

## PANEL TWO COMMENTARY

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I want to thank the *Annual Survey* for inviting me to participate today in this very interesting symposium. When the editors asked me to choose between the three panels, of course I paused on the *Boerne*<sup>1</sup> panel, and since I disagreed for different reasons with each of the first three speakers, I momentarily regretted my decision. Charitable Choice,<sup>2</sup> however, poses the most serious challenge to church-state separation today. How this issue is treated in the courts will determine for decades the relative balance of power between church and state and whether or not there is a meaningful separation.<sup>3</sup>

James Madison said that not even “three pence” from the government should support Christian education or pay Christian teachers.<sup>4</sup> He did not mean three pence as some kind of magical line, but rather that there is a slippery slope and once the money starts to be funneled to religious entities, he would assume on the basis of the history that he understood so well, especially the period from the Reformation up through the American Revolution, that there would be no stopping that flow. He believed that the identities of church and state would become so enmeshed that we would not be able to have either religious freedom from the government or governmental freedom from religion—both of which he emphasized throughout his life.

“Charitable Choice” is a politically loaded term that seems to have been conceived for the very point of making it appear as though it is an equality principle. I fundamentally disagree with Professors Larry Sager and Chris Eisgruber’s thesis that the Relig-

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1. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Professor Hamilton served as lead counsel for the successful City of Boerne in that case.

2. See generally STEPHEN L. CARTER, *GOD’S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* (2000); STEPHEN V. MONSMA, *WHEN SACRED & SECULAR MIX* 5 (1996).

3. Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. (forthcoming Mar. 2001).

4. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in *Everson v. Board of Educ.*, 330 U.S. 1 app. at 65-66 (1947) (Rutledge, J., dissenting).

ion Clauses can be reduced to a single equality principle.<sup>5</sup> Rather, I agree with Michael McConnell and with Marc Stern that the Religion Clauses are not simply equality principles;<sup>6</sup> religion is different. However, religion's uniqueness runs both ways. Religion is different because it is special; it is also different because it is uniquely powerful in human existence and has the capacity to lead to abuses of power.

Charitable Choice is in fact government support for mission. The money is given to religious entities for the purpose of funding a core religious activity for that particular group, its mission to those who are in need—the poor, the addicted, troubled youth. Religion is the animating force in those programs that are now receiving money that would not have before.<sup>7</sup> For example, “Teen Challenge”<sup>8</sup> credits its success to the presence of God in the operation of the program, in the way that they deliver their mission,<sup>9</sup> which is not criticism, but rather a statement of fact.

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5. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

6. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Marc Stern, *An Overview of Recent Decisions Affecting Religious Freedom in the Hands of a Statist Court: One Perspective*, 25 BEVERLY HILLS B. ASS'N J. 181 (1991).

7. See, e.g., <http://www.teenchallenge.com> (providing the organization Teen Challenge's description of its aims, which focus on teen drug rehabilitation) (last visited Mar. 20, 2001); <http://www.pfm.org> (providing the organization Prison Fellowship Ministries' statement of its aims, which focus on rehabilitation of prisoners) (last visited Mar. 20, 2001).

8. *Teen Challenge's Proven Answer to the Drug Problem*, at <http://www.teenchallenge.com/main/tcreview.html> (last visited Sept. 19, 2000) (reviewing a study of Teen Challenge International's residential program conducted by Northwestern University researcher Dr. Aaron Bicknese). The organization's review of the study, completed in June 1999, states that:

The results show that with at least one very popular type of publicly funded secular drug treatment program, Teen Challenge is in many ways far more effective. The study particularly emphasized Teen Challenge's ability to help students gain new social skills, so that upon leaving the program, the Teen Challenge student, compared to clients of the secular programs surveyed, is productively employed at a much higher rate and has a dramatically lower chance of returning for further residential treatment.

9. Teen Challenge World Wide Network, at <http://www.teenchallenge.com/main/tc/abouttci.htm> (last visited Sept. 19, 2000) (“During their 1-year stay, [residents] do not hold down outside jobs, as all their attention is focused on the program. We challenge the residents to embrace the Christian faith. We see that when they do, their lives are transformed and they find true meaning and purpose.”).

Along with Steve, I would reject Carl [Esbeck's] nondiscrimination principle as the singular principle explaining the Religion Clauses.<sup>10</sup> Constitutional theory exhibits an overfondness for formulas—a persistent search to find the two-word slogan that will explain an entire Clause of the Constitution. The Framers were more pragmatic. When the Framers sat down at the Convention, their question was, given what we know from history, given all the realities, and having seen abuses by the King and by the Parliament and by the people and by religion, what is the best solution? That learned but pragmatic approach retains wisdom.

The Charitable Choice debate would be enriched if we included what we already know about government funding of core First Amendment activities. It is fashionable to believe that history cannot be applied to modern problems, but I am in the Framers' camp that believes that history and experience hold valuable lessons.

