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## **Charitable Choice: Legal and Constitutional Issues**

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# Charitable Choice: Legal and Constitutional Issues

## Summary

Soon after taking office in 2001, President Bush put forward a charitable choice agenda intended to expand the ability of faith-based organizations to provide federally funded social services without impairing their religious character or the religious freedom of beneficiaries. However, prior to 2001, Congress began enacting charitable choice rules for various federally funded social programs, including, Temporary Assistance for Needy Families (TANF), the Community Service Block Grant (CSBG), and substance abuse prevention and treatment programs. When Congress did not enact legislation to apply the concepts behind charitable choice to more programs, the Bush Administration issued an Executive Order directing a wide range of social programs to follow the rubric of charitable choice. Despite the focus on charitable choice during the Bush Administration, perhaps the broadest example of charitable choice rules are those established by the 1996 welfare reform law (P.L. 104-193).

Since its inception, charitable choice has been persistently controversial; and President Bush's faith-based initiative made that controversy highly visible. Much of the legal controversy has centered on the constitutionality of the federal government directly subsidizing faith-based social services programs and on whether subsidized religious organizations ought to be able to discriminate on religious grounds in their employment practices.

This report provides analysis of a number of factual, civil rights, and constitutional questions that have been raised regarding charitable choice in general. The analysis is generally focused on those provisions enacted as part of the 1996 welfare reform law. More recent charitable choice rules may give rise to the same or similar concerns. Primarily, this report focuses on civil rights concerns that have arisen in the context of charitable choice and First Amendment issues, as well as recent legal developments related to charitable choice. It will be updated as events warrant.

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# Charitable Choice: Legal and Constitutional Issues

## Introduction

Soon after taking office in 2001, President Bush put forward a charitable choice agenda intended to expand the ability of faith-based organizations to provide federally funded social services without impairing their religious character or the religious freedom of beneficiaries. However, prior to 2001, Congress began enacting charitable choice rules for various federally funded social service programs, including Temporary Assistance for Needy Families (TANF), the Community Service Block Grant (CSBG), and substance abuse prevention and treatment programs.<sup>1</sup> When Congress did not enact legislation to apply the concepts behind charitable choice to more programs, the Administration issued an Executive Order directing a wide range of social programs to follow the rubric of charitable choice.<sup>2</sup>

Despite the focus on charitable choice during the Bush Administration, perhaps the broadest example of charitable choice rules are those established by the 1996 welfare reform law (P.L. 104-193).<sup>3</sup> The provisions of the 1996 law are probably the most far-ranging set of rules so far set out and have been a basic model for charitable choice provisions since enacted, proposed, or established by regulation. In general, the law's major charitable choice provision bars government from discriminating against an organization applying to provide publicly funded services on the basis of its religious character, so long as the program is implemented in a manner consistent with the Establishment Clause of the First Amendment to the U.S. Constitution. Moreover, it stipulates the following rules with regard to faith-based organizations applying for or receiving public funds and applicants for/recipients of services:

- Religious organizations remain independent of government and retain control over the definition, development, practice, and expression of their religious belief.
- Government may not require religious organizations to change their form of internal governance or to remove religious art and other symbols as a condition of participation.

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<sup>1</sup> For more information on the application of charitable choice rules to these and other programs, see CRS Report RL32736, *Charitable Choice Rules and Faith-Based Organizations* by Joe Richardson.

<sup>2</sup> For more information on this Executive Order, see CRS Report RS21924, *Charitable Choice: Expansion by Executive Action*, by Joe Richardson.

<sup>3</sup> For more information, see CRS Report RS20712, *Charitable Choice, Faith-Based Initiatives, and TANF*, by Vee Burke.

- Faith-based organizations may discriminate on religious grounds in their employment practices, regardless of their receipt of public funds.
- Like other grantees/contractors, religious organizations' use of public funds is subject to audit — except that, when federal funds are segregated, only those moneys are subject to audit.
- Any party seeking to enforce its rights under charitable choice provisions of law can assert a civil court action for relief against the entity/agency allegedly committing a violation.
- No funds provided directly (as opposed to indirectly through vouchers) may be spent for sectarian worship, instruction, or proselytization.
- Federal charitable choice rules are not to be construed as preempting any provision of a state's constitution or laws regarding aid to or through religious organizations.
- Faith-based organizations may not discriminate against beneficiaries or potential beneficiaries on the basis of religion or religious belief.
- Government must provide accessible alternative providers where individuals have an objection to the religious character of the organization/institution from which they receive or would receive services.

Since its inception, charitable choice has been persistently controversial; and President Bush's faith-based initiative made that controversy highly visible. Much of the legal controversy has centered on the constitutionality of the federal government directly subsidizing faith-based social services programs and on whether subsidized religious organizations ought to be able to discriminate on religious grounds in their employment practices.

This report provides analysis of a number of factual, civil rights, and constitutional questions that have been raised regarding charitable choice in general. The analysis is generally focused on those provisions enacted as part of the 1996 welfare reform law. More recent charitable choice regulations issued under the executive order discussed below may give rise to the same or similar concerns. Primarily, this report focuses on the civil rights concerns that have arisen in the context of charitable choice and First Amendment issues, as well as recent legal developments related to charitable choice. It will be updated as events warrant.

## **Civil Rights Concerns**

Several civil rights concerns have been raised in the debates on charitable choice. The primary one has been whether the religious exemption in Title VII of the Civil Rights Act of 1964, which allows religious organizations to discriminate on religious grounds in their employment practices, should apply to religious organizations that receive public funds under the rubric of charitable choice. President Bush's December 12, 2002, executive order (E.O. 13279) raised a related issue by exempting religious organizations that contract to provide goods and services to the federal government or that participate in federally financed construction contracts from the religious nondiscrimination in employment provisions of Executive Order 11246. There has also been some concern over the

protections from discrimination afforded beneficiaries by charitable choice, and on whether charitable choice should preempt state and local civil rights laws that go beyond federal nondiscrimination requirements and bar employment discrimination on such bases as sexual orientation and marital status.

These issues arise in the context of a complex panoply of civil rights mandates and exemptions that already exist. The following subsections explicate charitable choice with respect to (1) existing mandates barring discrimination in programs and activities that receive federal financial assistance, (2) existing regulatory mandates barring discrimination in employment practices, particularly Title VII of the Civil Rights Act of 1964; and (3) the preemption of state and local nondiscrimination laws that go beyond federal law. A final subsection discusses the employment nondiscrimination requirements of Executive Order 11246 and the President's exemption of religious organizations from the religious nondiscrimination requirement of that Order.

**Nondiscrimination in federally assisted programs.** Federal law imposes a number of civil rights obligations on the provision of services in programs and activities that receive federal financial assistance:

- Title VI of the Civil Rights Act of 1964 bars discrimination on the bases of race, color, or national origin.<sup>4</sup>
- Title IX of the Education Amendments of 1972 bars discrimination on the basis of sex and on the basis of blindness (in admissions) in education programs.<sup>5</sup>
- Section 504 of the Rehabilitation Act of 1973 bars discrimination on the basis of handicap.<sup>6</sup>
- The Age Discrimination Act of 1975 bars discrimination on the basis of age.<sup>7</sup>

All of these prohibitions on discrimination apply generally and are triggered by the receipt of federal funds, but most of them apply only to the delivery of services and not to the employment practices of the entities that receive federal funds. The applicability of these statutes to federally financed programs and activities is not altered by charitable choice.

