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If At First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice

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IF AT FIRST YOU DON'T SUCCEED, SIGN AN EXECUTIVE ORDER: PRESIDENT BUSH AND THE EXPANSION OF CHARITABLE CHOICE

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ABSTRACT

This Article analyzes whether President Bush's charitable choice executive orders, which permit religious organizations to apply for federal funds to deliver social services, are a permissible exercise of presidential power. Although Congress has enacted charitable choice provisions in some major statutes, including a 1996 welfare reform act, it debated but did not extend charitable choice throughout the entire federal human services bureaucracy, as the President's executive orders do. The core question this Article examines is whether President Bush's charitable choice executive orders constitute permissible gap-filling of ambiguous statutes under the *Chevron* doctrine or impermissible exercises of executive lawmaking under *Youngstown Sheet & Tube Co. v. Sawyer*. This Article analyzes possible statutory delegations to the executive branch, including human services statutes and federal procurement laws and concludes that they do not contain gaps that give policy-making discretion to the President. With regard to constitutional authority for the orders, recent Supreme Court case law makes clear that charitable choice programs are not constitutionally compelled. Article II of the Constitution, which gives the President the authority to take care that the laws are faithfully executed, is another possible source of authority, but its bounds are ill defined. Fans of a strong executive argue that presidential policy-making best serves constitutional values of accountability and efficiency. This Article tests these assumptions and finds that the charitable choice executive orders not only fail to further these values, but actually may undermine them. Accordingly, the Article concludes that the charitable choice executive orders constitute an unlawful aggrandizement of executive power.

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> I signed an Executive order that said that all faith-based groups should have equal access to Federal money. . . . That's what the initiative said; it said, "Since Congress isn't moving, I will."
>
> —President George W. Bush[1]

INTRODUCTION

When President George W. Bush took office in 2001, he immediately announced that he would expand the scope of charitable choice programs that provide public funds to religious organizations to tackle social problems.[2] The political battle lines were soon drawn with proponents praising Bush for tapping into the redemptive power of spirituality and opponents prophesizing that the wall of separation between church and state would collapse.[3] Yet despite the power of the bully pulpit, Bush's

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[1] Remarks at the White House Faith-Based and Community Initiatives Leadership Conference, 41 WEEKLY COMP. PRES. DOC. 332, 338 (Mar. 1, 2005).

[2] JO RENEE FORMICOLA ET AL., FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION: THE GOOD, THE BAD, AND THE UGLY 5 (2003).

[3] These arguments are summarized in AMY E. BLACK ET AL., OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH BASED INITIATIVES 65–73 (2004) and FORMICOLA ET AL., *supra* note 2, at 15–18, 161–81.

legislative proposals to expand charitable choice beyond the constraints of existing statutes floundered amidst congressional concerns that the bills permitted state-sponsored employment discrimination against non-believers.[4] Despite repeated attempts, Republican leaders in Congress could not push through the President's charitable choice proposals.[5] Then, after the terrorist attacks of September 11, 2001, Bush's attention and that of the nation was inevitably drawn abroad. Yet the disappearance of charitable choice from the national headlines does not mean that charitable choice has disappeared.

To the contrary, President Bush has forsaken Congress and delved into his executive toolbox—using executive orders, new rulemaking power, bureaucratic appointments, funding controls, the creation of a White House office on faith-based initiatives with sub-command posts in ten executive agencies, and other privileges of his executive authority—to refashion our nation's social service delivery system for the needy.[6] The affected programs distribute over $7.7 billion a year, and thus, not surprisingly, millions of federal dollars are now flowing to religious organizations to pay for social services.[7] Religious organizations have long played a central role in alleviating social problems, but charitable choice provides that churches need not set up separate, secular non-profit organizations to accept federal funds, a dramatic break from past practices.[8] Although academics have analyzed charitable choice from many angles, particularly the complex church-state questions it raises,[9] there has been scant attention paid to how President Bush has managed to outmaneuver Congress to enact his domestic agenda.[10]

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[4] *See infra* text accompanying notes 78–80.

[5] *See infra* notes 78–86 and accompanying text.

[6] *See* ANNE FARRIS ET AL., THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE 1 (2004), *available at* http://www.religionandsocialpolicy.org/docs/policy/FB_Administrative_Presidency_Report_10_08_04.pdf.

[7] *See* FORMICOLA ET AL., *supra* note 2, at 14; *infra* text accompanying notes 123–24.

[8] *See* Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 811 (2002).

[9] For some leading perspectives, see Carl H. Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. ANN. SURV. AM. L. 17, 22 (2000); Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33 (2000); Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005); Martha Minow, *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); David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003); Lewis D. Solomon & Matthew J. Vlissides, Jr., *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 (2001).

[10] *See* BLACK ET AL., *supra* note 3, at 88–89; *see also id.* at 89 ("The Bush team hoped to

Recently, the scope of the President's executive authority in responding to terrorism has come under scrutiny. President Bush has asserted that as Commander-in-Chief he can: detain "enemy combatants" who are United States citizens without giving them an opportunity to contest their detention, authorize military trials for suspected terrorists, and conduct warrantless wiretapping of Americans suspected of aiding terrorists.[11] These anti-terrorism tactics are based on a view of the unitary executive; that is, a President who has "broad constitutional power to use military force to defend the Nation" and can "take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters."[12] In the recent case of *Hamdan v. Rumsfeld*, the Supreme Court rebuffed this unitary executive theory, holding that the President could not establish military commissions to try alleged al Qaeda combatants without congressional authorization.[13] Yet presidential exercises of authority on the domestic side remain below the radar screen.

The President's forays into faith-based contracting are also founded on a view of a unitary executive, and, as with his anti-terrorism tactics, detractors charge that they imperil civil liberties.[14] President Bush's expansion of charitable choice affects billions of dollars of domestic spending and has the potential to impose religious preferences on millions of needy Americans while expanding the scope of permissible hiring discrimination on the basis of religion.[15] While the President arguably has greater implied constitutional powers when dealing with foreign affairs and national emergencies,[16] no similar justifications apply to matters of domestic policy. As a nation, we have become inexcusably blasé about presidential domestic lawmaking. Indeed, as the executive orders creating President Bush's charitable choice initiative reveal, the President no longer feels that he has to make even a feeble attempt to

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appeal to the core Republican constituency of evangelical voters and attract new support among conservative Catholics, traditionally Democrats . . . .").

[11] *See* Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1; Carol D. Leonnig, *Administration Paper Defends Spy Program*, WASH. POST, Jan. 20, 2006, at A1; David E. Sanger & Eric Lichtblau, *Administration Starts Weeklong Blitz in Defense of Eavesdropping Program*, N.Y. TIMES, Jan. 24, 2006, at A18.

[12] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to President George W. Bush pt. 4, para. 11 (Sept. 25, 2001), http://www.usdoj.gov/olc/warpowers925.htm.

[13] 126 S. Ct. 2749, 2774 & n.23 (2006).

[14] *See infra* text accompanying notes 138–40.

[15] *See infra* text accompanying notes 154–66.

[16] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936) (discussing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 47–48 (1993) ("[F]rom the beginning, virtually everyone recognized that in foreign affairs the President enjoys a freedom of movement and authority quite different from that in the domestic realm.").

articulate authority for advancing his domestic policies.[17] For its part, Congress often acquiesces to executive authority by failing to impose any limits on presidential law-making, and the courts have ceded power to the President to legislate in any zone untouched by Congress.[18]

President Bush's charitable choice strategy reflects two converging developments. First, ever since the New Deal, when President Roosevelt created the framework of the modern welfare state,[19] the executive branch, more than any other branch of government, has defined the tone and terrain of our social welfare policies. Amidst heightened awareness of economic inequality after the prosperity of the post-war years, Presidents Kennedy and Johnson called to their fellow Americans for a War on Poverty.[20] President Reagan shifted the battleground to a "war on the welfare state,"[21] and President Clinton oversaw the implementation of welfare reform legislation that adopts Reagan's behavioral premises about the causes of poverty.[22] Notably, welfare reform's major ideas were first conceived of and tested by several governors.[23] President Bush has seized upon charitable choice to further his domestic agenda of compassionate conservatism.[24]

Second, during the New Deal, President Roosevelt seized increasing control over federal regulatory policy,[25] an approach that was revitalized by President Reagan, who aimed to centralize and coordinate administrative policy,[26] and clinched by President Clinton, who overtly directed administrative agencies to implement his desired policies.[27] Today, "the innovation of 'Presidential Government' is triumphant in America."[28] President Bush has inherited and expanded upon these trends.

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[17] *See infra* text accompanying note 254.

[18] *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 56 (2001) ("Unless a presidential act contravenes a clear and explicit statutory or constitutional prohibition that directly addresses the action, the courts are likely to side with the president.").

[19] *See generally* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 280–99 (6th ed. 1999).

[20] *See generally id.* at 304–31.

[21] *Id.* at 362–78.

[22] *Id.* at 388–401.

[23] *See, e.g., id.* at 281 ("As President Roosevelt acted on the same ideas that had guided his actions as governor . . . .").

[24] FORMICOLA ET AL., *supra* note 2, at 5 (calling the faith-based initiative "the cornerstone of [Bush's] agenda of 'compassionate conservatism'" (internal quotation omitted)).

[25] *See* TRATTNER, *supra* note 19, at 288 (noting that Roosevelt used executive orders to achieve his goals).

[26] *See* MAYER, *supra* note 18, at 6.

[27] *See id.* at 9.

[28] David Gray Adler, *The Condition of the Presidency: Clinton in Context*, *in* THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 175, 176 (David Gray Adler & Michael A. Genovese eds., 2002).

Like President Clinton, he has used his supervisory powers over administrative agencies to accomplish objectives that he could not attain through the legislative process. Accordingly, this Article explores the justifications for and implications of President Bush's drive to expand charitable choice without congressional authorization.

In the leading case of *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court set forth the principle that presidential action must be based on either statutory or constitutional authority.[29] At the same time, Justice Jackson's influential concurrence noted that there may be times when the President can rely on his "independent powers" and act without congressional authorization.[30] The boundaries of this "zone of twilight"[31] have never been defined or limited, and as a result, the Presidents have slowly and steadily increased their powers without check from the other branches.[32] Of course, reactions to presidential assertions of authority often depend on whose ox is being gored.

It is more difficult to draw principled boundaries on presidential lawmaking. Fans of a unitary executive believe that presidential policymaking fulfills twin constitutional commitments to accountability and efficiency.[33] However, as this Article demonstrates, the charitable choice executive orders (CCEOs) fulfill neither value. Indeed, it is particularly difficult to serve these rationales when dealing with policies that impact the disadvantaged—people that vote in low numbers, lack money to contribute to political campaigns, and have little organized influence within politics. This analysis of the CCEOs suggests that one way to give content to the "zone of twilight" is to assess presidential policymaking by the very values of accountability and efficiency that underlay the office of the presidency.[34] In so doing, we further our own constitutional commitments to a unitary executive while avoiding the risk of presidential tyranny.

The Article proceeds as follows. Part I describes President Bush's charitable choice initiative from its tortured death in Congress to its resurrection in the executive branch. Although there are at least four major human services statutes that include charitable choice provisions, President Bush has single-handedly expanded charitable choice into hundreds of statutes that do not contain legislative authority for a faith-based approach.[35] The Court has never articulated a principled basis for distinguishing between presidential lawmaking (not permissible) and executive branch gap-filling of ambiguous statutes (perfectly fine).[36] Analysis of the President's

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[29] 343 U.S. 579 (1952).

[30] *Id.* at 637.

[31] *Id.*

[32] *See infra* Part II.A.

[33] *See infra* text accompanying notes 478–81.

[34] *See* discussion *infra* Part IV.B.2.

[35] *See* discussion *infra* Part II.B.

[36] *See* Monaghan, *supra* note 16, at 41 (noting that the boundary is "of course, context-sensitive and malleable").

CCEOs demonstrates that drawing such a line is not only exceedingly difficult, but also that the resulting confusion results in the aggrandizement of presidential power.

President Bush has not articulated the source of his authority to issue the CCEOs, which is not surprising given how entrenched presidential ownership of the administrative process has become. Nevertheless, by looking at justifications offered by prior Presidents for their executive orders as well as Bush's arguments in favor of expansive executive war powers, a likely presidential defense of the CCEOs can be gleaned. Accordingly, the Article explores both statutory and constitutional justifications for the CCEOs. In light of *Youngstown's* emphasis on congressional intent, Part II first explores possible statutory justifications for the CCEOs. This Part discusses why the President's whole-scale imposition of charitable choice over the human services bureaucracy does not constitute gap-filling of ambiguous statutes in the face of congressional silence, but rather, contravention of congressional understandings at the time those statutes were passed. The delegation argument is further weakened by Congress's failure to enact legislation that would have accomplished the same goals as the CCEOs.

Part II also addresses whether the President's powers over federal procurement justify the CCEOs. Although Presidents have long used the federal procurement system to advance anti-discrimination norms,[37] the CCEOs cannot similarly be justified by the rationales of efficiency and economy that underlay the federal procurement statutes. To the contrary, there is no empirical evidence that a sectarian approach is superior to a secular approach in social service delivery. But there is plenty of evidence that congregations lack the know-how to engage in the complexities of social service delivery or to comply with government accountability mechanisms.[38]

Given that there is no viable statutory authority for the CCEOs, the Article then explores possible constitutional justifications for the CCEOs. Part III examines the contention made by several First Amendment scholars that the CCEOs are constitutionally mandated to create a fair playing field between churches and other non-profits in federal contracting. In recent years, the Supreme Court has become more accepting of government funding schemes that include religious organizations. However, the Court has made it clear that while such funding programs are permissible if enacted by a legislature, they are not mandatory.[39] Under current law, President Bush would be hard-pressed to argue that the CCEOs fulfill a constitutional mandate.

Part IV then discusses the President's strongest justification for the CCEOs, which is the Take Care Clause. Presidents have long relied on the Take Care Clause in Article II of the Constitution to manage the output of administrative agencies. President Reagan and each of his predecessors have used a series of executive orders in attempting to centralize review of agency regulations in the White House, to improve the

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[37] *See infra* text accompanying notes 267–81.

[38] *See infra* text accompanying notes 333–46.

[39] *See infra* text accompanying notes 371–76.

content of regulations (in line with presidential anti- or pro-regulation philosophies), and to reduce inconsistencies and conflict among the federal agencies.[40] However, the CCEOs go far beyond these managerial mechanisms by imposing a substantive preference for religion in social service contracting, and thus, they cannot rest on the same rationales as the regulatory review executive orders.

Moreover, the President is not merely attempting to persuade the agencies to adopt faith-based preferences (and the agencies would be acting arbitrarily and capriciously if they did so); he is directing a specific outcome. Such directory authority is based on a theory of the unitary executive that hinges on both constitutional and normative arguments positing that the President is more accountable and efficient than either the bureaucracy or Congress. While these assumptions are frequently debated by legal scholars, they are rarely examined in a real-life context. This Article puts these assumptions to the test, and it finds that the President's implementation of the CCEOs actually lessens accountability by cutting off dialogue and debate over important First Amendment values, eliminating the expertise of agencies in making program decisions, and undermining norms of public participation in the policymaking process. Where efficiency and accountability are fostered, the President has a strong case for acting in the *Youngstown* zone of twilight. But where these values are hindered, it is dangerous to grant the President implied powers to implement domestic policy. The Article concludes that the CCEOs lack either statutory or constitutional authority and thus constitute impermissible presidential lawmaking.

I. IMPLEMENTATION OF CHARITABLE CHOICE

The President's charitable choice initiative, patterned after the 1996 welfare reform statute, was considered by both houses of Congress but never enacted.[41] This Part discusses the history of charitable choice, the scope and impact of the charitable choice executive orders, and the potential civil liberties threats posed by the orders. With this background in place, we can then begin to assess the legitimacy of the CCEOs.

A. Congress Considers

Charitable choice debuted in 1996, enacted by Congress as part of the massive reform of the federal welfare system and entitled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA).[42] The major goals of the

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[40] *See generally* MAYER, *supra* note 18.

[41] *See* FORMICOLA ET AL., *supra* note 2, at 13.

[42] Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161–63 (1996) (codified at 42 U.S.C. § 604a (Supp. III 1997)) [hereinafter PRA]. Prior to the PRA, Aid to Families With Dependent Children (AFDC) provided welfare as an entitlement to needy families based on objective criteria. The public, policymakers, and the press widely viewed AFDC as a failure that encouraged dependency while failing to solve poverty or its associated problems. For an

PRA were to move welfare recipients into the workplace and to foster two-parent families.[43] To effectuate these goals, the PRA restructured the delivery of welfare services by devolving authority over program design to the state and local level.[44] In turn, state and local governments were permitted to contract with private entities, including religious organizations, for delivery of welfare services or to provide beneficiaries with vouchers redeemable at private social service providers.[45] This downward devolution of governmental authority and inclusion of churches as contracting partners was a shift from prior law and practice.[46]

The charitable choice provisions in the PRA attempted to ease First Amendment church-state separation concerns while simultaneously preserving the religious character of grantees.[47] To protect against coercion of beneficiaries, the statute provided that religious organizations could not discriminate against beneficiaries on the basis of religion[48] or use charitable choice funds for proselytizing or worship.[49] Additionally, states must provide nonsectarian alternatives for beneficiaries who object to the religious character of their provider.[50] To protect the religious character of grantees, the statute allowed religious organizations to provide social services without altering their internal governance structures or removing religious art, icons, or other symbols from their premises[51] and exempted them from Title VII's nondiscrimination in employment requirements.[52]

Religious organizations have long been an essential part of our nation's efforts to relieve poverty.[53] However, prior to the PRA, the government did not fund churches directly.[54] Rather, religious groups that contracted with federal, state, and local governments to deliver social services set up independent, tax-exempt organizations, such as Catholic Charities and Lutheran Social Services, to administer those funds.[55] The Supreme Court held in 1988 that although religiously affiliated

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influential critique, see CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 17–19, 162–64 (2d ed. 1994).

[43] PRA, at, § 101, 110 Stat. at 2110–12.

[44] *Id.* § 104, 110 Stat. at 2161–63.

[45] *Id.* § 104(b), 110 Stat. at 2162.

[46] *See* Gilman, *supra* note 8, at 811.

[47] PRA, § 104(b)(d), 110 Stat. at 2162.

[48] *Id.* § 104(g), 110 Stat. at 2163.

[49] *Id.* § 104(j), 110 Stat. at 2163.

[50] *Id.* § 104(e)(1), 110 Stat. at 2162–63.

[51] *Id.* § 104(d)(2), 110 Stat. at 2162.

[52] *Id.* § 104(f), 110 Stat. at 2163.

[53] *See* 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); *see also* STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 7–9 (1996).

[54] *See* Gilman, *supra* note 8, at 811. In this Article, the term "church" refers generally to churches, synagogues, mosques, and other houses of prayer.

[55] *See id.*

organizations could receive federal funds without running afoul of the First Amendment's prohibition on governmental establishment of religion, the money could not flow to "pervasively sectarian" organizations or fund religious activities.[56] In the late 1980s and early 1990s, a group of conservative academics and policymakers began challenging the "pervasively sectarian" dividing line.[57] These thinkers aimed to foster a "civil society" that would bring religion into the public domain and view faith communities as an integral solution for social problems.[58] For instance, John Ashcroft, the chief sponsor of charitable choice legislation,[59] argued that involving religious groups in social welfare was necessary to combat the "miserable failure" of governmental programs.[60] The PRA ultimately codified this viewpoint.[61]

As a result of the PRA, churches are now vying with other private social service providers for government contracts to deliver welfare benefits and related services ranging from substance abuse treatment to job training programs.[62] Despite the fundamental shift that charitable choice effectuated in church-state relationships, the provision barely registered in the debates over the PRA.[63] Rather, heated debates centered on the proposed "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" (e.g., welfare recipients must work to receive benefits).[64] The Clinton administration did little to implement charitable choice once it was on the books.[65] The few states that were already pursuing faith-based partnerships in social service delivery found support in the federal legislation;

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[56] Bowen v. Kendrick, 487 U.S. 589, 593, 616 (1988) (tying such funding to excessive government entanglement with religion under the *Lemon* test).

[57] *See* ROBERT WUTHNOW, SAVING AMERICA? FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY 12–13 (2004).

[58] *See id.* at 15–24. An influential book propounding this perspective is MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992).

[59] *See* WUTHNOW, *supra* note 57, at 298 (noting that Ashcroft was "haled by conservative evangelical leaders as an ally on Capitol Hill").

[60] 142 CONG. REC. S8507 (daily ed. July 23, 1996) (statement of Sen. Ashcroft); *see also* 141 CONG. REC. S13500, 13500–02 (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, 12924–25 (daily ed. Sept. 8, 1995) (statement of Sen. Ashcroft) (also discussing the problems of the welfare system and the benefits of faith-based charities).

