



Spring 2007

Fighting Poverty With Faith: Reflections on Ten Years of Charitable Choice

Michele E. Gilman

University of Baltimore School of Law, mgilman@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac



Part of the [Social Welfare Law Commons](#)

Recommended Citation

Fighting Poverty With Faith: Reflections on Ten Years of Charitable Choice, 10 *J. Gender Race & Just.* 395 (2007) (symposium)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice

*Michele Estrin Gilman**

In 1996, welfare reform legislation spurred heated debates over tough new work requirements for welfare recipients and lifetime limits on welfare benefits.¹ Advocates sought to eliminate dependency on government; opponents feared widespread impoverishment of women and children.² In the midst of the uproar, then-Senator John Ashcroft quietly inserted a provision into the Personal Responsibility and Work Opportunity Reconciliation Act (PRA) that garnered scant attention at that time but transformed the delivery of welfare services in this country and radically redefined the relationship between church and state.³ This provision, commonly known as charitable choice, permits government funding of religious organizations, including churches, synagogues, and mosques, to deliver welfare-related services.⁴ Prior to welfare reform, houses of worship and other sectarian organizations were not eligible to receive government funds to deliver social services.⁵ Instead, religious organizations that wanted to contract with government had to create secular affiliates and keep religious content out of their government-funded programs.⁶ These steps are no longer necessary. Charitable choice was the first major governmental initiative for direct funding of churches, and thus, it quickly became a lightning rod for dissension. The debate intensified with the election of

* Associate Professor and Director, Civil Advocacy Clinic, University of Baltimore School of Law. B.A. 1990, Duke University; J.D. 1993, University of Michigan Law School.. I would like to thank the editors of *The Journal of Gender, Race & Justice* and the participants in the symposium for their thoughtful comments on this Article.

1. See GWENDOLYN MINK & ALICE O'CONNOR, POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POVERTY 813–15 (Gwendolyn Mink ed., 2004).

2. *Id.*

3. See AMY E. BLACK ET AL., OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH BASED INITIATIVE 22–32 (2004).

4. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 104, 110 Stat. 2105, 2161–63 (1996) (codified at 42 U.S.C. § 604(a)).

5. 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).

6. *Id.*

President George W. Bush, who made expanding and enforcing charitable choice a centerpiece of his “compassionate conservatism” domestic agenda.⁷

The controversy over charitable choice does not split along party, religious, or partisan lines. Religion plays a central and complex role in American society, and as a result, reactions to charitable choice splinter among and within the many constituencies impacted by the law.⁸ Supporters believe that religion should play a greater role within civil society and that religious groups have been discriminated against in government contracting programs.⁹ Moreover, charitable choice advocates contend that a spiritual approach is more effective than a secular one in solving social problems.¹⁰ As then-Governor Bush stated, “Government can do certain things very well, but it cannot put hope in our hearts or a sense of purpose in our lives. That requires churches and synagogues and mosques and charities.”¹¹

By contrast, many religious leaders fear that accepting government money would lead to increased bureaucratization of churches, church dependence on government funding, and government interference with religious practices.¹² In short, these critics fear that “government shekels” come with “government shackles.”¹³ Some conservative religious leaders object to charitable choice because they do not want government money flowing to “objectionable” religious groups, such as Scientology and the Nation of Islam.¹⁴ On the left, liberal critics charge that charitable choice permits federally subsidized employment discrimination on the basis of

7. See Mary Segers, *President Bush's Faith-Based Initiative*, in FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION: THE GOOD, THE BAD, AND THE UGLY 1, 5 (Jo Renee Formicola et al. eds., 2003) (hereinafter FAITH-BASED INITIATIVES).

8. *Id.* at 3. Even within denominations, religious leaders are split on their support for the concept of charitable choice. *Id.* It is opposed by most mainline Protestants as well as most reform and conservative Jewish groups. *Id.* It is supported by most evangelical Protestants and Orthodox Jewish groups, while the U.S. Catholic Bishops Conference supports it with reservations. *Id.* African-American denominations are split over the wisdom of charitable choice. *Id.*

9. The arguments on both sides of the charitable choice issue are summarized in BLACK ET AL., *supra* note 3, at 65–73 and FAITH-BASED INITIATIVES, *supra* note 7, at 15–18, 161–81.

10. See, e.g., Stanley Carlson-Thies, *Faith Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, in WELFARE REFORM AND FAITH BASED ORGANIZATIONS 29, 30 (Derek Davis & Barry Hankins eds., 1999).

11. See FAITH-BASED INITIATIVES, *supra* note 7, at 31.

12. See, e.g., David Saperstein, *Appropriate and Inappropriate Use of Religion*, in SACRED PLACES, CIVIC PURPOSES 297, 302–03 (E.J. Dionne, Jr. & Ming Hsu Chen eds., 2001).

13. See Jeffrey Polet & David K. Ryden, *Past, Present, Future: Final Reflections on Faith-Based Programs*, in SANCTIONING RELIGION? POLITICS, LAW, AND FAITH-BASED PUBLIC SERVICES 177, 181 (David K. Ryden & Jeffrey Polet eds., 2005) (“Others worry more about the religious entities themselves, and what might happen if they avail themselves of public dollars.”).

14. See, e.g., ARTHUR E. FARNSLEY II, RISING EXPECTATIONS: URBAN CONGREGATIONS, WELFARE REFORM, AND CIVIC LIFE 88 (2002) (quoting Reverend Jerry Falwell’s concerns about funding Moslem organizations); Segers, *supra* note 7, at 1 (listing similar examples).

religion, because charitable choice exempts religious contractors from certain anti-discrimination employment laws.¹⁵ Liberal opponents also worry about religious coercion of welfare beneficiaries, as well as the quickly dissolving boundaries between church and state.¹⁶ Further, critics worry that charitable choice is a step towards pushing the entire responsibility for alleviating poverty to the private sector, and they point to decreasing government funding for public benefits programs during the Bush Administration.¹⁷

In 1996, these arguments were mostly speculative. We now have ten years of experience with charitable choice to begin to assess its impact and to consider its future role. One thing is certain: charitable choice is here to stay. In 2005, the White House reported that federal agencies awarded over \$2.15 billion to faith-based organizations, accounting for 10.9% of the total funding distributed through 158 programs and seven federal agencies.¹⁸ Health and Human Services (“HHS”), which administers many welfare-related programs, increased its awards to faith-based organizations by 88% between 2002 and 2004.¹⁹ The definition of “faith-based organizations” is muddled, because these organizations vary tremendously in how much emphasis they place on faith and in the sort of ties they may have with religion in terms of funding, staffing, governance, and adherence to the norms of religious bodies.²⁰ While congregations are a subset of faith-based organizations, they are conceptually different because their primary mission

15. 42 U.S.C. § 604a(f) (2000).

16. See BLACK ET AL., *supra* note 3, at 65–73; FAITH-BASED INITIATIVES, *supra* note 7, at 15–18, 161–81.

17. See BLACK ET AL., *supra* note 3, at 65–73; FAITH-BASED INITIATIVES, *supra* note 7, at 15–18, 161–81.

18. See Claire Hughes, *White House Report: Federal Grants to FBOs Up in 2005*, ROUNDTABLE ON RELIGION AND SOC. POL’Y (2006), <http://www.socialpolicyandreligion.org/news/article.cfm?id=3967>.

19. *Id.*

20. See ROBERT WUTHNOW, *SAVING AMERICA? FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY* 138–49 (2004); see also FREDRICA D. KRAMER ET AL., *URBAN INSTITUTE, FEDERAL POLICY ON THE GROUND: FAITH-BASED ORGANIZATIONS DELIVERING SOCIAL SERVICES* 67 (2005), available at http://www.urban.org/UploadedPDF/311197_DP05-01.pdf. The article notes:

The term encompasses a wide variety of organizations, including large and small, affiliates and independents, community-based and congregation-based, and providers of secular and faith-infused services. Given this breadth, the term has limited meaning for analytic purposes. It is sufficiently politically charged that organizations may label themselves as faith-based in the belief that doing so will help get them money, or disavow the label for fear that accepting it would buy into administration initiatives they oppose.

Id.

is not social service.²¹ Nevertheless, it is safe to say that within this broad definitional umbrella, religious groups now deliver a wide array of government-funded, welfare-related services, including job training, employment placement, emergency housing, parenting classes, life skills training, substance abuse treatment, teen abstinence counseling, and child care.²² Moreover, the Deficit Reduction Act of 2005, which reauthorized the 1996 welfare reform statute, provides \$100 million per year for five years for healthy marriage promotion efforts, and \$50 million per year over five years for responsible fatherhood programs.²³ Government agencies are actively recruiting religious groups as grantees for these funds.²⁴

Yet despite the billions of dollars flowing to religious organizations to deliver human services, there has been little scrutiny of whether charitable choice is effective in fighting poverty.²⁵ This article discusses the benefits and limitations of charitable choice. To begin with, charitable choice requires a constitutional balance too precarious for many religious groups to maintain.²⁶ Numerous lawsuits are challenging overtly religious programs, usually delivered by white, evangelical Christian religious groups, which coerce participants into following the grantee organization's religious beliefs.²⁷ Religious content is spilling over into welfare programs partly because there are few accountability mechanisms in place to ensure that religious grantees respect constitutional boundaries or deliver on contractual obligations.²⁸ In addition, the government is spending millions of dollars to convince churches to apply for charitable choice grants, yet most congregations lack the institutional capacity to deliver many welfare-related services, which require professional skills and sophisticated contract and

21. See WUTHNOW, *supra* note 20, at 149; see also *id.* at 171 ("The comparison between faith-based organizations and congregations becomes especially important for making broader observations about the role of religion in providing social services.").

22. The White House provides an annual catalogue of available grant opportunities for religious organizations. See Federal Funds for Organizations That Help Those In Need (2006), available at <http://www.whitehouse.gov/government/fbci/grants-catalog-05-2006.pdf> (listing more than 170 programs with grant opportunities).

23. Deficit Reduction Act, Pub. L. No. 109-171, § 7103 (2005).

24. See ANNE FARRIS, RICHARD P. NATHAN & DAVID J. WRIGHT, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH BASED INITIATIVE 14-20 (August 2004), http://www.religionandsocialpolicy.org/docs/policy/FB_Administrative_Presidency_Report_10_08_04.pdf.

25. See *infra* Part II.A (discussing the difficulties in measuring the effectiveness of charitable choice).

26. See *infra* Part I.B.

27. See *infra* Part II.A.

28. *Id.*

program management.²⁹ Finally, there is scant empirical evidence that a spiritual approach is superior to a secular one in delivering welfare services, suggesting that the constitutional risks are simply not worth taking.³⁰ Despite the defects underlying current charitable choice programs, one insight of civil society proponents remains true—congregations have great reserves of social capital that can be successfully channeled in the fight against poverty.³¹ Particularly in low-income communities, churches play an instrumental role in connecting people to one another, to other organizations, and to available social services.

Thus, the challenge is getting government to partner productively with churches, while avoiding the dangers inherent in charitable choice. This article argues that these goals can be achieved. Part I of the article describes the charitable choice statute, the governing constitutional framework, and the precarious balance between religiosity and neutrality that underlies charitable choice. Part II analyzes the flaws of charitable choice as an anti-poverty mechanism, concluding that the constitutional dangers of charitable choice far outweigh the benefits of current faith-based contracting. Part III uses African-American churches as a model to show how congregations generate social capital, which consists of trust relationships that arise between individuals involved in social networks. Part IV proposes alternative ways for government to partner with religious organizations that avoid the shortcomings associated with charitable choice, while seizing upon the substantial social capital offered by these groups. In brief, this Part suggests that churches are ill-suited for delivering welfare counseling services that are transformative in nature, but ideally suited to deliver discrete, sustenance-based services as well as to serve as links between the needy and other community groups and governmental agencies.

I. THE FRAMEWORK OF CHARITABLE CHOICE

Charitable choice had its genesis in a group of conservative scholars, policymakers, and politicians who banded together in the early 1990s with the goal of bringing religion more overtly into the public square.³² For these activists, government aid is bureaucratic, impersonal, and breeds dependency.³³ By contrast, churches can provide spiritual solace and moral

29. See *infra* Part II.B.

30. See *infra* Part II.A.

31. See *infra* Part III.

32. See Jo Renee Formicola, *The Good in the Faith-Based Initiative*, in FAITH-BASED INITIATIVES, *supra* note 7, at 28–45; BLACK ET AL., *supra* note 3, at 46–48 (describing the influence of the Center for Public Justice and its goals of “finding a more welcome place for Christian groups and ideas in the public square”).