In contrast, there is no comparable federal statute that generally bars **religious** discrimination in federally funded programs and activities. Individual programs sometimes contain such a prohibition,<sup>8</sup> but there is no general statutory prohibition.

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<sup>4</sup> 42 U.S.C.A. 2000d *et seq.*

<sup>5</sup> 20 U.S.C.A. 1681 *et seq.*

<sup>6</sup> 29 U.S.C.A. 794.

<sup>7</sup> 42 U.S.C.A. 6101 *et seq.*

<sup>8</sup> *See, e.g.,* the nondiscrimination prohibition attached to the Head Start program at 42 U.S.C.A. 9849(a).

Nonetheless, charitable choice has, since its inception as part of the welfare reform measure in 1996, included provisions that bar religious organizations from discriminating against beneficiaries on religious grounds and that require government to make an alternate provider available to any beneficiary who objects to the religious character of a given provider.

All of the existing charitable choice statutes, with the exception of the Community Service Block Grants (CSBG) (P.L. 105-285), bar a religious organization that receives assistance from discriminating against beneficiaries on the basis of “religion” or “a religious belief.” Three of the four statutes also bar such discrimination on the basis of a “refusal to actively participate in a religious practice.” But one of the substance abuse statutes does not include this latter prohibition.<sup>9</sup>

**Nondiscrimination in employment.** Federal statutes impose a number of employment nondiscrimination requirements on public and private employers, and generally these are not dependent on whether or not the entity receives federal financial assistance, i.e., they are regulatory requirements that apply regardless of whether an entity receives federal assistance. With the exception of Title IX, none of the nondiscrimination statutes described in the previous subsection applies to the employment practices of entities that receive federal funds (unless a primary objective of the federally funded program is to provide employment). But most public and private employers that employ more than a specified number of employees are barred by the Americans with Disabilities Act from discriminating in their employment practices on the basis of disability,<sup>10</sup> by the Age Discrimination in Employment Act on the basis of age,<sup>11</sup> and by Title VII of the Civil Rights Act of 1964 on the bases of race, color, national origin, sex, and religion.<sup>12</sup>

A number of these statutes contain special provisions with respect to the employment practices of religious institutions. Religious educational institutions are exempt from the sex nondiscrimination requirement of Title IX, for instance, if “the application of this subsection would not be consistent with the religious tenets of such organization.”<sup>13</sup> The Americans with Disabilities Act, while barring religious organizations from discriminating on the basis of disability in employment, specifically provides that they may still give preference in their employment practices on the basis of religion and may require their employees to conform to their religious tenets.<sup>14</sup> Most important, Title VII specifically exempts religious employers from its ban on religious discrimination in employment.

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<sup>9</sup> See P.L. 106-554.

<sup>10</sup> 42 U.S.C.A. 12201 *et seq.*

<sup>11</sup> 29 U.S.C.A. 621 *et seq.*

<sup>12</sup> 42 U.S.C.A. 2000e *et seq.*

<sup>13</sup> 20 U.S.C.A. 1681(a)(3).

<sup>14</sup> 42 U.S.C.A. 12113(c).

***Title VII and the religious exemption.*** It is the Title VII exemption that has generated the most extensive debate in the discussion of charitable choice, because all of the charitable choice statutes and proposals so far have explicitly provided that the Title VII exemption “shall not be affected by the religious organization’s provision of assistance under, or receipt of funds from, a program described in ....”

Title VII bars most public and private employers with 15 or more employees from discriminating in their employment practices on the bases of race, color, national origin, sex, and religion. This threshold requirement of 15 employees means that many churches, synagogues, and other congregational entities, as well as small religious social services providers, are not large enough to be covered by any of the nondiscrimination mandates of Title VII. But Section 702 of Title VII specifically exempts those religious employers that are large enough to be covered from its prohibition on religious discrimination, as follows:

This title shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.<sup>15</sup>

Thus, religious organizations otherwise covered by Title VII may use religion as a criterion in their hiring, firing, promotion, and other employment practices; and they may do so not only with respect to employees engaged in religious activities but also those engaged in purely secular activities. This exemption has been unanimously upheld as constitutional by the Supreme Court with respect to the nonprofit activities of religious organizations<sup>16</sup> and has been applied to allow a wide variety of religious entities to discriminate on religious grounds in a wide variety of circumstances.<sup>17</sup>

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<sup>15</sup> 42 U.S.C.A. 2000e-1. Title VII also contains two other exemptions, now largely redundant, allowing religious employers to discriminate on religious grounds. The first allows educational institutions that are religiously controlled or that are “directed toward the propagation of a particular religion” to discriminate on religious grounds in their employment practices. The second allows all employers, not just religious organizations, to use religion, sex, or national origin as a criterion in their employment practices if religion, sex, or national origin “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” See 42 U.S.C.A. 2000e-2(e).

<sup>16</sup> *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). The Court offered no comment with respect to the constitutionality of the exemption as it might be applied to any profit-making activities of religious organizations.

<sup>17</sup> See, e.g., *Corporation of the Presiding Bishop v. Amos*, *supra* (church fired a building engineer employed in a church-owned gymnasium open to the public because he failed to qualify for a “temple recommend”); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (Catholic school fired a teacher who had remarried without first seeking an annulment of her first marriage in accord with Catholic doctrine); *Porth v. Roman Catholic Diocese of Kalamazoo*, 209 Mich.App. 630, 532 N.W.2d 195 (Mich. App. 1995) (Catholic school refused to renew the contract of a Protestant teacher after it had decided to hire only Catholics as faculty members); *Walker v. First Orthodox Presbyterian Church*, 22 FEP Cases 761 (Cal. 1980)

(continued...)

As noted, Title VII is a regulatory statute. Nothing in its language generally or in the religious exemption provision (§ 702) suggests that either is limited to situations in which an employer does not receive public funds. The case in which the Supreme Court upheld § 702 as constitutional did not involve any public funding,<sup>18</sup> but several lower federal courts have held the exemption to be applicable to religious organizations receiving public funds.<sup>19</sup> Nonetheless, apparently to eliminate any possible misunderstanding, all four charitable choice statutes have stated explicitly that the religious exemption in Title VII is not lost simply because a religious employer receives public funds. That, in turn, has generated vigorous opposition from those who believe government should not subsidize such discrimination.