[61] *See* PRA, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2161–63 (1996). Similar charitable choice provisions were also added to the Welfare-to-Work block grant program, 42 U.S.C. § 603(a)(5) (2000); the Community Services Block Grant programs, 42 U.S.C. § 9920 (2000); and some Substance Abuse and Mental Health Services Administration drug treatment funding, 42 U.S.C. § 290kk-1 (2000).

[62] *See* FORMICOLA ET AL., *supra* note 2, at 96–97.

[63] *See* BLACK ET AL., *supra* note 3, at 53 ("In the overall context of welfare reform, charitable choice was a small side issue.").

[64] *See* Gilman, *supra* note 8, at 809.

[65] *See* BLACK ET AL., *supra* note 3, at 62.

other states left the opportunity alone.[66] It was not until the 2000 presidential campaign that charitable choice leapt into the national consciousness.[67]

As they campaigned, then Vice President Gore and then Governor Bush advocated for the expansion of charitable choice into other government programs.[68] Both candidates seized upon the opportunity to woo moderate voters, who had become increasingly tolerant of religious expression within the public sphere.[69] Then Governor Bush was already promoting charitable choice within Texas's social service programs, and he had issued a gubernatorial executive order that required Texas agencies to encourage faith-based contracting.[70] On a personal level, charitable choice resonated for Bush because of his own religious conversion, which helped him overcome a drinking problem.[71] As a political matter, charitable choice was part of Bush's compassionate conservativism agenda, allowing him to appeal not only to his electoral base of religious conservatives and evangelicals, but also to court potential supporters among urban Latinos and African Americans, who tend to vote Democratic while also being strongly religious.[72]

Not surprisingly, as one of his first actions as President, Bush announced the formation of a high-profile White House Office of Faith-Based and Community Initiatives (OFBCI), whose director was titled an Assistant to the President, the highest ranking title for White House staffers.[73] He also created satellite offices in five cabinet level agencies (the Departments of Labor, Education, Health and Human Services, Housing and Urban Development, and Justice) and directed them to expand charitable choice into all their federal human services programs by identifying and removing regulatory barriers that discouraged federal contracting with faith-based groups.[74] At the end of July 2001, these agencies delivered a detailed program audit to the White House, which then assembled the results in a report entitled *Unlevel Playing Field*.[75] The report charged that existing agency rules were "repressive, restrictive, and . . . actively undermine the established civil rights" of religious groups

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[66] *See id.*

[67] *See* Daniel O. Conkle, *Religion, Politics, and the 2000 Presidential Election: A Selective Survey and Tentative Appraisal*, 77 IND. L.J. 247, 248 (2002) ("During the 2000 presidential campaign . . . the issue of Charitable Choice was prominent.")

[68] *See* BLACK ET AL., *supra* note 3, at 82–83.

[69] *See id.* at 82.

[70] *See* FARRIS ET AL., *supra* note 6, at 4.

[71] *See* BLACK ET AL., *supra* note 3, at 88; FARRIS ET AL., *supra* note 6, at 3.

[72] *See* BLACK ET AL, *supra* note 3, at 87–89.

[73] Exec. Order No. 13,199, 3 C.F.R. 752–54 (2001), *reprinted in* 2 U.S.C. ch. 2 (2006); *see* BLACK ET AL., *supra* note 3, at 202.

[74] Exec. Order No. 13,198, 3 C.F.R. 750–52 (2001), *reprinted in* 5 U.S.C. § 601 (2006).

[75] WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 1 (2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf.

seeking federal program grants.[76] In other words, the report charged that federal agencies were actively discriminating against religious organizations in the procurement process. The report concluded that federal officials were refusing to collaborate with faith-based organizations due to the agency's unwarranted perception that such partnerships were "legally suspect."[77]

Shortly thereafter, several members of the House of Representatives drafted the Community Solutions Act of 2001, a bill designed to codify the President's expansion of charitable choice into more than one hundred programs in five federal agencies.[78] The bill, "seen as the [P]resident's bill," generated a firestorm of controversy.[79] Opponents, who emerged from both the political right and left, charged variously that the bill would federally fund employment discrimination, funnel money to objectionable sects, bureaucratize churches, entangle government with religion, and lead to religious coercion of social service beneficiaries.[80] Some evangelical leaders surprised the White House with their hostility to the bill.[81] In July 2001, further partisanship was unleashed when the *Washington Post* reported that the Salvation Army, one of the largest faith-based organizations in the United States, told the White House it would lobby Congress in support of the bill if the White House granted it an exemption from state and local laws requiring domestic partner benefits and banning hiring discrimination against gays.[82] After the story "caused a furor in Washington," the White House denied making the commitment and said it would not issue the exemption.[83] During this time, House Democrats Robert C. Scott of Virginia and Chet Edwards of Texas led a spirited campaign against the legislation and convinced most of the Democrats in the House to vote against it.[84] Nevertheless, the House narrowly passed the Community Solutions Act of 2001 in July of that year, with some changes designed to meet public objections.[85] However, the partisanship that accompanied passage of the bill through the House eventually doomed it.[86]

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[76] *Id.* at 14.

[77] *Id.* at 10. Some commentators have noted that the report mischaracterized existing agency programs and "lacked full scrutiny." FARRIS ET AL., *supra* note 6, at 7.

[78] H.R. 7, 107th Cong. (2001).

[79] *See* BLACK ET AL., *supra* note 3, at 208.

[80] *See id.*

[81] *See* Thomas B. Edsall, *Robertson Joins Liberals in Faulting Bush's 'Faith-Based' Plan*, WASH. POST, Feb. 22, 2001, at A5; Dana Milbank & Thomas B. Edsall, *Faith Initiative May Be Revised: Criticism Surprises Administration*, WASH. POST, Mar. 12, 2001, at A1 (noting that the White House was surprised by objections from Pat Robertson, Jerry Falwell, Richard Land, and even charitable choice architect Marvin Olasky).

[82] *See* Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays: Salvation Army Wants Exemption from Laws*, WASH. POST, July 10, 2001, at A1.

[83] Dana Milbank, *Bush Drops Rule on Hiring of Gays; Democrats: 'Faith-Based' Initiative at Risk*, WASH. POST, July 10, 2001, at A1.

[84] *See* BLACK ET AL., *supra* note 3, at 128–29.

[85] *See id.* at 142.

[86] *See id.* at 143 (noting "the partisan push of H.R. 7 through the House cannot be seen as

The Senate delayed consideration of the bill for at least a year to work through heated public objections.[87] In 2001, the Senate held hearings on a narrow charitable choice provision that would funnel drug treatment funds to churches.[88] Although all opposing viewpoints were fully aired, "it was obvious from the tone and proportion of witnesses at the hearing that under the new Senate regime charitable choice bills were not going to get out of committee, much less be debated on the floor."[89] Meanwhile, late in 2001, Senators Lieberman and Santorum began to work with the White House on compromise legislation called the Charity Aid, Recovery and Empowerment Act of 2002 (CARE Act), which focused on improving tax incentives for charitable giving rather than on expanding charitable choice.[90] Due to the hiring discrimination controversy, Senator Lieberman stated that "too many church-state issues [involving charitable choice] had not been resolved"; Senator Santorum said it was too much of a "hot-button issue."[91] Yet even without the charitable choice initiative and with Republican control regained in the Senate, the Senate was unable to reach a consensus on the CARE Act.[92] In 2003, the Senate ultimately passed a pared-down version of the CARE Act; again, it did not expand charitable choice.[93] However, the House and the Senate were never able to work out their differences over this comparatively modest piece of legislation, and it was not enacted.[94] Charitable choice is off Congress's table for now.

B. The President Proceeds

Unable to move his legislation through Congress, President Bush decided to pursue the objectives of the failed Community Solutions Act through the prerogatives of his office.[95] In December 2002, he announced to a gathering of over one thousand religious and charitable leaders in Philadelphia that he was expanding charitable choice on his own.[96] He explained,

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a success" and worsened relations between the White House, House Republicans, and interest groups). In addition, some proponents of charitable choice, including Marvin Olasky, became disenchanted by what they saw as a watering down of the charitable choice provisions. *See* FORMICOLA ET AL., *supra* note 2, at 145–48.

[87] *See* FORMICOLA ET AL., *supra* note 2, at 143–49.

[88] *See* BLACK ET AL., *supra* note 3, at 157–58.

[89] *Id.* at 158.

[90] *See* FORMICOLA ET AL., *supra* note 2, at 12, 140–42. Other co-sponsors were Senators Clinton, Brownback, and Hatch. *Id.* at 12.

[91] *See id.* at 134.

[92] *See* BLACK ET AL., *supra* note 3, at 181–82.

[93] *See* S. 476, 108th Cong. (2003).

[94] *See* FORMICOLA ET AL., *supra* note 2, at 13.

[95] *Id.*

[96] *Id.*

> [W]elfare policy will not solve the deepest problems of the spirit . . . . No government policy can put hope in people's hearts or a sense of purpose in people's lives. That is done when someone, some good soul puts an arm around a neighbor and says, "God loves you, and I love you, and you can count on us both."[97]

One of the CCEOs announced that day created two new satellite faith-based offices in the Department of Agriculture (USDA) and the Agency for International Development (USAID) and also mandated that the Federal Emergency Management Agency permit churches to qualify for disaster aid in the same way as secular non-profit groups.[98]

The second order, Executive Order 13,279, was entitled Equal Protection of the Laws for Faith-Based and Community Organizations, and it declared that the government should provide a "level playing field" in federally funded grant programs by allowing religious and secular groups to compete for grants.[99] The order is similar to the PRA's charitable choice provision.[100] The order prohibits religious grantees from discriminating against program beneficiaries on the basis of religion.[101] Moreover, religious groups that receive direct government funding cannot use those funds on "inherently religious activities, such as worship, religious instruction, and proselytization," which need to be separated by time or space from the government-funded activities.[102] At the same time, religious grantees do not need to sacrifice "their independence, autonomy, expression, or religious character" when they accept federal funds.[103] Accordingly, religious grantees are permitted to discriminate in favor of co-religionists in their hiring.[104] This latter provision overturns part of a previous executive order signed by President Lyndon Johnson that prohibited government contractors from discriminating on the basis of race, creed, color, national origin, or religion.[105]

In June 2004, President Bush issued yet another executive order, this time adding three more faith-based centers—in the Departments of Commerce and Veterans

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[97] FARRIS ET AL., *supra* note 6, at 5.

[98] Exec. Order No. 13,280, 3 C.F.R. 262–64 (2003), *reprinted in* 5 U.S.C. § 601 (2006).

[99] Exec. Order No. 13,279, 3 C.F.R. 258–62 (2003), *reprinted in* 5 U.S.C. § 601 (2006) ("[A]ll eligible organizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance . . . .").

[100] *See* PRA, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996).

[101] 3 C.F.R. 258–62.

[102] *Id.* at 260.

[103] *Id.*

[104] *Id.* at 258–62.

[105] *See infra* text accompanying notes 260–67.

Affairs and the Small Business Administration—bringing the total number of satellite offices to ten.[106] In addition, the faith-based initiative is being implemented at other federal agencies not directly addressed by the executive orders, including the Corporation for National and Community Service, the Environmental Protection Agency, Fannie Mae and Freddie Mac, the National Credit Union Administration, the Social Security Administration, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank.[107]

Executive orders are only a part of the President's strategy to get out his faith-based message. Bush has utilized the power of the bully pulpit by giving numerous speeches across the country and in major policy addresses sermonizing about the need to bring faith-based organizations into the governmental fold.[108] The White House OFBCI and the satellite offices have also conducted outreach sessions, conferences, and workshops for religious organizations to inform them about available grants and how to apply for them.[109] The White House OFBCI has published and distributed a catalogue of federal grant programs totaling more than $50 billion that are open for applications from faith-based groups.[110] Given that the bulk of federal social service funds pass to the states for distribution at the state and local levels, federal officials have also created materials to educate state and local officials about how to partner with faith-based organizations.[111] In addition to the many pamphlets, manuals, guidebooks, brochures, videos, powerpoint presentations, and catalogues disseminated by federal officials to promote and explain charitable choice, the White House and satellite faith-based offices also have a strong presence on the Internet providing information and instructions related to their grant programs.[112] Throughout the government bureaucracy, efforts are designed not simply to level the playing field, but to affirmatively reach out to faith-based organizations.[113] For instance, grant announcements at all levels of government now explicitly state that faith-

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[106] Exec. Order No. 13,342, 3 C.F.R. 180–82 (2005), *reprinted in* 5 U.S.C. § 601 (2006).

[107] *See* FARRIS ET AL., *supra* note 6, at 51–56.

[108] *See* FORMICOLA ET AL., *supra* note 2, at 5.

[109] DAVE DONALDSON & STANLEY CARLSON-THIES, A REVOLUTION OF COMPASSION: FAITH-BASED GROUPS AS FULL PARTNERS IN FIGHTING AMERICA'S SOCIAL PROBLEMS 73–74 (2003). At one session sponsored by the Departments of Justice and Health and Human Services (HHS), a gospel singer and preacher took center stage in proceedings that looked more like a "tent revival than a government-sponsored information session." FARRIS ET AL., *supra* note 6, at 15. The religious character of the White House conferences is the subject of a lawsuit alleging that the conferences violate the Establishment Clause. Freedom From Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006), *cert. granted*, 127 S.Ct. 722 (2006).

[110] FARRIS ET AL., *supra* note 6, at 15.

[111] *See* DONALDSON & CARLSON-THIES, *supra* note 109, at 77 (noting that the Departments of Labor and HHS have produced workshops and presentations to guide state and local governments on reaching out to faith-based organizations).

[112] *Id.* at 74.

[113] *See* FARRIS ET AL., *supra* note 6, at 17.

based groups are not only eligible to compete for federal grants, but also that they are encouraged to apply.[114] In essence, there is now a federal procurement policy of affirmative action for churches.[115]

With speed not normally associated with the federal bureaucracy, HHS and HUD issued four notices of proposed rulemaking within days of the issuance of Executive Order 13,279.[116] The other covered agencies also swiftly conducted notice and comment rulemaking to implement the CCEOs shortly after they were subsumed within the faith-based initiative.[117] Notably, unlike the rules that implement the charitable choice provisions of the welfare statute, none of the final rules implementing the executive orders cite to any statutory authority—and indeed, they cannot. Rather, they each cite to the CCEOs as the underlying authority for the regulations.[118] In accordance with the notice and comment requirements for informal rulemaking in the Administrative Procedures Act, the agencies accepted public comments on the proposed rules.[119] Most of the comments were received from public interest or civil or religious liberties organizations and were critical of various aspects of the proposed

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[114] *Id.* at 17–18.

[115] *See Faith-Based Initiative Moves Forward at Agencies*, EXECUTIVE REP. (OMB Watch, Wash., D.C.), Nov. 6, 2002, at 1–3, http://www.ombwatch.org/article/articleview/1175. The OMB Watch report discusses an attempt by HHS to set aside certain grant funds for faith-based organizations. *Id.* at 3. HHS withdrew those plans when objections arose. *Id.* It also notes that some states, including New Jersey and North Carolina, have established separate funding streams targeted to faith-based providers. *See* Lupu & Tuttle, *supra* note 9, at 40–41 (asserting that the White House OFBCI's outreach to faith-based organizations is "a classic case of affirmative action").

[116] *See* IRA C. LUPU & ROBERT W. TUTTLE, ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, DEVELOPMENTS IN THE FAITH-BASED AND COMMUNITY INITIATIVES: COMMENTS ON NOTICES OF PROPOSED RULEMAKING AND GUIDANCE DOCUMENTS 21 (2003), *available at* http://www.religionandsocialpolicy.org/docs/legal/reports/1-9-2003_exec_order_analysis.pdf [hereinafter DEVELOPMENTS] ("The quick announcement of the four sets of proposed rules demonstrates that the agencies of the Executive Branch remain energetically committed to the President's Faith-Based and Community Initiative.").

[117] Some agencies issued policy announcements rather than regulations to implement the CCEOs. *See* IRA C. LUPU & ROBERT W. TUTTLE, ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE STATE OF THE LAW 2003: DEVELOPMENTS IN THE LAW CONCERNING GOVERNMENT PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS 28–53 (2003), *available at* http://www.socialpolicyandreligion.org/docs/legal/reports/12-2-2003_state_of_the_law.pdf [hereinafter STATE OF THE LAW 2003]. For instance, USDA has issued a list of grants available to faith-based organizations, but it did not engage in rulemaking because it had no preexisting written policies that conflicted with the CCEOs. *Id.* at 28–29.

[118] *See, e.g.*, Participation in Education Department Programs by Religious Organizations, 69 Fed. Reg. 31,708 (June 4, 2004) (stating in the supplement any background information that the new regulations "were part of the Department's effort to fulfill its responsibilities" under Executive Orders 13,198 and 13,279).

[119] 5 U.S.C. § 553(c) (2006).

rules.[120] Nevertheless, with the exception of some technical changes, the proposed rules and the final rules are nearly identical.[121] Moreover, many of the implementing rules from the various agencies are indistinguishable from one another (much of the language is identical, thereby suggesting a White House hand in their drafting) although some of the rules address unique issues raised by certain programs.[122]

The efforts of the White House and the agencies to expand faith-based contracting are yielding results. For instance, the White House reported that in 2005, over $2.1 billion was awarded to faith-based organizations, accounting for 11% of the total funding awarded through 130 programs and 28 program areas.[123] This marked a 38% increase in the number of grants awarded since 2003.[124] HHS alone increased the amount of funding it gives to faith-based organizations by 64% since 2002,[125] although it is not clear which of these grants are pursuant to statutory charitable choice provisions and which are attributable to the executive orders. As a result of the President's expansion of charitable choice, faith-based organizations are now using federal grants to provide a wide array of social programs, including those that engage in abstinence-only education,[126] mentoring for high-risk youths,[127] substance abuse treatment,[128] housing for AIDS patients,[129] housing counseling for minorities,[130] community re-entry for inmates,[131] drug and alcohol prevention,[132] international AIDS prevention,[133] housing for homeless veterans,[134] and emergency food assistance.[135]

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[120] For the Department of Education's analysis of comments submitted in reference to the new regulations issued in response to CCEOs, see, e.g., Participation in Education Department Programs by Religious Organizations, 69 Fed. Reg. at 31,712–15.

[121] The comments and resulting rules are described in STATE OF THE LAW 2003, *supra* note 117, at 28, 32–33.

[122] "The new rules have not materially altered the use or understanding of [the Executive Order] . . . ." IRA C. LUPU & ROBERT W. TUTTLE, ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE STATE OF THE LAW 2004: PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS 63 (2004), *available at* http://www.socialpolicyandreligion.org/docs/legal/reports/12-09-2004_state_of_the_law.pdf [hereinafter STATE OF THE LAW 2004].

[123] Press Release, White House, Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/ 2006/03/print/20060309-3.html [hereinafter Compassion in Action].

[124] *Id.*

[125] *Id.*

[126] *See* FARRIS ET AL., *supra* note 6, at 23.

[127] *Id.* at 23–24.

[128] *Id.* at 26, 40.

[129] *Id.* at 30.

[130] *Id.* at 32.

[131] *Id.* at 40.

[132] *Id.*

[133] *Id.* at 41–43.

[134] *Id.* at 47–48.

[135] *Id.* at 44–45.

C. Courts Contemplate

Charitable choice grantees walk a perilous "constitutional tightrope" that attempts to balance neutrality and religiosity.[136] On the one hand, their effectiveness supposedly divines from their overtly spiritual approach. On the other hand, they are not supposed to use their charitable choice funds for "inherently religious" activities, including proselytizing and worship and logically extending to any activity with religious content.[137] As one commentator has described this tension, "[i]f houses of worship are asked to perform acts of charity without communicating the underlying message of faith which inspires them, the act loses much of its life-changing impact. But if the religious message accompanies the acts . . . then the most basic aspects of the Establishment Clause are implicated."[138] As a result of charitable choice's mixed messages, "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."[139] Moreover, unlike the charitable choice legislation, the CCEOs do not require that beneficiaries uncomfortable with a religious approach be provided with a secular alternative, and this omission heightens potential beneficiary coercion in violation of the Establishment Clause.

Recent cases bear out this concern and suggest that the tensions within charitable choice may not be only irreconcilable, but can also result in interference with the civil liberties of beneficiaries. Under current Supreme Court case law, government aid provided on a neutral basis to secular and sectarian organizations does not violate the Establishment Clause, yet actual diversion of government aid to religious indoctrination does.[140] Accordingly, charitable choice programs tend to run into constitutional trouble when they push overtly religious messages that could coerce vulnerable populations, particularly prisoners and children. The overt religious content in many of the challenged programs not only threatens the free exercise rights of program beneficiaries, but also can amount to a government endorsement of religion in violation of the Establishment Clause.

For instance, a major recent opinion comes from Iowa, where Americans United for Separation of Church and State challenged the InnerChange Freedom Initiative (InnerChange), a pre-release prison program at the Newton Correctional Facility

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[136] *See* Conkle, *supra* note 67, at 248.