33. *Id.* at 27 (“Most of these thinkers believed that government alone could not provide—and

guidance to poor individuals that will lift them out of poverty.³⁴ As Texas Governor, George W. Bush was one of the first political leaders to put the ideas of these conservative, religious thinkers into practice.³⁵ He established a state policy of partnering with religious groups to deliver social services.³⁶ For President Bush, charitable choice has both personal and political resonance. On a personal level, charitable choice appeals to Bush because of his own religious conversion, which helped him overcome personal problems.³⁷ As a political matter, charitable choice allows Bush 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.³⁸ President Bush has aggressively and effectively expanded charitable choice. This Part sets forth the parameters and scope of charitable choice and examines its legality.

A. Charitable Choice Legislation

The PRA created the Temporary Assistance to Needy Families (TANF) block grant that states administer to qualifying needy families.³⁹ The PRA's stated purposes are to reduce welfare dependency and out-of-wedlock births and to encourage the formation of two-parent families.⁴⁰ The PRA gives the states considerable flexibility to create their own welfare programs with their TANF funds as long as they meet these objectives. In addition, states have the option of further devolving welfare operations to the county and city level, and to private organizations if they choose. Under the charitable choice provision, states can further opt to provide welfare services through contracts with charitable, religious, or private organizations, or to provide beneficiaries with vouchers that are redeemable with such private organizations.⁴¹ Since the PRA, charitable choice provisions have been

was not providing—effective welfare.”).

34. *Id.* at 36 (quoting Indianapolis mayor Stephen Goldmith, who wrote that “church based efforts provide needy individuals with a source of strength and the moral impetus for personal change that government simply cannot”).

35. *See id.* at 26.

36. *Id.*

37. *See* BLACK ET AL., *supra* note 3, at 88; FARRIS ET AL., *supra* note 24, at 3.

38. *See* BLACK ET AL., *supra* note 3, at 87–89.

39. 42 U.S.C. § 601 (2000). The TANF program replaced the prior welfare system, known as Aid to Families with Dependent Children.

40. *Id.*

41. *Id.* § 604a.

included in a variety of other social service statutes.⁴² Moreover, President Bush has expanded charitable choice through the entire human services bureaucracy by utilizing executive orders.⁴³

The charitable choice legislation in the PRA was carefully crafted with input from several lawyers and academics to ease First Amendment church-state separation concerns while simultaneously preserving the religious character of the grantees.⁴⁴ Religious organizations receiving charitable choice funds have several rights under the statute. To begin with, governmental entities cannot discriminate against religious organizations in awarding contracts,⁴⁵ nor can they interfere with the religious organization's "control over the definition, development, practice, and expression of its religious beliefs."⁴⁶ In addition, religious organizations receiving charitable choice funds need not alter their internal governance structures or remove religious art, icons, or other symbols from their premises.⁴⁷ Finally, religious organizations are exempt from Title VII's nondiscrimination in employment requirements.⁴⁸

Beneficiaries also have defined rights. Most importantly, charitable choice funds cannot be used for proselytizing or worship.⁴⁹ In addition, states must provide nonsectarian alternatives for beneficiaries who object to the religious character of their provider;⁵⁰ the TANF regulations that implement the PRA require that service providers give notice to beneficiaries informing them of this right. Under the statute, religious organizations cannot discriminate against beneficiaries on the basis of religion or religious beliefs.⁵¹ With regard to accountability, the statute provides that religious organizations are subject to the same regulations as other contractors "to account in accord with generally accepted auditing

42. See Community Services Block Grant Act of 1998, Pub. L. No. 105-285 (codified as 42 U.S.C. § 9920 (2003)); Substance Abuse and Mental Health Services Administration Act of 2000, Pub. L. No. 106-310 (codified as 42 U.S.C. § 290kk-1 (2003)); Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554 (codified as 12 U.S.C. § 1715z-14).

43. See *infra* notes 56–57 and accompanying text.

44. See Pub. L. No. 104-193, 110 Stat. 2105, § 104(b) (1996) (codified at 42 U.S.C.A. § 604a). ("The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.")

45. *Id.* § 104(c).

46. *Id.* § 104(d)(1).

47. *Id.* § 104(d)(2).

48. *Id.* § 104(f).

49. *Id.* § 104(j).

50. 110 Stat. 2105, § 104(e)(1).

51. *Id.* § 104(g).

principles for the use of such funds,” although the organization can segregate federal funds into separate accounts and limit any audit to those accounts.⁵² Finally, the statute provides that any party seeking to enforce its rights may file a civil suit for injunctive relief in state court.⁵³

The scope and scale of charitable choice have expanded dramatically since the PRA was enacted. Although President Clinton did little to implement charitable choice, the terrain changed dramatically when President Bush took office in 2001.⁵⁴ President Bush sought not only to enforce the charitable choice provisions in the PRA, but also to expand charitable choice across the entire human services bureaucracy.⁵⁵ Within weeks of taking office, he announced the formation of the high-profile White House Office of Faith-Based and Community Initiatives (“WHOFBCI”) as well as satellite offices in five Cabinet-level agencies.⁵⁶ By executive order, he directed these offices to identify and remove regulatory barriers that discouraged federal human services contracting with faith-based groups, declaring that that government should provide a “level playing field” between religious and secular grant applicants.⁵⁷ The White House also issued a report contending that religious organizations were discriminated against in the contracting process.⁵⁸

President Bush has failed repeatedly at getting Congress to pass his expansion of charitable choice into law because opponents, having learned their lesson in 1996, have effectively portrayed the proposed bills as permitting federally funded religious discrimination in employment.⁵⁹ Nevertheless, the President has used the prerogatives of his office, including a series of executive orders, to make an end-run around Congress.⁶⁰ Moreover, WHOFBCI and the satellite offices, which have now grown to cover eleven agencies, aggressively promote charitable choice across the country by conducting outreach sessions, conferences, and workshops to

52. *Id.* § 104(h).

53. *Id.* § 104(i).

54. See BLACK ET AL., *supra* note 3, at 62.

55. See generally FARRIS ET AL., *supra* note 24.

56. Exec. Order No. 13, 199, 66 Fed. Reg. 8499 (Jan. 29, 2001); see also BLACK ET AL., *supra* note 3, at 202.

57. Exec. Order No. 13, 199.

58. WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVES, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (Aug. 2001), <http://www.whitehouse.gov/#/news/releases/2001/08/20010816-3-report.pdf>.

59. See Segers, *supra* note 7, at 8–11.

60. See Michele Estrin Gilman, *If At First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. (forthcoming 2007).

educate state officials and religious organizations about available grants and how to apply for them.⁶¹ Grant announcements at all levels of government now explicitly state that faith-based groups are not only eligible to compete for federal grants, but also that they are especially encouraged to apply.⁶² As noted earlier, these executive branch efforts are yielding results—billions of dollars are being funneled toward religious organizations to deliver human services.⁶³

Although a future president could rescind President Bush's executive orders, ignore the PRA's charitable choice provisions, and shut down the WHOFBCI, this is unlikely to happen regardless of which party wins office in 2008. Likely candidates from both political parties have been touting the benefits of religious influence in public life.⁶⁴ In the current political climate, no candidate or politician wants to look anti-religion, and thus, dismantling a large component of the federal bureaucracy would be a difficult political sell. In short, charitable choice is now a permanent fixture of the human services bureaucracy.

B. *The Constitutional Context*

The drafters of charitable choice aimed to create a law that would pass constitutional muster under the U.S. Supreme Court's quickly changing religion clause jurisprudence.⁶⁵ The drafters had to predict where the Court's First Amendment currents would lead, but they also saw an opportunity to

61. See DAVE DONALDSON & STANLEY CARLSON-THIES, *A REVOLUTION OF COMPASSION* 73 (2003).

62. See *Federal Funds for Organizations That Help Those in Need* (2006), available at <http://www.whitehouse.gov/government/fbci/grants-catalog-05-2006.pdf> (listing more than 150 programs with grant opportunities for faith-based organizations); see also FARRIS ET AL., *supra* note 24.

63. See WHOFBCI Accomplishments in 2006, available at http://www.whitehouse.gov/government/fbci/2006_accomplishments.html ("Competitive Federal grants to faith-based organizations (FBOs) increased for the third straight year in FY2005. More than \$2.1 billion in grants were awarded to religious organizations in FY2005 by seven federal agencies."); see also Elisabeth Bumiller, *Bush Urges More Money for Religious Charities*, N.Y. TIMES, Mar. 10, 2006, at A1 (stating in 2005, the President awarded over \$2 billion in faith-based grants).

64. See, e.g., Anne E. Kornblut, *Political Memo: For This Red Meat Crowd, Obama's '08 Choice Is Clear*, N.Y. TIMES, Sept. 18, 2006, at A21 (Sen. Barack Obama, a potential Democratic candidate, "has earned a reputation for persuasive rhetoric about the role of religion in politics"); Raymond Hernandez, *Hillary Clinton's Popularity Up in State, Even Among Republicans*, N.Y. TIMES, Feb. 22, 2005, at B1 (likely candidate and Democrat, Senator Hilary Clinton often makes references to faith and prayer); Adam Nagourney, *McCain Emphasizing His Conservative Bona Fides*, N.Y. TIMES, Apr. 9, 2006, at 1 (describing Republican Senator John McCain's efforts to reach out to Rev. Jerry Falwell in advance of a likely presidential run).

65. Law professor Carl Esbeck was integral in drafting the statute. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 4 n.20 (2005) (noting the role Prof. Esbeck played as an advisor to Senator Ashcroft, the sponsor of charitable choice in the PRA); BLACK ET AL., *supra* note 3, at 45–49 (same).

shape the course of the flow. The Supreme Court has not ruled on any aspect of charitable choice, although cases are working through the system that may eventually be reviewed. Certiorari has been granted on the complicated issue of whether taxpayers have standing to challenge charitable choice programs.⁶⁶ Most scholars agree that government funding of faith-based providers is permissible under the First Amendment as interpreted by the current Court,⁶⁷ although some scholars object to the state of the law.⁶⁸ At the same time, the lower federal courts are striking down specific charitable choice programs for straying beyond permissible boundaries.⁶⁹ In short, charitable choice may be constitutional on its face but is far more problematic as applied.⁷⁰ As a result, numerous charitable choice programs have been subject to litigation,⁷¹ and we can expect continued litigation as courts define the parameters of permissible charitable choice programs.

Under the First Amendment's religion clauses, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷² Charitable choice is usually contested on Establishment Clause grounds. Opponents of charitable choice view it as an unlawful establishment of religion because government is not only funding religious organizations but also giving its imprimatur to religion as a solution for social problems.⁷³ This risks religious coercion of welfare recipients, as well

66. *Hein v. Freedom From Religion Foundation, Inc.*, 433 F.3d 989 (7th Cir. 2006), *cert. granted*, 127 S. Ct. 722 (2006).

67. *See e.g.*, Lupu & Tuttle, *supra* note 65 ("Changes in the law of the religion clauses have rendered it constitutionally plausible, but hardly unassailable.")

68. *See* Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 45–46 (2000); Alan Brownstein, *Constitutional Questions About Charitable Choice*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 10, at 219–65.

69. *See infra* cases discussed in Part I.C, as well as the comprehensive listing of charitable choice litigation, including pending cases, at The Roundtable on Religion and Social Welfare Policy, Legal Updates, http://www.religionandsocialpolicy.org/legal/lega_updates.cfm (last visited Feb. 21, 2007).

70. There are a variety of other constitutional issues raised by charitable choice, including the constitutionality of the exemption from employment discrimination laws for charitable choice grantees. *See generally* Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002); Melissa McClellan, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH. & LEE L. REV., 1437 (2004). On other constitutional issues, *see generally*, Lupu & Tuttle, *supra* note 65.

71. *See* Diana B. Henriques & Andrew Lehren, *Religion for Captive Audiences. With Taxpayers Footing the Bill*, N.Y. TIMES, Dec. 10, 2006, at A11.

72. U.S. CONST. AMEND. I.

73. *See* Paul Weber, *The Bad in the Faith-Based Initiative*, in FAITH-BASED INITIATIVES, *supra* note 7, at 63, 92 (summarizing the First Amendment objections to charitable choice); David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 561 (2002) ("The initiative is premised in significant part on the conviction that because of their faith, religious providers are better than their secular counterparts at delivering certain social

as the opportunity for government to prefer certain religious organizations over others.⁷⁴ By contrast, supporters of charitable choice argue that keeping churches out of government-contracting programs results in discrimination against religion in violation of the Establishment Clause's emphasis on neutrality.⁷⁵ Under a neutrality model, "individuals and religious groups [can] participate fully and equally with their fellow citizens in America's public life, without being forced either to shed or disguise their religious convictions or character."⁷⁶ Although the Court's Establishment Clause jurisprudence is convoluted and rapidly changing,⁷⁷ there are clear signals as to how the Court would evaluate charitable choice.

