

251. *Id.*

252. *Id.* at 6.

objectives of a given service and figuring out how to assess success and failure. Most cities are at best still reaching that first step."[253] Not surprisingly, government managers have bemoaned the complexity of this process.[254]

Yet another difficulty is that the staffs that formerly provided direct services usually lack the expertise to manage complex social service contracts, which require "understanding competitive markets, knowing how to value assets, making cost comparisons, managing a competitive bid, and managing contracts in place—[and] this list only scratches the surface."[255] In fact, a detailed study of how over 100 local government managers were conducting social service contracting found that performance-based contracting principles were having little effect on actual contracting practices.[256]

> Most of the contract managers we interviewed appeared to manage the outsourcing process in a "fly by the seat of your pants" manner rather in a manner that suggested a scientific or systematic approach to the outsourcing process. Often we were told that this was the way the contract and outsourcing process had always been handled, and in many cases the respondents described a "one approach fits all contracts" method of outsourcing for services.[257]

As a result, the study concluded that "most contract management shops are being operated on the basis of tradition and a sort of folk wisdom."[258] The irony of privatization is that it relies on the very entities deemed unfit to deliver social services to undertake the complex mission of performance contracting.[259]

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253. Moore & Hudson, *supra* note 56, at 22; *see also* O'LOONEY, *supra* note 236, at 220 ("The same things that make human-services delivery complex and difficult te measure, monitor, and assess will also make it difficult to link dollars to the individual contribution that a specific provider makes to the health and well-being of his or her clients.").

254. GOV'T ACCOUNTING OFFICE, SOCIAL SERVICE PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS 14 (1997). For an enlightening description of the challenges faced by the New York Department of Homeless Services in shifting to outcomes-based assessments, see Gordon J. Campbell & Elizabeth McCarthy, *Conveying Mission Through Outcome Measurement: Services to the Homeless in New York City*, 28 POL. STUD. J. 338 (2000).

255. Moore & Hudson, *supra* note 56, at 29; *see also* O'LOONEY, *supra* note 236, at 7; Jessica Yates, *Managing the Contracting Process for Results in Welfare Reform*, WELFARE INFO. NETWORK ISSUE NOTES (Welfare Info. Network, Washington, D.C.), Nov. 1998, *at* http://www.welfareinfo.org/contractissue.htm ("Good contract management involves significant skills in program design, program planning, communications and evaluation. Federal, state and local policies also set an important stage for contracting, especially the degree to which funds are set aside for data collection, monitoring, technical assistance and evaluation.").

256. O'LOONEY, *supra* note 236, at 3-4.

257. *Id.* at 4.

258. *Id.* Governments need to focus on payment strategies that minimize the risks of creaming and churning. *See id.* at 73-90 (describing a multitude of payment strategies and their effects); *infra* note 295 (defining terms "creaming" and "churning").

259. O'LOONEY, *supra* note 236, at 31.

Like government agencies, nonprofit organizations also lack experience using outcome measurement techniques. A study of nonprofits found that "few organizations have been exposed to a significant amount of training in implementing outcome measurement, analyzing it, and then using the resulting information."[260] Thus, the study concludes that "[m]uch more in the way of training and technical assistance is needed."[261] Religious organizations in particular "have paid little attention to documenting activities."[262] Accordingly, both governments and their social service contracting partners will need to vastly improve their sophistication in defining and monitoring contracts before contract law can begin to provide accountability in a privatization regime.

4. The Vouchers Alternative

Vouchers are one option that have been touted as a solution to the problems of defining and monitoring contracts, as well as a means for increasing program quality.[263] Vouchers are expressly approved as a charitable choice option. Under a vouchers program, beneficiaries are given a voucher for certain services that they can redeem at the provider of their choice. This is how food stamps, Medicaid benefits, and certain public housing programs operate.[264]

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260. ELAINE MORLEY ET AL., OUTCOME MEASUREMENT IN NONPROFIT ORGANIZATIONS: CURRENT PRACTICES AND RECOMMENDATIONS 10 (2001). Nonprofits have traditionally focused on administrative factors rather than outcomes.

> Outcome measurement is new to most private nonprofit organizations. Nonprofit organizations are more often familiar with monitoring and reporting such information as the number of clients served, the quantity of services, programs, or activities provided, the number of volunteers or volunteer hours contributed, and the amount of donations received. These are important data, but they do not help nonprofit managers or constituents understand *how well they are helping their clients*; that is, such statistics provide administrative information about programs, but not about the program's results.

Id. at 5.

261. *Id.* at 10.

262. Griener, *supra* note 20, at 5; *see also* INDEPENDENT SECTOR, AMERICA'S RELIGIOUS CONGREGATIONS: MEASURING THEIR CONTRIBUTIONS TO SOCIETY 9 (2000) (noting that religious organizations collect data less frequently than other nonprofits, perhaps because stakeholders are less likely to ask congregations about accomplishments); Caryle Murphy, *A Matter of Faith and Funds for Serving Area's Needy; Restrictions Divide Religion-Based Programs*, WASH. POST, Mar. 18, 2001, at A1 (describing faith-based programs in which the groups acknowledge that they "have no formal system of tracking those who have completed their missions' programs, . . . and can offer only anecdotal evidence about the programs' effectiveness").

263. Vouchers are also seen as a way to avoid First Amendment entanglement problems. *See infra* Part IV.C.

264. *See* Paul Posner et al., *A Survey of Voucher Use: Variations and Common Elements*, *in* VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 503, 522-39 (C. Eugene Steuerle et al. eds., 2000) (listing voucher programs at federal, state, and local levels); Susan Rose-Ackerman, *Social*

Vouchers apply a market-based approach to social services, which posits that underperforming providers will be pushed out of the market by competitive forces.[265] Whether the market metaphor works in this context is not clear, however, because the beneficiaries are not necessarily in a position to gain necessary information about available services or to evaluate services rendered. As Martha Minow explains:

> The sheer fact that the arena involves subsistence (as well as day care, substance abuse treatment, and other services crucial to daily survival) renders questionable the assertion that recipients are freely and autonomously choosing. Autonomous choice is in jeopardy when the individual has no money, food, or housing and is offered these necessities on conditions that she might quickly refuse under other circumstances.[266]

Moreover, a voucher-based system presumes a competitive market of providers. While food stamp recipients obviously have a bevy of food providers from which to choose, social services agencies are not nearly as numerous.[267] In certain jurisdictions, there may be only one provider, making the notion of choice meaningless. The voucher system, with its veneer of "choice," also poses the risk that governments will fail to monitor service delivery, on the theory that the beneficiaries are doing the job for them.

In reality, voucher programs can never be purely market based and inevitably require extensive regulation to ensure quality control.[268] Thus, to the degree vouchers can play a role in improving

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Services and the Market, 83 COLUM. L. REV. 1405, 1407-09 (1983); C. Eugene Steuerle, *Common Issues for Voucher Programs*, *in* VOUCHERS AND THE PROVISION OF PUBLIC SERVICES, *supra*, at 3, 3-4.

265. Rose-Ackerman, *supra* note 264, at 1407.

266. Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 535 (1999); *see also* Burt S. Barnow, *Vouchers for Federal Targeted Training Programs*, *in* VOUCHERS AND THE PROVISION OF PUBLIC SERVICES, *supra* note 264, at 224, 244 (noting that "participants in training programs may lack appropriate information about their own skills and aptitudes as well as the characteristics of training vendors"); Steuerle, *supra* note 264, at 19-20 (describing the issues raised by voucher recipients' capability to choose benefits).

267. JOEL F. HANDLER, DOWN FROM BUREAUCRACY 55 (1996) ("The theory assumes that there is competition among suppliers or vendors and that clients, or voucher holders, are informed, autonomous purchasers. In practice, such conditions rarely exist . . . .").

268. *See* Rose-Ackerman, *supra* note 264, at 1409 (noting that vouchers "impose direct regulations that reflect policymakers' concerns about both suppliers' monopoly power and beneficiaries' limited information and scarce 'shopping time' "); Steuerle, *supra* note 264, at 21, 31 ("Some standards and regulation are inevitable. At a minimum, the government will try to ensure that the voucher is spent on the goods and services prescribed and not on those proscribed, and that only 'eligible' individuals receive the vouchers.").

accountability, it will have to be through oversight regulations,[269] such as those proposed in this Article. A pure voucher system is not only unrealistic, but it gives the veneer of accountability where none exists.[270]

III. PROPOSALS FOR INCREASING ACCOUNTABILITY OF SOCIAL SERVICE PROVIDERS

Currently, the federal welfare law says very little about the accountability of private entities. Section 104 of the PRA provides that religious organizations contracting to provide welfare assistance are subject to the same regulations as other contractors "to account in accord with generally accepted auditing principles for the use of such funds."[271] Yet a religious organization can segregate its federal and nonfederal funds and thereby limit any audit to the federal funds, even when both funding streams contribute to the same activity.[272] Also, the Act provides an enforcement mechanism for any party seeking to enforce its rights under section 104; namely, the various provisions concerning nondiscrimination against religious groups and beneficiaries.[273] Thus, the notion of accountability embodied in the charitable choice provision is limited to fiscal matters and enforcing the statutory balance between competing First Amendment concerns. Nowhere does the PRA focus on ensuring that public dollars result in quality services, perhaps assuming that the market will impose quality results either through contracting or vouchers. As discussed above, however, neither contracts nor vouchers alone can currently guarantee quality.

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269. Stephen Macedo argues that conditions that attach to vouchers should reflect public purposes:

> [I]nsofar as those private agencies voluntarily accept a share of public monies, we should hope that public policy tilts in favor of such public values as fairness among all citizens, equal access, and openness to outsiders. . . . If religious believers sometimes feel they are being asked to "tone down" their religiosity, that will often be the price of agreeing to serve as a provider of public services.

Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 448 (2000).

270. Studies of voucher-oriented job training programs show little effectiveness. Barnow, *supra* note 266, at 244-46. The author reviewing these studies concludes that any job training voucher program "should include assessment and counseling to determine what training is appropriate for the participants and screening of vendors for quality of training and appropriate placement rates." *Id.* at 245.

271. Pub. L. No. 104-193, § 104(h)(1), 110 Stat. 2105, 2163 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997)).

272. *Id.* § 104(h)(2).

273. *Id.* § 104(c), (g).

