

## TRANSCRIPT OF

# IN GOOD FAITH: A DIALOGUE ON GOVERNMENT FUNDING OF FAITH BASED SOCIAL SERVICES

A Conference held on October 16, 2001 at  
the Columbus School of Law of Catholic University of America

**Dean Douglas Kmiec:** Welcome to the Catholic University of America. We're delighted to host this conference, which is supported by the Pew Charitable Trusts, on this very important topic of faith-based social services that has been much in the debate of Congress prior to a certain time point. For well over a century now, the Catholic University of American Law School has been something of the living embodiment of the church's teaching in favor of the needs of the least advantaged. Our children, our students, live this every day in their participation in the oldest and most extensive clinical programs in Washington, D.C. that address the social needs of the elderly, the poor, the abused and the disabled. Our alumni live this throughout their careers in extraordinary numbers. Year after year, graduates of this law school enter public service and government service at rates well above the national average of any of the leading law schools in the United States. So having done my duty now as the dean of the law school, let me again welcome you and present just a few insights before I must leave you briefly to go teach a class, but leave you in very good hands for a very provocative discussion this morning.

Prior to September 11th, the topic of faith-based organizations was front burner. It was very important. After September 11th, the capacity of faith-based organizations to participate in the delivery of social services is, at least in this dean's judgment, more important, and I would say more needed. While fighting a war on terrorism necessarily draws our attention as a nation to attend to matters of national security, none of us in this room, because all of us in this room are dedicated professionals to caring about the needs of others and taking on the burdens of others, can overlook the fact that on September 11th there was a tremendous rip, or tear, in the American social fabric, caused by what Sir Edward Cook called, 'the enemies of mankind', who perpetuated the ultimate hate crime, killing thousands of Americans because, well, they were Americans. And the ripple effects of that day are, of course, manifold. Thousands of our neighbors and friends have been laid off. Thousands have been added to the welfare rolls and the unemployment rolls. There have been unprecedented numbers of increases in problems associated with domestic violence and psychological distress. And, of course, all of this occurred at a time when the stock market and the economy of the United States was already somewhat downturn, or reeling in its nature.

Of course, America has responded as it always does in times of crisis, recognizing vulnerability, seeking to give comfort, seeking to give assistance as well as it can, and I would venture to say that it does that at its best when it does it not anonymously, but through very personal contact-family to family, person to person, the kinds of contact that, again, many in this room have dedicated their lives to.

But even this great charitable impulse poses its own challenge, as vast sums of charitable giving is now shifted from what might be called “safety net expenditures” to military and security and emergency public health needs. So the task you have set yourselves in this conference prior to September 11th was enormous. The task that you have set yourselves now upon is even greater, and I urge you to examine it today in new aspect and truly examine it anew, and in the words that you have styled in the conference brochure “*In Good Faith*.” Set aside previous partisan views or narrow views of the complacent past. Put aside suspicions that prevent man from helping man. Don’t let artificial legalisms or political boundaries prevent you from perhaps recognizing what I think is essential across faith denominations, and that is the transcendent dignity of the human person.

And so I ask you to consider fairly, within the set of that proposition, to ask the tough questions, scrutinize the research, be cautious about impositions of belief to be sure as well as casual or categorical exclusions of belief, but most of all, do not let the pleadings of your American neighbors, indeed the yearnings of the American soul at this time of great want, go unanswered.

As I mentioned, I have a duty myself now, to go teach a small seminar upstairs. I will rejoin you in an hour or so, but I leave you in very good hands, to lead you to the full scale discussion this morning, as Dr. Murray Friedman, the director of the Feinstein Center of the American Jewish History. He’s also Director of the Philadelphia chapter of the American Jewish Committee. We welcome him and we welcome you to the Catholic University of America. Thank you.

**Dr. Murray Friedman:** Good morning, ladies and gentleman. As has been indicated, my name is Murray Friedman and I’m with both Temple University and the American Jewish Committee. As the dean has suggested, we meet in unusual times and there’s no need to dwell on that. I think it’s safe to say, however, that the issues that we have been grappling with and we will be grappling with today will be with us for a long time to come. The weekend’s *New York Times*, after a kind of slow period of discussion of issues of Charitable Choice, has a major story. Bush is set to scale back his religion-based initiative bill, that he hopes to push for next year. So it’s still on the agenda and it still will be with us. I might add almost parenthetically that the Supreme Court has also agreed to deal with the issues of vouchers, and while that’s not the essence of our discussion here today, this too has an element of faith-based activism involved, with governmental monies and so on, so that this is only to say that the issue is alive and well.

In the interests of time I’ll say no more, and I’ll change the lineup slightly. Representative Souder can only be with us a portion of the time that’s been allotted here, and he has been working very closely with Congressman Edwards and others on the most recent phases of the Charitable Choice issue, so I’m going to give him a special

dispensation-I think that's appropriate in a Catholic University-a special dispensation to speak to us initially, with regard to the current developments, and then we'll go directly into the panel, and the Congressman will be able to be with us a portion of that time.

**THE CURRENT CONSTITUTIONAL QUESTION:  
The Politics of Government Funding of Faith-Based Social Services**

**Presenters:**

- **The Honorable Marc Souder ( R IN) U.S. House of Representatives;**
- **David Lackmann, Member of the Minority Professional Staff of the Committee On the Judiciary of the House of Representatives;**
- **Julie Segal, Former Legislative Counsel, Americans United for Separation of Church and State;**
- **Heidi Unruh, Policy Analyst, Evangelicals for Social Action.**

**Congressman Souder:** Thank you. I wanted to make some opening comments, because other than the Peace Sunday in the early week of August about the communities of character, where the administration was evolving and the announcement that Mr. DiIulio was leaving the faith-based office, and then, by the way, a delayed announcement as to who the replacement was going to be, and possibly even changes we'll never know for sure, that's been, for the most part, a public silence, and it's important that today not just be an autopsy of how Charitable Choice and the Bush Administration's proposal died, but in fact it has, and I think some analysis of what happened there suggests where we're going to go next. But I think we need to talk mostly about where we're going to go next but to understand that you need to understand where we in effect have had deep disagreements and now the players in this issue may change and the positions on the field may change as far as who's on which side.

Let me start by saying I have maintained from the beginning, including at a Pew forum earlier, that the tax cuts were the most important part of this package, not Charitable Choice. The debate has been on Charitable Choice, but having worked for Dan Coates in the House and the Senate and worked through these issues for many years, I realized that we were going to wind up in the debate that we actually wound up in, which was over whether churches have the right to maintain their right to discriminate and that that was going to be an extremely controversial provision to try to move. By using the tax code, you avoid that debate. Hence, that's why Dan Coates had tax credits, why when I was elected and it was one of my major platforms was the "give act" which is using the charitable deduction, which I believe is a better route than the tax credit, because even in a tax credit you have to define whether it's going to poverty. You get into church and state questions and getting into the books to decide whether it was actually used for poverty purposes. And you have a broader base to do it, because once you narrow down it to just tax credits, you don't have a broad base, thus you wind up with \$25 tax credits rather than significant changes in the charitable deduction system.

Furthermore, we made a tactical error, and there just isn't any other way to say it. As we were moving the Charitable Choice bill, I talked with Congressman Bobby Scott and Congressman Chet Edwards, and they were willing to go on a bill with me, on a full \$500 credit rather than the watered down version that we did. After consultations with our leadership and others, we decided that we could move the bill as it was and therefore we didn't take a compromise. Now we're scrambling to get back to a compromise position.

Let me also go through what I said was the second most important thing. I never maintained that Charitable Choice was the most important part of it. Targeting assistance inside existing Charitable Choice was important. After talking for years with Bob Woodson and grass roots groups, in the current system we already have faith-based organizations that get government funding. They just can't keep the constitutional protections for the church, so conservative, basically fundamentalist-oriented denominations, whether they be traditional, Catholics, Orthodox Jew, traditional Islamic groups or Evangelical to Fundamentalist Christians won't apply for government grants because it violates certain of their tenets to have the government telling them who they have to hire and what they have to do. Therefore, those groups have been excluded from the current Charitable Choice. But even in the field of who applies for Charitable Choice grants under the existing system, and there's a lot of dollars that go to faith-based organizations, in that, the organizations tend not to be based in the neighborhoods, and that for years I've talked about a zip code test of saying that a percentage, whether it's a third, a half, or two thirds of the grant have to go only to people who live in the zip code that they're serving. It's very controversial. We needed to have intermediary organizations, also to teach the legal guidelines of what you can and can't do, because many groups currently who receive the money in these neighborhoods are probably not following the constitution and somewhere along the line here we're going to have some test cases.

So those were the two most important parts of the Bush bill-the tax cuts, the tax credits, and the intermediary institution. The third part was where all the tension was, and let me go through because there are individuals who are going to fight straw men because the original House bill as drafted had some problems with it. It's why I didn't co-sponsor the original House bill. It's why the White House didn't endorse the original House bill. There was a misunderstanding in the general community about what we were debating over. Chairman Sensenbrenner, Mr. DiIulio, Don Eberly, John Ridgeland and, myself never had any white space in our position. In other words, we all knew that the House bill, as originally introduced, was not going to stand constitutional scrutiny.

Let me mention the things that are not being debated nor will they be debated in the future, again, because in effect, they've been fixed and we've moved on. One is you can't proselytize with government funds. Secondly, there has to be a bright line separation between the proselytization even with private sector funds in a publicly funded program. Thirdly, there needs to be an alternative for the individual. Even if you aren't directly proselytizing, if they don't want to go to an organization. For example, the priest can keep their collar on and you can have a crucifix behind you. If a person is uncomfortable with that, there has to be an alternative, or the faith-based organization can't receive the

funding. It's clear, by already decided court decisions, that you can't discriminate in who you serve. So this argument that we were going to have a bunch of people who were going to come in through private sector or others, proselytize with government funds, not have a separation, be forced into a program, simply was a false dichotomy. That was never part of the debate. The debate was over the constitutional protections and the right of who you hire and whether you had to change fundamental things in your church or even be open to audit, which led us into another question, which in the bill we said there had to be different boards. I personally believe we should have had 501(c)(3)'s, but many small groups in the urban centers did not want to do that, and also we weren't guaranteeing that there would be legal assistance to help them set them up, but that's something that down the road we're likely to head.

The reason this becomes critical is the reason people like myself and Senator Coates and others have advocated broadening the definition of the eligibility of faith-based organizations is what in effect we're saying right now is that people of faith who want to talk about how you do one element of your faith, which is to feed the hungry, house the poor and others, are invited in, but unless you are willing to take compromises in theological issues, you can't participate, and many conservatives who often are the most driven groups at the grass roots level on the character side-I'm not saying on the distribution of food or housing, but on the character side-and many of us believe that transformation of individuals is both a character question and a services delivery question, are in effect going to continue to be excluded other than through the tax code. I think that's unfortunate, but basically that's the way it is at this point.

We also agree, and you may hear some people today argue both sides of whether that's constitutional or not, if, for example, we were to give a grant directly to a group that discriminated against homosexuals in their church hiring policy. The plain truth of the matter is we don't know. I'm telling you that I believe that the court decisions have suggested that if you follow these other rules, that they're going to rule on the side of the faith-based group, that in fact you can keep your church exemption in who you hire. You can hire people who are within your faith and who share your faith's views. But there are others in the judiciary committee, Gerry Nadler and Barney Frank, for example, who argue that they don't believe that that's the case. But they don't know either. There hasn't been a direct case. There have been cases that hint, but for anybody to argue that this isn't ultimately going to be resolved by the Supreme Court at some point is a false argument. So we can't resolve those debates in forums like this. Eventually there will be a court decision.

So where are we likely to head? I believe in where you'll see the administration that's being suggested already, is first off, the tax cuts or tax credits or some form which I hope will go far beyond the more symbolic 25-25-25, a grand total of \$75, which while it's helpful, is only marginally so. I think that you'll see this attempt as to how to get more involvement from particular African-American and Hispanic churches in our inner-city areas, in the neighborhoods that are the poorest, and how to get them into the system, the information to them. Basically, as those of you who are at all involved, and that's in the traditional format, in the 501(c)(3) you can't discriminate in your hiring policies with

your church or any of your theological views. To try to get them integrated into the system is difficult, but essential. I think that they're the troops on the ground. I'm going to make one other comment about that in a minute, but it will be interesting to see how the administration involves the communities of character.

Clearly when we see a tragedy like happened in New York City in particular, a community of character means that faith-based organizations work with non-faith-based organizations. Some of those faith-based organizations got government funding to help do their delivery system. Some of them didn't have government funding, but when you face a disaster, they all work together as a community of character.

How can we do that as we address social problems, and I think that the administration is going to focus on if the government funding isn't going to go to those groups in any form, how can we integrate those diverse groups in our society into delivery of services even if they don't have direct government funding. I think you're going to see, as Steve Goldsmith has said a number of times, the corporation that he heads is going to look at how to have major corporations, and Mark Green and I both on the floor have been pushing this hard—we find appalling that the majority of the top ten companies in the United States prohibit their matching donations or their corporate donations to go to groups that are religious-based. That has to be changed. In arguably, that would mean more dollars than any Charitable Choice initiative for different groups.

Lastly, Les Linkowsky, who's been a long-time believer in the alternative ways and creative ways to supplement social service delivery, heads AmeriCorps, and I think you're going to see more ideas. AmeriCorps is one of the divisions, but you're going to see creative ideas coming out of his shop as far as how to integrate into communities of character.

Now, when I said there may be some switching of sides, I am very uncomfortable as we got into this debate, because I believe that some churches are so resource-short, particularly in the minority community, that they're going to be willing to change their theological beliefs to get the money, and this is the corrupting influence of government, that ironically the last time Chet Edwards and I were on a panel together, he warned about, because he said that people like me were going to draw our churches into the government, and that when we got them in we were going to change the guidelines and then they would change their rules of internal governance in order to keep the money. We're seeing that happen now, and some of us who backed the Charitable Choice provision now regret some of what we did, because in fact, we thought we could hold the constitutional divisions in America and we thought they were sacrosanct. We thought that people would defend the right of churches and all sorts of religions to maintain their religion without compromising, and what we learned politically is that is not possible in America. Thank you very much.

**Dr. Murray Friedman:** I'm going to call Julie, who is part of this panel, to come forward. Several of the other people are not yet here and time is fleeing, but Julie is an excellent person to comment on this because Julie, within the group that initially brought

forward these issues, has been one of those who has expressed some of the warnings that you now agree were well taken. Julie, just to give you a brief biographical sketch, is a strategy and policy consultant who represents public interest organizations and assists them with the legislative and legal complexities of civil rights and civil liberties issues. Julie also teaches as an adjunct professor of government at American University. I'm going to stop there. She has many other virtues and accomplishments, but you'll soon learn about them. I notice that Heidi has arrived, so I'll introduce her also and then we can have a kind of discussion rather than people taking their usual five minutes to say what they have to say. Heidi is associate director of the congregations, communities and leadership development project, sponsored by Eastern Baptist Seminary in Philadelphia. The study examines the relationship between faith and social outreach in church-based community ministries and the implications for public policy and social care practice. I'm going to ask Julie first to comment, since you were here. It sounds to me as if the ground rules and the discussion that have heretofore existed are being changed now through experience and other circumstances. In any case, let's have your reaction.

**Julie Segal:** I actually do have some comments I want to say, but I will answer that question first. I think the way that you phrased the question is interesting, that the ground rules have changed. I think actually the ground rules remain the same, the level of awareness of those rules has changed, and that the issues regarding Charitable Choice and the opportunities and the pitfalls were not elucidated during the five years that these issues were being enacted by Congress pre-2001, and that with the creation of the White House Faith Based Office and frankly-and I think Congressman Souder articulated this very well-with the unfortunate for Charitable Choice proponents enactment or at least discussion of the bill that was in Congress, people are becoming aware of what those issues that we've always talked about are. They were front and center, as opposed to behind closed doors. And I've always considered daylight and shining a spotlight on the issues to be beneficial for those of us who are trying to get at what those possible risks are. I'm quite heartened to hear Congressman Souder's remarks today, to know that people who really have paid attention to these issues for a long time are continuing to think about them and to see where things are starting to fall on the cost benefit analysis scale, and that in some cases the costs do outweigh the possible benefits of involving faith-based organizations in government funded social service programs under the wrong conditions. So I think that continued debate is a good thing as opposed to what I think most people think, which is, let's just stop talking and do it. I think that having had these conversations over and over again over the course of the last year has benefited the process.

**Dr. Murray Friedman:** I think by virtue of the numbers of people, maybe we'll hold you there for the moment. Heidi, would you react, because I think that serves as a basis for a discussion.

**Heidi Unruh:** I think I agree with Julie, and part of what I wanted to say this morning was that debate is important, discussion is necessary, but the manner in which it is done is also necessary, is also important. I think it's also very helpful that what Julie and I were talking about, this process that we went through took us two years to figure out some core

common elements that we all agreed on were essential in the construction of Charitable Choice—well, not the construction of Charitable Choice but in negotiating government partnerships with faith-based organizations, that what for us were revelations is now accepted as commonplace, common sense, and so the list that you supplied of things that are off the table for debate I think is very helpful. What's unfortunate, though, is that what's being left on the table to debate is sort of not the main course—it's the appetizers, it's sort of the leftovers, and that can easily become the focus.

**Dr. Murray Friedman:** I'm going to introduce David Lackmann, who is a member of the minority professional staff of the committee on the judiciary of the House of Representatives.

**David Lackmann:** Thank you. I guess I'm here in my capacity. I work for Congressman Gerald Nadler of New York, who's the ranking Democratic member on the subcommittee on the constitution, who is unfortunately still up in New York, where we have a lot of things going on, though those whose faith in a just G-d has recently been shaken will take heart in the comeback of the Yankees. Anyway, whatever Julie said, I agree. We've had an interesting experience going through some of the issues related to Charitable Choice on the judiciary committee and I will try to be terse.

The debate has really opened up some of the more complicated problems and I would just raise one issue from the perspective of the liberty and independence of religious institutions from government, and that is the committee looked at what it means to be a religious institution receiving public benefits, public funding in an era after the Smith decision and after the Burney decision, where the ability of government to coerce religion is far greater than it had been previously, and I know many people who have worked on both sides of this issue have tried very hard, despite the best efforts of our friends at the Supreme Court to undo our best efforts, to open up that particular zone. If however we are left in a situation which we might find ourselves where generally applicable rules which are officially neutral towards religion are not in fact violations of the free exercise clause, then religion and religious institutions are themselves left to the vicissitudes of popular opinion and the political process, which is a very unhappy place to be. So I would suggest, and I think some members of the committee raised the concern, that in the current legal environment, especially greater entanglement between government and religion, government and religious institutions, is far riskier to religion than it may have been prior to the early Nineties, when Smith was decided. I think that to some degree as we have explored the implications of receiving public funding and what zone of activity religious institutions might be permitted in that context, I think there has been a great deal of discomfort as to what the implications of that level of greater entanglement might be, and I think Mr. Souder, in his comments, referred to that as well.

**Congressman Souder:** I wanted to briefly state that I believe my position was slightly misrepresented. We didn't evolve our House position, while the judiciary committee evolved a position because they had never debated the issue before. In welfare reform, that we had choice so we had a slightly different configuration. In the education committee, most of the bright line and the different separations that I said weren't in J.C.

Watts' bill and the leadership bill had actually been in our amendments to the education committee, because Bob Scott and I had worked those through, and the bill that we moved through the House with the agreement at the last minute that we would look at some of the tough questions in conference, but we didn't say that we would agree to those. The bottom line is my switch is not based on enlightenment through the debate. We had already had that. My switch is based on the fact we didn't have the votes in the Senate and because we don't have the votes in the Senate, the bill is now changed.

**David Lackmann:** Mr. Souder, the enlightenment which I observed occurred in the judiciary committee, which is a rare occurrence indeed, and I know that the other committees of jurisdiction which deal with the actual programs have had to get more in depth over the years with some of these issues, the judiciary committee came to it somewhat fresher than did some of the other committees.

**Dr. Murray Friedman:** I'm going to let you cut in a moment, Julie, because I see you wrote lots of notes, but I think it would be well to permit the group out there to shoot some questions at the panel and then we'll come back to you.

**Question:** My name is Bob and I'm from Pennsylvania. Pennsylvania just passed an education tax credit law, which have tax credits instead of vouchers for reasons of entanglement. So I tend to think that your approach...seems to be more powerful to what I'll loosely call the right-wing. The objection that I've heard and this comes from a number of people is that what is effective about the religious-based institutions is character transformation which is based on religious values, and that...based on religious faith, exactly what the objection is. So philosophically, there's very little room to move and you could see just from the statement how powerful it is.

**Congressman Souder:** In the place we're likely to see it, bluntly put, is because while this bill is dead we had passed four different Charitable Choice amendments before, the most prominent being welfare reform, and it's going to come up again in a debate as we do welfare reform again, because in fact, generally speaking, except in small communities, people have alternative services, and the fundamental question here is that if you have alternative services and you can go to a place where faith isn't part of the transforming part, why should groups that have that mixed in be deprived of that opportunity, and why would individuals who want that, why should they be deprived of that, if in fact it works. Nobody is disputing it works. The question is should government tax payers' funds be used for that purpose, and the question is why should some taxpayers get their revenues used for the purposes they desire and the only groups that can't get their funds used for their desire is faith-based, and we can argue whether or not that's constitutional. The court will make that decision eventually. I would argue that in American history and in the court cases it's suggesting that if you follow the guidelines and there are choices it is, but I do believe it's transforming power and I believe people of faith are being discriminated against and it's unfair.

**Dr. Murray Friedman:** Julie, would you like to comment on that point.

**Julie Segal:** Not until I get my speech! I actually do have a significant amount to say on the issue of the use of language and specifically on the use of the term discrimination when referring to the involvement of religious organizations in publicly funded programs. I would like to comment on that more substantially.

**Dr. Murray Friedman:** Let's stay on that point for the moment, and then we'll get to the other point. Do you want to comment on that at all?

**Heidi Unruh:** Well, I'm wondering if I should take this time and we can go through the remarks that we prepared.

**Dr. Murray Friedman:** Maybe we want to concentrate on a point and run it down a little bit.

**Heidi Unruh:** I do think, in thinking about how we move forward, one way is to watch the use of our language, and the term discrimination, yes it does appear in Title VII and in all the legislation, but the term itself, like the term pervasively sectarian has such negative connotations and it tends to cloud the debate unnecessarily. So I think just like *Mitchell v. Helms* recognized the biased history, the anti-Catholic sentiment in which the term pervasively sectarian came to rise, we also have to recognize that when people hear the term discrimination, it brings a whole set of associations going back to the bus tours and the strikes and civil rights activism that we don't need to drag into this debate because we're talking about something entirely different. So I would prefer the term "religious preference" in hiring, because although many consider a religious organization's preference to someone with a similar faith to be discrimination, others don't see it the case. It's a matter of opinion whether that's discrimination. It's not a matter of fact. So giving preference to those in your own religion who share your beliefs, who share your values, who are willing to contribute to the organization's spiritual ethos is not comparable to the stereotyping of persons and just bias against persons on the basis of their color or their national origin, their gender, etc.

**David Lackmann:** Unburdened as I am by having thought about this in advance, let me turn back to the question. The word discrimination obviously appears in a number of different contexts, and Mr. Souder used it in terms of the faith organizations attempting to participate in publicly funded programs and also individuals of faith attempting to find programs which address their particular concerns in the context of their own religious orientation. We've also had a separate debate in terms of employment and they are in some sense intertwined, but let me try to pull them apart for a moment.

When we are talking about faith groups participating as faith groups, engaged in a overtly religious activity in the delivery of services, where in the case of, say, drug treatment, faith is the cure, whether it be the Nation of Islam or other groups that have come to public notice. What we're really talking about is government funding of religious activity, and the question we have to ask ourselves, and I agree with Mr. Souder, we shouldn't try to read the court's mind because I've lost a lot of money trying to do that, but the real question is for us is religion different somehow in American life? Is there a

reason why religion should be treated differently and government should be kept away from religion? The first amendment, by setting down both the free exercise clause and the establishment clause, I believe really aimed to place religion and religious life in a separate and, I think, specially protected sphere, which unfortunately has been undermined in recent years. The danger of government entanglement with religion is not, I think, a form of discrimination. Rather it is a foundation of religious liberty which we tamper with at our own peril, and certainly where you have the government specifically underwriting religious conversion, religious education, religious practice. That danger is quite great, and I think the framers of the constitution were quite right in treating religion differently in that respect. I have to tell you that after all the difficulty that we had in the committee in the last year, I was back home in New York, in Mr. Nadler's district, and I was at the World Trade Center, and there they all were-the Salvation Army, all the various charitable groups, without the various proposals that we've heard, and they were doing a heck of a job helping people who were delivering aid, helping the survivors. Quite frankly, that's the way it should be, and before we go beyond that relationship, I think we ought to take great care.

**Congressman Souder:** I want to just put this into the record. There's a difference between saying it's what the founding fathers intended or what the constitution intended and saying that as America evolves, we at times will alter some of those views. The fact is that Congress twice in its earlier period printed Bibles for distribution in the schools. In fact, the second time, they printed Bibles that were the Wycliffe version because they didn't want the King James Bibles in the schools, and they're stamped with Congress on it. The distinctions today are more difficult because our country is more diverse, but if we go back to original intent, it's clear that the bright lines that we're talking about here I don't believe were there in the beginning. We can debate whether or not we should go with original intent or current intent, but I don't agree that the founding fathers would have had some of these concerns. Thank you very much.

**Julie Segal:** What Heidi just mentioned about the use of the word language, while I don't agree with what she had to say about discrimination in the context of employment through the Title VII of the Civil Rights Law, I do agree with her that use of language is important and that efforts to make the language less pejorative are critical to a civil debate, and I use those terms without the slightest degree of irony. That's why we agreed to use the terminology pervasively religious instead of pervasively sectarian in our report, because we were educated to the fact that the language is actually hurtful to people who there was no reason to alienate. So we've been very receptive to that.

My concerns about the language of the debate center mostly on accuracy versus manipulation, and the way that it just flowed from Congressman Souder's lips that what we're trying to do is stop the discrimination against religious organizations in government programs, that has somehow become a mantra that I want to focus our attention on for a second. Somehow, the purported justification for Charitable Choice and for the faith-based initiative programs is that there is some kind of so-called discrimination against religious organizations, and I strongly disagree with that point. As mentioned, David just talked about it and we already know Catholic charities, Lutheran

services in America, all kinds of religious organizations, have been receiving billions of dollars from governments for years, and in addition, smaller houses of worship that have had the wherewithal to kind of create a separate entity have always been able to avail themselves of government funded programs as long as the appropriate constitutional safeguards are in place.

The administration has really kind of made conventional wisdom out of the thought that there is somehow discrimination against religious organizations out there and that's why this audit of five executive agencies was ordered. It's Housing and Urban Development, HHS, Labor, Justice and Education. So the audit, though, I think the results of the audit, what it's really demonstrated, is that what one person considers a discriminatory barrier to being able to contract with government is really another person's neutral, generally applicable regulation. The unlevel playing field report that came out of the administration illustrates this, because it says, and I'm going to quote directly from it, "Some regulations and requirements reflect important social, environmental, legal and health concerns. Nevertheless, the collective weight of these regulations can make it exceedingly difficult for smaller community based and grass roots organizations to compete for federal social service dollars." That, to me, is distinct from what I would consider discrimination. In stating that these regulations impose a disproportionate burden on religious organizations is really, in my view, a manipulative attempt to assert that government is somehow hostile toward religion. There is no federal agency that has a prohibition against contracting with religious organizations that adhere to the...

If I could stick with the subject of language for a second, because I've got one more point to make on that subject. The other issue of language that we hear a fair amount about is—and I'm sure you've all heard this—leveling the playing field. What we're all really trying to do here with respect to Charitable Choice and all these proposals is just to level the playing field and allow religious organizations to participate on the same grounds as other secular organizations. Apparently though, most proponents of Charitable Choice would really only be interested in equal treatment with respect to funding, but not with respect to implementation. What I just described with respect to the regulations is one illustration of that, but Charitable Choice, by its terms and all the laws that have already been enacted and all the proposals that are out there to date, does not require religious organizations to play by the same rules as other social service providers, because no other government contractor would be granted the privilege of preferential hiring on the basis of religion with taxpayer funds. It's important to note, as Heidi mentioned, that religious organizations are permitted—and I'm going to use the term discriminate—but it's really permitted to prefer employees on the basis of religion in who they hire with private funds, but Charitable Choice has, did and always will extend that concession to allow religious organizations to hire on the basis of religion for their employees who are paid with public funds. That is really excluding non-believers from government funded employment, and this is, as I mentioned, a privilege that is not afforded to any other government contractor.

**David Lackmann:** First of all, in terms of the word preference, I'm not sure you should prefer the word preference because when we debate affirmative action, which we haven't,

thank G-d, for a long time, because that's a really ugly one, the term preference is definitely used in a pejorative fashion, so you may want to find another word.

