

## CHARITABLE CHOICE AND NEUTRALITY THEORY

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From 1937 to 1962, my grandfather ran the Union Gospel Mission in Fort Worth, Texas. Founded in 1888 by a group of local churches, the mission operated a seven-story building with dining and lodging facilities for the hobos, homeless, and alcoholics who frequented the seedy side of downtown. Every evening, my grandmother prepared the meals while my grandfather, an ordained Baptist minister, counseled those who sought shelter and refuge in the mission. Before the men could eat their supper, however, my grandfather required them to assemble in the auditorium for a worship service, where they would pray, sing hymns, and listen to his hour-long sermons about the evils of alcohol. For you see, my grandfather's evangelical Calvinist framework taught him three things: the utter sinfulness of humankind; that alcohol consumption was a sin; and that the only way for alcoholics to recover was for them to acknowledge their sins and turn their lives over to Jesus Christ. Only after enduring one of my grandfather's "fire and brimstone" sermons were the men given a hot meal and a warm place to sleep.

I do not tell this story to criticize my grandfather. He was a stern, God-fearing man, but also a good man with a sincere desire to help the less fortunate. His strong, abiding faith taught him that there was but one way to address social problems such as alcoholism: to accept Jesus Christ as one's lord and savior. His efforts were sincere, although some might say misguided. Rather, I use this story to illustrate the attitude and approach of many faith-based social service programs. Faith not only motivates the enterprise, it infuses the organization's programs and subsumes its entire structure and operation. Religion is not merely a motive, comfort or aid to addressing the problem—it is the answer, the solution.<sup>1</sup> It is impossible to separate the secular components and functions from the profane.

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1. See generally AMY L. SHERMAN, *RESTORERS OF HOPE: REACHING THE POOR IN YOUR COMMUNITY WITH CHURCH-BASED MINISTRIES THAT WORK* (Crossway Books 1997).

This story frames the issues for the Charitable Choice debate.<sup>2</sup> Do churches and other faith-based organizations have a role in delivering social services? Is the product they provide fundamentally different from secular programs, and is it necessarily a valid or better product? If religious agencies do have a role in the social welfare system (and I believe they do), do they have a right to receive public funding while insisting on preserving the integrity of their spiritual approach? Stated differently, does it violate notions of government neutrality toward religion to require religiously affiliated agencies to provide government-funded services in a secular manner? Conversely, is neutrality truly furthered by including faith-based approaches in government-funded social service programs? And finally, what about the rights of recipients to be free of religious indoctrination and the spending of public tax dollars on intrinsically religious programs?

These questions cast Charitable Choice as the most challenging church-state issue to come along in some time. Regardless of how one answers them, all can agree that Charitable Choice represents a radical approach to the delivery of government-funded social services and a significant departure from past church-state jurisprudence. This article seeks to address some of these questions by discussing three points: (1) Charitable Choice was completely unnecessary; religious agencies were already actively involved in publicly funded social services. The old rules that restricted funding to secular programs and services did not discriminate against any religion or denomination or prevent any group from participating in government-funded programs. (2) Rather than “leveling the playing field,”<sup>3</sup> Charitable Choice evinces government preference for religion and religious approaches to social services, and thus fails the test of neutrality. (3) Charitable Choice creates a grave risk

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2. The term “Charitable Choice” was coined during the debates surrounding the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Welfare Reform Act”), 42 U.S.C. § 604a (Supp. IV 1999). As described in a report by the Congressional Research Service of the Library of Congress, “[c]haritable choice is a burgeoning legislative effort to expand the universe of religious organizations that can participate in publicly funded social services.” DAVID M. ACKERMAN, CONGRESSIONAL RESEARCH SERVICE, CHARITABLE CHOICE: BACKGROUND AND SELECTED LEGAL ISSUES 1 (2000) [hereinafter CRS REPORT].

3. See Amy L. Sherman, *Should We Put Faith in Charitable Choice?*, 10 THE RESPONSIVE COMMUNITY 22, 22 (2000) (“[Charitable Choice] creates a level playing field between faith-based social service organizations and secular groups in the competition for government contracts by insisting that if a state elects to involve any independent-sector providers in the delivery of social services, then it may not exclude some providers simply because of their religious character.”).

of government-financed indoctrination, providing distinct advantages to religious agencies to perpetuate their religious mission. Charitable Choice again fails the test of neutrality by empowering faith-based agencies to affect the religious choices of program beneficiaries.