[137] Ira Lupu and Robert Tuttle explain the meaning of "inherently religious" and the confusion the agency charitable choice rules are causing in using that term. *See* Lupu & Tuttle, *supra* note 9, at 78–89.

[138] Derek Davis, *Right Motive, Wrong Method: Thoughts on the Constitutionality of Charitable Choice*, *in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS 267, 291 (Derek Davis & Barry Hankins eds., 1999).

[139] *See* Gilman, *supra* note 8, at 869.

[140] Mitchell v. Helms, 530 U.S. 793 (2000).

designed to rehabilitate inmates and reduce recidivism.[141] After a lengthy trial, the United States District Court for the Southern District of Iowa held that the program was unlawful, and the court not only enjoined the program, but also ordered that InnerChange repay the state of Iowa over $1.5 million in spent funds.[142] The court found that program participants were required to spend hours each day engaging in Bible study, as well as to attend daily religious devotional practice, worship services, and weekly revivals.[143] In addition, InnerChange taught inmates that criminal behavior is a sin, which can only be remedied "through a miraculous delivery by God—specifically, God in Christ."[144] The court found further that the religious nature of the program precluded non-Evangelical Christian inmates from participating.[145] The Court stated, "[t]he overtly religious atmosphere of the InnerChange program is not simply an overlay or a secondary effect of the program—it is the program."[146] Thus, "[f]or all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates."[147] These actions constituted "severe" violations of the Establishment Clause, resulting in unlawful promotion of religion, incentives for inmates to engage in religious observance, and government financial support for religious indoctrination.[148]

There are also a series of cases challenging charitable choice programs that involve children. For example, the ACLU settled a case with the Department of Health and Human Services that challenged a one million dollar grant to a sexual abstinence program called the Silver Ring Thing (SRT).[149] SRT held high-tech multimedia shows where members testified about how Jesus Christ improved their lives, quoted Bible passages, and urged teenagers to commit their lives to Jesus Christ and to purchase

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[141] Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006).

[142] *Id.* at 941.

[143] *Id.* at 901–03.

[144] *Id.* at 875.

[145] *Id.* at 898–99.

[146] *Id.* at 922.

[147] *Id.* at 933.

[148] *Id.* at 939. In a similar case involving a prison program in Pennsylvania, a federal district court judge rejected a series of motions to dismiss a lawsuit that challenged government welfare grants to the Firm Foundation, a vocational training program and self-described "prison ministry" for inmates. Moeller v. Bradford, 444 F. Supp. 2d 316 (M.D. Pa. 2006); Moeller v. Bradford County, No. 3:05CU334, 2006 WL 319288 (M.D. Pa., Feb. 10, 2006). The court found that the program required staff to adhere to Christian beliefs, actively proselytized inmates, and did not segregate government funds for secular purposes. *Moeller*, 444 F. Supp. 2d at 318. The plaintiffs contended that such a program violated the Establishment Clause. *Id.*

[149] *See* Raja Misha, *U.S. to End Funding of Abstinence Program*, BOSTON GLOBE, Feb. 24, 2006, at B4.

rings that were inscribed with New Testament verse.[150] In the settlement, HHS ended funding for the program as it is currently structured, made future funds contingent on the Silver Ring Thing's compliance with charitable choice restrictions, and agreed to closely monitor any future grants to the program.[151] The settlement agreement also incorporated a list of safeguards that HHS would impose on any future grants with SRT; this document "represent[ed] the clearest and most complete legal guidance for faith-based grantees that has thus far been produced" by the government.[152] HHS terminated its grant to SRT in January 2006, and the SRT is not currently receiving funds from HHS.[153]

In addition, conflicts over hiring discrimination are also rising to the fore. Title VII exempts private religious organizations from the general ban on religious discrimination in hiring.[154] The exemption applies to all employees, not just those in ministerial positions.[155] In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[156] the Supreme Court upheld the exemption in a case involving employees of the Mormon Church who worked in secular positions, reasoning that the exemption alleviated governmental interference with the ability of religious organizations to carry out their missions.[157] The question remains post-*Amos* whether the exemption applies to religious organizations that receive government funds although most lower federal courts that have addressed the issue concluded that it does.[158] The issue is further complicated because many states and localities do not

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[150] *See* Frank James, *Faith-Based Organizations Face Suits—Groups Using Federal Funds Are Accused of Proselytizing*, CHI. TRIB., Jan. 2, 2006, at 8.

[151] *Id.*

[152] IRA LUPU & ROBERT TUTTLE, ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE STATE OF THE LAW 2006: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH BASED ORGANIZATIONS, at iii (2006), *available at* http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2006.pdf.

[153] *Id.* at 3. For another case involving an abstinence program, see ACLU v. Foster, No. Civ.A. 02-1440, 2002 WL 1733651, at *3–6 (E.D. La. 2002). There, a federal district court in Louisiana enjoined a state funding program for abstinence education that gave grants to a variety of groups that spent money to support prayer at pro-life marches and rallies; taught participants about "'the virgin birth and . . . . God's desire [for] sexual purity as a way of life'"; conducted public school skits that made statements "about what God and the Bible say about abstinence"; and gave engraved Bibles to children. *Id.* The court concluded that state money was "being used to convey religious messages and advance religion," *id.* at *7, and ordered the state to implement safeguards that would prevent government abstinence funds from being used for religious purposes. *Id.* at *6–8.

[154] 42 U.S.C. § 2000e–1(a) (2000) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

[155] *Id.*

[156] 483 U.S. 327 (1987).

[157] *Id.* at 330, 336, 339.

[158] *See, e.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000)

exempt publicly funded religious organizations from nondiscrimination laws.[159] It is unclear whether charitable choice statutes or the CCEOs preempt these provisions, and scholars are heatedly debating this issue.[160]

Meanwhile, the case law is developing. A court decision favorable to charitable choice policies was issued in *Lown v. Salvation Army*,[161] in which a group of current and former employees of the Salvation Army brought suit against the Salvation Army as well as government agencies that contracted with the organization, alleging that they were forced out of their jobs when they refused to sign a form affirming the Salvation Army's religious mission and requiring that they identify their religious affiliation as well as list all the churches they attended in the past ten years.[162] The district court judge held that the Salvation Army could maintain faith-selective employment policies[163] and that it was not a state actor subject to the Equal Protection Clause.[164] At the same time, the court did not dismiss the plaintiff's claims that the Salvation Army was violating the Establishment Clause by using government funds to implement a plan to infuse Salvation Army programs with religious content and by using ten percent of its government funding as a tithe to serve religious purposes.[165] Such litigation is likely to flourish, along with the expansion of charitable choice as the government and grantees struggle to capture the benefits of spirituality without funding activities that are "inherently religious."[166]

II. GAP-FILLING OR LAWMAKING?

With each new occupant in the White House, we have come to expect the whiplash of policy reversals as each President puts his own stamp on the activities of the executive branch. For instance, the Reagan Administration implemented a regulation forbidding family planning clinics that receive federal funds from counseling patients

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(finding that the Baptist Memorial College of Health Sciences did not waive its exemption by receipt of federal funds). For a compelling argument that the exemption should not apply in the context of charitable choice, see Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002).

[159] *See* Melissa McClellan, Note, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH. & LEE L. REV. 1437, 1451–52 (2004).

[160] *See id.* at 1443–44 (summarizing contrary positions).

[161] 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

[162] *Id.* at 226, 231–33.

[163] *Id.* at 246–52.

[164] *Id.* at 235–37.

[165] *Id.* at 239–41.

[166] For an updated, comprehensive listing of charitable choice litigation, including pending and settled cases, see The Roundtable on Religion and Social Welfare Policy, Legal Updates, http://www.religionandsocialpolicy.org/legal/legal_updates.cfm (last visited Apr. 24, 2007).

about abortion.[167] The Supreme Court upheld this "gag rule" against attack during the Bush Administration.[168] Making good on a widely-touted campaign promise, President Clinton reversed the "gag rule."[169] President Bush, in turn, reinstated part of it.[170] Likewise, President Bush's successor can always revoke the faith-based executive orders and reinstate requirements that social welfare funds flow only to secular providers. We tolerate these flip-flops in line with the realities of the modern administrative state. Congress is not able to legislate with specificity due to a combination of factors including unforeseen circumstances, the imprecision of language, the complexity of modern society, the need for technical expertise in policymaking, and, more often than not, a lack of political will.[171] Therefore, Congress delegates implementation of statutes to the executive branch. In turn, the courts generally uphold these broad delegations, as well as the agency policies carrying them out.[172]

For instance, when it upheld the Reagan and Bush I "gag rule" in *Rust v. Sullivan*, the Supreme Court stated that although the scope of Congress's ban on funding "methods of family planning" was ambiguous, the regulatory interpretation of that phrase to include a ban on abortion counseling activities was permissible and entitled to *Chevron* deference.[173] Under the *Chevron* doctrine, courts defer to reasonable agency interpretations of ambiguous statutes.[174] *Rust* thus exemplifies the principle that the executive branch can fill in gaps where a statute is silent or ambiguous.[175] Of course, gap-filling can only happen where there is an underlying statute delegating interpretive authority to an agency.[176]

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[167] *See* Separation of Abortion Related Services from Family Planning Programs, 52 Fed. Reg. 33,214–15 (Sept. 1, 1987).

[168] Rust v. Sullivan, 500 U.S. 173, 177–79 (1991) (holding that the provisions of Title X that prohibit clinics receiving funding under Title X from providing abortion counseling do not violate the First Amendment).

[169] *See* The Title X Gag Rule, 58 Fed. Reg. 7455 (Jan. 22, 1993); *see also* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 204 (2d ed. 1996) ("[T]wo days after his inauguration, Clinton dismantled the pro-life regulatory initiatives of the Reagan and Bush administrations.").

[170] Press Release, White House, Memorandum: Restoration of the Mexico City Policy (Jan. 22, 2001) (reinstating President Reagan's "Mexico City" gag order on foreign family planning clinics that receive U.S. aid).

[171] *See* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 43–44 (4th ed. 2004).

[172] *See id.* at 53–54.

[173] *Rust*, 500 U.S. at 181–82, 184, 186–87.

[174] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[175] *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 183 (1994) (discussing Presidential gap-filling in the context of the abortion "gag rule"); Monaghan, *supra* note 16, at 59.

[176] Greene, *supra* note 175, at 183 ("Thus, it is well accepted that the Court may allow the executive branch to resolve statutory ambiguities, flesh out statutory vagueness, and fill in statutory gaps—all of which are interpretive lawmaking functions.").

In the absence of such a statute or an express constitutional grant of executive authority, *Youngstown Sheet & Tube Co. v. Sawyer*[177] teaches that an executive who engages in policy-making may stray into lawmaking, which is an impermissible aggrandizement of power to the executive.[178] Yet the distinction between gap-filling and lawmaking is difficult to pinpoint; it is so difficult, in fact, that the courts have largely left it to the executive branch to draw the line itself.[179] Under both *Youngstown* and *Chevron*, locating congressional intent is paramount. *Youngstown* tells us when a President can act; *Chevron* tells us how much deference to afford executive action. This Part explores whether the charitable choice orders constitute gap-filling or lawmaking, and it concludes that there is no statutory delegation to the President to implement charitable choice.

A. Youngstown *and the Search for Delegated Authority*

Charitable choice legislation is found in the Personal Responsibility Act[180] as well as in a handful of other statutes involving discrete social service programs.[181] While there are questions about the constitutionality of these provisions due to the church-state entanglements they create,[182] there is no doubt that these provisions represent the will of Congress. By contrast, Congress has repeatedly failed to enact proposed expansions of charitable choice into the programs covered by President Bush's faith-based executive orders.[183] Thus, CCEOs appear contrary to the will of Congress; that is, Congress thought about and fought over these expansions, and proponents ultimately could not muster enough votes to put them into effect.

A similar expression of congressional will was determinative in *Youngstown Sheet & Tube Co. v. Sawyer*,[184] a case getting renewed scrutiny in the aftermath of President Bush's exercises of his alleged war powers. *Youngstown* "is the routine starting point in decisions dealing with challenges to presidential power."[185] There, President Truman ordered the Secretary of Commerce to seize U.S. steel mills so

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[177] 343 U.S. 579 (1952).

[178] *Id.* at 587–88.

[179] *See* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 561 (2005) ("In decisions that review the president's actions to determine whether they exceed the authority granted by statute, courts generally have treated the president's assertions of statutory authority with 'deference and restraint.' But they have not settled on the character or scope of this deference.").

[180] 42 U.S.C. § 604(a) (2001).

[181] JOE RICHARDSON, CONG. RESEARCH SERV., CHARITABLE CHOICE RULES AND FAITH-BASED ORGANIZATIONS 2 (2006), *available at* http://bartlett.house.gov/uploadedfiles/Faith%20Based.pdf.

[182] *See supra* note 9.

[183] RICHARDSON, *supra* note 181, at 2.

[184] 343 U.S. 579 (1952).

[185] *See* Stack, *supra* note 179, at 557.

that an impending strike would not hobble steel production during the Korean War.[186] Prior to Truman's seizure, Congress had considered but rejected granting President Truman the very emergency seizure powers that he later exercised.[187] Although the case produced seven decisions by the Court, all the Justices agreed on the principle that the President's power to issue the seizure order must stem from either the Constitution or an enacted statute; where the Justices disagreed was whether such authority existed in the case before it.[188] Justice Black, writing for the court, held that there was neither a statute authorizing the seizure nor constitutional authority to support it.[189] Thus, the President's action was illegal.[190] As he stated, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[191]

In his influential concurrence, Justice Jackson identified three "somewhat oversimplified" categories of presidential action that reflect a more fluid conception of presidential power.[192] Justice Jackson stressed that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[193] A President's authority is at its utmost when he acts pursuant to express or implied statutory authority.[194] By contrast, his authority is "at its lowest ebb" where his actions contradict Congress's will.[195] In such a case, the President acts lawfully only if the Constitution grants him exclusive power that is beyond Congress's power to limit.[196] Between these two extremes, there is a "zone of twilight" in which the President can act where Congress has been silent.[197] In such a case, the President and Congress may have concurrent authority, and the President "can only rely upon his own independent powers."[198] Justice Jackson commented that in the zone of twilight, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[199] Applying this framework to Truman's steel seizure, Justice Jackson concluded that the President acted in derogation of congressional will, as expressed by Congress's enactment of at least three alternative statutory procedures

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[186] *Youngstown*, 343 U.S. at 582.
[187] *Id.* at 586.
[188] *See id.* at 667 (Vinson, C.J., dissenting).
[189] *Id.* at 585, 587 (majority opinion).
[190] *Id.* at 589.
[191] *Id.* at 587.
[192] *Id.* at 635–38 (Jackson, J., concurring).
[193] *Id.* at 635.
[194] *Id.* at 635–37.
[195] *Id.* at 637–38.
[196] *Id.* at 637.
[197] *Id.*
[198] *Id.*
[199] *Id.*

for seizing private property that Truman failed to utilize and by Congress's failure to enact authorizing legislation.[200] Conversely, the dissenters concluded that not only was there no statute expressly prohibiting Truman's actions, but also that the objectives of existing national defense and procurement statutes could not be effectuated without continued operation of the steel mills.[201]

The parallels between the steel seizure order and the CCEOs are obvious. Both presidential policies were implemented after Congress failed to enact nearly identical legislation that would have accomplished the same objectives. The rejected legislative proposal in *Youngstown* influenced at least five of the Justices, who felt it reflected congressional opposition to Truman's action.[202] Similarly, one could argue that the CCEOs fall into Justice Jackson's third category: for executive action that is taken contrary to congressional will on an issue that is not within the President's exclusive constitutional purview. The President clearly does not have the exclusive power to establish domestic policy (even his inherent power is questionable);[203] the focus must be discerning congressional intent.

Thus, the President would need to search for statutes that delegate discretion to the executive to make faith-based policy choices. By jumping into *Youngstown*'s first category—where the President has implied or express statutory authority[204]—the President might also garner *Chevron* deference.[205] It is an open question whether *Chevron* deference, available to agency interpretations of statutes, extends to presidential interpretations. It is also debatable whether a statute that gives policy-making discretion to an agency permits the President to step in and direct agencies to implement his own desired outcome. In other words, there may be a legal consequence to the fact that charitable choice emanates from the President rather than from the agencies.

Putting these questions aside for now, a likely presidential argument would go as follows. The hundreds of human services statutes covered by the CCEOs are silent or ambiguous as to who is eligible to receive grants. Thus, there is a statutory ambiguity available to be filled. Moreover, the constitutional law in this area has moved from strict separationism to increased tolerance of government programs that fund religious groups for educational and social services. Accordingly, the President—who is in the best institutional position to conform agency conduct to legal changes—is simply shifting agency policy to adapt to changing constitutional

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[200] *Id.* at 640–55; *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (applying the *Youngstown* framework to hold that the President could suspend claims against Iran based on "inferences to be drawn from the character of the legislation Congress has enacted in the area . . . and from the history of acquiescence in executive claims settlement").

[201] *Youngstown*, 343 U.S. at 667–710 (Vinson, C.J., dissenting).

[202] *See generally id.*

[203] *Id.* at 587–88 (majority opinion).

[204] *Id.* at 635 (Jackson, J., concurring).

[205] Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

circumstances. Further, because there is a gap, the agencies' new regulations implementing charitable choice are worthy of *Chevron* deference, and since they are reasonable, they should be upheld. In sum, if there is a statutory delegation, the President is on much firmer ground; he becomes a gap-filler rather than a lawmaker. Notably, the President has not made the argument outlined above. To the contrary, he has cited to no statutory or constitutional authority for the orders, and he has not been challenged for his failure to do so.

B. The Sounds of Silence in Human Services Statutes

The CCEOs affect hundreds of human services statutes that neither expressly permit nor prohibit charitable choice. The question thus arises whether this silence amounts to a gap. Examples of these statutes are helpful in answering this question. For instance, under the statute creating the Public Awareness in Underserved Communities demonstration projects,[206] the Department of Justice is authorized to make grants to organizations to raise the awareness of underserved populations, particularly socially isolated immigrant communities, about victims' rights and how to access crime victim services.[207] Eligible victim assistance programs include a "public agency or a nonprofit organization" that meet certain statutory requirements designed to ensure program effectiveness.[208] The statute was enacted in 1984 as part of the Comprehensive Crime Control Act,[209] long before grants to pervasively sectarian organizations were considered permissible. In 2006, $350,000 was available for these demonstration projects,[210] and faith-based partnerships received "[f]avorable consideration."[211] President Bush might argue that the statute, allowing the Secretary to make grants to educate communities of limited-English speakers about their rights as crime victims, is silent as to who is eligible to receive grants. As a result, the argument goes, the executive branch has the authority to fill that gap and to conclude that faith-based providers should be included as potential grantees.

Another example of this sort of statute is the HUD-administered Housing Opportunities for Persons with AIDS (HOPWA), which is designed to provide housing assistance and related supportive services for low-income people with HIV/AIDS and their families.[212] Grantees of HOPWA funds can engage in activities including

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[206] 42 U.S.C. § 10603(c)(1)(A) (2000).

[207] U.S. Dep't of Justice, Grant Announcement for Public Awareness in Underserved Communities 3, http://www.ojp.usdoj.gov/ovc/fund/pdftext/FY06_UnderservedAwareness.pdf (last visited Apr. 24 2007) [hereinafter Grant Announcement].

[208] 42 U.S.C. § 10603(b)(1) (2000).

[209] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 42 U.S.C. § 10603 (2000)).

[210] Grant Announcement, *supra* note 207, at 4.

[211] *Id.* at 3.

[212] 42 U.S.C. §§ 12,901–12 (2000).

housing information services;[213] resource identification;[214] project or tenant-based rental assistance;[215] short-term rent, mortgage, and utility payments to prevent homelessness;[216] housing and development operations;[217] and supportive services.[218] The Secretary is authorized to make grants to states, cities, and nonprofit organizations.[219] In 2003, over one-third of the organizations that received HOPWA funding were faith-based although it is not clear how many would fit within the pervasively sectarian label.[220] Here too, Bush might argue that he interprets the term "non-profit" to include religious organizations, and this is a reasonable interpretation subject to *Chevron* deference.[221]

These are only two examples of the statutes covered by the CCEOs. Yet the gap-filling rationale, used successfully in *Rust v. Sullivan*,[222] is misplaced in this context. *Chevron* permits deference where there is an interpretive act from an agency (and maybe the President) construing a particular statute.[223] But President Bush is not really analyzing the statutory text and gap-filling hundreds of silent statutes. Neither he nor his advisors have looked at each statute to make a considered policy or interpretive decision as to each one, and such an approach would be foolish for implementing a whole-scale, government-wide program. For their part, the agencies have not conducted interpretations of the statutes they administer to determine if they contain ambiguity. President Bush is regulating across a broad field of legislation and mandating a policy preference for sectarian involvement in social services for any statutory program that does not expressly direct otherwise. Not surprisingly, the affected statutes do not provide "otherwise"; the vast majority was enacted at a time when government funding to sectarian groups was deemed unconstitutional by all three branches of government.[224] Thus, there really is no "gap" to fill.