The PRA makes a nod towards procedural fairness. States must "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment."[274] Presumably, private entities that contract with the state would have to abide by these objective criteria and fairness requirements. Yet there is no formal mechanism in the statute for enforcing these procedural due process norms.[275]

In addition, the Act requires various forms of data collection and reporting,[276] and the Department of Health and Human Services ("HHS") has issued detailed regulations governing how TANF funds are to be spent.[277] However, the statute and the regulations are focused on ensuring that federal funds are spent in line with federal goals (to make sure that no one receives benefits for more than five years, to ensure that adults are participating in work activities, and so forth).[278] The regulations have little bearing on accountability to the beneficiaries themselves.[279]

The lack of specific accountability mechanisms at the federal level is largely the result of Congress's desire to give the states and their localities flexibility to develop their own welfare programs and to devolve discretion downward. However, the state and municipal governments have generated very little formal statutory or regulatory guidance with regard to accountability of private contractors. Thus, presumably any accountability mechanisms are being established through the contracting process.[280] Yet state and local governments are, by and large, neither prepared nor skilled in contracting for performance.[281] An in-depth study of welfare contract-

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274. *Id.* § 402(a)(1)(B)(iii), 110 Stat. at 2114 (codified at 42 U.S.C. § 602(a)(1)(B)(iii) (Supp. III 1997)).

275. *See generally* Gilman, *supra* note 19 (detailing the lack of enforcement mechanisms to ensure that procedural due process norms are met).

276. Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2148 (1996) (codified at 42 U.S.C. § 611 (Supp. III 1997)).

277. *See* 64 Fed. Reg. 17,885 (Apr. 12, 1999).

278. *Id.* ("How will we hold a State accountable for acbieving the work objectives of TANF?"); 64 Fed. Reg. 17,890-91 (Apr. 12, 1999) (indicating that states will be penalized for failing to complete timely reports, failing to get the required number of adults into work activities, failing to penalize noncooperative recipients, and failing to comply with the five-year limit on federal assistance). *See generally* 64 Fed. Reg. 17,719, 17,857-878, 17,890-914 (Apr. 12, 1999) (setting forth regulations governing accountability of TANF funds).

279. The HHS has stated that states that improperly sanction welfare recipients may themselves be sanctioned. 64 Fed. Reg. 17,793-94 (Apr. 12, 1999).

280. One study found that detailed charitable choice guidelines have been codified into formal contracts only in Texas, Arizona, Indiana, and Wisconsin. *See* Griener, *supra* note 20, at 3-4.

281. Barbara Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1603 (2001) ("Formal contract management is largely absent in local government procurement, and

ing in the City of Baltimore found that the contracts contained "no meaningful benchmarks, outcomes, or control mechanisms" and that the city government was not evaluating "the vendor services for which it spends public funds and recipients' time-limited welfare support."[282]

As a result, in Baltimore and elsewhere, private entities are operating with very few constraints on their discretion. Moreover, devolution, by its very nature, makes it hard to assess the impact of federal policies because it creates a multitude of government funders and an even greater number of service deliverers.[283] Thus, the current statutory regime does little to protect beneficiaries. Of even greater concern is President Bush's goal of easing the regulatory burdens for faith-based providers alone. Not only does this raise First Amendment issues because of the preferential treatment it would accord to religious providers, but it also means that churches could be providing services in an accountability vacuum.

A. The Value of Citizen Participation

By contrast, a model for accountability in social service privatization should focus on quality service delivery at three progressive levels: preventing abuses; monitoring for quality; and enforcing quality standards. Beneficiaries should play a key role throughout this process as they have unique insights and information about "the needs, opportunities, priorities, and special dynamics at work" in their communities that are essential to designing a productive program.[284] As one far-reaching study of social service privatization

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few people responsible are procurement professionals or bave any formal training in contract management."); *see also supra* notes 253-62 and accompanying text.

282. Bezdek, *supra* note 281, at 1603. She writes that for "$60 million, Baltimore got 2000 jobs for more than 10,000 [welfare] families." *Id.* at 1602.

283. *See* Mark Greenberg, *Welfare Reform and Devolution: Looking Back and Forward*, BROOKINGS REV., Summer 2001, at 20. Greenberg concludes that when the federal law is up for reauthorization in 2002, legislators should improve accountability by generating better information about what states are doing, how funds are being spent, and how beneficiaries are heing impacted. *Id.* at 24.

284. ROBERT J. CHASKIN, THE FORD FOUNDATION'S NEIGHBORHOOD AND FAMILY INITIATIVE: TOWARD A MODEL OF COMPREHENSIVE, NEIGHBORHOOD-BASED DEVELOPMENT 16 (1992) (noting that "residents' knowledge may provide important insight into *how* the provision of services should be carried out, or *where* a certain facility should be placed"); *see also* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 540 (1970) (arguing that the interested public should participate in the rulemaking process). In addition, public participation can ensure that an agency is "prepared for certain problems that could arise from those rules' application, or the community's reaction to tbem." *Id.* at 541.

found, " 'Where there is a willingness on the part of contracting partners to involve a broad range of stakeholders in decisionmaking, there is greater overall satisfaction with service delivery, the public policy making process and the contracting relationship.' "[285] Moreover, empowering beneficiaries to take control over matters directly affecting them can not only lead to more efficient service delivery, but is also a worthy goal in itself[286]—and one heavily promoted by privatization proponents on both the left and right of the political spectrum.[287] Empowerment results not only when people are given a means to influence policies that affect them, but also when they gain valuable skills through the participatory process.[288] Finally, encouraging public participation fits within our democratic norms, under which the government derives its authority directly from the people.[289]

In federal law, public participation has been recognized as an integral aspect of decisionmaking in the areas of environmental law, public housing, and otber programs that disproportionately affect poor people. *See, e.g.*, MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY 5-7 (1981); Marcus E. Ethridge, *Procedures for Citizen Involvement in Environmental Policy: An Assessment of Policy Effects, in* CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING 115 (Jack DeSario & Stuart Langton eds., 1987); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation*, 66 BROOK. L. REV. 861 (2000-2001); *Resident Advisory Board and Public Participation in the PHA Plan Adoption Process*, 30 HOUSING L. BULL. 173 (National Housing Law Center, Nov.-Dec. 2000) (describing public participation requirements in public housing programs). These norms have generally not been included in welfare delivery, likely because prior to the PRA, governments basically handed out checks and were not charged with changing behavior.

285. Yates, *supra* note 255, at 6 (quoting JENICE L. VIEW, A MEANS TO AN END: THE ROLE OF NONPROFIT/GOVERNMENT CONTRACTING IN SUSTAINING THE SOCIAL CONTRACT (1995)). Likewise, experts in performance contracting urge that clients be a part of selecting performance measures. *See* MARTIN & KETTNER, *supra* note 7, at 102.

286. Empowerment "involves a sense of perceived control, of competence, a critical awareness of one's environment, and involvement in activities that, in fact, exert control." HANDLER, *supra* note 267, at 122.

287. *Id.* at 5. Handler states:

> Initially, citizen empowerment was tbe program of the traditional or liberal Left, but that is no longer true. For a long time, conservatives have talked of empowering "mediating institutions" and of market-based incentives as a way of achieving citizen autonomy and bureaucratic accountability. . . . Citizen or community empowerment is also urged by minorities who champion the preservation of cultural diversity, by activists and academics who celebrate the victories of the subordinate against systems of social control, and by a wide range of "new" social-movement or post-modern groups under the broad labels of feminism, environmentalism, and peace.

Id.

288. *See, e.g.*, CHASKIN, *supra* note 284, at 13, 17.

289. *See* Bonfield, *supra* note 284, at 541; Spyke, *supra* note 101, at 267. For a thorough discussion and critique of the theories supporting citizen participation initiatives, see McFarlane, *supra* note 284, at 892-929.

Participation is particularly essential where administrative agencies are making the decisions, as they are not subject to majoritarian political processes. Thus, public participation is itself an accountability tool.[290] To be sure, public participation can be costly, not only in monetary terms, but also in terms of time, efficiency, and, sometimes, the quality of the deliberations.[291] However, in the context of social service contracting, the costs of nonparticipation are severe—keeping beneficiaries away from the table can result in ineffective programs that squander public funds. Nonparticipation also eliminates opportunities for empowering the targeted populations, one of the goals of social service delivery. Although the populations at issue are particularly vulnerable, they can provide valuable insights as long as they are provided with information and resources to enable their participation in the service delivery process. Thus, state and local governments will need to find a balance between increasing citizen participation and the competing concerns of cost and efficiency. Certainly, cutting back on accountability mechanisms is not the answer.

When discussing the value of citizen participation, the question inevitably arises as to how much ultimate control the citizens should have and what role they should play.[292] Citizen participation

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290. Public participation is most effective where: (1) all affected persons are included, (2) procedures are open and include educational tools "to make the information usable by unsophisticated participants," (3) procedures are fair, and (4) procedures result in public involvement in the decision. *See* John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 952-53 (1998); *see also* Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317 (1998) (listing barriers to participation and some ways to overcome them).

291. As to the costs of mass participation, see Bonfield, *supra* note 284, at 543 ("There is an obvious need to conduct our government efficiently, expeditiously, effectively, and inexpensively. No rulemaking scheme may be considered acceptable unless it fairly reconciles these latter values with the societal interest in maximizing public participation in the development of administrative regulations."); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (exploring the costs of public participation).

292. The complexities of this issue are well illustrated in ROBERT HALPERN, REBUILDING THE INNER CITY 167-94 (1995). Halpern discusses community involvement in neighborhood-based social services during the 1960s. During this era, participatory norms "meant involvement of community residents in program-level policy setting, as volunteers and as paid staff." *Id.* at 176-77. Conflicts arose as to whether clients should rely on outside guidance or whether they could actually run programs themselves. *Id.* at 181-83. Halpern concludes that

> [n]eighborhood-based services in poor neighborhoods have helped both to sustain and inadvertently to maintain those neighborhoods. . . . The notion of rebuilding a sense of community through networks of neighborhood-based services can only be taken so far when the majority of poor children and families are geographically and socially isolated from the rest of society.

Id. at 194.

can mean anything from belonging to a rubber stamp advisory committee to having voting power on policymaking boards to outright citizen control—and all the gradations of power sharing along this spectrum.[293] After all, simply giving people a forum to express their views does not mean that those views will be taken into account. To the contrary, such a strategy can be used as a political tool to give the appearance of participation, when in fact, there is none. In the context of privatization, as discussed below, representatives from the class of beneficiaries at issue should be given voting power on government bodies throughout the procurement process (even in deciding whether privatization should be used in the first place) and during its monitoring phases. Voting power ensures that beneficiaries have a meaningful voice in shaping the services that affect them.

Given the range of social services that are provided under contract with private entities, it is beyond the scope of this Article to specify detailed regulatory or contract terms that should govern the relationships between and among the various stakeholders. However, the general principles set forth here have widespread applicability and are derived from performance management literature, studies of community participation, and reports of "best practices" in the area of privatized social services.