The starting point for the analysis is *Bowen v. Kendrick*, a case that pre-dates charitable choice by eight years, in which the Court considered the extent to which government aid can flow to religiously affiliated social service providers.⁷⁸ In *Bowen*, the Court addressed the constitutionality of the Adolescent Family Life Act ("AFLA"), a statute that made government grants available to public and nonprofit private organizations, including religious organizations, to counsel and educate teenagers about reproduction and sexuality.⁷⁹ The challengers contended that grants to religious organizations violated the Establishment Clause.⁸⁰ The Court ruled that the AFLA was constitutional on its face, but that individual AFLA grants might violate the Establishment Clause as applied.⁸¹ The Court's opinion largely

services.").

74. See Weber, *supra* note 73, at 65–67 (discussing coercion and discrimination objections).

75. See, e.g., Carl H. Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS, *supra* note 68, at 180–82. In addition, some prominent charitable choice supporters contend that religious organizations that participate in charitable choice should be free from regulatory burdens that apply to secular grantees, arguing that the First Amendment permits, or even mandates, such exemptions to avoid government interference with religion. See Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 23–27 (1997). This viewpoint is not consistent with current law. See Gilman, *supra* note 5, at 871–81 (explaining that religious organizations are subject to neutral laws of general applicability). Also, contrary to the claims of some charitable choice supporters, it is clear that governments are not required to adopt charitable choice, i.e. to open up social service contracting to religious organizations. See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that the State of Washington did not have to provide college scholarships to students pursuing devotional degrees).

76. Esbeck, *supra* note 75, at 21.

77. See *Mitchell v. Helms*, 530 U.S. 793, 804 (2000) (Thomas, J., plurality opinion) ("[O]ur Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle.").

78. *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

79. *Id.* at 593–96.

80. *Id.* at 596–97.

81. The Court applied the three-part purpose-effect-entanglement test for analyzing Establishment Clause challenges set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has

hinged on its conclusion that as long as funds were not going towards “pervasively sectarian” organizations, there was no risk of government advancing, inhibiting, or excessively entangling itself with religion.⁸² At that time, the ban on direct aid to pervasively sectarian institutions had a long pedigree in cases involving aid to parochial schools.⁸³ Although the AFLA survived facial attack, the Court remanded the case back to the district court to determine whether the AFLA was unconstitutional as applied; that is, whether some AFLA aid was flowing to pervasively sectarian grantees and/or whether the aid was used to fund specifically religious activities.⁸⁴ The Court indicated that either of these uses would be unconstitutional.⁸⁵

Bowen approved government funding of religious organizations to combat social problems as long as the aid money finances only secular activities and as long as religious organizations are not preferred over secular groups.⁸⁶ Thus, *Bowen* embodies the Court’s move away from separationist rhetoric that had long dominated its religion-clause jurisprudence toward a more neutral vision, under which both the secular and sectarian are entitled to equal treatment by government.⁸⁷ However, *Bowen* also takes a strong stance against the funding of “pervasively sectarian” institutions.⁸⁸ The Court has vaguely defined “pervasively sectarian” organizations as those in which the “secular activities cannot be separated from sectarian ones.”⁸⁹ Parochial schools and houses of worship fit squarely within this definition.⁹⁰ Charitable choice violates the pervasively sectarian test because its very purpose is to involve churches, synagogues, mosques, and the like in welfare delivery without requiring these organizations to set up affiliated, nonsectarian nonprofits. Yet since *Bowen*, the Court has moved away from the “pervasively sectarian” test, and accordingly, a majority of the Court no longer considers the nature of the

since been modified under *Agostini v. Felton*, 521 U.S. 203 (1997). Under the *Agostini* analysis, the Court first asks whether the statute has a secular purpose and then looks to the effect of the statute by asking whether the government aid (1) results in government indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Agostini*, 521 U.S. at 233–34.

82. *Lemon*, 403 U.S. at 610–18.

83. See Gilman, *supra* note 5, at 865 n.323.

84. *Bowen v. Kendrick*, 487 U.S. 589, 622–23 (1988).

85. *Id.*

86. *Id.* at 608, 616.

87. For a description of the Court’s move toward a neutrality theory of the religion clauses, see generally Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 57–60 (2002).

88. *Id.* at 609–12.

89. *Roemer v. Maryland*, 426 U.S. 736, 755 (1976).

90. *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988).

organization receiving aid to be determinative.⁹¹ This shift accords with the goals of the drafters of charitable choice who felt that religious organizations were being unfairly excluded from government programs.⁹²

The Court shed the pervasively sectarian concept in a series of cases involving government aid to parochial schools, which, like charitable choice, raise concerns about government indoctrination and entanglement.⁹³ Thus, the education cases are likely predictors of how the Court would treat charitable choice. The leading case in this area is *Mitchell v. Helms*, in which the Court upheld a federal program that provided educational equipment and materials, such as computers, software, and VCRs, to economically disadvantaged public and private schools, including religious schools.⁹⁴ The Justices articulated three sharply differing positions about the aid program. A four vote plurality consisting of Justices Thomas, Rehnquist, Scalia, and Kennedy, concluded that the Establishment Clause is not violated as long as the aid lacks religious content and is distributed based on neutral criteria.⁹⁵ For the plurality, the actual use of the aid or the character of the recipient is irrelevant.⁹⁶ By contrast, the dissenting Justices, consisting of Souter, Stevens, and Ginsberg, contended that any form of government aid that could potentially be diverted towards religious activities violates the Establishment Clause.⁹⁷

The controlling opinion, authored by concurring Justice O'Connor and joined by Justice Breyer, falls between these two positions.⁹⁸ Whereas *Bowen* focused on the religious character of the recipient as the touchstone for satisfying the Establishment Clause, the *Mitchell* concurrence focuses instead on how the aid is actually used by grantees. Justice O'Connor reaffirmed the rule set forth in prior direct-aid cases that government aid cannot be used to advance or inhibit religion.⁹⁹ Thus, the government violates the Establishment Clause when it endorses religion, that is, when a "reasonable observer would naturally perceive the aid program as

91. See *Mitchell v. Helms*, 530 U.S. 793 (2000) (discussed *infra* Part II.C).

92. See Jeffrey Polet & David K. Ryden, *Religion, the Constitution, and Charitable Choice*, in SANCTIONING RELIGION?, *supra* note 13, at 19.

93. See Lupu & Tuttle, *supra* note 65, at 21–26 (describing the shifts in the Court's jurisprudence with regard to direct government financing of schools).

94. *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion).

95. *Id.* at 826.

96. *Id.* at 814–15, 820, 827.

97. *Id.* at 890 (Souter, J., dissenting).

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

99. *Id.* at 844–45 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)).

government support for the advancement of religion.”¹⁰⁰ Accordingly, Justice O’Connor concluded that the government can provide religiously neutral aid to parochial schools as long as the aid is distributed to both secular and sectarian schools on a neutral basis and is not, in fact, diverted for religious purposes. Moreover, O’Connor determined that because religious indoctrination with government funds is impermissible, the government must have adequate safeguards for preventing the unlawful diversion of funds for religious purposes.¹⁰¹ For the concurrence, all of these conditions were satisfied in *Mitchell*.¹⁰² Whereas *Bowen* focused on the religious character of the recipient as the touchstone for satisfying the Establishment Clause, *Mitchell* focuses instead on how the aid is actually used by grantees.

In *Zelman v. Simmons-Harris*, the Court further stressed the concept of neutrality and created a safe harbor for voucher programs, a form of indirect government aid.¹⁰³ Whereas direct government aid involves contracting directly with a religious provider to deliver services, indirect aid involves giving private individuals vouchers, which they may use at any provider that accepts the vouchers.¹⁰⁴ In a 5-4 decision, the majority approved the Cleveland school district’s use of tuition vouchers for low-income elementary school students to attend the private schools of their choice, including religious schools.¹⁰⁵ The majority reasoned that the intervening private choice of parents to use their vouchers to send their children to parochial schools erased any state responsibility for religious indoctrination.¹⁰⁶ Accordingly, indirect aid programs are permissible if there is independent choice by beneficiaries and government neutrality in selecting participating schools.¹⁰⁷ This would seem to portend an explosion of voucher programs in the social services field because it avoids the

100. *Mitchell*, 530 U.S. at 843. In *Lynch v. Donnelly*, Justice O’Connor explained that unlawful endorsement occurs when the government sends “a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984). For a critique of the endorsement test, see Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002).

101. *Mitchell*, 530 U.S. at 858–62.

102. *Id.* at 867.

103. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

104. See *Cole*, *supra* note 73, at 565 (“Contemporary Establishment Clause jurisprudence draws a sharp line between direct government aid, which generally may not support religious activity, and indirect aid routed through private individual choice, such as vouchers, which may generally support religious activity without creating a constitutional problem unless the private routing is a transparent fiction.”).

105. *Id.* at 662–63.

106. *Id.* at 650–52.

107. *Id.*

complicated questions about the appropriate uses of direct aid under *Mitchell*. Yet voucher programs in low-income communities can be problematic as a policy matter because beneficiaries may not be able to gain information about available services or to evaluate services rendered.¹⁰⁸ Also, some jurisdictions cannot maintain a competitive market of service providers from which to choose, making the notion of choice meaningless. Regardless of the constitutional appeal of voucher programs, most welfare-related programs are still structured as direct aid programs. This is because social service providers need to maintain their capacity to respond to fluctuating demand and cannot run on fee-for-service arrangements.¹⁰⁹

Under both *Mitchell* and *Zelman*, charitable choice's direct aid provision would likely satisfy current constitutional standards because it requires government nondiscrimination in selecting grantees, and the aid is not permitted to be used for "sectarian worship, instruction, or proselytization."¹¹⁰ Although Justice O'Connor is no longer on the Court, the newest members, Justices Roberts and Alito, are expected to hold views on the religion clauses that would support charitable choice.¹¹¹ Still, it remains to be seen whether they would go as far as the plurality in *Mitchell*, which concluded that as long as distributional criteria are neutral, and the purposes of the program are secular, the actual use of government aid is irrelevant.¹¹² In sum, at the current time, charitable choice appears to be facially valid, but its application has run into constitutional problems.

C. Charitable Choice Litigation

Numerous lawsuits have been filed challenging direct aid programs on the grounds that the government funds were used for religious activities.¹¹³

108. See JO ANNE SCHNEIDER, *SOCIAL CAPITAL AND WELFARE REFORM: ORGANIZATIONS, CONGREGATIONS, AND COMMUNITIES* 234 (2006) ("People of the rising educated and established middle class have the skills to evaluate these options, but this is far less likely to be the case for regular users of these systems."); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 *DUKE L.J.* 493, 535 (1999) ("Autonomous choice is in jeopardy when the individual has no money, food, or housing and is offered these necessities on conditions that she might quickly refuse under other circumstances.").

109. See Lupu & Tuttle, *supra* note 87, at 74.

110. 42 U.S.C. § 604(a)(j) (2000).

111. See Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 *U. PA. J. CONST. L.* 725, 749 n.106 (2006) ("[B]oth of them [Roberts and Alito] expressed views prior to serving on the bench that contribute to the perception that they will join the other three conservatives on most issues relating to church/state issues.").

112. See IRA LUPU & ROBERT TUTTLE, *THE STATE OF THE LAW 2005: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH BASED ORGANIZATIONS* 19–20 (2005), available at <http://www.socialpolicyandreligion.org/publications/publication.cfm?id=67>.

113. See cases gathered at The Roundtable on Social and Religious Policy, Legal Updates,

Under *Mitchell*, 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. Accordingly, as discussed below, 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.

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 designed to rehabilitate inmates and reduce recidivism.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷ The court found further that the religious nature of the program precluded non-Evangelical Christian inmates from participating.¹¹⁸ The Court stated, “The overtly religious atmosphere of the InnerChange program is not simply an overlay or a secondary effect of the program—it is the program.”¹¹⁹ Thus, “For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of 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.”¹²⁰ These actions constituted “severe” violations of the Establishment Clause, resulting in unlawful promotion of religion,

http://www.religionandsocialpolicy.org/legal/legal_updates.cfm (last visited Feb. 21, 2007).

114. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006).

115. *Id.* at 941.

116. *Id.* at 901–03.

117. *Id.* at 875.

118. *Id.* at 898–99.

119. *Id.* at 922.