Today I will describe two examples of what has happened when the government funded core First Amendment activity. First, I will address contemporary arts funding. Second, I will discuss President Ulysses S. Grant's "Peace Policy." Each turns on the government's willingness to insist on accountability for the use of taxpayer dollars.

In the arts funding cases, the government has attempted to make artists accountable, and thereby crossed the line into viewpoint discrimination. Under the "Peace Policy," Congress underwrote mission activities without requiring enough accountability, to the detriment of those receiving social services.

The federal government engages in arts funding through the National Endowment for the Arts ("NEA");<sup>11</sup> state and local govern-

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10. Carl Esbeck, *The Neutral Treatment of Religion*, in WELFARE REFORM AND FAITH-BASED SOCIAL SERVICE PROVIDERS: CHARITABLE CHOICE AND ITS CRITICS 173 (Derek Davis & Barry Hankins eds., 1993).

11. H.R. REP. NO. 89-618, at 7 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3192. The report describes the original purpose of the NEA:

[To] enable groups and individuals to provide or support in the United States (1) productions which have substantial artistic and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence; (2) other productions, irrespective of origin, which meet professional standards or standards of authenticity and are of significant merit, and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country; (3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence; (4) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens; and (5) other relevant projects, including surveys, research, and planning in the arts.

ments also supply arts funding.<sup>12</sup> Initially, nobody objected to the NEA's choice of recipients. Then, NEA funded works that were deeply challenging to the status quo. Members of Congress strongly dissented.

It pays to compare what Congress would normally do in a non-First Amendment setting to how it would act in a setting governed by the First Amendment. In the non-First Amendment setting, let's talk about a bridge. Government pays for a bridge. There are three responses when that bridge collapses and kills a person. The government immediately condemns the action—this never should have happened. Second, members say, "We are going to fix it. We will immediately fix it." And third, the government promises, "This will never happen again." This is the standard line of accountability of every representative of the people, whether it is the federal, state, or the local government: condemn the harm, fix it, and prevent it from happening again.

Let's now translate this into funding for art. The Brooklyn Arts Museum case<sup>13</sup> is as good an example as *National Endowment for the Arts v. Finley*.<sup>14</sup> The government gives the money and then someone uses the money in ways that offend the status quo. What is the government's response? In the Brooklyn Arts Museum case, the New York City Administration used the bridge approach. First, condemn the offense to the status quo. The Virgin Mary has elephant dung on her. Condemn it to all who will listen. Second, redress the problem: shut down the entire museum. Third, pledge that it will never happen again. Mayor Giuliani pledged to visit every museum in the city to make sure none of them had heretical artworks.<sup>15</sup> While the city's reaction to the "Sensation" exhibit would have been an appropriate reaction to a fallen bridge, the

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12. For example, New York City provides support services, including security and maintenance, to a number of artistic organizations. "City funds, however, generally 'are not used for direct curatorial or artistic services.'" *Brooklyn Inst. of Arts and Scis. v. City of New York*, 64 F. Supp. 2d 184, 189 (E.D.N.Y. 1999).

13. David Barstow, *Giuliani Ordered to Restore Funds for Art Museum*, N.Y. TIMES, Nov. 2, 1999, at A1; Ralph Blumenthal & Carol Vogel, *Museum Says Giuliani Knew of Show in July and Was Silent*, N.Y. TIMES, Oct. 5, 1999, at B1.

14. 524 U.S. 569 (1998). The Court held that viewpoint discrimination in NEA funding was acceptable under certain circumstances (art directed at children, for example), but would violate the First Amendment under other scenarios; if the provision of subsidies were "manipulated" to have "coercive effect," then relief would be appropriate." *Id.* at 587.

15. Michael R. Blood, *Mayor Hints at Art Exams*, N.Y. DAILY NEWS, Oct. 6, 1999, at 26.

courts found that it was a clear violation of the First Amendment.<sup>16</sup> The Constitution builds in accountability, and it is only because of the First Amendment that First Amendment-protected activities may not receive the bridge treatment. In the absence of the First Amendment, every penny that the government spends carries with it accountability strings.

The same phenomenon is likely to happen in the Charitable Choice context. Such funding will seem unremarkable until a religious organization uses the government funds in a way that is not popular. Or, an unpopular organization like the Scientologists, the Wiccans, or the Ku Klux Klan will request government funds. When such groups come to the government and say, "Okay, we are ready to do job training," or when the white supremacist group, The World Church of the Creator, requests funding, officials are likely to reject such requests out of hand.

The diversity of religions in the United States will test the mettle of any government entity that claims to be focused on "results" only. To state the issue from another angle, government funds, with their accountability strings, create a circumstance that increases the likelihood that representatives will be tempted to take public positions against particular religions, especially those that do not enjoy political power. While the representatives' alarm can be understood, it strikes at the heart of the American devotion to pluralism in religious belief. For this reason, Charitable Choice and the faith-based organization initiatives may be as contrary to the spirit of the Religion Clauses.