What I find interesting about the administration's report on barrier to participation is that the barriers cited to participation by religious institutions sound very much like the arguments made by opponents of the Religious Freedom Restoration Act when we considering it, that if you pass this legislation, religiously affiliated day care centers would be able to ignore all local health and safety rules, fire codes, building codes, etc. That was not the case then, and I don't think any court has any held that that would be the case. But I think we tread on dangerous ground when we equate religious liberty with the ability to ignore basic public health and welfare standards, whether it's the delivery of child care services or health care services. It was originally, when I first heard it, an anti-religious liberty argument, and to suggest that somehow now this sort of carve-out would be the basis is the sin-qua-non of religious liberty in the modern age, is, I think, to play a very dangerous card in the religious liberty sphere, and so I would urge extreme caution.

**Heidi Unruh:** I actually agree with you that there is a double standard, but I think that there's a double standard in terms of discrimination or preference or whatever you want to call it for a very good reason, and that is because government is different than religious organizations, so there's two very different actors who are being held to two very different standards. Government may not discriminate because government is required to be neutral towards religion. Religious actors, by definition, should discriminate or have preference when it comes to religious faith, because they are private agencies. So you're not talking about having the same standard because they're two different actors.

I also want to come back to a point that was made earlier in your comments. You were talking about the funding of transformational character and that we don't want to get into funding groups like Teen Challenge and other drug rehabilitation groups where faith is the method. I say yes, let's agree with that. Let's say no one is really talking right now about funding Teen Challenge with a direct grant, sending a check to them and saying, "here, use it for Bible study." So if we agree that that's not what's being debated, then I think we need to move on to talk about all the thousands of other organizations for whom faith is important, it's central to what they do and how they do it, but who don't integrate the religious activities into their service provision, for whom it's possible to have that bright line of separation that the Congressman was talking about, and to get on with the questions of for those kinds of groups, who will obey the law when it comes to not using government funds for religious instruction, worship and proselytization, for those groups, what would a good law look like? That's the question that I want to talk about.

**Question:** As I'm hearing what you all are saying, I understand that...but being aware of government contracting in another area...or even buying computers...is to kind of...large organizations so that small businesses... are being sidelined. I'm wondering, as we move in the area of social service delivery, if there's the same tendency that whether you're talking about a faith-based group or just some neighborhood based group that has no religious affiliation, if there is something...in a way government contracting is evolving,

that they are getting sidelined. The reason I ask that is because that adds complexity to this issue that is totally separate from the faith-based question, but it nevertheless stands.

**Heidi Unruh:** I think we often forget that it's the initiative for faith-based and community services, and we do need a lot more conversation about how to recruit and equip and build capacity in local groups. I like the suggestion about sort of a zip-code zeroing in. That's one of the conversations that has to be on the front burner of this policy debate.

**David Lackmann:** I think that you've touched on one area where there was a great deal of agreement in the committee among members on both sides of the issue, and that is how best to assist whether it's a small parish or a small community based development organization, to focus public money in those areas, and there was general agreement that as in, say, defense contracting, where you do have small business and offices to assist small businesses in bidding on federal contracts, so too in the delivery of social services, in terms of helping smaller organizations with the paperwork and if they need to set up the appropriate financial structures to handle properly the public's money, which is what we're talking about here—we're not talking about...here's one area where I think I may diverge a little bit from Heidi, we're not talking about purely private entities once they are receiving the taxpayers' money and delivering a public service on behalf of the government. They're now trustees of the public trust and so the rules which the Congress will apply to them and which I think the taxpayers have a right to expect become very different. The debate is how does that change things. I think we're talking in that zone. They're no longer purely private.

This is not a new issue. I worked for many years at the local level in Brooklyn and we built senior housing with Catholic Charities. We helped Lutheran medical services deliver services in Red Hook. Large and small. I don't think anybody would accuse Catholic Charities of being small, but it certainly is effective and it does an effective job in administering social services and safeguarding the public trust in a responsible manner and it is a model, to the extent that money is not sent out strictly from the education department, say, but comes through the state and local government, or through other granting procedures. We do have the means and we can improve upon the means to assist for those types of community based organizations, whether they be religiously oriented or not.

**Heidi Unruh:** Can I add just one more thing? Your question also reminds us that we need to break out of the box in the way we've always done things, because the current system pits the large bureaucratic organizations against the small community organizations, many of whom are faith-based, and it throws the same rules out there. It throws the same piles of money out there. And what you end up with is something that you keep on doing what you're doing, you're going to keep on getting what you're getting, and what you're getting is small organizations that are not equipped or competent to carry out the public trust. So what we need to do is we need to devise new mechanisms for funding. We need to come up with all kinds of ways of empowering agencies and collaborating with agencies besides direct funding, and we need to recognize that small

community based organizations serve a different function than those large bureaucratic networks, and so they should not be subject to the same types of programs.

**David Lackmann:** I would just differ in one way.

**Heidi Unruh:** Maybe the same standards in terms of health, because I do agree with you there and I wanted to make that point.

**David Lackmann:** Just to reinforce one point, which is that when we're talking about administering public funds and smaller agencies, community based agencies that do have, perhaps, difficulty in administering these funds or setting up a 501(c)(3) or whatever the problem is, the role of government in working with community based organizations should be in providing them the assistance to administer those public funds properly and responsibly, not in waiving the rules. You don't want to give public money to an organization that can't get a Bloomberg form and file it with the Secretary of State so they can be a 501(c)(3). Anybody without that minimum capability probably shouldn't get a half a million dollars of the public's money. So the assistance that government provides to small businesses or community based organizations can be improved upon and expanded upon, so that those organizations which are closest to the community do have the capability to administer public money and public programs in a responsible fashion.

**Heidi Unruh:** It's also why we need to be talking about intermediaries.

**Julie Segal:** The only point I wanted to make when Heidi was just talking about these things are all off the table, let's move on, I have to-at least everybody here should know this-we've been fighting for a lot of years. Personally me, I'm approaching six years on fighting to get to the point where those things that Congressman Souder threw off the table are now off the table.

**David Lackmann:** I can't wait to get back to my office and tell people that.

**Julie Segal:** Exactly. So we could now move on and start talking about things for which I believe there is substantial support, technical assistance, laws, and how we, under the current law, under the current constitutional law and under the current construct for what we're going to require from government contractors, faith-based or otherwise, would remain intact with technical assistance on how to help people maneuver and work their way through the contracting process. So if that's where we are, then beautiful, but I didn't know that until an hour ago.

**Dr. Murray Friedman:** Let me ask this question. Maybe it's a hot potato question but...In all the discussion we've had so far, the discussion has revolved around the potential dangers or real dangers that such governmental supports for religion per se can engender. Obviously there's been support for this from Souder and Heidi. There's been virtually no discussion, no discussion, not virtually, of the people out there who are hurting. After all, these devices that have been fashioned, Charitable Choice, vouchers,

have been created in order to recognize an extraordinary difficult problem out there with many, many people suffering. So let's even stipulate for a quick moment that these dangers are real, let's say Julie is pointing to, and David is pointing to. They're real, but also, there are the very real dangers and very real problems out there of people who are in poverty and lack the resources and the ability of churches maybe through building of character. So how do you reconcile these two dangers? How do you deal with that?

**David Lackmann:** Can I refer you back, I think, to one of our hearings, where we had a minister from Philadelphia, and she ran a program out of her church, and she was asked this very question. She was testifying in support of the president's initial proposal and was asked this very question, and she said quite bluntly that without the resources to provide the food, to provide the shelter, to provide the blankets, it wasn't going to work and you weren't going to help people no matter which mechanism you funded it through. One of the problems that we've encountered-especially in the last year as we've moved this debate forward, is the precise question you've asked, which is that the president's budget cut these very programs, cut resources, and that's happening, unfortunately, at the state level too, and it's been going on for many years. Fifteen years ago, when I worked in Albany, we were encountering the same problems and seeing if we could find state money to make up for the Reagan cuts. No amount of prayer or character building will provide sufficient food to feed hungry stomachs if we, as a nation, lack the determination to do so and unfortunately, that commitment, that preferential option for the poor-to use the word preference in a positive sense-has been very lacking. I think that we should spend more time looking at Dr. Friedman's question than we have perhaps at some of the more arcane constitutional ones that have taken up so much of Congress' time.

**Julie Segal:** I'd like to make a comment. In the course of the two or three years that we spent working on this "*In Good Faith*" document, it took us-Murray asked that question, I think, at every meeting-and I'm going to say it here now. I somehow found myself in the really unfortunate position of being a kind of apologist for defending the separation of church and state, and for some reason, when I spend all of my time and energy talking about the separation of church and state I have run out of time in a position to also talk about how much I care about serving the people who have needs that we need to find a way to serve. So I wanted to say something. I actually am honored to be able to be here today to talk about the separation of church and state and other uniquely American freedoms that are especially critical right now, given the events of the last month. This is an amazing country and the rights embedded in our constitution vest us with liberties that we should all hold dear. But the separation of church and state somehow remains one of the most maligned and least understood concepts in current political discourse, and even though the level of religious freedom we enjoy in this country wouldn't be possible without it. So the constitution is not an obstacle to effective public policy or a pesky detail, and protecting religious freedom and serving the poor are not mutually exclusive. In my view, Charitable Choice really causes great damage to religious liberty, and while many religious organizations may provide beneficial services in their communities, that does not negate the requirement that collaboration between religious groups and the government must withstand legal and ethical scrutiny.

We say in our “good faith” document, no one side is the sole protector of the poor or of religious liberty and the most fruitful public debate will result when all acknowledge our shared stake in both the general welfare of our nation and the flourishing of religious freedom. So it’s not really about whether, but about how.

**Dr. Murray Friedman:** Heidi, you’ll get the last word.

**Heidi Unruh:** My final words of advice are to accept the inevitable, to accept that the question before us is not whether government is going to fund FBO’s and speaking of language, I think we really need to work on this term FBO because it covers everything from Catholic charities to the non-incorporated food pantry in the church, and so we need to become more distinct in the way we use this language so that we can craft policy that actually reflects the social reality. But the question in force is not whether government should fund these FBO’s, whatever they are, but which ones it’s going to fund and how it’s going to do it. Now, if you accept that it’s a given, if you accept that we’re not going to stop sending checks to Catholic charity, we’re not going to yank government subsidized children out of day cares, out of religious day cares, then you have to make a distinction between the problems that are specifically created by or associated with Charitable Choice, and the conundrums that are inherent in the government partnerships with the faith community. You have to accept that if government is going to fund some faith-based services, then there are some things that follow from that as given, so one given is that one way or another, government cannot escape making choices between religious groups. The pervasively sectarian standard was designed to answer the question of which religious groups are you going to fund, so Charitable Choice does not create competition between religious groups. It just merely changes the rules of that competition.

A second given is that as long as religious groups are involved in social services and as long as government is pursuing the policy of government by proxy, there will always be competition and that competition will always be politicized, so again, Charitable Choice doesn’t create the problems of damaging religion by enmeshing and entangling religious groups in the political process. Again, it just changes the rules by which those groups can compete.

**Dr. Murray Friedman:** I want to thank the panelists for their contribution and the audience for asking sensible questions. Thank you very much.

## **PANEL TWO: IS CHARITABLE CHOICE CONSTITUTIONAL?**

**Presenters: Professor Alan Brownstein, University of California, Davis, Law School;  
Professor Jeffrey Rosen, George Washington University Law School.**

**Alan Brownstein:** Thank you. I want to thank the Feinstein Center for American Jewish History and the American Jewish Committee for sponsoring this conference and for inviting me to participate in this program. I want to thank the participants for having to

put up with a disembodied voice for this part of the conference. In my judgment, Charitable Choice is another step in the wrong direction in defining the relationship between church and state in the United States. As currently discussed and conceptualized, it violates existing First Amendment doctrine, by publicly funding the religious activities of religious institutions and by permitted religious discrimination in hiring in publicly funded programs.

Let me be more specific. First, direct grants of government funds may not be used for exclusively religious purposes, such as religious indoctrination. To the extent the Charitable Choice provisions involve public subsidies of such distinctly religious activities, they are unconstitutional, just as O'Connor's controlling opinion in *Mitchell vs. Helms* reaffirms this principle repeatedly. A religious institution cannot use government money to support uniquely religious activities and to advance its distinct sect-specific religious mission. The plurality opinion to the contrary in *Mitchell* was explicitly rejected by a majority of the members of the court.

Second, the establishment clause prohibits direct financial aid to what the court has called pervasively sectarian religious organizations. Again, there is considerable language in O'Connor's opinion in *Mitchell* that suggests this constraint continues to apply, at least to direct monetary aid. Indeed, if the secular and sectarian activities of a religious organization are so inextricably intertwined that they can't be separated, direct monetary grants to the institution would necessarily be employed to subsidize religious activities, in violation of the establishment clause.

Third, religious providers cannot discriminate on the basis of religion in hiring staff to implement publicly funded social welfare programs. Some proponents of Charitable Choice contend that this discrimination is constitutional, under the authority of *Corporation of Presiding Bishop versus Amos*. But *Amos* is distinguishable from the publicly funded discrimination permitted by Charitable Choice. *Amos* holds that it doesn't violate the establishment clause when government permits a faith-based organization to use its own resources to advance its unique religious mission. But *Amos* says nothing to suggest that religious organizations may discriminate on the basis of religion in hiring staff for publicly funded programs, thereby commandeering government financial support to further their religious missions. *Amos* involved an establishment clause challenge, to Title VII amendments, that exempt religious organizations from the statutes ban on religion discrimination in hiring, even for jobs that didn't appear to involve religious duties or activities. The court upheld the amendments on the ground that they permissibly alleviated significant government interference with the ability of religious organizations to define and carry out their religious mission.

Intrinsic to that conclusion are three important premises. One-in order for religious organizations to effectively further their religious objectives, they need to be able to define which of their activities are so fundamentally religious in nature that they must be conducted by employees committed to the organizations' denominational goals. The focus here is not on ethical norms accepted by many faiths, such as a commitment to honesty or charity. A Methodist organization, for example, doesn't need the discretionary

authority to hire only Methodists to further the goal of having honest employees. Sect specific discrimination is only necessary to advance a distinctly denominational religious mission.

Two—an exemption from Title VII for only those jobs involving religious duties is too narrow an accommodation to protect the economy of religious organizations. Uncertainty as to whether a court would accept an organization’s definition of the religious nature of its activities would create a burdensome chilling affect. As Justice White explained, it’s a significant burden on a religious organization to require it on pain of substantial liability to predict which of its activities a secular court will consider religious.

Three—the government’s decision to alleviate that burden by permitting religious organizations to discriminate generally in hiring served a secular purpose and did not imperceptibly advance religion. Again, in Justice White’s words, a law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.

Amos is good law, but its rationale provides no support to Charitable Choice provisions permitting religious discrimination. There isn’t any free exercise basis for permitting discrimination here. Prohibiting discrimination in publicly funded programs doesn’t burden or chill a religious organization’s ability to define its religious mission. Religious organizations are clearly informed beforehand that the advancement of their religious mission isn’t the purpose of these programs. Public support is provided solely to serve the state’s secular goals. Indeed, the constitution and many Charitable Choice provisions themselves require religious organizations to distinguish between government funded secular programs that may not be imbued with religious content and their own proprietary religious operations.

Put simply, permitting religious discrimination in hiring staff for publicly funded programs doesn’t protect anyone’s religious liberty. Instead, it empowers religious organizations to reinforce and reward adherence to their faith with the government’s money. Amos is not only distinguishable from the discrimination authorized by Charitable Choice. The Amos analysis, in conjunction with Justice O’Connor’s controlling opinion in Mitchell affirmatively demonstrates that permitting religious discrimination in publicly funded programs violates the constitution. In Amos, religious organizations argued and the court agreed that religious discrimination in hiring is intrinsic to a faith-based organization’s carrying out its distinctly religious mission. It is this precise recognition that justified the court’s holding in Amos that religious organizations had to be free to engage in sect-specific discrimination. But activities and decisions that are intrinsically religious in their nature and purpose cannot be supported with government funds.

Thus, the very same argument that makes discrimination in hiring with private funds a legitimate free exercise concern makes discrimination in hiring with public funds a violation of the establishment clause. Indeed, it’s hard to imagine how such discrimination could be considered anything other than the diversion of government aid

to religious indoctrination. Individuals are told that they will be not hired for jobs or will lose their current jobs unless they believe approved religious precepts and practice the tenets of a particular faith. State funds are used to directly reinforce certain religious commitments and are withheld from individuals who believe and pray differently. How could that not constitute using public funds to support religious objectives?

Justice Brennan's concurrence in *Amos* also requires the conclusion that the discrimination authorized by Charitable Choice is unconstitutional, but here the analysis is somewhat different. To Brennan, permitting religious employers to discriminate in hiring was only permissible because their employees' activities were so likely to be religious in nature. Conditioning performance of secular activity upon religious belief was fundamentally different. In Brennan's words, the authorization of religious discrimination with respect to non-religious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the establishment clause. Since Charitable Choice grants are limited by statute and constitutional requirements to secular services, under Brennan's analysis, the religious discrimination authorized by Charitable Choice violates the establishment clause.

How do Charitable Choice proponents respond to the above argument? One response suggests that religion should be treated just like any other belief system. Since we allow secular associations like the Sierra Club to discriminate in hiring on the basis of the environmental beliefs of publicly funded employees, we should also allow religious organizations to discriminate on the basis of religion in hiring staff. I see little support in the case law for this position. More importantly, I think this argument reflects a profound misunderstanding of constitutional law, the nature of religion and the role of civil rights laws in American history. For constitutional purposes, religion is not simply another belief system. It is singled out for distinctive treatment in the First Amendment and in the case law. Even under the erroneous and truncated analysis of *Employment Division vs. Smith*, the religious nature of a practice or institution entitles it to heightened protection in at least some circumstances. And the special protection provided religious practices and institutions in Federal and state statutory law is even more pronounced.

Similarly, the establishment clause limits government endorsement of religion and financial subsidies of religious activities, but it doesn't restrict government support of secular beliefs, and belief-motivated conduct. The Sierra Club can discriminate in hiring on the basis of employee views about air pollution and publicly funded programs, because the constitution doesn't prohibit government from endorsing or subsidizing specific environmental policies. It does prohibit government endorsement and subsidies of religious faith.

In my view, the distinctive treatment religion receives in our legal system for both regulatory and funding purposes is justified by real differences between religion and the secular world. Religion is more than a belief or preference. In many ways it is a status, the foundation of personal identity. It is a statement of who a person is as much as it is a statement of what a person believes. For many devout individuals, religion is not only a set of beliefs to which they subscribe. It is a description of the group and community to which they belong. In a real sense, it is an aspect, if not a form, of ethnic identity. Unlike

conventional secular beliefs, religion involves the interpersonal relationships that define who we are in a special way, and may determine who we marry as well as the significance of that union, whether we have children and how they should be raised and educated, our understanding of death and the way we memorialize deceased relatives and friends. Religion is about all of the self-defining choices we independently protect—marriage, procreation, parenthood, child-rearing and the role of the family, as well as transcendent issues relating to morality and meaning. Moreover for many religious persons, religion involves more of an individual choice. In John Darby’s words, “the individual does not have complete control over choosing the religious option. It is G-d who is making the choice.” Or as Michael McConnell has written, “for many people, religion is not a matter of choice, but rather the irresistible conviction of the authority of G-d, viewed either as a fundamental aspect of personal identity, or as a response to Divine mandate.” Religion deserves the distinctive treatment that it receives in constitutional and statutory law.

Religious discrimination is also unique in our society for another reason, one that parallels the reason we protect people under current law against discrimination based on race, national ancestry and gender. Constitutional civil rights law reflects our history, and American history identified particular characteristics such as race and religion that have been the basis for unfair and abusive divisions among our people. We don’t prohibit discrimination based on innumerable other mutable or immutable personal characteristics, because there’s no reason to think that a large number of employers will take those characteristics into account to substantially limit the rights and opportunities of people identified by those attributes. Religion, like race, national ancestry and gender, is different, because here we have a history that demonstrates the power to discriminate on this basis is likely to be abused.

Finally, religious discrimination raises special problems because of the pervasive role that religion plays in our society and in the lives of our people. The number of government-funded job opportunities that an applicant might be denied because of his or her environmental views is minimal. Those non-profit institutions applying for government grants that define themselves in secular ideological terms typically are limited to a discreet and narrow range of activities. Religion institutions, on the other hand, are involved in an extremely broad range of almost limitless services and activities. If religious institutions are going to be utilized as conduits for social service and educational programs and discrimination on the basis of religion is permitted, religious minorities might be excluded from an extraordinarily sweeping span of publicly funded job opportunities. No other set of belief systems in our society has a comparable institutional infrastructure that would place so many jobs at risk.

From my perspective, Charitable Choice is simply another step in the wrong direction, and at the moment, at least, under current authority, it violates the constitution as well. Thank you.

**Moderator:** Thank you, Professor Brownstein. We will ask you to stay with us on the line from your office in Davis as we hear from Professor Rosen, Professor Jeffrey Rosen.

**Jeffrey Rosen:** Thank you so much. It's a great honor to be here, and I thank Professor Brownstein for his cogent summary of existing case law. Is Charitable Choice constitutional? Professor Brownstein focused on the predictive question—is the Supreme Court likely to uphold Charitable Choice? Like so many questions in our jurisprudence today, this turns on the often mystical preferences of Justice Sandra Day O'Connor, and for reasons that I'll discuss later, overconfidence in the prediction of O'Connor's votes is always hazardous, and I'm far less confident than Professor Brownstein that when push comes to shove, Justice O'Connor will indeed strike down Charitable Choice.

But what I want to talk about before that rather pedestrian predictive exercise is the arc of the Supreme Court's religious jurisprudence over the past decade. This is the story of the decline of strict separationism and the rise of a new paradigm of the religion clauses, and this is the vision that demands equal treatment for religion. The equal treatment vision can be simply stated. It says that private religious choice is good, public religious choice is bad, and all the hard questions are those of state action. Laugh you might. Nevertheless, stated frankly, one could say that Charitable Choice, in its current form, as long as the current bans on proselytizing remain in place, is clearly consistent with the equal treatment vision, because Charitable Choice is an example of private choice rather than public choice determining the ultimate destination of government funds. I'll address the wrinkles of that paradigm after tracing the arc of the rise of the equal treatment vision, but far more than school vouchers, Charitable Choice seems like a fairly easy program to uphold if you take seriously the equal treatment vision.

How did this equal treatment vision arise and what are the likelihoods of it commanding five votes on the Supreme Court? Of course, this is not only a legal but also a social story, and how the strict separation declined is in large measure the story of the relationship between Protestants and Catholics in America, the most important political factor in the rise and fall of strict separationism, and in particular, the rise of the equal treatment vision, is the realignment of Southern Protestants, who used to oppose state-aid to religious education, but now support it. Protestant suspicion of the Catholic Church was the driving force between political and legal efforts to deny state aid to parochial schools, beginning in the 19th century and culminating in the high-water mark of strict separation in the Sixties and Seventies. But other religious groups also contributed to the brief reign of strict separationism in America. After World War II, mainstream Jewish organizations, like the American Jewish Congress and the Anti Defamation League decided that building a wall of separation was the best way of protecting Jews against discrimination. Of course, the high-water mark of strict separationism was *Lemon* and *Kurtzman*, and applying the *Lemon* test at the height of the separationist era, some lower courts interpreted the constitution to forbid expressions of religious faith by private citizens on public property, in short, to authorize unequal treatment of religion and religious discrimination. In 1984, a federal appeals court held that students in a public high school couldn't form a non-denominational prayer group, because the spectacle of student's praying might send a message to non-believers that the school was somehow endorsing religion

These and other decisions that held that religion should be a completely private activity inspired an understandable backlash, because in an era when other groups in America, from gays and lesbians to ethnic minorities were finding their voice in public, it seemed like a violation of the free speech rights of the religiously devout to prohibit them from proclaiming their identity in public along with everyone else.

The cases that followed Lemon, some of which Professor Brownstein referred to, followed a predictable formula. Essentially they held that state provision of instructional materials, for example, to pervasively sectarian schools to be used in classrooms by employees of the schools, created an unacceptable risk that government aid would be put to religious use. The only way to ensure that schools and employees didn't engage in the forbidden uses was the closely monitor the use of equipment, and the monitoring itself would create an excessive entanglement. It's important to note that many of those cases were overruled by the Helms case.

In the Eighties and Nineties, the political, religious and legal forces that had briefly produced the wall of separation began to collapse, and just focusing on the legal part of the story, I want to talk about three decisions which represent the equal treatment vision in their clearest form, and then try to apply them to Charitable Choice. All three were argued by Professor Michael McConnell, arguably the leading advocate of the equal treatment vision.

The first, of course, was the Widmar case, which took place when McConnell was a law clerk for Justice Brennan. In 1972, the University of Missouri at Kansas City, which had long made its facilities available to a variety of students' organizations, adopted a regulation forbidding the use of university property for purposes of religious worship or religious training. The university refused to let a Bible study group meet after class. A federal district court upheld the exclusion, and McConnell recalled being outraged by the decision, which struck him as a form of discrimination. He said once the courts had held that a public university had to allow politically subversive groups to meet, it seemed crazy, like lunacy, to say that a Bible study group couldn't meet. That seemed like the height of anti-religious bigotry, and in the Widmar case, the Supreme Court agreed 8-1, holding that when a public institution opens its facilities to private speakers, the First Amendment requires it to treat religious and non-religious groups equally. This was the first chink in the wall of separationism, one that was greatly expanded and codified in 1995, when McConnell, now an advocate, had a chance to convince the Supreme Court that the legal debate had shifted so significantly that strict separationism should be reputed in favor of the equal treatment vision.

In the Rosenberger case, which involved a university rule that allowed all journals of student opinion except for those with a religious perspective, to receive a subsidy from a student activities fee. Lower courts had held that the university couldn't withhold funds from a gay student newspaper because it disapproved of the message, and McConnell argued that a religious newspaper was entitled to equal treatment. The Supreme Court agreed by a vote of 5-4. Five justices, Rehnquist, Kennedy, Scalia and Thomas, announced that the First Amendment prohibits public institutions to exclude religious

groups from benefits that are offered to a broad class of participants. Four justices, Souter, Stevens, Ginsburg and Breyer made a last ditch defense of the old separationist principle, that the First Amendment prohibits direct government financing of religious activity, even if the funds are distributed as part of a neutral scheme, and O'Connor concurred with the majority, but drew a series of small distinctions that preserved her ability to change her mind in future cases. She did not, in *Rosenberger*, tip her hand, nor was she entirely dispositive in *Mitchell vs. Helms*, the 1999 case which really identifies the battlegrounds for Charitable Choice quite clearly.

The program challenged in *Mitchell* distributed federal money to state and local educational agencies which used the money to pursue educational equipment for loan to private elementary and secondary schools. The statute limited the use of the equipment, including computers, software and library books, to programs that are secular, neutral and non-ideological. It also included restrictions on the diversion of loaned equipment to religious uses, even though these restrictions were not carefully enforced by public authorities. The plurality opinion, authored by Justice Thomas and joined by the Chief Justice, Kennedy, and Justice Scalia, firmly embraced the neutrality principle, leaving no doubt of their readiness and willingness to uphold Charitable Choice. The plurality opinion insisted on two criteria-that the aid program be neutral, as between sectarian schools and others, both public and private, and that the government itself must not be engaged in religious indoctrinations. By these criteria, the Chapter Two program easily passed muster. The plurality rejected the argument that the possibility of diversion of the aid to religious instruction created an establishment clause obstacle. Any diversion would not be attributable to the government, and therefore would not violate the establishment clause. Along the way, the plurality overruled *Meek* and *Wolman*, and rejected the notion that aid to pervasively sectarian schools should be treated under rules any different from aid to other schools. It labeled this distinction troubling and anti-Catholic in its pedigree and argued that the exclusion of pervasively sectarian schools from otherwise permissible aid programs is born of bigotry and should be buried now.

I think we have no doubt that four justices, having embraced the neutrality principles and not blinking at its implications, would indeed uphold Charitable Choice. The concurring opinion by O'Connor and Breyer I think is susceptible to more ambiguity than Professor Brownstein suggested. It certainly expressed more caution than the plurality. It refused to make neutrality and non-indoctrination by the government dispositive by itself. It tried to distinguish between a direct grant to schools allocated by students per capita and a program of benefits distributed to families in which intervening private choice arguably breaks the connection between the state aid and the sectarian school, and it seems to me conceivable that Charitable Choice would be viewed more as a program in which the ultimate destination of the funds is determined by private choice rather than a direct grant, and therefore would satisfy this aspect of the *Helms* concurrence.

Justice O'Connor also worried about another factor, which Professor Brownstein didn't stress extensively, and this is the danger that per capital school aid may create a public perception, a government endorsement of religious education. She also was troubled about the idea of grants in cash rather than in kind. From now on, O'Connor said, to

establish a First Amendment violation, plaintiffs must prove that the aid in question actually is or has been used for religious purposes, and on the record, the safeguards were sufficiently strong and sparse as to be safely ignored.

The concurrence in Mitchell says nothing to tip O'Connor's hand, specifically on the question of the constitutionality of vouchers or school choice, Charitable Choice. Vouchers seems a harder question under the test that O'Connor set out. Might they be viewed as neutral devices covering sectarian and non-sectarian schools, running through families which ultimately determine the destination of funds, or will the perception that they involve direct transfers, coupled with the large frequency of sectarian schools doom them to a finding of unconstitutionality? Charitable Choice, the question seems similar but perhaps the dangers are less acute. One could argue that at least on its face, private choice rather than public coercion determines the ultimate destination of governmental funds, and the perception that the government is endorsing religion is mitigated by the opportunity of individual recipients to seek a secular rather than a religious setting to receive welfare benefits.