120. *Americans United for Separation of Church and State*, 432 F. Supp. 2d at 933.

incentives for inmates to engage in religious observance, and government financial support for religious indoctrination.¹²¹

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.¹²² The program requires staff to adhere to Christian beliefs, actively proselytizes inmates, and does not segregate government funds for secular purposes.¹²³ The plaintiffs contend that such a program violated the Establishment Clause.¹²⁴

Other cases abound. 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).¹²⁵ 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 rings that were inscribed with New Testament verse.¹²⁶ In the settlement, HHS ended funding for the program as it is currently structured, made future funds contingent on the SRT’s compliance with charitable choice restrictions, and agreed to closely monitor any future grants to the program.¹²⁷ The settlement agreement also incorporated a list of safeguards that HHS would impose on any future grants with SRT; this document “represents the clearest and most complete legal guidance for faith-based grantees that has thus far been produced” by the government.¹²⁸ HHS terminated its grant to SRT in January 2006, and the SRT is not currently receiving funds from HHS.¹²⁹

In another case involving an abstinence program, *American Civil Liberties Union v. Foster*, a federal district court in Louisiana enjoined a

121. *Id.* at 939.

122. *Moeller v. Bradford County*, 2006 WL 319288 (M.D. Pa., Feb. 10, 2006); *Moeller v. Bradford*, 444 F. Supp. 2d 316 (M.D. Pa. 2006).

123. *Moeller*, 444 F. Supp. 2d at 318.

124. *Id.*

125. See Raja Misha, *U.S. To End Funding of Abstinence Program, Settles a Lawsuit Filed by the ACLU*, BOSTON GLOBE, Feb. 24, 2006.

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

127. *Id.*

128. IRA LUPU & ROBERT TUTTLE, THE STATE OF THE LAW 2006: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH BASED ORGANIZATIONS iii (Roundtable on Religion and Social Policy 2006), available at http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2006.pdf (last visited Feb. 21, 2007).

129. *Id.* at 3.

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 and taught participants about “the virgin birth and . . . God’s desire [for] sexual purity as a way of life.” The groups also conducted public school skits that made statements “about what God and the Bible say about abstinence,” and gave engraved Bibles to children.¹³⁰ The court concluded that state money was “being used to convey religious messages and advance religion.”¹³¹ and ordered the state to implement safeguards that would prevent government abstinence funds from being used for religious purposes.¹³²

These and other blatant violations of charitable choice restrictions have several causes. Obviously, the government is not doing an adequate job of monitoring its charitable choice grants. Moreover, the government is not providing grantees with a clear description of how charitable choice funds can be spent. Professors Ira Lupu and Robert Tuttle have lamented the government’s failure to define what sorts of religious activity beyond worship and proselytizing are forbidden, thus leaving grantees in a legal limbo.¹³³ The regulations and guidance issued by the White House and federal agencies state that government may not directly support “inherently religious activities,” such as “worship, religious instruction, or proselytizing.”¹³⁴ This statement is incomplete because it fails to recognize that religious indoctrination can occur when social services are “intertwined with the inculcation of religious beliefs.”¹³⁵ Yet, even crystal clear regulations would not have prevented the activities conducted by the Silver Ring Thing or the Firm Foundation. Their activities purposely included worship and proselytizing, which are forbidden on the face of the statute.

At bottom, the tensions within charitable choice between religiosity and neutrality may be irreconcilable.¹³⁶ On the one hand, charitable choice is based on the premise that personal transformations achieved through the power of religion can solve social ills.¹³⁷ Accordingly, charitable choice attempts to preserve the spiritual character of religious groups, which is, after all, the supposed source of their effectiveness in delivering social

130. *American Civil Liberties Union v. Foster*, 2002 WL 1733651, *3–6 (E.D. La. 2002).

131. *Id.* at *7.

132. *Id.* at *6–8.

133. *See Lupu & Tuttle, supra* note 87, at 77.

134. *Id.* at 85.

135. *Id.* at 84. The authors also note that the Supreme Court has never used an “inherently religious” test in considering permissible church-state activities. *Id.*

136. *See FAITH-BASED INITIATIVES, supra* note 7, at 174 (“[W]e seem to be faced here with a faith-based public policy that is inherently contradictory.”).

137. *See supra* notes 21–22 and accompanying text.

services.¹³⁸ On the other hand, charitable choice can constitutionally fund only secular activities, thus precluding religious service providers from using religious content in their programs.¹³⁹ It is hard to see how both objectives can be served simultaneously. Stripped of their religious content, the Silver Ring Thing and the Firm Foundation are simply social service programs delivered by employees who are moved by a higher power to help the needy. Yet this sort of motivation is not enough for proponents of charitable choice; they want program content to be imbued with religion.¹⁴⁰ Even in a compliant charitable choice program, a welfare beneficiary can receive services in a facility adorned with religious symbols and be invited to join a voluntary prayer session by a church employee—and indeed, this is happening.¹⁴¹ Although local governments are supposed to provide alternative secular providers in the beneficiary’s geographic area (which is often impossible in rural locales), it is not clear that needy individuals struggling with drug addiction, homelessness, domestic violence, mental illness, or other disabilities have the wherewithal to make such a request. Does charitable choice really erase the risk of involuntary religious indoctrination, which is unconstitutional under current law? Charitable choice raises profound constitutional questions with no easy answers. However, ten years of experience provide some evidence for considering whether charitable choice is more of a panacea or a peril.

II. LIMITED EFFECTIVENESS OF CHARITABLE CHOICE

Welfare reform has effectively reduced the welfare rolls; there are half as many people on welfare today as there were in 1996.¹⁴² Yet welfare reform has not eliminated poverty.¹⁴³ Most former welfare recipients are working, but remain below the poverty line, while others are unemployed and disconnected from the welfare system.¹⁴⁴ These sobering results reflect

138. See Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY, L. & POL’Y 167, 177 (2002) (“The [President’s] Initiative’s unstated but fundamental contention is that faith-based programs ought to command government funding because they influence the *religious* beliefs of clients.”).

139. See *supra* Part I.B (discussing the constitutional restrictions on charitable choice).

140. See FAITH-BASED INITIATIVES, *supra* note 7, at 174 (the Bush Administration’s “concept of life transformation seems to confirm the idea that religious worship, preaching, and proselytization are part of a successful program.”).

141. See Heidi Rolland Unruh & Jill Witmer Sinha, *A Church-Based Welfare-to-Work Partnership*, in SANCTIONING RELIGION?, *supra* note 13, at 69, 81; see also KRAMER ET AL., *supra* note 20, at 56–59, 64 (describing religious content in charitable choice programs).

142. THE URBAN INSTITUTE, A DECADE OF WELFARE REFORM: FACTS AND FIGURES, June 2006, available at http://www.urban.org/UploadedPDF/900980_welfarereform.pdf.

143. *Id.*

144. *Id.*

the fact that the drafters of welfare reform were fixated on ending welfare dependency, rather than on fighting poverty.¹⁴⁵ Achieving the latter goal would likely require more significant structural changes than welfare reform offers, such as a better educational system, health care coverage for all Americans, universal child care, and improved employment opportunities.¹⁴⁶ By contrast, charitable choice claims to offer religious transformation as a way of solving social ills.¹⁴⁷

Yet moral and spiritual failings are not the root causes of either welfare dependency or poverty. This premise, put forward by charitable choice proponents such as President Bush, ignores the far more complicated causes of poverty, including decades of forced segregation, changes in urban economies, declines in labor market opportunities, the erosion of the minimum wage and low-wage income, deindustrialization, globalization, the decline of unions, and the increased use of contingent workers who are low-wage, part-time, and lack benefits.¹⁴⁸ The premise is also inaccurate; many welfare recipients are members of faith communities and do not fit the “profile of . . . morally confused people.”¹⁴⁹ This emphasis on the morals of the poor is thus dangerous because it threatens to push responsibility for the poor onto private organizations and lets government off the hook from grappling with structural strategies that might more effectively combat the causes of poverty.¹⁵⁰ This rhetoric would not be as troubling if the actual implementation of charitable choice aided in reducing poverty. Accordingly, this Part assesses whether charitable choice is an effective strategy for bringing current and former welfare recipients out of poverty. In turn, this analysis sheds light on whether the constitutional risks of charitable choice are worth taking.

145. Juliet Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201, 213 (2006) (“Indeed, while ending “dependence” on welfare is among the legislative goals of [PRA], decreasing poverty is not.”).

146. See Weber, *supra* note 73, at 105–06 (“Many of the problems of those needing social services are such things as lack of affordable housing, an inadequate minimum wage, and understaffed agencies.”).

147. See, e.g., FARNSLEY, *supra* note 14, at 84 (quoting the rhetoric of President Bush and former HUD Secretary Henry Cisneros).

148. See, e.g., Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 66–72 (1996); Joel F. Handler, “Ending Welfare as We Know It”—*Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 10–13 (1994); MICHAEL B. KATZ, *IMPROVING POOR PEOPLE* 77–78 (1995).

149. SCHNEIDER, *supra* note 108, at 265.

150. See Ross, *supra* note 138, at 180.

A. Effectiveness

Charitable choice assumes that a faith-based approach to human services is superior to a secular approach, but there is little empirical evidence to support this assumption.¹⁵¹ Comparing the performance of secular and sectarian providers is a challenge in the highly decentralized human services environment.¹⁵² Moreover, it is also difficult to quantify and measure performance-based outcomes for these services, which are intensely interpersonal.¹⁵³ For instance, in a job training program, is success measured by the number of recipients who obtain a part-time job? A full-time job? By the number of participants who keep a job for more than three months? Six months? A year? By the number of participants who obtain any job? Or a job with benefits? Measuring the impact of faith is further complicated because the religious content of faith-based programs varies across a wide spectrum;¹⁵⁴ on one end are faith-based groups that do not mention religion at all, at the other end are those that explicitly make adherence to deeply religious content a condition of participation.¹⁵⁵ In the absence of empirical evidence, the Bush Administration has touted anecdotal evidence about a few allegedly successful faith-based programs, and ignored horror stories from other programs.¹⁵⁶ Yet, the anecdotal evidence suggests that successful faith-based organizations cultivate intensive, long-term staff-client

151. See FAITH-BASED INITIATIVES, *supra* note 7, at 172 (“There is no evidence that it will save money or be more effective in changing people’s lives.”); KRAMER ET AL., *supra* note 20, 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.”).

152. For the challenges inherent in studying charitable choice effectiveness, see SHEILA SUESS KENNEDY & WOLFGANG BIELEFELD, CHARITABLE CHOICE AT WORK 1–13 (2006).

153. See SHEILA SUESS KENNEDY, CENTER FOR URBAN POLICY AND THE ENVIRONMENT, CHARITABLE CHOICE: FIRST RESULTS FROM THREE STATES 57 (2003), available at <http://ccr.urbancenter.iupui.edu/PDFs/Interim%20report/Interim%20report%20PDF.pdf> (noting the difficulties in drawing comparisons due to problems in measuring outcomes “where quality is not easily quantified and multiple objectives and constituencies frequently exist”).

154. See generally Helen Rose Ebaugh et al., *Where’s the Faith in Faith-Based Organizations? Measures and Correlates of Religiosity in Faith-Based Social Service Coalitions*, 84 SOC. FORCES 2259 (June 2006) (demonstrating that faith-based organizations vary widely in terms of service religiosity, staff religiosity, and organizational religiosity); see also KRAMER ET AL., *supra* note 20, at 67 (stating that the wide variety in program characteristics among faith-based organizations “are sufficiently broad to make consideration of FBOs as a class only minimally meaningful”).

155. See ROBERT WUTHNOW, SAVING AMERICA: FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY 143 (2004).

156. See Gilman, *supra* note 5, 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, available at www.slate.com/id/2086617/ (explaining how a study of a Bible-centered prison program misrepresented outcomes by engaging in selection bias).

relationships with a strong religious overlay.¹⁵⁷ This sort of explicit, overt religious content, however, is forbidden under charitable choice.¹⁵⁸ It may be a desirable way to spend private dollars, but it is impermissible with public funds.

Moreover, while anecdotal “claims about the success of particular faith-based programs are widespread . . . there is typically no control group for comparison.”¹⁵⁹ Even where a control group is used, the data is often misleading. For instance, President Bush often points to the success of the InnerChange Freedom Initiative, the same evangelical, in-prison rehabilitation program that a federal district court judge in Iowa recently found unconstitutional.¹⁶⁰ InnerChange “encourages inmates to turn from their sinful past, see the world through God’s eyes, and surrender to God’s will. This model promotes the transformation of the inmate from the inside out through the miraculous power of God’s love.”¹⁶¹ A prominent and oft-touted 2003 study of InnerChange found that recidivism rates for the InnerChange offenders were significantly lower than for prisoners who did not take part in the program.¹⁶² However, the study only considered success rates for graduates and did not take into account that over half the InnerChange participants did not complete the program because they were released from prison, dropped out, or were expelled.¹⁶³ When these non-graduating participants were factored into the data, the differences between the InnerChange participants and the comparison groups evaporated, with the Innerchange participants actually faring slightly worse in terms of recidivism.¹⁶⁴

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 TANF statute.¹⁶⁵ The preliminary findings of the researchers were that faith-based job training and placement services “were

157. See WUTHNOW, *supra* note 155, at 160–61.

158. 42 U.S.C. § 604a(j) (2000).