## I

### CHARITABLE CHOICE WAS UNNECESSARY

Charitable Choice first appeared in the Personal Responsibility and Work Opportunity Act of 1996, otherwise known as the Welfare Reform Act.<sup>4</sup> A centerpiece of changing “welfare as we know it,” Charitable Choice promised to remove the barriers that prevented religious groups from participating in publicly funded welfare services.<sup>5</sup> Though consistent with welfare reform’s general thrust towards privatization, Charitable Choice proceeded on its own highly developed assumptions. Charitable Choice proponents argued that churches and religious organizations had long been excluded from participating in government-funded social service programs because of religious biases, bureaucratic regulations, and legal rules prohibiting the funding of religiously infused services.<sup>6</sup> The old rules requiring essentially secular approaches had discriminated against religious organizations and engendered a climate of hostility towards using religious solutions to address human problems.<sup>7</sup> Enabling and funding churches to provide social services would make welfare more efficient (by restricting government bureaucracies), less expensive, more personable, and produce more effective results through the transforming power of faith-based approaches.<sup>8</sup>

This assessment of the pre-Charitable Choice environment is incorrect in at least two respects. First, religious groups and agencies have long been active players in the social welfare system—at

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4. 42 U.S.C. § 604a.

5. See CRS REPORT, *supra* note 2, at 1.

6. See Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

7. See CARL H. ESBECK, *The Neutral Treatment of Religion*, in WELFARE REFORM AND FAITH-BASED SOCIAL SERVICE PROVIDERS: CHARITABLE CHOICE AND ITS CRITICS 173, 177 (Derek Davis & Barry Hankins eds., 1999) [hereinafter WELFARE REFORM] (“[T]he exclusion of certain religious providers based on what they believe and because of how they practice and express what they believe, is discrimination on the basis of religious exercise and religious speech.”).

8. See generally CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000); Esbeck, *supra* note 6; STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* (1996).

times and in many locales, they have been the only providers. Religious charity work predates most government welfare programs.<sup>9</sup> For over 150 years, churches have run orphanages and provided health, education and social services, and relief to the poor, often in the absence of government programs.<sup>10</sup> For example, the Salvation Army annually serves twenty-seven million people, Catholic Charities nearly eleven million.<sup>11</sup> This does not include thousands of social service programs run by local agencies and congregations.<sup>12</sup> Moreover, many religiously affiliated agencies, such as Catholic Charities USA, Lutheran Social Ministries, and the Jewish Board of Family and Children's Services, have long received government referrals and even public funding for their programs.<sup>13</sup> In 1996, the same year Charitable Choice was first enacted, Catholic Charities USA received 1.3 billion in public dollars for its programming, accounting for 62% of its overall budget.<sup>14</sup> Catholic Charities is the largest private nonprofit network of independent local social service agencies in the nation.<sup>15</sup> Though accounting for less of their budgets, social services agencies affiliated with other religious denominations have all received many millions of dollars in public funds for their programs.<sup>16</sup> If one had listened only to the rhetoric surrounding Charitable Choice as it moved through Congress in the mid-nineties, however, one would have been left with the impression that religious participation in public welfare programs had been minimal prior to 1996.<sup>17</sup>

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9. See MONSMA, *supra* note 8, at 5-6.

10. *Id.*; RONALD G.

11. JOHN McCARTHY & JIM CASTELLI, THE ASPEN INSTITUTE NONPROFIT SECTOR RESEARCH FUND, RELIGION-SPONSORED SOCIAL SERVICE PROVIDERS: THE NOT-SO INDEPENDENT SECTOR 23-31 (1997); Press Release, Catholic Charities USA, Catholic Charities USA Serves 10.6 Million People, at <http://www.catholiccharitiesusa.org/media/releases/1998/121798.html> (Dec. 17, 1998); Salvation Army, What We Do, at <http://www.salvationarmy.org/webmain.nsf/sub/whatwedo> (last visited Mar. 18, 2001). See *supra* text following note 1; McCARTHY & CASTELLI, *supra* note 11.