For instance, the term "nonprofit organization" in HOPWA is not further defined;[225] however, the term does not automatically encompass churches. As a matter of tax law as well as the Religion Clause of the First Amendment, churches are subject to differing rules and standards than other nonprofits and accordingly, are referred

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[213] *Id.* § 12,906(1).

[214] *Id.* § 12,906(2).

[215] *Id.* § 12,907(a)(1).

[216] *Id.* § 12,907(a)(2).

[217] *Id.* § 12,907(a)(4).

[218] *Id.* § 12,907(a)(3).

[219] *Id.* § 12,903.

[220] *See* FARRIS ET AL., *supra* note 6, at 30.

[221] Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), courts must defer to reasonable agency interpretations of ambiguous statutes.

[222] 500 U.S. 173, 184–87 (1991).

[223] *Chevron*, 467 U.S. at 842–45.

[224] *See supra* notes 54–56 and accompanying text.

[225] 42 U.S.C. § 12,902(13) (2000).

to in statutes and case law with distinctive terminology.[226] Moreover, when the HOPWA statute was passed in 1992, the clear understanding was that pervasively sectarian organizations were not eligible to apply for federal grants.[227] Thus, Congress's silence on faith-based funding embodied a constitutional prohibition on funding "pervasively sectarian" organizations that became part of the fabric of these statutes. If Congress wanted to promote faith-based funding of sectarian groups when most of these statutes were enacted, it could not. If it wanted to prohibit faith-based funding, such action was not necessary. In other words, Congress did not prohibit faith-based funding because the Supreme Court already did. Thus, the CCEOs cannot fairly be considered exercises in gap-filling because there is no "gap" to fill. In this case, silence spoke volumes.

Moreover, Congress—or at least some of its members—has been well aware of the shifting landscape of constitutional doctrine in this area. In 1996, Congress enacted charitable choice into the welfare reform statute and expressly added charitable choice to several other pieces of legislation.[228] In other words, when Congress wants to use faith-based contracting, it knows how to do so. This further suggests that "silence" does not always create a gap. Indeed, because the issue was effectively closed at the time of the statutory enactments, none of the three types of statutory gaps identified in *Chevron* apply to these human services statutes, such as when Congress has failed to consider a question,[229] is "unable to forge a coalition,"[230] or consciously delegated discretion to the agency.[231] To the contrary, when Congress has expressly considered the charitable choice issue, it has either chosen to enact such policies or not.

Recently, the Supreme Court struck an interpretive rule issued by Attorney General Ashcroft that made physician use of a controlled substance to assist suicide illegal, holding that the rule was not authorized by the underlying statute.[232] The Court concluded that the Attorney General acted outside the scope of the specific statutory delegation, noting "[t]he importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country . . . makes the oblique form of the claimed delegation all the more suspect."[233] Likewise, charitable choice has been a subject of high-profile political debate and popular interest, making it unlikely that Congress would "'delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'"[234]

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[226] *See, e.g.*, Gilman, *supra* note 8, at 836–43 (discussing the different accountability mechanisms that apply to religious organizations as opposed to other nonprofit organizations).

[227] *See, e.g.*, FARRIS ET AL., *supra* note 6, at 29.

[228] RICHARDSON, *supra* note 181, at 2.

[229] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[230] *Id.*

[231] *Id.*

[232] Gonzales v. Oregon, 546 U.S. 243, 921 (2006).

[233] *Id.*

[234] *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

It could be that Congress simply wants human services contracting to be as broad as the Constitution permits. That is, it does not have to legislate specifically in this area because agencies will follow constitutional boundaries. Yet just because faith-based contracting is permissible does not mean that Congress has delegated the policy choice to agencies. Indeed, the legislative history of the failed charitable choice legislation, which is far more specific than any supposed gap in the human services statutes, belies this idea. These non-enactments demonstrate Congress's intent that charitable choice not be expanded to the programs covered by the CCEOs. This is another form of congressional inaction—that which emanates from non-enacted proposals. To be sure, relying on the rejected proposal as an expression of congressional intent might read more into Congress's actions than some Justices might be willing to do. A textualist interpreter would likely argue that congressional silence is not a constitutionally permissible way to legislate. As the argument goes, Congress speaks authoritatively only when both houses pass legislation that is then either signed by the President or upheld over his veto by a two-thirds vote.[235] A non-enactment is not the same as a prohibition—which Congress could pass if it wanted to.[236] This argument begs the question as to why Congress would have passed a statute prohibiting charitable choice in the first place; as Congress generally passes statutes to effectuate policies, not to prohibit non-existent policies.

Moreover, requiring Congress to serve as an active check on presidential overreaching is not realistic or desirable, given Congress's institutional constraints and the collective action problems that beset it.[237] As political scientists Terry Moe and William Howell explain: Congress, constituted by hundreds of members each beholden to different bounded constituencies, faces immense transaction costs to overturn presidential action.[238] Because members of Congress must please their constituencies in order to win reelection, they have little institutional motivation to reign in presidential power by promoting congressional power as an end to itself.[239] Even if Congress wanted to check presidential overreaching, congressional action faces a "maze of obstacles," as bills must work their way through multiple committees, subcommittees, floor votes in the House and Senate, and intense negotiations to reach a form agreeable in both houses—all the while fending off attacks by party leaders, rules committees, filibusters, holds, and other procedural roadblocks.[240]

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[235] *See* Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding that [congressional] intent from the *failure* to enact legislation. . . . [W]e should admit that vindication by congressional inaction is a canard.").

[236] *See* Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 234–35 (2002).

[237] *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999); Stack, *supra* note 179, at 579–81.

[238] *See* Moe & Howell, *supra* note 237, at 144.

[239] *See id.* (noting the dilemma for the member of Congress becomes a prisoner's dilemma).

[240] *See id.* at 146.

> [C]oalitions [must] somehow be formed among hundreds of legislators across two houses and a variety of committees, which calls for intricate coordination, persuasion, trades, promises, and all the rest, but owing to scarce time and resources, members must also be convinced that the issue at hand is more deserving than the hundreds of other issues competing for their attention.[241]

Not surprisingly, Congress rarely attempts to overturn executive orders, and when it does, it is rarely successful.[242]

In the case of charitable choice, expecting a congressional response is unrealistic and unnecessary. This is not a case where the meaning of congressional silence is elusive, such as where Congress pays little attention to a proposed bill. In the case of charitable choice, both houses of Congress debated the legislation extensively for two years, the media actively covered the debate, and despite all the attention, the Senate could not bring the bill to a vote due to substantive opposition to the bill's goals.[243] As Justice O'Connor stated in *FDA v. Brown & Williamson Tobacco Co.*,[244] in concluding that congressional inaction can reveal legislative intent, "'[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on.'"[245] In *Brown & Williamson*, the Court struck down a Clinton administration regulation in which the FDA asserted jurisdiction to regulate tobacco.[246] As Justice O'Connor recognized, not all congressional inaction is the same, and some is highly indicative of congressional intent.[247] The Court—as in the subsequent *Gonzales v. Oregon* case—refused to presume that Congress delegates power to the executive branch to fill statutory gaps in cases involving highly controversial issues.[248] Her majority opinion, joined by proclaimed textualists such as Justices Scalia and Thomas, relied on numerous indicia of congressional intent regarding tobacco regulation in the absence of a clear statutory command, including rejected bills, related statutes, and years of legislative acquiescence to prior agency interpretations.[249]

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[241] *Id.*

[242] *Id.* at 165–66. Moe and Howell note that members of Congress proposed legislation to overturn a scant 37 out of 1,000executive orders between 1973 and 1997; of these attempts, only three succeeded. *Id.* However, most executive orders are not controversial; they deal with internal government affairs. Thus, these statistics may overstate the extent of both presidential overreaching and congressional acquiescence.

[243] *See supra* notes 78–94 and accompanying text.

[244] 529 U.S. 120 (2000).

[245] *Id.* at 156 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983)).

[246] *Id.* at 161.

[247] *Id.* at 155–56.

[248] *Id.* at 159–60.

[249] *Id.* at 143–59.

Yet, relying on a failure to enact might also open up an invitation to look at Congress's intent since implementation of the CCEOs. Congress has not subsequently passed legislation overruling the President, and it has continued appropriating funds for the affected social programs. Thus, Congress might be viewed as acquiescing in the President's approach. Acquiescence is another controversial, but widely used, method of statutory interpretation that textualists disavow.[250] The acquiescence argument seems weak, given that overruling presidential action is institutionally difficult for Congress and that stripping funds from programs that serve desperately needy people is an undesirable way to teach the President a lesson. However, it is difficult to predict how the Court might read these scattered tea leaves. For the reasons suggested above, the Court has been maddeningly inconsistent in how much interpretive weight rejected proposals, acquiescence, and congressional silence can bear.[251]

Nevertheless, *Youngstown* provides one way out of the thicket. In particular, *Youngstown* teaches that congressional inaction can shed light on sweeping assertions of presidential power in contexts involving controversial issues where congressional competencies are highest.[252] As in *Youngstown*, there is no statutory gap here to be filled. At the same time, there is ample evidence that the President's orders, particularly the employment discrimination provisions, are contrary to congressional intent, as expressed in the non-enactment of the President's proposed bills. As a result, the President will need to point to other sources of statutory authority as well as his constitutional powers in the "zone of twilight" as hooks upon which to hang his charitable choice hat.

C. The Executive Role in Federal Procurement

Another possible hook for the President is to rely on his long-standing role as the head of federal procurement policies. As noted earlier, most of Bush's faith-based executive orders do not cite to any specific statutory or constitutional authority.[253] Rather, they state simply that they are being promulgated, "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America."[254]

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[250] *Compare* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 185–88 (1994) (rejecting acquiescence arguments), *with* Bob Jones Univ. v. United States, 461 U.S. 574, 599–602 (1983) (describing how Congress acquiesced in an IRS revenue ruling prohibiting tax-exempt status to schools that discriminate on the basis of race).

[251] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

[252] With regard to legislative competencies involving issues of religious liberty, see *infra* Part III.

[253] *See supra* Part I.B.

[254] Exec. Order No. 13,342, 3 C.F.R. 180–82 (2005), *reprinted in* 5 U.S.C. § 601 (2006); Exec. Order No. 13,331, 3 C.F.R. 146–48 (2005), *reprinted in* 42 U.S.C. § 12,501 (2006); Exec. Order No. 13,280, 3 C.F.R. 262–64 (2003), *reprinted in* 5 U.S.C. § 601 (2006); Exec. Order No. 13,199, 3 C.F.R. 752–54 (2002), *reprinted in* 3 U.S.C. ch. 2 (2006); Exec. Order

However, in Executive Order 13,279, which mandates equal protection for faith-based organizations,[255] President Bush expressly cites the Federal Property and Administrative Services Act of 1949 (FPASA) as the basis for at least part of the order's authority.[256] FPASA gives the President and his subordinates broad authority to purchase goods and services for the federal government and to "prescribe policies and directives that the President considers necessary to carry out"[257] the function of promoting "'an economical and efficient system' for procurement."[258] Echoing this language, Executive Order 13,279 itself states that it is meant "to ensure the economical and efficient administration and completion of Government contracts...."[259] However, the CCEOs extend beyond the President's procurement powers and conflict with congressional intent. Thus, they cannot be sustained under FPASA.

1. The History of Presidential Procurement Powers

The President appears to rely on FPASA only to defend a portion of Executive Order 13,279 that amends anti-discrimination employment policies found in Executive Order 11,246, which dates from the Johnson Administration.[260] Among other things, Executive Order 11,246 prohibits employment discrimination—including discrimination on the basis of religion—in federal procurement and construction contracts and imposes certain affirmative action obligations upon such contractors.[261] Executive Order 13,279 provides that religious organizations that contract with the federal government pursuant to FPASA are not bound by the anti-discrimination provisions in Executive Order 11,246 with regard to religion.[262] In other words, charitable choice grantees can hire co-religionists without running afoul of the Johnson order. Executive Order 13,279 explains that it is making the change to further the government's interest in "ensuring that the cost and progress of Federal procurement contracts are not adversely affected by an artificial restriction of the labor pool" resulting from the exclusion of faith-based organizations from social service contracting.[263]

The impact of this change seems somewhat limited, given that Executive Order 11,246 applies only to procurement contracts involving goods and services provided to the government and construction contracts.[264] Likewise, FPASA, the assumed

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No. 13,198, 3 C.F.R. 750–52 (2002), *reprinted in* 5 U.S.C. § 601 (2006).

[255] Exec. Order No. 13,279, 3 C.F.R. 258–62 (2003), *reprinted in* 5 U.S.C. § 601 (2006).

[256] *See id.*; *see also* 40 U.S.C. § 121(a) (2006).

[257] 40 U.S.C. § 121(a).

[258] MAYER, *supra* note 18, at 46.

[259] 3 C.F.R. 258.

[260] Exec. Order No. 11,246, 3 C.F.R. 339–48 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (2006).

[261] *Id.*

[262] 3 C.F.R. 259–60.

[263] *Id.* at 261.

[264] *See* ANGIE A. WELBORN, CHARITABLE CHOICE: LEGAL AND CONSTITUTIONAL ISSUES 8–10

source of authority for Executive Order 11,246, does not cover social service contracts where the services are provided by non-governmental entities to third parties.[265] Yet despite the limited scope of FPASA and Bush's narrow reliance on that statute, history suggests that he might rely on the long history of presidential involvement in federal procurement to justify the broad sweep of the CCEOs.[266]

As reflected by the Johnson executive order, the Presidents since the New Deal have issued a stream of executive orders regulating the nation's procurement policies, especially with regard to the employment and labor practices of government contractors.[267] During World War II, Roosevelt issued a series of increasingly detailed orders that required defense contracts, and later all government contracts, to contain clauses prohibiting discrimination on the basis of race or national origin.[268] Although the orders' practical impact was muted, their symbolic effect was large.[269] Roosevelt based the orders on his constitutional powers to act in the national defense; the orders attempted to assure maximum utilization of available manpower.[270] After the war, Truman issued an executive order continuing Roosevelt's policies into the peacetime economy, and he later used an executive order to create a government committee to monitor compliance with the executive order's nondiscrimination principles.[271] Eisenhower further strengthened the existing executive orders by requiring compliance reports to the President, posting of equal employment opportunity policies in workplaces, and anti-discrimination education efforts.[272]

(2006), *available at* http://digital.library.unt.edu/govdocs/crs//data/2006/upl-meta-crs-8340/RL32195_2006Jan27.pdf. There are construction contracts related to federal programs that are within the scope of FPASA and thus affected by Executive Order 13,279. *Id.* at 10. For instance, the CCEOs permit government funding for construction or renovation of structures owned by religious organizations. *See* STATE OF THE LAW 2003, *supra* note 117, at 32. Moreover, the CCEOs cover many programs administered by HUD, "from those that deal with affordable housing and community development to grants for homeless shelters and housing for people with AIDS." *Id.*

[265] "The origins of the congressional authority for Executive Order 11,246 are somewhat obscure and have been roundly debated by commentators and courts." Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979). Nevertheless, most courts have determined that FPASA provides the authority for Executive Order 11,246. *See* Daniel M. Katz et al., *A Commentary on Professor Morris's Comparison of Discrimination for Union Activity Under the NLRA and RLA*, 3 EMP. RTS. & EMP. POL'Y J. 305 (1999).

[266] *See* Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 234 (1996) (noting that there were 113 such executive orders prior to 1996).

[267] *Id.*

[268] *See* MAYER, *supra* note 18, at 187–88; Debra A. Millenson, *W(h)ither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679, 685 (1999); LeRoy, *supra* note 266, at 252–54;.

[269] *See* MAYER, *supra* note 18, at 189–90.

[270] *See* Millenson, *supra* note 268, at 686.

[271] *See* MAYER, *supra* note 18, at 190; LeRoy, *supra* note 266, at 254–55.

[272] *See* LeRoy, *supra* note 266, at 257.

In 1961, President Kennedy upped the ante by issuing two executive orders requiring federal contractors to take affirmative action to promote full employment opportunities.[273] Unlike the prior national defense justifications for such executive orders, Kennedy based his orders on the principle that "'discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States.'"[274] He also cited prior executive orders as precedential authority, "suggesting that these had become something like a cumulating body of common law for federal procurement."[275] Notably, from FDR through Kennedy, the executive branch was far more progressive than Congress in pursuing nondiscrimination in employment.[276] The orders ultimately served as models for later legislation and lead to greater public acceptance of nondiscrimination ideals.[277] This was accomplished in the face of intense congressional resistance to civil rights norms.[278] As one commentator explained, "[n]o branch of the federal government in the 1950s was more hostile to the principle of integrating African Americans than Congress."[279] President Johnson issued Executive Order 11,246 shortly after passage of Title VII of the Civil Rights Act of 1964.[280] He derived the authority for this order from FPASA's requirement that government procurement be conducted in an economical and efficient matter—an objective achieved by broadening the available labor pool in government contracts.[281]

A group of government contractors challenged the implementation of Executive Order 11,246, contending that it constituted a violation of *Youngstown's* proscription on lawmaking. However, the Third Circuit upheld the executive order in *Contractors Ass'n v. Secretary of Labor*,[282] finding it well within the President's authority under FPASA to ensure that contractors "are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen."[283] The Third Circuit noted that Congress had not prohibited

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[273] *See* MAYER, *supra* note 17, at 197–200; LeRoy, *supra* note 266, at 258–59. The term "affirmative action" was added "almost as an afterthought," and its forthcoming implications were not foreseen. *See* MAYER, *supra* note 18, at 203.

[274] *See* LeRoy, *supra* note 266, at 258 (quoting Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961)).

[275] *Id.* at 260.

[276] *See* MAYER, *supra* note 18, at 184.

[277] *See id.* at 184–85 ("[P]residential initiative played a decisive role in broadening the scope of civil rights policies, in a sequence of increasingly effective presidential responses, which ultimately pulled along both the courts and Congress."); LeRoy, *supra* note 266, at 266–67.

[278] LeRoy, *supra* note 266, at 287.

[279] *Id.*

[280] Exec. Order No. 11,246, 3 C.F.R. 339–48 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (2006).

[281] *See* MAYER, *supra* note 18, at 203; Millenson, *supra* note 268, at 688. The order put enforcement authority in the Secretary of Labor and strengthened enforcement mechanisms. MAYER, *supra* note 18, at 203.

[282] 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

[283] *Id.* at 170; *see also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th

the presidential action, but rather, it had continued to make appropriations under the contested programs.[284] In other words, for the Third Circuit, Executive Order 11,246 falls within Justice Jackson's first category for presidential action authorized by Congress.

Over the same time frame, the Presidents since Franklin Delano Roosevelt have also issued a series of executive orders that affect the labor policies of private employers.[285] These labor relations executive orders were uniformly upheld until President Clinton issued Executive Order 12,954, which barred the government from contracting with employers who hire permanent striker replacements.[286] Clinton issued the order to woo disaffected labor groups in the aftermath of his support for NAFTA after he failed to persuade Congress to enact a bill that would effectuate the same result.[287] Congress debated the bill at length, and a majority in each house voted to support it, but a Senate minority threatened a filibuster, and the bill was not passed.[288] As authority for the executive order, Clinton cited the federal government's interest under FPASA in "economy, efficiency, and cost of operations" that would be furthered by promoting stable relationships between contractors and their employees.[289] The order stated that use of striker replacements exacerbated labor disputes and deprived employers of the accumulated knowledge and skills of the replaced employees to the detriment of the federal government.[290]

Several pro-business interests, led by the Chamber of Commerce, challenged the order in federal court.[291] They asserted that Clinton was violating the NLRA, and, in the only rebuke to an executive order since *Youngstown*, the Court of Appeals for the D.C. Circuit agreed.[292] In *Chamber of Commerce v. Reich*, the court held that the order was preempted by the National Labor Relations Act and constituted an impermissible use of the President's executive powers.[293] The court stated that FPASA is not "a blank check for the President to fill in at his will."[294] Further, even if the order was based on FPASA, it conflicted with the NLRA—a more specific statute.[295] In an exposition of labor law unnecessary for the present analysis, the court concluded

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Cir. 1977).

[284] *Contractors Ass'n*, 442 F.2d at 171.

[285] *See* LeRoy, *supra* note 266, at 235–52.

[286] Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) ("We conclude that . . . the Order conflicts with the National Labor Relations Act."); *see* Exec. Order No. 12,954, 3 C.F.R. 329–31 (1995), *reprinted in* 40 U.S.C. § 121 (2006).

[287] *See* LeRoy, *supra* note 266, at 230, 280.

[288] *See id.* at 278–80.

[289] 3 C.F.R. 329.

[290] *Id.*

[291] *Reich*, 74 F.3d 1322.