159. See KRAMER ET AL., *supra* note 20, at 15 (noting that there is a selection bias in faith-based interventions, stating “those 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”).

160. See *supra* notes 114–121 and accompanying text.

161. The Innerchange Freedom Initiative, http://www.ifiprison.org/program_Details/ATranf.Model/generic.asp?ID=969 (last visited Feb. 21, 2007).

162. KENNEDY & BIELEFELD, *supra* note 152, at 30.

163. *Id.*

164. *Id.*

165. See generally KENNEDY, *supra* note 153.

somewhat less effective than those of secular organizations.”¹⁶⁶ While both faith-based and secular providers were able to put welfare recipients in jobs at the same placement rates and at similar hourly wages, the clients of the faith-based providers worked substantially fewer hours per week and were less likely to have health insurance.¹⁶⁷ The study, however, does not shed light on other forms of social service provisions. Another 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.¹⁶⁸ Each type of program had certain advantages.¹⁶⁹ 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.¹⁷⁰

While most researchers agree that faith-based organizations bring unique attributes to the human services field due to their strong community ties,¹⁷¹ 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.

B. Limited Congregational Capacity

Charitable choice seeks to “level the playing field” by opening up government grant opportunities to religious organizations.¹⁷² In particular, the government is seeking to include congregations within charitable choice initiatives.¹⁷³ Yet the evidence suggests that congregations are ill-suited to play a meaningful role in human services delivery. In the leading analysis of congregational activity, Professor Mark Chaves examined data from the National Congregations Study and concluded that charitable choice is

166. *Id.* at iv.

167. *Id.*

168. See KRAMER ET AL., *supra* note 20, at 14.

169. See *id.* at 14–15.

170. See *id.*

171. See *id.* at 41.

172. See 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. 724, 730 (2005) (discussing the Bush Administration’s claim that religious organizations are discriminated against in government funding programs).

173. See FARNSELY, *supra* note 14, at 8–10, 121; U.S. Dep’t of Health & Hum. Serv., Admin. for Children and Families, Compassion Capital Fund, <http://www.acf.hhs.gov/programs/ccf/> (providing information about the fund and listing grant opportunities); U.S. GEN. ACCOUNTING OFFICE, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 22 (2006), available at <http://www.gao.gov/new.items/d06616.pdf> [hereinafter GAO Report].

unlikely to alter existing patterns of congregational involvement in social services.¹⁷⁴ Although a majority of congregations are involved in social service activities, these activities constitute a peripheral aspect of congregational life.¹⁷⁵ Only 6% of all congregations report that they have a staff person who devotes at least 25% of his or her time to social services, and congregations spend a median average of 3% of their total budgets, or \$1200, on social service programs.¹⁷⁶ Most charitable efforts are spearheaded by a tiny, dedicated core of volunteers within a congregation.¹⁷⁷ Thus, congregations are best suited to organizing small groups to perform discrete tasks.¹⁷⁸ As a result, most congregational activity focuses on assisting with emergency needs of the poor for food, clothing, and shelter, “rather than in programs requiring more sustained and personal involvement to meet longer-term needs, such as programs in the areas of health, education . . . , domestic violence, substance abuse, tutoring or mentoring, and work or employment.”¹⁷⁹ Detailed jurisdictional studies from Wisconsin, Pennsylvania, and Indianapolis confirm Chaves’ findings and conclude that welfare reform is not spurring congregations to develop social service programs.¹⁸⁰

Moreover, congregations do not deliver these discrete social services in a particularly holistic or transformational way. Rather, services are provided with only minimal, short-term contact with the needy, thus undercutting claims that churches develop long-term connections with service recipients that integrate the needy into faith communities.¹⁸¹ While many congregations are focused on moral uplift of their members, in-depth studies reveal that congregational services do not transfer morals to non-member clients who receive social services, in part due to differences in class and race between church members and clients.¹⁸² Moreover, comparisons of secular and sectarian providers demonstrate that religious groups are no

174. See MARK CHAVES, *CONGREGATIONS IN AMERICA* 7 (2004). This study is considered the “gold standard” in terms of research of congregational activity because of its comprehensiveness, although it may underestimate the amount of social services provided by congregations. See WUTHNOW, *supra* note 155, at 38–41.

175. See CHAVES, *supra* note 174, at 47–50 (noting the “peripheral nature of social services for most congregations”).

176. See *id.* at 50.

177. See *id.* at 55.

178. See *id.* at 290.

179. *Id.* at 47, 59–60; see also KRÄMER ET AL., *supra* note 20, at 10–14 (summarizing studies).

180. See SCHNEIDER, *supra* note 108, at 291 (discussing Wisconsin and Pennsylvania); FARNSLEY, *supra* note 14, at 55 (discussing Indianapolis).

181. See CHAVES, *supra* note 174, at 59–60.

182. See FARNSLEY, *supra* note 14, at 85, 92–93.

more or less likely to utilize holistic strategies in aiding clients.¹⁸³ And “even when congregations set out to provide more holistic care, those efforts often flounder on the rocky shore of social boundaries and complex realities” that shape the lives of the poor.¹⁸⁴

Most congregational social service activity is done in collaboration with other organizations, ranging from other churches to secular non-profits to government agencies.¹⁸⁵ A typical example is a church that provides volunteers for a soup kitchen where the food comes from a secular food bank and a publicly funded cook prepares the food.¹⁸⁶ Due to resource constraints, congregations are more likely to run food pantries than soup kitchens; when they cannot afford to provide services themselves, they will often collaborate with other groups.¹⁸⁷ Therefore, rather than being a freestanding alternative to secular providers, this pattern of collaboration demonstrates that “congregation-based social services often are integrated into community social welfare systems.”¹⁸⁸ In sum, research on congregations shows that churches play an integral and important role in meeting discrete, immediate needs within their communities, as well as in collaborating with professionalized service providers. However, congregations generally lack either the resources or desire to engage in more complex forms of social service delivery.

Although well-meaning, congregations that have pursued larger ambitions have often faltered.¹⁸⁹ For instance, the Faith and Families program in Mississippi was received with great fanfare on the national stage when Governor Fordice announced that the state would link welfare recipients with congregations, who were to serve as mentors.¹⁹⁰ The

183. See CHAVES, *supra* note 174, at 63–64.

184. *Id.* at 63.

185. See FARNLEY, *supra* note 14, at 68 (congregations are “more likely to serve as points of access and referral for public and private agencies offering health, human services, and other forms of assistance”); WUTHNOW, *supra* note 155, at 100. Collaboration is most likely among large, mainline-Protestant, theologically liberal congregations and least likely among evangelical congregations. See CHAVES, *supra* note 174, at 69. African-American churches are most likely to collaborate with secular groups. *Id.*

186. See CHAVES, *supra* note 174, at 70.

187. See RAM A. CNAAN, *THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE* 71 (2002).

188. *Id.* at 73. These collaborations neither discourage a holistic approach, as conservatives fear, nor dampen congregations’ political activism, as liberals fear. *Id.* at 92. See also WUTHNOW, *supra* note 155, at 61 (“Congregations are more likely, it appears, to help other organizations supply services than to invest heavily in organizing formal programs of their own.”).

189. See FARNLEY, *supra* note 14, at 69 (“There is an abundance of evidence that congregations have difficulty sustaining community development or delivering social welfare services.”).

190. *Id.*

adoptive churches were expected to provide material resources, such as job training, as well as moral guidance in the hopes of moving welfare recipients toward self-sufficiency.¹⁹¹ Yet in the first two and half years of the program, only ninety-eight families volunteered for the program and of these, only twenty-one families were able to leave welfare.¹⁹² The program was eventually terminated.¹⁹³ Reflecting on the program, one scholar explains that the congregations simply did not have the ability to “sustain ongoing, effective assistance for the families they adopt.”¹⁹⁴ Poor families face a bevy of interrelated problems that the average congregation could not handle while also meeting the spiritual needs of its members.¹⁹⁵

Furthermore, it is not clear that congregations are needed to level the human services playing field. Indeed, the “unlevel playing field” analogy is misleading because the pre-charitable choice federal procurement system for social services did not discriminate against faith-based providers.¹⁹⁶ From the founding of this country, governments and religious groups have had an intertwined, and often collaborative, relationship in providing social welfare.¹⁹⁷ During the twentieth century, governments at all levels extensively funded religiously affiliated nonprofit groups to deliver services to the needy.¹⁹⁸ For instance, in 1993, government funding accounted for 92% of the budget of Lutheran Social Ministries, 65% of Catholic Charities, and 75% of the Jewish Board of Family and Children’s Services.¹⁹⁹ This historic pattern of interrelationships between government and faith-based organizations spurred one charitable choice proponent to remark, even prior to the enactment of the PRA, “when it comes to public money and religious nonprofit organizations, sacred and secular mix.”²⁰⁰

191. See JOHN P. BARTKOWSKI & HELEN A. REGIS, CHARITABLE CHOICES: RELIGION, RACE, AND POVERTY IN THE POST-WELFARE ERA 173 (2003).

192. See FARNSLEY, *supra* note 14, at 70.

193. Explanations for the demise of the program vary. See BARTKOWSKI & REGIS, *supra* note 191, at 63.

194. FARNSLEY, *supra* note 14, at 70.

195. See *id.*

196. See Green, *supra* note 160, at 753–61.

197. LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE 33–34 (1995).

198. See Green, *supra* note 160, at 754–57.

199. *Id.* at 1. Religious groups created these separate affiliates to be eligible for government social service funds, because governing Supreme Court caselaw until the mid-1990s stated that government could not fund “pervasively sectarian” organizations. See *infra* notes 82–92 and accompanying text. While these affiliated organizations were built upon a religious motivation to provide social services, they did so in a more secular environment. See Ryden and Polet, *supra* note 13, at 1–2.

200. *Id.* at 1; see also KRAMER ET AL., *supra* note 20, at 3, 40 (“Many faith-based social

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.²⁰¹ In 1988, in *Bowen v. Kendrick*, the Supreme Court upheld a federal grant program that funded religious organizations, among others, to counsel pregnant teenagers, while prohibiting abortion-related services or information.²⁰² As these cases demonstrate, there has never been an outright ban on the participation of religiously-affiliated organizations in federal grant programs. A major pre-1996 study of faith-based contracting at the state and local level found that local governmental officials “welcomed the participation of faith-based organizations.”²⁰³ The study “found little indication that public officials were hostile to [faith based organizations]” and there were no “allegations from the [faith based organizations] about past or present ill treatment.”²⁰⁴ Thus, claims of anti-religious discrimination are overstated and fail to distinguish between churches and affiliates of religious organizations, who have long been eligible to apply for federal grants.²⁰⁵ Although most congregations have limited administrative capacity for complex human services grants, there are many highly professional religiously affiliated organizations that can deliver these services. Thus, there is little warrant for spending millions of dollars to increase the technical and administrative capacity of congregations to battle over an ever-decreasing slice of the federal social service pie.

C. Accountability

The charitable choice statute provides that religious organizations are subject to the same regulations as other contractors “to account in accord with generally accepted auditing principles for the use of such funds.”²⁰⁶ However, this narrow accountability requirement is not sufficient to ensure that religious grantees deliver on their contractual obligations or maintain the legally required separation between religious practices and service delivery.²⁰⁷ Current research shows that congregational leaders and staff lack the knowledge and competence to understand the complicated constitutional

service organizations contracted with government long before Charitable Choice and continue to do so.”).

201. *Bradfield v. Roberts*, 175 U.S. 291, 297–300 (1899).

202. *Bowen v. Kendrick*, 487 U.S. at 589.

203. See KRAMER ET AL., *supra* note 20, at 4.

204. *Id.*

205. See Green, *supra* note 172, at 755–56.

206. 42 U.S.C. § 604a(h) (2000).

207. See Gilman, *supra* note 5, at 853 (explaining the narrowness of this provision).

restrictions on the use of government funds.²⁰⁸ 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.²⁰⁹ For its part, the government is not doing enough to educate congregations about their rights and responsibilities. According to a recent report by the General Accounting Office (GAO), almost all the federal agencies studied told grantees that they were not permitted to spend money on “inherently religious activities,” but less than half of the agencies informed grantees about the rights of program beneficiaries or provided them with information about permissible hiring practices.²¹⁰ Not surprisingly then, four of the thirteen faith-based organizations that provided voluntary religious activities such as prayer did not separate them in either time or location from the federally-funded services.²¹¹ The GAO further found that most federal agencies are not monitoring contracts to see whether grantees are complying with constitutional safeguards or standards that protect beneficiaries from discrimination.²¹² Moreover, the single audit required by the statute does not include checks for these safeguards,²¹³ and site visits to grantee programs are rare.²¹⁴ The “bewildering variety and complexity” of faith-based organizations can make it difficult for government to devise regulatory oversight mechanisms,²¹⁵ suggesting further that accountability is much tougher to ensure than charitable choice drafters envisioned.