There are several hard questions that remain open after Mitchell and Helms. The first is that even if a facial challenge to a Charitable Choice program might fail under the, even a soft neutrality vision, one could certainly challenge the program on its face, and Professor Brownstein has argued persuasively and helpfully that there may be some areas where the actual opportunity to seek benefits from secular alternatives are less strong than in others. It may be easier to have a wide range of uncoerced choice in New York City, Brownstein has argued, rather than in Oakland, California, and this possibility, as applied challenges to Charitable Choice, seem quite open and certainly up for grabs within the scope of the Helms concurrence.

There's also the question of the enforce ability of the prohibition on proselytizing, and especially if public perception of endorsement is the test, the formal existence of the prohibition of proselytizing might or might not be enough to satisfy O'Connor, and certainly if one is in the prediction business, it's worth noting that in hard cases, when push comes to shove, she's tended to side with the neutrality rather than the separationist crowd, so I wouldn't be at all confident about how she'd come down on that hard question.

And the final hard question that I want to think about is the question of the ability of religious organizations to discriminate on the basis of religion. Contrary to Professor Brownstein, I would argue that exemptions for religious organizations in their ability to discriminate are not only unconstitutional, but could conceivably be viewed as constitutionally required under the neutrality vision. I just want to say a word about that. We remember a few months ago, in the unimaginable world that we inhabited before September 11th, when the greatest political controversy that was shaking Washington was the Bush administration's proposal to exempt religious organizations that receive government funds from federal civil rights laws that prohibit discrimination on the basis of religion. Under the Bush initiative, a Catholic Church receiving public funds for literacy programs could fire a teacher for getting pregnant outside of marriage. Far from

violating the equality vision, I would suggest this is actually required by it. Preserving church's abilities to fire or refuse to hire people who reject their religious values is central to Charitable Choice and necessary to protect religious autonomy and equal treatment of religion. Once church has become more enmeshed in the welfare state, in fact, the exemptions that Bush proposed from anti-discrimination laws shouldn't be scaled back. They should be expanded.

So here is the argument, in brief. It may seem that religious organizations are asking for special treatment when they demand the right to engage in discrimination with public money. They're double-dipping. They're accepting public funds but not the restrictions that usually accompany them. But it's obvious on reflection that without the ability to discriminate on the basis of religion in hiring and firing staff, religious organizations lose their right to define the organizational missions enjoyed by secular organizations that receive public funds. Professor Brownstein gave the example of the Sierra Club's ability to discriminate. Professor Lupu, my colleague at George Washington, gives the example of Planned Parenthood and reaches the opposite conclusion from Professor Brownstein. Planned Parenthood may refuse to hire those who don't share its views about abortion. I think whether or not these views about abortion are religiously motivated or not, equal treatment, then, would require that churches, mosques and synagogues have the same right to discriminate on ideological grounds. The impossibility of disentangling motive and the court's traditional reluctance to decide whether it's a religious or political motive that is behind a particular exemption I think should cause us to view this as ideological rather than religious discrimination, and this should be a right that's enjoyed evenhandedly by secular as well as religious organizations. Indeed, the Supreme Court adopted this reasoning in 1988, when it upheld religious non-profits' exemption from the federal law prohibiting religious discrimination.

The Charitable Choice law extends this exemption to religious groups that receive government funds, but it's careful to insist that these groups can discriminate in the hiring of staff but not in the treatment of beneficiaries, so the Baptist Church can refuse to hire Jews as drug counselors, but it can't refuse to serve Jews who ask for drug counseling. Under Charitable Choice, the requirements of anti-discrimination law extend not to the providers, but to the beneficiaries, and this seems utterly consistent with the equal treatment vision. A beneficiary has to be able to have a genuinely equal right to receive funds from secular or religious organizations, but at the same time, the religious organizations and secular ones have to have equal autonomy to maintain their distinctive character in the distribution of funds.

The hard question is how far the exemption should be extended. It's not hard to imagine a situation where a religious organization is forced to hire a choir director or drug counselors or secretaries whose lifestyles offend their conception of appropriate behavior, which would change the group's character in the process. Lower courts have held that religious organizations may be exempt from gender discrimination requirements in hiring ministerial employees. To be true to the neutrality vision, it seems to me that as Charitable Choice makes an increasing number of churches susceptible to federal regulation, courts and congress might consider extending the exemption to allow churches to discriminate on the basis of sex and sexual orientation when hiring and firing

non-ministerial employees as well. I smile as I make this selection. I can make it an academic. We know that the political firestorm that greeted Bush's far more modest proposal along these lines, merely to float a trial balloon and think about extending the exemption, was so great and the eagerness of even the most hardy supporters of Charitable Choice, including Professor DiIulio, was so quick, that we have a fairly strong sense that when the rubber hits the road, the neutrality vision may have few staunch adherents, and that's the note that I want to leave you on.

Neutrality really is subject to hydraulic pressure from all sides. On the one hand, there are the religious supremacists, the four justices who claim to be adherents of neutrality, but at times in the prayer cases made clear that they yearn for open religious state endorsement of religious practices, as long as it's done in a non-denominational way. For them, the neutrality vision is just an intermediate step toward the goal of an openly religious state. In the center we have Justice O'Connor, drawn toward neutrality but unwilling to accept its logical implications and pressing toward her endorsement view, and then, of course, among the liberal dissenters we have rejection of the neutrality vision and an attempt to make a last-ditch attempt, defense of the old separationist principle.

So this is an idea, a powerful idea, whose time may or may not have come. We may be at the dawn of this bright new era in which religious and non-religious speech really is treated equally, and private choice, rather than public coercion, is viewed as the centerpiece of an establishment clause violation. Predictively, I don't know how Justice O'Connor will make up her mind, but normatively I can tell you that I find the neutrality vision appealing and hope it will prevail. Thank you.

**Moderator:** Thank you, Professor Rosen. Thank you, Professor Brownstein. I would like to give Professor Brownstein a chance to respond specifically on the discrimination in hiring points, since that a centerpiece of his beginning remarks. Professor Brownstein, if you would like to take that opportunity briefly.

**Alan Brownstein:** I would like to make a few comments. One, I hope nothing I said suggests that I think I can predict what Justice O'Connor is going to do in any decision. I can read what she has written, and I think her concurrence in Mitchell is pretty clear that she rejects the use of government money for religious purposes.

With regard to the discrimination issue, I think there are two questions here. One is, does government funding make a difference? As far as I know, most people accept the idea in Ames that religious institutions can discriminate on the basis of religion in hiring with private funds. I think secular ideological organizations should have that same freedom under the free speech clause. The issue is whether that analysis changes when the government funds an organization and says, for example, that you may use the government support that we've given you to discriminate on the basis of protected categories, like race, gender or religion, in hiring your staff. I think that's a different question and I think for those constitutional provisions where we have an expansive view of state action, and that would include the equal protection clause and the establishment clause, you cannot cavalierly exempt certain groups and allow them to discriminate on

the basis of suspect classifications without regard for the constitutional constraints that would apply if the government itself was engaged in that discrimination.

**Moderator:** Professor Brownstein, respond, if you will, to the issue of tax exemptions or deductions that are presently allowed to religious organizations who are obviously drawing those distinctions now.

**Alan Brownstein:** Of all the ranges of subsidies that could be provided to either religious or secular organizations, we've clearly adopted some formal distinctions that may or may not be justifiable substantively. We tend to view tax exemptions differently than direct grants. It's obvious that you've got the two concurring justices in *Mitchell vs. Helms* which see a substantial difference between vouchers and direct grants. I would certainly concede that not everything the government does that could be viewed as a form of financial support to a religious organization involves these kinds of establishment clause constraints on what the religious organization can do in terms of hiring or in terms of pursuing its religious mission in other ways. I don't think you lose the right to advance your religious mission because you're tax exempt. It's an open question as to how vouchers would operate. I think Professor Rosen was clearly correct when he suggested that vouchers raise a distinctly different issue in light of the *Helms* concurrence. My focus is on direct grants, and if we're talking about direct financial subsidies, I think the case law continues to support the position that religious organizations can not use that money to advance their distinctly religious missions, and that would include imbuing programs with religious content or discriminating on the basis of religion in hiring staff.

If I could just make one other point with regard to the neutrality or equal treatment framework that Professor Rosen was supporting. This kind of equality analysis can be a pretty harsh mistress if we're going to take it seriously because it would suggest that religious organizations and religious individuals should be treated no differently than their secular counterparts normally with regard to eligibility to funding, but also with regard to exemptions from neutral laws and general applicability. If you want invigorated free exercise clause, if you want federal and state law to be able to accommodate religion and to exempt religious organizations and individuals from general laws that secular individuals have to obey and that secular institutions have to obey, then it's very, very hard to base your constitutional jurisprudence on equal treatment analysis. So, for example, I'd like to know whether Professor Rosen thinks RLUIPA, the religious land used in institutionalized persons' act is constitutional, because it certainly exhibits a dramatic preference for religious institutions and doesn't extend to their secular counterparts. I was delighted to see RLUIPA enacted, but that's because I don't accept the formal neutrality and equal treatment analysis of the current court, and I would like to see religion treated distinctively, as I think it deserves to be.

**Moderator:** I want to give Professor Rosen a chance to respond to that directly, but you raised something interesting in your question before then, which I had also asked Professor Rosen to comment on, and that is the form of delivery of assistance to faith-based organizations. The model that passed the house is a direct funding model with a limitation on sectarian worship and the like. If in fact this is going to be reconsidered to

more of a tax credit model, one that is more approximate to vouchers, is it either of your assessment that that sufficiently addresses the constitutional questions that the odds in favor of constitutionality increase appreciatively.

**Jeffrey Rosen:** On the first question, I think the equal treatment vision, as I understand it, is not a requirement of formal equality, that religious organizations or individuals are treated in precisely the same way as their secular counterparts. The core of the idea is that private choice rather than any form of public coercion should govern, so we want to minimize so far as possible any public pressure, either for or against religion, and this is why in an age in which the baseline has changed and religious organizations become enmeshed in the welfare state, the best way of minimizing public pressure on private religious choice is to allow religious organizations to preserve their autonomy in the same way that secular organizations have. It's essentially sometimes equal treatment requires a little bit of special treatment after all—not formal neutrality but a minimization of the incentives on private religious choice one way or the other.

On the direct grant question, I think it's certainly clear as a predictive matter that a direct grant is closer to the line and more vulnerable than a voucher-like system. I assume that the neutrality advocates would argue that ultimately it's private, uncoerced choice that determines where you actually receive your benefits and therefore the scheme itself is neutral. I agree with Professor Brownstein that O'Connor was quite clear in Mitchell that she was more troubled by direct grants than by programs in which private choice was intervening, and therefore for the sake of satisfying her it might be wise to reconceive the program.

**Moderator:** I know there are questions in the audience. I see one over here. Please articulate your question and I'll repeat it for Professor Brownstein's benefit.

Question-inaudible

Professor Rosen, I think you probably heard the question so I'll let you go right to it.

**Jeffrey Rosen:** A wonderful question. I think the thought in focusing on ideological rather than religious discrimination is just to leave it up to the individual organization to decide how to enforce its rules, so the point isn't that the Catholic Church isn't free to engage in religious discrimination. It's that that freedom is necessary to give it the same autonomy that an ideological organization would have. So it can choose to say that it's engaging in religious discrimination or ideological discrimination. Courts won't presume to actually second guess the motive, but the freedom is to discriminate on the basis of religion, so they'd be free, in your hypothetical, to fire both classes of employees.

**Moderator:** Professor Brownstein, I'm not sure you heard the question but he asked about limits on even tax benefits, in specific a limit that was articulated in Bob Jones University, where the authority, as you remember, of the Internal Revenue Service to deny a tax benefit to Bob Jones was upheld in light of the fact that their racial discrimination was held to be contrary to public policy.

**Alan Brownstein:** I don't think Bob Jones is definitive precedent on that issue. I think the opinion is ambiguous. I certainly think it could be understood to be talking about statutory, rather than constitutional limits, that would necessarily be imposed on Bob Jones that would prohibit it from discriminating on the basis of race. I don't think we've had a clear equal protection case that tells us that a secular organization that receives some kind of tax-exempt status cannot discriminate on the basis of race. If we do, that would certainly raise implications for the tax-exempt status of religious organizations and whether or not they would be permitted to continue to discriminate on the basis of religion. I don't think that precedent exists.

If I could just briefly comment on Professor Rosen's last statement, it's far less clear to me that ideological organizations that receive government funds have a constitutional right to discriminate on the basis of ideology in hiring staff in publicly funded programs. If the Democratic Party or the Republican Party submitted a grant application and wanted to be a social welfare conduit for some social service program and said, of course we only want to hire Democrats or Republicans to staff these programs, it's not at all clear to me that the constitution prohibits government in telling that grant applicant, no, you can't do that. You can't make ideology the basis for hiring staff, because that comes perilously close to the kind of patronage situations which we've declared unconstitutional because of the burden they impose on First Amendment rights of job applicants. And I think the argument with religious organizations is very similar. There's no reason to think that under some kind of equal treatment or neutral principle of funding that money will actually be allocated equally among religious groups. Some groups will receive more, some groups will receive less, and if the groups that receive more can discriminate on the basis of religion in hiring, you're imposing some pressure on job applicants in millions, if not billions, of government funded job opportunities to adhere to someone else's faith if they want to have the opportunity to be hired in these programs.

**Moderator:** Professor Brownstein, I don't want to misinterpret what you said. In raising the patronage cases, you raise a First Amendment issue and to what degree do you see problems in the current House version in its prohibition of sectarian worship and proselytization as being subject to challenge under Rosenberger as a First Amendment violation.

**Alan Brownstein:** I think Rosenberger is a much more limited case than Professor Rosen does and some other people think. I think it's very much limited to a form context in a public university where the university explicitly disclaimed having any interest in the particular activities of the funded student groups that were going to be using student fee money for expressed purposes. And I think that's really the message, not only in the majority opinion in Rosenberger but in O'Connor's concurrence as well, that this opinion should be read narrowly. But again, we confront this basic conundrum. If someone insists that a neutrality or an equal treatment model should apply, and after Rosenberger that would justify equal funding or equal funding eligibility to all religious organizations as well as secular organizations, then the question is whether or not you can justify regulatory exemptions, accommodations and immunities which make it far easier for

religious organizations to operate, to be effective in the advancement of their religious mission and whatever activities they engage in.

From my perspective, in a welfare state and a regulatory state, you don't create a neutral playing field by telling secular organizations they have to obey a host of intrusive regulations that interfere with their ability to pursue their ideological missions but you free religious organizations from having to accept those same burdens and forms of interference. That's why I asked the RLUIPA question. If you're free from land use regulations, your costs are dramatically lowered in an awful lot of communities. A secular competitor simply is going to be disadvantaged. I don't want to be misunderstood as opposing accommodations and exemptions. I spent most of my pro bono life fighting for them. But I don't think you can maintain that commitment to the distinctiveness of religion at the same time you insist in the same breathe that there's really no difference between religious organizations and secular ones. I'm very suspicious of a rule that says everyone is equal but some people are a little more equal than others.

**Moderator:** Professor Rosen, the final word.

**Jeffrey Rosen:** It's interesting, isn't it, that the First Amendment is our last thought and it had been our first one too. The equal treatment vision came not only out of the free exercise and establishment clauses, but also out of this idea that it was a form of discrimination against private speech to allow the government to influence religious choice.

I want to end by thinking about the relevance of the Boy Scouts case, which really reminds us that there are certain expressive aspects of individual organizational autonomy that are protected by the First Amendment and have to be protected from state influence, even in cases where regulations are imposed. That model, which has strong sympathy on the court, perhaps would cause us to rethink the patronage cases, as Justice Scalia urged that they should be done at the time, to allow organizations really to take the bitter with the sweet, to maintain their distinctive quality even as they become enmeshed in the welfare state, and if that happens I think we'll all be better for it.

**Moderator:** Professor Brownstein and Professor Rosen, I want to thank you for an excellent discussion. Thank you very much.

## **WHERE DID CHARITABLE CHOICE COME FROM?: A HISTORICAL RETROSPECTIVE**

**Presenters:**

- **Robert A. Destro, Professor of Law, Catholic University and**
- **Derek Davis, Director, JM Institute of Church-State Studies, Baylor University**

**Robert Destro:** Welcome everyone to Catholic University here. I'd like to extend my greetings in addition to those that the Dean gave you a little earlier.

Our topic for this session is where did Charitable Choice come from, and what can we learn, I think, from a little bit of a retrospective look at this issue over time. In one respect, I think, one thing you can say is that this is very much *deja vu* all over again. I hope it's not reminiscent of the Bill Murray movie, *Groundhog Day*, that we're going to have do it over and over and over again until we get it right, but I think that we're getting closer and closer as time goes on. One of the things that I learned in the process of preparing for this is that if you look at the issue of faith-based organizations and public funding over time, you realize that the French have it right when they say the more things change the more things stay the same. What has been different over time, though, what has been changing gradually over time, is that the way we perceive the religious liberty guarantee has been changing. If you look back into the early debates in the colonies, especially in Virginia, you see this imperative of separation of Church and State almost taking the center stage. As time wears on, you begin to see that the religious liberty guarantee is a much more nuanced and inclusive kind of a provision that includes the bans on no religious tests, the establishment clause, the free exercise clause. We heard some talk today about equal protection, about freedom of speech, freedom of association, so I think that as we work all these in, we can start to see that what we're really dealing with here is the way in which a diverse society understands the question of how you compete for the ability to participate in public welfare programs.

The debates that we're having today really do go back to the very beginning parts of the nation. From the early days of the republic and even during the colonial period, basically the role of faith-based communities was key. In the earliest times, there really wasn't any differentiation between the faith-based community and the regular community. In places like Massachusetts, it was all a faith-based community. In places like Virginia, the faith-based community really didn't do much. Again, there wasn't a differentiation. The places were organized along the concept of territorial parish, but some of the earliest social welfare programs were the payment of apprenticeship premiums by the parishes for kids in the community. In the Carolinas, the parish clerks, who were not clerics by and large, did most of the teaching. So what you began to see as the colonial period started to bleed into the early republic period was that by the 1790's or so, we were looking at the growth and development, kind of the beginning of the great awakening. People began to get out there and proselytize, and they saw a real deficiency in character among many of the unchurched folks in the community. It was those people who really became the foundation stone of many of our kind of religious faith-based organizations and charitable efforts today. There was a lot of concern about them, but nonetheless, if you look at places like New York City and the development of the public school society there, for example, the public school society was inspired by the efforts of Quaker and Dutch Reformed and other women who basically started the first Sunday schools. So what we begin to see as we go along during the course of history, that as communities became more religiously diverse, and by and large in the early parts of the 19th century, at least, that diversity was more among Protestant Christian sects than it was with Catholics or Jews, and certainly not Muslims, you began to see fights over how you were going to

allocate public funds, and the fights were not very, very different than the ones we see today.

So if you were going to ask for a bottom line of the question, where does this fight over Charitable Choice come from, especially where does the demand for equal access come from, it seems to me that the easy answer to that question is to say that any time you have an imbalance in the political structure where certain groups perceive themselves to be cut out of the ability to participate effectively in things they think are important, you're going to get equal access arguments. It's always been so, and I think Heidi Unruh had it exactly right when she said there's always going to be competition. The thing that we're going to have to do over time is to adjust the rules. So one of the things that I found as I went through this is that oftentimes, the loudest complainers in these debates were those who were once in power and want some of their powers and prerogatives back. So if you see many of the discussions today about the fears of the evangelical right getting access to public funds, those were mirrored in a hundred years ago, because they were basically in charge of things. So you're seeing this tension, you're seeing an equilibrium reasserting itself in the political process.

In other cases, the complaining parties, the ones who sought equal treatment, were the newcomers. We saw that in the case of Catholics and Jews in New York City, and the Baptists in New York City, looking for allocations of school funds. But in all cases, the issues, if you go back in time, equal access always puts certain cherished values at risk. We've heard them talked about extensively in the first two sessions this morning.

The first one, I would say, is there's always going to be a concern for vulnerable audiences. If you allow everybody access to the public funds, then what do you do with the centers? What do you do with vulnerable people? Today we're talking about non-religious welfare recipients. You're talking about non-religious people who would work for public welfare programs. Back in the days of the early days in New York City, it was the unchurched poor that they were concerned about and the public school society was set up to serve the unchurched poor, the people who were not being served by the existing faith-based organizations. Another concern that runs through that whole history is that the church will be corrupted. In the words of the Methodists of Virginia in the 1840's that ministers would be rendered "independent of the people that they serve." Basically, they would start to take their orders from the state and not from their congregations. Another concern that equal access always raises is that turning over public or private resources to individuals who have a profoundly different viewpoint or approach to certain questions always raises questions in the minds of people who are being asked to share those resources about the qualifications of the people getting them, about their motivation, about their professional and personal ethics, and oftentimes when it gets really nasty, they will often talk about either their commitment to democracy, to equality and to the constitution itself and all one really has to do is take a look back about the ways the schools that served black children in the days prior to the Civil War were treated, that this was kind of an un-American thing to do down in the South. So basically, the churches that were schooling black children-this idea of equality was considered to be un-American, so it kind of goes back and forth over time.

I was talking about another issue that people have to worry about, and again it comes through equal access, is control. Control over the education system. We heard in the first session this morning I thought an excellent question from one of our visitors from Pennsylvania. He talked about the character building aspects of these things. If you're looking at public schools or if you're looking at the adult education programs, you're really talking about character building. From the 1790's onwards, public welfare was equated with the need to build character, and it's only been since pretty much the late 1880's that there's this idea that you can have neutrality in these kinds of programs. I'll talk about that in a minute. But basically what we're talking about here when we talk about control over the dynamics and the perspective of the educational system, including the adult education programs and adult education programs, which are really what drug and alcohol treatment programs are, the first ones of those were religiously based. The Chataqua Institution was originally a Sunday school, and they simply adapted that to adult education. So basically, the funding of character transformation is and always has been the foundation of the public school system as well. All you got to do is go to my son's public school and you see they're big into character development this year. That's the theme and the idea that there's going to be different points of view who's in control of that have always been at the foundation of many of these views.

One of the things that's very interesting about all of this, and it's one of the things that's most deeply denied and one of the things I think that was refreshing about Congressman Souder's views on this is how refreshingly open he was. I think that if you look back a hundred years ago, a hundred and fifty years ago, people were a lot more open about people they don't like than we are today. It's politically incorrect to admit that you just don't like somebody because they're Methodist or that you can't trust Baptists or that Catholics...as the ministers put it in Virginia, that if you allowed these things to be opened up, if you allowed all religious organizations to incorporate in Virginia, which was a big fight in the 1840's, not just the toe of the Pope would be in but his whole foot. So what we really need to do here is understand that there are very deep-seated issues of distrust here.

So when you say where did Charitable Choice come from, basically these arguments about discrimination come from the fact that people know when they're being distrusted. Can we really trust these Evangelicals or can we trust Orthodox Jews with the money? That's the implicit question that's being asked and answered, and for someone like me who takes the no religious test clause seriously, it seems to me that we have to trust people until they show that they can't be trusted. But we see that in the philanthropic and corporate areas today. You heard about the restriction on giving money to religious organizations.

Several other general themes that just show the identity between what we're going through today and what has gone in the past. Back in the past, utilitarian arguments were being made all the time. The Baptists who were arguing for school funds in 1815 and 1820 in New York City said that they did education more economically than the public school society did. In Virginia, people argued it would be a lot easier for the political

process if we just kept all these religious groups out. That's utilitarian arguments and you see the diversity arguments being made. Diversity is a good thing-we should accept it. Diversity is a bad thing and it just causes political debates.

Another thing that's very clear and you heard this in the second session today, the factions in these debates always disagree over the proper understanding of the purposes behind the religious liberty guarantees. James Madison, for example, vetoed the incorporation of Christ Church in the District of Columbia in 1811 because he felt that churches should have no role whatsoever in public service delivery. He felt that if you allowed them to incorporate, they would start to aggregate the money and they wouldn't get involved. What was very interesting is that he was opposed to the incorporation of churches, which in Virginia was the focus of very large anti-discrimination battles from the early 1800's on, where basically those who believed in religious liberty restricted the ability of churches to form their own policies and do their own business because they were going to control the structure. So what you're talking about is structural resources versus financial ones.

So what we need to do is to understand that many of these discussions today, we focus on money at our peril, I think. What we need to focus on very carefully is what an establishment of religion would do if you had one. A lot of times we talk about establishment of religion as if it is something that churches do. Churches establish religion. An establishment is a political construct, and what you always want to look for, like Toto did in the Wizard of Oz, is the man behind the controls. Basically, if you look at these things over time, what you find is that much of the discussion is really about who's in charge of what. In Virginia, even James Madison and Jefferson, who were very much in favor of churches having their own ability, controlled access to incorporation, because they didn't want the churches involved in certain kinds of things. They didn't want them, for religious reasons and philosophical reasons, to have the kinds of funds they would need to do the kinds of faith-based things that we're talking about today. Other people agreed with them.

The same thing with respect to controls on religious speech in any of these kinds of faith-based organizations. If you listen carefully, what you'll hear is people saying, if you take government money, we get to tell you what you're allowed to say and how you're allowed to say it. If you take that and put it over into the area of the arts, you'll find people will bleed all over the First Amendment for you. Why? Because they think we shouldn't control artists. Well, those who are in favor of religious liberty would also say well, you shouldn't control religious organizations either. What should be the question? To my mind, the bottom line really should be almost the utilitarian ethical one. Is the organization actually producing the goods that are being contracted for? Are they doing it in an ethical way, in a professional way, etc.

Lastly, and I'll finish up with this point, is that for many, many years there has been a great distrust of the motives of religious philanthropy and humanitarian effort. I'm going to quote from an article by a Professor Lois Banner, who wrote in 1973. She says, "All academic observers agreed that when religious humanitarians founded Bible and Track societies or promoted temperance and Sabbath observance or tried to aid the urban poor,

what they wanted in reality was to gain power over society for their own conservative, if not reactionary, ends. It was the desire for social control, not social improvement, which lay behind their seemingly benevolent schemes.” Yesterday’s New York Times had almost an identical quote in it. So like I say, the more things change, the more they stay the same. But the one thing that did change from pretty much 1790 to 1890 was that in 1890 the views of a man by the name of Lancaster...Joseph Lancaster was an Englishman who believed that basically character education could be done in a non-sectarian way. Basically, by the time the 1890’s rolled around, academics, primarily in religiously affiliated colleges and universities, began to take the view that anything sectarian was inconsistent with the search for truth. Out of this view grew the notion of institutional neutrality, that institutions are not supposed to take positions on very basic points of morality. So by the time you get to today, what you have is basically the claim that all institutions that are serious about their “sectarian or religious identity” are-and I use the word, and I quote, “proprietary.” In other words, I found it very interesting that Allen Brownstein used exactly the same term. Basically, the idea of institutional neutrality is such that an institution can not put the stamp of its approval or disapproval on any disputed truth claim and still be faithful to its social trust. Again, you heard the words of trust being used today, and I’m quoting now from the Association of American University Professors’ statement back in 1915. They basically say, “Any university which lays restrictions on the intellectual freedom of its professors proclaims itself to be a proprietary institution, and should be so described whenever it makes a general appeal for funds. The public should be advised that the institution has no claim whatever to general support or regard.” So basically, these organizations, any organization that is serious about its sectarians point of view is, by definition, not professional. You see that kind of embedded. It’s kind of entwined in these arguments, that can you really trust a faith-based organization to really be true to its professional ethics.

My answer to you there is the control is not by leaving them out. It’s by taking a look at whether it’s legal ethics or nursing ethics or social work ethics. They all put the client first. If people are serious about their religion, they also put the client first. So these themes are all there. The way I answer the question ‘how did we get here’ is that we’ve always been in the same place. We’re just asking the same questions over and over again.

**Derek Davis:** Let me also extend my greetings and thank all of you for attending. I also want to thank the American Jewish Committee, and of course the Feinstein Center for hosting this event which, in my view, is clearly one of the most important church-state topics of our lifetimes.

As Bob said, what we have been asked to do is make some comments about where all of this came from. How did Charitable Choice emerge? How did we get to the point that we now are? He offered some very illuminating and very interesting historical perspectives. What I think I want to do is try to bring us a little bit more current and focus on the last twenty to thirty years, and think about four different aspects of this. I want to think about it philosophically. I want to think about it culturally. I want to think about it a little bit theologically, and if we have time, maybe even make some attempts to think about it constitutionally as well.

Philosophically, where does all of this come from? Well, I want to echo and affirm what Murray Friedman said very early on. I really think that the primary genesis for all of this is the desire to help those who really need help. This is a country that has a lot of poor, a lot of people who are riven with poverty. We all recognize it. We all recognize that we don't do as good a job as perhaps we can do or should do in meeting the needs of those who really need the help. I really believe that this is the primary motivating feature of Charitable Choice and I hope that it will remain so. The more important question for me is this the right way to do it? My good friend and colleague, Melissa Rogers, who's here and is also on the panel, will be speaking this afternoon, framed the question in a very appropriate way, I think. She said is this the wrong way to do right. We all want to do right. We all want to help those who need help, but it's a matter of methodology. What is the appropriate method by which we can render this help?