[292] *Id.*

[293] *Id.* at 1339.

[294] *Id.* at 1330 (citing AFL-CIO v. Kahn, 618 F.2d 784, 793 (D.C. Cir. 1979)).

[295] *See id.* at 1333.

that NLRA, as interpreted by the Supreme Court, allows employers to permanently replace economic strikers.[296] The court noted that a statutory conflict did not exist in *Contractors Ass'n* or in *AFL-CIO v. Kahn*, a prior D.C. Circuit opinion upholding an executive order issued by President Carter that imposed wage and price controls on government contractors.[297] The D.C. Circuit later remarked in rejecting the government's petition for rehearing that President Clinton's broad reading of the Procurement Act would mean that the President could issue any order as if no other statutes in the United States Code existed.[298] Thus, the court essentially concluded that conflict with a narrower statute pushed the Clinton executive order into Jackson's third category—actions contrary to Congressional will.

Subsequently, in *Building & Construction Trades Dep't v. Allbaugh*, the D.C. Circuit rejected a challenge to an executive order issued by President Bush designed to limit union influence over government contracting.[299] Executive Order 13,202 provided that the federal government could neither require nor prohibit contractors from entering into project labor agreements (which would require that all contractors on a site agree in advance to abide by a master collective bargaining agreement for all work on a project).[300] The District Court for the District of Columbia looked to *Reich* and concluded that the President lacked constitutional or statutory authority to impose conditions on projects owned by parties other than the federal government and that the order conflicted with the NLRA because it altered the delicate balance of bargaining and economic power created by that law.[301]

The Court of Appeals for the District of Columbia reversed; the court distinguished *Youngstown* on the basis that unlike Truman's order, Bush's executive order was not self-executing.[302] Whereas Bush was directing a subordinate official to enforce the President's policies only to the extent permitted by other statutes, Truman's order overrode other statutes: "Indeed, had President Truman merely instructed the

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[296] *Id.* at 1332–36. The court's finding of a conflict is controversial because it reads Supreme Court dicta into the text of the National Labor Relations Act. *See* Charles Thomas Kimmett, Note, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in* Chamber of Commerce v. Reich, 106 YALE L.J. 811, 813–26 (1996).

[297] Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159 (1971), *cert. denied*, 404 U.S. 854 (1971); *Kahn*, 618 F.2d at 792.

[298] Chamber of Commerce v. Reich, 83 F.3d 438, 440 (D.C. Cir. 1996).

[299] 295 F.3d 28 (D.C. Cir. 2002).

[300] Exec. Order No. 13,202, 3 C.F.R. 759–61 (2002), *reprinted in* 41 U.S.C. § 251 (2006).

[301] Bldg. & Constr. Trades Dep't v. Allbaugh, 172 F. Supp. 2d 138, 167 (D.D.C. Cir. 2001), *rev'd*, 295 F.3d 28 (2002), *cert. denied*, 537 U.S. 1171 (2003).

[302] *Allbaugh*, 295 F.3d at 33. The decision was authored by Chief Judge Ginsburg, who had written an article during the Reagan Administration supporting President Reagan's regulatory review executive orders, which were controversial when issued because of the President's assertion of authority over rulemaking (discussed *infra* at Part IV.A). *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

Secretary of Commerce to secure the Government's access to steel '[t]o the extent permitted by law,' *Youngstown* would have been a rather mundane dispute over whether the Secretary had statutory authority to act as he did."[303] The D.C. Circuit held further that Bush's executive order did not conflict with the NLRA because it constituted proprietary action; that is, it involved the government acting just as a private contractor would act.[304] This is significant as a principle of labor law because the NLRA only preempts the government when it is acting as a regulator. The court distinguished the Clinton executive order at issue in *Reich* as involving government action in a regulatory capacity.[305] Putting the intricacies of labor law aside, the bottom line is that in *Reich* the court perceived a conflict with the NLRA, while in *Allbaugh* the court perceived no conflict.

Thus, under current law (at least in the D.C. Circuit), the President has authority under FPASA to implement substantive procurement policies covered by that statute as long as there is no direct conflict with another statute. Even assuming that FPASA covers the subject matter of the CCEOs, the orders are vulnerable because they contain provisions that may conflict with other legal requirements. For instance, federalism concerns are likely to rise to the fore because some state constitutions are more protective of anti-establishment values than the federal constitution, and thus state laws may conflict with the CCEOs.[306] While Congress has the power to preempt inconsistent state laws,[307] it is far less clear that the President can do this on his own.[308] Still other aspects of the CCEOs, particularly the failure to require secular alternatives to sectarian providers, appear to conflict with Supreme Court admonitions against the government indoctrination of religion.

Further, the D.C. Circuit's emphasis on statutory conflict as a limitation on the President's powers shows a concern with executive undermining of congressional intent. In other words, Congress does not delegate discretion to the executive to carry out policies that conflict with other statutes. The CCEOs conflict with congressional intent is expressed in the non-enactment of the charitable choice bills. Given that the

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[303] *Allbaugh*, 295 F.3d at 33.

[304] *Id.* at 34–36.

[305] *Id.* at 34–36, 36 n.*.

[306] *See* IRA C. LUPU & ROBERT W. TUTTLE, ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE STATE OF THE LAW 2005: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS 93–95 (2005), *available at* http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2005.pdf [hereinafter STATE OF THE LAW 2005].

[307] *See* McClellan, *supra* note 159, at 1455–78 (discussing preemption doctrine to assess whether state and local nondiscrimination provisions survive federal charitable choice laws). Even so, it is not clear that Congress chose to preempt state and local laws in the charitable choice legislation in the PRA. It stated: "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) (Supp. III 1997).

[308] *See* STATE OF THE LAW 2005, *supra* note 306, at 99–101.

CCEOs conflict with congressional intent, this looks like a paradigmatic case where the executive is defying Congress, and the D.C. Circuit's cases suggest that the President's procurement powers are thus circumscribed.

However, the CCEOs facially claim to apply only to the "extent permitted by law."[309] As a result, the CCEOs might avoid the problem of conflict that doomed the Clinton executive order concerning mandatory strikers. Yet, the magical incantation of "to the extent permitted by law" should not save presidential policymaking.[310] To be sure, the limited case law on this issue suggests that the President is only constrained by existing law; if Congress has not addressed an issue, the President can step into the breach and fill it. Yet this opens up vast realms of policymaking to the President's control and undermines *Youngstown*'s bedrock principle that presidential action must rest on either statutory or constitutional authority. This limitation also uses "law" as the only valid expression of congressional intent, while the Supreme Court has held that congressional intent can be found in other sources, such as inaction, rejected proposals, and other statutes. At bottom, *Youngstown* requires fidelity to congressional intent—however expressed.

2. Economy and Efficiency

In addition, the CCEOs might run afoul of the delegation to the executive branch in FPASA,[311] which, while broad, is not a "blank check."[312] It is worth a reminder that the scope of FPASA does not extend to social service contracts.[313] Nevertheless, language of the CCEOs reveals that the President is clearly trying to squeeze the CCEOs into this category of broad presidential procurement powers.[314] As the cases have held, executive orders issued under the Procurement Act must foster an economic and efficient system for procurement, a generally lenient standard measured under a "reasonable nexus" test. FPASA was enacted after World War II to improve procurement processes given the "absence of central management" at the time.[315] Although Presidents have latched on to FPASA to justify social policies tenuously related to these narrow procurement objectives, the CCEOs would stretch this expansion to new heights. The President wisely frames his charitable choice initiative in terms of economy and efficiency,[316] knowing the deferential review courts award such justifications. Yet the deference afforded in other contexts may be misplaced here, given that the impact of the CCEOs extends far beyond the contracting parties, and thus, far

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[309] *See Allbaugh*, 295 F.3d at 33.

[310] *See id.*

[311] *See supra* text accompanying notes 254–59.

[312] Chamber of Commerce v. Reich, 74 F.3d 1332, 1330–31 (D.C. Cir. 1996) (citing AFL-CIO v. Kahn, 618 F.2d 784, 793 (D.C. Cir. 1979)).

[313] *See supra* note 265 and accompanying text.

[314] *See supra* text accompanying note 266.

[315] *Reich*, 74 F.3d at 1333.

[316] *See supra* text accompanying note 259.

beyond the objectives of the Procurement Act. Other procurement executive orders effectuated new social policies whereby the government was buying services for itself.[317] With the CCEOs, the government is buying services for delivery to third parties.[318] By extending contracting opportunities to faith-based organizations, the President is using the vulnerabilities of our neediest citizens as a platform for engineering social change unrelated to procurement objectives.

If the nexus test had any teeth, the President would be hard-pressed to justify his empirical claims. The President claims that the CCEOs eliminate discrimination against religious groups, which are more effective at solving social problems.[319] However, the preceding federal procurement system for social services did not discriminate against faith-based providers.[320] From the founding of this country, governments and religious groups have had an intertwined and sometimes collaborative relationship in providing social welfare.[321] In the twentieth century, the government has extensively funded religiously affiliated nonprofit groups as long as those groups were not "pervasively sectarian."[322] For instance, in 1993, government funding accounted for ninety-two percent of the revenues for Lutheran Social Ministries, sixty-five percent of the revenues for Catholic Charities, and seventy-five percent of the revenues for the Jewish Board of Family and Children's Services.[323] These interrelationships spurred Stephen Monsma to remark, prior to the enactment of the first charitable choice statute, "when it comes to public money and religious nonprofit organizations, sacred and secular mix."[324]

As far back as 1899, the Supreme Court upheld a congressional appropriation for construction of a Catholic hospital, reasoning that the hospital provided secular services.[325] In 1988, the Supreme Court upheld a federal grant program that funded religious organizations to counsel pregnant teenagers while prohibiting abortion-related services or information.[326] As these cases demonstrate, there has never been

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[317] *See supra* text accompanying note 6.

[318] *See supra* text accompanying notes 7, 127–35.

[319] *See supra* text accompanying notes 97, 99–01.

[320] *See generally* Steven K. Green, *"A Legacy of Discrimination"? The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 84 OR. L. REV. 725 (2005). Professor Green examines many studies of religious involvement in social services and concludes that "government anti-religious bias does not appear to be a problem." *Id.* at 754.

[321] *Id.* at 754 ("FBOs have long participated in government-funded and unfunded social service grants and programs."); MONSMA, *supra* note 53, at 5–6, 9–10.

[322] *See supra* note 56 and accompanying text.

[323] MONSMA, *supra* note 53, at 1.

[324] *Id.*; *see also* FREDRICA D. KRAMER ET AL., UNION INST., FEDERAL POLICY ON THE GROUND: FAITH-BASED ORGANIZATIONS DELIVERING SOCIAL SERVICES 3 (2005), *available at* http://www.urban.org/UploadedPDF/311197_DP05-01.pdf ("Many faith-based social service organizations contracted with government long before Charitable Choice and continue to do so."); *id.* at 40.

[325] Bradfield v. Roberts, 175 U.S. 291, 297–300 (1899).

[326] Bowen v. Kendrick, 487 U.S. 589 (1988).

an outright ban on the participation of religiously-affiliated organizations in federal grant programs. A major post-1996 study of faith-based contracting at the state and local level found that local governmental officials "welcomed the participation of faith-based organizations."[327] The study "found little indication that public officials were hostile to [faith based organizations]" and there were "few allegations from the [faith based organizations] about past or present ill treatment."[328]

Thus, the White House's *Unlevel Playing Field* is misleading.[329] It uses the term "faith-based" broadly, without distinguishing between churches and affiliates of religious organizations, who have long been eligible to apply for federal grants.[330] To some detractors, the CCEOs are creating an unlevel playing field tilted in a different direction by exempting religious organizations from accountability mechanisms and hiring discrimination laws that apply to secular providers.[331] In addition, the CCEOs as applied (but not on their face) may result in some preferences for religious organizations in the procurement process, as agencies look for ways to expand their faith-based contracting.[332]

Moreover, to the degree President Bush is trying to integrate congregations into the social service network,[333] there is scant evidence that these groups either want to or realistically can play a meaningful role in human services delivery, which is complex and highly specialized. Studies of congregational involvement in social services reveal that many congregations have programs to meet immediate, individual needs, such as food banks and clothing drives, but they do not engage in sustained human services efforts.[334] Most charitable efforts are spearheaded by a tiny group of

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[327] *See* KRAMER ET AL., *supra* note 324, at 4.

[328] *Id.*

[329] *See supra* text accompanying notes 75–77.

[330] *See White House Releases Report on Faith-Based and Community Organizations*, OMB WATCH, Aug. 20, 2001, http://www.ombwatch.org/article/articleview/363.

[331] *See supra* text accompanying notes 260–62.

[332] Mark Chaves, *Debunking Charitable Choice: The Evidence Doesn't Support the Political Left or Right*, STAN. SOC. INNOVATION REV., Summer 2003, at 33, *available at* http://www.ssireview.org/pdf/2003SU_feature_chaves.pdf. Chaves discusses a request for proposals (RFP) issued by HUD that announced $6.5 million for private entities that eliminate the lead poisoning threat to children. The RFP asked applicants to describe how they would involve faith-based organizations in their proposed organizations. *Id.* Similarly, another notice offering $80 million in grants to control lead poisoning said that faith-based partnerships would get higher points in the bidding process than other entities. *Id.*

[333] *See supra* notes 6–7.

[334] *See* Mark Chaves, *Testing the Assumptions: Who Provides Social Services?*, *in* SACRED PLACES, CIVIL PURPOSES: SHOULD GOVERNMENT HELP FAITH-BASED CLERGY? 287, 289 (E.J. Dionne Jr. & Ming Hsu Chen eds., 2001). Only six percent of all congregations report that they have a staff person who devotes at least twenty-five percent of his time to social services. *Id.* at 288. Moreover, the median congregation spends only three percent of its total budget, or $1,200, on social service programs. *Id.*

volunteers within a congregation.[335] Thus, congregations are best suited to organizing small groups to perform discrete tasks.[336]

In addition, there is no empirical evidence that a faith-based approach to human services is superior to a secular approach.[337] Comparing the performance of secular and sectarian providers is a challenge in the highly decentralized human services environment.[338] Moreover, it is also difficult to quantify and measure performance-based outcomes for these services, which are intensely interpersonal.[339] In the absence of empirical evidence, the administration has touted anecdotal evidence about a few allegedly successful faith-based programs and ignored horror stories from other programs.[340] Yet while "[c]laims about the success of particular faith-based programs are widespread . . . there is typically no control group for comparison."[341] A major study by the non-partisan Center for Urban Policy and the Environment compared the performance of faith-based and secular entities delivering job training and placement services to welfare recipients in Indiana pursuant to the Temporary Assistance to Needy Families (TANF) statute.[342] The preliminary findings of the researchers were that faith-based job training and placement services were "somewhat less effective than those of secular organizations."[343] While both faith-based and secular providers were able to put welfare recipients in jobs at the same placement rates at similar hourly wages, the "[c]lients of the faith-based providers work[ed] substantially fewer hours per week and [were] less likely to be offered health insurance."[344] The study,

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[335] *See id.*

[336] *See id.* at 289; *see also id.* at 290 ("Those results contradict the widely held assumption that religious organizations provide social services in a distinctively holistic or personal way.").

[337] *See* FORMICOLA ET AL., *supra* note 2, at 172; KRAMER ET AL., *supra* note 324, at 14 ("There is no systematic evidence that the quality of services delivered by faith-based organizations is superior to the quality of services provided by other social service providers.").

[338] *See infra* note 341 and accompanying text.

[339] *See* Partha Deb & Dana Jones, *Does Faith Work? A Preliminary Comparison of Labor Market Outcomes of Job Training Programs*, *n* CENTER FOR URBAN POLICY AND THE ENVIRONMENT, CHARITABLE CHOICE: FIRST RESULTS FROM THREE STATES 57, 57 (Sheila Suess Kennedy & Wolfgang Bielefeld eds., 2003), *available at* http://ccr.urbancenter.iupui.edu/PDFs/Interim%20report/Interim%20report%20PDF.pdf [hereinafter CHARITABLE CHOICE: FIRST RESULTS] (noting difficulties of drawing comparisons due to problems in measuring outcomes "where quality is not easily quantified and multiple objectives and constituencies frequently exist").

[340] *See* Gilman, *supra* note 8, at 802–03; *see also* Mark A.R. Kleiman, *Faith Based Fudging: How a Bush-Promoted Christian Prison Program Fakes Success by Massaging Data*, SLATE, Aug. 5, 2003, http://www.slate.com/id/2086617 (explaining how a study of a Bible-centered prison program misrepresented outcomes by engaging in selection bias).

[341] *See* KRAMER ET AL., *supra* note 324, at 15 (noting that there is selection bias in faith-based interventions: "[T]hose who choose to participate in faith-based programs and those who stay in such programs may have an explicit affinity to the religious or spiritual grounding of the intervention.").

[342] *See generally* CHARITABLE CHOICE: FIRST RESULTS, *supra* note 339.

[343] *Id.* at iv.

[344] *Id.*

however, does not shed light on other forms of social service provision.[345] While most researchers agree that faith-based organizations bring unique attributes to the human services field due to their strong community ties,[346] there is no evidence that these attributes can be harnessed to create better outcomes or that these benefits cannot be realized when churches set up religiously-affiliated non-profits.

In sum, there is neither a history of discrimination against faith-based organizations in social service contracting nor a compelling justification for altering the prior balance between secular and sectarian. Instead, charitable choice could lead to inefficiencies of its own. Governments at all levels will have to undertake extensive monitoring to ensure that faith-based contractors comply with constitutional limits, raising the risk of government entanglement with religion. Current research shows that congregations lack the knowledge and competence to understand the complex constitutional restrictions on the use of government funds.[347] For instance, a survey of congregational leaders revealed that sixty-seven percent did not know that they were prohibited from using their government funds for religious activities such as prayer or Bible study.[348] Moreover, many small congregations are unprepared to deal with the requirements of government contracting.[349] They have neither adequate staff nor the capacity for the data management and reporting that are required to meet government accountability mechanisms.[350] Not surprisingly, charitable choice is already generating what will likely be a long road of litigation as the practices of specific faith-based providers are challenged for constitutional violations.[351] While Congress does not need a justification for implementing charitable choice, the President does as long as he is relying on his procurement powers.

D. Evasion of Hard Look Review

Of course, because Bush's order is essentially self-executing, these efficiency and economy concerns were never meaningfully aired or considered by the agencies. By contrast, if an executive agency had decided to implement charitable choice on its own, without express statutory authorization, the agency's change in policies would

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[345] A separate study of Los Angeles Welfare-to-Work programs found that no type of provider—governmental, non-profit, or religious—was superior or inferior to others. *See* KRAMER ET AL., *supra* note 324, at 14. Each type of program had certain advantages. *See id.* at 14–15. For-profit providers had the highest placement rates; government programs had employees who were particularly helpful; and faith-based organizations and other non-profits were perceived as most empathetic by clients. *Id.*

[346] *See id.* at 41–42.

[347] *See* CHARITABLE CHOICE: FIRST RESULTS, *supra* note 339, at iv.

[348] *See id.* at v.

[349] *See* KRAMER ET AL., *supra* note 324, at 42.

[350] *See id.* at 42–43.

[351] *See* STATE OF THE LAW 2005, *supra* note 306, at 35–88.

be subject to hard look review by the courts. Prior to welfare reform and the CCEOs, many agencies had written policies limiting faith-based contracting that had to be revoked in order to implement President Bush's executive order. For example, the Department of Education (DOE) previously barred religious schools and divinity departments from applying for certain federal grants.[352] The new rule eliminates that barrier and permits seminaries and divinity schools to participate in DOE programs as long as they comply with the restrictions on religious use of government grant funds.[353] Likewise, pre-existing rules prohibited the use of federal funds for renovating or constructing churches.[354] Now, rules that affect programs administered by USDA, HUD, Department of Labor (DOL), and USAID all permit faith-based organizations to use federal funds to acquire, construct, or rehabilitate structures, as long as the buildings are used for eligible activities.[355] In addition, many agencies previously required faith-based organization grantees to provide assurances in their contracts that they would not use direct government funding for religious purposes.[356] Those assurances are no longer required.[357]

Thus, the CCEOs have wrought a major shift in agency practices. It is a settled principle of administrative law that agencies must justify a change in policy positions. This requirement was set forth in the Supreme Court's 1983 decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Insurance Co.*[358] In *State Farm*, the Court reversed a decision by the National Highway Traffic Safety Administration (NHTSA) to revoke a rule that required manufacturers to equip all new cars with passive restraints,[359] a change in position driven by President Reagan's deregulation agenda. Under *State Farm*, an agency must show that it examined the relevant data and made a "rational connection between the facts found and the choice made."[360] Without such a rational connection, the agency's decision is "arbitrary and capricious."[361] Agency policy is particularly suspect where, as here, the agency "has relied on factors which Congress has not intended [the agency] to consider."[362] "[T]he submerged yet powerful message . . . in *State Farm* [is] that the political directions of

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[352] Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 Fed. Reg. 31,708–09 (June 4, 2004) (revising 34 C.F.R. pts. 74, 75, 76, 80).