B. Preventing Abuses

From the outset, a government can take several steps to ensure that the social services for which it contracts are delivered fairly, efficiently, and effectively. Governments need to use the techniques of performance contracting and measurement, about which there is substantial literature, knowledge, and training opportunities.[294] A government agency considering privatization should bring the various stakeholders together to define precise programmatic goals, transmit those goals clearly to contractors, and then devise a strategy for measuring whether contractor performance meets those goals. Beneficiary participation is especially important in performance contracting. The downside of an emphasis on results is that it can push providers to serve the easiest popu-

293. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. OF PLANNERS 216, 216-24 (1969).

294. *See generally* MARTIN & KETTNER, *supra* note 7; O'LOONEY, *supra* note 236; SMITH & LIPSKY, *supra* note 106; USING PERFORMANCE MEASUREMENT TO IMPROVE PUBLIC AND NONPROFIT PROGRAMS, *supra* note 244.

lations first and/or to discourage hard-to-serve individuals from pursuing assistance.[295] It can also affect how results are defined. For instance, the definition of "work" satisfying welfare reform requirements could be anything from a minimum wage, menial job to a job with training and opportunities for advancement. For these reasons, it is important to involve all stakeholders, including beneficiaries (or their surrogates in the case of certain populations) in the process of defining goals and desired outcomes.

Despite the proven effectiveness of performance contracting, it is playing little role in most social service contracting schemes, in part because of government inexperience.[296] This means that governments are going to have to make substantial investments in incorporating these methods into their procurement systems. At a minimum, they will have to train staffs, purchase appropriate information technologies, and maintain ongoing efforts to keep up with developments and strategies in this burgeoning field.[297] Moreover, governments may need to include funds for contractors to engage in outcome measurement.[298] All of this costs money. However, there are significant long-term costs to the lawsuits, failed contracts, and misspent funds that would otherwise occur. Accordingly, federal and state legislatures should consider making some charitable choice funds available for training in performance contracting.

At each stage, the procurement process should involve the program beneficiaries. They can play valuable roles in discussing

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295. These incentives are often called "creaming" (serving only the best clients) and "churning" (discouraging harder-to-assist populations). *See* DIANE PAULSELL & ROBERT G. WOOD, THE COMMUNITY SOLUTIONS INITIATIVE: EARLY IMPLEMENTATION EXPERIENCES (1999) (finding that contractors providing employment services to welfare recipients were implementing selective admissions policies), *available at* http://www.mathematica-mpr.com/PDFs/community.pdf; Yates, *supra* note 255, at 2 ("[C]ritics suggest that [performance contracting] encourages contractors to focus their resources on the easier-to-serve clients and spend less time with harder-to-serve ones.").

296. *See supra* notes 253-55 and accompanying text.

297. *See* Cheryle A. Broom & Marilyn Jackson, *Performance Measurement Training*, *in* USING PERFORMANCE MEASUREMENT TO IMPROVE PUBLIC AND NONPROFIT PROGRAMS, *supra* note 244, at 79 (describing training challenges and proposing an approach); Kathryn Newcomer, *Using Performance Measurement to Improve Programs*, *in* USING PERFORMANCE MEASUREMENT TO IMPROVE PUBLIC AND NONPROFIT PROGRAMS, *supra* note 244, at 5, 10 ("Abundant political support and resources are essential to ensure that performance measurement systems are designed with adequate input from key stakeholders and with technical expertise to ensure useful systems. Consultation with stakeholders in oversight bodies, service beneficiaries, and internal staff takes time and resource support.").

298. *See* MORLEY ET AL., *supra* note 260, at 10; *see also* Harry P. Hatry, *Where the Rubber Meets the Road: Performance Measurement for State and Local Public Agencies*, *in* USING PERFORMANCE MEASUREMENT TO IMPROVE PUBLIC AND NONPROFIT PROGRAMS, *supra* note 297, at 31, 37 ("Many local private nonprofit programs are quite small and without personnel experienced in quantitative technique and program evaluation.").

whether to contract out a particular service, identifying the scope of services needed, assisting in evaluating bids, suggesting points for negotiation, and selecting final bids. However, it is not enough for agencies to make opportunities for participation available. Rather, especially where disenfranchised populations are involved, agencies need to take affirmative steps to identify and include affected persons, or their surrogates, in the case of children, mentally disabled persons, and other persons who lack the ability to participate meaningfully.[299] Such steps should include outreach efforts to local community and neighborhood leaders, scheduling meetings at times when working people can attend, holding meetings in the affected communities, and the like.[300] It is also essential to involve the public at the start of a proposed program, rather than asking for comment on an already finalized agency proposal—by that time, an agency has an overriding interest, driven both by efficiency concerns and self-interest, to push that specific proposal through.[301]

C. Monitoring for Quality

Once a contract has been awarded, the procurement agency must monitor its implementation to ensure its integrity with contract terms, and, in the area of charitable choice, to ensure that First Amendment guidelines are being followed. Effective performance contracting requires the government to conduct data collection

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299. "When communities receive inadequate notice or receive information that they cannot understand the participatory nature of the decision-making processes is called into serious question." Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 833 (1998). Foster suggests four questions which should be asked when evaluating the legitimacy of a participatory decisionmaking process involving siting of environmental hazardous waste. The questions are just as relevant for social service delivery:

> (1) whether those most affected by the decision either have an opportunity to participate directly or to be represented in each phase of the decision-making process; (2) whether the community is informed adequately about all available information regarding the proposed action and whether such information is accessible; (3) whether the agency is responsive to community knowledge and concerns; and (4) whether decision-making power and influence is shared between those asked to bear the greatest risk, those who stand to benefit the most, and the institutions, administrators, and technical experts responsible for the ultimate decision.

Id. at 834-35.

300. *See* HANDLER, *supra* note 267, at 167 ("Participation on the part of the dependent person is difficult, often anxiety-producing, and time-consuming.").

301. "[T]he difference between reacting to amend the margins of a proposal that you had no part in creating, and starting from scratch to create a plan that addresses concerns you consider paramount, is vast." Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 698 (1994).

on financial spending, processes, and outcomes; to compare results among similarly situated providers; to evaluate the data collected; and to report the results of the data to all the affected stakeholders.[302] In carrying out these tasks, it would be particularly helpful for local and state governments to create centralized clearinghouses to compare such data, to gather examples of "best practices," and to serve as resource centers on performance contracting techniques. In addition, in selecting contractors and in monitoring their performance, governments may want to rely on national accreditation bodies that have developed rigorous standards for evaluating providers and have specialized expertise in their fields.

Beneficiaries can also assist government in monitoring service delivery. To begin with, they should serve on reviewing panels in determining whether to renew existing contracts. Also, on an ongoing basis, government agencies should conduct on-site visits and customer interviews. Beneficiaries can be surveyed as to satisfaction with services, as well as to specific aspects of service delivery such as timeliness, helpfulness of the staff, and comprehensibility of materials.[303] Following up with client surveys to determine the status of beneficiaries during and after service delivery can also provide valuable information about outcomes. In certain circumstances, it may be appropriate for the government to use "testers" to get an objective view of the services being provided.[304] Sharing the results of data collection with the general public, government and contractor personnel, and other stakeholders can also heighten accountability. Beneficiaries should have a way to voice their concerns, even if surveying efforts do not cover them. Thus, governments should consider establishing an ombudsperson in an independent agency to listen to beneficiary complaints and to assist in resolving them. In brief, monitoring involves casting the broadest net possible to gather and share information, recognizing that beneficiaries are a key source of accurate information.

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302. *See* MORLEY ET AL., *supra* note 260, at 7-8.

303. *See id.* at 6. Where the service beneficiary is unable to participate in monitoring due to youth, disability, or the like, caretakers and family members can be surveyed. *Cf.* Freeman, *supra* note 79, at 608 n.264 ("Indeed, third party oversight by either family members of residents or community groups already seems to be a crucial ingredient in the quality of nursing home care.").

304. *See* Diller, *supra* note 75, at 1215.

D. Enforcement

While effective prevention and monitoring will go far to ensure accountability, meaningful enforcement of accountability mechanisms is a necessary last resort. Without the threat of enforcement, there is little incentive for either government or its contractors to implement accountability reforms. Given the reality that most service contracts become self-perpetuating, and that governments and their contractors develop mutually reinforcing relationships,[305] outside pressure is needed to counterbalance this potentially static state of affairs. Express rights to enforce accountability mechanisms should be included in contracts and regulations governing social service programs.[306]

IV. THE FIRST AMENDMENT AND REGULATING FAITH-BASED PROVIDERS

Charitable choice poses a challenge to the First Amendment's Religion Clauses, under which "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[307] Opponents of charitable choice charge that direct monetary grants to religious organizations violate the wall of separation between church and state.[308] Supporters counter that charitable choice fulfills the First Amendment's goal of treating religion and nonreligion equally.[309] Not surprisingly, this issue has received a great deal of scholarly attention.[310] Yet given the lack of doctrinal

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305. *See* HANDLER, *supra* note 267, at 92-93.

306. A government may wish to include some sort of administrative exhaustion, mediation, or negotiation requirements before authorizing lawsuits.

307. U.S. CONST. amend. I.

308. *See, e.g.*, Alan Brownstein, *Constitutional Questions About Charitable Choice, in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 5, at 219, 220 (noting that "[b]ecause of [the] essential distinction between church and state, partnerships between religious organizations and government are constitutionally precarious undertakings").

309. *See, e.g.*, Carl Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics, in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 5, at 173, 175 (explaining that under charitable choice, social service providers "are to be selected only with regard to which providers can effectively deliver the contract services" and thus that "religion is neither favored nor disfavored"). Supporters also contend that denying religious groups access to generally available government funds is discrimination in violation of the Free Exercise Clause. *See id.* at 184-85.

310. *See generally* Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149 (2000) (arguing that charitable choice will have adverse consequences by increasing government regulation of religious organizations); Steven K. Green, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies*, 86

clarity in Establishment Clause jurisprudence, it is difficult to predict how the Supreme Court will rule on the constitutionality of charitable choice provisions, and case law supports arguments on both sides.[311] The issue is clouded by the fact that the Religion Clauses serve a variety of purposes and support a variety of readings.[312] Moreover, an obvious tension exists between the Establishment and the Free Exercise Clauses, which, if taken to their logical extremes, conflict with one another.[313] For instance, if government allows religious groups total freedom to practice their religion and thereby exempts them from certain types of regulation, the government may end up establishing a religion.[314] Conversely, if the government cannot grant religious groups specific accommodations from neutral regulatory schemes, the result may be a loss of free exercise for those groups.[315]

CORNELL L. REV. 692 (2001) (arguing that charitable choice treats religious groups more favorably than secular groups); Ira C. Lupu, *Government Messages and Government Money:* Sante Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001) (explaining that neutrality rather than separationism is driving the Supreme Court's analysis of government funding cases); Minow, *supra* note 266 (concluding that partnerships between governmental and private groups, including religious groups, further both pluralism and individual freedom).