While the federal government struggles with maintaining accountability, many congregations struggle as well because they are unprepared to deal with the requirements of government procurement processes. Unlike highly regarded non-profits such as Catholic Charities and the Salvation Army, which are widely seen as some of the most effective community-based organizations in the country,²¹⁶ most congregations have neither adequate staff nor the capacity for the data management and

208. See KENNEDY & BIELEFELD, *supra* note 152, at iv.

209. See *id.* at v.

210. See GAO Report, *supra* note 173, at 29; see also KRAMER ET AL., *supra* note 20, at 60–62 (documenting that beneficiaries are not being notified of their right to seek services from an alternate provider).

211. See GAO Report, *supra* note 173, at 34.

212. *Id.* at 29.

213. See *id.* at 29, 36.

214. See *id.* at 37.

215. PETER DOBKIN HALL, ACCOUNTABILITY IN FAITH-BASED ORGANIZATIONS AND THE FUTURE OF CHARITABLE CHOICE 11 (2002), available at <http://ksghome.harvard.edu/~phall/ARNOVA-FB0%20ACCOUNTABILITY.pdf>.

216. See FARNSLEY, *supra* note 14, at 68.

reporting that are required to meet government accountability mechanisms.²¹⁷ Congregations focus on a religious mission and generally lack the accoutrements of professional management, such as staffing, office space and technology, planning, and administrative competence.²¹⁸ Clergy are generally not trained in administration, and churches often rely on lay volunteers for accounting because they cannot afford professional financial services.²¹⁹ This limited capacity is why so many congregations turn to established nonprofits when they are seeking services for the needy.²²⁰ While some larger churches can amass the resources to be effective partners in government procurement, “the reality of the situation is that most congregations are much too small to have a broad impact and are too small, even, to write the grant applications or leverage the funds necessary to compete in the public or foundation funding arena.”²²¹ Charitable choice may reinforce racial and class inequality because some smaller congregations, as well as denominations headed by part-time clergy, cannot compete effectively for grants.²²² For example, researchers in Mississippi found that bi-vocational ministers are concentrated in black churches that have low-income membership.²²³ Such churches are disadvantaged in applying for and managing government contracts.

Although President Bush is pushing millions of dollars toward building the technical capacity of small, faith-based groups such as congregations, there is still reluctance on the part of some churches to avail themselves of these funds because of their own awareness of capacity limitations and concerns about government entanglement with their religious beliefs.²²⁴ In addition, some churches fear that data collection and performance measurement will impersonalize the service they provide, as well as work to stigmatize beneficiaries by singling them out for data collection.²²⁵ At bottom, the contractual norms of charitable choice that aim to protect

217. See KRAMER ET AL., *supra* note 20, at 42–43.

218. See WUTHNOW, *supra* note 155, at 111 (noting that when non-profits got involved in government contracting, there ensued “a revolution in nonprofit management, producing a pronounced shift in power from boards and volunteers to cadres of paid professionally-trained staff”); KRAMER ET AL., *supra* note 20, at 42 (Small FBOs “lack sophisticated organizational and financial structures, including adequate policies regarding governing boards, financial record keeping, and fundraising and employment practices.”).

219. See WUTHNOW, *supra* note 155, at 111.

220. See SCHNEIDER, *supra* note 108, at 308.

221. FARNLEY, *supra* note 14, at 74.

222. See BARTKOWSKI & REGIS, *supra* note 191, at 173.

223. See *id.* at 173–74.

224. See SCHNEIDER, *supra* note 108, at 293 (“Most congregations have neither the administrative capacity nor the inclination to serve as social service agencies.”).

225. See BARTKOWSKI & REGIS, *supra* note 191, at 164.

beneficiaries and ensure quality services tend to conflict with the “covenantal impetus and moral bases” that underlie church outreach to the poor.²²⁶ As one commentator summarizes, “Working within a ministry, a religious group is accountable only to God; working under contract inevitably subjects faith communities to oversight and monitoring that may compromise not only their beliefs, but their constitutional freedoms.”²²⁷

Charitable choice resolves the tension between religious freedom and contractual accountability by erring on the side of non-entanglement. The law has long shielded religious organizations from government intrusion so as to promote the free exercise of religion and to avoid the government establishment of religion.²²⁸ Thus, lawmakers and courts tread lightly where religious groups are involved, treating religious groups “as nearly sovereign entities.”²²⁹ For instance, as a matter of state corporate law, churches generally have greater freedom than other nonprofits to structure their organizational form, and they are subject to less oversight from state agencies, even though they obtain identical tax benefits as other nonprofits.²³⁰ Similarly, churches are awarded automatic tax-exempt status from the IRS.²³¹ They not only can forgo the tax-exempt application, but also do not have to go through the annual reporting required from secular nonprofits, which provides the public with valuable information about the sources of the nonprofit’s financial support; net assets; the breakdown of expenses between fundraising, management, and program expenditures; staff salaries; and program activities.²³²

Moreover, the tort liability of religious organizations is more limited than that of other non-profits, which already have substantial protections against lawsuits.²³³ The Supreme Court has long held that the First Amendment bars courts from adjudicating religious questions.²³⁴ As a result, courts cannot inquire into the validity of religious beliefs, they cannot independently interpret religious texts, and they cannot examine the internal

226. *Id.* at 171.

227. WUTHNOW, *supra* note 155, at 112.

228. *See generally* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 *IND. L.J.* 219 (2000).

229. *See* HALL, *supra* note 215, at 3.

230. *See* Gilman, *supra* note 5, at 838.

231. I.R.C. §§ 501(a), (c)(3) and 508(a), (c)(1)(A).

232. IRS, Dep’t of Treas., Instructions for Form 990 and Form 990-EZ (2006), available at <http://www.irs.gov/pub/irs-pdf/i990-ez.pdf>. For the benefits of the Form 990 in maintaining non-profit accountability, see generally Peter Swords, *The Form 990 as an Accountability Tool for 501(c)(3) Nonprofits*, 51 *TAX LAW.* 571 (1998).

233. *See* Idleman, *supra* note 228, at 220–27.

234. *See id.* at 220–27 (describing caselaw).

decision-making of religious entities.²³⁵ The reluctance of courts to interfere with religious practices has resulted in many courts dismissing tort claims against churches and clergy, such as breach of fiduciary duty, negligent hiring and supervision, tortious interference with contract, negligent infliction of emotional distress, intentional infliction of emotional distress, and defamation.²³⁶

In addition to the protection from lawsuits, many states exempt religious groups not only from taxation, but also from licensing and inspection requirements that apply to other non-profits.²³⁷ For instance, in eleven states, non-profit secular day care centers must comply with a bevy of detailed regulations about staff-child ratios, cleanliness, safety, academic programming, and other quality of care standards, while day care centers at churches are free to ignore most, if not all, of these requirements.²³⁸ Since 1989, congressional legislation has provided religious groups with more than 200 exemptions or special arrangements not available to other non-profits or for-profit businesses in areas ranging from immigration to land use to pensions.²³⁹ For welfare recipients, this hands-off approach risks placing them in the hands of religious groups that lack the skills, training, or competence to deliver social services, while denying them any avenues for recourse.

All of these doctrines, designed to promote the free exercise of religion, shield religious groups from public scrutiny. In turn, this inadvertently defeats external attempts to keep congregations accountable to the public for the money they are spending to deliver social services.²⁴⁰ When religious groups are operating in the private sphere, their members, donors, and service recipients generally have a choice whether or not to associate with the organization, and these various constituents can disengage for any reason.²⁴¹ Yet when a religious group is delivering federally funded social services, taxpayers and beneficiaries do not always have the choice to opt out. Particularly given the capacity limitations of many congregations, accountability mechanisms should be more rigorous for these groups, yet, current practice is to the contrary.

235. *Id.*

236. *See Gilman, supra note 5, at 840–42.*

237. *See Diana B. Henriques, As Exemptions Grow, Religion Outweighs Regulation, N.Y. TIMES, Oct. 8, 2006, at A1.*

238. *Id.* Texas dropped the exemption for daycare centers established when President Bush was Governor because there was ten times the rate of abuse and neglect cases at the unlicensed, sectarian facilities. *Id.*

239. *Id.*

240. *See Gilman, supra note 5, at 822–23.*

241. *Id.* at 839.

III. CONGREGATIONS AND SOCIAL CAPITAL

Although most congregations lack the capacity to deliver comprehensive social services, they still have much to offer government in fighting poverty because of the pivotal role they play within communities and for their members. Scholars who study religion have focused increasingly on the concept of social capital,²⁴² which consists of “social relationships based on trust that have value or can be used productively.”²⁴³ Although it is difficult to generalize across the vast diversity of congregational life in the United States,²⁴⁴ congregations generally share one feature—they are valuable reservoirs of social capital. Social capital is grouped into two categories: bonding and bridging.²⁴⁵ Bonding capital is “inward looking” and happens within social groups.²⁴⁶ Within congregations, bonding capital develops from communal worship, shared religious norms, social support, and mutual aid to members.²⁴⁷ By contrast, bridging social capital is “outward looking,” and develops when groups that do not necessarily share the same cultural background or common identity forge on-going relationships of trust.²⁴⁸ For instance, many congregations collaborate with other religious groups, community organizations, and governmental agencies in social service programs to help the needy.²⁴⁹ Also, in many low-income communities, churches provide personal connections, mentoring relationships, and leadership opportunities for members that serve as a bridge to the “wider world of work and social service.”²⁵⁰ This Part explores the social capital within the black church.²⁵¹ Although this Part

242. See BARTKOWSKI & REGIS, *supra* note 191, at 18.

243. SCHNEIDER, *supra* note 108, at 9.

244. Congregations range from megachurches to small storefront churches; from fundamentalist to liberal denominations. See CNAAN, *supra* note 187, at 101.

245. See SCHNEIDER, *supra* note 108, at 11–12.

246. BARTOWSKI & REGIS, *supra* note 222, at 19.

247. See *id.* at 19; CNAAN, *supra* note 187, at 261.

248. See BARTKOWSKI & REGIS, *supra* note 191, at 19.

249. See CNAAN, *supra* note 187, at 71, 141, 261.

250. SCHNEIDER, *supra* note 108, at 266. Congregations are often the local organizations with the longest history in the neighborhood, they have a tradition of helping those in need, and they can mobilize volunteers. See FARNSELY, *supra* note 14, at 108.

251. Although this Article focuses on the social capital within the black church, it is important to note that congregations play a similarly important role in other minority neighborhoods and in rural areas. See KRAMER ET AL., *supra* note 20, at 41; Melanie D. Acevedo, Note, *Client Choices, Community Values: Why Faith-Based Legal Services Providers are Good for Poverty Law*, 70 *FORDHAM L. REV.* 1491, 1529–30 (2002) (“Poor communities, particularly urban communities of

highlights some limits inherent within social capital, it concludes that churches can be valuable partners to government in fighting poverty. Most importantly, congregations are reservoirs of moral legitimacy, and they are already important partners in social service networks.²⁵²

A. The Black Church

An examination of the social capital within urban, African-American churches in low-income communities is particularly useful in illustrating the two forms of social capital and how they can contribute to a more effective welfare system. Also, urban African-American neighborhoods are focal points for welfare reform efforts because they are disproportionately poor.²⁵³ Leading religion scholars Eric Lincoln and Lawrence Mamiya have stated that “[t]he black church has no challenger as the cultural womb of the black community.”²⁵⁴ This is especially true in poor, inner-city neighborhoods where churches are often the only viable social institutions.²⁵⁵ The Bush Administration has targeted black churches by encouraging them to engage

color, do, in fact, value their faith institutions. Within the African American and Latino communities, the church, and increasingly, the mosque, is the center of the social and political, as well as spiritual, activity of the community.”)

252. See FARNSELEY, *supra* note 14, at 77.

253. See Ruth McCoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL'Y & L. 475, 478 (2005) (“African-American families have been disproportionately impacted by both the 1961 and 1996 welfare legislation because they comprise a disproportionate amount of the impoverished families in the United States.”). At the same time, it is important to recognize that much of welfare reform was fueled by racist images of urban African Americans, particularly women. See Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389, 392–93 (2004) (“Inner-city African-American families never constituted more than twenty percent of all the people on welfare. They never even constituted a majority of African-Americans on welfare. Yet the politicized stereotype of the typical welfare recipient—the image that millions of Americans carried in their minds—was that of a never-married inner-city African-American woman who kept getting pregnant in order to get a bigger welfare check. Factually incorrect. Demonstrably. Never mind that the racially driven backlash against welfare would hurt more non-blacks than blacks; nevertheless, a racially connected anti-welfare politics began to take hold.”).