[353] *Id.*

[354] STATE OF THE LAW 2004, *supra* note 122, at 75.

[355] *Id.* at 73.

[356] *Id.* at 75.

[357] *See id.* at 76.

[358] 463 U.S. 29 (1983).

[359] *Id.* at 30–31.

[360] *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[361] *Id.*

[362] *Id.*

a particular administration are inadequate to justify regulatory policy."[363] Although presidential preferences can and do influence agency outcomes, agencies still need to engage in the reasoning process and articulate a rational basis for a particular result.[364] If an agency had undertaken to write charitable choice into regulatory policy in the absence of the executive orders, it would have had to articulate a justification for faith-based contracting. Not only would the agency have to confront the efficiency and economy arguments outlined above,[365] but it would also have to consider the entire litany of policy and constitutional concerns that swirl around charitable choice.[366] This is exactly what Congress did when it considered, but then rejected, expanding charitable choice.[367] The entire process of agency deliberation was shortcut by President Bush's executive orders. Moreover, and perhaps most damaging to such an agency initiative, the agency would have to identify statutes that give it the authority to engage in faith-based contracting in the first place. As discussed earlier, the human services statutes do not provide the needed ambiguity.[368] Thus, on a hard look review, the policy might very well fail as arbitrary and capricious.

III. CONSTITUTIONAL COMPULSION

It is possible that the President would seek to legitimate the CCEOs by contending that he was compelled to issue them because they are mandated by the Constitution. Executive Order 13,279 contains glimmers of such an argument: It states that the order is designed "to ensure equal protection of the laws for faith-based and community organizations" because "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs."[369] The use of terms such as "equal protection" and "discrimination" not coincidentally echoes arguments by some legal scholars (including the architects of charitable choice) that mandatory inclusion of religious groups in government funding programs that include secular entities is a constitutional imperative.[370] These scholars argue that the Free Exercise Clause

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[363] *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 226 (1990).

[364] *State Farm*, 463 U.S. at 43.

[365] *See supra* Part II.C.2.

[366] *See supra* Part I.C.

[367] *See supra* Part I.A.

[368] *See supra* Part II.B.

[369] Exec. Order No. 13,279, 3 C.F.R. 258, 260 (2003), *reprinted in* 5 U.S.C. § 601 (2006).

[370] *See, e.g.*, Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 300 (1999) ("The exclusion of certain faith-based social service providers from program eligibility simply because of what they believe, or because of how they practice and express what they believe, is discriminatory on the bases of religious speech and religious exercise."); Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365

requires equal treatment of secular and sectarian groups, without any regard to the content of their beliefs. To do otherwise, in their view, punishes religion and unfairly elevates secular beliefs over spiritual ones. However, these arguments have not prevailed in the Supreme Court.

The Court has not yet addressed the constitutionality of charitable choice programs. However, existing caselaw in the context of school funding indicates that charitable choice programs enacted by Congress are facially constitutional as long as they do not result in government indoctrination of religion. Accordingly, the lower federal courts have upheld charitable choice programs that adhere to the Court's articulated constitutional limitations and stricken those that have lead to worship and proselytizing with government money.[371]

Nevertheless, while charitable choice may be a permissible policy choice, it is not a mandatory one. This distinction was set forth in *Locke v. Davey*,[372] in which Joshua Davey, a college student who had been awarded a state academic, needs-based scholarship, sued Washington State when it forbade him from using his scholarship to pay for a degree in devotional theology as part of his studies to become a minister.[373] A state statute excluded devotional theology majors from the scholarship program, based on a state constitutional provision that bars the appropriation of public money for religious instruction.[374] Davey argued that the state's failure to fund his religious studies violated his free exercise rights, and the Ninth Circuit agreed with him.[375] By a vote of 7–2, the Supreme Court reversed and upheld the exclusion.[376]

(1999) ("I also believe equal treatment is constitutionally compelled.").

[371] *Compare* Teen Ranch, Inc. v. Udow, No. 05-2371, 2007 WL 128770 (6th Cir. Jan. 17, 2007) (holding state welfare officials did not violate the constitutional rights of Teen Ranch, a residential, faith-based program for troubled youth, by refusing to use state funds to place teenagers in the program); Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006) (holding Christian prison rehabilitation program violated the Equal Protection Clause because it indoctrinated inmates in Evangelical Christianity); Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002) (holding faith-based drug rehabilitation program violated the Equal Protection Clause because the program involved faith-intensive counseling and state funds had been used to pay at least part of the salaries of the counselors), *with* Am. Jewish Cong. v. Corp. for Nat'l & Comty. Serv., 399 F.3d 351 (D.C. Cir. 2005) (holding Americorps program that places teachers in Catholic schools does not violate the Establishment Clause because it is indirect, rather than direct, financing of religion); Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003) (holding religiously oriented halfway house for parolees did not violate Establishment Clause because it involved indirect funding); Freedom from Religion Found., Inc. v. Nicholson, No. 06-C-212-S, 2007 WL 80857 (W.D. Wis. Jan. 8, 2007) (holding chaplaincy programs in Veterans Affairs hospitals do not violate the Establishment Clause).

[372] 540 U.S. 712 (2004).

[373] *Id.*

[374] *Id.* at 716.

[375] *Id.* at 718.

[376] *Id.* at 725. For extended analyses of the case, see Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913 (2004); Douglas Laycock, *Theology*

The Court concluded that the scholarship limitation neither violated Davey's free exercise rights under the First Amendment nor discriminated against religion.[377] There was no doubt, and the parties did not contest, that the State could choose to provide scholarships for devotional theology studies.[378] In such a situation, the private and independent choice of the college student would break the link between government funds and religious training and thereby vitiate any establishment clause concerns.[379] However, Washington's decision to exclude theology students from the scholarship program reflected the state's substantial and historically-rooted anti-establishment interest in not using tax dollars to support the ministry.[380] The state's choice did not impose sanctions upon Davey's religious beliefs or keep anyone from participating in political affairs based on religious status—two forms of line-drawing that the Court previously held are constitutionally suspect.[381] Moreover, the burden of the exclusion on Davey was minimal because he could use his scholarship money to pursue any other line of study.[382] He could even take religion courses at a religious college as long as he pursued a secular degree.[383] He simply could not pursue a religious major with his scholarship funds.[384] Thus, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[385]

The decision thus rejected the strict vision of neutrality pushed by the Bush Administration, in which religious and secular beliefs are constitutionally "fungible" for funding purposes.[386] The Court's rejection of strict neutrality principles represents "deference to legislative choices."[387] As Steven Green explains, neutrality may "support[] a legislative decision to *allow* religious uses of a general benefit," but it "does not *mandate* the inclusion of religious uses under a different program."[388] With charitable choice, as with *Locke*, there is no violation of the free-exercise rights of religious groups if they are legislatively excluded from grant programs. They remain free to pursue their religious beliefs in any way they see fit; they simply do not get

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Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 HARV. L. REV. 155 (2004).

[377] *Locke*, 540 U.S. at 725.

[378] *Id.* at 719.

[379] *See id.*

[380] *Id.* at 721–22.

[381] *Id.* at 720–21.

[382] *See id.*

[383] *Id.* at 724–25.

[384] *Id.*

[385] *Id.* at 719.

[386] *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1862 (2004).

[387] Green, *supra* note 376, at 943.

[388] *Id.*; *see also* Schragger, *supra* note 386, at 1865 (noting that *Locke* affirms that legislatures are allowed "to express political judgments about the extent of church-state entanglement").

a piece of the government pie to provide secular services, which cannot involve religious activities in any event.

There are legitimate reasons for the Court's deference to the legislative branch to make determinations about the role of religion in public life. In our system of representation, legislators are expected to exercise independent judgment in making difficult decisions while also being responsive to their constituents.[389] Thus, any legislative decision results from the interweaving of multiple perspectives into a negotiated compromise. Especially where religion is involved, as it "stands very near the moral core of the nation,"[390] the cumbersome legislative process serves to check the impulse toward faction and to foster debate and compromise.[391] Indeed, the Court has noted that history shows that "the regular political process has safeguarded the religious freedom of minorities as well as—and often better than—the courts."[392] Louis Fisher has explained that when religious organizations work with other groups to press for social change, they have had a substantial impact.[393] By contrast, religious factions have not fared well in the legislative process because other groups come forward and block them.[394]

From an institutional perspective, legislators can better balance governmental and public interests, assess how to spend limited public resources, and determine how to tackle complex and multi-variable social problems than the other two branches.[395] With regard to expanding charitable choice, Congress might consider a slew of factors, such as the advisability of endorsing co-religionist discrimination; the effectiveness of existing charitable choice programs; past experiences with existing statutes; which populations can best be served by charitable choice, if any; how to avoid government entanglement in religion; how to ensure that religious social service providers remain accountable to contract terms and program requirements; and the like. These factors are all particularly well-suited for resolution by the legislative branch.

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[389] *See* Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387, 416 (2002).

[390] WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM, at xii (2003).

[391] *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) ("[D]emocratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

[392] LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 1 (2002).

[393] *Id.* at 60.

[394] *Id.*

[395] *See* Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1034 (2001) ("[L]egislatures are better able than courts to resolve the complex balancing of governmental interests and resources often involved in determining the proper scope of particular exemptions."). *But see* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999) (arguing that courts, and not legislatures, should determine whether to make permissive accommodations for religious organizations from laws of general applicability).

Nevertheless, it could be that President Bush disagrees with the result in *Locke* and wants to impose his own constitutional interpretation of neutrality under the Religion Clauses on the agencies. This would be a controversial position with the potential to put the President at loggerheads with the courts. To be sure, conventional notions of judicial supremacy have come under attack in recent years, beginning most publicly with Attorney General Edwin Meese's statements during the Reagan Administration that "constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government."[396] Departmentalism, the academic school of thought that embodies this view, contends as an originalist and normative matter that each federal branch of government has the independent authority to interpret the constitution unrestrained by any other branch's interpretation.[397] Even judicial supremacists agree that the President has an important role in interpreting the Constitution, especially when he decides whether to present legislation to Congress or to veto legislation, in appointing judges to the federal judiciary, and when he considers how best to execute statutes.[398] Yet judicial supremacists disagree that the President can (or should) undermine settled constitutional interpretations by the Supreme Court.[399]

In the case of the CCEOs, there is no indication that the President is seeking a showdown with the Supreme Court over the proper definition of "neutrality" within the Religion Clauses.[400] The CCEOs state that they apply only to the "extent permitted by law,"[401] thus codifying the President's willingness to defer to the expressed choices made by the other branches within their spheres of authority. In addition, President Bush continues to push for passage of legislation to codify his initiative;[402] legislation would be unnecessary if he believed the orders were constitutionally compelled. In any event, this is not an area of the law where the Court is attempting to aggrandize power for itself; a frequent target for departmentalists.[403] To the contrary,

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[396] Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

[397] This position is articulated in its strongest form in Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). His position is that the President is a co-equal interpreter of the Constitution who does not need to enforce Court judgments even in the cases in which they are rendered. *Id.*

[398] *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 105, 112–13.

[399] *See* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 367–69 (1997).

[400] For his part, Attorney General Meese's words were more bluster than bite. *See* Johnsen, *supra* note 398, at 107, 117–18.

[401] *See* Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 33 (D.C. Cir. 1996).

[402] A 2006 White House press release states, "The President Continues to Seek Congressional Action Providing Charitable Choice Protections to Other Social Service Programs." Compassion in Action, *supra* note 123.

[403] *See* Gant, *supra* note 399, at 369–73.

where religion is concerned, the Court is more often than not deferring to the political branches to make difficult choices, thereby "energizing the political process."[404]

By wresting interpretive authority from the courts, departmentalism is supposed to further "cautious and interactive deliberation," promote education about constitutional questions, and "provide a rich source of information exchanged in the dialogic process."[405] It rests on the idea that the "best possible constitutional outcomes would result from the constitutional clashes and vibrant disagreement likely to result from the absence of deference."[406] To achieve these goals, it is imperative that law "not be reduced simply to politics."[407] Prior to the CCEOs, there was a rich and developing dialogue between Congress, the courts, the President, and the public over the permissible boundaries of direct funding to religious organizations driven in part by the Court's deference to political choices.[408] There is little to be gained and much to be lost if the President cuts off this discourse by overriding the balance that has been struck by the Court for issues of religious liberty. Even the staunchest promoter of executive departmentalism urges that the President use executive restraint and be guided by a principle of deference to interpretations of the other branches.[409] For all these reasons, President Bush is unlikely to argue that the CCEOs are constitutionally compelled. Instead, due to the undefined boundaries of the "zone of twilight,"[410] the President's strongest argument is that the CCEOs are constitutionally permitted exercises of his powers under the Take Care Clause.

IV. TAKE CARE CLAUSE

As Part II reveals, President Bush lacks express or implied statutory authority for imposing his faith-based preference on federal human service programs. As Part III reveals, the CCEOs are not constitutionally compelled. The question then arises whether the CCEOs fall within *Youngstown*'s "zone of twilight," where the President has concurrent authority with Congress and must "rely upon his own independent powers."[411] Does the President have independent powers to direct agency action? Article II of the Constitution vests executive power in the President, but it says little about the scope and extent of that power in the domestic sphere.[412] The President has

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[404] *See* Schragger, *supra* note 386, at 1854.

[405] Gant, *supra* note 399, at 388, 393, 397.

[406] Johnsen, *supra* note 398, at 121.

[407] *See id.* at 130.

[408] *See id.* at 114–15.

[409] *See* Paulsen, *supra* note 397, at 331–42.

[410] *See supra* Part II.A.

[411] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[412] U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America.").

the authority to appoint "officers" of the United States, and he can "require the opinion, in writing" of those officers.[413] Beyond those specifications, Article II directs the President to "take care that the laws be faithfully executed."[414] Not only is this language vague, but the history surrounding the Take Care Clause is not determinative, probably because the Framers themselves disagreed over the proper scope of executive power.[415] As a result, vast disagreements over the scope of presidential powers remain unresolved. This uncertainty creates an opening for Presidents to justify their domestic policy-making under the Take Care Clause.[416] Indeed, such justifications underlie a series of regulatory review executive orders that were initially seen by some as radically interfering with agency discretion but which eventually have become a mundane part of the structure of the administrative state. However, as this Part explains, the CCEOs go far beyond the scope and effect of the regulatory review orders, and thus, cannot stand on the same footing.

A. The Regulatory Review Executive Orders

Since the 1970s, Presidents have sought to impose centralized review over the ever-increasing work product of administrative agencies.[417] The 1970s saw the burgeoning of new agencies with the authority to regulate vast swaths of economic activity such as the Consumer Product Safety Commission, the Environmental Protection Agency, and the Occupational Safety and Health Agency.[418] Amidst concerns that the regulatory process was creating far greater burdens on business than benefits for the country, the Presidents sought to impose centralization and coordination over regulation that was widely viewed as running amuck.[419] Presidents realized "that their grip on the course of domestic policy hinged to a considerable extent on their ability to influence the thousands of rules that put programs into action."[420] President Nixon

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[413] *Id.* § 2.

[414] *Id.* § 3.

[415] *See* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 289–90 (1993) ("Indeed, the vagueness of . . . Article [II] itself may have resulted from the Framers' failure to agree on a view of executive power."); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996) (describing the narrative of the founding as revealing "at the most general level people groping . . . toward a workable conception of government from which only broad purposes can safely be inferred").

[416] *See* Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1246 ("The executive branch typically relies on [the Take Care Clause] to justify independent Presidential initiatives in domestic affairs . . . .").

[417] For a detailed history of the regulatory review executive orders, see CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 118–23 (3d ed. 2003); MAYER, *supra* note 18, at 122–37.

[418] *See* MAYER, *supra* note 18, at 123.

[419] *Id.*

[420] KERWIN, *supra* note 417, at 119.

started down the path of regulatory review by creating the Office of Management and Budget (OMB) and charging OMB with conducting a "quality of life" review of proposed regulations, especially those promulgated by EPA.[421] Presidents Ford and Carter each issued executive orders that not only provided for OMB review of major regulations, but also required agencies to prepare inflationary impact statements (Ford) and cost-benefit analysis (Carter) for proposed regulations.[422]

President Reagan was the first President to give regulatory review some teeth by giving the White House enforcement authority over the rulemaking process. In Executive Order 12,291, Reagan mandated that executive agencies weigh the costs and benefits of existing and proposed regulations and take action only if "the potential benefits to society for the regulation outweigh the potential costs."[423] Executive Order 12,291 also required that agencies attempt to maximize social benefits, choose the least costly alternative in selecting among regulatory objectives, and set priorities with the goal of maximizing net benefits.[424] Under the order, the Office of Information and Regulatory Affairs (OIRA), a unit within OMB, was charged with reviewing the agencies' analysis of major rules and could "recommend the withdrawal of regulations which cannot be reformulated to meet its objections."[425] Reagan later issued Executive Order 12,498 to extend these review principles to the regulatory planning process, before rules were drafted.[426] During the Reagan Administration, OMB largely used its authority under Executive Order 12,291 to pursue the President's deregulation agenda, and critics charged that the order allowed the White House covertly to interfere with and delay rulemakings.[427]

President George H.W. Bush continued Reagan's regulatory review orders, but he transferred OMB's regulatory review authority to a newly created Council on Competitiveness headed by Vice President Quayle.[428] The Council became a lighting rod for criticism because most of its activities were shrouded in secrecy, including ex parte contacts.[429] In his first year in office, President Clinton replaced Executive Order 12,291 with Executive Order 12,866, which continued Reagan's substantive requirement for cost-benefit analysis and review while curbing the more controversial

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[421] *See* MAYER, *supra* note 18, at 124.

[422] *See id.* at 124–26.

[423] Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1981).

[424] *Id.* 2(c)–(e), 3 C.F.R. at 128.

[425] MAYER, *supra* note 18, at 126.

[426] Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

[427] *See generally* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986). "The Administration has principally used the system of OMB review created by the Executive Orders to implement a myopic vision of the regulatory process which places the elimination of cost to industry above all other considerations." *Id.* at 1065.

[428] *See* MAYER, *supra* note 18, at 130–31.

[429] *See id.* at 131.

portions of the Reagan order.[430] He modified the cost-benefit paradigm by requiring that agencies consider qualitative costs and benefits in addition to quantifiable ones, as well as "distributional impacts" and "equity."[431] To minimize delay, Executive Order 12,866 required that OIRA limit its review to major rules and complete its assessment within ninety days.[432] To reduce conflict, Executive Order 12,866 provided that the President or Vice President would resolve disputes between the agencies and OIRA.[433] To increase transparency, the order required that OIRA publicly maintain a log of ex parte contacts.[434] The Clinton order also extended the procedural (but not the substantive) review requirements to the independent agencies, which Reagan had left out of Executive Order 12,291 due to constitutional questions surrounding presidential assertions of authority over the independent agencies.[435] For his part, President George W. Bush has left Executive Order 12,866 intact but has issued his own executive order requiring that agencies give special attention to energy-related issues in rulemakings.[436]

Congress's response to these executive orders has been muted.[437] Prior to 1996, Congress proposed, but could not enact, various pieces of legislation designed to recapture power over regulatory review. In 1996, Congress enacted the Congressional Review Act to require that agencies transmit major regulations to the General Accounting Office, which then reviews the rules for compliance with applicable statutes and executive orders and reports its findings to Congress.[438] Under the Act, Congress can disapprove a proposed regulation by enacting a joint resolution of disapproval.[439] However, the Act is widely considered to be ineffective and understaffed, and only one joint resolution of disapproval has passed.[440]

The regulatory review executive orders have been controversial since their inception, with critics charging that they are not only bad policy, but also illegal exercises

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[430] Exec. Order No. 12,866, 3 C.F.R. 638–49 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

[431] *Id.* § 1(a), 3 C.F.R. at 639.

[432] *Id.* § 6(b), 3 C.F.R. at 646–47.

[433] *Id.* § 7, 3 C.F.R. at 648.

[434] *Id.* § 6(b)(4)(C), 3 C.F.R. at 647–48.

[435] *See* James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 853 (2001). Clinton also issued subsequent orders requiring agencies to consider the impact of rules on "poor and minority populations, children, and tribal governments." *See* MAYER, *supra* note 18, at 132.

[436] Exec. Order No. 13,211, 3 C.F.R. 767 (2002), *reprinted in* 42 U.S.C. § 13,201 (2006).

[437] This is not surprising given the institutional constraints Congress faces in overturning executive orders. *See infra* text accompanying notes 438–49.

[438] 5 U.S.C. §§ 801–08 (2000).

[439] *Id.* § 802.