Religious organizations that meet the minimum size requirement of Title VII (i.e. the organization has 15 or more employees) are **not** exempt from the other employment nondiscrimination requirements of Title VII regarding race, color, national origin, and sex; and charitable choice does not alter, or propose to alter, the applicability of these requirements. Thus, religious organizations have in a number of instances been held liable under Title VII for discrimination on the bases of race, sex, or national origin.<sup>20</sup> It can sometimes be a close question, however, whether the

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<sup>17</sup> (...continued)

(church fired its organist on the grounds his homosexuality conflicted with the church's beliefs); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6<sup>th</sup> Cir. 1996) (Christian school fired an unmarried female teacher after she became pregnant because of its beliefs opposing extramarital sex); *Maguire v. Marquette University*, 814 F.2d 1213 (7<sup>th</sup> Cir. 1987) (Catholic university refused to hire a female professor because her views on abortion were not in accord with Catholic doctrine); *EEOC v. Presbyterian Ministries, Inc.*, 788 F.Supp. 1154 (W.D. Wash. 1992) (a Christian retirement home fired a Muslim receptionist because she insisted on wearing a head covering as required by her faith); *Piatti v. Jewish Community Centers of Greater Boston, Mass.* LEXIS 733 (1993) (a Jewish community center refused to hire a Catholic as a youth director); *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983) (a newspaper owned by the Christian Scientist Church refused to hire applicants of other faiths); and *Hall v. Baptist Memorial Health Care Corporation*, 215 F.3d 618 (6<sup>th</sup> Cir. 2000) (a Baptist health care corporation fired an employee because she had assumed a leadership role in a church that welcomed and supported gay and lesbian individuals).

<sup>18</sup> *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, *supra*, n. 86.

<sup>19</sup> *See, e.g.*, *Hall v. Baptist Memorial Health Care Corporation*, *supra*, n. 10 (student assistance); *Siegel v. Truett-McConnell College*, *supra*, n. 11 (student assistance); *Young v. Shawnee Mission Medical Center*, Civ. No. 88-2321-S (D. Kan., decided Oct. 21, 1988) (Medicare payments); *Dodge v. Salvation Army*, 1989 U.S. Dist. LEXIS 4797, 48 Empl. Prac. Dec. (CCH) P38,619 (S.D. Miss. 1989) (unspecified public funding of a Victims Assistance Coordinator position).

<sup>20</sup> *See, e.g.*, *EEOC v. Pacific Press Publishing House*, 676 F.2d 1272 (9<sup>th</sup> Cir. 1982) (publishing house had fired a female employee after she complained that she had been denied monetary allowances paid to similarly situation male employees); *EEOC v. Lutheran Family Services in the Carolinas*, 884 F.Supp. 1033 (E.D. N.C. 1994) (a religious social services provider had refused to give a pregnant employee a leave of absence but gave extended leaves of absence to male employees for a variety of reasons); and *EEOC v.*

(continued...)

alleged discrimination by a religious employer is based on religion or one of the prohibited bases of discrimination.<sup>21</sup>

**Ministerial exception.** It should be noted that the Title VII exemption overlaps to some degree with a constitutionally-based employment discrimination exemption for religious organizations that has been labeled the “ministerial exception.” This exception exempts religious organizations from **all** statutory prohibitions on discrimination with respect to the employment of ministers and other ecclesiastical personnel. The free exercise of religion clause of the First Amendment, it has been held, bars the government from interfering in any way with the relationship between a religious institution and its ministers. The ministerial exception has been held to apply to the employment of ministers (including youth ministers, probationary ministers, and ministers of music), seminary faculty, and hospital chaplains.<sup>22</sup> It has been held **not** to apply, however, with respect to the employment by religious organizations of persons who are not engaged in a religious ministry or in the training of persons for such ministries, such as the administrative and support staff in religious institutions.<sup>23</sup> Because the ministerial exemption is constitutionally based, it is not modified by charitable choice in any way.

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<sup>20</sup> (...continued)

Southwestern Baptist Theological Seminary, 651 F.2d 277 (5<sup>th</sup> Cir. 1981), *cert. den.*, 456 U.S. 905 (1982) (seminary held to be subject to filing information reports on its employment practices with respect to staff in its non-academic departments).

<sup>21</sup> In several cases the courts have refused to grant summary judgment in favor of Christian schools that had each fired an unmarried female teacher who had become pregnant, saying that if the dismissals were due to the teachers’ adultery the Title VII religious exemption would apply but that dismissal for pregnancy alone would constitute forbidden sex discrimination. *See Vigars v. Valley Christian Center of Dublin, Cal.*, 805 F.Supp. 802 (N.D. Cal. 1992); *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D. N.Y. 1998); and *Cline v. Catholic Diocese of Toledo*, 199 F.3d 853 (6<sup>th</sup> Cir. 1999).

<sup>22</sup> *See McClure v. Salvation Army*, 460 F.2d 553 (5<sup>th</sup> Cir.), *cert. den.*, 409 U.S. 896 (1972) (firing of a female officer in the Salvation Army after she claimed she was given a lower salary and fewer benefits than male officers held to be within the scope of the ministerial exemption); *Bryce v. Episcopal Church in the Diocese of Colorado*, 121 F.Supp.2d 1327 (firing of youth minister by her church after she participated in a commitment ceremony with her partner held to be a constitutionally exempt act); *Young v. Northern Illinois Conference of the United Methodist Church*, 21 F.3d 184 (7<sup>th</sup> Cir. 1994), *cert. den.*, 513 U.S. 929 (1994) (conference of churches’ refusal to change the probationary status of an African-American minister held to be constitutionally exempt); *EEOC v. The Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4<sup>th</sup> Cir.), *cert. den.*, 69 U.S.L.W. 3206 (2000) (church fired its minister of music); *EEOC v. Southwestern Baptist Theological Seminary*, *supra* (seminary’s criteria for its faculty held to be constitutionally exempt from monitoring and examination by the EEOC); and *Sharon v. St. Luke’s Presbyterian School of Theology*, 713 N.E.2d 334 (Ind. Ct. App., 1<sup>st</sup> Dist., 1999) (firing of a chaplain by a religiously affiliated hospital held to be constitutionally protected).

<sup>23</sup> *See, e.g.*, *EEOC v. Southwestern Baptist Theological Seminary*, *supra* (administrative and support staff in a seminary) and *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9<sup>th</sup> Cir. 1982) (editorial support staff in a religious publishing house).

**Preemption of state and local civil rights laws.** Another issue that has raised concerns is the preemptive effect of charitable choice on state and local civil rights laws that bar forms of discrimination that are not barred by federal law, such as discrimination based on sexual orientation or marital status. All of the charitable choice statutes that have been enacted to date provide that a religious organization that is a program participant “shall retain its independence from Federal, State, and local government, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.” Similarly, all of the charitable choice statutes to date have barred government from requiring that a religious provider “alter its form of internal governance” and, as noted above, have explicitly provided that a religious organization’s exemption under Title VII “shall not be affected by its participation in, or receipt of funds from, a designated program.” But with the exception of a provision added to the charitable choice statute concerning substance abuse programs,<sup>24</sup> little attention has been paid to whether these provisions might have a preemptive effect on state and local civil rights laws.