I have a lot of concerns. One is that I'm not sure that even under an equal treatment theory, even if it is approved constitutionally by the Supreme Court, that we can really treat all religious groups in America equally in terms of distribution of government money to administer social programs. My guess is that the public will not stand for it. When we really begin to-and I've been in meetings where we started talking groups like the Branch Davidians or the Druids or the Wiccans or the Scientologists, the list is literally endless, when we think about groups actually not only being entitled by receiving government money to administer social programs, this is not very popular with people. My guess is that there's going to be an outcry by a large segment of the American population if this comes to fruition. I suspect that what will happen is that most of the groups that will receive the money will be those that are the largest, the most traditional, and certainly in America that means Christian groups. Virtually every poll that we read will still suggest to us that of those in America who claim to be religious, at least 80-85% of them claim to be Christians. There still is very much a Christian majority in America. Just by the sake of mere numbers, most of the applicants are going to be Christian groups. Most of those who the popular public will approve of receiving money will be Christians. In fact, those who receive most of the money, I think, will be the largest, most efficient, certainly probably the wealthiest religious organizations and probably those that have the most political clout. Everyone else will sort of be left in the dust is my guess, although there will be an effort, I'm sure, to fund certain religious minorities in order that we can ensure that there really is some semblance of equal treatment. My guess is that there will be token grants of funds to various religious minorities, but when we back off and look at the overall funding, probably the overwhelming majority of funds, probably in the range of 90-95% of the funds, will go to the more accepted Christian groups.

I'm also struck by the fact that a lot of people seem to think that this will help religion. I'm not sure it will help religion. We all have grown up in an America that we recognize as highly religious. Most of us are religious ourselves. We appreciate what religion has done for America. Most of us think of religion as being part of the success story of America and we want it to remain so. But when I back off and look at this, I have lots of concerns in terms of the long-term future of the benefit to religion. I'm concerned that when the general...if all this comes to fruition and we have literally billions and billions of dollars that are going to churches and other faith-based organizations, I'm concerned

that people across America are going to get the perception that religion has become another government program, and that it is government's job to support religion. I don't think they'll make the fine distinctions that we tend to make in this Charitable Choice discussion about whether or not these are only secular programs that are being funded versus religious programs or versus some kind of hybrid. I think the great majority of the public will perceive that government is funding religion. The long-term effect, I figure, will be that the sort of voluntary commitment that we have always abided by and literally thrived under will subside. People will quit giving as much because they expect government to do this. They will tend to say that I gave on April 15th when I filed my tax return, so that when the offering plates are passed, for example, on Sunday morning in the churches, they will tend less to pull out their wallets and put some money in the plate.

I have tried to do a little bit of analysis myself, doing kind of a cross-cultural analysis, comparing some of this with what is done in Europe, and it's interesting. Across most of Europe, they have been doing this for a long time-that is funding under a sort of equal treatment, non-discrimination principle, neutrality principle, call it what you will, various churches and other faith-based organizations to administer social programs.

The question that I tend to ask is, "does it really help religion over there?" Is all of this activity in terms of government participation and partnering with religious organizations furthering the cause of faith and spirituality in religion in Europe? My impression is that religion is not doing very well across Europe. I don't want to fault specifically Charitable Choice funding as being a cause for that, but I do think it's somewhat related. I think that when you look at the history of Europe, it certainly has had a much closer tradition of a union of religion and state than the United States has. We see that there is a greater propensity, a greater willingness, to allow government participation, even the government funding, of religious organizations. I don't see that it's done very much for Europe. When you look, for example, just at the question of religious belief, do you believe in G-d, in England and France, for example, the percentages hover around 50%. When you go to a country like Germany, it's far less than 50%, or even Sweden, where it tends to be hovering around 25%. When you look at the question of how many persons actually attend on a regular basis some kind of religious service, be it church, temple, synagogue, mosque, what have you, again, the percentages are very striking. In countries like France and England, the percentages run somewhere around 10-20%. In Germany it's less than 10%, about 7 or 8% actually, for participating in some kind of religious service on a regular basis. When you look at the United States that is so widely criticized for having this tradition of the strict separation of church and state-I'm not sure there is, incidentally, any such thing as a strict separation principle, but we're widely perceived as adhering to a very strict principle-but when you look at the statistics in the United States, I tend to think that the separation of church and state has been good for America in terms of the religious vitality, the dynamic character of religion here. In every poll, 90-95% of the American people will say they believe in G-d. In virtually every poll, 50% to about 65% of Americans will suggest to us that they participate on a regular basis in some kind of religious service. So when I do a sort of across the seas comparison, I'm very skeptical about Charitable Choice really advancing the quality of religion here in America.

Let me move on and just say briefly a few words about where I think this comes from on a cultural basis. I think a lot of people tend to be supportive of the idea of religious groups partnering with government because they perceive that we are in a significant moral decline, that we're in a literal moral free-fall, and if we don't do something quickly to upgrade the moral quality, the moral character, of our people, then we're going to be in significant trouble. So when we see movements for more religious activity in the public schools, when we see people crying out for more government support of private religious schools, when we see this sort of cry for posting religious symbols on public property, I think a lot of this is motivated by this since that we really are in trouble, and unless we enlist the aid of religion, people of faith, to get them more involved, and certainly we can get them more involved if we give them some money to do the things that they are best at doing, that that will solve a lot of our problems. I would question first whether or not we're in the kind of moral slide that many people tell us that we are in. Literally, I think if you go back through history all the way to our founding, I think we'll find that we have always had this sense that we are in a significant moral decline. In that sense, as Bob was saying, nothing is really new. Maybe the debate has changed a little bit and the reasons, the rationale, for why we think we are in a moral decline might have changed some, but as I read history, I see this is a pervasive sense that the American people have always had, and it's always the religious impulse that has given rise to this sense that we are in a significant moral period of decay. But just as an aside, I would question this, certainly on a public or an institutional basis. When I look back over the last fifty years and see some of the things that we have done to improve the rights of women, just in terms of equity in hiring, in terms of giving women pregnancy leaves, when I think about the kinds of advances that we have made in non-discrimination against racial and ethnic and even religious minorities, I'm very much encouraged. When I think about the things that we do now just for handicapped persons in terms of the ability for them to have ingress and egress to and from a building, or to get down a sidewalk on a public street, I'm very encouraged. This tells me that we're more moral than we were thirty, forty, fifty years ago.

Of course, on an individual basis, I do think one could make a good argument that we are having some trouble. Certainly, this is an unprecedented age in the sense that we see young students taking guns to school and pointing them at their classmates and their teachers and literally pulling the trigger. We've never seen anything like this on the kind of scale that we have seen it in the last five years or so. So obviously we're all concerned, but on the other hand, there are lots of good things happening. The teenage pregnancy rate is down in recent years. Generally, test scores have been up in the last several years. Some polls will tell us that alcohol abuse rates are down. Drug use tends to be up and is up now, but I think alcohol use is certainly down. There are lots of good kids across this country. I think we've seen that in the last month in Washington, D.C. and New York City, in the sort of outpouring of support that we've seen from the youth across America. It's very, very encouraging. While one can make an argument that we are in trouble on an individual basis in terms of really experiencing a moral decline, I think one can make an argument that we're as well off morally as we ever have been.

Second, with regard to just thinking about where this comes from culturally, I question whether or not just throwing money at faith-based organizations to enable them to do better what they do, is really the answer to this. As some previous speakers have mentioned, it has always been the case in recent memory that faith-based organizations have been entitled to receive government money to administer social programs. What's changed is sort of the ground rules, or what is now in the process of changing is the ground rules. The previous rules were that as long as you agreed not to proselytize and as long as you agreed not to discriminate on the basis of religion in your hiring practices, that there was no bar to you receiving government money to administer a social program. And lots of churches, lots of temples, lots of mosques across America have done this for years. They were willing to live by the rules, that they engage what some of have called true charity, that is a willingness, a desire, to engage in works of charity without the need to sort of incorporate or pass along their distinctive faith perspectives to those whom they serve. My sense is that throwing money at religious organizations long-term is not really the answer. Those organizations that are interested in providing social services have been doing so and I think have been going an excellent job under the existing law. My sense is that the reason that others don't get as active and as involved in administering social programs is not because they don't have the money. It's because they don't care enough to do it. I do think apathy tends to be something that we need to throw into the equation here. I don't want to cast the net too broadly. Of course there are many who are saying that they can do more if they have more money, but long-term, I don't think that just throwing money out there is really addressing the problem. The problem really is the recognition of the need, the recognition of the need that all Americans have the responsibility to meet the needs of those who need help.

Let me just say a word or two about where this comes from theologically, and I really sort of fault most of my fellow Christians in this respect. When I sort of assess all of this, my impression is that most religious minorities in America are really not for this. That's not true across the board, of course, but for the most part it is true and I think it's because they kind of fear this Christian majoritarianism and that if we have this, that sure enough all the groups who get most of the money are going to be Christian groups, and they're sort of going to be crushed under this weight of Christian majoritarianism, and they're just going to be left in the dust. Whether or not that would become a reality is another question, but from a theological standpoint, I have always been somewhat disappointed in the sort of Biblical illiteracy of a lot of Christians and the very low level of depth at which they think about problems of church and state, of state nurturing religion, of partnerships between religion and government. I think a lot of Christians tend to look at the Old Testament and they see a theocratic model there and they think that's the basic Biblical model, and if G-d supported Israel, if Israel was in fact a theocracy, well, what's wrong with America being a theocracy too? That's about as far as they think about it. Christians put a lot of emphasis on the New Testament, of course, but they tend not to make interesting distinctions between the Old Testament and the New Testament, the Old Covenant and the New Covenant. I think the New Covenant, the New Testament, has a lot to say about a displacement of the old order, of the old Covenant. It's a lot about no longer being subject to the law, no longer being enslaved to the law. And so, I don't really see in the New Testament, certainly from the lips of Christ, I don't see any kind of

movement to resurrect the Old Testament theocracy or continue the Old Testament theocracy. His is a different kind of program altogether. I don't see him enlisting ever the aid of government in a financial way or otherwise to assist him in what was a clearly spiritual program.

We could go on and on about this. This is, of course, in and of itself, looking at sacred text and what they had to say about the interface between religion and state, but all I want to say is I'm surprised, at times, at the lack of depth at which many Christians across America think about this issue. I think they think that, again, religion is a good thing and the more religion we have the better, and if government could get behind religion, how much the better, and if we could get government to pour money into churches and other faith organizations then we're going to be a whole lot more religious and we're going to have a whole lot more character and we're going to be a much better people and things will be wonderful. I really don't think it's quite that simple.

Let me just close by saying this. I do think that-you can tell I'm a critic of Charitable Choice, can you not?-I do think that separation of church and state has been very, very good for America. I really do. This is my basic conviction. I'm always amazed when I hear people talk about this strict separation that we have in America, because we don't have any such thing. In fact, I would say that I don't really know any people that I would characterize as being a strict separationist. I just don't know any. I tend to be a fairly hard line separationist myself, but like most people who I think think about me, there are lots of things that we are very, very supportive of. I'm very supportive of the equal access act, the right of kids in our secondary schools to have Bible studies before school or after school. I think kids ought to have freedom under the free exercise clause to engage in as much religion as they want to on their own, at school, during recess, before school, after school, at lunchtime. They ought to be able to pray alone or with others in school. I like the fact that we give tax exemptions to religious organizations. I think it helps religion. I like the fact that we allow people to write off on their tax return a certain amount for making a charitable contribution to a religious organization. I think it helps religion. We have in America 125-130 different religious organizations whose only reason for existence, the *raison d'etre*, is to be an advocate for religion in the public square. People who are very, very given to understanding that there is a public role for religion in American life and they work daily in terms of giving advice to those who lead us in Congress, for example, in terms of how to formulate law and public policy in America. That certainly is a violation of a strict notion of separation of church and state. I hear people all the time who complain about this sometimes. Why do we allow all these religious groups to be so involved in politics? Don't we have a separation of church and state in America? But separation has never countenanced that sort of activity by religious groups in the political process. It's part of our democracy. We could talk about it being non-discrimination. We don't discriminate against religious groups in terms of their ability to participate in democracy. They're just like everyone else. We have a national motto, In G-d We Trust. I support it. We invoke the name of G-d in the Pledge of Allegiance. We have a national day of prayer. Virtually every time we hear a political figure, certainly the president in recent memory, make a speech, he'll quote- ...we have tax-paid chaplains. The list goes on and on and on. We could continue. I'm describing to you what I think is a very warm, friendly accommodation of religion in something that is

criticized as being overly strict in terms of its separation of church and state. Charitable Choice, to me it's all about where do we draw the lines. I'm not sure where exactly we draw the lines. Bob and I would draw the lines in different places, but it's a very complex issue and I just appreciate all of you being here, being willing to listen to differing arguments about Charitable Choice. Thank you.

**Moderator:** Thank you, Derek. We have about ten minutes for questions, so let's open up the floor.

Question mostly inaudible.

**Robert Destro:** The short answer is that they're afraid. Of what? They're afraid of the reaction of the public. They're afraid of the reaction of their shareholders. They have exactly the same fears that Derek was voicing, and I think quite accurately. Derek and I don't disagree on the concerns out there, but if it came out, for example, that Microsoft was giving money to the Presbyterians but not to the Zoroastrians somebody is going to be upset and they might not buy Windows XP. What's really interesting is that they don't have the same proclivities when it comes to participation in political affairs. They don't have the same fear sometimes when they get themselves involved in political affairs, so there's a couple of different levels. The first level is I think they are just afraid of the controversy that's going to ensue, and it's going to be exactly the same kind of a controversy that ensues-you can't guarantee equality of outcomes, so therefore just don't do it. That's part of the argument.

The other part, and this is also an interesting piece of it, is that many corporate organizations won't even allow their employees to participate, so they not only don't give money, they don't give in kind services either to religious organizations, even if it's working down at the soup kitchen. Some of that is liability, but some of it is also we can't have everybody from Citibank down at the one place. So they're very concerned about the appearances for consumer reasons, I think.

**Derek Davis:** Let me just add one thing. For me, if we can enlist Corporate America in a movement to assist those who need the help, that's the movement that we need to create. I really think the Charitable Choice movement is the wrong movement to create, trying to enlist government to give money to faith-based organizations to help solve the problem. I have always thought that if we could give accelerated deductions, enhanced deductions, credits to Corporate America, let them create partnerships, have liaisons, maybe who work for them, who serve as a liaison between the corporation and a particular faith-based organization or organizations that they adopt, so that there is some accountability-not from government but from this private corporation. Of course, it's going to take more than just tweaking the Internal Revenue code to do this, guaranteeing some increased tax benefits. It's really going to take a movement in which we make aware of the need for Corporate America to help be a problem-solver. To me, that's the way to do it. I think we're only limited by our imagination in terms of the kind of new partnering that could take place here-not between government and religion but between private business and religion.

**Robert Destro:** I could also add along those lines that I know of at least one organization here in D.C.-it was a faith-based organization that found out that it was in competition under Charitable Choice with Martin Marietta, so basically, what you have is corporations are getting involved in the contracting parts of this but what we really want them to do, and I think Derek and I certainly agree on this, we want them to use their own money, not state money.

**Question:** I have a question for Professor Davis. If I understood you correctly, you seem to be suggesting that separationism really hasn't been much of a policy for various religious organizations. Let me suggest a real-life scenario that, evidence to the contrary, where I work at, sometimes we get mistaken to be lawyers. As a result, we get calls from faith-based organizations all across the country, and periodically I'll hear from organizations that are providing health training and these kinds of services, that they've gone through the proposal process and they're told that they're a pervasively sectarian organization and they're not eligible for state funds. And it's not just congregations and houses of worship, but non-profits as well, 501 (c)(3). So what kind of advice would you give for that organization that says it's part of our faith...and we want...

**Derek Davis:** Again, to me the bigger question is is it really good for religion, is it really good for that faith-based organization, to get involved in all of the trappings of receiving government money. We haven't talked much about this sort of control and monitoring and supervision of religious organizations that is coming with all of this. I don't think there's any denying that. But again, my basic advice to those organizations would be work harder at tapping other sources, non-government sources. Maybe there's some nooks and crannies where you have not looked. Maybe there are some people who would be interested in your kind of program that you really haven't approached. Again, it's part of this movement I think that we need to create across America, that this is all of our problem. If we're really serious about helping those who are poor, we all have to get involved. We all have to give a little bit more. I think the voluntary spirit is what will carry this thing in America. I really think we'll all be much more interested, we'll be much more engaged in the whole process, if it's us who's having to sacrifice a little bit as opposed to simply calling upon government to meet the problem. So that would be my basic advice.

Inaudible question

**Derek Davis:** I'm not sure it's an accurate correlation to make. It's anecdotal at best. I don't really have any empirical evidence to connect the decline of religion in Europe with their administration of social programs under a Charitable Choice concept. I really can't do that for you. What I would recommend that you do is get a book that was written a couple of years ago by Steven Monsma and Christopher Soper, both political science professors at Pepperdine University. Somebody will have to help me with the name of the book-Equal Treatment and Examination of something in five different countries-but they examine England, Germany, the Netherlands, Australia, and I think the United States. Of course, in their thesis, they're very supportive of Charitable Choice. They're very

supportive of the equal treatment concept from a constitutional standpoint. They think that we do discriminate against religion in America. Their basic thesis is that if you look at these other countries across Europe, they all do this and they go through the sort of constitutional arguments that all of these countries have gone through to get to the place that they accept it, so that we will look at the evidence there and try to get to the same place. Well, my argument is that we don't really want to get to the same place because there's no indication whatsoever, no empirical evidence, no anecdotal evidence, that would cause us to reach the conclusion that it has done religion any good. I would contend that they would be better off in terms of the level of religiosity in those countries if they were to look to a voluntary public to sustain religious organizations, even the assistance of "secular" social programs. But get the book-it's very enlightening. It's an excellent book.

**Moderator:** We have time for one last question.

**Question:** Looking from a historical perspective of who's delivering services and for what reason...how large was government supported or secular supported social services in days gone by? If we look at the size of government sponsored social services, I know the argument has been made of Charitable Choice that if in fact crowding out voluntary contributions...So if we look from a historical perspective ...

**Robert Destro:** That's a very good question. I think that it's also a way to kind of tie the European question together. In the United States, the private and primarily religious came first, and so basically if there was going to be any kind of education in North Carolina, it was being done by the clerks of the parish. If there was going to be a free school in New York, it started with the Quaker and Dutch Reform women. Then you got some private entities, and then they talked the state into giving them some money. Now we're at the stage where we're at the other end of that spectrum, where the state is crowding out the private thing, but we start from the initial proposition that private is better. You heard Derek say that. I agree with you. You have a roomful of Europeans here and they will disagree with that initial premise. Their view is that the social contract, if you will, presupposes that it's the government's obligation to do it first. It's the government's obligation to support religion and what was very interesting if you look back into the 1840's, basically the Virginia legislature wouldn't allow charities, religiously affiliated charities, to take any private money because they said it would be bad for the church to allow them to have this kind of money. So what you see is the arguments are all there, and basically Jefferson argued that the state should not be the nurse to the church. Back in the 1840's they said well no, the state has to be the nurse for the church. In Europe there's no question. They take the view that one of the roles of the state is to support the church. Here, our idea of separation of church and state is that the state stick to its own business, and its business is not to do religion. It's not to support the church. It's to do the public's business. It's not a symmetry, because the state is us, so we can't be expected to separate our religious selves from our political selves. That would be inconsistent with everything we believe in. But we can expect our government to mind its own business when it comes to religion, and these discussions over the last couple of years that have resulted in this report have been phenomenal in the sense that you have had people sitting

down and saying okay, here's my concerns. Here's my concerns, and we're getting a look at those rules in light of exactly the philosophical, cultural and historical kinds of things that we're talking about today.

**Moderator:** I'd like to thank Bob and Derek for their excellent presentation.

## **THE CURRENT STATUS OF FAITH-BASED INITIATIVES**

**Presenter:**

- **Stanley Carlson-Thies, Associate Director for Cabinet Center Affairs of the Office of Faith-Based and Community Initiatives.**

**Dr. Stanley Carlson-Thies:** Thank you. I'm glad to be here. I was part of this process that led up to this conference which went on for years and years and years. I think it's led to a good result-both the statement and this opportunity to exchange views. I want to apologize that this is kind of drive-by speaking. I came in late and I'm going to leave after this. After I agreed that this was a good day for the conference, I was asked to do some out of town speaking engagements and so that's kind of taking up my week. I'm also glad to be here at Catholic University Law School, which is now several times, although I feel like an interloper always because I'm not a lawyer. Whether that's good or bad I guess depends on your normative judgments.

This session was originally advertised as a report from Dr. John DiIulio, Director of the White House Office of Faith-based and Community Initiatives. Obviously this is me and not him. He has very large shoes which I'm not capable of filling in any of the senses, so I will be an alternative to him and not a substitute, if we can put it that way. You know that John resigned in mid-August and he is back at the University of Pennsylvania recovering and doing other things, carrying forth the good fight in good faith in many other arenas, including talking with corporations and foundations about whether or not they support faith-based and community organizations. He had agreed to be with the initiative for six months and he stayed for seven, so we got an extra month out of him. I don't know if we paid for it or not. But he's gone, and he hasn't been replaced. So you could say we're headless, or director-less, at the office of faith-based and community initiatives. I don't think we're directionless, however. So I want to talk about our direction, which is there even though we don't have a director and won't have one for some time, thanks to the emergency that the government is laboring under.

The president made the direction amply clear in rallying the armies of compassion-that statement that was issued at the beginning of his administration. He made it clear in speeches and actions on the campaign trail and since he's been in office, other things he's done. And, of course, in his actions and speeches as governor of Texas. I think it's pretty plain where President George W. Bush wants to go with this initiative.

According to yesterday's Washington Post, thanks to the terrorist attacks of September 11th and the need to respond to those attacks, "Bush's domestic agenda takes a backseat," so I'm speaking to you from the backseat, but the car is still going forward with great

momentum and energy. So I want to talk about what that is. September 11th has forced the entire federal government to shift its main focus. There's a new set of priorities that's given all of us who work for the government, including in an office like this. A new set of worries, including do you open the mail or not. Can you have interns or volunteers or not, if you might be subjecting them to personal danger. And certainly it's difficult to get the attention of high officials for anything other than the response to the terrorism-not that you can't, it's just very hard these days, for good reasons. But September 11th didn't end the president's faith-based initiative. The government continues to do all the things it does, including giving out money and collaborating, or not, with various kinds of organizations.

Indeed, if we think of what happened immediately after those four planes struck the towers and the Pentagon and the earth up in Pennsylvania, I think we're reminded to use the title of this segment of the conference, that the current status of faith-based initiatives is extremely robust, if you think about initiatives in the sense of all those organizations out there that are faith-based and that responded to the crisis. If you think of actual initiatives and not the presidential thing but the actual initiatives, the groups, the programs, the organizations that are shaped by faith, inspired by faith, then just like the civic initiatives, the secular ones, they sprang from vigorously, in great profusion, when the planes struck and a response was needed. The terrorist attacks, in other words, remind us of the incredible depth and diversity of our nation's civil society and social safety net, and how much a part of that are faith-based and community groups. Certainly the federal government, state governments, local governments got immediately involved. Large non-profits, notably the Red Cross and Salvation Army, and a number of others were immediately involved. But also, a great diversity of responses were immediately forthcoming from a great variety of less well-known groups, not national but local in scales, both sacred and secular. Neighborhood groups, congregations, specialized groups, general groups, all who have a stake in their neighborhood and in the well-being of their neighbors, and all who responded because that's at the heart of what they do. It is these neighborhood healers, as the president sometimes called them, that are the special focus of the president's faith-based and community initiative.

These groups are a vigorous part of our national fabric and social safety net, and yet they are, from the public and governmental standpoint, a neglected part, often ignored, often overlooked, kind of below the radar screen, something we don't think about most of the time unless we think specifically about our own neighborhood. The president says, of course government services are key. Of course larger organizations, government's traditional partners, are vital. But what about these smaller groups, grass roots groups, neighborhood groups, groups that are often distinctly faith-based? What is it that should be done to support them? The core faith-based and community initiatives issue, I think, the heart of the president's agenda, is to say how can government and society better acknowledge and uphold these neglected but vital elements of our civil society.

You all watched the spectacle in the spring and early summer of what house hearings committee action and...action did with HR7, the community solutions act-you talked about that before I came, I'm sure-in which expansion of Charitable Choice was a major

part and a contentious part. The bill squeaked through the process but after that fight, apparently escaping death only by inches, it's not unreasonable to think that the president's initiative has lost steam and is staggering and barely alive, but that legislative initiative, or that attitude, that view, represents too narrow a view of what the president has in mind. He has spoken from the beginning of wanting to expand private giving-that was the topic that came up in the last session-expanding private giving to charities partly by using tax changes and liability law changes to encourage greater corporate giving, by using his pulpit to encourage corporations and foundations to give to groups that look distinctive and are even sectarian, because they are also part of the common good. They're part of the network that supports those communities that these groups say they want to support. And he's urged Congress to pass tax law changes to encourage greater private giving by allowing non-itemized to deduct for the charitable contributions. So the president wants to expand private giving. He thinks that is a non-controversial and essential part of what needs to happen.

At the same time, the federal government spends money itself. It looks for service providers. It looks out there for who can do the best job, who best serves their neighbors in certain instances, and the faith-based and community initiatives agenda also wants to look at that part of what the government does. So if we look at the federal government's own action, there are a number of things that the president has talked about, so some of this is review for you, so just let me run through it. There is a compassion capital fund slowly making its way through Congress. It keeps changing shape and size and amounts, so I don't know what the current status of that is. This would be a way to fund innovative projects that bring together public and private, sacred and secular, in a format that really emphasizes results and accountability, so it's kind of pioneering a new form of collaboration. Some of that money also is to support increased technical assistance to improve the capacity and competence of non-traditional groups that want to partner with the federal government. There are a number of other specific initiatives in different program areas that are also working their way through appropriations process, and I don't know the exact status of all those things for certain human services initiatives. And of course, there's HR7, community solutions act, passed by the House, sitting at the Senate. The tax incentives part of that were relatively non-controversial. The parts that contemplated expanded Charitable Choice to some ten new federal program areas was controversial, at least for some people, and the fate of the expansion of Charitable Choice, the fate of that initiative, is, I think, somewhat up in doubt because of the way schedules are going and so on. It seems likely that there will be some action, which will be targeted to increasing private giving, both private individuals and corporate, and that there will be some kind of language to emphasize that the federal government wants to work with a wide range of providers, faith-based as well as secular. Exactly what the shape of that is I'm not privy to all those discussions and I know it's a matter of discussion in the Senate, along with all the other things that are high priority items these days.

But that legislative initiative is only a part of the president's agenda for thinking about how government works with faith-based and community organizations. Always from the first, a major focus is how to act within existing law, within the normal administrative

scope of action, to make sure the federal government is hospitable as possible to faith-based and community-based organizations that seek federal funding. So yes, can we do something legislatively, but next to that there's always from the beginning been an emphasis on what can be done administratively as well to make government more hospitable. That's why, in addition to the White House office of faith-based and community initiatives, at the same time, the president created five centers for faith-based and community initiatives-one at HHS, one at HUD, one at the Education Department, one at Justice and one at Labor-and there will be others in the future. The idea was to put something in these major funding departments to make sure that the way they operate their systems changes and it's not just the White House beating from the outside and asking them to do something different.

These five centers were given a very precise initial task-to take a hard look at policies, procedures and practices in their major grants programs, to see if those programs had barriers that were in the way of community serving groups, sacred and secular, when they give out money, when they do outreach, when they provide technical assistance. While the centers were busy doing that with the help of career staff, this detailed analysis of statutes, regulations, guidelines, literature, grant manager's instructions, funding announcements and all the rest-while that was going on, we asked the Office of Management and Budget to inquire of the managers of major funding programs in those five departments how they distributed the money-who got the money. Did it go just to big organizations that weren't very religious, or did it go also to faith-based and community organizations? Well, at the end of asking that and getting back reams of paper, we discovered that we have no idea. And why is that? Well, 80 or 90% of federal social spending goes to state and local governments and they don't report back in detail where they, in turn, distribute the money. So you could look out there at how a state spends community development block grants or what they do with one or another federal funding source-you can go and ask them, but they don't give that automatically back to the federal government for all kinds of reasons. So 80 or 90% of the money we just don't know in precise detail where it goes.

What about the 10 or 20% then that's left in federal competitive grants? Well, no one knows where that goes either in detail when it comes to faith-based and community organizations. Applicants and grantees are not identified as being faith-based or community organizations. So what you could do is go through the list of grantees and look for all those that sound religious-for example, St. something, but that just may turn out organizations that are in St. Louis and aren't religious at all. And there are a lot of religious organizations that don't have religious names. So it's a very imprecise way of going through the data. Well, it's a good thing in one sense that we don't ask that question, because there ought not to be a bias for or against faith-based or community organizations. Nobody ought to be left at the door because they sound religious or because they're community-based. But the bad thing is we don't know if there are systemic problems in the system if you try to look at who gets the money. If you look out in the communities, you see lots of faith-based and community organizations that do services. Do they get federal funds or not? Should they get federal funds? You can't tell

by looking at the federal numbers until we do something about this data gathering problem.