311. As one commentator summarized Establishment Clause jurisprudence, "Few areas of the law today are so riven with wild generalizations and hair-splitting distinctions, so given to grand statements of principle and petty applications of precept, so rife with selective readings of history and inventive renderings of precedent." JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 182 (2000).

312. *See generally* WITTE, *supra* note 311. In his book, Witte describes the principles underlying the Religion Clauses as understood by the Founders, and how these principles have ebbed and flowed in the Court's jurisprudence. The six main principles are: (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) disestablishment of religion. *Id.* at 4. He argues that all of these principles should inform our current understanding of the Religion Clauses.

313. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."). One commentator has explained this tension:

> Just as the Free Exercise Clause seems to be saying to avoid burdening religion, the Establishment Clause seems to be telling us not to make any special deals for religious groups. Because we're not sure of the proper baseline, we don't know when an accommodation for religion "advances" it and when it merely "accommodates" a burden created by the government.

DANIEL A. FARBER, THE FIRST AMENDMENT 281 (1998).

314. *See* Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise*, 11 VA. TAX REV. 71, 116-17 (1991).

315. *See* Minow, *supra* note 266, at 510:

> If a state cannot close schools and businesses on Sundays or Good Friday for fear of establishing Christianity as an official or preferred religion, that prohibition burdens individuals' abilities to observe their Sabbath and their holy days. If the state cannot exempt a synagogue from municipal historic preservation codes, then public rules may infringe on a religious group's self-government.

Even if, as is likely, some form of charitable choice survives constitutional challenges, the inquiry does not end there. Rather, there is the subsequent question, which has received far less attention, as to what lengths government may go in ensuring accountability from its sectarian contracting partners.[316] Some religious organizations fear that if the expenditure of charitable choice funds is regulated, the government will become excessively entangled in their work and that they will lose their uniquely spiritual character as a result. This line of argument implicates both Free Exercise and Establishment Clause rights. At the same time, if government exempts religious organizations from otherwise generally applicable regulations, the government may violate the Establishment Clause by favoring religion over nonreligion. This part considers these concerns. First, this part addresses whether government can provide direct aid to religious organizations for social services. This issue is intertwined with the regulation issue and is thus a necessary predicate to discussing the latter issue. Second, this part considers whether the government can regulate religious organizations despite their special constitutional status. Third, having decisively answered the second question in the affirmative, this part then asks what the limitations on such regulation are. Fourth, this part considers whether legislatures may permissively choose to accommodate religious organizations and exempt them from regulations otherwise applicable to secular providers. This part concludes that regulating religious organizations that accept charitable choice funds is not only necessary to achieve program objectives but also constitutional.

A. The Direct Aid Dilemma

The direct aid question is inextricably linked with the regulation question, and thus must be addressed as a preliminary matter. This is because a direct aid program can be invalidated under the Establishment Clause if the government heavily monitors the use of the aid to ensure that it is not used for religious purposes.[317]

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316. One notable exception is Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343 (1992).

317. Agostini v. Felton, 521 U.S. 203, 232 (1997) ("Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion . . . .").

In other words, the court may strike down an aid program as excessively entangling.

The leading case involving government aid to religiously affiliated social service providers is *Bowen v. Kendrick*, a 1988 decision in which the Court addressed the constitutionality of the Adolescent Family Life Act ("AFLA").[318] Under AFLA, the federal government provided grants to public and nonprofit private organizations, including religious organizations, to give care, educational services, and counseling to pregnant teenagers.[319] However, AFLA funds could not be granted to programs that provided abortion services, counseling, or referrals.[320] The Court ruled that AFLA was constitutional on its face, but that individual AFLA grants might violate the Establishment Clause as applied.[321] The Court's opinion largely hinged on its conclusion that as long as funds were not going towards "pervasively sectarian" organizations, there was no risk of government advancing, inhibiting, or excessively entangling itself with religion.[322] At that time, the ban on direct aid to pervasively sectarian institutions had a long pedigree in cases involving aid to parochial schools.[323] Although AFLA survived facial attack,

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318. 487 U.S. 589, 593 (1988). The only other case involving government aid to social services is *Bradfield v. Roberts*, 175 U.S. 291, 297-300 (1899), in which the Court upheld a congressional appropriation for construction to a Catholic hospital, reasoning formalistically that the hospital was incorporated as a secular institution. In *Bowen*, the court cited to *Bradfield* as exemplifying "the long history of cooperation and interdependency between governments and charitable or religious organizations." 487 U.S. at 609.

319. *Bowen*, 487 U.S. at 593-96.

320. *Id.* at 596-97.

321. *Id.* at 618-22. The Court applied the three-part, purpose-effect-entanglement test for analyzing Establishment Clause challenges set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under *Lemon*, the Court asks whether the statute (1) is motivated by an impermissible purpose; (2) has as its primary effect the advancement of religion; or (3) requires excessive entanglement between church and state. Failure to pass any of these prongs is fatal to the statute at issue. *Id.* Although the Court has never disavowed *Lemon*, it recently repackaged the test in *Agostini*, 521 U.S. at 218-40. The Court now puts the excessive entanglement inquiry into the effects test. Thus, the Court first asks whether the statute has a secular purpose, and second, looks to the effect of the statute by asking whether the government aid results in (1) government indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Id.* at 232-34.

322. *See Bowen*, 487 U.S. at 610-18.

323. Through the 1970s and 1980s very few school aid programs survived the *Lemon* test. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 255 (1977) (holding that the state cannot loan instructional materials to private schools or provide transportation for field trips by private schools), *overruled by* Mitchell v. Helms, 530 U.S. 793, 808 (2000); Meek v. Pittenger, 421 U.S. 349, 372-73 (1975) (holding that the state may loan textbooks to religious schools, but not other school supplies or film and may not fund counseling and personnel), *overruled by Mitchell*, 530 U.S. at 808; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (holding that the state cannot give tax deductions to low-income parents who send their children to private schools); *Lemon*, 403 U.S. at 609 (holding that the state cannot reimburse religious schools for

the Court remanded the case back to the district court to determine whether AFLA was unconstitutional as applied, that is, whether some AFLA aid was flowing to pervasively sectarian grantees and/or whether the aid was used to fund specifically religious activities.[324] The Court indicated that either of these uses would be unconstitutional.[325]

Bowen raises several issues for evaluating the constitutionality of charitable choice. It is fair to read *Bowen* as approving government funding of religious organizations to combat social problems as long as the aid money finances only secular activities, and advocates have argued as much. Thus, *Bowen* embodies the Court's move away from separationist rhetoric[326] toward a more neutral vision, under which both the secular and sectarian are entitled to equal treatment by government.[327] However, *Bowen* also takes a strong stance against the funding of "pervasively sectarian" institutions. The Court has vaguely defined pervasively sectarian organizations as those in which the "secular activities cannot be separated from sectarian ones."[328] Parochial schools and houses of worship fit

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portion of costs of teacher's salaries). By contrast, the Court upheld various government aid programs to religiously affiliated institutions of higher learning on the theory that college-age students are less subject to indoctrination and that colleges are not permeated with religion. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766-67 (1976) (upholding state annual grants of fifteen percent per pupil); Tilton v. Richardson, 403 U.S. 672, 681-84 (1971) (holding that federal grants may be made for construction of college facilities for other than religious activities).

324. *See Bowen*, 487 U.S. at 620-22.

325. In dissent, Justice Blackmun argued that expecting religious organizations to refrain from promoting religion was unrealistic. He argued:

> There is a very real and important difference between running a soup kitchen or a hospital and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.

Id. at 641 (Blackmun, J., dissenting).

326. The Court most forcefully endorsed a separationist reading of the Religion Clauses in a series of cases involving aid to parochial schools in the 1970s. *See infra* note 323 (citing cases).

327. For a description of the Court's move toward a neutrality theory of the Religion Clauses, see Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 66-72 (2002).

328. *Roemer*, 426 U.S. at 755. Various factors courts have used to determine whether an entity is pervasively sectarian include whether: (1) the organization is located near houses of worship; (2) worship or religious instruction is an important part of the organization's program; (3) religious symbols and activities are found in the facility; (4) operation of the institution is considered an integral part of the sponsoring faith's religious mission; (5) staff are subject to discipline and control of religious authorities; (6) participants must attend religious devotions; (7) the organization is directly funded by religious groups; and (8) the organization discriminates on the basis of religion with regard to clients or staff. *See* Brownstein, *supra* note 308, at 222.

squarely within this definition.[329] Charitable choice would appear to violate the pervasively sectarian test, because its very purpose is to involve churches, synagogues, mosques, and the like in welfare delivery without requiring these organizations to set up affiliated, nonsectarian nonprofits.[330] Yet since *Bowen*, the Court has moved away from the "pervasively sectarian" test. That is, a majority of the Court no longer considers determinative the nature of the organization receiving the aid.

Most recently, in *Mitchell v. Helms*, six Justices upheld a federal program that provided educational equipment and materials such as computers, software, and VCRs, to public and private schools, including religious schools. There was no majority opinion in the case.[331] The plurality, consisting of Justices Thomas, Rehnquist, Scalia, and Kennedy, concluded that the Establishment Clause is not violated as long as the aid lacks religious content and is distributed based on neutral criteria.[332] For the plurality, the actual use of the aid or character of the recipient is irrelevant.[333] Although the plurality cautioned that direct monetary aid to religious entities raises special Establishment Clause "dangers," it suggested that such dangers could be diminished if there are neutral criteria for distribution and an intervening element of private choice as to where the aid is used.[334] The plurality was unconcerned by government funds going to individuals who then choose where to spend the money, reasoning that these private decisions remove any intimation of government coercion or indoctrination.[335]

The *Mitchell* concurrence, consisting of Justices O'Connor and Breyer, which held the deciding votes on the aid question, concluded that the government could provide religiously neutral aid to parochial schools as long as the aid was not in fact diverted for religious purposes.[336] Echoing *Bowen*, the concurrence stated that from now on, "[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for reli-

329. *Bowen*, 487 U.S. at 621.

330. It is questionable whether setting up independent, but affiliated nonprofits eases the First Amendment concerns. *See infra* note 343.

331. 530 U.S. 793, 801 (2000) (plurality opinion).

332. *Id.* at 826.

333. The plurality argued that the pervasively sectarian standard should be eliminated, calling it offensive. *Id.* "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828.

334. *Id.* at 818-19 & n.8.

335. *Id.* at 816.