Under the supremacy clause of the Constitution,<sup>25</sup> it seems clear that Congress has the power to preempt state and local laws pursuant to charitable choice. What has been the subject of debate has been the desirability of doing so in this case. It might be noted, however, that Executive Order 13279 issued by President Bush on December 12, 2002 (discussed *infra*), directs federal departments and agencies to implement a similar policy regarding the independence of religious entities from state and local laws in their social services programs.

**Modification of Executive Order 11246.** Executive Order 11246, in effect since 1965,<sup>26</sup> requires that all federal procurement contracts (Part II) and federally assisted construction contracts (Part III) include clauses barring contractors and subcontractors from discriminating in their employment practices on the bases of race, color, religion, sex,<sup>27</sup> or national origin and requiring them to take affirmative action to promote equal employment opportunity. Section 202 of the Order provides in part as follows:

During the performance of this contract, the contractor agrees as follows: (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The

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<sup>24</sup> P.L. 106-554, which added charitable choice provisions to Title V of the Public Health Service Act, prefaced the Title VII exemption language with the following sentence: “Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment.”

<sup>25</sup> U.S. Constitution, Art. VI, cl. 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.”

<sup>26</sup> 30 Fed. Reg. 12319 (Sept. 25, 1965). As amended, it can be found in the U.S. Code following 42 U.S.C.A. 2000e.

<sup>27</sup> E.O. 11246 did not initially include “sex” among the prohibited grounds of discrimination. That was added two years later by E.O. 11376 (32 Fed. Reg. 14303 (Oct. 13, 1967)). A subsequent amendment also consolidated enforcement functions in the Department of Labor. See E.O. 12086, 43 Fed. Reg. 46501 (Oct. 10, 1978).

contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin ....

Section 301, in turn, requires that the same provisions be included in all federally assisted construction contracts.

On December 12, 2002, President Bush issued Executive Order 13279.<sup>28</sup> That Order, *inter alia*, amends E.O. 11246 with respect to the prohibition on religious discrimination as it applies to religious organizations. The amendment adds the following language to E.O. 11246:

Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.<sup>29</sup>

E.O. 13279 states that the amendment is “to further the strong Federal interest in ensuring that the cost and progress of Federal procurement contracts are not adversely affected by an artificial restriction of the labor pool caused by an unwarranted exclusion of faith-based organizations from such contracts.”<sup>30</sup>

The amendment tracks word-for-word the exemption afforded religious entities from the religious nondiscrimination requirement of Title VII of the Civil Rights Act of 1964.<sup>31</sup> Thus, like the Title VII exemption, the exemption it affords covered religious entities is broad: It applies to *all* of the activities of the organizations regardless of whether an employee’s functions are secular or religious. But the amendment does not affect the obligation of covered religious entities to comply with the other requirements of the executive order regarding employment nondiscrimination on the bases of race, color, sex, and national origin; nor does it affect the obligation of covered nonreligious entities with respect to religious discrimination.

To the extent the amendment modifies Part II of E.O. 11246, it seems doubtful that it has substantial significance for religious organizations. Part II in itself is not applicable to the federal grant and cooperative agreement programs subsidizing the provision of social services that have been the primary focus of debate about charitable choice and religious discrimination by faith-based organizations. Part II concerns federal procurement contracts, i.e., contracts for the provision of goods and services directly to the federal government. Such contracts can range from food services to office supplies to bombers and can, obviously, involve substantial sums

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<sup>28</sup> 67 Fed. Reg. 77141 (Dec. 16, 2002).

<sup>29</sup> *Id.* at 77143.

<sup>30</sup> *Id.*

<sup>31</sup> 42 U.S.C. 2000e-1.

of money. But it is not at all clear that religious organizations have historically played a significant role in such federal procurement contracts.

However, the amendment also appears to apply to Part III of E.O. 11246, i.e., to federally assisted construction contracts. Part III defines “construction contract” to mean a contract “for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property”; and its coverage includes construction contracts that are incident to carrying out a federal “grant, contract, loan, insurance, or guarantee” program. Thus, Part III reaches beyond the federal procurement contracts addressed by Part II and applies to the construction aspects of federal grant programs such as, for example, those of the Department of Housing and Urban Development. Because religious organizations have historically been extensively involved in federally assisted housing and community development programs, and because other federally assisted social services programs in which faith-based organizations participate may incidentally involve construction or renovation activities, the amendment to this part of E.O. 11246 likely has greater significance for such organizations.

## **First Amendment Issues**

As noted above, the charitable choice statutes contain a number of provisions that seem intended to ensure their constitutionality. All of these measures require that they be implemented “consistent with the Establishment Clause of the United States Constitution.” All require that public funds that are disbursed directly to religious organizations not be used for purposes of religious worship, instruction, or proselytization. All have provisions to protect those who receive services from religious organizations from religious discrimination. All require equal treatment, but not preferential treatment, for religious organizations seeking to participate in government social services programs.

On the other hand, all of the statutes also allow religious organizations that receive public funds to discriminate on religious grounds with respect to their employees, to display religious symbols on the premises where services are provided, and to practice and express their religious beliefs independent of any government restrictions. None of them, moreover, require the publicly funded program to be separately incorporated from its sponsoring religious organization. In addition, the measures allow religious organizations that receive public funds indirectly, i.e., by means of vouchers, to engage in religious worship, instruction, and proselytization in the funded program and to impose religious requirements on beneficiaries after they are once admitted to a program. Finally, all of the charitable choice initiatives seem premised on the assumption that charitable choice may in some manner allow religious organizations to employ their faiths in carrying out the publicly funded programs, regardless of whether they are directly or indirectly funded.

As a consequence, questions have been raised about whether charitable choice on its face or in its implementation is consistent with the establishment of religion clause of the First Amendment. One aspect of this issue concerns whether it is constitutional for public funds to go to organizations that discriminate on religious grounds in their employment practices. More generally, the question is whether it is constitutional for public funds to go to religious organizations that have the

characteristics detailed in the previous paragraph and that in some manner employ their faiths in carrying out the funded programs.

These questions of constitutionality, in turn, have at least two dimensions. The charitable choice statutes and proposals govern public aid that is given **directly** to religious organizations by means of grants or cooperative agreements in the specified programs and, at least in the case of Temporary Assistance for Needy Families (TANF), public aid that is given **indirectly** in the form of vouchers that can be redeemed with religious (as well as nonreligious) organizations. The constitutional strictures that apply to these two forms of aid differ; and as a consequence, the form in which the public aid is provided to religious organizations under charitable choice has implications for the constitutionality of the aid.

These questions are further complicated by the fact that the Supreme Court's interpretation of the establishment clause has been shifting. Prior to its recent decisions, the Court's construction of the establishment clause made it difficult, if not impossible, for religious organizations that are deemed pervasively sectarian to receive aid directly from the government, even for avowedly secular purposes, and have required that programs receiving direct public aid be essentially secular in nature. But the Court's recent decisions in *Agostini v. Felton*<sup>32</sup> and *Mitchell v. Helms*<sup>33</sup> have relaxed the strictures on direct aid and eliminated the pervasively sectarian barrier, although the Court still requires that direct aid to religious institutions not be used for religious indoctrination. With respect to indirect assistance, the Court's past jurisprudence has been less restrictive; and its recent decision in *Zelman v. Simmons-Harris*<sup>34</sup> appears to legitimate an even broader array of voucher programs.