There are a lot of anecdotal reasons to think that most of that money, federal competitive grants, does not go to faith-based organizations that look really faith-based, ad to community organizations that are really rooted in neighborhoods, but that's anecdotal information. A lot of that money seems to go to large organizations-some of them are religious and religiously affiliated, some of them have community roots or want to serve particular parts of the community, but they are larger players that know how to run the system. They're good at grant-getting. They have a long track record with government and possibly are not always necessarily the best providers of services in every instance.

The five centers delivered their reports-detailed looks at major funding programs-not all of the funding programs, but major ones-to the White House at the end of July, and out of that came a White House report that some of you know about called The Unlevel Playing Field-Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs. This is on the White House website if you're interested in it. You can go to [whitehouse.gov](http://whitehouse.gov) and find the faith-based and community initiatives link. It will take you to that report. I can't run through the fifteen problem areas that we identified as I looked at those separate reports and tried to summarize them in this White House report. Fifteen problem areas, fifteen barriers, unjustifiable hurdles, but let me note some of them.

Nine of the fifteen were problems that face all smaller and newer applicants for federal funding, whether they're faith-based or secular. For example, the difficulty of getting information about grant programs. If you ever tried to do this, you'll know that's the case. It's even difficult to find out from federal sites that most of that federal money goes to state and local government, and maybe that's the happy hunting ground for most organizations and not federal competitive grants. So it's very difficult to find out funding programs unless you're trained in it, so those who are trained in hunting down federal funding have access and those who aren't trained find this a real barrier, a real difficult thing to find a way through.

The complexity and weight of requirements-hey, this is the federal government. Some programs have relatively short applications. The Weed and Seed program-it's a seventy-four application. That's not too bad, right? But grantees have to agree that they will comply with 1300 pages of federal statutes, and if you're not a lawyer and maybe even if you are, that's a pretty daunting load of requirements that you agreed to follow and hopefully know something about before you follow them.

A requirement to collaborate with competitors. There are federal programs that require a new applicant to first of all get agreement from potential competitors for the same money, and the competitor has to say yes, we support this program. Now that's a good way of fostering collaboration. It's a great way of decreasing competition as well, because a competitor can say sorry, we don't want to endorse your program when you go

after funding. We're going after that funding ourselves and we're not going to endorse your recommendation.

On vary rare instances, there's actually a bias in federal grant programs for faith-based organizations, and you all heard about the instance earlier this year-an HHS program in which applicants had to be faith-based organizations, or had to apply in collaboration with a faith-based organization. That fund proposal had to be withdrawn because that's bad policy, of course.

The other barriers were church-state kinds of barriers, kinds of things you've been talking about predominately here today-problems for faith-based organizations because they are religious or too religious. In general, it appears that there's a pervasive uneasiness or suspicion on the part of federal officials about working with religious organizations. Not that they never do it, but that it's always kind of in doubt about whether or not it's legitimate. In consequence, even when the statutes or regulations don't exclude religious organizations, often officials do because they're not certain what ground they stand on, or they put unconstitutional restrictions on what the organizations may or may not do. Some of this is past history and it's been cleaned up at the federal level, but that cleaning up of the regulations hasn't been pushed down to state and local governments, and so there are kind of continuing restrictions at the state and local level that have been taken out of federal statutes or regulations.

Sometimes officials try to lay down that bright line between-or some kind of line-between not too religious organizations which can be funded and those that are distinctly religious which some people think ought not to be funded between religiously affiliated providers and pervasively sectarian providers, between organizations with religious roots providing secular programs on the one side, and what HUD calls "primarily religious organizations" on the other. This is a subject of great debate whether there is such a line, whether the constitution requires it. I know you talked about and will continue to. There's a lot of disagreement about that. Is it required by the constitution and the Supreme Court, or has it been outlawed by them? You know that this administration favors looking at what organizations do and not whether they're religious or very religious or not. But there is that problem. There is that issue in some federal grants programs, trying to draw this line and then excluding groups because they look very religious-no matter what they say they will do, no matter how they say they will use the money.

Sometimes there are restrictions in one program area that are slipped over into other program areas where the statute doesn't say anything about it, and that's happened in abstinence education. Sometimes there's a requirement that all grantees, including religious organizations, have to agree not to take faith into account in employment. There are federal funding programs that have that requirement. All grantees have to agree not to discriminate on a wide range of grounds, including religion. But if the statute doesn't say that, the underlying law is the 1964 Civil Rights Act, which does give religious organizations an exemption. So when this general rule that's in other funding programs are applied across the board, it seems to us it creates a problem for religious organizations, where Congress did put that requirement in.

Also, Congress did act to try to create a level playing field for religious organizations through passing Charitable Choice, whether you like it or not. That's been done. It applies to a number of federal programs already. The administration has done very little to inform state and local governments about that and what that means, or indeed, in its own programs, to follow those new rules, so that creates continued problems for Congress trying to redress those problems.

Finally, one last general problem, the federal grant streamlining process was put into action by Congress two or three years ago. It's a six-seven year process, because all who seek federal funds report feeling hobbled by regulations and paperwork and the difficulty of going through the system. That's whether they're states or just regular small non-profits. Unfortunately, the federal government has interpreted that federal grant streamlining to be a way of reducing burdens on current grantees, which is good-nobody should have to be subjected to excessive paperwork and excessive regulations that don't achieve their purpose anymore, but what's left outside are groups for whom the process itself creates a barrier. So we're trying to encourage them to not just take away the burdens inside the process for grantees already there, but see if the barriers could be lowered to groups that have always been left outside because the process is so complex for everybody.

What should be done about these problem areas within the boundaries of current law and administrative discretion? Well, at the moment, in those five departments, the secretaries, along with their staffs and their centers, are formulating action plans. They're not finished yet-everything was put on delay because of the September 11th crisis, but they will be coming out with some form of internal decision about which things they most want to tackle in each of the separate departments. I don't know what those are going to be. I've got some idea but those will be individually determined by the secretaries, in consultation with their own staffs and with their own centers. As I said, we're working with the federal grant streamlining process to make sure it's opened up maximally to groups that have so far been left out by the way the system operates. Furthermore, the Office of Management and Budget-those are the president's folks with big sticks to go around and talk to program officials about how they run their programs-in the president's management budget for FY2002, one of the emphases is the faith-based and community initiative. So when OMB folks go out and talk to program managers, they will be asking them as part of making government more efficient and more effective, are they removing barriers to faith-based and community-based participation. So that's a general kind of impulse that will go out across the government, through the OMB.

All these changes will be made within the law, as it exists-Charitable Choice and those programs, the other statutes in the other programs. This is action to remove barriers that aren't supported by statute that we don't think are supported by the constitution and that are not necessary to preserve the public trust and ensure accountability. In looking at this kind of reform, we'll be following certain basic principles. You can guess what they are. Level playing field, there shouldn't be a bias against faith-based groups or for them, there ought to be the least red tape and the least paper load consistent with accountability and

effectiveness. That's a continuing promise of every administration. We're working on it like everybody else is. An effort to protect the religious character of religious organizations, consistent with religious liberty and the constitution. Protecting the religious liberty of people who seek assistance, making sure they're not coerced. And protecting the religious liberty of faith-based organizations to manifest who they are, consistent with constitutional restrictions when they get government money.

When I talk about this agenda to folks, they always say, "Well, but is there going to be more money for social services? You're going to have more competitors." That is a crucial question, of course, and it comes up all the time. It's coming up now on Capitol Hill. It has to come up between budget times, as we think about what the government does and what responsibilities lie in government funded programs and which lie outside. But there is also this other important question. Who may the government partner with and on what terms? So the government does spend billions and billions of dollars to get services. Who may be its partners and on what terms? That's the core issue at the heart of the president's faith-based and community-based initiative when it comes to government's own internal operations. Yes, social institutions and private individuals can and should support neighborhood healers, even when those groups are small, when they're distinctly faith-based, when they're sectarian or distinctive, so the president wants to encourage private giving to neighborhood groups of all kinds.

There's this other question. Can and should the federal government also support those groups? The president says yes, within the proper guidelines. Thank you.

**Moderator:** We're running just a little behind schedule but if there are any questions. Inaudible question.

**Dr. Stanley Carlson-Thies:** I think the president wants to ensure that religious organizations enjoy their religious liberty, which under the Civil Rights Act includes certain hiring provisions. What needs to be done in terms of specific legislation and what can be done is another question, and that's, as you can imagine, has been a discussion for months behind the scenes between all the different players here, and exactly what's going to come out of that I'm not going to venture to say for all kinds of reasons.

Inaudible question

**Dr. Stanley Carlson-Thies:** That list hasn't been settled. There are a lot of federal government departments and agencies that do funding, and so all of them, by executive order, are required to cooperate with this agenda just like everything else the administration does. Which ones ought to have centers-I've seen bigger and smaller lists. State department, for example, because of all the overseas development programs would be a likely one. Agriculture would be a likely one. Commerce would be a likely one. The Veteran's Administration, on their own, developed a task force on faith-based institutions. Apparently there's some important things going on there. The National Credit Union folks have done something. There's a task force at the Corporation for National Service having to do with faith-based and community initiatives. The Defense

Department does things with faith-based and community groups as well. So potentially, this could be a very large list. Which ones need to have institutionalized centers is another question. They all ought to have, I think, I would argue, institutionalized responsibilities, but it may be, in some cases, a designated official and not a whole center.

The complication with developing the center, of course, is that it could appear in those inside the agency as kind of a boil on the outside of the agency. Here comes a new White House initiative, and there's the interlopers and there's no...I don't see anything on the part of this president or this administration to think that this ought to be a rhetorical kind of thing-it will get the president's brownie points, more votes, who knows what-and then it will go away when it's served its purpose, but this really is part of his idea of how you reform the federal bureaucracy, and therefore, whatever happens needs to happen inside those bureaucracies, and if the best way to do that is with a center, then that's the way I think we'll be doing it, and if there are other ways to do that, then it will be done in other ways.

Inaudible question

**Dr. Stanley Carlson-Thies:** What's the next step after identifying these barriers? Well, it depends on the nature of the barriers, obviously. I think in a few cases in the audit reports, there was an indication that there may be some language and statutes that the centers thought were problematic, and that means going back to Congress. I think that was a relatively small number. In a few cases it was regulations, and of course there's a whole regulatory process to go through. I don't know if secretaries are going to put those at the top or someplace else in their agenda, but a lot of the issues actually weren't in regulations or statutes. They were the way programs were operated within the discretion of previous administrations, the secretaries of those departments or the program operation people who designed the programs and gave out grants. In some cases, I think some of these things were just within the discretion of individual program officers. You can kind of guess then that besides potentially going to Congress for certain kinds of things and to the regulatory process for a few things, that the rest of it is administrative things, so does this mean writing new guidelines? Does this mean talking to grants managers? How do you change the culture of a bureaucracy-that's one of those big issues-so that things that are happening because of some perception that at one time there was a certain rule or a certain guidance that was given, and now the perception ought to be different, how do you get that message out? That's a complex thing.

Inaudible question

**Dr. Stanley Carlson-Thies:** It seems to me that under current law, organizations in which inherently religious elements are woven entirely through the program can't receive direct funding, so to the extent that Teen Challenge or some other program, the heart of its program is to offer process of discipleship or worship or something like that, then I think that's not eligible for direct funding. There are other ways to fund organizations. Organizations get all kinds of support besides direct funding, and so the question is is Teen Challenge eligible for some of those. Currently, if they're not eligible, is that

because of statute or regulation or something else. I think those are the kinds of things that will be looked at. I haven't heard of anybody specifically trying to go through the regulations to see how to fund Teen Challenge, but I think there is a general desire on the part of this administration to make sure that good programs that achieve good results, if they seek public funding can get it if it's consistent with the constitution and the rules that Congress has passed.

Inaudible question

**Dr. Stanley Carlson-Thies:** I don't know. We talked about that on the phone. At one time there was an idea-in fact, it was announced-that there would be a White House ceremony to say here's what's going to happen. Of course, all the White House ceremonies are on other things now, and I think rightly so. So how the different departments, the five departments, are going to announce what they do I don't know.

Inaudible question

**Dr. Stanley Carlson-Thies:** The general issue here-will government's rules and regulations be clear to everybody, boy, that's some other universe, I think. To what extent can these things be made clear so well-intentioned people that don't have a K Street law firm behind them can know that they're falling within the guidelines, that's what we would like to clear up. But you can imagine this is extremely complex. Besides the specific rules that comes with the program, there are a lot of cross-cutting rules that apply to all federal money that goes out-that's 51 separate regulations that have to do with all kinds of things you wouldn't even dream of as an organization providing some direct service. So there's always this question of how to explain those things. If you put it in plain language, it may misled people because they miss a technical detail that catches them later, and all those kinds of things. That's all a subject for debate. I think every administration, again, tries to see how to hack back on these things.

There's a specific difficulty here when it comes to faith-based organizations, because there are some rules that have to apply, and how government officials look at that is not always the way people in the community look at those rules, and so how we can provide accurate information that people know where they stand without it being an encyclopedia I think is going to be one of our big challenges.

I think one of the best solutions that's been talked about over the last number of years is that small organizations, faith-based or others, ought to team up with big organizations that know how to play the game, and that's good for the small organizations. They don't have to take on huge administrative apparatus. And it's good for the big organizations that sometimes have lost their community roots, and so it seems to me it's a win-win situation. A lot of that can be done without anything needing to be done in terms of regulations of statutes. It's just kind of encouragement to grant managers to be open to that and to let it happen. I think more can be done than that, so that's the kind of we certainly like to encourage.

**Moderator:** Thank you very much, Dr. Thies.

## **JUDICIAL AND LEGISLATIVE UPDATE**

**Presenters:**

- **Richard Foltin, Legislative Director and Counsel, American Jewish Committee;**
- **Marshall Breger, Professor, Columbus School of Law, Catholic University of America.**

**Richard Foltin:** Good afternoon everyone. It's good to be here. I feel a little bit like the person in the situation who says everything has been said but not everybody has said it. We have heard some really remarkable presentations this morning about the cases and what I'd like to do with respect to the judicial background vis-a-vis the Supreme Court cases is just do a little bit-I guess in this season it's appropriate to say bad cleanup, and to add maybe a couple of things to what the professors spoke about this morning. Say a few words about some pending cases in the lower courts, and turn over to my friend Marshall Breger, who will then be focusing on the legislative section. I think I'm just going to say a few words after that. And then we'll turn it over to you all.

I think what came through has come through with the discussion first with the professors this morning, but in the rest of the conversation is-to paraphrase the old Dillon song-nothing was delivered. Nothing is resolved. Certainly when it comes to Charitable Choice and vouchers and these related areas, we have many more unanswered questions than answered questions as to what ultimately the Supreme Court, which is to say Justice Sandra Day O'Connor, is going to do or think about these matters, and I think that the conversation you heard about the Ames case having to do with issues of discrimination and also the discussion of the Helms against Mitchell case really point that up very well. So with respect first of all to the issue of whether or not what at least in these circles we call the pervasively religious institutions, the Supreme Court calls them pervasively sectarian institutions, but many of us have stopped using that term, whether or not they can receive taxpayer dollars for provision of social services. It's worth nothing that the Supreme Court has only dealt with the issue of whether or not religious organizations of that type, or of any type, should be receiving public funds in two cases, and one of them was in 1899 or thereabouts, so it's not clear how much validity that case still has, since it's really before the development of the whole strain of First Amendment laws we know today. The other case is Bowen v. Kendrick, which came down in 1988, and had to do with the issue of whether or not a Catholic organization could receive funds to provide education on matters having to do with pregnancy and counseling teenagers in related matters. The court there upheld the funding going to this particular institution, but did so because it found that they were in effect providing a secular service and in part because it was a religiously affiliated organization and not a pervasively religious organization. The court there said it was their assumption that since the organization was not pervasively sectarian and it was a federally funded program, they were operating on the assumption

that the program would be implemented in a lawful and secular manner. They cited earlier precedence holding that aid flowing to pervasively sectarian organizations normally may be thought to have a primary effect of advancing religion because there is a risk that government funding, even if it designated for specific secular purposes, may nonetheless advance the pervasively sectarian institutions' religious mission. The court's reference there was to the risks attendant on government funding of pervasively religious institutions which the court found was grounded in a core concern to which the First Amendment's prohibition on government establishment of religion was addressed, that the state not be allowed to utilize its tax authority to fund religion.

That decision, interestingly enough, was written by Chief Justice Rehnquist, who I dare say probably wouldn't write the same opinion anymore, but it still is good law and it seems to be that the principles of that case remain intact, even post Helms against Mitchell, as was discussed at length this morning. In that case, which upheld the loan of federally funded programs to religious schools, Justice O'Connor noted that the upholding of the loan of the computers didn't necessarily apply to cases where money is going to religious institutions of that nature. She said our concern with direct monetary aid to religious schools is based on more than just concern about diversion of tax fund aid to religious youths. In fact, the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the establishment clause's prohibition. So for all of the discussion by Professor Rosen about the distinction between per capita aid versus aid where the funds are being used on a basis that's purely privately motivated, even though with government funds, all the vouchers, the involvement of actual money flowing through these institutions to provide services may still make a difference and the neutrality principle that some people have been arguing for is not yet established, certainly in Justice O'Connor's mind, as the pure or only principle that one looks to. One has to look at other considerations, amongst which money flowing to these institutions is a special one.

What I found really interesting is that even in the plurality opinion of that case, written by Justice Thomas on behalf of the Chief Justice, Justice Scalia and Justice Kennedy, there's this little note that says of course we have seen special establishment clause dangers when money is given to religious schools or entities directly, rather than as in...and then it goes on to discuss some other cases, but direct payments of money are not at issue in this case and we refuse to allow a special case to create a rule for all cases. So I'm not sure what that means. It is hard to believe that those four justices would, in fact, not uphold Charitable Choice, even when it's in the form of direct government grants, but the fact that they found it necessary to put that in the opinion I think is very interesting.

On the issue of employment discrimination, I think the point was made very well this morning by Professor Brownstein, that the rationale behind allowing religious institutions to discriminate on the basis of religion with respect to all their privately funded positions simply can't be extrapolated to situations where the funds are going to publicly funded services. Much of the Amos analysis turns on the problem that we posed in limiting exemption to religious activities of a religious organization, not the least of the problems of which would be placing the state in the position of parsoning which activities of the

organization are secular and which are religious, and while that's an important principle when one is talking about privately funded positions, when one is dealing with a publicly funded position, by definition we're dealing with an individual who is being hired to provide a secular service. Therefore, there's no problem. The courts are not being placed in the position of having to decide whether or not this person is engaged in a religious activity on behalf of the organization or a secular activity. At the very least, that suggests that there's no constitutional requirement that these organizations be enabled to discriminate in who they hire on the basis of religion in hiring for those funded positions and, as was discussed this morning, it may even be that there's a constitutional problem, although that's certainly less clear with government funds going for that purpose. But certainly, the public policy concerns are such that we ought to be very, very cautious about that.

I would note also as a concurrence in *Amos* which says that the concurring justices noted that they joined with the opinion because as they read it, what was being exempted was the ability of a non-profit religious organization to discriminate on the basis of religion in who it hired, and they suggested that there might even be a constitutional problem if there was a for-profit organization that wanted to discriminate on the basis of religion in who they hired. I would argue *a fortiori*, or as we might say in the Talmud, *kal v'chomer*, if there is a problem with allowing a for-profit organization to discriminate on the basis of religion, a constitutional problem where the law otherwise prohibits discrimination on the basis of religion, that problem is even greater when you're dealing with funding that's going to an institution that's providing publicly funded services.

Having said that, I just want to say a few words about the cases that have been pending in the courts. There are not an awful lot of cases even several years into the Charitable Choice era that have been brought. One that got a lot of attention was *Pedraza v. Kentucky Baptist Homes for Children*, which was brought by Americans United for Separation of Church and State and the ACLU against the state of Kentucky and Kentucky Baptist Homes for Children, challenging the constitutionality of state financing of the Kentucky Baptist Homes on the grounds that the Kentucky Baptists Homes were discriminating against gay people on religious grounds. There was a particular individual who was fired when it was learned by the employer that she was a lesbian and teaches sectarian beliefs to the youths who reside there. The plaintiffs alleged that the public financing of those activities violated the establishment clause, and that the Home's anti-gay employment policies amounted to religious discrimination in violation of Title VII. The district court dismissed the discrimination claims. They found that the Home's policy of discriminating against gay people didn't amount to discrimination on the basis of religion. We should note here in light of the controversy over the Salvation Army over last summer and the issue of whether or not it ought to be exempt from otherwise applicable civil rights laws, that this was not a case where the Kentucky Baptist Homes was being exempted by virtue of this decision from otherwise applicable civil rights laws. There is now law in the state of Kentucky that prohibits discrimination on the basis of sexual orientation, so the claim where was being made that a religious organization ought to be prohibited from discriminating on a basis that a secular organization would be allowed to discriminate on the basis of, and the court said we're not going to go that far.

We're not going to find that the prohibition on religious discrimination operates here. They did find, however, that the establishment claim that was raised, that the funding of the homes amounted to the funding of a pervasively religious institution, did raise an issue that has to be tried and that part of the case is going forward.

In fact, for the most part, the several other cases that have been brought also deal with the issue of whether or not the government can fund pervasively religious organizations. Our colleagues at the American Jewish Congress have spearheaded several cases that have been brought. There's a couple of cases in Texas, one of which involves a state-funded job training and placement program which is said to be permeated with Protestant evangelical Christianity. That case, the funding of that particular institution ceased. The district court declared the case moot and has refused to rule on these issues, and the plaintiffs have filed in the court of appeals saying that the rules that allowed the funding to go to that particular institution do continue in effect, so the case should be treated as a live case, and are asking the court of appeals to reinstate the complaint.

In another case, the Texas Supreme Court has declared unconstitutional as an endorsement for government of religion the chaplain's education unit in the Tarrant County Fort Worth jail, in which Christian proselytizing takes place. The CFW houses forty-eight inmates for ninety to one hundred day periods, offers inmates Christian religious instruction in accordance with doctrines determined by jail officials, orthodox Christian principles identical with evangelical Christianity, and there the lawsuit was brought by American Jewish Congress together with ACLU, arguing that this is unconstitutional, and in fact the Supreme Court did hold that the funding of this program was unconstitutional.

Finally, in a case pending in California, there's a permanent injunction being sought against implementation of a state-funded job training program which is open only to faith-based providers. As Stanley Carlson-Thies discussed earlier, there had been federal regulations for a particular program that seemed to contemplate a similar kind of funding, and that was withdrawn when it came to light. Interestingly enough, it's my understanding that the regulation underlying that particular program were developed not in the current administration but in the prior administration, and I think it is something that by and large nobody in the current administration is arguing for, the idea that you ought to have funding that's devoted and designated purely for an organization that's faith-based in nature, as opposed to the argument being made that faith-based organizations ought to be eligible to compete for funding. That case, as far as I know, is still pending. There's still an effort to get a permanent injunction against this California program going forward.

There may be a couple of other cases around the country, but I think that pretty much covers the waterfront in terms of the litigation that we know of, that deals with some of the Charitable Choice issues.

**Marshall Breger:** My task is to talk about the legislation that's on the table, but I just want to spend a moment on Richard's description of some of the judicial cases, most of

which I agree with but I'll just make one small point on the matter of Justice O'Connor and money. You correctly quoted from her concurring opinion in Mitchell that she'd have concern if what was being provided was not computers but cash. I think that her concern, which is a reasonable one, is that money is "fudgeable", and that is to say, money could be misdirected and go for purchase of Bibles, paying the salary of the preacher, all of which would clearly be an establishment violation. But we have to remember that in these Charitable Choice programs, it's pretty clear rules, statutory rules, that say the money can't be used for these things, and they'd have to be a kind of dispositive presumption that if there can be a migration of the money to illegal purposes it's going to happen, and if there's going to be that, if the line is going to be porous it's going to happen and therefore such a proposal is unconstitutional. I think that recent case law has actually gone the other law-that is to say one of the things that happened recently is the overturning of the Grand Rapids case. The city rented a room in a religious school to do certain special ed, and had a big sign this is a city room, not the local parish room, and the question was there's the possibility of misunderstanding. Do you presume irrefutably and the view now, I think, is you have to show, you have to show, in fact, that this was misused. You have to show that this was misunderstood. You can't presume it. So I think that if that is the case, the money problem becomes much more controllable and less of a concern. What you're getting now, of course, is a preview of what the briefs are going to be on the school voucher case, so listen carefully.

But back to the legislation. We've gone over a lot of this, so I'm just going to touch on some of the highlights so that we'll have a chance for discussion. As you know, Charitable Choice started in 1996. Welfare reform legislation, the personal responsibility and work opportunity reconciliation act. In 1997, Department of Labor, welfare to work programs, were put under Charitable Choice. That's actually the only Charitable Choice program that actually was used a great deal. About sixteen million dollars went out to faith-based organizations. In 1998, the community services block grant renewal added Charitable Choice language, and in 2000, Charitable Choice was extended to cover substance abuse, prevention and treatment in the substance abuse and mental health services act and in the children's health act of 2000. The community solutions act, the Charitable Choice bill that's now on the table, HR7, added eight new categories of federal grant programs-juvenile justice, crime, housing, job training, domestic violence, hunger relief, senior services and education-so now what's on the table is quite a large and extensive package. The bill went through a number of transformations. The original bill, how it came out of committee and how it was finally voted on July 18th in the House, it's now gone to the Senate where it is-I don't know if the word is languishing but awaiting action in the Senate Finance Committee.

What are some of the main points? First, I think organizational autonomy. There is an effort clearly to protect the religious organization from government control over the definition, development, practice and expression of its religious beliefs. There's two specific protections. You can't be required to alter your form of internal governments to get a government grant, and you can't be required to remove religious art, icons, scripture or other symbols because they're religious. That is to say, if you're a one-room church house, one room schoolhouse, one room church house, and you do your social service in

that room, you don't have to run around covering up your religious icons. I was very pleased about this because back when I first started teaching at the University of Buffalo, I spent months trying to get HUD to allow a government HUD-subsidized elderly housing program to put up a mezuzah, a Jewish religious artifact, and it was just a question of who would give up from exhaustion first. Needless to say, they did. Organizational character and autonomy protected.

Second, employment practices. This is one of the biggest and controversial. The original bill said specifically you can't prevent an organization from requiring that its employees adhere to the religious practices of the organization. By the way, religious practices, not religious beliefs. I don't know how far that gets you but at least that distinction was made. The bill, as it came out of the House, that language was dropped. There is no explicit protection. Instead, there is a re-statement of the Title VII exemption, that regarding employment practices shall not be affected by its participation in or receipt of funds from the Charitable Choice. So therefore, the exemption in Section VII of the Civil Rights Act isn't waived, isn't given up, still exists after the Charitable Choice legislation, even though the legislation restates the duty of the religious organization to comply with the non-discrimination provisions of the Civil Rights Act, but that includes presumptively the exemption. So everything that depends on what is the Title VII exemption.

We have to remember one thing. There is a kind of judicial, ministerial exemption. Presumably, you can never tell the minister or the rabbi what he can or can't do. But the statutory exemption is broader, and in fact it was amended in 1972. It was expanded to permit religious employment discrimination with regard to all activities conducted by the religious employer. So now the question is what is activities? Is the janitor-is that part of the activities? Is the chef, if it's a soup kitchen? And what are the activities of the chef? Teen Challenge we know the notion is that religion is used in the treatment process to be transformational, and it's generally accepted-although I'd be delighted and interested to hear other views-that that raises pretty big constitutional problems. But what if the religious plus is not the fact that the recipient participates in the religion, but what if it is the fact that he sees religious people acting according to their own religious duty? That is to say I'm a recipient in the soup kitchen. I'm not required to engage in religious practices to get the meal but I see the tender loving care, the TLC, given by the religious person who's assisting me, and I know last week I was in the state soup kitchen and I just got the bureaucratic shuffle. So maybe there's more here, and it's not forcing me to participate, but it's the fact that I can see what the religious person's outlook and approach, which makes the difference transformationally. That gets you into a more interesting question. Does that activity raise constitutional problems or is that also accepted? So we still have, I think, a lot of thinking on what to do over what is in the Title VII exemption.

It may be best, since the fact is-I'll jump the gun and say what you all know, what's been said all this morning-that this question may be the decider in terms of what happens to Charitable Choice. A lot depends on whether Senator Lieberman for the Democrats will say I'll go forward with Charitable Choice but without this religious exemption. We'll drop it. Leave things as it is. Leaving things as it is may be not as bad for the pro

Charitable Choice forces as one would think because you would then have to rely on the case law, and I think the case law is not as negative towards protecting religious practice as some people have stated or some people have feared. So the need to clarify, while it's a great-I would say from an academic point of view-is great. Let's be explicit. Let's not have ambiguity. But in practice, allowing this thing to go forward with the ambiguities that still exist in the understanding of the 702 exemption of the Civil Rights Act may not be all bad from the pro-Charitable Choice perspective.

There's also a protection for the beneficiary. In the first version, the beneficiary had a right to a non-religious alternative. In the version that came out from the House that's different, if the beneficiary objects to the religious character of the organization, he has the right, within a reasonable time, to receive an alternative that's unobjectionable to the individual on religious grounds and has the same value as the value he would have received from the religious provider. How much freight you put on that difference I don't know, but it certainly means that it doesn't necessarily have to be a non-religious alternative. I could say I don't like the Catholic, so give me a Lutheran and I'm happy. It makes it not an all or nothing, and more of a pluralistic potpourri, you might say. Again, the beneficiary cannot be denied admission into a program on the basis of their religious beliefs. That's in the present. The earlier version suggests that religious organizations shall not discriminate in carrying out the program. This may just be a technical distinction, but there is a difference between no discrimination in admission, once you're in, and then when you're in, no discrimination in carrying out. I suppose that you can envision a situation where there's no discrimination for entry, but once you're in the program, there could be distinctions, official, unofficial, natural, inappropriate, on the basis of the believer gets extra benefits than the non-believer. So that's a problem in terms of differences in the language.