12. See *supra* text following note 22; McCARTHY & CASTELLI, *supra* note 11.

13. Stephen V. Monsma, *The "Pervasively Sectarian" Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322-23 (1999).

14. See Catholic Charities USA 1997 Annual Report, at 24-25. Interestingly, that percentage has not increased but has gone down slightly since the enactment of Charitable Choice. See Catholic Charities USA 1999 Annual Report, at 21 (noting that government funds account for 58% of Catholic Charities' total budget).

15. Press Release, Catholic Charities USA, *supra* note 11.

16. Monsma, *supra* note 13, at 322.

17. Julie A. Segal, *A "Holy Mistaken Zeal:" The Legislative History and Future of Charitable Choice*, in WELFARE REFORM, *supra* note 7, at 9-27.

Granted, prior to welfare reform, programs and services that were run by religious organizations had to be secular in order to receive public financial support,<sup>18</sup> even though all observers recognized that the services were motivated by a religious purpose and consistent with the various agencies' religious mission. This restriction was due to the constitutional prohibition on government advancing the religious mission of churches and, more specifically, on using public funds for religious instruction, indoctrination, and worship.<sup>19</sup> This prior practice also reflected the general principle that government must seek to achieve *secular* goals through its programs while ensuring that its services are compatible with the greatest number of recipients.<sup>20</sup> Services provided from a particular ideological or theological perspective will necessarily serve a much narrower audience.

Nevertheless, Charitable Choice proponents insisted that the old model discriminated against evangelical churches and religious organizations that believe in a faith-based or integrated approach to solving social problems. This argument is wrongheaded. The older model did not prohibit any religion from participating in government programs; it only limited the *manner* of participation in order to ensure that the government funds paid for secular programs and achieved secular goals. While the old rules prohibited funds flowing to "pervasively sectarian" organizations—those in which the secular and religious components are so intertwined as to be inseparable—all churches and religious entities were able to set up separate, free-standing agencies to conduct social service programs with government funds.<sup>21</sup> In many instances, government agencies did not require a formal separation provided the functions and funding remained distinct.<sup>22</sup> Evangelical churches are no more sectarian than the Catholic Church, yet the Catholic Church has found a way to work effectively within the system without losing its sense of

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18. See *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 612 (1988); Esbeck, *supra* note 6, at 10.

19. See *Bowen*, 487 U.S. at 589, 609-10; *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985).

20. See *Bowen*, 487 U.S. at 607 n.11.

21. See *id.* at 610-12 ("Only in the context of aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination . . . . [W]hen the aid is to flow to religiously affiliated institutions that were not pervasively sectarian . . . we refused to presume that it would be used in a way that would have the primary effect of advancing religion.").

22. See *Monisma*, *supra* note 13, at 323-34.

mission.<sup>23</sup> The same is true for the Salvation Army, which is an evangelical church.<sup>24</sup> The point is that some evangelical agencies and churches did not want to abide by the rules that applied equally to religious and nonreligious grantees alike. Instead, they wanted to have their cake and eat it too: to receive government funding but be exempt from the rules prohibiting the funding of religious activities. While it may be a valid policy perspective to argue that churches should be able to have it both ways, it is inaccurate to characterize the past rules that insisted on secular objectives and outcomes for government-funded programs as discriminating against religion.

As the Court reminded us in *Rust v. Sullivan*, the government may legitimately structure its programs in ways that reflect particular goals and perspectives without having to support other perspectives.<sup>25</sup> With respect to those types of programs that are more intimately tied to the government's proprietary functions, termed "managerial domains" by Stanford's Robert Post, the government can structure its programs to achieve explicit governmental objectives by excluding particular viewpoints or perspectives without engaging in impermissible discrimination.<sup>26</sup> For example, the Department of Veterans Affairs could decide (as it apparently has) that medical care is the appropriate course of treatment in its V.A. hospitals and so refuse to employ Christian Science practitioners or Native American shamans who undoubtedly offer a different perspective on the treatment of illness.<sup>27</sup> Such "discrimination" in a government program is permissible because the government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>28</sup> The same principle held true for the pre-Charitable Choice restrictions on funding pervasively sectarian entities or using funds for religious activities.