The following subsections detail the constitutional frameworks that appear to govern direct and indirect aid and apply them to charitable choice:

**Direct aid.** In general terms the establishment clause has been construed by the Supreme Court to "absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."<sup>35</sup> "[G]overnment inculcation of religious beliefs," the Court has stated, "has the impermissible effect of advancing religion."<sup>36</sup> To guard against that effect, public assistance which flows **directly** to religious institutions in the form of grants or cooperative agreements has been required by the Court to be limited to aid that is "secular, neutral, and nonideological...."<sup>37</sup> Government has been able to provide direct support to **secular** programs and services sponsored or provided by religious

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<sup>32</sup> 521 U.S. 203 (1997).

<sup>33</sup> 530 U.S. 793 (2000).

<sup>34</sup> 122 S.Ct. 2460 (2002).

<sup>35</sup> *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1973).

<sup>36</sup> *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

<sup>37</sup> *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

entities, but it has been barred from directly subsidizing such organizations' religious activities or proselytizing.<sup>38</sup>

The Court gradually distilled the constitutional requirements governing direct aid into a tripartite test. That test, known as the *Lemon* test after the case in which it was first given full expression, required public aid to meet all of the following requirements:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive entanglement with religion."<sup>39</sup>

The secular purpose prong has rarely posed a serious obstacle to the constitutionality of a direct aid program, but the Court's original formulations of the primary effect and entanglement tests often proved fatal to programs providing direct aid to pervasively religious institutions. The Court construed the primary effect test to mean that direct public aid must be limited to secular use. Thus, a direct aid program could founder on this aspect of the *Lemon* test in either of two ways. It could be held unconstitutional if the aid was not limited to secular use either by its nature or by statutory or regulatory constraint.<sup>40</sup> It could also be held unconstitutional if it flowed to institutions that the Court deemed to be pervasively sectarian, i.e., entities whose religious and secular functions were so "inextricably intertwined" that their secular functions could not be isolated for purposes of public aid.<sup>41</sup>

Moreover, even if an aid program was limited to secular use, it often foundered on the excessive entanglement prong of the *Lemon* test. Particularly in the context of direct aid to pervasively sectarian organizations, the Court held that government had to closely monitor the use religious organizations made of the aid provided in order to be sure that the limitation to secular use was observed. But the very act of monitoring, the Court sometimes said, excessively intruded the government into the affairs of the religious institution; and for that reason the aid program was unconstitutional.<sup>42</sup>

Thus, under this application of the *Lemon* test, religious organizations were not automatically disqualified from participating in public programs providing direct assistance. But in order to meet the secular use requirement, such organizations had either to divest themselves of their religious character and to become predominantly secular in nature or, at the least, to be able to separate their secular functions and

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<sup>38</sup> *Committee for Public Education v. Nyquist, supra; Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

<sup>39</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>40</sup> *See, e.g., Committee for Public Education v. Nyquist, supra; Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>41</sup> *See, e.g., Wolman v. Walter, supra, and School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

<sup>42</sup> *Lemon v. Kurtzman, supra; Meek v. Pittenger, supra; Aguilar v. Felton*, 473 U.S. 402 (1985).

activities from their religious functions and activities. To the extent they did so, it was deemed constitutionally permissible for government to provide direct funding to their secular functions. This former interpretation of the establishment clause also generally meant that it was constitutionally **impermissible** for religious organizations that are **pervasively sectarian** to participate in direct public aid programs.<sup>43</sup>

As a practical matter, these interpretations of the establishment clause had their most severe effects on programs providing direct aid to sectarian elementary and secondary schools, because the Court presumed that such schools are pervasively sectarian. The Court presumed to the contrary with respect to sectarian colleges, hospitals, and other social welfare organizations, although it held open the possibility that some of these agencies might be pervasively sectarian.<sup>44</sup>

In its most recent decisions, however, the Court has reformulated the *Lemon* test and abandoned the presumption that some religious institutions, such as sectarian elementary and secondary schools, are so pervasively sectarian that they are constitutionally ineligible to participate in direct public aid programs. The Court still requires that direct public aid serve a secular purpose, not have a primary effect of advancing or inhibiting religion, and not lead to excessive entanglement. But the primary effect test now means that the aid itself must be secular in nature, must be distributed on a religiously neutral basis, and must not be used for purposes of religious indoctrination. Moreover, the Court has now made the excessive entanglement test one aspect of the primary effect inquiry; and it no longer assumes that such entanglement is the inevitable result of government oversight of its aid program.

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<sup>43</sup> The Court did not lay down a hard and fast definition of what makes an organization pervasively sectarian. But it looked at such factors as the proximity of the organization in question to a sponsoring church; the presence of religious symbols and paintings on the premises; formal church or denominational control over the organization; whether a religious criterion is applied in the hiring of employees or in the selection of trustees or, in the case of a school, to the admission of students; statements in the organization's charter or other publications that its purpose is the propagation and promotion of religious faith; whether the organization engages in religious services or other religious activities; its devotion, in the case of schools, to academic freedom; *etc.* See, e.g., *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Lemon v. Kurtzman*, *supra*; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, *supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); and *Bowen v. Kendrick*, 487 U.S. 589 (1988). But the Court has also made clear that "it is not enough to show that the recipient of a ... grant is affiliated with a religious institution or that it is 'religiously inspired.'" *Bowen v. Kendrick*, *supra*, at 621. Indeed, none of these factors, by itself, has been held sufficient to make an institution pervasively sectarian and therefore ineligible for direct aid. Such a finding has always rested on a combination of factors. For useful lower federal court discussions of the criteria bearing on whether an institution is pervasively sectarian or not, see *Minnesota Federation of Teachers v. Nelson*, 740 F.Supp. 694 (D. Minn. 1990) and *Columbia Union College v. Clark*, 159 F.3d 151 (4<sup>th</sup> Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), *on remand sub nom Columbia Union College v. Oliver*, 2000 U.S. Dist. LEXIS 13644 (D. Md. 2000), *aff'd*, 2001 U.S. App. LEXIS 14253 (4<sup>th</sup> Cir. decided June 26, 2001).