254. C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* 8 (1990). The term “black church” is used as a “term of art for expressing the centrality of Black churches in Black communities.” Michele M. SimmsParris, *What Does It Mean to See a Black Church Burning?: Understanding the Significance of Constitutionalizing Hate Speech*, 1 U. PA. J. CONST. L. 127, 131 (1998). Nevertheless, there are “innumerable differences” in black churches in America that arise from denominational affiliations, political philosophies, geographical location, surrounding communities, and other social differences. *Id.* at 131–32.

255. See R. Khari Brown & Ronald E. Brown, *Faith and Works: Church-Based Social Capital Resources and African American Political Activism*, 82 SOC. FORCES 617 (2003) (“Churches are often the only nongovernmental institution in black communities.”).

in charitable choice programs,²⁵⁶ and as a result, the black church must confront the benefits and detriments of accepting government funding.²⁵⁷

The history of the black church has its roots in slavery.²⁵⁸ Religion not only aided black Americans in coping with slavery and racial segregation, but it was the only “stable and coherent” social institution that emerged against the strictures of extreme racism.²⁵⁹ Although religion was imposed on slaves by their masters, slaves also held secret, independent religious gatherings that resisted white culture and laid the foundation for the black church.²⁶⁰ Post-emancipation, mutual aid societies and churches were the first social institutions that free blacks created.²⁶¹ In the mid to late Nineteenth Century, black churches developed a “civic tradition that nurtures a sense of charity for the poor and an active engagement in political life.”²⁶² Churches became the center of black life, and they were the “incubator behind schools, business enterprises, charity, politics, and recreation.”²⁶³ In the early twentieth century, urban churches absorbed and helped acclimate thousands of migrants from the rural South.²⁶⁴

In the 1960s, the black church was the anchor of the Civil Rights Movement.²⁶⁵ Black clergy were instrumental in the movement, and black churches provided meeting space, a mobilized base of supporters, and financial support.²⁶⁶ In the post-civil rights era, most black churches agreed that they needed to be engaged in both community outreach and political

256. See Frank A. Pryor III & David K. Ryden, *Serving the Inner City: Social Programs in Black Churches*, in SANCTIONING RELIGION?, *supra* note 13, at 131.

257. See generally Fredrick C. Harris, *Black Churches and Civic Traditions: Outreach, Activism, and the Politics of Public Funding of Faith-Based Ministries*, in CAN CHARITABLE CHOICE WORK? COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES 240, 240 (Andrew Walsh ed., 2001).

258. See LINCOLN & MAMIYA, *supra* note 254, at 7, 92–93.

259. *Id.*

260. See SimmsParris, *supra* note 254, at 135–38.

261. See LINCOLN & MAMIYA, *supra* note 254, at 8.

262. See Harris, *supra* note 257, at 140.

263. *Id.* at 142.

264. See LINCOLN & MAMIYA, *supra* note 254, at 119–23. Although most churches were too financially strained by mortgage obligations on church property to offer significant community outreach programs, churches were active in publicly denouncing racially motivated violence against blacks. *Id.* at 120–21; Harris, *supra* note 257, at 143; SimmsParris, *supra* note 254, at 138. Several prominent large churches did have major social service initiatives during this time.

265. See LINCOLN & MAMIYA, *supra* note 254, at 211–12.

266. See *id.* at 165; Harris, *supra* note 257, at 144–45. Not all black churches supported the movement; nevertheless, the black churches that were involved served as the “institutional center” for mobilization. See SimmsParris, *supra* note 254, at 138.

matters, although they differed about how to achieve these goals.²⁶⁷ In short, throughout American history, the black church has provided “opportunities for participation, leadership, and cultural expression in a society where few other such opportunities were available.”²⁶⁸ Despite denominational, doctrinal, and cultural differences across the broad spectrum of black congregations,²⁶⁹ the black church collectively offers social structure in addition to spiritual solace and thus continues to occupy “an unparalleled position as a foundational social institution in the African American community.”²⁷⁰ For all these reasons, the black church has been called a “nation within a nation.”²⁷¹

Today, in low-income African-American communities, the black church is not only a spiritual center but also continues to serve as the “base community for recreation, career matters, and many other aspects of daily life.”²⁷² Bonding social capital is generated by concerted efforts at community building—congregants actively recruit new members, offer social events, take an interest in the personal welfare of fellow members, and offer assistance to needy members.²⁷³ These churches also create bridging social capital. A study by Joanne Schneider of welfare reform in Wisconsin and Pennsylvania found that African-American churches serving low-income communities helped members adapt to norms of white, middle-class social and work environments, which, in turn, helped members obtain and keep jobs.²⁷⁴ Many black churches offer their members leadership roles that exceed the responsibilities of their paid work.²⁷⁵ In turn, these skills propel members into roles within the wider community.²⁷⁶ These churches are thus a source of empowerment and change for their members.²⁷⁷ Studies further establish that black churches are more likely than white churches to teach civic skills, foster political participation, and provide social services for their

267. See Harris, *supra* note 257, at 140.

268. Nancy T. Ammerman, *Still Gathering After All These Years: Congregations in U.S. Cities*, in CAN CHARITABLE CHOICE WORK?, *supra* note 257, at 8.

269. See SimmsParris, *supra* note 254, at 133.

270. Pryor & Ryden, *supra* note 256, at 131.

271. See LINCOLN & MAMIYA, *supra* note 254, at 8 (quoting E. Franklin Frazier).

272. SCHNEIDER, *supra* note 108, at 268.

273. See *id.* at 268–69.

274. See *id.* at 266, 270.

275. *Id.* at 274. Congregations are places where people learn “organizational, bureaucratic, and leadership skills.” FARNSLEY, *supra* note 14, at 3.

276. See SCHNEIDER, *supra* note 108, at 274.

277. *Id.* at 293–94.

members.²⁷⁸ In many inner-city churches, a majority of members commute from more affluent neighborhoods, and the financial and social resources of these members allow such congregations to have active social service programs.²⁷⁹

The “bridging” social capital developed by black churches benefits not only members, but also poor non-members within the geographic community. Black churches are “significantly more involved than their white counterparts in providing programs for the poor.”²⁸⁰ Almost all black churches have some sort of social outreach ministry; the majority of programs focus on youth, food and clothing banks, and prison ministries.²⁸¹ Moreover, many churches serve a valuable role in connecting the needy to available social services outside the congregation.²⁸² The bridging social capital of black churches goes beyond their immediate neighborhoods; black churches are also central to urban cities and are more likely than white churches to be actively engaged in urban politics and community economic development.²⁸³ The clergy of large black churches often serve as a moral voice for the city as a whole,²⁸⁴ and the black church has launched the careers of many civic and political leaders.²⁸⁵

Perhaps as a result of the centrality of the black church in the lives of African Americans, they are the most religious group of citizens within the United States.²⁸⁶ Surveys show that 82% of African Americans belong to a church, versus 67% of whites.²⁸⁷ Similarly, 82% of African Americans say religion is “very important in their life,” as compared to 55% of whites.²⁸⁸ African Americans also see churches as the most important institution for

278. See CNAAN, *supra* note 187, at 100, 110, 262.

279. See Ammerman, *supra* note 268, at 8. Members of black churches are less likely than other church members to live in the neighborhood where their church is located. See FARNSELY, *supra* note 14, at 52. In Indianapolis, only thirty-six percent of black church members lived in the neighborhood. *Id.* Thus, one cannot assume that black churches are neighborhood churches. *Id.*

280. Pryor & Ryden, *supra* note 256, at 132.

281. DAVID A. BOSITIS, BLACK CHURCHES AND THE FAITH-BASED INITIATIVE, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES 7 (Sept. 2006), available at <http://www.jointcenter.org/publications1/publication-PDFs/FAITH3.pdf>.

282. See SCHNEIDER, *supra* note 108, at 291; CNAAN, *supra* note 187, at 66, 294 (churches serve as brokers between service system and local residents).

283. See Ammerman, *supra* note 268, at 8. Black churches are more involved in community development (twenty-two percent) than other churches. *Id.* at 18.

284. See *id.* at 8.

285. See Kelly Brown Douglas & Ronald E. Hopson, *Understanding the Black Church: The Dynamics of Change*, 2 J. RELIGIOUS THOUGHT 95, 99 (2001).

286. See Pryor & Ryden, *supra* note 256, at 131.

287. See *id.*

288. See *id.*

alleviating social problems in black communities.²⁸⁹ Not surprisingly, African Americans are also more interested than whites in partnering with government to solve social problems; 64% of African Americans support the idea, versus 28% of whites.²⁹⁰ However, the extent and form of such a partnership is controversial within the black community.²⁹¹

While a majority of black clergy view charitable choice as a good match for the “historically rich activism of black churches,” others fear that partnerships with government will dilute the political activism and moral authority of the black church.²⁹² In general, more theologically liberal congregations, as well as black civil rights organizations oppose charitable choice, while more conservative denominations welcome the outreach of the Bush Administration.²⁹³ Some black leaders are suspicious of President Bush’s attention, fearing that the initiative is designed to woo black voters to the Republican Party as well as a cover for the cutbacks in federal funds available for public assistance.²⁹⁴ There are also concerns that charitable choice will be used as tool for political patronage that could corrupt black communities “by rewarding contracts to activist ministers and churches who might be lured into accepting contracts in exchange for their support of political campaigns or policy initiatives.”²⁹⁵ In short, black church leaders are well aware that they have substantial social capital to contribute to welfare programs, but they are torn on whether to put that capital at the service of the federal government.

Black clergy are also concerned about the capacity constraints that face their congregations. A nationwide survey of black church clergy found that only three percent of black churches are engaged in charitable choice programs.²⁹⁶ Although three-quarters of black ministers are aware of charitable choice, fewer than one in three had a detailed understanding of the

289. See Brown & Brown, *supra* note 255, at 618 (2003).

290. See Pryor & Ryden, *supra* note 256, at 132.

291. See *id.* at 139.

292. *Id.* at 129. Black congregations are more likely than other congregations to be willing to apply for public funding. See Michael Leo Owens, *Which Congregations Will Take Advantage of Charitable Choice? Explaining the Pursuit of Public Funding by Congregations*, 87 SOC. SCI. Q. 55, 70 (2006); Bositis, *supra* note 281, at 4.

293. See Pryor & Ryden, *supra* note 256, at 134.

294. See *id.* at 133–34.

295. Harris, *supra* note 257, at 154. These fears have not been borne out by the evidence. Data shows that theologically liberal black congregations in traditionally Democratic states constitute the majority of charitable choice grant recipients among black churches. Bositis, *supra* note 281, at 6.

296. The number may actually be somewhere between three and eleven percent because many churches that receive government grants through state and local governments are not aware that they are receiving federal funds that pass through local governments. See Bositis, *supra* note 281, at 5.

President's initiative or had spoken with a lawyer or accountant about the program's requirements.²⁹⁷ Only one out of nine black churches had applied for a charitable choice grant, and applicants were generally larger churches with higher revenues and a liberal theology.²⁹⁸ Thirty-one percent of black church applicants were awarded funds, and these recipients shared the attributes of being larger, wealthier, and more progressive.²⁹⁹ By contrast, smaller churches, particularly those in rural areas, do not feel they have the capability to apply; "they not only have limited resources, but they are also embedded in a very limited network."³⁰⁰ Thus, although black churches are more likely to have existing social service programs than other churches, they are less involved in charitable choice. This suggests that there is plenty of room for government to work effectively with black churches on alleviating poverty, but that charitable choice, as currently structured, may not be the best vehicle for such partnerships.

B. Social Capital Perils and Promise

Charitable choice proponents are very enthusiastic about the untapped social capital in churches, but there is almost no discussion of the potential dark side to social capital. Congregations in America usually consist of members who share the same racial, ethnic, and socio-economic backgrounds.³⁰¹ While these commonalities foster bonding social capital,³⁰² homogeneity can also have a coercive side that perpetuates racial and class inequality.³⁰³ This homogeneity, along with the strict moral values and belief systems held by many denominations, can result in congregations excluding outsiders or withholding their assistance to persons deemed unworthy.³⁰⁴ Even when they provide services to those in need, many congregations distinguish sharply between members and service recipients, and as a result, few outside aid recipients actually end up joining the congregation.³⁰⁵ Moreover, social hierarchies can exist within congregations based on age,

297. *Id.* at 4.

298. *See id.* at 4.

299. *See id.* at 5.

300. *Id.* at 5. "Only three percent of the smallest churches applied for [a charitable choice] grant, and none received one." *Id.* at 6.