336. *Id.* at 840 (O'Connor, J., concurring).

gious purposes."[337] The concurrence parted company with the plurality in arguing that neutrality in distribution does not, by itself, satisfy Establishment Clause concerns.[338] Nevertheless, the concurrence did suggest that while direct grants that finance religious practices are unconstitutional,[339] the intervening element of private choice could support the actual diversion of funds to religious practices.[340] Moreover, the concurrence seemingly, but not explicitly, abandoned the pervasively sectarian standard, as the schools at issue were clearly "pervasively sectarian" under the Court's prior rulings. By contrast, the dissenting Justices, who included Souter, Stevens, and Ginsburg, contended that any form of government aid that could potentially be diverted towards religious activities violates the Establishment Clause.[341]

It seems that none of the Justices is ready to uphold direct cash grants to houses of worship if the funds are used for religious purposes, at least in the absence of private choice. The charitable choice legislation intends to avoid this result by requiring that religious organizations not use federal funds for proselytizing or worship. In other words, charitable choice aims to fund only secular activities carried out by religious groups. At the same time, however, charitable choice aims to preserve the spiritual character of religious groups, which is, after all, the supposed source of their effectiveness in the social service field. However, it is hard to see

337. *Id.* at 857. The concurrence concluded that any divertability that had occurred in the case before it was de minimis. *Id.* at 864.

338. *Id.* at 837-39.

339. *Id.* at 843. "[T]he most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856.

340. *Id.* at 842-44. The Court has frequently upheld aid programs to parochial schools where there was an intervening element of private choice. That is, where "[a]ny aid . . . tbat ultimately flows to religious institutions does so only as a result of tbe genuinely independent and private choices of aid recipients." Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986) (upholding state grant to disabled student choosing to use his grant for training as a pastor); *see also, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (upholding special education services to student attending parochial high school); Mueller v. Allen, 463 U.S. 388, 390-91 (1983) (upholding state income tax deduction for tuition for parents enrolling their children in K-12 schools, including parochial schools). However, it is not clear that private intervening choice truly severs the link between the state aid and the sectarian recipient. *See* Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 191 (2000) ("The theory of the individual as causative agent does not break the connection between a state funding program and its beneficiaries when the individual's private choice simply operates, in an anticipated and authorized way, as a part of the state funding scheme.").

341. *Mitchell*, 530 U.S. at 890 (Souter, J., dissenting).

how both objectives can be served simultaneously. As one commentator has explained this tension:

> Churches and other houses of worship cannot separate the act of charity from the reason they feel compelled to offer the act. If houses of worship are asked to perform acts of charity without communicating the underlying message of faith that inspires them, the act loses much of its life-changing impact. But if the religious message accompanies the acts—acts funded by the government's money and determined by the state's rules of eligibility—then the most basic aspects of the Establishment Clause are implicated.[342]

Under charitable choice, which struggles to reconcile neutrality and religiosity, a beneficiary may well end up receiving services from an organization with religious symbols on the walls, a discriminatory hiring policy, and required prayer led by an employee whose position is funded by private dollars. This likely scenario links government funding to coercive and indoctrinating practices—a combination that the Court has held to violate the Establishment Clause as an advancement of religion. Simply put, while most would agree that worship and proselytizing are religious practices, it is not clear why permitted practices under charitable choice—religious symbolism, expressions of religious belief, and hiring discrimination against nonbelievers—are not. These permitted activities pose the same risks of coercion and indoctrination as traditional religious activities such as worship and proselytizing.[343]

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342. Derek Davis, *Right Motive, Wrong Method: Thoughts on the Constitutionality of Charitable Choice*, *in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 5, at 267, 291. The difficulty between separating secular goals from sectarian programs is highlighted in a recent district court case, Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 950 (W.D. Wis. 2002), which struck down state funding of a faith-based, long-term residential alcohol and drug rehabilitation program. *Id.* The program at issue, called Faith Works, used a Christian-enhanced model of the Alcoholics Anonymous twelve-step program. *Id.* at 951. Participants were told during intake that the program was faith-based; spiritual matters were discussed at mandatory meetings; counselors were available to advise participants on spiritual matters; and the program sponsored Bible study, chapel services, and daily prayer time. *Id.* at 966. The staff encouraged participants to "integrate spirituality into their recovery program." *Id.* The court concluded that the spiritual and sectarian aspects of the program could not be separated. *Id.* Indeed, the reason that the state had chosen Faith Works as a contracting partner was because of its religious orientation and holistic approach. *Id.* at 967, 970. Thus, there was "direct state funding of persons who actively inculcate religious beliefs" in violation of the Establishment Clause. *Id.* at 965, 976. The court expressly refused to rule upon the constitutionality of the charitable choice legislation. *Id.* at 979.

343. For this reason, it is unlikely that setting up affiliated, tax-exempt charities resolves the First Amendment problem. As Stephen Monsma found in his study of religiously affiliated nonprofits, most of them freely admitted that they engaged in a range of religious activities that arguably offend the First Amendment, such as informally referring to religious ideas, holding voluntary religious activities, giving hiring preferences to coreligionists, and encouraging religious commitments by beneficiaries. MONSMA, *supra* note 46, at 63-108. He concludes that "legal doctrines set down by the Supreme Court are simply ignored when policy elites and nonprofits find it convenient to do so." *Id.* at 109.

Although the Justices still appear wary of government funds going directly to religious purposes, they have never fully defined what religious purposes mean. Accordingly, charitable choice may force the Court to articulate more clearly what constitutes "religion."

An even harder question is whether the Court would permit direct cash grants to houses of worship even if the secular and sectarian components of the programs could be separated. For the three *Mitchell* dissenters, even the potential for divertibility of government funds is fatal.[344] For the remaining six Justices, a voucher program may be more constitutionally palatable given the appearance of intervening private choice that underlies such programs.[345] Private choice supposedly removes the specter of government endorsement and indoctrination of religion. Yet, ironically, a charitable choice voucher program could result in a greater degree of religious coercion and indoctrination of social service beneficiaries. As noted earlier, the conception of "choice" in the area of social services may be an illusion, given the vulnerable state of many beneficiaries. Recall that the statute does not require religious organizations to notify beneficiaries of alternative sources for receiving benefits.[346] In addition, while the charitable choice provision in the PRA requires that there be no worship or proselytizing with government funds under contracting schemes, there are no such limitations in voucher programs. Thus, under the voucher scenario, beneficiaries may be directed towards religious providers, uninformed about available alternatives, and required to pray to receive benefits. This scenario raises concerns about government coercion and indoctrination not present in *Mitchell*; thus, charitable choice in any of its forms may not fit within the paradigms established in the *Mitchell* case.

The battle lines drawn by the Justices in *Mitchell* will be further tested when the Court considers the controversial issue of school vouchers. The Supreme Court recently agreed to review a school voucher case arising out of the Sixth Circuit, in which the court struck down a voucher program in Cleveland, Ohio as violating the Establishment Clause because the program "involves the grant of state aid directly and predominantly to the coffers of . . .

344. 530 U.S. at 890 (Souter, J., dissenting).

345. *Id.* at 816.

346. *See supra* note 29. Proposed legislation, however, does contain a notice requirement. H.R. 7, 107th Cong. § 1991 (2001).

private, religious schools."[347] If the Court approves of school vouchers, it will likely uphold any charitable choice program. The Court has indicated that government funding of religious schools raises greater Establishment Clause concerns than similar funding of social service programs because of the vulnerability of children and the unique role schools play in forming moral character.[348] In this regard, recall that the Supreme Court has upheld both of the state-funded, religiously affiliated social service programs that have come before it.[349] Even if the Court strikes down the Cleveland school voucher program, charitable choice will likely be analyzed under a different rubric and could well survive, particularly because the charitable choice legislation was specifically drafted to meet the Court's specific concerns about coercion and indoctrination. Moreover, given the Court's preference for a fact-based, program-specific inquiry in evaluating state aid programs,[350] it is unlikely that the Court will strike down any charitable choice legislation. Rather, we can most likely expect that federal and state courts will spend considerable time and effort in the future evaluating a wide array of state-funded, religiously affiliated social service programs and determining the constitutionality of specific programs.

B. Can the Government Regulate Religious Organizations?

Assuming that some form of charitable choice survives constitutional scrutiny, as is likely, the next question is whether and to what extent government can regulate its religious grantees. The term "regulate" is not used here to mean only formal regulations

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347. Simmons-Harris v. Zelman, 234 F.3d 945, 960 (6th Cir. 2000), *cert. granted*, 533 U.S. 976 (2001) (mem.). Under the Cleveland program, scholarships were targeted to low-income elementary school children who attended private schools that enrolled in the program. *Id.* at 948. Eighty-two percent of the schools registered to participate in the program in the 1999-2000 school year were sectarian, and ninety-six percent of the students enrolled in the program attended sectarian schools. *Id.* at 949. As to other leading school voucher cases, the courts have split. For instance, a school voucher program in Milwaukee, Wisconsin, was upheld by that state's highest court, Jackson v. Benson, 578 N.W.2d 602, 607 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998), while the Vermont Supreme Court held that a school voucher program violated state constitutional law, Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 542 (Vt. 1999).

348. Also, as a result of the history of religious school funding in this country, the Court has always treated funding cases involving primary and secondary education as a separate class. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50-53 (1997); *supra* text accompanying notes 38-52. The Court may also treat school funding cases differently because of "the place of civic and cultural meaning that schooling" occupies. Minow, *supra* note 266, at 556.

349. Bowen v. Kendrick, 487 U.S. 589, 593 (1988); Bradfield v. Roberts, 175 U.S. 291, 300 (1899).

350. *See Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring); *Bowen*, 487 U.S. at 620-22.

issued through notice and comment procedures, but more broadly to include all forms of government oversight and monitoring that should accompany the transfer of government funds to private bodies. Traditionally, religious individuals and groups have sought exemptions from government regulation through the Free Exercise Clause, asserting that governmental involvement in their affairs infringes upon freedom of their religious practices. Several prominent scholars currently interpret the Religion Clauses as requiring "positive neutrality." Under this view, government must treat secular and sectarian groups alike in distributing grants (an Establishment Clause argument), but restrain from regulating sectarian groups once funds are distributed (a Free Exercise Clause argument).[351] As to the latter point, these scholars argue that the government interferes the least with religion when it leaves religion alone, thereby securing free exercise values. However, since 1990, when the Court in *Employment Division v. Smith* held that religious groups are subject to neutral laws of general applicability, claims such as these for mandatory exemptions from regulation are unlikely to prevail.[352] A bit of background is helpful.