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23. See Fred Kammer, *10 Ways Catholic Charities Are Catholic*, at <http://www.catholiccharitiesusa.org/beliefs/10ways2.html> (last visited March 19, 2001).

24. See *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 187-89 (3<sup>rd</sup> Cir. 1990); *McClure v. Salvation Army*, 323 F. Supp. 1100, 1101 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5<sup>th</sup> Cir. 1972); GLENN, *supra* note 8, at 212-40.

25. 500 U.S. 173, 193-94 (1991).

26. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

27. *Rust*, 500 U.S. at 194 (noting that merely because the government established the National Endowment for Democracy to encourage countries to adopt democratic principles it was not required "to fund a program to encourage competing lines of political philosophy such as communism and fascism").

28. *Id.* at 193.

Certainly, it is reasonable for the government to insist on a secular, non-ideological approach to government-funded human services as a way of ensuring that it receives full secular value for its money and that all programs are amenable to the greatest number of beneficiaries. The fact that the government narrows the scope of its program in a manner that excludes a religious approach to social services or education does not mean it has engaged in constitutionally suspect discrimination or has imposed an unconstitutional condition on a protected right.<sup>29</sup> Rather, the government has merely chosen to provide services in a particular manner.<sup>30</sup>

Granted, when the government establishes a forum with the purpose of encouraging a diversity of views from private speakers, it is constrained in its ability to choose between proffered perspectives.<sup>31</sup> The Court reiterated this principle in *Rosenberger v. Rector & Visitors of University of Virginia*, where it stated that “the guarantee of neutrality is respected, not offended, when the government . . . extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”<sup>32</sup> But even the *Rosenberger* Court acknowledged that this nondiscrimination principle has scant application outside the context of a free speech forum,<sup>33</sup> a point reiterated in *National Endowment for the Arts v. Finley*.<sup>34</sup> We should not confuse those programs with a purpose of enhancing speech with those the government has designed to achieve specific goals or in which enhancing speech is a by-prod-

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29. *Contra* Esbeck, *supra* note 7, at 177 (“[T]he exclusion of certain religious providers based on what they believe and because of how they practice and express what they believe, is discrimination on the bases of religious exercise and religious speech.”).

30. *Cf. Rust*, 500 U.S. at 193-194; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (affirming that the government may regulate the content of its own speech).

31. *Rosenberger*, 515 U.S. at 834; *Widmar v. Vincent*, 454 U.S. 263 (1981).

32. *Rosenberger*, 515 U.S. at 839.

33. *Id.* at 833 (“We recognized [in *Rust v. Sullivan*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”).

34. 524 U.S. 569, 586-88 (1998). Justices Scalia and Thomas were even more emphatic on this point: “It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in our democracy, our) favored point of view by achieving it directly . . . or by giving money to others who achieve or advocate it . . . . None of this has anything to do with abridging anyone’s speech.” *Id.* at 598 (Scalia, J., concurring in the judgment).

uct.<sup>35</sup> In such managerial domains, as Post states, “speech is necessarily and routinely constrained on the basis of both its content and its viewpoint.”<sup>36</sup> This is true even where the government enlists private entities to administer those programs or “convey its own message.”<sup>37</sup> As the Court stated in *Rosenberger*, “When the government disburses public funds to private entities to convey a government message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”<sup>38</sup>

Finally, the argument that religiously affiliated organizations lack a certain integrity and effectiveness if not permitted to integrate spirituality into their services offends those entities that have been performing welfare services for generations.<sup>39</sup> I do not believe there is a single religious agency that does not see its charitable work as part of its religious calling, even if its services are indistinguishable from those of a public agency. For example, the church I attended as a teenager sponsored a food and clothing pantry with other area churches, and I volunteered my time by sorting clothes and canned-goods and delivering food to the homebound. Though our churches accepted no government cash, we received commodities and referrals from county agencies. We were called to the work by our faith, and it was no less religious (or religiously genuine) because we did not proselytize or pray with the people we served. Many organizations, like Catholic Charities, purposely avoid imposing their religious views on beneficiaries as a way of ensuring their programs are inclusive and out of a recognition that people in need are often vulnerable to pressure. This approach also respects the religious choices of the beneficiaries, while recognizing that sinfulness may have little to do with one’s economic or employment situation.