[440] *See* MAYER, *supra* note 18, at 133; MORTON ROSENBERG, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN ASSESSMENT AFTER NULLIFICATION OF OSHA'S ERGONOMICS STANDARD 5–6 (2002).

of executive lawmaking lacking constitutional or statutory support.[441] Acknowledging the uncertainty surrounding this new exercise of presidential power, the Office of Legal Counsel (OLC) issued a detailed legal justification for President Reagan's regulatory review executive orders that articulated a view of the President as a unitary executive.[442] Relying heavily on the case of *Myers v. United States*, in which the Supreme Court held that Congress could not limit the President's removal powers over purely executive officers,[443] OLC concluded the President has the power "to 'supervise and guide' executive officers in 'their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.'"[444] OLC went on to state that only the President "has a national constituency" and therefore, "he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole."[445] Moreover, the President can reduce the "confusion and inconsistency" that would result if agencies issued contrary and conflicting regulations.[446]

OLC acknowledged that presidential power "must conform to legislation enacted by Congress."[447] However, "[w]hen Congress delegates legislative power to executive agencies, it is aware that those agencies perform their functions subject to presidential supervision on matters of both substance and procedure."[448] Given that the President has the power to remove the heads of cabinet agencies, OLC reasoned that Congress clearly cannot immunize those officials from presidential supervision.[449]

The most questionable portion of Executive Order 12,291, as OLC recognized, was its substantive requirement that agencies use cost-benefit analysis in their decision-making processes.[450] OLC concluded that this was permissible for two reasons. First, OLC contended that cost-benefit assessment was a permissible consideration in agency decision-making.[451] Moreover, Congress could, if it wanted to, displace cost-benefit analysis with another form of assessment because the executive order was

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[441] *See generally* Morrison, *supra* note 427; Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981). Articles supporting the constitutionality of the regulatory review orders include Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483 (1988); Shane, *supra* note 416.

[442] 5 Op. Off. Legal Counsel 59 (1981).

[443] 272 U.S. 52, 135 (1926).

[444] 5 Op. Off. Legal Counsel at 60 (quoting *Myers*, 272 U.S. at 135).

[445] *Id.* at 60–61.

[446] *Id.* at 61.

[447] *Id.*

[448] *Id.*

[449] *Id.*

[450] *Id.* at 63.

[451] *Id.*

only applied "to the extent permitted by law."[452] Second, the order left decision-making discretion to the agencies to conduct the cost-benefit assessment, and OMB could not compel a certain result because its role was "advisory and consultative."[453]

Despite the legal and prudential concerns surrounding the regulatory review executive orders, they never faced a frontal legal challenge and have "now taken center stage as an institutionalized part of the modern American presidency."[454] Yet, even accepting the premises of regulatory review, the CCEOs cannot be similarly justified. To begin, while agencies would generally be expected to conduct cost-benefit assessments even in the absence of an executive order, pushing the boundaries of church-state relationships has not historically been part of agency decision-making. To the contrary, until the Bush Administration, agencies avoided giving government funds directly to churches in order to comply with Supreme Court precedent that prohibited government from funding "pervasively sectarian" groups.[455] The Supreme Court has recently shifted towards a less separationist stance that views neutrality as the touchstone by which to judge government funding schemes that provide direct aid to religious groups.[456] Current court precedent indicates that direct aid programs such as charitable choice are permissible as long as the aid lacks religious content, is distributed based on neutral criteria, and is not diverted for religious purposes.[457] Nevertheless, although the Supreme Court would likely uphold charitable choice statutes, it has held that inclusion of religious groups in government funding schemes is not constitutionally required.[458] Rather, it is within the legislature's discretion to decide whether or not to include churches within the funding fold.[459] In short, adopting a faith-based funding scheme is simply not a historic part of agency decision-making processes, and there are good reasons to prefer legislative judgments about the advisability of these programs.

In addition, while the regulatory review orders seize upon the President's supervisory capacities,[460] the CCEOs are not similarly animated by managerial objectives.

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[452] *Id.*

[453] *Id.* at 63–64.

[454] Blumstein, *supra* note 435, at 854–55.

[455] *See* Lupu & Tuttle, *supra* note 9, at 5–6, 21–26.

[456] *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 66–72 (2002).

[457] Lupu & Tuttle, *supra* note 9, at 25–26. Some charitable choice programs are structured as voucher programs and thus constitute indirect aid. *Id.* at 26–28. These programs are even more constitutionally sound under current Court doctrine because they allow for the intervening element of private choice, which, according to the Court, eliminates the risk of government indoctrination. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). For a critique of the private-choice rationale, see Laura S. Underkuffler, *Vouchers and Beyond: The Individual As Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

[458] *See supra* discussion of *Locke v. Davey*, text accompanying notes 373–86.

[459] *See supra* text accompanying note 378.

[460] *See supra* text accompanying notes 441–49.

The regulatory review orders were designed to coordinate policy among the agencies and to avoid duplication, overlap, and conflict.[461] By contrast, President Bush did not issue the CCEOs to improve executive-branch management, but to foster a larger executive-branch strategy to move religion into the public square and to reward and pursue religious voters.[462] The CCEOs do impose a uniform policy across agencies and thereby avoid intra-agency differences, but this is simply the end-result of the President's executive strategy. In other words, consistency is not the reason for the policy; it is the byproduct of how the policy was implemented. To be sure, the President is in a unique position to guarantee faithful execution of the laws due to "his national constituency" and his position at the apex of the executive branch.[463] However, the very wording of the Take Care Clause tells the President to ensure "that the laws are faithfully executed";[464] it does not give him the power to execute those laws himself. The wording of the clause presumes that executive subordinates will be carrying out Congress's mandates under the President's watchful eye. Most importantly, the Take Care Clause and its emphasis on *faithfulness* assumes that these attributes of presidential power and position will be used to further fidelity to externally defined norms—not those of the President alone.

The CCEOs also go further than the regulatory review orders in imposing the President's policy preferences on the agencies. The regulatory review orders favored cost-benefit assessment as a decision-making tool.[465] While they imposed a substantive value on the decision-making process, they did not mandate a substantive result in any particular rulemaking. The agencies were free to conduct cost-benefit balancing in line with their expertise, and the President could not mandate a particular result. By contrast, the CCEOs mandate that all of the human services agencies open their doors to some faith-based contracting,[466] even if they were to determine independently that a faith-based approach is not appropriate for any of their programs or that a faith-based approach raised too many constitutional entanglement issues to make such contracting worthwhile. The agencies were forced to adopt the President's policy preference regardless of the public input gathered through notice and comment proceedings. Indeed, the notice and comment proceedings were largely a sham because the outcome was predetermined. The role of the White House is not "advisory and consultative" as with the regulatory review orders, but directive. Thus, the heart of the issue in assessing the legality of the CCEOs is whether the President can direct the agencies to adopt a specific policy.

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[461] *See* Shane, *supra* note 416, at 1245.

[462] *See supra* text accompanying note 72.

[463] *See supra* text accompanying note 445.

[464] U.S. CONST. art. II, § 3.

[465] *See supra* text accompanying notes 423–31.

[466] *See supra* Part I.B.

B. Presidential Directory Authority

The President has extensive persuasive powers in his arsenal short of exercising directory authority. Not only can he command the public's attention, but he also has the power to set budgetary priorities and to appoint and remove agency heads with the resultant loyalty of officials throughout the bureaucracy.[467] Where a statute vests an agency with decision-making discretion, it is entirely appropriate for the President to try to prod the agency in his favored direction although the agency must ultimately provide factual support for its rules.[468] Thus, in *Rust*, the anti-abortion stance of the Reagan Administration was reflected in a gag rule, but the regulation was issued and justified by the Secretary of Health and Human Services.[469] So, while the Secretary was undoubtedly subject to presidential pressure, the rule was nevertheless that of the agency.[470] However, when a President directs an agency to adopt a specific result, he goes further than these informal methods of persuasion by substituting presidential preferences for agency analysis and public input. Directory authority thereby "tear[s] down the structures of law and regularity Congress has built up in relation to the presidency."[471]

Even if the agencies could have adopted charitable choice policies within their statutory mandates, the question would still remain as to whether the President could substitute his judgment for that of the agencies. That is, even if there is the opportunity for gap-filling, it does not mean that the President can fill the gap. The agencies alone might have that job. Recall the statutes discussed earlier.[472] The Public Awareness in Underserved Communities statute gives authority to the Director of the Office for Victims of Crime within the Department of Justice to make grants to further the statute's purposes.[473] The HOPWA statute gives discretion to the Secretary of the Department of Health and Human Services to make grants to carry out the terms of the statute.[474] Do these delegations permit the President to substitute his judgment for that of these delegatees?

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[467] *See* PIERCE ET AL., *supra* note 171, at 81.

[468] *See* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

[469] *See* Rust v. Sullivan, 500 U.S. 173 (1991).

[470] "There is . . . an important formal distinction between the official who, as a mere agency for the President, may have his decisions immediately countermanded by the President and the official who has the independent power to decide, subject to being fired at the President's whim after-the-fact." Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465 (1987).

[471] Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 985 (1997).

[472] *See supra* text accompanying notes 207–22.

[473] 42 U.S.C. § 10,603(c)(1)(A) (2000).

[474] 42 U.S.C. §§ 12,901–12 (2000).

1. Presidentialist v. Anti-Presidentialist Perspectives

Almost all presidential scholars agree that the Framers chose a unitary executive, rather than multiple executives, to promote important constitutional values of efficiency and accountability.[475] Where scholars disagree is whether these values can ever yield to countervailing constitutional concerns, such as checks and balances, participatory norms, or restraints on arbitrariness. Unitary executive enthusiasts contend that the President is at the apex of the executive branch, that all executive officers serve in his stead, and that, therefore, the President can direct the outcome of the executive officers' exercise of delegated powers.[476] As Steven Calabresi and Saikrishna Prakash put it: "[I]t is the President, under our Constitution, who must always be the ultimate empowered and responsible actor."[477] Some presidentialists make an originalist case for their position based on constitutional text, structure, and pre- and post-enactment history.[478] They contend that only a unitary executive secure from congressional control can foster accountability and efficiency. These twin values are also decisive for non-originalists such as Cass Sunstein and Lawrence Lessig, who contend that although the Framers did not create a unitary executive, the modern massive administrative state demands one to maintain fidelity to these constitutional commitments.[479] Elena Kagan doubts that a unitary executive is constitutionally required but agrees that "the values of accountability and efficiency [are] the principal values that all models of administration must attempt to further" and justify presidential directory authority.[480]

By contrast, those more wary of presidential power argue that agencies are delegates of Congress and not instruments of the executive. Critical response to the Reagan regulatory review order[481] articulated this position sharply. As Morton

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[475] *See, e.g.*, Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967 (2001) ("By placing executive authority in a single person, the Framers sought to create a chief executive who would be energetic, effective, and accountable.").

[476] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

[477] *See id.* at 595–96; *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) [hereinafter Calabresi, *Normative Arguments*]; Steven Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1159–70 (1992) (setting forth the position of unitary executive theorists); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 845–56 (1996) (summarizing the views of unitary executive supporters).

[478] *See* Calabresi & Prakash, *supra* note 476.

[479] Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

[480] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251–52 (2001).

[481] *See supra* note 427 and accompanying text.

Rosenberg explained, the Framers "believed that the President would be a managerial agent for the legislature rather than an independent source of domestic policy."[482] The anti-presidentialists contend that balance and dispersion of power among the three branches prevents tyranny by any single branch, a main concern of the Framers.[483] Abner Greene reviewed the historical record and concluded that the Framers were less concerned with accountability than "with making the machinery of government somewhat cumbersome, thus ensuring against the hegemony of one branch or person."[484] This anti-presidentialist perspective finds plenty of support in the constitutional text, structure, and history—making an originalist case in either direction a tough sell, as the Supreme Court's waffling in both directions suggests.

Supreme Court cases variously—and irreconcilably—reflect both views. Unitary executive supporters line up behind *Myers v. United States*,[485] *Bowsher v. Synar*,[486] and *INS v. Chadha*[487]—decisions which limit Congress's ability to intrude on executive authority.[488] Yet, despite the broad language in these cases, the Supreme Court has made it clear that the President's power is not as absolute as the unitary executive proponents would have it. For instance, limiting the broad sweep of the language in *Myers*, the Court has upheld the existence of independent agencies whose heads are insulated from presidential removal as well as independent counsels who also exercise powers out of the President's control.[489] These cases rebut the idea that the President can command all forms of administrative discretion.[490] Accordingly, the conventional wisdom is that the President does not have directive authority over the agencies.[491] However, the conventional wisdom does not match conventional practice. The reality is that Presidents have occasionally acted unilaterally (think Louisiana Purchase, Emancipation Proclamation, internment of Japanese-Americans during World War II). President Clinton relied on unilateral action to push his agenda in the face of a recalcitrant Congress; he "treated the sphere of regulation as his own, and

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[482] Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 202–03 (1981).

[483] *See* Flaherty, *supra* note 415, at 1741; *see also* Percival, *supra* note 475, at 967–69 (setting forth a textualist argument in favor of checks and balances).

[484] Greene, *supra* note 175, at 177.

[485] 272 U.S. 52 (1926).

[486] 478 U.S. 714 (1986) (holding that Congress cannot delegate budget functions to the Comptroller General).

[487] 462 U.S. 919 (1983) (invalidating the legislative veto).

[488] *See* Barksdale, *supra* note 415, at 290–92 ("[T]he Court has vacillated between two sharply divergent visions of the constitutional role of the President in administrative decisionmaking.").

[489] Morrison v. Olson, 487 U.S. 654 (1988) (upholding the office of the independent counsel); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding the constitutionality of the independent agencies).

[490] *See* Barksdale, *supra* note 415, at 294.

[491] *See* Kagan, *supra* note 480, at 2250–51; Percival, *supra* note 475, at 965.

in doing so made it his own, in a way no other modern President had done."[492] Whereas Reagan and Bush never claimed that they had directive authority over the agencies, Clinton proudly proclaimed that he did.[493] Clinton issued at least 107 directives, including some controversial orders that converted millions of acres of public land into national monuments, prohibited federal discrimination based on sexual orientation, imposed pro-environmental policies on federal entities, and required federal agencies to hire a certain amount of welfare recipients and disabled persons.[494] The CCEOs follow in the Clinton mode.

2. Accountability and Efficiency

President Bush's exercise of presidential directory authority in the CCEOs is humdrum, business-as-usual for presidentialists; by contrast, anti-presidentialists view the orders as yet another sign of an imperial presidency run amuck. It is not necessary, however, to resolve the historical or normative debates between these competing theories of the presidency to assess the legality of the CCEOs. Even if we accept unitarian premises and assume that accountability and efficiency are paramount constitutional objectives, the CCEOs do not serve these values. Thus, under no competing theory can they be justified as legitimate exercises of presidential power. By exploring how the CCEOs relate to the goals of accountability and efficiency, we can begin to divine the parameters of Justice Jackson's "zone of twilight."[495]

Accountability is best defined as "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation."[496] Fans of the unitary executive make several accountability claims in connection with the President. They point out that the thousands of bureaucrats that work in federal agencies are unelected and hidden from view, while the President is directly accountable to the entire electorate.[497] The President also has a broad, national perspective, one not shared by

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[492] *See* Kagan, *supra* note 480, at 2281. *See generally* THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY (David Gray Adler & Michael Genovese eds., 2002).

[493] *See* Kagan, *supra* note 480, at 2289–303; Strauss, *supra* note 471, at 965–68.

[494] *See* Kagan, *supra* note 480, at 2294–96. Clinton's strategy was not always a success. For instance, his high-profile efforts to have the FDA regulate tobacco failed in the courts as did his striker replacement executive order. *See supra* text accompanying notes 286–98.

[495] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[496] Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005).

[497] *See* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1405–06 (1975) (noting that regulation often involves political choices rather than solely technical decisions).

bureaucrats who often operate within the narrow zone of their expertise.[498] Given that many administrative decisions require resolution of policy disputes, the President is in the best position to consider how those policies play out on a national stage.[499] In addition, citizens can associate presidential actions with a specific person and punish or reward the President for those actions.[500] With regard to efficiency, the President is uniquely situated to coordinate efforts across the federal bureaucracy and has the energy to put ideas into action.[501] In *The Federalist*, Alexander Hamilton articulated this idea: "Energy in the executive is a leading character in the definition of good government."[502] Due to the spotlight generated by his national position, the President can center attention on a specific issue and bring energy to its resolution.[503] However, the benefits of efficiency and accountability associated with a unitary executive are merely assumptions. The CCEOs provide a vehicle for taking these assumptions for a test drive.

Clearly, President Bush brought great efficiency and energy to the implementation of charitable choice. He moved quickly to announce the policy.[504] He set up command posts throughout the bureaucracy to implement it.[505] He disseminated information about the policy from his bully pulpit.[506] He harnessed the bureaucracy to promote the initiative to grantees and the states.[507] Yet the virtues of efficiency have an obvious downside. Sometimes, efficiency simply means that the President can put questionable policies into effect very quickly with little thought, analysis, or input from the public or affected groups. Furthermore, although efficiency is desirable in certain circumstances, it is not a primary value with regard to lawmaking. The Framers purposely gave lawmaking powers to the cumbersome and slow-moving legislative branch.[508] President Bush's failure to get the initiative passed into law despite the great energy that attends his office underscores the policy's dubious origins.

Although the CCEOs harnessed the President's efficiency, if not dangerously so, they cannot be said to foster any facet of accountability. Unitary executive proponents tout increased transparency as a benefit of directive authority.[509] As this argument goes, when policies are issued from within massive, unelected bureaucracies, it is hard to pinpoint who is generating the policies and thereby impossible to influence

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498 *Id.*

499 *Id.*

500 *See* Kagan, *supra* note 480, at 2331–34.

501 *See* Calabresi, *Normative Arguments*, *supra* note 477, at 37–38.

502 THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

503 *See* Kagan, *supra* note 480, at 2332.

504 *See supra* text accompanying note 73.

505 *See supra* text accompanying note 74.

506 *See supra* text accompanying notes 97, 108.

507 *See supra* text accompanying notes 109–15.

508 *See supra* text accompanying note 484.

509 *See* Kagan, *supra* note 480, at 2331–34.

the policies or hold the policy-makers to account.[510] The CCEOs are clearly the handiwork of President Bush, who makes no secret of his end run around Congress,[511] and in that sense, their provenance is highly transparent. However, the CCEOs are complicated, and it is not clear that Americans either understand or approve of them.[512] Thus, while the source of the CCEOs is transparent, the CCEOs themselves are fairly inscrutable. Moreover, transparency is not at risk with this issue. Charitable choice is a highly polarizing subject that is being closely tracked by national religious organizations, civil liberties groups, anti-poverty organizations, and conservative think tanks.[513] Thus, any administrative action in this area would have been quickly pounced on by interested groups—as happened in the legislative arena.[514] Charitable choice is simply not an issue that risks getting hidden in the mists of the bureaucratic jungle, and thus transparency is not a sufficient justification for preferring presidential action on this issue. Moreover, the transparency argument is concerned with the nature of bureaucracies and compares the President to the agencies;[515] it does not draw a comparison between the President and Congress.

Presidentialists do not argue that Congress lacks transparency; for better or worse, it does.[516] Rather, they contend that Congress is prone to factionalism and responds only to state and local pork barrel concerns.[517] Thus, the President is better suited to take broad, national concerns into consideration in shaping national policies. However, where human services are concerned, state and local influence is arguably the goal, and federalism is the defining model. Most social services are delivered at the local level, where officials are deemed better able to identify and respond to the unique needs of their communities.[518] For instance, what it takes to help the jobless

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[510] *Id.*

[511] *See supra* text accompanying notes 88–89.

[512] *See infra* text accompanying notes 533–35 (summarizing polling data).

[513] *See, e.g., infra* notes 528–37; *supra* notes 117, 121, 351.

[514] Agency rulemaking might actually enhance public participation more than the legislative process because the costs of participation are lower and the policy stakes for interested groups are better defined. *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999).

[515] *See supra* text accompanying note 497.

[516] *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 412–13 (2004).