<sup>44</sup> See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

In 1997, in *Agostini v. Felton*<sup>45</sup> the Court for the first time overturned a prior establishment clause decision and held it to be constitutional for public school teachers to provide remedial and enrichment services on the premises of private sectarian schools to children attending those schools who were eligible for such services under Title I of the Elementary and Secondary Education Act.<sup>46</sup> The earlier decision of *Aguilar v. Felton, supra*, had found the delivery of such services on the premises of sectarian elementary and secondary schools to be excessively entangling, because the pervasively sectarian nature of the institutions required government to engage in a very intrusive monitoring to be sure that the Title I employees did not inculcate religion. But in *Agostini* the Court stated that subsequent decisions had abandoned the presumption that “public employees will inculcate religion simply because they happen to be in a sectarian environment.”<sup>47</sup> As a consequence, it said, it had also to “discard the assumption that *pervasive* monitoring of Title I teachers is required.”<sup>48</sup> The Court also stated that

the factors we use to assess whether an entanglement is “excessive” are similar to the factors we use to examine “effect” .... Thus, it is simplest to recognize why entanglement is significant and treat it ... as an aspect of the inquiry into a statute’s effect.<sup>49</sup>

Most recently, the Court in *Mitchell v. Helms*<sup>50</sup> upheld as constitutional an ESEA program which subsidizes the acquisition and use of educational materials and equipment by public and private schools. More particularly, the Court found the provision of such items as computer hardware and software, library books, movie projectors, television sets, tape recorders, VCRs, laboratory equipment, maps, and cassette recordings to private sectarian elementary and secondary schools not to violate the establishment clause. In the process the Court overturned parts of two prior decisions which had held similar aid programs to be unconstitutional and which had been premised on the view that direct aid to pervasively sectarian institutions is constitutionally suspect.<sup>51</sup> Although the Justices could not agree on a majority opinion, the plurality opinion by Justice Thomas and the concurring opinion by Justice O’Connor (joined by Justice Breyer) both appear to have eliminated pervasive sectarianism as a constitutionally preclusive characteristic regarding direct aid and modified the primary effect test accordingly. *Agostini* had hinted at this result but *Mitchell* confirmed it. As summarized by Justice O’Connor, the primary effect test now has three essential elements:

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<sup>45</sup> 521 U.S. 203 (1997).

<sup>46</sup> The *Agostini* decision overturned in its entirety the Court’s decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) but also overturned parts of *Meek v. Pittenger, supra*, and *City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

<sup>47</sup> *Agostini v. Felton, supra*, at 234.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 232-33.

<sup>50</sup> 530 U.S. 793 (2000).

<sup>51</sup> Overturned in part were *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977).

(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion.<sup>52</sup>

Thus, the Court now appears to construe the establishment clause to allow some forms of direct aid to religious entities that formerly were deemed constitutionally excluded because of their pervasively religious character. Under the reformulated *Lemon* test, direct public aid must still serve a secular purpose and not create an excessive entanglement. But the most critical elements appear to be that the aid is distributed in a religiously neutral manner, i.e., that it does not define its recipients on the basis of religion and provide an incentive for beneficiaries to undertake religious indoctrination, and that it does not result in religious indoctrination which is attributable to the government.

**Indirect aid.** Indirect aid in the form of tax benefits or vouchers, however, was less constrained prior to the Court's recent revisions of its establishment clause jurisprudence; and the Court's most recent decision in *Zelman v. Simmons-Harris*<sup>53</sup> appears to loosen the constitutional bounds even more. Like its standards for direct aid, the Court requires that indirect aid programs serve a secular purpose and be distributed to their initial beneficiaries on a religiously neutral basis, i.e., that the beneficiaries not be chosen or given preference on the basis of a religious criterion. But the critical element seems to be whether the initial beneficiaries have a "true private choice" in deciding whether to obtain subsidized services from secular or religious providers.

In its earlier decisions the Court held indirect aid programs unconstitutional if they had been designed in such a manner that the universe of choice available to the beneficiaries was almost entirely religious.<sup>54</sup> But if the initial beneficiaries had a genuinely independent choice among secular and religious providers, the Court held the programs constitutional and ruled that even pervasively sectarian entities were not precluded from participating.<sup>55</sup> Indeed, the Court made clear that indirect aid which ultimately is channeled to religious institutions does not have to be restricted to secular use but can be used for all of the institutions' functions, including their religious ones.<sup>56</sup>

The Court's recent decision in *Zelman v. Simmons-Harris*, *supra*, further loosened the constitutional constraints on indirect aid. That case involved a program

<sup>52</sup> *Mitchell v. Helms*, *supra*, at 845 (opinion of O'Connor, J.).

<sup>53</sup> 122 S.Ct. 2460 (2002).

<sup>54</sup> *Committee for Public Education v. Nyquist*, *supra*, and *Sloan v. Lemon*, *supra*.

<sup>55</sup> *Mueller v. Allen*, 463 US. 388 (1983); *Witters v. Washington Department of Social Services*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Zelman v. Simmons-Harris*, *supra*.

<sup>56</sup> For a more detailed examination of the constitutional standards governing indirect aid, including the Court's decision in *Zelman v. Simmons-Harris*, *supra*, and for summaries of recent state and lower federal court decisions, see CRS Report RL30165, *Education Vouchers: Constitutional Issues and Cases*.

of educational vouchers that low-income parents could use at private schools in the city of Cleveland. Most of those schools were religious in nature. But the Court held that in evaluating whether the parents had a true private choice in using the aid, **all** of the educational options open to the parents needed to be considered and not just the private school options. Thus, enrollment in public schools, magnet schools, and community schools, as well as the possibility of receiving special tutoring assistance, all needed to be considered as options along with the private religious and secular school possibilities. In other words, the Court held that the universe of choice available to the voucher recipients was not defined solely by the private providers where the vouchers could be used but included a number of public school and non-voucher educational options as well.

**Constitutionality of charitable choice.** Some aspects of the charitable choice proposals that have been enacted likely satisfy the foregoing requirements. That seems particularly to be the case with respect to social services aid that is provided in the form of vouchers. The Court's interpretations of the establishment clause make clear that such aid can ultimately flow even to pervasively sectarian institutions, so long as the initial recipients have a true private choice among service providers. That means both that such aid can go to religious entities that discriminate on religious grounds in their employment practices<sup>57</sup> and that such entities need not be barred from engaging in religious worship, instruction, and proselytizing in programs receiving such support. Thus, there does not appear to be a constitutional problem in the provisions of the charitable choice statutes that allow such employment discrimination and that permit religious institutions receiving social services aid indirectly to engage in religious worship, instruction, or proselytizing in the subsidized program.

Nonetheless, there may still be a constitutional question raised about charitable choice with respect to indirect aid. The critical issue for indirect aid continues to be whether there is a genuinely independent decision-maker between the government and the entity that ultimately receives the assistance or whether the government has dictated that the aid ultimately goes to a religious entity. All of the charitable choice measures, with the exception of CSBG, require that those who object to a particular religious provider be given an alternative that is either secular or not religiously objectionable. But they may not require that a voucher recipient have a choice of

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<sup>57</sup> A number of lower court decisions have held that religious colleges and hospitals do not forfeit their Title VII exemption as a result of receiving public funds indirectly in the form of student aid and Medicare payments. *See, e.g.,* *Young v. Shawnee Mission Medical Center*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. 1988) (court held that the Title VII exemption applied to a religiously affiliated hospital's firing of a clerk-receptionist because she was not a Seventh Day Adventist, notwithstanding the hospital's acceptance of Medicare payments); *Siegel v. Truett-McConnell College, Inc.*, 13 F.Supp.2d 1335 (N.D. Ga. 1994) (Baptist college's firing of a teacher because he was not a Christian held to be protected by Title VII notwithstanding college's receipt of public funds from a federal student assistance program); and *Hall v. Baptist Memorial Health Care Corporation*, 215 F.2d 618 (6<sup>th</sup> Cir. 2000) (Baptist college's firing of a student services specialist because she had become a lay minister in a community church that welcomed gay and lesbian members held to be protected by Title VII exemption notwithstanding the college's receipt of public funds by means of unspecified federal student assistance programs).

secular and religious providers initially. Whether this is sufficient to meet the Court's standards does not seem certain.