In sum, Charitable Choice proponents are wrong in arguing that religious agencies were discriminated against by the earlier rules prohibiting the funding of social service programs that are

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35. See GLENN, *supra* note 8, at 98, 128 (arguing for the inclusion of religious entities in funding programs on the authority of *Rosenberger*). However, *Rosenberger* recognizes the distinction between government programs that use private speakers to achieve specific goals and programs established for the purpose of encouraging “a diversity of views from private speakers.” 515 U.S. at 833-34 (citing *Rust v. Sullivan*).

36. Post, *supra* note 26, at 166.

37. *Rosenberger*, 515 U.S. at 833.

38. *Id.* at 833; see also *Finley*, 524 U.S. at 586-88.

39. See Stanley W. Carlson-Thies, “Don’t Look to Us”: *The Negative Responses of the Churches to Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 667, 680 (citing policy statement of the Presbyterian Church).



religiously infused. Aside from adhering to the Establishment Clause (discussed below), the government was justified in structuring its programs in a manner that excluded faith-based approaches to social services. The government's preference for a secular approach to funded services was entirely reasonable, considering the goal of making social services amenable to the greatest number of individuals. Even then, this preference for secular approaches did not exclude religiously affiliated organizations from participating in such funding programs, nor necessarily deprive them of realizing religious goals when helping the needy.

## II CHARITABLE CHOICE FAVORS RELIGIOUS SOLUTIONS TO WELFARE

Under the Charitable Choice language that is now in three federal laws,<sup>40</sup> religious organizations are specially recognized and expressly exempted from regulations that otherwise could intrude on their religious character. Those provisions include affirmative statements that religious organizations retain the independence to “control . . . the definition, development, practice and expression of [their] religious beliefs,”<sup>41</sup> may not be forced to alter their form of governance or “remove religious art, icons, scripture, or other symbols” from their facilities,<sup>42</sup> and are entitled to discriminate on religious grounds in their employment practices involving positions funded by the government.<sup>43</sup> Proponents of Charitable Choice argue that these provisions are crucial to the success of human services by allowing churches and faith-based organizations to participate fully in government programs without losing their religious identity or requiring them to abandon their greatest asset: the ability to transform people's lives spiritually.<sup>44</sup> The government receives its value for the services while the faith-based organizations

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40. See 42 U.S.C. § 604a (Supp. IV 1999); 42 U.S.C.A. § 9920 (West Supp. 2000); Children's Health Act of 2000, Pub. L. No. 106-310, § 3305, 114 Stat. 1212-13 (2000).

41. 42 U.S.C. § 604a(d)(1).

42. 42 U.S.C. § 604a(d)(2)(A) & (B).

43. 42 U.S.C. § 604a(f). Section 604a(b) also provides that religious organizations may contract with states or receive vouchers or certificates “on the same basis as any other nongovernmental provider *without impairing the religious character of such organizations*” (emphasis added).

44. See Jonathan Friedman, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 113; see also Carlson-Thies, *supra* note 39, at 681-82.

are able to minister in a way that is true to their calling.<sup>45</sup> Charitable Choice thus “levels the playing field” to allow religious organizations to participate in welfare programs while providing religious options for program beneficiaries.<sup>46</sup>

The theory that supports such special treatment of religious organizations is government “neutrality” toward religion. Neutrality theory provides that individuals and organizations should not be disabled from participating in government benefits programs simply because of their religious character. Its goal is to minimize government influences on private religious choices. Under this theory, the government violates neutrality when it requires religious individuals and organizations “to shed or disguise their religious convictions or character” as the cost of participating in benefits programs.<sup>47</sup> Charitable Choice proponents argue that the above exemptions are necessary to ensure that religious organizations can participate equally with nonreligious organizations without being forced to abandon their religious character.<sup>48</sup>

Here the problem is not in identifying neutrality as a guiding principle but in manipulating that principle to fit Charitable Choice. The purpose of Charitable Choice was not to open the door to religious participation in government programs—as stated, this already existed—but to allow for explicitly faith-based approaches to social services. The law expressly states that “[its] purpose . . . is to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental provider *without impairing the religious character of such organizations.*”<sup>49</sup> While that language could be read simply as allowing religious organizations to participate in government-funded social service programs without denying their religious character, that claim is belied by the prior history of religious involvement. Chari-

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45. See Carlson-Thies, *supra* note 39, at 681-82.