The alternative scenario involves the situation in which the government decides not to make those entities expending government funds accountable. It removes itself from that role of accountability. For example, members of Congress take the position, "We can't handle this problem, but we are willing to fund it." You can find statements by both 2000 presidential candidates, by Governor George W. Bush and by Vice President Al Gore, saying precisely that.<sup>17</sup> The problem is that the government views itself as inadequate to the social problem, but it has funds available.

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16. *Brooklyn Inst. of Arts and Scis.*, 64 F. Supp. 2d 184, 205 (granting the museum's motion for a preliminary injunction against Mayor Giuliani's content-motivated withholding of funds from the museum because of the likelihood of success of the museum's First Amendment claim).

17. For a detailed listing of Governor George W. Bush's proposed "faith based initiatives," see <http://www.georgewbush.com/issues/armiescompassion.html> (last visited Mar. 20, 2001). Vice President Al Gore stated in a May 24, 1999 speech that: "I believe we should extend this carefully tailored approach [Charitable

This same attitude—then toward the Native American reservations—was held by President Grant, who instituted something called the “Peace Policy.”<sup>18</sup> The Peace Policy was intended to be a means of “conquering [the Indians] with kindness.”<sup>19</sup> It began with the best of intentions. The military was not doing a good job of civilizing and educating the Native Americans in the West. Banned from hunting, they needed to learn farming techniques to avoid starvation. Religious organizations, with the Quakers leading the way, went to Washington and said, “You should let us do it because we already have missions in the West.” The result was that Congress and the President divided up the Indian reservations among particular religious denominations.<sup>20</sup> Reservations were assigned to particular religions: there were Quaker agents, there were Methodists, there were Presbyterians. The results were not promising.

First, churches that did not receive reservation assignments complained to Congress. The result was interdenominational dispute that descended quickly into charges of bigotry. The Catholics were particularly unhappy because they had been quite successful at mission work in the West, but they were not part of the original agency assignments.<sup>21</sup> At that point, the government was so distraught over how to handle these fights over territory—these were territorial fights by religious organizations—that the Catholics were allowed to go on the same reservation with the Protestants, but they were not permitted to talk to the same Native Americans.

One might say, “We live in a more enlightened era; that would never happen in this era.” But, in fact, the existing Charitable Choice laws are drafted in a way that encourages interdenominational rancor by permitting Congress to assign a particular religious organization control over all drug treatment in one particular state.<sup>22</sup> For example, one group could be assigned Minnesota, and

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Choice] to other vital services where faith-based organizations can play a role—such as drug treatment, homelessness, and youth violence prevention.” Al Gore, Speech in Atlanta, Georgia, at [http://www.gorenet.com/speeches/speeches\\_faith\\_052499.html](http://www.gorenet.com/speeches/speeches_faith_052499.html) (May 24, 1999).

18. See generally HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890* 56-86 (1963); ROBERT WINSTON MARDOCK, *THE REFORMERS AND THE AMERICAN INDIAN* (1971).

19. See FRITZ, *supra* note 18, at 64.

20. *Id.* at 64-70.

21. *Id.* at 87, 92.

22. See, e.g., Community Services Block Grant Program, 42 U.S.C. § 9920(e) (2000) (“If an eligible entity or other organization . . . acting under a contract . . . with the Federal Government or a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to pro-

then it would have the power to subcontract to other religious organizations. Where there is one group that has control of geographical territory, the Peace Policy echoes. The notion that there will be no fighting by religious groups over a large amount of government money would seem to be wishful thinking.<sup>23</sup>

Under the Peace Policy, when Congress decided it would not insist on accountability of government expenditures and allowed the churches to address a large social problem, it inadequately funded the missions. On the one hand, the churches treated government money as a reason not to have to raise their own funds. On the other hand, the government, believing itself not responsible for the results of the Peace Policy, provided too little funding to succeed.<sup>24</sup> The tragic but seemingly inevitable result was that, because the Native Americans were not educated in agrarian techniques, but rather proselytized with the money provided, many Indians starved.<sup>25</sup>

We heard this morning from Marc Stern that religions do not design their buildings and should not have to design their buildings with the public purpose in mind. The same is true of religious organizations engaging in mission, not the government. The mission is for furthering the religious organization's often transcendental ends. The experience with the Peace Policy teaches that handing responsibility for social problems to religious organizations may not be a panacea, but rather a Pandora's box.

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vide assistance . . . [this organization] shall have the same duties under this section as the government.").

23. One fascinating thing about the Peace Policy is that it generated the first lobbying offices in Washington by religious organizations. In response, the Protestants and the Catholics set up their religious lobbying offices.

24. See FRITZ, *supra* note 18, at 135.

25. *Id.*