Whether **direct** aid to religious entities that discriminate on religious grounds in their employment practices, as allowed by all of the charitable choice statutes, can pass constitutional muster seems more complex but still likely. Prior to *Mitchell* the Court's decisions had often used such employment discrimination as an indicator that an entity was pervasively sectarian and, hence, ineligible for direct assistance.<sup>58</sup> But it had never relied on that factor alone; other factors always entered into the constitutional equation.<sup>59</sup> Those rulings, consequently, seem to suggest that religious discrimination in employment, by itself, might not have been enough to render a direct aid program unconstitutional. *Mitchell* seems to strengthen that possibility, at least for certain kinds of direct aid. In that case, as noted, the Court upheld as constitutional a direct aid program providing educational supplies and equipment to entities that the Court had previously found to be pervasively sectarian and had previously held to be constitutionally barred from receiving such aid — sectarian elementary and secondary schools. In so doing the Court shifted the constitutional focus from the nature of the organization receiving the aid to whether the aid is distributed in a religiously neutral manner and whether it is used for religious indoctrination. As a consequence, whether the entity receiving the assistance discriminates on religious grounds in its employment practices seems to have become of little or no concern, at least for in-kind direct assistance.

The more critical question concerns the role of faith in carrying out social services programs that are directly subsidized. The Court's decisions make clear that direct public aid cannot be used for religious indoctrination, and all of the charitable choice measures seem to meet this requirement by explicitly prohibiting direct aid from being used for religious worship, instruction, or proselytizing. But the underlying assumption of charitable choice has been that religious organizations ought to be able to retain their religious character and employ their religious faiths

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<sup>58</sup> See, e.g., *Lemon v. Kurtzman*, supra (fact that most of the teachers in the Catholic schools were nuns and rest were largely lay Catholics found to support finding that schools were “an integral part of the religious mission of the Catholic church”); *Hunt v. McNair*, 413 U.S. 734 (1973) (fact that religiously affiliated college had no religious qualifications for faculty weighed in determining whether state could issue bonds to subsidize the construction of academic buildings); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (imposition of religious restrictions on faculty appointments found to be one element in rendering sectarian elementary and secondary schools constitutionally ineligible for state maintenance and repair grants); and *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976) (finding that religiously affiliated colleges did not make hiring decisions “on a religious basis” relied on in part in upholding direct public grants to colleges).

<sup>59</sup> Indeed, in some decisions the Court has given that factor no weight at all. See, e.g., *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding construction of wing at a hospital run by an order of Catholic nuns on the condition the wing be used for the medical care of the poor) and *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (in finding several religiously affiliated colleges not to be so permeated by religion as to be ineligible for federal construction grants for academic buildings, the Court placed primary emphasis on the fact that the schools “were characterized by an atmosphere of academic freedom rather than religious indoctrination”).

in carrying out the subsidized programs. That, it is said, is what makes their programs distinctive and more effective. Thus, given this assumption and the various possibilities for how particular subsidized programs might be implemented, it seems likely that constitutional questions will inevitably arise in the implementation of direct aid programs under charitable choice, notwithstanding its prohibitions on the use of direct aid for religious worship, instruction, and proselytization.

In addition, it should be noted that *Mitchell* involved an in-kind aid program — educational supplies and equipment. All of the Justices in *Mitchell* expressed doubt that direct grants of **money** to religious entities could pass constitutional muster even under the Court’s loosened standards for direct aid programs; and direct grants of money are what seem contemplated in the programs to which charitable choice now applies. Justice O’Connor, joined by Justice Breyer, stated in *Mitchell* both that “[t]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions” and that a direct subsidy “would be impermissible under the Establishment Clause.”<sup>60</sup> Justice Souter, joined by Justices Stevens and Ginsburg, stated:

[W]e have long held government aid invalid when circumstances would allow its diversion to religious education. The risk of diversion is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations, and so from the start we have understood the Constitution to bar outright money grants of aid to religion.<sup>61</sup>

Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, asserted that neutrality is the essential constitutional criterion governing public aid programs that benefit religious entities. But he, nonetheless, observed that “we have seen ‘special Establishment Clause dangers’ ... when *money* is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly.”<sup>62</sup> These statements are all *dicta* and do not indicate with any certainty how the Court might rule on a case involving a particular grant or cooperative agreement. But they do indicate constitutional doubt about direct money grants.

In addition, it deserves notice that one federal district court, in a decision handed down some years prior to *Mitchell*, held religious discrimination in employment by a religious organization in a position **specifically** funded by a government grant to be unconstitutional.<sup>63</sup> Neither *Agostini* nor *Mitchell* addressed the constitutionality

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<sup>60</sup> *Mitchell v. Helms*, *supra*, at 843 (quoting *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 842 (1995) and 841, respectively (O’Connor, J., concurring in the judgment)).

<sup>61</sup> *Id.* at 890 (Souter, J., dissenting).

<sup>62</sup> *Id.* at 818-19, quoting *Rosenberger*, *supra*, at 842 (Thomas, J., plurality opinion) (emphasis in original).

<sup>63</sup> *Dodge v. Salvation Army*, 48 Empl.Prac.Dec. 38619, 1989 U.S. Dist. LEXIS 4797, 1989 WL 53857 (S.D. Miss. 1989) (establishment clause held to bar the Salvation Army from firing a Wiccan from her position as Victims Assistance Coordinator in a Domestic Violence Shelter, both of which were substantially funded by public grants, on the grounds (continued...))

of direct monetary subsidies. On the other hand, it should also be noted that, although not in direct conflict, a federal appellate court recently upheld a state program providing general aid to colleges, including religiously affiliated ones, as applied to a Seventh Day Adventist college, notwithstanding that the college “gave an express preference in hiring ... to members of the Church.”<sup>64</sup> Another recent case that was thought to raise the question of the constitutionality of public funding of an agency that discriminated on religious grounds in its employment practices turned out not to do so. In *Pedreira v. Kentucky Baptist Homes for Children, Inc.*<sup>65</sup> the federal district court held that the firing of an employee because of her lesbian lifestyle by an organization whose Christian values abhorred homosexuality did not involve religious discrimination, because the organization’s policy did not require employees to accept or practice its religious beliefs but only to conform to a behavioral requirement.