46. See, e.g., James D. Standish, *Maryland's Implementation of the Charitable Choice Provision: The Story of One Woman's Success*, 5 GEO. J. ON FIGHTING POVERTY 65, 67 (1997) (quoting Emily Thayer, director of faith-based organization Genesis Jobs: “Until now, if we were faith-based, the government had an allergy to us . . . [T]his releases us from the bondage of never taking public funds.”).

47. Esbeck, *supra* note 6, at 21; see also Esbeck, *supra* note 7, at 180-182; Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 45 (1997) [hereinafter Laycock, *Underlying Unity*]; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) [hereinafter Laycock, *Neutrality*].

48. See, e.g., Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 290 (1999).

49. 42 U.S.C. § 604a(b).

table Choice's goal was not to permit religious involvement, but to encourage involvement of a particular evangelical variety.

Rather than simply allowing religious agencies to participate equally in government-funded social services, Charitable Choice is based on the premise that a faith-based approach is both superior to and more effective than the "worn out" secular approach, and that religious organizations will not participate in government-funded service programs unless they can do so in a way that is fully religiously integrated.<sup>50</sup> As mentioned, only with religious providers is the government prohibited from affecting the structure of the programs or controlling the message of its grantees.<sup>51</sup> Consequently, the government must take a "hands-off" approach in its treatment of faith-based providers, allowing them to communicate their religious message unfettered. The faith-based organizations gain an additional advantage by being able to hire only co-religionists for publicly funded positions, thus guaranteeing that their message remains consistent and ungarbled. On one level, this unequal treatment creates the impression that religious and moral solutions to human problems are superior and preferable to secular ones. Certainly, both secular and religious grantees will perceive a difference in government priorities and in how religious agencies are being treated. Typical beneficiaries participating in a variety of government-funded programs will also be able to discern when one ideological message is muted and another is not. But concerns regarding government imprimatur aside, these exemptions provide a powerful advantage to religious providers not afforded to secular providers, skewing the marketplace of ideas in favor of religion and resulting in the very type of viewpoint discrimination neutrality theory rejects. Only religious providers are free to communicate their ideological message to welfare recipients and seek to influence their religious choices.<sup>52</sup> In so doing, Charitable Choice contra-

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50. See Segal, A "Holy Mistaken Zeal:" *The Legislative History and Future of Charitable Choice*, in WELFARE REFORM, *supra* note 17, at 9-27; Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 529-31 (1999).

51. 42 U.S.C. § 604a(b).

52. For a fuller discussion of this problem, see Alan E. Brownstein, *Constitutional Questions About Charitable Choice*, in WELFARE REFORM, *supra* note 7, at 240-45; Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 246-47 (1999).

venes a central tenet of neutrality theory: that government treat private religious and nonreligious perspectives the same.<sup>53</sup>

As noted, Charitable Choice proponents argue that the exemptions are necessary to allow faith-based organizations to operate independently and without losing their religious voice.<sup>54</sup> But this point highlights the inconsistency in Charitable Choice: despite its overarching religious thrust, the government-funded programs are not supposed to be religious; that is, the statute forbids recipient organizations from using government funds to pay for religious worship, instruction, or proselytizing.<sup>55</sup> The purported need for the exemptions is thus minimized by the same law that provides for them. Because religious activity is to be minimal, it is difficult to argue that the exemptions are either required or even necessary. Arguments that the exemptions are required by the Free Exercise Clause are unpersuasive, as there can be no “substantial burden” on religious practice when the funded programs are to be secular and the accompanying regulations are designed to ensure that result. While a permissible accommodation argument may fare better, it is important to differentiate between accommodations that relieve reporting and oversight burdens and those that enhance the ability of faith-based organizations to advance their religion, particularly when secular counterparts are not similarly treated.<sup>56</sup> The Court’s leading statement on religious accommodation, found in *Corporation of Presiding Bishop v. Amos*, does not sweep so broadly as to countenance the government’s facilitation of a religious organization’s religious mission.<sup>57</sup>

Thus Charitable Choice violates neutrality theory principles by providing distinct advantages to religious entities that non-religious entities do not share. Charitable Choice skews the debate over solutions to social problems by promoting the superiority of religious approaches. Rather than “leveling the playing field,” Charitable Choice affords religiously-affiliated social service organizations preferential treatment. While the special treatment of religious entities

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53. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-31 (1995).

