

**Social Service Vouchers:
Eliminating Poverty By Including Sectarians
In A Constitutional Manner**

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Restoring Self Respect: Social Service Vouchers in the Welfare System

Introduction

In his January 4th 1935 address to Congress, Franklin Delano Roosevelt said:

The lesson of history, confirmed by the evidence immediately before me, shows conclusively that continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fiber. To dole out relief in this way is to administer a narcotic, a subtle destroyer of the human spirit. ... It is in violation of the traditions of America. ... The federal government must and shall quit this business of relief. ... We must preserve not only the bodies of the unemployed from destitution but also their self-respect, their self-reliance and courage and determination.¹

His quote proved sadly true and the program he created grew into something that has cost a great deal of money while the problem it purported to solve grew worse.² Welfare, the term given to describe governmental cash assistance for poor families with dependents, was created under FDR but remained limited. In 1965, President Lyndon Johnson announced he was going to expand federal welfare programs to win the "War on Poverty." The critical lack of understanding that welfare programs would only encourage dependency was demonstrated in August 1964, when President Johnson proclaimed that enactment of his welfare proposals would mean, "The days of the dole in our country are numbered."³ The welfare state continued to grow along with spending, until according to Ohio University professors, Lowell Gallaway and Richard Vedder, in 1994 the federal government funded seventy-six different welfare programs at a cost of more than \$ 240 billion annually. The Professors mentioned that the funding level was "more than twice the amount necessary to raise every welfare recipient above the poverty level."⁴

¹President Roosevelt, Franklin Delano, *The State of the Union Address (1935)* [online] Available: <http://odur.let.rug.nl/~usa/P/fr32/speeches/su35fdr.htm> [Accessed, April 12, 2003]

²Lowell Gallaway & Richard Vedder, Institute for Policy Innovation, *The Cost of Waiting for Welfare Reform*, IPI Policy Report - # 129 (1994), [online] Available : <http://www.ipi.org/> [Accessed, April 20, 2003]

³Id. at 4

⁴Id. at 2 (this figure includes 180 billion in Medicaid spending, 16 billion in Education Aid, 21.7 billion in housing aid, 40.7 billion in food and nutrition service, 80 billion for AFDC, EITC & SSI, 4 billion in Urban and Community Aid etc.) For an argument that Medicaid should be included in estimating welfare benefits see "The Value of Welfare" [online] Available: <http://www.cato.org/pubs/briefs/bp-027.html> [Accessed, April 20, 2003]

Since then the welfare system has been massively overhauled, and while the rolls have been reduced, some people remain entrenched in poverty and unable to receive any assistance. As President George W. Bush put it, “Despite a multitude of programs and renewed commitments by the Federal and state governments to battle social distress, all too many of our neighbors still suffer poverty and despair amidst abundance.”⁵ This paper seeks to answer the question how can we most effectively fight poverty in America? For many Americans part of the answer is to raise the level of funding available for private groups. The inefficiency of governmental bureaucracy as a poverty fighter is evident both in its failure, and in an analysis of the inherent position a bureaucracy finds itself in when it is removed from all incentives to do anything but grow. As President Bush said, “Traditional social programs are often too bureaucratic, inflexible, and impersonal to meet the acute and complex needs of the poor”⁶ In the first section of the paper I will begin by describing the state of welfare at the end of the old system, then I will discuss the changes that were made to the system, and then I will discuss the system as it is set up currently including its shortcomings. This section is included to show that some changes have been made that have been effective, but that some people still seem trapped by intractable poverty, and none of the proposed solutions are adequate. The solutions are inadequate because of the exclusion of sectarian religious groups whose programs cannot ever be supported constitutionally absent social service vouchers. The second section argues that these sectarian religious groups constitute a key group in fighting poverty, and that their inclusion can only be effectuated through social service vouchers. I will analyze other options for decreasing poverty including tax credits, and direct aid to religious organizations for non religious activities and I will examine how they will fail legally if applied to the currently excluded groups.

I. The System That Exists

A. As It Was

The system as it existed prior to the Welfare Reform Act of 1996 was ineffective in many ways. The reason the reform act passed so overwhelmingly was that there was a broad consensus from both parties that changes were needed CITE Michael Tanner the Director of Health and Welfare Studies at the Cato Institute highlighted many of the failings that existed with his article that was published in a Symposium on Economic Justice at Harvard in (1995).⁷ He painted a picture that was so bleak it is no surprise that welfare was reformed soon after.