[517] *See* Calabresi, *Normative Arguments*, *supra* note 477, at 34–36. Jide Nzelibe strongly disputes this characterization, concluding that "the collective wisdom of these parochial legislators [in Congress] will often produce policy outcomes that are more national and public-regarding than those produced by any single elected official." Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1222 (2006). This is because "Congress is subject to a wider range of pluralist voices and interest groups than any other political actor (including the president), which means that Congress is likely to receive better information regarding the relative costs and benefits of competing policy proposals." *Id.*

[518] *See* Theodore J. Lowi, *Federalism*, *in* 1 POVERTY IN THE UNITED STATES: AN

in New York City is very different than what it takes in rural North Dakota. In today's human services system, the federal government's role is mainly to disburse funds to state and local governments and establish overarching goals; local governments then decide how best to structure their programs.[519] President Bush's charitable choice initiative thus runs counter to the highly devolved and decentralized system of social service delivery in this country as well as to his own commitment to federalism and professed preference for localized solutions to social problems.[520]

The CCEOs also threaten the federal-state balance in this area because they conflict with a slew of state constitutional provisions that are more protective of anti-establishment values than the U.S. Constitution, as well as state and local anti-discrimination laws that do not exempt religious organizations.[521] Courts and commentators are grappling with how to resolve these conflicts.[522] The CCEOs permit religious grantees to hire co-religionists.[523] However, many state and local employment statutes do not grant a similar exemption to religious organizations that accept government funds.[524] It is unclear how to reconcile these policies, and the agency regulations do nothing to clarify the issue. For its part, the White House is urging a uniform federal exemption from anti-discrimination statutes for religious organizations while leaving it to courts "to provide guidance on whether faith-based organizations are required to comply with State and local ordinances that restrict their ability to participate in Federally funded formula and block grant programs."[525] The CCEOs also conflict with some state constitutions, which have higher anti-establishment bars than the U.S. Constitution.[526] By imposing a national preference for faith-based

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ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY 310, 312–13 (Gwendolyn Mink & Alice O'Connor eds., 2004). Lowi points out that state and local governments are inherently conservative due to their responsibility to maintain social order. *Id.* at 312. Devolution also allows higher levels of government to push political conflict to lower levels of government where "the conflicts between charity and ideology are most keenly felt." JOEL F. HANDLER & YEHESKEL HASENFELD, WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE 19–20, 208–09 (1997).

[519] *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003).

[520] *See* FORMICOLA ET AL., *supra* note 2, at 105.

[521] *See infra* note 526.

[522] *See supra* text accompanying notes 160–61.

[523] *See supra* text accompanying note 159.

[524] *See supra* text accompanying notes 159–66.

[525] WHITE HOUSE FAITH-BASED & CMTY. INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED 8, *available at* http://www.whitehouse.gov/government/fbci/booklet.pdf (last visited Apr. 4, 2007).

[526] *See generally* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551 (2002); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57 (2005).

organizations in human services, the President may be undermining state choices and guaranteeing turmoil in federal-state relations. For these reasons, Congress's factionalism may actually be an advantage when considering faith-based solutions to social problems, whereas the President's national perspective is ill-suited to social service delivery.

Moreover, while accountability is widely-touted as a hallmark of the office of the President, it is not clear who, if anyone, can hold the President accountable—the public? Program beneficiaries? Regulated entities? The President's supporters?[527] It is worth considering each of these groups in turn. To begin with, the CCEOs do not embody the majority will. In 2005, sixty-six percent of the public approved allowing churches to apply for government funding (a notable decline from seventy-five percent in Bush's first term), but this number is misleading.[528] We have long had government funding of religious groups to deliver social services, so it is hard to know whether the people surveyed were just approving a long-standing practice or whether they were approving the specifics of Bush's approach. The data suggest the former.[529] Most Americans have deep reservations about how the CCEOs involve churches in human services.[530] A majority of Americans do not want the government to fund non-Judeo-Christian religious groups, such as Muslims, Buddhists, the Nation of Islam, and Scientologists;[531] yet non-discrimination among grantees is constitutionally required and guaranteed by the CCEOs.[532] Sixty-eight percent of Americans are worried that faith-based initiatives will lead to too much government involvement with religion.[533] Sixty percent are worried that religious groups will proselytize among recipients (a concern that is supported by growing evidence), and the same percentage would ban groups that encourage conversion from receiving funds.[534] Seventy-eight percent of Americans are opposed to grantee organizations hiring only co-religionists,[535] as the CCEOs permit.[536] As the Pew Research Forum on Religion

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[527] This analysis is based on questions posed by Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196–209 (1995).

[528] PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW FORUM ON RELGION & PUBLIC LIFE, PUBLIC DIVIDED ON ORIGINS OF LIFE: RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES 16 (2005), http://pewforum.org/publications/surveys/religion-politics-05.pdf.

[529] *See id.*

[530] THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND 1 (2001), http://people-press.org/reports/display.php3?ReportID=15 [hereinafter FAITH-BASED FUNDING].

[531] *Id.* at 9–10.

[532] Exec. Order No. 13,279, 3 C.F.R. 258, 259–60 (2003), *reprinted in* 5 U.S.C. § 601 (2006).

[533] FAITH-BASED FUNDING, *supra* note 530, at 11–12.

[534] *Id.* at 11.

[535] *Id.* at 1, 14.

[536] 3 C.F.R. at 260.

and Public Life concluded after conducting these surveys, "[i]t is clear . . . that the public has yet to fully think through the details and implications of using government money to finance social service activities of churches and other houses of worship."[537] Given Americans' qualms about charitable choice, it is more likely that Congress's rejection of H.R. 7[538] represents the public's interest. To become law, a bill must be supported by a majority of Congress, providing "a much greater guarantee that legislation passed by Congress has the wide popular support that the framers desired."[539] The legislative process thus serves values of deliberation and consensus.

Even if the CCEOs represented the interests of a majority of Americans, relying on majority will as a measure of accountability is questionable. Do we really want a President who governs by polls?[540] As the surveys regarding faith-based initiatives reveal, many Americans lack the information or comprehension of these complex church-state entanglements to come to a reasoned conclusion about them.[541] Moreover, when the President acts unilaterally, he cuts off the debate and dialogue that would further inform Americans about these issues—including minority viewpoints that he has little incentive to consider.

Alternatively, fans of the unitary executive might be more interested in promoting accountability to the parties directly affected by regulation rather than the public at large. The CCEOs directly affect the non-profit sector that bids for human service contracts, churches newly eligible to apply for grants, and the beneficiaries of human service programs. Nevertheless, the initiative does not heighten the President's responsiveness to any of these groups. The non-profit sector is unhappy because it is now faced with new, unproven competitors in bidding over an ever-decreasing slice of the federal budgetary pie.[542] Churches are highly divided over the wisdom of charitable choice, even within denominations.[543]

The people most impacted by charitable choice have the least amount of access and influence over President Bush. They are the poor, the disadvantaged, children, the elderly, the physically ill, the mentally ill, and other needy persons. These are groups that vote in very low numbers and tend to vote Democratic.[544] They do not

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[537] FAITH-BASED FUNDING, *supra* note 530, at 5.

[538] *See* H.R. 7, 107th Cong. (2001).

[539] Rosenberg, *supra* note 441, at 211.

[540] *See* Shane, *supra* note 527, at 198–99 ("A President whose every view tracked the majority in the latest relevant opinion poll would presumably be so conspicuously lacking in any internal compass as to call into question at least the President's capacity for leadership, not to mention his mental health.").

[541] *See supra* text accompanying notes 528–37.

[542] *See supra* text accompanying notes 219–20.

[543] *See, e.g.*, FORMICOLA ET AL., *supra* note 2, at 3.

[544] KAY L. SCHLOZMAN ET AL., AM. POL. SCI. ASS'N, INEQUALITIES OF POLITICAL VOICE 23, *available at* http://www.apsanet.org/imgtest/voicememo.pdf (last visited Apr. 24, 2007) ("Study after study has demonstrated that individuals with high socio-economic status . . . are much more likely to be politically active."); *id.* at 59 (pointing out that the less affluent tend

constitute a powerful voting block that can change the outcome of elections. They lack the money that influences presidential campaigns and presidential policy preferences.[545] Instead, their best chance at impacting public policies is through interest groups that advocate successfully on their behalf through legislative and administrative processes.[546] These particular interest groups have no access to or influence over President Bush.

This is not to say that affected disadvantaged groups oppose charitable choice. Due to their exclusion from the political process, it is hard to know what they think about the initiative. Based on my experience representing low-income individuals, my sense is that people in need simply want programs that work regardless of who the provider is. However, charitable choice's effectiveness is questionable according to the data,[547] while there are very few mechanisms in place to ensure that religious grantees are accountable to the populations they serve.[548] As a legal matter, religious organizations are immune from many forms of government scrutiny due to fears over entanglement with religion.[549] As a practical matter, they are ill-suited to conduct the reporting and assessment functions that are part of government procurement processes.[550] Thus, there is good reason to fear that these grantees are left to their own devices with no meaningful oversight, resulting in a lack of accountability in both the charitable choice policy's formation and its delivery.

Clearly, the President is not pursuing the expansion of charitable choice in response to demands of the disadvantaged; he is pushing for massive cuts to human services programs while simultaneously forcing the private sector to bear more of the burden for solving social problems.[551] Furthermore, President Bush's emphasis on religion as a cure for societal problems is a new twist on the old theory of blaming the needy for their plight.[552] If only the disadvantaged were more religious, this story goes, their problems would be solved. As Thomas Ross has explained, "[T]he

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to be Democrats).

[545] Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 274–75 (1993).

[546] Nevertheless, "the economically disadvantaged continue to be underrepresented in pressure politics." SCHLOZMAN ET AL., *supra* note 544, at 45.

[547] *See supra* text accompanying notes 337–47.

[548] *See* Gilman, *supra* note 8, at 822–40.

[549] *See id.* at 836–43.

[550] *See id.* at 847–51.

[551] *See* Peter Baker & Christopher Lee, *Previously Untargeted Programs at Risk: 68 Among Those Bush Seeks to Cut*, WASH. POST, Feb. 12, 2005, at A4; Jonathan Weisman, *Budget Cuts Pass by a Slim Margin: Poor; Elderly and Students to Feel Pinch*, WASH. POST, Feb. 2, 2006, at A1 (discussing the House of Representatives's implementation of the President's proposed budget cuts that will impact welfare recipients, students, and Medicaid recipients).

[552] *See* FORMICOLA ET AL., *supra* note 2, at 104 ("President Bush's focus in proposing the faith-based solutions has been on the personal or familial failures of those who need assistance.").

[i]nitiative assumes that fighting poverty effectively entails changing the moral beliefs of the poor and that government-sponsored service agencies have failed precisely because they have not done so."[553] Not surprisingly, supporters of charitable choice are more likely to believe that poverty results from individual failings.[554] Yet given that the disadvantaged suffer from economic, medical, and socio-demographic forces often outside their control, this behavioral explanation for their status is flawed.[555] It is also dangerous because it allows the government to avoid responsibility for solving some of the very problems it has played a hand in creating.[556]

In any event, there is little evidence that President Bush is pushing charitable choice to mirror majority sentiment or to improve agency responsiveness to the people and groups affected by the initiative. Rather, the initiative delivers on the President's campaign promises to his conservative, religious supporters.[557] This is the only group affected by the CCEOs that has access to and influence with the President.[558] Yet capture by a special interest religious group does not constitute accountability; to the contrary, it raises the specter of one of the Founders' worst fears, especially where religion is concerned. James Madison believed that a "multiplicity of sects" would diffuse and decentralize religious power so that no one religion could dominate and impose its views on others.[559] Whereas the Framers sought political decentralization to avoid a national monopoly over religion, charitable choice imposes a uniform pro-religion policy that threatens Establishment Clause protections.[560] The national constituency of a unitary executive is supposed to avoid governance by faction, but the opposite has happened here.[561]

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[553] Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY L. & POL'Y, 167, 177 (2002).

[554] *See* WUTHNOW, *supra* note 58, at 300.

[555] *See* FORMICOLA ET AL., *supra* note 2, at 103–06; *see also* Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 745–50 (2005) (discussing and rebutting behaviorial theories of poverty).

[556] *See* FORMICOLA ET AL., *supra* note 2, at 106 ("[Faith-based initiatives] absolve large institutions of their responsibilities for causing the problems, and they are a giant step toward withdrawing government from its responsibilities to care for its citizens in need.").

[557] Bush's "opponents and supporters agree that he has done more than any president in recent history to advance the agenda of Christian social conservatives." Laurie Goodstein, *Personal and Political, Bush's Faith Blurs Lines*, N.Y. TIMES, Oct. 26, 2004, at A21.

[558] *Id.* ("[D]ozens of conservative religious leaders, including evangelical Christians, Catholics and Jews, exulted at the unprecedented access they had had to this White House . . . ."); *see also* WUTHNOW, *supra* note 58, at 304 (discussing the Christian conservative movement's access to the White House).

[559] *See* Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 70 (2000) (discussing Madison's FEDERALIST NOS. 10, 51); *see also* JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 46–48 (2d ed. 2005) (discussing similar views regarding religious pluralism held by other founders).

[560] *See* Schragger, *supra* note 386, at 1815, 1873 (arguing that the Supreme Court should have a more local perspective in interpreting the Religion Clauses).

[561] The initiative is also driving a wedge within African-American clergy. Some members

The strategy did pay off for the President.[562] In the 2000 election, the Christian Right delivered large blocs of voters to the President in key states and funded efforts during the primaries to defeat Senator John McCain.[563] In the 2004 election against John Kerry, seventy-eight percent of evangelicals supported Bush, and the most traditionalist branches of all Christian groups voted for Bush overwhelmingly.[564] For members of traditionalist religious groups, social issues were more important than economic issues or foreign policy in the 2004 election but were least important to all other voters.[565] Bush's emphasis on religion and moral themes, of which the CCEOs were a major part, resonated strongly with his supporters. Surveys show that "support for the Christian conservative movement and support for government funding of church-based service programs are closely related."[566] However, rewarding the special interests of the few is leading to increased polarization in America along religious lines.[567] This polarization runs counter to any notion of the public interest as well as founding commitments to religious liberty. As the Supreme Court has stated, while "political debate and division . . . are normal and healthy manifestations of our democratic system of government, . . . political division along religious lines was one of the principal evils against which [the Religion Clauses were] . . . intended to protect."[568]

It is hard to find any group that could hold President Bush to account on this issue. He was up for election twice and is now a lame duck. Research shows that voters do not cast ballots based on how the President acts on specific policy issues.[569] Rather, they elect someone who they consider like-minded, in part, so they do not have to monitor the "quotidian decisions, complex judgments, recondite bargains, and other actions" that are "beyond their . . . attention span."[570] This is the "opposite of

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feel that the President's initiative is giving them "a political home," while others claim that Bush is trying to "seduce[]" African-American conservatives. Neela Banerjee, *Black Churches Struggle over Their Role in Politics: Conservatives Looking to Align with Bush*, N.Y. TIMES, Mar. 6, 2005, at N23.

[562] Jide Nzelibe explains that "the winner-take-all feature of the electoral college shows that it will often be in the president's interests to target benefits at a small group of voters at the expense of the rest of the population." Nzelibe, *supra* note 517, at 1248. Charitable choice may well fit this pattern.

[563] *See* FISHER, *supra* note 392, at 80.

[564] JOHN C. GREEN ET AL., THE AMERICAN RELIGIOUS LANDSCAPE AND THE 2004 PRESIDENTIAL VOTE: INCREASED POLARIZATION 2–3 (2005), http://pewforum.org/publications/surveys/postelection.pdf. By contrast, Kerry had a more diverse coalition of supporters, including minority faiths, the unaffiliated, and modernist Christians. *Id.* at 1–2.

[565] *Id.* at 10–12.

[566] *See* WUTHNOW, *supra* note 58, at 296.

[567] GREEN ET AL., *supra* note 564, at 1 ("The American religious landscape was strongly polarized in the 2004 presidential vote and more so than in 2000.").

[568] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[569] *See* Shane, *supra* note 527, at 199.

[570] Rubin, *supra* note 496, at 2078.

accountability."[571] In the 2000 presidential election, both candidates, Bush and Gore, touted a faith-based agenda.[572] That, combined with the fact that President Bush did not win the popular vote,[573] makes it hard to say that he had a mandate one way or the other with regard to charitable choice. In the 2004 election, voters conceivably could have punished the President for issuing the CCEOs, but foreign policy and economic priorities were more important to most voters, who gave him the edge on those particular issues.[574] Even the most ardent supporters or vehement opponents of charitable choice, who single-mindedly voted on this issue alone (an unlikely group, to be sure), would not have been able to impact either election. For all these reasons, "intermittent, highly contested elections are simply very poor devices for holding a person accountable."[575]

The President's charitable choice strategy has diminished rather than improved accountability. The CCEOs reduced public participation in the decision-making process, cut off dialogue and debate, and denied the application of the agencies' expertise to the affected statutory programs.[576] By contrast, "[v]irtually every plausible normative version of accountability seems to depend quite strongly on the availability of multiple pressure points within the bureaucracy, a diffusion of policy making influence, public dialogue, and a general fluidity in the value structure that guides the bureaucracy's decision-making."[577] All of these components of accountability were sacrificed when the President unilaterally expanded charitable choice. The result was predetermined, so the notice and comment process was a sham. The agencies did not have to gather or analyze information to support their rulemakings, and they did not have to justify the result. The vigorous debate over constitutional values that ultimately derailed the bills in Congress[578] was curtailed. In short, there is no efficiency or accountability justification for the President's order to the federal agencies that they fund religious groups.

Over fifty years later, the boundaries of Justice Jackson's zone of twilight[579] remain murky. No court or commentator has been able to devise a simple test to separate lawful presidential action from presidential overreaching, and it unlikely such

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[571] *Id.*

[572] *See supra* text accompanying notes 67–72.

[573] *See* FEDERAL ELECTION COMMITTEE, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS (2000), http://www.fec.gov/pubrec/fe2000/2000presge.htm (showing a vote margin of 593,895 or 0.41%).

[574] *See* GREEN ET AL., *supra* note 564, at 1.

[575] Rubin, *supra* note 496, at 2079.

[576] *See* Barksdale, *supra* note 415, at 304 (keeping decision-making in the hands of agencies "protects important legislative process values such as consensus building, citizen participation, deliberation, and diffusion of power").

[577] Shane, *supra* note 527, at 212.

[578] *See supra* text accompanying notes 55–63.

[579] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

a test exists. As Justice Jackson recognized, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[580] The *Youngstown* majority's emphasis on congressional intent[581] further muddies the waters because the courts differ over what methodologies and materials are legitimate sources for discerning Congress's will. As a result of these difficulties, the few lower courts to address these issues are assessing presidential domestic policymaking solely by whether or not it conflicts with enacted statutes.[582] Express conflicts are the easy cases; obviously, the President cannot implement domestic policies that are contrary to existing statutes.[583] The problem with this approach, however, is that it means the President can move freely in any zone untouched by Congress. And, conversely, where Congress has delegated statutory authority to an agency, the President can trump the agency's expertise with his own policy prescription.

The case study of the CCEOs suggests that one way to think about the President's powers within the zone of twilight is to focus on efficiency and accountability, which are, after all, the underlying reasons for and benefits of having a unitary executive. Purely theoretical contentions about the virtues or vices of a unitary executive make untested assumptions about these constitutional values.[584] By contrast, the CCEOs demonstrate that we cannot presume that the President serves these values when he engages in policymaking.[585] Yet where these values are furthered, we have less to fear from presidential policymaking and more confidence that the President is taking care that the laws are faithfully executed pursuant to some norm other than his personal preferences. Moreover, putting some boundaries on the zone of twilight would make exercises of presidential power more transparent because the President would have to articulate a basis for his actions. In turn, the President's rationale could be judged on its merits, rather than forcing courts to engage in an often fruitless search for legislative intent that usually results in the aggrandizement of executive power. In searching for a line between presidential lawmaking and gap-filling we should not forget that the Framers of the Constitution have given us valuable benchmarks by which to judge presidential action. We best serve both original understandings and modern realities by returning to the touchstones of accountability and efficiency.

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[580] *Id.*

[581] *See id.* at 579, 587–89.

[582] *See supra* text accompanying notes 174–79.

[583] *See* McGarity, *supra* note 470, at 464 ("Congress may establish national domestic policy in duly enacted statutes, and the President may not unilaterally change that policy in executing those statutes. . . . Virtually all of the constitutional commentators agree with this modest proposition.").

[584] *See generally* Shane, *supra* note 527.

[585] *See supra* text accompanying notes 496–516.

CONCLUSION

Debates over the scope of presidential power remain unresolved, but all sides agree that the founders feared tyranny by any single branch of government and constructed the Constitution to avoid such concentrations of power. Likewise, while there is little consensus about the extent and effect of the First Amendment's Religion Clauses, it is clear that religion holds a special place in our constitutional order—one that demands an ongoing dialogue as we attempt to balance the many commitments to liberty of conscience that underlay the Religion clauses. President Bush's end run around Congress to dispense millions of dollars to religious organizations to further public purposes implicates both of these founding concerns. Despite the outcry over hiring discrimination that doomed the President's proposed legislation,[586] there has been little public protest over how the President's initiative has been implemented. James Madison warned, "The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse."[587] We cannot point our fingers only at the President and accuse him of pursuing his own ambitions. The silence of the courts, Congress, and the people in the face of presidential lawmaking have allowed the "zone of twilight" to expand ever larger. And, where the brunt of presidential lawmaking falls on the disadvantaged, this zone threatens to become a black hole, into which the voices of the marginalized are lost forever.

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[586] *See* BLACK ET AL., *supra* note 3, at 208.

[587] JAMES MADISON, *Speech in the Virginia Constitutional Convention*, *in* JAMES MADISON: WRITINGS 824 (Jack N. Rakove ed., 1999).