54. See Esbeck, *supra* note 48, at 290.

55. 42 U.S.C. § 604a(j).

56. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989).

57. 483 U.S. 327, 337 (1987) (“A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.”).

may minimize the government's influence on religious entities, it cannot be justified on grounds of neutrality.<sup>58</sup>

### III CHARITABLE CHOICE RESULTS IN GOVERNMENT- FUNDED INDOCTRINATION

As mentioned, Charitable Choice rests on an internal tension or inconsistency. The entire purpose of Charitable Choice is to allow for a religiously integrated approach to the delivery of social services, one that emphasizes a spiritual response. At the same time, however, the law prohibits public funds being used for religious worship, instruction, or proselytization (unless it is a voucher program).<sup>59</sup> Thus, Congress has told churches their programs can now be religious, but just not too religious.

Few observers believe that the restrictions on using public funds for religious instruction or proselytization will be effective.<sup>60</sup> The effect of the law will be to fund services that are fully religious, with agencies supplying *religious* solutions to social problems. While actual worship and proselytization may not be funded (though accountability remains a real concern), funds will support programs that have adopted a spiritual approach to the provision of social services. Thus, as existed in Texas,<sup>61</sup> churches will run job training programs that rely solely on the Bible for teaching job skills. If the government funds such biblically-based job training or drug treatment programs that encourage the beneficiaries to turn their lives over to Jesus, the Constitution is violated, even if funds are not spent on actual worship or religious instruction. Even if agencies are careful to segregate their funds and promote religion only through private funds, recipients may be pressured to participate in the religious activities. An invitation to participate in a Bible study may be difficult to resist when it comes from the same social worker

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58. See Laycock, *Neutrality*, *supra* note 47, at 1002 ("Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.").

59. 42 U.S.C. §§ 604a(d)(1), 604a(j).

60. See, e.g., Julie A. Segal, *Welfare for Churches: Buyers and Beneficiaries Beware*, 5 GEO. J. ON FIGHTING POVERTY 71, 71-72 (1997) (concluding that "so long as religious institutions do not actually expend [public] funds on religious activities," they can proselytize to those who attend their publicly funded programs).

61. See, e.g., Patty Reinert, *Billions of Dollars Set for Religious Groups*, HOUSTON CHOICE, Jan. 27, 2001, at A1, LEXIS, Nexis Library (discussing two cases in Texas where faith-based job training classes used the Bible as a textbook and dedicated half of the classes to "Biblical values").

who is overseeing your benefits. The same coercive power of the government comes into play when people entitled to public benefits must endure religious overtures, even if those activities are not publicly funded. The government, by supplying a captive audience for proselytizing, has afforded a distinct advantage for faith-based organizations.

Even though Establishment Clause jurisprudence has been evolving over the past decade, one point has remained constant: government must not finance, encourage, or support religious indoctrination.<sup>62</sup> This principle dates back to the first modern Establishment Clause case, *Everson v. Board of Education*,<sup>63</sup> and has been a central inquiry in every religious funding dispute since that 1947 decision.<sup>64</sup> The Court has characterized this prohibition as “absolute,” based in part on the recognition that government-financed indoctrination, “if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with corrosive secularism.”<sup>65</sup> In its more recent decisions, the Court has placed new emphasis on the Clause’s prohibition on indoctrination and inculcation of religion, with all nine justices in *Mitchell v. Helms* indicating fealty to that principle.<sup>66</sup>

This is exactly what Charitable Choice allows: government funding of activities and services that are fully religious and have the goal of transforming people’s lives spiritually. Spiritual trans-

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62. “Although Establishment Clause jurisprudence is characterized by few absolutes, it does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.” *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *accord* *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988).

63. 330 U.S. 1, 16 (1947) (“New Jersey cannot consistently with the ‘establishment of religion’ clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.”).