Prior to *Smith*, the Court used a compelling interest test to police the boundary between permissible and unduly burdensome regulation.[353] This test was set forth in *Sherbert v. Verner*.[354] The Court first asked whether the government had imposed any burden on the free exercise of religion; the Court then examined whether the government had a compelling state interest justifying the free exercise infringement and whether the regulation was narrowly tailored to achieve that interest with the least possible intrusion on free exercise rights.[355] *Sherbert* involved a Seventh-day Adventist who was denied state unemployment compensation after she re-

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351. *See, e.g.*, MONSMA, *supra* note 46, at 173-97; Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 21 (1997); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000). Their nondiscrimination principle is built largely on Court holdings in free speech cases, where the Court has ruled that government may not deny religious groups access to religious forums. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995) (disallowing university's refusal to fund student-run Christian newspaper); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (holding that the government may not forbid the Ku Klux Klan from erecting a Latin Cross in a public square). It is not clear that a majority of the Court is willing to go as far in endorsing government funding of the nonexpressive aspects of religious groups.

352. 494 U.S. 872, 890 (1990).

353. It has long been acknowledged that government can regulate to prevent "immediate threat to public safety, peace, or order." Cantwell v. Connecticut, 310 U.S 296, 308 (1940).

354. 374 U.S. 398, 403 (1963).

355. *Id.* at 406.

fused to work on Saturday because of her religious beliefs.[356] The Court held that the denial of benefits burdened her free exercise rights by forcing her to make an untenable choice between her religious beliefs and work.[357] Moreover, the state could not point to any compelling interest for denying her benefits, as no evidence indicated that the state unemployment compensation system was or would be burdened by false claims.[358]

Despite the compelling interest test, after *Sherbert*, the Court upheld most challenged government regulations before it, ruling that the neutral application of administrative systems constituted a compelling state interest.[359] Thus, for instance, in *United States v. Lee*[360] the Court concluded that an Amish employer had to pay Social Security taxes despite the employer's claim that the Amish believe there is a religious obligation to provide for their fellow members and that they therefore do not believe in the national Social Security system.[361] The Court explained that allowing individual exemptions from the Social Security system would result in an administrative quagmire, stating that "[i]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[362] More-

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356. *Id.* at 399-401.

357. *Id.* at 404.

358. *Id.* at 407. The high-water mark for the *Sherbert* test was *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972), in which the Court held that a state could not compel Amish parents to send their children to high school through age sixteen. *Id.* Again, the Court focused on the untenable choice posed to the Amish parents, commenting that state law "compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

359. Unemployment cases, however, remained as a class of cases in which the court regularly granted exemptions from state law. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 720 (1981).

360. 455 U.S. 252, 254 (1982).

361. *Id.* at 257.

362. *Id.* at 259-60. This neutrality rationale was also the touchstone in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42, 451 (1988), in which the Court held that the Forest Service could construct a road through a sacred Native American site despite the acknowledged "devastating effects" this would have on the practice of the plaintiff tribe's religion. *Id.* at 441-42, 451. Justice O'Connor stated that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Id.* at 452; *see also* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389, 391-92 (1990) (holding that the state could retroactively impose sales and use taxes on the sale of religious articles by a religious ministry because the law applied "neutrally to all retail sales," and there was no evidence that collection of the taxes burdened the ministries' sincere religious beliefs); Bowen v. Roy, 476 U.S. 693, 696, 712 (1986) (holding that the government could require a Native American parent to accede to the use of a Social Security number for his two-year-old daughter despite claims that the use of a numerical

over, the Court reasoned that if one "enter[s] into commercial activity as a matter of choice," one's religious beliefs "are not to be superimposed on the statutory schemes which are binding on others in th[e] activity."[363]

These cases foreshadowed the Court's decision in *Smith*, a 5-4 ruling in which the Court formally abandoned the compelling state interest requirement altogether.[364] There, the Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[365] *Smith* involved two Native Americans who were fired by a private drug rehabilitation organization after they used peyote at a Native American church ceremony.[366] The state denied their unemployment compensation applications pursuant to a state law that disqualified employees discharged for work-related misconduct.[367] Justice Scalia, writing for the majority, reasoned that if a state could criminalize conduct, it could also penalize the conduct in its unemployment scheme.[368] He stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[369]

The *Smith* Court, however, recognized at least two exceptions to its holding. First, where the free exercise claim is joined with another constitutional protection, that hybrid claim might be entitled to an exemption.[370] For instance, in *Wisconsin v. Yoder*, the successful claim of Amish parents for an exemption from a school attendance requirement involved not only the Free Exercise Clause but also the parents' constitutional right to direct the education of their children.[371] Unfortunately, the *Smith* Court did not address the level of scrutiny that applies to a hybrid claim or how strong each or both of the claims need to be to succeed. Second, where the law at issue provides for individualized determinations of exemp-

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identifier would rob her spirit); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that the IRS could deny tax-exempt status to a religious college that engaged in racial discrimination).

363. *Lee*, 455 U.S. at 261.

364. 494 U.S. 872, 885 (1990).

365. *Id.* at 879 (citation and internal quotation marks omitted).

366. *Id.* at 874.

367. *Id.*

368. *Id.* at 872.

369. *Id.* at 878-79.

370. *Id.* at 881-83.

371. 406 U.S. 205, 233 (1972).

tion, "[the government] may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[372] The best example here is *Sherbert*, in which the state had the discretion to make individualized determinations for statutory exemptions.[373]

The *Smith* decision was intensely controversial, and was attacked as the downfall of religious liberty.[374] In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), the stated purpose of which was to "restore the compelling state interest test" of *Sherbert*.[375] RFRA was short-lived, however. In *City of Boerne v. Flores*, the Court declared RFRA unconstitutional as it applied to the states.[376] Motivated by separation of powers and federalism concerns, the Court reasoned that Congress exceeded its power under Section 5 of the Fourteenth Amendment in passing RFRA, because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause."[377] However, RFRA may remain the standard as applied to free exercise challenges to federal laws.[378]

Accordingly, at this time, neutral, generally applicable government regulations—even those that arguably burden religious groups—are presumptively constitutional. However, there are at least four instances in which religious groups can challenge state and local government regulation: (1) when the free exercise violation is linked with another constitutional violation (a hybrid claim); (2) when the regulation at issue requires some form of individualized determination; (3) when the law at issue is not neutral; and (4)

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372. 494 U.S. at 884.

373. In addition, the compelling state interest test remains the test for cases involving laws that target religion, i.e., laws which are non-neutral. Thus, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), the Court struck down a series of local ordinances, which although facially neutral, were targeted against a religious group's use of animal sacrifice. The Court held that the ordinances were not "neutral and of general applicability," but instead were enacted with the object of "the suppression of religion." *Id.* at 531, 542. None of the charitable choice provisions or proposed accountability mechanisms in this Article implicates the concerns underlying *Church of the Lukumi Babalu Aye*.

374. *See* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 643 n.279 (2000) (citing sources); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1055 n.42 (2000) (same).

375. Pub. L. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (1994)).

376. 521 U.S. 507, 511 (1997).

377. *Id.* at 519.

378. *See* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1915-17 (2001) (setting forth split in courts as to whether the RFRA applies to federal legislation and arguing in favor of such application).

when the regulation violates Establishment Clause rights by excessively entangling church and state.[379] The proposed accountability mechanisms in this Article are unlikely to fall within any of these *Smith* exceptions.[380]

First, the proposed quality assurance regulations do not implicate the hybrid exception to *Smith* because they do not violate other constitutional guarantees. Although it is certainly easy for plaintiffs to allege a violation of another constitutional right such as the rights of association or speech, mere allegations are not sufficient to garner an exemption. Rather, in cases interpreting the hybrid exception that have ruled in favor of the religious plaintiffs, the decisions generally could stand on the independent constitutional right alone.[381] Such independent rights are not present in this context. For instance, grantees might argue that accountability measures force them to adapt their messages in order to achieve social service objectives. However, there is no free speech violation when the government restricts the messages it wants to accompany government-funded programs delivered by private entities.[382]

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379. State constitutional law is not a useful source for challenging regulation of charitable choice spending because the federal charitable choice legislation preempts state law. Although the statute provides: "Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of state funds in or by religious organizations," 42 U.S.C. § 604a(k) (1994), this language references only state funds. Thus, it means that expenditure of federal welfare funds remains subject to federal law. Of course, a state-funded charitable choice program could be challenged on state constitutional grounds. Several states have enacted their own statutes to encourage contracts with faith-based organizations.

Also, while RFRA challenges could possibly be brought to federal accountability regulations should they be enacted, *see supra* note 378, the proposals in this Article would likely be implemented on a state or local basis in keeping with the PRA's emphasis on devolving authority downward.

Religious organizations might challenge the financial auditing requirements as a burden on free exercise. However, even under the compelling state interest test, the provision would likely be upheld. The state has a compelling interest in ensuring that its funds are properly spent on the defined statutory purposes, and the religious organizations are not excessively burdened by such reporting requirements—especially since the charitable choice legislation gives them a special accommodation that allows them to segregate charitable choice funds for accounting purposes.

380. The excessive entanglement argument is addressed in detail *infra* Part IV.C.

381. Kaplan, *supra* note 374, at 1068-69. *But see* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 709, 711 (9th Cir.) (concerning landlords who asserted "colorable claim" that antidiscrimination law violated their religious, free speech, and property rights), *vacated*, 192 F.3d 1208 (9th Cir. 1999).

382. Rust v. Sullivan, 500 U.S. 173, 198 (1991). *Rust* involved a federal statute that provided federal funding for family planning services. The statute provided that none of the funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178. The implementing regulations stated that grantees could not: refer women to abortion providers; engage in abortion rights lobbying or advocacy; and be physically or financially connected to abortion ac-

Second, as long as quality assurance regulations do not contain "hardship," "good cause," or other similar exceptions, they will not raise the concern that government officials could discriminate against or in favor of religion. Little incentive exists for governments to incorporate individualized exceptions into quality assurance regulations, as such determinations are costly and inefficient. To the degree that a given provider would claim a hardship from complying with auditing requirements or the like, the provider is likely not a qualified candidate for service delivery and the sophistication such programs require in the first place.

Third, the proposed quality assurance regulations would be, and should be, neutrally applied to all providers, whether they are government agencies, nonprofit secular groups, or sectarian organizations. The purpose of such regulations is to ensure that the government obtains results for its expenditures, and accordingly, the regulations target no particular type of group for examination. Thus, where states or localities seek, either by regulation or by contract, to apply accountability mechanisms to religious groups accepting charitable choice funds, these methods are likely to survive free exercise scrutiny. Along these lines, it should be noted that social service ministries are regulated in other regards as well, and that challenges to such neutral regulations on the basis of religion generally fail.[383] Federal laws that affect social service ministries include labor law and employee benefits, as well as tax and antidiscrimination laws.[384] At the state and local level, religious organizations are subject to laws relating to licensing, workers' compensation, labor relations, safety, incorporation, taxes, human rights and antidiscrimination, charitable solicitation, lobbying and political activity, zoning, health, sanitation, food handling, environmental

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tivities. *Id.* at 179-80. The Court held that the regulations were not an unconstitutional restriction on speech, but rather that "public funds [can] be spent for the purposes for which they were authorized." *Id.* at 196.