He began by pointing out that although many people seem to suggest that all is needed is more funding for the welfare system, since 1965 our country has spent more than \$3.5 trillion on

⁵President George W. Bush, *Rallying the Armies of Compassion*, [online] Available: <http://www.whitehouse.gov/news/reports/faithbased.html> [Accessed April 20, 2003].

⁶Id.

⁷30 Harv. C.R.-C.L. L. Rev. 299 *Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement: Rounding out the Table: Opening an Impoverished Poverty Discourse to Community Voices*, (1995).

our social welfare system.⁸ Despite this enormous outlay of funds, the poverty rate today is higher than when social welfare spending began.⁹ Some evidence suggests that welfare has actually kept people mired in poverty, including a study that showed that poor people who did not receive welfare were nearly two and one-half times more likely to leave poverty than were benefit recipients.¹⁰ During this same time period illegitimacy has skyrocketed and while other factors contributed, the marriage penalty provision that was in place during much of its spike. For reference in 1960, only 5.3% of births were illegitimate, today, nearly 30% of births are illegitimate. Among blacks the illegitimacy rate is nearly two-thirds. Among whites it exceeds 23%. Evidence directly links the availability of welfare with the increase.¹¹ Welfare also has created a cycle of dependence that is devastating. Almost 65% of the people on welfare at any given time will be on the program for eight years or longer.¹² Even worse welfare is increasingly passed on to the next generation. The children of parents who receive welfare benefits are seven times more likely to become dependent on welfare than other children.¹³

Tanner then advocated a complete dismantling of all state welfare programs. He went on to say that although America is the most generous nation on earth, an increase in charitable giving was necessary to fill the void that would be left when inefficient government welfare programs were abolished. He proposed that the federal government should offer a dollar-for-dollar tax credit for contributions to private charities that provide social welfare services. This tax liability reduction would be capped at 41% because it is the amount of personal income tax revenue that was being spent on major means testing programs.¹⁴

He offered reasons that private charities are more effective. His first reason was that private charities are inherently more flexible and able to individualize their approach. They are able to check behaviors and are much more likely to do follow up or one on one. He then argued that private programs are more effective at ferreting out root causes of poverty and he pointed to examples of faith based groups that had a dramatic impact on their communities. He went on to say that private charities are better at targeting assistance to the truly needy because without

⁸The Heritage Foundation, *A Comprehensive Urban Policy: How to Fix Welfare and Revitalize America's Inner Cities* (1993).

⁹Randolph E. Schmid, "More Than 39 Million in U.S. Live in Poverty", WASH. TIMES, Oct. 7, 1994, at 1.

¹⁰Richard Vedder & Lowell Gallaway, Institute for Policy Innovation, Report No. 117, *The War On The Poor* (1992).

¹¹See, e.g., M. Anne Hill & June O'Neill, *Underclass Behaviors In The United States: Measurement And Analysis Of Determinants* (1990); Shelley Lundberg & Robert Plotnick, Population Association of America, *Adolescent Premarital Childbearing: Do Opportunity Costs Matter?* (1990).

¹²U.S. HOUSE OF REPRESENTATIVES, COMM. ON WAYS AND MEANS, 1994 GREEN BOOK: Overview of Entitlement Program 441 (1992).

¹³Greg Duncan & Martha Hill, *Welfare Dependence Within and Across Generations*, in SCIENCE, Jan. 29, 1988, at 468.

¹⁴John C. Goodman et al., National Center for Policy Analysis, *Why Not Abolish The Welfare State?*, 30 (1994).

bureaucratic restrictions they can provide for homeless people with no address etc.

Then he began to include figures reflecting that private charities are more efficient than governmental bureaucracies. He said:

In spite of the money that is spent on federal and state social welfare programs, surprisingly little money actually reaches recipients. In 1994, for example, federal, state and local government welfare spending averaged \$ 35,756 for every family of four below the poverty level.¹⁵ Obviously, the poor did not receive benefit payments that even approximated this level of government spending. In 1965, 70 cents of every dollar spent by the government to fight poverty went directly to poor people.¹⁶ Today, 70 cents of every dollar goes not to poor people, but to government bureaucrats and others who serve the poor.¹⁷ Few private charities have the bureaucratic overhead and inefficiency of government programs.