301. *See* BARTKOWSKI & REGIS, *supra* note 191, at 20; FARNSLEY, *supra* note 14, at 110.

302. *See* CNAAN, *supra* note 187, at 262.

303. *See* SCHNEIDER, *supra* note 108, at 12; BARTKOWSKI & REGIS, *supra* note 191, at 20.

304. *See* SCHNEIDER, *supra* note 108, at 270; CNAAN, *supra* note 187, at 245; BARTKOWSKI & REGIS, *supra* note 191, at 21.

305. *See* CNAAN, *supra* note 187, at 244-45. Most intermittent relief is for members and is often given with cultural judgments attached. *See* BARTKOWSKI & REGIS, *supra* note 191, at 165-67.

gender, and other cultural factors, and thus, charitable choice could inadvertently replicate these patterns in serving the needy.³⁰⁶

Further, extensive bonding social capital within a congregation can sometimes result in less bridging social capital. For instance, a recent study of Mississippi churches found tight bonding within black congregations. However, as a result of those internal bonds, black churches lagged behind white churches in forming interdenominational partnerships.³⁰⁷ Similarly, another cross-jurisdictional study of welfare reform in Philadelphia, Milwaukee, and Kenosha, Wisconsin found that churches serving the poorest neighborhoods had no intention of developing bridging capital, choosing instead to focus internally on providing a safety net, spiritual support, and a social life for economically struggling members.³⁰⁸ For these churches, the long history of racial segregation and oppression resulted in a lack of trust in mainstream organizations and a corresponding emphasis on inward-looking self-help.³⁰⁹

Thus, social capital does not always reinforce norms of social equality. To the degree charitable choice is founded on the notion that local churches will convert the morally destitute into devout members, the evidence suggests that social divides will preclude this transformation.³¹⁰ At the same time, it is doubtful that such a transformation is even necessary. Religion can be a powerful adjunct to the fight against poverty not because poor people are unmoored from moral or spiritual values, but rather because most poor people are already connected to faith communities.³¹¹ Moreover, congregations are the primary social institution in America where poverty is regularly confronted, discussed, and tackled.³¹² The challenge is to ensure that faith communities can play a meaningful role in welfare reform based on realistic expectations of their capacity. Assessments by welfare reform researchers across the country uniformly confirm that churches are integral to connecting the needy to social services and that, with adequate technical assistance and funding, these congregations could serve as even more effective intermediaries for their members and other needy persons within their communities.

306. See BARTOWSKI & REGIS, *supra* note 222, at 20.

307. See *id.* at 174.

308. See SCHNEIDER, *supra* note 108, at 293–94.

309. *Id.* at 281–85, 293–94.

310. See *infra* notes 291–292 and accompanying text.

311. See Schneider, *supra* note 108, at 265. “Religion loomed large in the lives of many families” in Schneider’s study of welfare recipients in three cities. *Id.* at 293.

312. See CNAAN, *supra* note 187, at 281.

IV. USING FAITH TO FIGHT POVERTY

Prior to 1996, congregations and other religious groups could not apply directly for governmental grants to deliver social services.³¹³ Instead, if they wanted to be considered as grantees, they had to create separate, tax-exempt affiliates.³¹⁴ This system had advantages over charitable choice for all of the constituents involved in welfare programs. For welfare recipients, there was less risk for coercion because they usually received services in a secular atmosphere and were not subject to attempts at religious indoctrination.³¹⁵ For its part, the government did not have to spend extensive time and effort monitoring religious affiliates for potential First Amendment violations.³¹⁶ Current and potential employees of religious affiliates were also protected by the same anti-discrimination laws that governed other employers;³¹⁷ by contrast, under charitable choice, grantees can discriminate on the basis of religion in their employment practices.³¹⁸ For grantee organizations the prior system led to fewer worries about government entanglement with religious practices because the religious and secular components of organizations were formally separate.³¹⁹ Moreover, religious groups were involved in government contracting prior to charitable choice, and they reported satisfaction with the church-state balance that had been struck.³²⁰

From a managerial perspective, the creation of a tax-exempt affiliate also had tangible benefits. Non-profits who apply for tax-exempt status must create bylaws and articles of incorporation and fill out an application to the IRS that lists financial resources, potential conflicts of interest, a two-year budget, and a written narrative essay outlining the organization's existing and planned programs that will advance the organization's exempt

313. See KRAMER ET AL., *supra* note 20, at 3 ("Many faith-based social service organizations contracted with government long before Charitable Choice and continue to do so.").

314. See Green, *supra* note 68, at 36–37.

315. See FAITH-BASED INITIATIVES, *supra* note 7, at 4; BLACK ET AL., *supra* note 3, at 36–37.

316. *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) ("[T]here is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated . . . grantees.").

317. See Melissa Rogers, *Federal Funding and Religion-Based Employment Decisions*, in POLET & RYDEN, *supra* note 13, at 106–07 (discussing the prohibition on discrimination in government contracting and under Title VII).

318. 42 U.S.C. § 604a(f) (2000).

319. *Bowen*, 478 U.S. at 616.

320. See KRAMER ET AL., *supra* note 20, at 40 ("Many faith-based social service organizations contracted with government long before Charitable Choice and continue to do so.").

purpose.³²¹ This process provides independence for the board of directors; a religious group might otherwise be dominated by the wishes of a single clergyperson. This process also forces the organization to take stock of its assets, financial and otherwise, and to engage in strategic planning.³²² In turn, this increases the likelihood of receiving grants and running a successful program.³²³ None of these steps, however, are required for churches, who are awarded automatic tax-exempt status from the IRS.³²⁴ This hands-off approach has historical and legal justifications for churches that are privately-funded, but churches that spend government money would be well-served by assessing and improving their internal infrastructure. Churches can benefit by forming separate affiliates in other ways as well. If there is a separate affiliate, it is easier to segregate government funds from church funds and thereby protect a church's financial information from government scrutiny.³²⁵ Separate affiliations also protect the religious organization from any liabilities incurred by the secular affiliate.³²⁶

For all these reasons, it can be tempting to call for a return to pre-charitable choice procurement practices. However, this system did not maximize the social capital offered by congregations, and thus, it missed an opportunity to better serve welfare recipients. Substantial social science research confirms that congregations have much to offer to our nation's welfare system—most congregations have committed volunteers, connections to other social service organizations, support networks for members, and the ability and desire to meet discrete, immediate needs in their communities.³²⁷ The spiritual motivation of congregational members is valuable, even if congregations do not deliver social services in a uniquely holistic manner to recipients. Moreover, congregations have the trust of their geographic communities as well as a moral legitimacy, which no government bureaucrat can claim. At the same time, congregations are no substitute for long-standing governmental and non-profit welfare programs. Congregations generally lack the administrative capacity and/or the desire to

321. See Philip A. Faix, Jr., *Organizing a Nonprofit Corporation*, in NON-PROFIT GOVERNANCE AND MANAGEMENT 469–83 (Victor Futter, ed. 2002) (describing fourteen steps involved in creating a tax-exempt nonprofit).

322. *Id.*

323. ARNOLD J. OLENICK & PHILIP R. OLENICK, A NONPROFIT ORGANIZATION OPERATING MANUAL: PLANNING FOR SURVIVAL AND GROWTH 45–46 (1991) (stating that organizational planning can “impress funding sources and donors” and “sets a framework for accountability”).

324. I.R.C. §§ 501(a), (c)(3); I.R.C. §§ 508(a), (c)(1)(A).

325. See David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1395–96 n.182 (2003).

326. See *id.*; OLENICK & OLENICK, *supra* note 323, at 34–36 (describing the benefits of incorporating).

327. See *supra* Part III.A.

manage complex government contracts involving tasks such as job training and drug rehabilitation, which demand personal transformation from welfare recipients.³²⁸ In a limited pool of funds, providing churches with the technical support and training needed to run complex programs inevitably takes away funds from a shrinking pool that could otherwise directly benefit welfare recipients.³²⁹ Thus, congregations can only play an effective role in governmental welfare reform programs as long as policymakers are realistic about what congregations can offer.

Given the variety of congregations in America, the differences in local welfare systems, and the diversity of welfare recipients, it is difficult to generalize about how best to channel congregational social capital. In our highly devolved and decentralized welfare system, the emphasis is on local solutions to local problems.³³⁰ Nevertheless, there are broad steps that policymakers can take to involve congregations in welfare systems in an effective and useful manner. Currently, many congregations link members to local social service agencies.³³¹ However, churches often lack adequate information about resources in their community, and social service agencies are likewise uninformed about their local congregational resources.³³² Accordingly, government could help foster more formalized, collaborative networks that would provide education and information to congregations, local government, and social service agencies about available resources.³³³ For instance, government grants could be used to fund positions for community organizers or congregational staff members who could develop and maintain these connections over time. Government could also bring together coalitions of leaders from congregations, social service agencies, and local government on an ongoing basis to exchange information and to conduct trainings about available resources both within and without the community. With better information and long-term collaborative efforts, social service agencies, both public and private, would better fulfill their missions and might benefit from donations and volunteer time of church members. At the same time, churches would better be able to serve the needs of their members and surrounding communities without sapping their internal resources and diverting them from their primary mission.

328. See *supra* Part II.B.

329. See FAITH-BASED INITIATIVES, *supra* note 7, at 172–73 (discussing how the lack of new money will cause resource-shifting from bureaucratic agencies to faith-based organizations).

330. See Steven D. Schwinn, *Toward a More Expansive Welfare Devolution Debate*, 9 LEWIS & CLARK L. REV. 311, 312–13 (2005).

331. See *supra* note 268 and accompanying text.

332. See FARNSELY, *supra* note 14, at 112–113.

333. See SCHNEIDER, *supra* note 108, at 317–18 (stating that churches are not capable of delivering social services on a large scale, but government can encourage collaboration among nonprofits, faith communities, and government).

Governments could also benefit from involving congregations in welfare planning and evaluation. Congregations have first-hand knowledge about needs and assets within their communities. They also have the trust of community members and speak with moral authority. Accordingly, congregations should be viewed as one of many stakeholders in the welfare procurement process. By allowing congregations to influence public policies that affect them, remaining barriers of mistrust can be eased. Moreover, such an approach could provide opportunities for empowerment that arise as church members gain valuable skills through public participation. Congregations could be helpful to policymakers in many ways, such as assessing community needs, providing input on program goals, gathering data on the effectiveness of social services, and serving as ombudsmen for service recipients.

Government can also support congregations in the work they already do in meeting discrete, immediate needs, such as clothing and food. Additional funding could support and enhance the existing infrastructure in congregations that serve these community needs. Not only do congregations have the capacity to carry out these sorts of services without diminishing their core mission, but the risks of coercion are also lower in programs that do not involve long-term, intensive interpersonal counseling. As Justice Blackmun explained in dissent in the *Bowen v. Kendrick* case, “The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.”³³⁴ Accordingly, governments should consider focusing charitable choice grants on these latter types of services. These congregational services are effective not because a religious approach is better at feeding and clothing the poor, but because congregations have knowledge of community needs and the experience to meet discrete requests for assistance as they arise.

In short, this proposal is based on the premise that government should not directly fund religious groups to deliver complex social services, but should instead do a better job of collaborating with congregations to better serve needy Americans and link them with available services. This approach would maintain the substantial benefits of the pre-charitable choice system in which religious groups created separate affiliates to deliver social services, while enhancing that system by providing a meaningful role for congregations. In low-income communities, churches are often the most long-standing and influential institutions, and many welfare recipients are already connected to them.³³⁵ It is a mistake to overlook the social capital

334. *Bowen v. Kendrick*, 487 U.S. 589, 641 (1988) (Blackmun, J., dissenting).

335. *See supra* Part III.

these congregations offer, but it is also a mistake to rely on them to deliver comprehensive social services.

V. CONCLUSION

Ten years of experience with charitable choice reveals that congregations lack the administrative capacity to enter long-term government contracts, that a spiritual approach is not more effective than a secular one in social service delivery, and that religious organizations are not adequately accountable to the public, government, or welfare recipients for the charitable choice funds they receive. Moreover, many religious organizations that receive charitable choice funds are falling off the constitutional tightrope that they must balance to comply with the Establishment Clause. As a result, some of our most vulnerable citizens are subject to the involuntary indoctrination of religion—a consequence clearly at odds with the First Amendment.

Despite what we have learned over the last ten years, hundreds of years of experience suggest that congregations can and should play an integral role in assisting the needy. In the future, we should acknowledge both the promise and the perils of bringing religious organizations into the government contracting fold. Congregations, in particular, are exemplary at meeting discrete community needs and in collaborating with other organizations to solve more complex social problems. Instead of pushing congregations to take on tasks for which they are ill-suited, policymakers should build charitable choice initiatives on the existing strengths offered by religious groups.