383. As one commentator explained:

> The amenability of churches to some governmental regulation is not seriously disputed. For example, few would protest the application to churches of laws prohibiting fraud in the sale of securities, requiring donated funds to be expended for the purposes represented, protecting copyright owners against infringement, or prohibiting activities that cause physical harm, property damage, or material disturbance to others. Similarly, churches routinely comply with municipal building codes and zoning regulations in the construction and location of worship facilities.

Hammar, *supra* note 205, § 9-01.

384. *See* Esbeck, *supra* note 316, at 360-66; *see also* Rogers, *supra* note 5, at 64-66. Rogers believes that "most churches are not equipped to jump through the regulatory hoops necessary to prove compliance with such laws. . . . [and that] proving compliance is likely to take a large toll on religious autonomy." Rogers, *supra* note 5, at 65.

regulation, and building and fire codes.[385] In return for their compliance with this web of neutral regulations, religious organizations receive the benefits available to secular organizations and individuals, such as police and fire protection and access to roads, water, and power. To be sure, quality assurance regulations probe into the programmatic aspects of a social service organization, but they do not mandate a specific course of action, and they apply equally to all grantees. Moreover, unlike the various federal and state statutes listed above, which apply across the board, charitable choice regulations apply only to an entity that has chosen to participate in social service delivery. Thus, there is no arguable element of coercion or of "untenable choice," factors which concerned the Court in *Sherbert*.

C. How Extensively Can the Government Regulate Religious Organizations?

Although government can regulate religious organizations through generally applicable, neutral laws, this authority is not boundless. At some point, government regulation of religious groups can become so onerous that the regulations end up violating the Establishment Clause's prohibition on excessive entanglement between government and religion. Identifying the boundary between permissible and impermissible entanglement, however, is no easy task.

The notion of excessive entanglement was first articulated in *Walz v. Tax Commission*, in which the Court held that a state could exempt religious organizations along with other nonprofit, charitable organizations from state property taxes.[386] The Court reasoned in part that the exemption was less entangling than the alternative of imposing the tax, which would "tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[387] Conversely, the Court has upheld laws that imposed taxes on or denied deductions for religious organizations, ruling that such neutral

385. *See* Esbeck, *supra* note 316, at 381-86; Rogers, *supra* note 5, at 66-67.

386. 397 U.S. 664, 674 (1970).

387. *Id.* The Court ignored the fact that granting exemptions also requires the government to evaluate the legitimacy of the claims for exemption—a task arguably more likely to result in government assessments about religion. *See* Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 1010 (1999).

laws are not excessively entangling. For instance, in *Hernandez v. Commissioner*, the Court held that disallowing deductions for contributions to the Church of Scientology for auditing sessions was not excessively entangling.[388] The Court stated that "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command."[389] The Court has also upheld regulations requiring religious organizations to maintain various sorts of records related to secular objectives.[390] Taken together, these cases indicate that the Court tends to defer to Congress when it enacts regulations that are unrelated to policing the boundary between sectarian and secular.

After *Walz*, the excessive entanglement inquiry became part of the *Lemon* test,[391] under which the Court evaluates alleged Establishment Clause violations by looking to the statute's purpose, effect, and entanglement between church and state. Notably, this formulation permits some entanglement; it bars only those entanglements that are deemed excessive.[392] In *Lemon* itself, the Court struck down a state policy that reimbursed parochial schools for part of the costs of teaching secular students.[393] Excessive entanglement arose in that case because "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that [the restrictions on aid] are obeyed and the First Amendment otherwise respected."[394] Thus, the Court has been most troubled by regulations, such as those in *Lemon*, which attempt to monitor the use of government aid to ensure that it is not spent for

388. 490 U.S. 680, 696 (1989).

389. *Id.* at 696-97 (citations omitted); *see also* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 394 (1990) (finding that the imposition of generally applicable sales and use tax on religious organization did not result in excessive entanglement between government and religion).

390. *See, e.g.*, Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305-06 (1985) ("The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations . . . and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs."); *cf.* NLRB v. Catholic Bishop, 440 U.S. 490, 503-07 (1979) (holding that the NLRB does not have jurisdiction over a Catholic school's teachers in the absence of clear congressional intent because of potential for entanglement).

391. *See supra* note 322.

392. Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two.").

393. 403 U.S. 602, 625 (1971).

394. *Id.* at 619.

religious purposes.[395] But even in these sorts of cases, the Court has recently become more accepting of a variety of monitoring measures.

In the 1997 case of *Agostini*, the Court tweaked the *Lemon* test, but Justice O'Connor confirmed that entanglement was still a relevant inquiry.[396]

> [T]he factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and religious authority."[397]

Thus, entanglement remains a basis for striking down government regulation, which is, of course, why it has become a popular argument for foes of regulation in the face of *Smith*'s almost blanket approval of government regulation as consistent with the Free Exercise Clause.[398] *Agostini* upheld a federally funded program in New York City that sent public school teachers into religious schools to provide remedial education for disadvantaged students.[399] Although the program called for unannounced monthly visits of public supervisors to ensure that funds were not spent to inculcate religion, the Court decided that this level of monitoring did not amount to excessive entanglement.[400] In fact, citing to *Bowen*, the Court noted that it had upheld far greater entanglements in the past.[401]

As noted earlier, the AFLA, which was the statute involved in *Bowen*, contained various ongoing oversight mechanisms to ensure that funds were spent in line with congressional intent and in accord with the Establishment Clause.[402] These mechanisms included government evaluations of the services provided, required reports from grantees, and grantee disclosures on application forms as to the nature of the services that would be provided.[403] In addition, the Court recognized that the Department of Health and Hu-

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395. *See id.*

396. *See supra* note 321.

397. *Agostini*, 521 U.S. at 232 (citation omitted).

398. *See* Gerstenblith, *supra* note 186, at 472-73.

399. *Agostini*, 521 U.S. at 234-35. In *Agostini*, the Court overruled its decision twelve years prior in *Aguilar v. Felton*, 473 U.S. 402 (1985).

400. *Agostini*, 521 U.S. at 234.

401. *Id.* The *Agostini* Court rejected its prior statements that a program that might increase the dangers of "political divisiveness" or that requires "administrative cooperation" between government and parochial schools is excessively entangling. *Id.* at 233.

402. 487 U.S. 589, 615 (1988).

403. *Id.*

man Services would review AFLA-funded programs, including educational materials, and might visit program offices.[404]

The Court commented on the Catch-22 nature of its emphasis on excessive entanglement; in some circumstances, "the very supervision of the aid to assure that it does not further religion renders the statute invalid."[405] However, in the case of AFLA, because the religious organizations at issue were not pervasively sectarian, there was no reason "to fear that . . . the Government [will] intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees,"[406] in the absence of evidence to the contrary. The Court thus appeared to assume that a "less" religious organization would require less policing than a "more" religious one because the former is less likely to be inculcating religion.[407] Now that the Court is leaning towards abandoning the pervasively sectarian standard, the Court likely will see even less need for policing proper First Amendment boundaries. Because the mechanisms proposed in this Article deal with quality issues rather than First Amendment issues, they should implicate constitutional concerns to an even lesser degree.

The proposed accountability mechanisms are focused on achieving secular objectives and ensuring that public funds are spent on programs that deliver measurable results for beneficiaries. They open up all organizations to scrutiny, but they do not proscribe or prescribe any particular method for delivering the services at issue. Accordingly, while they involve some entanglement between government and religion, the entanglement is not more excessive than that envisioned in *Bowen*, and it does not infringe on the religious character of the organizations. To the degree providers claim that the religious nature of their programs is compromised by such regulation, they are essentially admitting that they are commingling government funds for religious purposes—an admission that is fatal under charitable choice.

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404. *Id.* at 616-17.

405. *Id.* at 615.

406. *Id.* at 616; *see also* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 763-64 (1976) (finding no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion). As noted previously, it appears that the "pervasively sectarian" limitation on government aid is no longer controlling law. *See supra* notes 333-34 and accompanying text.

407. *Bowen*, 487 U.S. at 616.

D. Can the Legislature Exempt Religious Organizations from Regulation?

Although *Smith* holds that religious organizations do not have a constitutional right to mandatory exemptions from neutral government regulations, the decision expressly leaves open the possibility of legislative, or permissive, accommodations to religion.[408] Indeed, in *Smith*, Justice Scalia noted that a state or federal legislature could exempt sacramental drugs from its drug laws, and Oregon did exactly that after the *Smith* ruling.[409]

At some point, however, an accommodation can tip over into favoritism towards religion in violation of the Establishment Clause.[410] Yet the Court has not defined where this tipping point lies.[411] This issue is significant in the charitable choice context for two reasons. First, the charitable choice legislation makes some clear accommodations to religious groups, including a tailored auditing provision, an exemption from nondiscrimination in employment laws, and a mandate that governments not interfere with the religious character of grantees. Nonsectarian groups do not have these "benefits." Secular groups may therefore challenge the existing accommodations. Second, a heightened accountability scheme such as that proposed in this Article could be subject to demands from religious groups for various exemptions. Indeed, many proponents of charitable choice legislation, including President Bush,

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408. 494 U.S. 872, 890 (1990).

409. *Id.*; *see* WITTE, *supra* note 311, at 145. Likewise, in response to a circuit court decision, Congress passed the Equal Access Act requiring that secondary schools with limited open forums permit religious groups to conduct meetings on school property, *id.*, and Congress amended the military code to allow the wearing of yarmulkes after the Supreme Court held that there was no constitutional right to such an exemption, *id.*

410. Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 706 (1994) (striking down separate school district created for religious enclave of Satmar Hasidim and noting that "accommodation is not a principle without limits").

411. Scholars have hotly debated what the scope of permissive accommodation should be. *See, e.g.*, Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1014 (2001) (arguing that permissive accommodations should take into account principles of equal treatment, that is, they should be permitted as long as accommodations are extended to similarly situated nonreligious claimants); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (arguing that permissive accommodations should be permitted only where necessary to protect religious practices against discrimination); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 768 (1992) (arguing that there should be no permissive accommodations, in part because such accommodations tend to be religion-specific and prefer religion over nonreligion); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 689-93 (1992) (arguing that accommodations should always be permitted as they achieve purposes of both the Free Exercise and Establishment Clauses).

want to exclude religious groups from any sort of regulation whatsoever related to charitable choice. They argue that churches are discouraged from applying for charitable choice funds because of a fear of governmental intrusion.