I agree with him that private charities are more efficient generally than public sector groups for reasons I will lay out later, but I disagree with him that the solution to poverty is to dismantle the welfare state and cut taxes. Cutting taxes would result in more private giving, but it would not be giving to those organizations that are effective at helping the poor. Insulated from poverty, many Americans would give more to organizations that promote an aesthetic they find pleasing or benefit their favorite affluent pet cause, more beached whales would be saved but more children would go hungry or without an education. I agree with the assessment in the Democratic Leadership Council's Blueprint Magazine that said:

In a world of downsizing, niche marketing, and core competencies, perhaps Washington can change its approach to social policy as well - focusing on those things that it does well. There can be few doubts that Washington raises money, distributes money, and monitors that money better than most any other institution. It should continue to do those things and thereby increase the capability of society's community institutions to do what they do best.¹⁸

Changes in the welfare state began the next year after the debate Tanner was involved in occurred. In 1996 the Welfare Reform Act passed and its many changes included a "Charitable Choice" provision that was intended to allow faith based organizations to compete on equal footing with secular groups for governmental funding. As David Kuo put it:

The most extraordinary thing about 1996's historic welfare reform bill wasn't simply that an overwhelming number of Senators and Congressmen in both parties voted to reform an outdated, anti-work system. The amazing thing was that they reached consensus on a radically new approach to caring for people in need. Rejecting a one-size-fits-all

¹⁵Goodman et al., supra note 10, at 3.

¹⁶Robert Woodson, Heritage Foundation Lectures, *Is The Black Community A Casualty Of The War On Poverty?* (1990).

¹⁷13 Id.

¹⁸David Kuo, *Re-Funding Social Service: Why Government Shouldn't Fear working with churches*, web published in *Blueprint: Ideas for a New Century*, Spring 1999, Volume 3, [online] Available: <http://www.ndol.org/blueprint/spring99/thesolution4.html>, [Accessed, April 20, 2003].

approach to welfare, they recognized the limits of the federal government's reach, embraced state government reform, and perhaps most significantly took tentative steps towards establishing a public/private partnership to strengthen a panoply of charities, civic groups, churches, and synagogues.¹⁹

B. As It Is

Section 104 of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) gives states specific options to provide welfare-related services to the poor through contracts with charitable, religious, or private organizations; and to provide beneficiaries of assistance with vouchers which are redeemable with such organizations.

In particular, Section 104 provides specific language regarding the participation of religious organizations in delivering welfare services. It allows funding for religious groups and requires that they be considered. The charitable choice provision applies to funds under the new Temporary Assistance for Needy Families (TANF) program, which replaces AFDC, and the Supplemental Security Income program in cases where the law allows for contracts or voucher programs with the private sector. Under TANF states could contract with religious charities to administer the work requirement through providing job training and placement as well as subsidized jobs themselves. It can pay for food for hunger relief programs, it can pay for maternity care that the state provides, and it can also contract for medical and health services including drug and alcohol rehabilitation and abstinence based sex education.

I will discuss the legal ramifications of charitable choice later in section III but the relevant rights granted to independent sector charities include nondiscrimination (to be administered by state courts through private civil litigation granting injunctive relief), the right to keep up religious symbols even if they are found in a place that houses a state paid for program, the right to maintain its own organizational control and internal governance, the right to discriminate on a religious basis in employment practices (they still have the Title VII exemption despite the funding).

The charitable choice legislation also establishes some rights for beneficiaries that include the right not to be discriminated against, (no one can be forced to say a blessing with food, but they also cannot object to a blessing being given), and there is a requirement that a secular provider be available for anyone who does not wish to receive services from a faith based organization. Their legal remedy is the same as that of the faith based organizations above.

The next year a bipartisan group of House members introduced legislation that would expand the tax deduction for charitable contributions to all taxpayers - not just those who itemize their tax returns. Under the Charitable Giving Relief Act, non-itemizers would be allowed to deduct 50 percent of their annual charitable contributions over \$500. According to a study by the accounting firm Price Waterhouse, the legislation, if passed, would increase charitable giving by approximately \$2.7 billion a year and would spur \$16.5 billion in charitable contributions

¹⁹Id.

between 1998 and 2002.²⁰

On December 12, 2002 President Bush created Executive Orders that reinforce poverty fighting programs that are faith based. The recent actions taken by the President in Philadelphia to help ensure equal treatment for all charitable organizations is a welcome relief from the discrimination that many groups have suffered as a result of a misunderstanding of the Constitution. These orders provide welcome clarification and guidance. Equality is what the Constitution mandates, and it is what these orders are designed to produce. While the government will not advance religion, it will also no longer inhibit it. Religious groups can partner effectively with Federally-funded social services now without the fear of discrimination. The order recognizes the Constitutional prohibitions on governmental funding of “inherently religious” activities, but allows for groups to maintain their identity in their hiring policy, and display of religious icons. The creation of agencies to monitor progress in various parts of the Executive Branch should ensure success for these initiatives.