64. *See* *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (“As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.”); *see also* *Grand Rapids*, 473 U.S. at 385; *Levitt v. Comm. for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 480 (1973) (“[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.”); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (“The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.”).

65. *Grand Rapids*, 473 U.S. at 385.

66. 530 U.S. 793, 120 S.Ct. 2530, 2540-41, 2560-61, 2592-95 (2000); *see also* *Agostini*, 521 U.S. at 223, 234 (stating that governmental indoctrination is one of three primary criteria the Court uses to evaluate whether government aid has the effect of advancing religion).

formation is not merely an adjunct or by-product of the funded service, it is its primary objective. Funding an activity with the express purpose and goal of inculcating religious values and beliefs violates the core of the Establishment Clause prohibition.

Charitable Choice also violates the Establishment Clause in a more subtle way. Through its exemptions that allow religious organizations to retain their religious character, maintain and promote their ideological perspective, and hire only co-religionists, the law provides faith-based organizations (“FBOs”) a distinct advantage over secular nonprofits while it enhances the ability of faith-based organizations to advance their religious mission. For example, Congress could require that grantees under a law funding pregnancy counseling and referral neither encourage nor discourage abortion as an option. An FBO that opposes abortion on religious grounds, however, would be exempt from this provision. Not only does this give the FBO a distinct expressive advantage over pro-choice groups, the law assists them in promoting their religious message and maintaining their religious identity. FBOs also receive an economic advantage through freedom from certain regulatory burdens and by being able to exclusively hire co-religionists and thus vie more effectively for competitive bids.

The ability to discriminate in employment also advances the religious mission of FBOs in an unconstitutional manner. In *Corporation of Presiding Bishop v. Amos*, the Supreme Court upheld the religious exemption to Title VII which otherwise prohibits discrimination in employment on the basis of race, religion, and gender.<sup>67</sup> The section 702 exemption, upheld by the Court against an Establishment Clause challenge, permits religious organizations to discriminate on religious grounds against employees in both religious and non-religious positions.<sup>68</sup> In that case, however, the Court viewed the exemption as a passive benefit—one that merely allowed religious organizations to “define and carry out their religious missions” unfettered by the government.<sup>69</sup> It is a different matter entirely when the government funds particular positions but then allows the religious organization to use those positions in ways that promote its religious perspective. Allowing FBOs to discriminate

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67. 483 U.S. 327 (1987).

68. Civil Rights Act of 1964 § 702, 42 U.S.C. § 2000e-1 (1994); see also Joanne Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 284 (1994) (noting that, in 1972, Congress broadened the scope of the exemption to include employees with secular duties).

69. 483 U.S. 327, 335 (1987).

on the basis of religion guarantees FBOs that their religious missions will be secure and their religious message uncensored. Additionally, the ability to discriminate in publicly funded positions has the effect of defining recipients of a government benefit by reference to religion; this is an evil the Court has emphasized in its more recent decisions.<sup>70</sup>

#### IV CONCLUSION

Aside from the Establishment Clause funding problems, Charitable Choice raises a host of additional concerns, the most prominent of which is its failure to adhere to its purported legal rationale: the neutrality theory. Charitable Choice provides preferential treatment to religious organizations over their secular counterparts while communicating a distinct message that the government favors religious solutions to social problems. Charitable Choice also contravenes neutrality by skewing the marketplace in favor of religious perspectives. But Charitable Choice most seriously and directly conflicts with neutrality theory by permitting faith-based providers to influence the religious choices and behavior of recipients through a government-funded program.<sup>71</sup> Few actions could be more inconsistent with neutrality toward religion.<sup>72</sup>

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70. See, e.g., *Agostini*, 521 U.S. at 234 (stating that one of three primary criteria by which the Court evaluates the constitutionality of government aid programs is whether the program “define[s] its recipients by reference to religion”).

71. Esbeck describes the goal of neutrality as “to minimize the effects of government action on individual or group choices concerning religious belief and practice.” Esbeck, *supra* note 7, at 4. See also Laycock, *Neutrality*, *supra* note 47, at 69-70 (stating that “[m]inimizing government influence is consistent with neutrality”).

72. See Laycock, *Underlying Unity*, *supra* note 47, at 69-71.