The Court has held that certain accommodations for religious groups are appropriate to achieve a level of neutrality between religion and nonreligion and to relieve religious practices from government-created burdens. Thus, in *Walz*, the Court approved a property tax exemption for religious and other nonprofit groups because historically such exemptions reflected a "kind of benevolent neutrality toward churches."[412] Central to its holding was the fact that secular organizations and nonprofits were also entitled to the exemption, and there was thus no favoritism for religion.[413] This accomodationist approach reached its zenith in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, in which the Court upheld a 1972 amendment to Title VII of the Civil Rights Act that exempted religious nonprofit organizations from the general prohibition against religious discrimination in employment.[414] The Court reasoned that the exemption "alleviat[ed] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[415] The result in *Amos* seems to reflect not only the Court's desire to protect some free exercise values but also its long-standing discomfort with interfering in the internal operations of churches.[416] Where an accommodation is not related to protecting the doctrinal aspects of a religious group's beliefs or operations, the Court is more likely to strike down the accommodation as pure favoritism of religion. Thus, two years after *Amos*, in *Texas Monthly v. Bullock*, the Court put firm limits on permissive accommodations, striking down a sales tax exemption for religious periodicals because the benefits of the exemption flowed only to reli-

412. 397 U.S. 664, 676 (1970).

413. In a prior case, *Zorach v. Clauson*, the Court approved a release time program to allow religious students in public schools to attend off-site religious classes, calling the program a "suitable accommodation . . . to spiritual needs." 343 U.S. 306, 313 (1952). The result in *Zorach* is questionable given its favoritism of religious beliefs over nonreligion. *See* Lupu, *supra* note 310, at 791 (explaining the result in *Zorach* as a result of the Cold War era in which it was decided: "*Zorach* arguably involved government resources for religion alone, symbolic government support for religion, and proreligious government coercion—a combination that one today would expect to be fatal to any government policy challenged on Establishment Clause grounds.").

414. 483 U.S. 327 (1987).

415. *Id.* at 335.

416. *See supra* notes 208-09 and accompanying text.

gious groups.[417] In *Texas Monthly*, the Court identified three limits on permissive accommodations.[418] Not only must they be designed to alleviate a government-created burden on religion, but they cannot favor particular sects, favor religious groups over nonreligious groups, or burden nonbeneficiaries.[419]

The existing charitable choice accommodations, all of which are designed to preserve the unique character of religious organizations, run the risk of unduly favoring religion. This is another way of saying that the accommodations, drafted with free exercise principles in mind, might ultimately be invalidated under the Establishment Clause. For instance, under charitable choice, governments cannot interfere with the messages of religious groups, but they can restrict the messages of secular groups.[420] Moreover, while government funds cannot be used for proselytizing or worship, private funds may be so used as part of the same program. Courts may deem the special treatment for religious speech in this context a "statutory preference for the dissemination of religious ideas" that "offends our most basic understanding of what the Establishment Clause is all about."[421]

The accommodation limiting the scope of audits for religious organizations might also be deemed unlawful favoritism. Religious groups will be able to hide how their nongovernmental funds are spent, and, given that private funds can be used for proselytizing and worship, this will make it nearly impossible to get a complete picture of how social services are delivered at a particular site.[422] Finally, the exemption granted to charitable choice providers from the federal civil rights law prohibiting discrimination on the basis of religion could be attacked as an unlawful accommodation given the overlay of government funding. In *Amos*, the Court viewed this Title VII exemption as a way to keep government from interfering

417. 489 U.S. 1, 5 (1989).

418. *Id.* at 10-13.

419. *Id.* The Court has also struck down legislative attempts to provide employees with an absolute right not to work on their chosen Sabbath, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985), and a state attempt to carve out a special school district for a particular religious sect, Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 690 (1994). In the former case, the Court was concerned about the burden tbe accommodation would put on employers, and in the latter case, the Court was concerned about favoritism towards a particular religion. *Caldor*, 472 U.S. at 706-09.

420. *See* Brownstein, *supra* note 308, at 242; Green, *supra* note 310, at 714-15.

421. *Tex. Monthly*, 489 U.S. at 28 (Blackmun, J., concurring).

422. The remedy here would be to expand the scope of audits, not to eliminate them for all contractors.

with religion in its purely private sphere.[423] However, under charitable choice, discrimination is no longer carried on solely in the private sphere; rather, it is government funded. Given that charitable choice funds are only supposed to be used for secular purposes, government-funded discrimination does not serve free exercise values.

These types of accommodations should not be extended when it comes to quality control. That is, legislators and administrators should approach with caution requests for exemptions from accountability mechanisms, as such exemptions may tilt over into the realm of government sponsorship of religion in violation of the Establishment Clause. Most importantly, becoming a charitable choice grantee is entirely voluntary. Thus, religious groups cannot claim that they are subjected to a government-created burden on their free exercise from which they need relief. This point was made in *United States v. Lee*, where the Court ruled that the Amish must pay Social Security taxes, stating that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice,"[424] they must abide by statutory schemes binding on others in the same activity. In a sense, this notion of voluntariness is a corollary to the current Court's determination that "private choice" absolves a program of Establishment Clause concerns. Just as private choice is seen to break the link between the government and the ultimate aid recipient, voluntariness eases any concerns of coercion that accompany regulatory schemes.[425]

In addition, quality assurance regulations are neutral as between religious and secular providers, and there are no questions of favoritism of particular sects. Indeed, favoritism for religion would arise by exempting religious groups from regulation while leaving secular groups, which hold similarly strong but nonreligious convictions, more strictly accountable. Such favoritism is particularly troubling, and unnecessary, where there is no interference with the internal issues of church doctrine. The mechanisms proposed in this Article do not specify how a program is to achieve its goals, they

423. 483 U.S. 327, 336 (1987).

424. 455 U.S. 252, 261 (1982).

425. The Court is less deferential to claims for religious exemption when the exemption could result in a harm to third parties, although this is not an expressly stated factor in evaluating claims for exemptions. *See generally* Lipson, *supra* note 374, at 615-22 ("[T]he continuum of deference suggests that deference declines, and judicial scrutiny increases, in proportion to the likelihood of third-party harm."). To exempt religious social service providers from an accountability regime would likely result in harm to beneficiaries by exposing them to potentially ineffective services.

seek only to ensure that community-based goals are achieved in a fair and effective manner.

Finally, granting an exemption from such regulations for religious grantees could unduly burden secular grantees and the government. Demanding quality from secular groups while allowing religious groups freedom to do as they please could result in radically different levels of services at different sites. To the degree that a specific religious group does not provide effective services, the burden falls on other providers to pick up the slack, and the harms fall upon beneficiaries. Thus, under the *Texas Monthly* tests for unlawful permissive exemptions, legislators and policymakers should not award religious groups exemptions from any quality assurance regulations they implement. To the contrary, the neutral distribution of government funds should be accompanied by the neutral imposition of accountability mechanisms.

CONCLUSION

In the heady constitutional debates over charitable choice, it is easy to forget that the real beneficiaries of charitable choice are meant to be the poor. While there has been some acknowledgement that charitable choice might force some beneficiaries to tolerate religious messages or even adopt religious practices in order to receive services, far less attention has been paid to the actual effectiveness of those services in meeting the beneficiaries' needs. Charitable choice promises that a spiritual approach is more effective than a secular one in solving social problems. Yet at this time, no reliable evidence exists to make the case either way. Thus, in undertaking this social experiment, we need to ensure that charitable choice providers are accountable to those they are serving. Regardless of how one feels about charitable choice or even the premises underlying welfare reform, it is obvious that to fulfill the legislative mandate, the services provided must be effectively and fairly delivered. Nevertheless, existing and proposed charitable choice legislation does little to ensure accountability to beneficiaries.

If legislators are counting on the contracting process or a voucher system to provide the needed accountability, they are sorely misguided. Contract law grants scant rights to third-party beneficiaries, and procurement processes ignore beneficiaries altogether. Likewise, vouchers cannot ensure accountability where consumers lack the necessary choices or information to "shop" effectively. In addition, a variety of immunities and limited fiduciary

duties generally work to insulate churches and other religious organizations from public scrutiny.

Thus, it is time for the states and localities contracting for social services to take affirmative steps to ensure that they are purchasing quality services. Importantly, in doing so, they need not fear running afoul of First Amendment restrictions, an often-cited, but misplaced concern when regulation of charitable choice programs is at issue. This fear of entanglement has kept state and local governments from intruding into religious affairs. While this hands-off approach has a long and justified pedigree when churches are operating in the private sphere, it has far less justification when churches are spending public funds to carry out public purposes.

The First Amendment Religion Clauses prevent the government from advancing or inhibiting religion. The quality assurance proposals set forth in this Article implicate neither of these prohibitions. These proposals do not prescribe or proscribe any particular method for delivering services. Rather, by merging the principles of performance contracting with citizen participation norms, the proposals ensure that all providers—secular and sectarian alike—are selected and evaluated according to neutral standards set by the community. Ensuring quality does not advance religion; it advances successful programs whatever their orientation. At the same time, government procurement agencies that set clear standards and focus on results do not inhibit religion because they do not tell churches, or anyone else, *how* to achieve these goals. Churches that do not want to support the underlying secular goals or to be held accountable for how they spend government funds can always opt out and, as they have traditionally done, provide services with their own funds.

Accordingly, supporters of charitable choice should embrace such regulation as a way to demonstrate the effectiveness of faith-based programs to the public. At the same time, quality assurance regulations should provide some comfort to those uneasy with the idea of charitable choice, because such regulations provide a method for evaluating these programs and for protecting the rights of beneficiaries.

This Article's proposed approach also fits within the Court's recent moves towards neutrality in its Religion Clause jurisprudence. Recent cases have confirmed that the so-called wall of separation between church and state is no longer an accurate metaphor. In Establishment Clause jurisprudence, the Court has moved away from separationism towards a neutrality approach, under which

secular and sectarian are entitled to the same benefits. Tbe Court has also used neutrality as a touchstone in free exercise cases, allowing regulatory burdens to fall evenly upon both secular and sectarian groups. Thus, while Religion Clause jurisprudence is evershifting, the current Court would appear to support including sectarian providers in a social service delivery scheme while also holding them to the same regulatory and accountability standards as other providers.

Spirituality alone is not enough to combat the complex root causes of poverty and other social problems. While it may have value for some individuals, we know far too little about when, how, and for whom spiritually based programs work. We can and must debate the constitutional implications of charitable choice, but we should not forget the practical realities faced by our neediest citizens. For people who struggle daily to find and hold down jobs, to secure decent and affordable housing, to feed and clothe themselves and their children, these debates miss the mark. They need services that work.