As a final observation, it also deserves notice that formal neutrality as the controlling constitutional principle did gain the adherence of four Justices in *Mitchell v. Helms, supra* (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas). This perspective contends that the critical constitutional elements governing direct public aid to religious entities are whether the aid itself is secular and whether it has been distributed in a religiously neutral fashion, i.e., without preference for religious entities. From this perspective it makes no difference whether the institutional entity eventually uses the aid for religious purposes or not. A slight shift in the membership of the Court, thus, could foreshadow further changes in the Court’s jurisprudence in this area.

## Recent Legal Developments

In 2004, several decisions addressing some aspects of charitable choice generally were handed down by the United States Supreme Court and other lower federal courts. While none of these cases specifically addressed the constitutionality of any of the federally funded programs currently subject to charitable choice rules, the decisions may be an indication of how a federal court would address challenges

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<sup>63</sup> (...continued)

that public funding of such discrimination would have a primary effect of advancing religion and would entangle the government in the religious purpose of the Salvation Army).

<sup>64</sup> *Columbia Union College v. Oliver*, 254 F.3d 496 (4<sup>th</sup> Cir. 2001).

<sup>65</sup> 186 F.Supp.2d 757, 86 FEP Cases 417 (W.D. Ky. 2001).

to those programs if brought at a later date.<sup>66</sup> Two of these cases are discussed below.

In *Locke v. Davey*<sup>67</sup>, the United States Supreme Court overturned a decision by the U.S. Court of Appeals for the Ninth Circuit that had held the free exercise clause of the First Amendment to be violated by a statute and a constitutional provision in the state of Washington that were applied to deny a college scholarship to an eligible student simply because he planned to pursue a degree in theology at a religious college.<sup>68</sup> Article I, § 11, of the Washington Constitution provides in part that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Reflecting that stricture, a state statute providing college scholarships for in-state, low and moderate income college students included a provision stating that “[n]o aid may be awarded to any student who is pursuing a degree in theology.”<sup>69</sup> As a consequence, the state denied a Promise Scholarship to a student enrolled in a religious college who sought to pursue a double major in Pastoral Ministries and Business Management and Administration.

The Supreme Court reversed the decision of the Ninth Circuit finding that Washington state’s exclusion of the pursuit of a devotional theology degree from its otherwise inclusive scholarship aid program did not violate the Free Exercise Clause of the First Amendment.<sup>70</sup> The Court rejected Davey’s argument that the program was presumptively unconstitutional because it is not facially neutral with respect to religion. Davey’s claim was based on the Court’s decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* where the Court determined that a city ordinance making it a crime to engage in certain types of animal slaughter violated the Free Exercise

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<sup>66</sup> In mid-2004, the Freedom From Religion Foundation filed a challenge to the current Administration’s faith-based and community initiative as a whole alleging that it violated the Establishment Clause by using government resources to promote religion, favoring religious organizations over secular, and religiously indoctrinating social service recipients. A copy of the complaint can be found here [[http://www.ffrf.org/legal/faithbased\\_complaint.html](http://www.ffrf.org/legal/faithbased_complaint.html)]. The plaintiffs have reportedly voluntarily dismissed eight of their original claims, and others have been dismissed due to lack of standing. What remains are challenges to two particular grants awarded by the Department of Health and Human Services. Motions for summary judgment were due at the end of 2004, but there is no indication of whether the last two claims have been resolved. The case is presumably pending in the United States District Court for the Western District of Wisconsin.

<sup>67</sup> 540 U.S. 712 (2004). For more information see CRS Report RL30165, *Education Vouchers: Constitutional Issues and Cases*.

<sup>68</sup> 299 F.3d 748 (9<sup>th</sup> Cir. 2002).

<sup>69</sup> Wash. Rev. Code § 28B.10.814.

<sup>70</sup> 540 U.S. 720. The Court also rejected Davey’s argument that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech, finding that the Program was not a forum for speech. *Id.* at 721.

rights of those who practice the Santeria religion.<sup>71</sup> The Court distinguished the present case from *Lukumi*, and others in that line of cases, by noting that the state law in question imposed no civil or criminal penalties on any type of religious service or rite, nor did it require the student to choose between their religious beliefs and receipt of a government benefit.<sup>72</sup>

The Court went on to note that the Promise Scholarship Program went “a long way toward including religion in its benefits” by allowing students to attend pervasively religious schools, so long as they are accredited, and allowing students to take devotional theology courses.<sup>73</sup> Without any evidence to suggest animus towards religion, there existed no presumption of unconstitutionality.<sup>74</sup> The Court found that since the state’s interest in not funding the pursuit of devotional degrees was substantial and the burden placed on Promise Scholars by the exclusion of such programs was minor, the program survived constitutional scrutiny.<sup>75</sup>

The United States District Court for the District of Columbia, in *American Jewish Congress v. Corporation for National and Community Service*, ruled that AmeriCorps Education Award Program violated the Establishment Clause by providing awards to teachers who serve in religious schools and by making grants to the religious organizations that oversee such teachers.<sup>76</sup> In making this determination, the court found that Corporation used “highly discretionary criteria to select among potentially qualifying grantees” and “that a number of programs actually list among their requirements that AmeriCorps participants must be of a particular faith.”<sup>77</sup> Based upon these findings, the court stated that “it is clear that the Corporation does not determine eligibility for government aid neutrally.”<sup>78</sup>

The Corporation had argued that although Americorps participants were placed in religious schools, they were required to keep timesheets noting that amount of time they spend on classroom activities and that religious activities were to be excluded from the timesheets they submitted as a condition of their participation in the program. Despite these efforts, the court found that the Corporation’s monitoring of the participant’s time spent on religious and nonreligious activities was inadequate, and that in the context of a religious classroom, it was “not possible to clearly distinguish between the two roles the AmeriCorps participants are supposed to play.”<sup>79</sup> The court also found that funds received by the educational institutions for

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<sup>71</sup> 508 U.S. 520 (1993).

<sup>72</sup> 540 U.S. at 720, citations omitted.

<sup>73</sup> *Id.* at 724.

<sup>74</sup> *Id.* at 725.

<sup>75</sup> *Id.*

<sup>76</sup> 323 F. Supp.2d 44 (D. D.C. 2004).

<sup>77</sup> 323 F. Supp.2d at 60.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 63.

the AmeriCorp participants was not segregated to ensure that the money was spent on only secular activities.<sup>80</sup>

On March 8, 2005, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court.<sup>81</sup> The Court of Appeals noted that AmeriCorps participants and grantees were chosen without regard to religion and that participants who elected to teach religion in addition to secular subjects did so as a result of their own private interests.<sup>82</sup> The court found that the AmeriCorps program itself created no incentives for participants to teach religion and that there were adequate measures in place to ensure that when a participant chose to teach religion, there was no “*imprimatur* of government endorsement.”<sup>83</sup> The court’s decision was appealed, but the Supreme Court denied certiorari on January 9, 2006.<sup>84</sup>

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<sup>80</sup> *Id.* at 64.

<sup>81</sup> 399 F.3d 351 (DC Cir. 2005).

<sup>82</sup> *Id.* at 10.

<sup>83</sup> *Id.* at 11, citing *Zelman* at 655.

<sup>84</sup> 2006 U.S. LEXIS 221 (January 9, 2006).