There are two other very important points that are in the final legislation, the legislation that passed the house, but not in the original. One, I think, is non-controversial. Money for technical assistance for the small organizations. We've talked about that this morning and I think there's a general consensus if you're going to have this program, you have to have some kind of technical assistance operation. The second is a kind of curved ball that came out of nowhere, that has not been talked about much, which is what I call the voucherization proposal. It was not in the original bill. It wasn't even in the bill that came out of committee. It sort of crept in there on the floor and it suggests, or it states, that the canon officer in charge of a certain program-let's say the Secretary of Labor, if it's a work training program, can make the judgment that they're going to use this money for work training purposes, not by holding a direct grant competition for religious and non-religious providers to see who would get the money directly, but to create a voucher scheme, to engage in indirect assistance and indirect assistance is defined as including a voucher scheme. So here HR7 throws up and raises for us the whole voucher debate with its pluses and minuses, but certainly that's a big difference in the legislation and it needs to be thought about.

Finally, while it was part of Charitable Choice back in the 1995, before the original bill, when then Senator Ashcroft said we should be a charitable deduction so people would,

instead of the state paying for welfare, people would pay for the welfare in some small part through religious charities, or pay for services... the religious charities, that approach, which never made it into law in '95 or thereafter has come back in HR7 with a proposal that there be a charitable deduction for non-itemizers for providing services for the poor. This raises a problem of what are services for the poor, which is both easy and difficult. I know of at least two instances where government and courts tried to wrestle this problem. In the legal services corporation, when I was on the board of directors, there were proposals made that we limit the legal services to core poverty functions, and of course that created great debate what is a core poverty function. Service to the poor-does that include class actions? Secondly, in the whole issue of United Way and the federal government, where there was an effort made in the Reagan Administration to say if you're going to be part of the check off, if you're a charitable group that will be part of the check off program for the federal government, which gets millions of dollars for United Way because federal employees just check off what they want, we're going to limit that to programs for the poor, and the courts overturned that and now, as you know, all sorts of flora and fauna of the philanthropy world are part of the United Way program. So if we move forward with this Charitable Choice deduction, we're going to have a problem of figuring out what it means to say for poverty services.

Let me stop now because I promised Mr. Foltin a chance to beat me up, and then we'll have time for some questions.

**Richard Foltin:** I'll just take a couple of minutes, with the indulgence of the chair. First of all, certainly when it comes to the notion of expanding the availability of a general tax deduction-and here I'm not going to get into the issue of limiting it to poverty programs which I think is more problematic-but certainly if there's a general availability of a deduction for people who had not previously had that deduction available, that's all to the good. One of the problems with the bill that came out of the house is in fact it so greatly reduced the numbers, as I think Stanley Carson-Thies acknowledged, you really don't wind up with what's going to be any meaningful relief in terms of additional donations being made or greater deductions available to people that are making these contributions. One can only hope the Senate will do a better job in terms of that.

I think a lot of the problems with HR7 are what comes in under the rubric of protecting organizational autonomy. I certainly don't have any problem with beneficiaries of aid receiving TLC and I don't particularly care whether or not that's religiously motivated or motivated by some humanistic vision of the greater good, and I don't have a particular problem with even where there's a religiously affiliated institution providing the services, there being an icon on the premises. I certainly think this would be a nice room to have social services provided in, even given the fact that there are religious symbols on the wall. That's not the issue. But there are things that are far more problematic and that are more problematic about HR7 than they were about even earlier versions of Charitable Choice.

The good news is that there is an explicit provision now that says not only can't the government funds be used to support sectarian proselytization, worship or instruction, but

it does say that to the extent it takes place it has to be separate from the provision of the other services, and the involvement in those religious activities has to be voluntary on the part of the beneficiary, and that's good additional language, but it's really undercut by some other things, most notably in the area of discrimination. Beyond just extending Title VII, as I think Marshall has described, there is all this additional language of authorizing discrimination on the basis of the employee's religious practice and that, taken together with other language in the bill, suggests-and I think as much has been said by some of the sponsors-indicates that state and local civil rights laws would not apply to these organizations to the extent they're inconsistent the religious practice of those organizations. That goes well beyond anything that was in early versions of Charitable Choice. What the bill does do, as Marshall says, is it does itemize the federal civil rights laws that will apply, so for instance the federal prohibitions on discrimination in hiring on the basis of religion and sex, for instance, or national origin-not religion-race, national origin or sex, would continue in effect, but that is the way the cases have understood the ability to discriminate on the basis of religion anywhere. They have basically said you can discriminate on the basis of religion in your privately funded activities to religious institutions, but except for ministerial positions and similar kinds of core religious activities, you're still going to be prohibited from discriminating on these other basis, even if there's a religious reason for it. So all that the bill seems to do is to incorporate that provision to the publicly funded positions, but to allow what appears to be a broader exemption from civil rights laws than was earlier the case. It's no longer clear what this option to alternative service means. The law, I think, was much clearer when it said there had to be a secular alternative provided. Now in saying it just has to not be objectionable on religious grounds, I'm not sure what that means. I'm not sure on whom the burden is going to be when a beneficiary thinks it's not appropriate because of religious grounds, and are they going to have to go to one provider after another until finally the state relents and gives them a secular provider? There are a lot of very problematic things about how that is set up.

Finally, on the voucher issue, there's a difference in the level of protection for beneficiaries if the services are funded by government contracts or vouchers. That's a problem. I think even more of a problem is this language that Marshall described that was brought into the bill late in the game, which allows the secretary of the supervising department, cabinet secretary, to voucherize the entire program. This section-and with this I'll close-really is remarkable, because what it means is that Congress will have decided to set up programs which are government contract in nature, that are structured in a certain way so as, in effect, to allow services to get in the most efficient way to recipients, allow them to contract with organizations that are going to be accountable, allow the organizations that are going to be providing the services to know in advance what level of funding they're going to have and how much clientele they can count on getting, and therefore make the system operate in an appropriate way, and instead we're going to have a system that could be entirely turned into a voucherized program in which all these elements of accountability and predictability would be thrown out the window. It really would be turning the entire federal system of funding and providing social services on its head, and all seemingly for the purpose of doing an...around the problems of funding going to religious institutions. I think that particular provision, the implications

of which many of us really hadn't grasped at the time that the bill was on the floor, are just astonishing, and the good news is, I think, that we're never going to see this provision anywhere except in HR7, and I can't imagine that it would ultimately be enacted into law, although a lot of things I haven't imagined have happened in my life. But it really is a very problematic and troubling-perhaps the most troubling aspect of the entire bill, and with that I'll stop.

**Marshall Breger:** I'll just add one thing. I don't want us to go off on the voucher toot, which would shift the whole course of this conversation, and I agree with a lot of what Richard says, but I think it's worth stepping back for a minute. One kind of useful thing that this voucher clause does is let us see that really the debate about vouchers, the debate about Charitable Choice, the debate about charitable tax deductions, it's all part of the same question. Maybe to have charter schools. The issues are how you deal with private sector activity in the welfare state, and how you deal with religious provision of social services in the welfare state in the 21st century. So these are all parts of the same puzzle, and I think it's important that we look at the forest even though we're here having this kind of intense conversation about the trees.

**Question:** I'd like to ask you a question that has to do with tax credits or advantages that are now being offered. Let's take the Jewish community, for example. Most of the Jewish agencies have been opposed to vouchers...since you can't get the vouchers through in Pennsylvania, for example, the state offers tax credits to corporations that will do, in effect, what vouchers will do. The voucher system provides government money, however it's distributed. The tax credit arrangement takes away from government money in order to accomplish exactly the same purpose. Curiously, in the Jewish community, the Federations are now setting up programs-and other Christian groups as well-to enjoy this new advantage. I can't understand the reasoning, however, in which on one hand they oppose the voucher, but accept the tax credit which, in effect, is the same kind of thing, because it makes government money available to these institutions.

**Richard Foltin:** I think there's a lot to that. First of all, I think that the issue of tax credits is problematic in that you're talking about dollar for dollar benefit to the person that's giving the money, so that even though it's true that the individual decides what they're going to give and then they do or they don't get the tax credit, by virtue of its being a dollar for dollar give-back as opposed to a deduction, I would say that the government is inherently more associated with that as an objective that it's trying to accomplish, and there's more of a possibility to the extent you're talking about funds not only flowing to religious institutions but you're creating programs which are intended to direct the money to religious institutions, that you may run into the same kinds of problems you do when you have vouchers.

Having said that, the fact is the cases-and there was some discussion of that this morning-set up these distinctions so you have sort of a spectrum of deductions. You have credits. You have vouchers. You have direct government contracts. So one never knows for sure where these lines are ultimately going to be drawn. But I do think there are issues with the tax credit approach that have to be wrestled with. Having said that, I would say that to

the extent you do have a program in place that's legal and ultimately passes whatever court challenges there might be, I can well understand why a not-for-profit institution which is in need of funds is going to take the money from where it's available and deal with those concerns.

**Question:** Are they not the same thing, though, in another guise?

**Richard Foltin:** They have the potential to be. They may be.

**Question:** In that case, we're against it, as an agency. On the other hand, we pose no objection, and indeed cooperate with it.

**Richard Foltin:** I don't know which agency you're talking about. AJ Committee, for instance, has been opposed to it.

**Question:** It has not been opposed at this moment to tax credits.

**Richard Foltin:** We did oppose tax credits when they had to do with use of money for tuition, so a tax credit which was upheld by the court in the Mueller case, but if you're talking about our organization, we were opposed to it. I think each tax credit case will have to be dealt with in its own situation.

**Marshall Breger:** I think your question makes my point, that you got to step back and look at the forest. These are all ways of how we're going to deal with social services in the welfare state. Do we want to deal with them only by the government? I think Bob Destro earlier pointed out that in European countries, there's a strong bias against private sector social services because it's against the job of the government. If it's worth doing, the government should do it. If it's not worth doing then why should we care if the private sector does it and why should we help them.

**Moderator:** If I may, because I was involved in this in Pennsylvania, there's two answers. At the philosophical level, as a conservative, it is not the government's money. This is my money that the government is not taking. But the more practical answer was that you're involved in electoral politics, and all this maneuvering of how things are going to work, when you put it in place in front of somebody, what's that person going to do, and frankly, our purpose is to see how widespread involvement we can have in the community to have electoral involvement in this particular program so that it won't be turned around legislatively, and it will grow. In fact, we were right because the sense is, despite what the position of AJ Committee and AJ Congress, on the ground there is not that strong opposition in the Jewish community, especially among under-fifty people, so when you start looking at how this all plays out, and we are very careful-the regional alliance in Pennsylvania is very careful-to make sure that it's spread throughout the whole state, that it's not limited to Philadelphia and Pittsburgh, that it's not limited to African-American, because we're concerned that in the court challenge we will not only have the legal, philosophical issue, but the practical issue. If all the money, for example, goes to Catholic schools and it turns out to be a bailout of Catholic schools, we feel we're

going to be in jeopardy, so we're very careful on how we're trying to maneuver this thing because we are looking for the broader public perspective.

Inaudible question

**Richard Foltin:** I appreciate the correction and that certainly would be a different situation than what was reported in the press. But putting that aside, the fact is that the bill, as it emerged from HR7, does appear to exempt religious organizations that are receiving these funds from having to comply with the state and local civil rights law. I'll accept your correction but I think the description of the bill is an accurate one and it still reflects the problems with it.

**Moderator:** If I can ask for clarification, Philadelphia, for example, has a domestic partners act and there is Salvation Armies offices in Philadelphia. You mean that outside of Philadelphia, where there are no domestic partners act, that the Salvation Army then has to still extend those benefits?

Inaudible Response

**Question:** I had a question specifically regarding the recent legal challenges that have taken place regarding...the expression of G-d Bless America and reciting the Pledge of Allegiance, under G-d. I'm wondering-is this a tactic of those that are for separation to try to affect faith-based social service legislation? It seems like...I'm not sure of the wisdom of that but...

**Richard Foltin:** I think there's a lot of different organizations. When one speaks about separation of church and state, that covers a lot of ground and there are different organizations and individuals with different views about what that requires. I can tell you that my organization has never and is not likely to ever file a lawsuit over it saying In G-d We Trust on the coins. There is a certain notion of there being markers of civil religion that are distinct from things that really amount more to actual observance by an establishment of religion, and I suspect that...I know that there are people that have objected to schools putting G-d Bless America up in the schools. I think that reflects the diversity of perspectives in terms of people that are concerned about separation of church and state.

**Marshall Breger:** Let me put it this way. If I were a practicing lawyer and had on a contingency fee basis, I'd much rather take the Salvation Army case than this one that you conjured up. You could sleep well without worrying about that.

**Question:** There are several reported cases where the school put up G-d Bless America and there was a lawsuit.

**Marshall Breger:** Well, as I said, they certainly weren't taking it...the lawyers weren't taking those cases on the need to win basis.

Inaudible question

**Richard Foltin:** I'm not sure what it is he's... There has been some talk-it's been reported in the press-of an effort to develop a bill in the Senate which would deal with whatever consensus there is, move that forward so we could do some good for people in need now and leave for the future the more divisive issues, many of which we've talked about during this day. So for instance, this talk about there being a bill that would include the compassionate capital fund, tax issues having to do with tax deduction, maybe some other things as to which we might find some common ground, and as to that, I'm sure there will be an effort. There's an effort now ongoing, in terms of conferences and discussions between the administration and the congress and interested groups of various stripes, trying to see what kind of common ground we can find, but it's not going to be found on Charitable Choice as such. I think if they're able to find that common ground and move forward, it's going to be on these other areas where there has been less disagreement in an effort to do what good we can do now for people in need, rather than make the whole initiative await final resolution of all the issues that divide us.

**Marshall Breger:** I think the legislation this year depends on Senator Lieberman, who will decide whether some compromise comes out of the Senate Finance Committee or not, and that's the long of it and the short of it.

Inaudible question

**Richard Foltin:** Let me just say the tax provision that came out of the house doesn't do any good because it was so reduced in terms of the numbers, in terms of the deduction that's available to individuals, and therefore in terms of the likely benefit to the institutions that are going to receive any contributions. The bill that was introduced by Senators Santorum and Lieberman, however, would have provided meaningful relief, and I think that's still a good model for us to look to, and I hope a good model for the Senator to look to.

In terms of what one could do with HR7 as such and the Charitable Choice provisions, I would argue that it would not be sufficient, it wouldn't address our concerns, to simply take out the language dealing with Title VII and discrimination because one really has to look at that bill as an entirety. I think it's a coherent whole. It represents a particular approach to funding of religious institutions, in which even if you take out that piece you're going to still have a structure that, at least from my perspective, is an inappropriate and unconstitutional one, so I don't think one can simply say let's take out that section and go with the rest of the bill. One really has to start from scratch and find a better approach to dealing with these issues.

**Marshall Breger:** It's all on your head that it doesn't go forward.

**Moderator:** Thank you very much.

**OUTSIDE THE BELTWAY:  
WHAT IS HAPPENING AND WHERE DO WE GO FROM HERE?**

**Presenters:**

- **Sherri Heller, senior advisor to the Secretary for Child Support in the Department of Health and Human Services;**
- **Samantha Smoot, Executive Director, Texas Freedom Network;**
- **David Wright, Director of Urban and Metropolitan Studies, Nelson A. Rockefeller Institute of Government, State University of New York;**
- **Reverend Alfred A. Terrell, pastor, Macedonia Baptist Church, Newport News, Virginia.**

**Moderator:** We've heard a lot today about the politics and constitutional questions and history and current status and all about Charitable Choice. The program calls this Outside the Beltway. After counting the number of lawyers on the program, I'm tempted to call it Outside the Courtroom. I think we have a wonderful panel of four folks here who will talk about what's actually happening on the ground with relations between governments and faith-based organizations, what are some of the real experiences, both positive and some problematic. I think we'll follow the order in the program and to make it easier, I will introduce each person one at a time, right before they speak. Our first speaker is Dr. Sherri Heller, who as of about a week ago is the senior advisor to the Secretary for Child Support in the Department of Health and Human Services. She's a former deputy secretary for income maintenance with the Pennsylvania Department of Public Welfare, where she was responsible for a wide range of public assistance programs. She's had a distinguished career in public service, which I told her the one thing that caught my eye on her resume was a period of time as county administrator of Lancaster County, Pennsylvania, which is where I grew up. It's an honor to introduce Dr. Heller to speak about the experience of the State of Pennsylvania.

**Dr. Sherri Heller:** Thank you. Good afternoon. I'm happy to be in Washington, where I sort of live now. I'm not here today as a spokesman for the Bush Administration however. I'm really here to talk about my experience managing welfare reform for then Governor Tom Ridge of Pennsylvania, so a lot has happened since the invitation to this event.

Let me begin by drawing for you parallel stories of what was going on at the Pennsylvania Department of Public Welfare and what was going on with me, before we got together on the issue of contracting with faith-based organizations. At the Pennsylvania Department of Public Welfare, there had been a long history of contracting with faith-based organizations, way prior to Charitable Choice, way prior to welfare reform, in ways that if you think about it, you're probably familiar with. There were contracts for adoption agencies. There were contracts with faith-based organizations to run and manage community homes for mentally retarded individuals, services to the homeless and so on. And in fact, even in the employment and training area, the idea of contracting for services to place people in jobs and train them to get better jobs, there were plenty of precedents prior to Charitable Choice. And you would find on the roster of

contractors organizations like the Sisters of St. Benedict in Erie, or the Jewish Educational and Vocational Services in Philadelphia. This was prior to welfare reform, prior to Charitable Choice.

When I came in to manage welfare reform, I didn't have any particular interest or ideological program about dealing with faith-based organizations or not. I had two distinct problems that I personally, as the manager of the program, was trying to solve. One is that I had an awful lot of trouble with clients, actual welfare recipients trying to move from welfare to work, getting mixed messages out in the neighborhoods, out in the communities, and that is they would come to the welfare office and the case worker who worked for us would say hey, it's really important that you go on this job search program and get a job as early as you can, and then they would go to their trusted advisors at the Christian Center or the Hispanic Center or their church and get a message of don't worry, dear, we'll take care of you, and you need to stay home with your babies and so forth. So we had clients getting mixed messages, and in that context the client is likely to rely on the person she knew already, the person she trusted, not the professional case worker at the welfare office. So the first problem I faced was how to get a consistent message to the clients.

Another problem that I faced, as I think a lot of welfare reform administrators did, was how to get the truth about welfare reform out into the neighborhoods where people could hear it, and it turns out my original theory was foolish. My original theory was that if I stood up in Philadelphia and let people yell at me for three or four hours every couple of weeks and was left bloodied but standing, and so pictured in the Philadelphia Inquirer, eventually I would get some credibility and we could get the truth out about welfare reform. But that turned out to be a foolish theory, for reasons we don't have time to go into but you could probably guess most of them. It turned out that my credibility didn't matter that much anyway. What mattered was getting the true story out to the clients about what the rules really were. For example, the law said that you could be exempt from work requirements in Pennsylvania because of illness. The word on the street was if you could get a doctor's note, you were exempt from all of welfare reform, including the time limits. Not true. How do you get the word out if you can't get the paper to print it? The answer I discovered was to meet quietly and informally with African-American clergy in the city, because they were the community leaders. They were the opinion leaders. So I began organizing a series of such meetings and it turned out that was a really good way to get good information out and a mutual trust was gained. It became clear to me, if it wasn't already, that if you try to make social change happen and try to help families in social services and you ignore the people they already know and trust in the neighborhoods, you're not going to get very far.

So here we come together. It's time to contract for welfare to work tight training programs, and I've just discovered the power of church leaders and clergy and so forth, so we set out at this point to make the process of contracting for job placement services and job training services easier for small community-based and faith-based organizations. We had the same competitive criteria as anywhere else. There were no set-aside funds for faith-based or community-based organizations. Everybody competed on the same

grounds. But we did change some of the competition criteria, so for example, whereas we used to buy services primarily based on price, now we introduced a competitive criterion having to do with ability to access on a twenty-four hour a day basis people in neighborhoods that we found hard to reach. Once you award contracts based on criteria like that, it makes it much easier for neighborhood-based organizations to compete effectively. We also provided a good deal of technical assistance to small neighborhood organizations to help them deal with the contracting complexity. I will admit to you right off the bat, some of the things that I did to try to make this easier failed miserably. For example, I instructed my staff to make the application into a fill-in-the-blank. Instead of saying attach your budget for the project, we said write the salary of the teacher here. Well, it turns out, if you tell them every little thing in a sentence to fill in the blank, it takes more pages than just saying attach your budget. Consequently, our application, when it came out, looked like this. Shrink-wrapped, it had the basic effect of a brick. And a lot of the clergy who I had grown friendly with, at this point said you know what, it came and it was so scary we didn't even bother to take the shrink-wrap off to see how easy it was to fill out. The point is, it's not easy how you do these things. You have to learn as you go along.

We also made changes in cash flow to make it easier for smaller organizations to do business with us. I'm a very big believer in performance-based contracts. We pay for outcomes, not for services provided. So we paid for how many jobs people got. That made sense. But in the old days, the person had to get the job before you could get your payment. For a smaller neighborhood-based organization, they don't have a line of credit at the bank. How are they going to hire the staff to even get started? So we came up with a program of cash advances and cash flow that made it easier for these organizations to compete.

We also explicitly decided to contract with what are known as umbrella organizations. We thought that was a nice, non-sectarian term. We had in mind to maybe get money to County Councils of Churches, who would deal with the administrivia of working with the government but pass the funds through to local congregations who could provide the kinds of services we need. It turns out not just Councils of Churches took advantage. United Ways took advantage too. They did the contracting and passed money down to their local organizations perfectly fine. A great frustration of the reporters who asked questions about what we did in Pennsylvania was that I never was able to tell them how many faith-based organizations we contracted with, try as I might. We had sort of a don't ask, you know the rest, philosophy. There's no box on the application-check here if you're faith-based. Somewhere obvious. When we contracted with United Methodist Church, I was pretty sure that was faith-based. But then there was Sisters United. I wasn't sure whether these were nuns or feminists or both. But they did real well with their contact.

To come to the chase here, did it work, was it effective, was it worth all the trouble we went to? It varied according to the exact nature of the service we were buying. For example, if we needed a quick turnaround program where 250 people would get their first jobs within six months, smaller, neighborhood-based organizations did not have the

capacity to gear up that quickly, and so very often they did not do well with their contracts. When I say did not do well, I need to tell you how that was determined. We have formal monitoring teams on our programs. We monitor all of our contracts closely. If you're not hitting your performance standard within six months, you go on probation and you get technical assistance from us. And if you don't hit your goal by the time you're at about ten months, we start canceling contracts, and we do that across the board. So that kind of quick turnaround contract, the faith-based, the community-based organizations did not necessarily do well with. Some did-the more experienced ones, but not the new ones. Contracts they did very well with-we had a program called Community Connections. This was a program where we sent people out to find the folks who weren't coming in to talk to us. They just weren't showing up at their appointments. We didn't know what was what with them. So we wanted to hire people to go out and find them and talk to them-why don't you go in? Why don't you sign up for these training programs? You only have five years-you're wasting your time here. Sort of counseling them to make better use of their time on welfare. The smaller neighborhood-based and faith-based organizations did extremely well with that kind of contract, as you might imagine.

Here's an interesting one that I want to tell you about briefly. We called it J Rare. In government, that's what we do. We make up acronyms. This was one Job Retention Advancement and Rapid Reemployment Services. Here was the idea. The performance standard was this: We refer people to your program. You have a year to work with them. Sixty percent of them have to get a raise of at least twenty-five percent. These are employed, low-income, entry-level people. You can't screen any of them out. No creaming. Some of the corporate contractors left at that point. And to keep your contract, to stay off probation and get your contract for the second year, sixty percent have to get a raise. This is sort of the promise of welfare reform. We don't just ask people to go out and work. We help them move up the ladder. Interesting, interesting, what people chose to do with this money. Here's something very weird that I need to explain. What is a job retention and advancement service? This drove the attorneys and the accountants nuts, because I couldn't specify in advance what we were buying. I was buying outcomes-people getting raises. So for the lady pushing pictures on a cash register, a job advancement service might be literacy training class. For the young mom he lives in a neighborhood where everybody parties until three a.m., a job advancement service might be a human alarm clock who goes around your house and gets you out of bed in the morning and makes sure you get to work on time. As you might imagine, the more professional, classic, consolidated school of business-type organizations did very well with the literacy approach. The faith-based organizations did really, really well with the human alarm clock approach, and a lot of people got raises and started making progress on the economic ladder.

The organizations, the faith-based organizations that did not do well with us, besides not being able to gear up quickly enough, sometimes they couldn't deal with the aggressiveness of the performance standards. It wasn't consistent with their mission. They wanted people to come to the point where they could see the light, and our contract should sort of require them to shine the light in people's faces, and so that was a struggle for some people.

Let me wrap up because I know time is short and I'm hoping for some questions here. These issues are very hard that we've been talking about today, the hiring issues and so forth. I did not come to this program and doing this kind of contracting, working with these organizations, out of any ideological need to test the constitution or anything like that. I find that they worked for a lot of reasons, and they reached clients that we could not reach in other ways, and for me, the idea was spending the taxpayer's money and getting the outcome that we purchased. I don't know how you feel about this. My own view, after a lot of years in government, is that too many people in the American public have grown to not expect outcomes from government programs. They just don't. They measure whether a public official cares about a certain constituency, and caring is measured in dollars, but you can really shake people up by actually producing results, like young mothers in entry level jobs getting raises good enough to move out of the neighborhood, and I found that many of these programs achieved quite spectacular results. The question then arises why. Why did they achieve the results? Everybody swishes together the terms faith-based organization and community-based organization, CBO, FBO. You sort of swish them together and pretend people don't notice the difference. I started wondering after a while whether this worked because the organization was neighborhood-based or because it was faith-based. I have some research instinct and I really wanted to know the answer. In other words, did the woman trust the lady at the church because the teacher was a woman of G-d, or did she trust the lady in the church because when her baby had a fever of 103\_ at two in the morning, that woman came to her house. She happened to live nearby and help her. What difference did it make? And as you might imagine, the answer varied considerably.

I talked to a lot of welfare recipients. I made it my business to sort of not be a pie in the sky bureaucrat but to ask them. I talked to women and I said, "What made you get up at five o'clock in the morning and stuff your toddler in a snowsuit and stand out at the bus stop in the dark to go to a six dollar an hour job?" I asked this question quite regularly. You'd be surprised how many toddlers were at bus stops at six o'clock in the morning to make this work. And never once did one of them say to me the computer system really made a difference. Or even the career assessment inventory gave me a new outlook on life. Very often they'd thank the teacher. Very seldom did they mention a role model in the neighborhood, because not that many people worked and knew what to do on a snow day. Quite frequently, with startling frequency, the answer was, "I came to believe that G-d had a better path for me than the one I was on." And if that makes the difference and you want to be effective, why would you walk away from trying to wrestle with the issues, legal and otherwise, so as to partner and capitalize on that. Thank you.

**Moderator:** The next presenter is Samantha Smoot, who is the executive director of the Texas Freedom Network, which works on an agenda of religious freedom and individual liberties, particularly to counter the religious right. It's a grassroots network with over eight thousand religious and community leaders around the state, and Miss Smoot has many years experience in issue advocacy in political campaigns, and she will present some thoughts on a more critical look at government funded faith-based services.

**Samantha Smoot:** Thanks a lot. I'm thrilled to be here with you all and I want to thank all of you who are here who have spent so many years working on the statement and working on this conference and working on this issue which is so vital to our constitution and to keeping alive the conversation about how it is we do help people.

I don't know about you all, but since September 11th, just about any comment can send me into kind of a reverie about big issues when in fact we're trying to look at the trees and not the forest. I'm going to talk about what happened in Texas and some of the problems that we had with implementing Charitable Choice, but every time I state this issue, I feel the temptation that I felt when Dr. Heller was speaking, about how wonderful to have something that actually works, and we have resources on the one hand that are the government's, are taxpayer's, and we have people in need on the other hand. This may work, but I do believe there are things that we can't legislate, try as we might.

On to more grounded things. I'm from Texas, and Texas is a state that pursued implementation of Charitable Choice, perhaps more vigorously or aggressively than any other. That's why I'm here to talk to you about what we've tried and some of the outcomes we've had. Texas is obviously important for other reasons as well. We all know how committed this administration is to Charitable Choice, and the president personally- I'm sure you all noted-that in the week after September 11th, he asked the Congress to push forward with the Charitable Choice initiative and his education package. It's that important to him. And I want to tell you all that it's been that personally important to him since at least 1995, when he was a newly elected governor of Texas. So I think that what that gubernatorial administration did and how they pushed forward may cast some light for us now on how this presidential administration may push forward. And I also think that this is particularly significant at a time when the legislation in the Senate, if not languishing, certainly is relaxing for a while because, as I'll talk about, there are numerous non-legislative means that this administration is looking at, and we have some results to talk about from our experience in Texas.

We've been researching Charitable Choice in Texas for about sixteen months now, and the first thing I should tell you is the thing that was most surprising to us in our studies was how little there was, in fact, to study. With all the talk about Charitable Choice and this much-vaunted initiative, we actually could find relatively few Charitable Choice programs. Of the 2300 programs that the State of Texas will tell you are Charitable Choice programs, only about 500 of those are actually funded programs. The rest of them are various kinds of informal partnerships. Of that 500, only about 100 are truly Charitable Choice, in other words, came from the welfare reform act. The others are programs that for one reason or another are counted by the state as Charitable Choice. Even though only about 5% of the State of Texas's Charitable Choice programs are technically Charitable Choice, over 10 million of the 13.5 million dollars in Charitable Choice spending went to those types of programs. That's a little bit misleading as well, because the overwhelming majority of that money went to programs that had already been funded before the passage of the 1996 welfare reform act. Catholic charities, for instance, got a grant for the State of Texas in the amount of over three million dollars, and so again, the vast majority of Charitable Choice in Texas was simply a continuation

of funding and partnerships with organizations and programs that had existed for years and decades. Very little new, despite all the hype.

We were surprised at this and started asking questions, and again, this evidence, unlike the financial evidence is anecdotal but certainly those in the faith-based community had the word that there was no new money on the table. So even though there was some initial excitement in the religious community, people, it seemed, figured out that this was not additional money and I think we're seeing a similar thing nationally now, that many people in the religious community realize that with budget cuts, we're not talking about additional potential sources of funding.

We've also talked to, of course, a large number of religious leaders and congregations that already have programs that serve people in need but are not interested in partnering with the government in a formal funded fashion. Their reasons run the gamut from they're concerned, of course, about government strings and red tape to becoming dependent on that funding to potentially their voice being threatened if they are dependent on government funds. But the main reason, we found, in talking to people was that the congregations and the faith-based organizations that have the capacity to partner with the government in a professional outreach or care-giving program were already doing it. If they have the capacity and the desire, they probably were already doing it. This is something that's been talked about today. Yes, usually this is the larger congregations or the larger, better established organizations. But certainly, smaller congregations-we talked to several ministers who said we do not have the staffing or the ability to handle all the paperwork that comes with this. Some have handled this through various umbrella groups quite effectively, but for the most part, groups that want to be in this business of partnering with the government are already doing it. We've sort of seen this as a solution in search of a problem, because groups who are interested in getting funding already can.

The financial information I just gave you about the State of Texas and you probably already guessed this, certainly Stanley Carlson-Thies and also Dr. Heller would lead you to believe that it is difficult, if not impossible, to actually count the number of groups that are getting funding that are faith-based. I'll tell you-in Texas there is no common or clear definition of what is a faith-based organization. The state doesn't have one. The two state agencies, Health and Human Services and our workforce commission don't have one. The twenty-eight regional workforce commission boards certainly don't have one, and in our one-on-one interviews with the directors of the twenty-eight local boards, we've been told by several of them that they have no Charitable Choice contracts, even though they've got very religious program names on their list and the State of Texas lists them as having contracts. We've got local workforce commission boards who count only their...and welfare to work funds as Charitable Choice, but all of those, and we even have one that counted all of the federally funded programs as Charitable Choice. They were all over the map. So there's a lot of confusion about tracking this program and I hope that Stanley Carlson-Thies, if he was hoping to look to the states for information about that 80-90% of where the money goes, I think he's going to be sorely disappointed, because

our experience would suggest that they don't have it and I'll get in a minute to why this is so important.

We have also had problems in Texas not just with tracking the money but also with implementation of the Charitable Choice law. Individuals at all levels of state government have been on the record with varying interpretations of what the law is, what is permissible and what is not, in terms of how these funds are being spent. With all this confusion coming down from the top, it's not wonder that there is confusion down at the level of recipients of Charitable Choice funds. We have a program in Texas some of you may be familiar with. It's now closed down, but when it was open it was called the Jobs Partnership of Washington County. It was a job training program. It was the only one in its rural county, in Washington County, Texas, and this was a project of a local church. 40% of the funds for this program were provided with Charitable Choice monies. This was a small congregation. It was a small program. They had tremendous difficulties, first of all in separating the funds out and only funding the secular job training aspects of the program. Instead, it just so happened that they purchased Bibles and other worship materials with the money in part. But I think more telling than that is the fact that this program had real trouble in segregating the religious training and worship practices, the religious aspects from the secular ones. So this is a program, for instance, whose mission statement was to help people find meaningful employment through a relationship with Jesus Christ. Every meeting of this program contained prayer and worship and hymn singing, and so it was hard to segregate by minutes, for instance, but it was even harder to segregate because if participants are being taught, for instance, comportment on the job, how to behave on the job, and they should treat their boss respectfully because they're not working for their boss, they're working for the Lord Jesus Christ, how do you separate out which is the religious part of that and which is the secular part of that? It is well nigh impossible, and really I think the only way to get around it is a don't ask, don't tell type policy. Job Partnership of Washington County also, not surprisingly, ran into problems with the religious freedoms of the people that they were trying to serve. A third of the people who ran through that program said that they did feel pressure to join the congregation of the sponsoring church.

So with all the problems tracking the money, implementing the money and so forth, you won't be surprised to learn that we are going to hear a lot, and we've been hearing today already, a lot of words like results. We're going to hear a lot of words like appropriate safeguards. I actually was glad to hear Dr. Heller talk about outcomes, but I think that when you talk about results and outcomes, first of all, there's a very real reason why Charitable Choice proponents are going to talk about results and outcomes a lot, and that is because that is the one thing that might calm Americans' uneasiness with handing over the government the right to choose which religious groups to fund and which ones not to fund. Unfortunately, what I can say about our experience in Texas is it's very difficult to judge results of a faith-based program and allow that program to retain its religious character. Not always, but frequently.

A couple of quick examples. I think many of you are familiar with a program called Teen Challenge. There are several others around the country-Victory Fellowship and so forth.

Teen Challenge is famous because it is the way that then Governor Bush became interested in Charitable Choice. Teen Challenge at the time was about to be shut down by the State of Texas because they had repeatedly violated a number of different statutes. Teen Challenge has since become one of the poster children for success and how faith-based organizations do a better job than other organizations. But it turns out that Teen Challenge only counts their success rate among the 18% of people who make it all the way through the program, so they claim 70% or 86% is their success rate, which is wildly successful by any means, but the truth is that that is only 86% of the 18%. Interchange, which is the prison fellowship program located in the Houston area, does their numbers in a similar fashion. So there are some questions about success but I would say there are philosophical questions about how you define success with a faith-based program as well.

Here I'll invoke my fellow Texas, Marvin Lasky, who is often cited as the architect of Charitable Choice, and he has said that the press is going to have a difficult time covering Charitable Choice because we are accustomed to outcomes. We are accustomed to worldly outcomes. But faith-based organizations are going to be looking for everlasting outcomes, and so there really are questions of what is success. And again, if we can't track the money and count the money, how do we know what's working and what's not.

I have to wrap up here because I know time is short, but I passed out some information. We've seen some problems with preferential treatment in Texas being given to faith-based organizations. I'm going to close with one quick note because I think this is very important, again, given the fact that the legislation is very probably on ice for the near future anyway. The administration's representative here talked very much about how administrative action has always been a main goal of this program and so I don't know how many of you have had a chance to actually look through the reports that were published by the five agencies of the regulations that might be burdensome to religious organizations. We did so, and we did so with interest because we found a number of parallels with what has been done in Texas. Briefly, let me tell you that deregulation of faith-based organizations was a major, major component of Governor Bush's Charitable Choice initiative in Texas, and it followed eventually two different paths. On the one hand, straightforward deregulation of faith-based drug treatment agencies. In Texas, if you're a faith-based substance abuse treatment program, all you have to do is register that fact with the State of Texas and automatically you become exempt from a long list of basic health and safety regulations, including you no longer have to report medical emergencies, or you don't have to report medication errors. Your employees don't have to have any level of training, much less licensing or certification. Intake and follow up, client's rights, etc. So that's the straightforward path. The other is something that was called in Texas alternative accreditation, and this is not a straightforward exemption from laws but it is alternative, private accreditation in lieu of state licensure. In Texas, we passed a bill that the governor submitted that was alternative accreditation for faith-based child-care agencies, and I do note quickly that we have the most liberal child-care laws in the country in terms of freedom of religion, so there was no religious freedom rationale for this, but only one agency filed to become an alternative accreditation agency. It's called TACCA, Texas Association of Christian Child-Care Agencies. They accredited

eight homes, the first of which is called the Rolof Homes, which in Texas are notorious for abusing children for three decades. The Rolof Homes have since been covered by Dateline and The Washington Post, so some of you may be familiar with that. The point, I think, is that alternative accreditation by putting the state at more than arm's length from these homes actually endangered people and encouraged dangerous practices.

What we've really seen, given that so many people of faith and faith-based organizations are already doing the work, there is no need to rally the armies of compassion because those are the armies that were already in the trenches. By relaxing the regulations on discrimination and health and safety, what we've done instead is we've invited in those people who were inclined to not play by the rules in the first place.

I'm going to close now and sorry to take so much time.

**Moderator:** Thank you. Our next speaker is David Wright, who is director of Urban and Metropolitan Studies at the Nelson Rockefeller Institute of Government at the State University of New York. He serves as an advisor to the New York State Division of Housing and Community Renewal on affordable housing and downtown development policy and has recently finished a number of research studies on community development and enterprise zones, etc., in a number of cities around the country.

**David Wright:** Good afternoon. I know it's been a very long day for you all and you've been asked to take in a whole lot of information, but as the academic on this panel I guess that really can't stop me from torturing you with a little bit more context, and worse than context, some descriptions of research that we have underway.

Long before and certainly apart from Charitable Choice, there had been some trends underway that are an important influence on faith-based organizations being involved in social service delivery, and it's important for us to be mindful of those as well, for all the very interesting ...that we've heard today and we'll focus on I'm sure more in the coming days on Charitable Choice. We also need to just keep in mind, again, these longer term trends and some other very important policy issues that are going to be coming up, that are certainly going to be relevant.

As far as trends go, for some decades now and certainly with increasing intensity since the personal responsibility act of 1996, there have been some profound changes in the relationships between government non-profit organizations and private sector organizations as well in the delivery of social services. There's been an aggressive devolution, a sending out of responsibility from Washington out to the states and from states to smaller units of government. There has, as well, been increasing complexity of relationships between local units of government and service providers. Much more flexibility in those arrangements is now possible, and increasingly flexibility will be possible. At the same time, a second, very important trend that has been influencing much of social service policy, community development policy as well, is the idea of seeing people that are in need in context-not as people only who need additional income, but who also may need education, housing help, a variety of other social supports. Both of those trends, the idea of seeing people in the context in which they live and the trend

pushing flexibility and responsibility for social service delivery down to smaller units of geography, both of those trends are an important influence on whether faith-based organizations are going to be increasingly involved in helping to deliver social services, quite separate and apart from Charitable Choice. I want to just underscore the need to consider some things beyond the immediate Charitable Choice debate.

The Rockefeller Institute of Government where I work, and the Institute is the public policy research arm of the State University of New York, has several interrelated streams of research underway that touch on the extent to which faith organizations are involved in delivering social services, and I want to tell you a little bit about those lines of research. The first of our large studies is a study called The Study of State Capacity, and forgive me for the dry, academese on this, but the capacity studies' purpose is to take a very good, close look at the management capacity of states and their local partners to deliver social services in this redesigned environment, after the Personal Responsibility Act of 1996. This study is covering twenty-three states across the nation, usually a couple of different sites in each of those states. In it we are documenting the design of the new delivery systems, where money goes, what organizations are involved, both governmental and non-governmental. In that study, we've come across various examples of faith organizations involved in various ways, and I want to share a very quick overview of some of those findings with your now.

In Texas-well, I'll skip Texas, we heard a lot about Texas-in the interest of time. In Colorado, El Paso County contracts much of its social service delivery system out to organizations and includes a variety of faith-based organizations in that system. In Georgia, the Department of Human Resources has begun a Charitable Choice initiative whereby officials are convening regional workshops throughout the state to explain new rules to faith organizations and to encourage their participation in providing services. In Michigan, the Michigan Works Agency, which is Michigan's prime human resource agency, contracts with an organization called Good Samaritan Services, which recruits, trains and monitors activities in a church-based mentoring program. Good Sam, as it's known-kind of a catchy little name there-recruits faith-based organizations to assume responsibility for family support services for referred clients, recruits volunteers from local churches and the community at large who are able to service client mentors. They screen volunteers for suitability, provide training to those volunteers in how to mentor. They maintain records regarding recruitment and screen and train and a variety of other activities like that. Also in Michigan, Project Zero, which is an effort to reduce to zero the number of work-ready TNF clients that don't have earned income. The one county that achieved that was a county that used a religious organization. A provision in Michigan's regulations, by the ways, states that in contracting with faith organizations for mentoring or other supportive services, there can be no funds used for any sectarian purpose, sectarian worship, instruction or proselytization. In New Jersey, the Department of Human Services has awarded grants to qualified faith-based, non-profit organizations who work with post-TNF clients to help maintain self-sufficiency. The faith-based agencies ensure the clients are aware of all post-TNF support services, including child care and Medicaid, transportation and the like. They also provide additional services as required to help clients remain employed. In Essex County, a large county in New Jersey-

that's where Newark is based-involved churches as well as other community-based non-profit organizations as vendors for job assistance services, child care, substance abuse treatment and other services as well. In New York, a strategy for who to contend effectively with child-only cases-those are cases that remain on the rolls where the only person eligible is the minor-proposes to use faith-based community to work with caretaker relatives, children themselves, absent parents. In New York City, there's a Charitable Choice demonstration project that involves faith-based organizations, which I'll touch on in a minute. In Utah, the state relies on civic...(End of tape 6, side 1)

In West Virginia, the Department of Health and Human Resources contracts with Mission WV, a coalition of faith organizations. They provide computer training to those who are eligible. In Wisconsin, my last example, the state provides a performance incentive, encouraging the use of faith-based providers. A substitution credit is generated by contracting with a faith-based provider. The W2 system, which is the name for TNF in Wisconsin, operates within a broader safety net and service network. It typically includes pantries, shelters, the child welfare system, mentors, sponsoring church groups, mutual support groups at the neighborhood level and a host of volunteer events.

The next round of the capacity study is underway presently. We're going to include nineteen states in the next round, twenty-seven counties in total. We're tracking and will be reporting on participation of faith-based organizations as part of that research, and we expect our field reports in in the spring and a report out in December of 2002.

A second stream of research that we're doing is an intensive evaluation of a Charitable Choice demonstration program which is in New York City. This demonstration program involves thirteen churches, two very large-scale non-profit community organizations as well. The idea is to test the effectiveness of faith-based organizations working to assist clients who have been penalized for not complying with the work requirements under the temporary systems for needy families act. They perform an assessment of needs. They provide job readiness training. They refer clients to appropriate employment and training programs and otherwise counsel them.

The outreach services consist of two main tasks. The faith-based organizations make contact with clients through mail, phone or home visits, after they have been referred by the city government. They assess client needs. They again counsel them to participate in job readiness activities, and then they try to get them to return to prescribed employment and training programs and get them secured as quickly as possible. The structure has four intermediary organizations that act as the administrators of this on behalf of the twelve churches. Those are Mission of Mercy, the South Bronx Overall Economic Development Corporation, Harlem Congregations for Community Initiatives and ALLEN, African Methodist Episcopal Church in Queens. Those are the four largest groups. The front line churches are all Christian. Their affiliations differ. They include Pentecostal, Baptist and Presbyterian. The congregations in the communities these churches are based within are primarily Hispanic and African-American. They vary quite a lot in financial resources, level of social services and the like. Most of the buildings that are involved here are not utilized during the week or otherwise, outside this demonstration project. Most of these

churches involved found themselves in a variety of other services. They operate schools and day care centers, job training, a host of activities like that. Each of these twelve organizations, the twelve churches themselves, operate outreach centers within their neighborhood to be more accessible and available to clients. Mostly those are pretty simple, small, straightforward operations, but they do provide an important way of reaching out to the community.

The formal evaluation that we're doing on that program is going to be expected in January 2002, and it will get directly at the question of the effectiveness of this service. We're going to be comparing services through this program, both to other city-delivered services and other community organizations that are working with welfare clients.

A third stream of research is pointed at the opposite end of the telescope. It's an effort to look at the neighborhood level, at organizations that are particularly important to making certain neighborhoods fare well over time. It's a study called the Urban Neighborhoods and Community Capacity Building Study. It's an intensive look at social capital in predominately African-American neighborhoods, over eight hundred neighborhoods across the country, forty-two that we've been studying in-depth and in the field. The relevance for faith organizations is that we've asked a series of open-ended questions both through community surveys, to people that live in these neighborhoods, as well as through direct interviews with key informants, important civic leaders and the like that are based in these neighborhoods, and we've been asking them open-ended questions about what organizations are most important to their community, what's helped shape them over history, what's most important to their ability now to marshal forces on behalf of the community to provide services that are needed to people that live within them. Through that process, roughly 15% of all the organizations that have been identified through that process, are religious-based. Interestingly, there seems to be a linear relationship between the prevalence of organizations like that, how often they're named, and neighborhoods that are doing better over time, particularly moderate income neighborhoods. The higher the proportion of faith organizations are than those that are present in those neighborhoods, the better off they seem to be doing in terms of their socio-economic status over time.

Lastly, beginning after January of this coming year, we anticipate undertaking an expanded program of research on faith-based social serving organizations. Our program is expected to encompass several different things. One of the main ones is convening fellow researchers to identify gaps in knowledge about what is actually known about social serving organizations that are faith-based-what do we know empirically about their effectiveness, what gaps are there still in what we need to know. Secondly, we plan on summarizing and disseminating what formal evaluation material has been done on faith organizations to the present. We also plan on taking some quasi-experimental research underway, based in part on our work in New York City, to take advantage of the reporting that's required under TNF, which has a variety of data over time about how people are saying we're going to come off the rolls and we're going to be looking to do some demonstration research involving faith-based organizations in various cities. We plan on tracking and reporting policy developments regarding faith-based social service

delivery across the states, and also federal policy as well. In part, what we are going to be doing is working through the comptroller's offices and budget offices in each state to form a baseline analysis, what information is available on what faith organizations are involved in getting direct contracts from government and trying to trend that data over time.

Lastly, we plan on exploring trends in the corporate and private grant making, to get into service delivery relationships with faith-based organizations as well. We look forward to working with a number of you that are in the room.

**Moderator:** Thank you. Now with a perspective from a local faith-based service provider, Reverend Alfred A. Terrell is pastor of the Macedonia Baptist Church in Newport News, Virginia, and is the founder and director of the In-Agape Family Life and Educational Center, which sponsors two major programs working with youth who have been suspended or expelled from school for various reasons. Pastor Terrell.

**Pastor Terrell:** Thank you. I would say good afternoon, but I've seen how you all responded to them so I ain't saying nothing.

Family Life Center, is a 501(c)(3) organization called In-Agape Family Life and Education Center, and In-Agape is the Greek work for in spite of, in spite of who you are or what you've done, we love you anyway. I separated the 501(c)(3) from the church because I asked G-d to show me what He wanted me to do and He told me, and then I asked Him where were the people, and He said I want you to go three places. I want you to go to the school division. I want you to go to social services, and I want you to go to juvenile court, and I did. And I went to all three of those agencies and formed relationships with them and partnerships with them, and that's where we get our people.

In-Agape takes children who are suspended from school ten days or less, or now we are up to eleven days to three hundred and sixty five days, long term suspension, and we bring them into the church. The schools supply us with the books, the lesson assignments and they even give us three teachers, to the church. This is not separation of church and state simply because the school division does not send them to us. They refer the parent to us, so as long as the parent is bringing the child to the church, then we're free to do as we please with the child. Over the last five years, we formed a great relationship with the school divisions in Hampton, Newport News and Norfolk, and so they send us the teachers, the teachers do the academic. My staff and I do the counseling, because we want to do two things here. You want to send a child back to school current with the work, and the next thing you want to do is you want to send this child back to school with behavior modified. You want to change the attitude. You want to change the conduct. You want to change the personality. You want to do that, and that's where In-Agape comes in. So if we can take a child who's been suspended from school and bring him into the church, do the same work that they would have been doing had they been in school, keep them off the street during the day, stopping them from getting into more trouble, and then providing help with their attitudes and personalities and those kinds of things, then the school division is pleased, the parent is pleased and the church is pleased.

For us, it's the ministry. I do not consider what I do as helping social services do social ministries. What I do is I get social services to help me do my ministries. You see, all the talk I've heard over the last two or three years, it's churches or faith-based communities or initiatives helping social services to do social services work. I turned it around. I get social services to help me do my ministry and get paid for. And I'll tell you why-because accessibility-in order to do effective ministry, you have to go where the needs are. Well, the needs for youth, and that's our specialty, are in the juvenile court system, in the school division and in social services. Three years ago, I was called in by the juvenile judges in the 7th District Court and so now children are actually sentenced to us, or referred to us by probation officers and we house these kids in another building. We have a computer lab for them if they cannot go to school for the next year. We have eighteen businesses within the community where these youth can learn how to do various jobs, and they are exposed to different trades and skills and professions. We help them to acquire a GED. And then, starting next week, we're going to be taking boys ages four to eleven who are removed from their home by social services and we're going to put them in a facility of ours, where we will keep them up to ninety days until social services can find a place for them to go. In Newport News, there are 600 youth in the foster care system, and only 147 foster care homes. So the church comes in and says give us the child.

If you want to talk about faith-based initiatives and government programs or grants, we've been receiving money from the government for the last five years. I think the mistake here is when this first came out, especially in the black community, the African-American community, people were seeing dollar bills. They were seeing dollar signs, and everybody wanted to jump on board, and I said you're crazy. First of all, because if you allow the government to give money directly to the church, and I know the church that I come from, there's going to be some fighting in the church. I'll give you an example. Mayor Joe Frank, the mayor of Newport News, had a golf tournament and raised ten thousand dollars and gave it to me. The City Council voted to give me some start-up money, and I had some deacons in my congregation who saw me on television receiving this check, and then they said where's the money? I said the money is in In-Agape Family Life and Education System. So our people have to understand that the separation between the Family Life Center and the church is significant.

The other thing is that you got to be careful to allow the government to come inside the church to audit your books. I know that you can get around that by opening up a separate account and that kind of thing, but suppose your church gets the money from the government and you do open up a separate account for that money, and then you do, by the way, pay the church for some lights or use of facilities, and when an audit comes in, they're going to want to see where every dime went. So you say well, over here is an account that we set up separately, the money that you gave us, and we gave the church, by the way, so much money per month for use of gas or electric or van, and then they're going to say well, let us see it. And where are they going? They're going right into the books of the church, and any time you let the government come inside the church, there's no telling where they end up. That's what I believe.

The other thing is that we see an average of 400 children in Stay While You're Out program a year. 400 children come through our church every year. 400. 400. And one of the questions we asked is have you told your pastor about your suspension? And they're going to tell us one of two things. We don't have a pastor or no, we haven't told the pastor yet. If they have a pastor, we call the pastor and invite the pastor in, whether it's a Jewish rabbi, a Catholic priest or whatever. We invite the pastor in, the religious leader in, to do the counseling with the child and that family. But if they say well, we don't go to church, guess what we say. Welcome to Macedonia Baptist Church. For us, it's evangelism. During the day, we only do those things that we say we're going to do on a grant. If we say we're going to teach math, we teach math. If we say we're going to do some drug and alcohol, we do drug and alcohol. We don't open up a Bible during the day. Why? Because our motto is I'd rather see a sermon live than to hear one preach. And when people see the love for them through you and your concern for them and their families, guess what-they'll want to come to your Sunday schools and they'll want to come to your Bible studies.

I'll give you an example. Probation officer brought a kid in fourteen years old. Happened to be Hindu. No problem-we take anybody. We helped the boy get a GED. Two Sundays later I see him sitting in the congregation. I didn't say a word. The next day, Monday, I said not a word. We kept helping him get a GED. The next Sunday he was sitting right in the congregation. I didn't say a word. That's between him and G-d. The third Sunday he got up and he joined our Church, got baptized. We didn't encourage him to do that. I let him make his decision on his own. We didn't push the issue. The only thing we did with that kid was to help him get his GED, change his attitude and behavior, and he saw the love that we were demonstrating for him and he decided he wanted to be like us. The danger is when the government gives funds to a religious organization-know this. The religious organization has a mission, and the mission in any organization is for them to become like us. That's a great principle in ethical issues.

One of the great ethical theories is if you want to know if a thing is right, make it universal. Everybody ought to be like me. And so when the church is designed to do ministries, that means when I do ministries on behalf of the church, I want everybody to become just like me. I appreciate who you are. I respect who you are. But if I'm going to feed you and I'm going to give you some counseling, what do I want? I want you to become just like me, because the mission of our church is to exalt the savior, equip the saint and evangelize. So if you give Macedonia some money, guess what we're going to do? Exalt the savior, equip the saint and evangelize. If you give In-Agape Family Life and Education some money, guess what we're going to do? We're going to do some A, B, C, D, E, F, G. We're going to do some math, some science, some reading, some calculating, some job development skills and all of those kinds of things because that's what we're set up to do. I designed the Family Life Center as a vehicle to gain access to those who need help, and then took the church and formed ministries to those people that we have made contact with, to give them, after hours-because everybody works during the day anyway-assess to those people so ministries can be done, and I think this is the safest and the best way to do it.

Another thing that worries me about this is that a lot of ministers believe that all you got to do is have a program and ask for some money. Guess what? There is no new money, and if this will keep going on like it is then there's not going to be any other money. So what happened is that we believe that we can just open a program and here comes some money. But guess what? You have to compete for funds. That stuff is very competitive. You have to have a grant writer. You have to have goals and objectives. You have to have outcomes. You have to give reports. And not only that-in most grants that I've written or received, you have to have start-up money. You don't get your first buck of money until about three months after you started a program, and so if you don't have start-up money, guess what? You can't start up. So there are a lot of things in this that we preachers did not see, and are now beginning to see. It's not as easy as it seems, so what we do is we have three initiatives. Children suspended and expelled from school, children from juvenile court, and now an immediate foster care center for boys. All are social services ministries, but again, I use social services to help me do my ministries by giving me access to people who need help, and then I organize my church to do ministries to those folks who need help with their permission, and that way everything is safe and I'm not worried about the government coming in and telling me what to do, because when I make an agreement for a grant, I sign a contract. The grantor has rules. The grantee have read the rules and the grantor has read what I want to do. If they agree with it and I agree with what they want me to do, then that's a great love affair.

But when you start giving money to a church or synagogue or mosque, you have a problem, because that leader, religious leader, might not want to do what is stated in that grant, and then you want to get the money. But if you keep is separate, form a separate 501(c)(3), and that way get access to the people who need the help the most and allow social services and partnership with school divisions, court system, because that's where the people are who need help. And if you really want to do a ministry, if you really want to improve ministries, go to where the people are. And again, where are they? They're in jail, they're in court, they're in school and they're in social services. And I did that in a nutshell. I'm a Baptist preacher though.

**Moderator:** Thank you very much. We do have time for some questions.

**Question:** Drew Gensler, Lutheran Services of America. We've heard some talk today also about the idea of intermediary services, large and established groups or a network of groups that has the capacity, has know-how and ability, actually acting sort of as an assistant in grant writing or application writing, and, of course, smaller or newer groups. I'm wondering on your panel's comments on what you might feel about the effectiveness or the feasibility of this intermediary service.

**Sherri Heller:** We found that to be a very effective approach, and actually we found it was going on long before we tried to make it happen. When I first started meeting with African-American clergy in Pittsburgh and Philadelphia, guys would come up and introduce themselves to me and say, "Hi, I do business with you." And for the life of me..."I'm sorry, what as the name of your church again?" "Oh yeah, well, it's not in the

paperwork. I'm a subcontractor to Consolidated School of Business because they don't have the people who can go out and deal with clients when they need it in the middle of the night and I do." So that's been going on a long time and it seems to be very effective.

**Samantha Smoot:** It certainly happens in Texas, and for the most part to very good result. There's a wonderful program in Dallas called the Community Council of Churches that functions essentially as the fiscal agent for dozens of faith-based organizations. The key, I think, though, is not letting this intermediary organization structure allow organizations to...or make it more confusing for the subcontracting organizations to know what is permissible and what's not and what crosses the line.

**David Wright:** We've seen interesting examples both of that as well as partnerships between large organizations and smaller, community-based ones. You might want to take a look in Wisconsin and in Ohio for both.

**Reverend Terrell:** I think I got your question right. Partnership is essential. You see, as a preacher, I owe my congregation the best I can give them. If Macedonia Baptist Church can partnership with social agencies and I can get them involved with social agencies when they get in trouble, then we have an ace in the hole. I would suggest that in any church or religious organization, there ought to be some kind of partnership within the community between the religious leader and those agencies. You can't beat it. You can't beat walking into a court and the judge says, "Hello, Reverend Terrell, how are you doing? Do you want this kid?" And I say, "Yes, that's why I'm here." When you can do those kinds of things, when you can partnership effectively with agencies, you gain the respect of those agencies who have the people, to get them to you where you could do the kind of ministries that you want to do with them. I think partnership-you just can't beat it.

**Question:** Do you believe there's more education needed for ministers, for churches, for houses of worship...more effective partners with governments so that...properly structure monetary contributions?

**Sherri Heller:** I would answer yes, but you got to be careful about that word "education" to be real specific about what you mean. Is it indoctrination? Is it advantages, like you have special help on how to fill out the application, or what exactly does it mean. I prefer the word "information exchange and trust building" and it goes both directions. If people see that you're for real, that you tell the straight scoop, that you're not an ideologue or you're not in it for the press spin, you're in it to help the same people, then enormous stuff happens and it goes both directions.

**Reverend Terrell:** I think more and more colleges are becoming involved in this. We receive students from half the universities. For example, Princeton University sent us a student every summer to do internship, a theological student, and I think that if this concept, or something like it, were taught in schools of religion, of theology, or Bible colleges even, I think that to educate ministers to this kind of ministry would be effective, simply because when you start pastoring a congregation, those folk in the congregation don't know a thing in the world about this. But if the religious leader had a concept of

how to write grants, how to deal effectively with other agencies in the community, I just think it would make better for the congregation and the community as a whole. So the better educated the minister is or the lay leader is who's doing this kind of work about forming these kinds of relationships and developing these kinds of programs, I think it works for everybody.

### **Inaudible question**

**Sherri Heller:** I'll answer by saying that I personally think the beneficiary choice provision is important, but after twenty years of doing public sector program administration plus, I can tell you that any attempt to ritualize the procedure and statute is bound to fail. All you'll get is the printed stuff handed out in a packet with a hundred other sheets. At some level, these things happen because human beings understand the concept, not because you've over-ritualized the procedure. I will give you a very specific example, since you asked. We did, in our program monitoring-remember I told you we sent these program monitoring teams out-our program monitoring teams always interview clients to ask them how things are going, and we interviewed a client at one place who said...we had the right question in there. "Is anybody forcing you to do anything you don't want to do? Do you have to read any materials you don't want to read?" That's the question. It wasn't exactly a proselytization question, but that's why we wrote it. And she said, "Yes, in literacy class we're reading the Bible." We picked that up in our monitoring. The monitoring guy reported it right into our office. We went out to see them. We did two things. We instructed the contractor that they were going to lose their contract if they didn't fix it in thirty days. They wanted to keep their contract so they went out and bought all new materials. Secondly, we gave every enrollee in that class the chance to leave and go to another one, with transportation vouchers and child-care arrangements made by us. Not a single person left, including the one who first tipped us off to the problem. She wanted to stay because she felt more than any other place she had ever been, these people cared about her and wanted her life to come out right. That didn't happen because of any elaborate procedure in the law. It happened because our staff understood the concept behind the law.

**Samantha Smoot:** I think that's a telling example. The one thing I would add is that as currently written after its last revision before passage, HR7 no longer guarantees any kind of a secular alternative, which was really a huge shift. This issue has come up on earlier panels. Is it maybe easier for someone who lives in New York City or a major urban area to examine their alternatives, and someone may be in a rural area and who knows, but I agree with Dr. Heller that people have to understand the basic concept, but I also think one of the basic concepts needs to be that people need an alternative that is not a faith-based one.

**Question:** Some of us were interested in mobilizing the armies of compassion of religious congregations and leaders for the reason the bank robber goes to the bank-there are people there. And I appreciate the...because I don't want to encourage bank robbers. But really the most...thing I've heard is when you said there's no reason to mobilize the armies of compassion because they're all there already in the trenches.

**Sherri Heller:** I think that people of deep religious conviction of many, many faiths are already more likely than most people to be committing their time or their money to helping people in need. Yes. And I think a great many of congregations have active programs. Of course, there are congregations that don't do what their resources suggest that they could do, but my point was that the people we're trying to rouse are the people who have already been roused, and the people who are there not for the financial reward, but because it is their ministry, because it is the right thing, because it's part of their faith and their belief, and they're already there, they're going to be there long after all of us are gone and Charitable Choice is a distant memory.

**Comment:** I have one comment on this question...On the collective issue, people don't act in a rational way, that is, to get the collective job done unless there is an organizing principle who can guide them. If people don't do things voluntarily it's because they individually don't see other people doing it voluntarily, and each is acting on that assumption...

**Question:** Could you help me understand-when you talk about the...beneficiaries, how this works, the process? Is it a situation where you have a client coming to a case worker, a state social worker, and the money out? Choices for supportive services? Whether it's Charitable Choice or not, when the state contracts with a private social service provider, how does that connection between client and service provider happen?

**Sherri Heller:** You correctly described the general gist, although I'll add one little loop. A client and a publicly funded county case worker are talking-here are your options, here's how much time you have, now you could spend the first year in literacy training or you could go get some entry level job experience, and let's look over your work record and the problems you've had in the job market to see which is right with you. Now, here's an organization and they're especially skilled at banking. They have good connections with the banks and people get bank jobs. Over here is a nursing option. Now that might have better hours for you because you have an adolescent. You need to be there after school. This outfit over here is affiliated with such-and-such a church in your neighborhood, which is a good thing, and they have child-care on the premises. They're especially effective with people whose lives are a little disorganized and so forth, and maybe you would like, but it should be clear to you that they have church things going on in the evening which are optional. And then they go on to describe the next one. The extra loop I would add is this. We also have the providers coming into the office quite regularly to pitch themselves, to recruit, so it's not all dependent on how knowledgeable that case-worker is about the options.

**Question:** I apologize if this was already addressed but you mentioned that there are people of many faiths...My question is to what extent people or organizations take advantage of Charitable Choice...(rest of the question is inaudible)

**Samantha Smoot:** All the programs we've identified in Texas have been Christian.

**Reverend Terrell:** We've had some children who were Muslim been suspended from school placed in our program, and I think I've had one child from the juvenile court service who was Muslim, but again, it really doesn't matter because the services rendered, the money that we received from juvenile court or the grant money we received from whomever sponsoring the program, again, is designed...we'll do exactly what we said we're going to do in that proposal. But I would suggest to you though that, especially in Newport News, the black Muslims are beginning to catch on to the Charitable Choice issues and they're beginning to see whether they could get some financial help to do some of the things that they do, because they do these kinds of things within the community and I think that this might bring the black Muslim in America closer to the government here.

**David Wright:** At the present state of the data, it wouldn't lend me an ability to answer that in a definitive way. That's part of what the research we're planning to do after January 2002.

**Samantha Smoot:** Furthermore, in Texas, the outreach, the government outreach to the faith community, starting with the original task force on this issue back in 1995, has been composed of Christians, and so that's part of the problem. I think there has not been...this program, to date, in Texas, has been designed for outreach from the Christian community to the Christian community, and I think that, to some extent, is a factor of it being in its early years as well.

**Sherri Heller:** I do recall one Muslim group that while not doing business with us directly, was interested in having an event for their welfare recipients and bring all the training providers in, like a little back-to-school night. I can't think of a way to describe it other than that. And we helped them organize that. No money changed hands. We just made sure that all the providers got there.

**Moderator:** It's been very informative.

**THE RAPPOREUR'S PERSPECTIVE:  
A LOOK AT THE ISSUES DISCUSSED TODAY AND  
RECOMMENDATIONS ON NEXT STEPS**

**Presenters:**

- **Melissa Rogers, Executive Director, Pew Forum on Religion and Public Life;**
- **E.J. Dionne, Senior Fellow, The Brookings Institution; Co-Chair, Pew Forum on Religion and Public Life.**

**Moderator:** Melissa Rogers was the general counsel of the Baptist Joint Committee on public affairs, and I guess for the last year or so, Melissa and I have been constant rote companions on the Charitable Choice tour, which has even taken us to Aspen, Colorado, so it's a good gig if you could get it. And then we will hear from E.J. Dionne, a star of

screen and press, a columnist at the Washington Post and a senior fellow at the Brookings Institution. Melissa, please.

**Melissa Rogers:** Thanks. I had the privilege of being one of the drafters of *In Good Faith*, and I'm reminded now that this is exactly how I felt after each drafting session of *In Good Faith*. I felt very tired, very convinced of the good faith of my colleagues and the worthiness of the cause. So that's how I feel right now.

Let me try to sum up a bit of the day for us. I would like to try to look at an updated view on where the sources of agreement and disagreement are, as I heard them today in the conversation. I think most importantly, first, we have agreement on all sides that we need to do more as a society and as individuals to help those in need, that the problems of poverty are very real and urgent and that we need more resources brought to the table to deal with these very tough questions. Well, then the question becomes, of course, well, how do we meet these needs and from whence do the resources come? Well, on the first issue, creating a greater resource pool. I think that we heard a number of areas of agreement. First, that we should start with ourselves, that we should give more of our own money, out of our own pockets, to these organizations that are working every day with people in need. Secondly, that the government should create tax incentives, like the non-itemizer deduction, that would give more credit and perhaps spur more private giving. Also, widely agreeable was a focused campaign to convince corporations and, where relevant, charitable foundations to end any bars on giving to religious organizations. We heard some great ideas from Derek Davis and from Professor Wright about the research that's going on in this area and the possibilities of such a campaign.

Next, the areas of agreement about how faith-based organizations, community organizations and others can work with the government to solve these problems. What are the areas of agreement there? This is what I heard. I think that I heard that we should work together. It's not a matter, as Julie Segal said, of not whether we work together but how we work together. It's been a long time, I think, for us to truly hear that message but I think *In Good Faith* communicated it and I heard it again today. We heard a lot of agreement about the fact that the problems of poverty are real, and also that the risks to religious liberty are real in this arena and that they have to be taken seriously. They're not dismissed by any side of the argument. I think we also heard agreement on some ultimate goals here, that we must serve the poor, and I also think a widely shared goal is that we must insure that the government's impact on religion is kept minimal. We have different ways of getting there but I think that's a shared goal.

Well, I think there's widespread agreement that government and faith-based organizations and community organizations should work in non-financial cooperation. Government training volunteers from houses of worship and the like. Also, that money should be spent on technical assistance, expanding capacity, expanding knowledge about how to apply for grants and helping people understand how to comply with rules and regulations. We also heard that government money has gone and continues to go to groups that separate from a house of worship, like a Catholic charities or Reverend Terrell's group, that that is agreeable in a widespread way.

Further down the spectrum, we heard that there's agreement among many that where the government funds religious groups, and those groups provide religious activities in addition to secular activities, that the religious activities can be offered if they're separate from the tax funded activities, voluntarily attended and privately funded. I think *In Good Faith* traced this particular area of agreement and it was one of the first documents to isolate that particular area of agreement. I think it's important. We heard Heidi Unruh say this morning, at least for her part, that there was agreement that she wasn't trying to urge funding of groups that would inextricably interweave the religious content into the tax funded content, and I think that was important. We also heard strong agreement that there should be non-discrimination against beneficiaries on the basis of religion, that there should be alternatives to religious organizations and importantly, that more work needs to be done to insure that there are actually adequate alternatives that are easily accessible in all areas, particularly in rural areas, and religiously homogenous areas.

Strong agreement as well that there should be some looking at the regulatory system that we currently have. What are the burdens placed on NGO's that provide tax-funded social services? Are there ways to improve paperwork burdens and the like? At the same time, we also heard on that regulatory reform issue from many that tax-funded religious groups shouldn't be exempted from regulations that protect basic things like health and safety. We also heard from Representative Souder, interestingly, and I think it's interesting that there may be some more agreement here to pursue, on a greater integration of community organizations into the system of social service delivery. He referred to the zip code test, of looking at community organizations and how they could be folded into the system, particularly with regard to Hispanic and African-American groups. And I think these would be widely agreeable areas, particularly if there was more money on the table but also if there were some safeguards that everybody could agree would apply to these community groups.

Finally, in the areas of agreement, I think we heard some suggestions that there might be some areas of agreement surrounding intermediary organizations and their functions, but that needs to be further reviewed and examined. Let me give you two other quick ones on areas of agreement. We also heard that religious set-asides are inappropriate. We heard it from Stanley, from the White House office. We heard it from others who would come from a different point of view. So that is a broad area of agreement. And also, the White House's focus on not just religious groups but other groups, community groups that are not religious. We should not make this just a dialogue about what religious groups could do but a broader dialogue, and that's agreed to in a widespread kind of way. We also heard about language. Language sometimes could be a problem in the debate. Heidi Unruh suggested, and I think Samantha Smoot also mentioned that the use of the faith-based organization term can be problematic at times because it covers so much we don't know exactly what we're talking about sometimes. Finally, on the areas of agreement, I think we heard that people are cognizant that Charitable Choice is already on the books in several laws and that it will be very important for us to look at how that is progressing. What are the benefits that it's producing? What are the obstacles that it might be creating? And we really have an experiment in place, looking at Charitable Choice, and

the details of that and results of that experiment will be important to all of us as we move forward.

Very quickly, on the areas of disagreement, as I heard them. The areas of disagreement on how to work together. We have a question and a difference of opinion about how much does getting government money change things. For some people, it changes things a lot. For other people, they say shouldn't change that much, relatively speaking. For example, the Title VII question is a great example. For Alan Brownstein, he says I'm fine with groups having the exemption for privately funded activities but that changes for me when the government is funding the particular activity. So there are a number of things like that that crop up. Eligibility. I think there's still some disagreement about how religious a group can be and receive government funding. There are still some things to work out there. Also, we're concerned about people being locked out of the system, but sometimes we're concerned about different groups of people. Bob Destro referred to the sort of suspicion that's existed around religious people and what they do. Other people are more concerned about religious minorities and whether they might be shut out of the system if Charitable Choice is expanded. We also have differences of opinion about autonomy and the relationship of autonomy and taxpayer accountability. Representative Souder I think was saying that to his dismay, he became convinced that we couldn't hold a line that he would like to be held, and I think he meant by that line allowing churches to keep their autonomy while receiving government grants and contracts, and I think that's a significant area of difference. Do you lean more towards the autonomy rights or more towards the taxpayer accountability rights when a religion organization is receiving tax-funding.

And then, is religion different, and should it be treated differently? I think now we're getting really to some of the crux of the disagreement here. Let me just sketch out something quickly on this topic. We've heard a lot of language about equality and level playing field, and people mean different things in neutrality as well. We all mean a lot of different stuff when we say those things. I see at least three theories that are happening when we're using this language. One is the kind of equality across the board, meaning equality in access to funding and also equality in regulation. This is what Alan Brownstein described as a harsh mistress for religion, in that sometimes religion would be regulated very harshly. Then we have a second kind of theory where we're talking about equal access to money but sometimes different treatment in terms of regulation. I think Jeff Rosen was referring to this quite a bit, and this is what Representative Souder was referring to as well. Souder, I think, believed in many cases that this was politically unsustainable but desirable. On the other hand, David Lachmann said this morning that he agreed it was politically unsustainable but not desirable, and David Lachmann would probably fall into this third category, which would take a stance of different treatment in terms of access to government money, meaning some religious groups can get it-maybe the religious groups that were more inextricably interwoven with religion couldn't. And sometimes different treatment in regulation, meaning when a group wouldn't get-a religious group should be treated differently in certain regulatory incidents, and some of those same groups, however...and they would be treated specially with a sort of benefit

toward them, but when they went to get government funding they would have a special limit put on them, in that they would not be able to access those funds.

Everybody claims the term neutrality but it means different things to different people, and these are some of the theories that are operating there, whether you mean neutrality to treat everyone alike or whether you mean neutrality as sort of standing with an arms link, government standing with an arms link relationship between itself and religion.

Just to finish up, let me say that there was very touching examples and motivational examples that Dr. Heller and Reverend Terrell talked about, and I think we're all, at the bottom, grappling for ways to allow those who would choose to tap into this powerful source of motivation to do so without wrapping up religion in a government program in a way that hurts people's rights or hurts religion itself. As we move forward, I think the disagreement is going to be very important as we touch on fundamental differences. We should expect and welcome the debate when we get to those fundamental differences. But there's also significant agreement here, and it's really enough agreement to make any faith-based initiative a success, I think, if we dedicated ourselves to just even speaking of the areas of agreement.

I think *In Good Faith* did a good job of framing this debate a long time ago. It opened up a space that didn't exist to define this agenda broadly, to speak about it forthrightly and to work cooperatively whenever possible. I think that space got wider today as we convened this conference, and it's my hope that the space will get wider still in the future.

**E. J. Dionne:** Many are called but few are as patient as you are. Bless you all for hanging around. I want to just say I work with Melissa every day and you probably shouldn't say this in a law school, but it's rare to find someone who always operates in good faith and always is a good lawyer, so she is a wonderful person to be on a panel with. I was inspired by Dr. Heller and feel like saying that it's great to be at a distinguished umbrella organization, the Catholic University of America, and I feel I should begin brothers and sisters united, or perhaps following Mr. Wright, I should refer to everybody as Good Sams.

I want to say just two points very quickly. I love the fact that Bob Destro quoted my favorite theologian, who is Yogi Berra, and I recently learned a new Berraism, which I think is very rich with theological meaning, so I couldn't resist sharing it with you. Yogi Berra once said, "If you don't go to your friend's funeral, he won't come to yours." You could run a whole conference around that statement. I also want to thank Heidi Unruh for suggesting that we rename FBO, faith-based organizations, something else. I used to write a language column and I actually had a contest where I wrote a column saying this name is flawed, can you please help me. And the readers of my column were very intelligent folks-not, it should be said, because they read my column, and I got all sorts of entries and no one in the end really came up with a better name for FBO, and that's why we're still stuck with it, but I still think it's a good challenge because otherwise you end up with a mouthful that starts with Church, Synagogue and Mosque, and with the increasing pluralism of America we would be here all day just making the list.

Lastly, the last thing I should say, is I don't want you to become just like me. I want you to become just like Reverend Terrell, and I think that reflects a difference between us. I'm a mere columnist and academic and he is the preacher, so you should very much become like him. In a way it's perfect, because I want to pick up where Melissa left off. I think that Professors Rosen and Brownstein really laid out the challenge of agreement and the challenge of disagreement on this issue very well, and at least as I saw it, the challenge for supporters of Charitable Choice is whether dealing with religious faith as a choice like any other may actually reduce and even degrade the majesty and importance of religious belief. I think he put that issue on the table very squarely, Professor Brownstein did. On the other hand, the challenge for opponents of Charitable Choice is that by insisting that religious faith is in fact a personal choice even more important than any other choice, they may be reducing the rights of those for whom religion is of central importance to a level below the rights enjoyed say by environmentalists, fascists, communists, survivalists, all of whom I think it can be said of that they define and build their identities around a dominant idea. I think Professor Brownstein is clearly right that the constitution gives religion special protections that are distinct and in some ways above those of other forms of choice and other rights of speech. It is separated out as a separate right, and with those protections come certain restrictions. But in a sociological sense, placing religion under special restrictions can indeed diminish the reach of its voice, can diminish the reach of the voice of people of faith, placing a religious world view at a disadvantage relative to all other world views. I think those dilemmas are the dilemmas we grapple with as we try to reach any sort of concord on this issue.

I want to first pay a special tribute to this document. This document has been incredibly instructive to me and I just finished editing a book on faith-based organizations which focuses more on what they do than on this argument, but when I was looking for a statement that's talked about the argument plainly, *In Good Faith* was best statement, not only about agreement but about disagreement, and it will amuse you to know that I got a call from the copy editor who said, "Can I edit this document?" And I said to the copy editor that if you are willing to call about seventeen or eighteen people and get them all to agree on the change of a single word or two or three, then you can edit the document, so you can know that the *In Good Faith* document is unedited, unexcepted, in its own entirety in this book that we just put together, with actually an excellent commentary by Melissa, who claims, in fairness to all of you, only to speak for herself in her commentary.

One of the things that doing this book has underscored for me is that if there is a large problem in our debate over Charitable Choice and President Bush's initiative, it is that we have gotten so engaged in an argument over what government cannot do or what it shouldn't do, or what it might do that it doesn't already do, that we have forgotten the very, very long list of partnerships that now go on between the world of faith and the government, and other private, non-profit organizations. I would just like to list a couple of examples. David Hornbeck, the former superintendent of Philadelphia-have you noticed how often Philadelphia comes up? Maybe it's the City of Brotherly Love, I think. But David Hornbeck was the superintendent of the schools in Philadelphia. He had a truancy

problem. He realized that sending out truant officers is very similar to other stories we heard in the course of the day. He realized that sending out truant officers was not going to get kids to go to school every day, and so what he did is Sunday after Sunday he went and preached in churches. He wasn't paid for that time by the government. He didn't pay the churches any money. He just said to members of those congregations-we have a problem because a lot of your kids aren't going to school. And he invited members of those congregations to divide up their kids and to track them and make sure they went to school, and indeed the rates of truancy started to go down in Philadelphia as a result of this program. This program raises none of the difficult constitutional issues talked about in *In Good Faith*. Similarly in Philadelphia, Mayor Street decided that there were too many children whose Dads were in prison and who needed big brothers or big sisters. Again, Mayor Street didn't send money out to the churches and say we're going to pay for big brothers and big sisters. He just invited every church in Philadelphia to provide big brothers or big sisters for kids whose Dads were in prison. It's another example, and there's a very long list of them, of where government can partner with churches without raising any constitutional issues.

The last example I would offer is of Ernie Cortes in the Industrial Areas Foundation. The conflict between public and private schools or public and religious schools is often talked about in terms of hostility in competition. What the Industrial Areas Foundation did in Texas was to use the churches-in this case mostly the Catholic churches, but not only the Catholic churches-to organize the parents of public school children, first to have more contact with their teachers and then to lobby their local government to improve the public schools of the city. Again, Ernie Cortes did nothing that crossed any line having to do with the First Amendment that even the most strict separationist would say exists, and yet he used religious congregations to a very important public purpose.

I think that as we see concord, some concord on these issues, we need to explore all of those examples and how we might make them multiply that-to pick up on...and the President-is a way to rally the armies of compassion without rallying a good deal of discord.

Somebody once said that the world is divided into two kinds of people-people who divide the world into two kinds of people and people who don't divide the world into two kinds of people. I'm one of those who likes to make categories like that, and I want to sort of describe why some of these differences are not simply between separationist and accommodationist, if I can use those terms. There are real divisions among people who, broadly speaking, are sympathetic to Charitable Choice or to initiatives similar to the president's. I think one important distinction is between people who see poverty as being caused primarily by individual disabilities, personal or moral or others, and who see these programs, these faith-based programs, as a way of helping people to repair their own lives as individuals. I think this is very prominent in President Bush's rhetoric, who talks often about the role of faith in changing his own life. I think others who support faith-based organizations are people who see them as rallying others to the support of the very poor, that in this optic, the churches, the synagogues and the mosques are not there simply to help individuals, but also there to be, as Jim Wallace likes to put it, prophetic

interrogators. I think you can reach very different conclusions if you start from these two different premises.

Secondly, I think there are those who see faith-based organizations as potential substitutes for government programs and those who see faith-based organizations as supplementary to government programs, and here again you can see how political differences might be expressed. There are those-and this goes back a little bit to the first point-who see the congregations as being primarily oriented toward individuals and those who see them primarily as the creators, as well as the creation of community, and again, I think if you see churches, synagogues and mosques having primarily an individualistic purpose, you come to one set of conclusions. If you see them as sources of community, you see them as another.

Lastly, I think there are those who are drawn to these ideas primarily because they want to fulfill what they see as their obligation to convert and evangelize others, and those who are drawn to these organizations and ideas because their faith obliges them to lift up the poor, or in that great prayer of St. Francis, preach the gospel always, if necessary use words. Obviously, there are people in both of those, people who cross over in many of these groups, particularly those last two, but I think to understand these distinctions might help us to understand a little better the nature of this debate and the fact that as we move forward, there will be differences to be settled not only across the divides we know well, but very much within particular communities. I think you saw some of that in the conflict in the White House at times between my friend John DiIulio and others in the conservative movement. You see these divisions, I think, in many different ways.

I think Professor Breger had it right about the future, that it all depends on Senator Lieberman. I think Senator Lieberman has been given enormous authority, both by the president and by his Democrats, fellow Democrats, in Congress, and I think Richard Foltin was right that Senator Lieberman's success will depend in part on figuring out which aspects of this can actually pass with very substantial majorities and not simply narrow majorities.

Here are what I see-and I'll close with this-here are what I see as potential options for moving forward that might create a greater consensus than already exists. One is to marry President Bush's favorite idea-if I can call it that-on faith-based initiatives with President Clinton's favorite idea-if I can call it that-on national and community service. I think no one knows more or is more committed to both ends of this than Harris Wofford, who joins us today. I think the Corporation for National Service and the AmeriCorp program in particular offers a very interesting model of how to fund individual volunteers in all sorts of organizations in ways that do not raise some of the constitutional difficulties that you folks have been grappling with for a long time. And I think related to that, and Representative Souder made this point, is to see faith-based programs not all by themselves but to see strengthening them as part of an effort to strengthen civil society more broadly, and I think there would be less opposition to this effort if it were placed in the broader optic of strengthening community non-profit organizations across the board,

and that those organizations would include religious organizations. That doesn't make the problems you discussed go away, but I think it might change the debate.

I think the idea of expanding charitable giving is a good idea. It is actually a scandal in the tax code that you have to be relatively well-off, at least middle class, in order to take advantage of the charitable contribution, even though we know that poor people actually give a larger share of their income to others than wealthier people do. But I think we have to acknowledge, and my friend Margie Waller has written very well and spoken very well about this, I think that expanding charitable giving, while a very good idea, is not as big an idea as we might like to think. The biggest worry I have and Margie has talked about this is that if you put all the emphasis on the giving, the choice in terms of which organizations will be strengthened goes not to the potential recipient but goes to the contributor, so that the person being empowered is really not the person who at some level we want to empower, which is the person going to the organization. I always joke also that you might end up with a situation where McLean, Virginia would get the biggest, best homeless shelter in the country because people tend to give money to charities closer to them, and I think one of the issues that supporters of a broader tax credit say the charitable tax credit has to address is how do you get aid to the other side of town. The United Way has had this problem.

My utopian solution is to have a broad effort to lift up the poor, which would involve both strengthening the government sector where the government sector needs strengthening and to strengthen the non-governmental sector, including the religious sector, if possible. As soon as I started writing those words down and thinking about them, I realized that this is the love me, love me, love me, I'm a liberal solution, let's throw money at everybody. To some degree that is what I believe on this question. I believe that in the end, if you're serious about the poor, no matter which structures you create, no matter how you talk about, you actually have to be in favor of increasing resources that get to the poor. That's not enough. Values matter, attitudes matter, lots of things matter besides money, but I do think money is important. And I think that the good thing about this Charitable Choice debate and the good thing about the president's rhetoric on this as many people have suggested today is that it does have the effect of putting the poor in our minds and at the center of our public discussion. If we do that, I think we will come up with better solutions than we will if we don't think about them at all.

I just want to close by saying that you can't talk about anything these days, especially this subject, without thinking about September 11th, and I think never have the sacred and the civic been drawn so closely together. Millions of Americans responded to that terrible event by repairing to their houses of worship in search of comfort, understanding and community. Their reflections often led them to acts of mercy and kindness. I think the repairing to these houses of worship, not subsidized by the government, nonetheless these were civic as well as spiritual acts. People were looking for a sense of solidarity as well as a sense of understanding and comfort. Yet we also reflected on how at least some understandings of religious faith might lead some to what we can only describe as horrific acts. Faith, depending upon how it is understood, can lead to community or

chaos, to love or hatred. I think these events forced us all to reflect on the urgency of religious tolerance and openness, and also on how our different faiths, all of them, might lead us to a critical understanding of the obligations that a loving G-d imposes upon us all. I think these events have led to a new spirit of seriousness and reflection in our country. I think this moment might allow us to begin anew our reflections, not only on faith-based organizations, but also on the broader relationships between religion and public life.

What I'm saying in short is that it's time for In Good Faith II or perhaps More Good Faith, or if you will, More Better Faith. If you proceed in the same spirit that you have shown, you will add to our shared deposit of hope, which we need. I didn't mean today to assign you three more years of work, but I just did. Thank you very much.

**Moderator:** If I can have just have your patience for another couple of moments. This conclusion, not only of the *In Good Faith* conference, but also of the *In Good Faith* process, which I have to say as it's played out this year has played just the role that those of us who were in at the beginning had hoped it would play. But that doesn't mean that even though it's the end of this *In Good Faith* process that it's the end of the Charitable Choice or faith-based organization conversational process. That is going to go on. It is going to continue in the Congress. It's going to continue among policy makers, in the public. No doubt the courts. The remarks just now to the contrary, it will not be Senator Lieberman in the end who will decide the fate of Charitable Choice but Justice O'Connor. And in addition, there will be others who will continue the work.

I want to acknowledge the presence, as others have done, of Senator Harris Wofford, who's chairing a group that is continuing in building upon the work that the *In Good Faith* group came together to do. I'm sure that there will be new and creative things coming out of that working group in the future, and contribute to the work that continues in Congress.

I'd like on behalf of the American Jewish Committee and the Feinstein Center to thank a number of people or organizations; The Pew Charitable Trusts, without whose support this program and this process would not have been possible. The Catholic University Law School for being so hospitable and for three long years making a couple of its most estimable faculty members available to us, who also made what we did turn out as well as it did. And finally, I want to thank all of you who attended this program and showed the patience and endurance and contributed many thoughtful comments and questions. I wish you all Godspeed on your way home. Thank you.