The Equal Protection of the Laws for Faith-based and Community Organizations Order deals directly with poverty fighting program. Many programs qualify as “social service programs” operating under parts i, iii, iv, vi, vii and viii. Section 2, Fundamental Principles and Policymaking Criteria, sets out principles that highlight the attractiveness of Faith Based programs and mandate involvement with them. Part (a) sets out that the financial assistance should be used in the most efficient and effective manner. This establishes a baseline to ensure that groups that are getting the job done get the funding. It is similar to some of the ideas proposed by Sunstein in that in a way it lets the market dictate where the funding should go. Part (b) mandates that faith-based groups be able to compete on an equal footing with secular groups. Part (c) disallows religious discrimination in funding. Part (d) says that groups who receive federal funding cannot discriminate on the basis of religious belief with regards to beneficiaries or potential beneficiaries. Part (e) states that inherently religious activities such as worship, religious instruction, and proselytization must be offered separately from programs that are directly supported with Federal funds and participation must be voluntary. Part (f) says that a faith-based group can maintain its character as long as it does not support its inherently religious activities with federal funds, but it can retain a board and employees consistent with its mission, and icons need not be removed from common buildings.

In the same month the Congressional Budget Office issued a report²¹ suggesting that the increase in giving spurred by the non itemized deductions bill would probably not be much more than 4%. On March 27 Senator Rick Santorum (R-PA) announced that Republican Senators agreed to drop the portion of the Charity Aid Recovery and Empowerment Act (CARE) aimed at making it easier for religious organizations to get government grants. The remainder of the bill addressed tax incentives for charitable giving, simplified the rules for charity lobbying and

²⁰Pulse! The Online Newsletter of the Nonprofit Management Support Community, October 15, 1997, [online] Available: <http://www.allianceonline.org/Pulse/p101597.html> (Citations omitted) [Accessed, April 20, 2003]

²¹CBO, *Effects of Allowing Non Itemizers to Deduct Charitable Contributions*, [online] Available: <ftp://ftp.cbo.gov/40xx/doc4008/12-13-CharitableGiving.pdf> [Accessed, April 20, 2003]

restored funding for Title XX of the Social Service Block Grant. Santorum said House Republicans agreed to a scaled back bill. Issues relating to grant rules for religious organizations will be debated in reauthorization legislation, such as Temporary Assistance to Needy Families, or appropriations of specific programs. Senator Santorum and Senator Joe Lieberman (D-CT) had planned to offer their compromise faith-based bill as an amendment to the version passed by the Senate Finance Committee earlier this year. However, continued controversy over the terms of funding for religious organizations was blocking progress on the bill. Although the CARE Act's provisions on grant rules did not specifically address religious discrimination issues or ban proselytization, its silence would likely have been interpreted as an endorsement of the President's Executive Order 13279, issued last December, which implements to most controversial elements of the President's agenda. Subsequent regulations proposed by the Department of Health and Human Services and the Department of Housing and Urban Development extended the administration's agenda even further.²²

The bill passed on April 9th, by a vote of 95-5.²³ The earlier discussed deduction for those who do not itemize was created for the tax years 2003-2005. There is also a requirement that the Treasury Department conduct a study to see if giving increases as a result of the bill. The bill also created tax breaks for corporate donations, allows tax-free donations from Individual Retirement Accounts and encourages banks to offer Individual Development Accounts, which match the savings of low-income people. It also creates a new fund of \$150 million dollars to help small charities, including religious groups, expand their programs. The White House said it supported the bill overall but objected to the increased money for the social services program. The article describing the passage went into the history of the bill:

The vote came after more than two years of sometimes angry debate in Congress about the role of religious groups using tax dollars. Sen. Joe Lieberman, D-Conn., one of the lead sponsors, said he was "proud and in some sense relieved" to arrive at the vote. "This began as an attempt to give support to faith-based groups that perform good works," Lieberman said. "It no longer contains any provisions targeted specifically at carving out a large or lawful space for faith-based groups in our social services." Sen. Rick Santorum, R-Pa., the other lead sponsor, said the bill would encourage charitable giving and therefore support religious groups, as well as secular ones, that will receive more contributions.

"It's really a great day for those who have been working hard, committing their lives in some of the most difficult neighborhoods of this country," Santorum said. "We're going to be getting those resources that are much needed to those grass roots organizations."

²²See OMB Watch, Senate Republicans Drop Faith-Based Provisions of CARE, 4/01/2003 web published [online] Available: <http://www.ombwatch.org/article/articleview/1429/1/3/?PHPSESSID=7ab2c49e94f77150075676b4b8fead02> [Accessed, April 20, 2003].

²³AP "Senate Allows New Tax Cuts for Charitable Giving", April 09, 2003 [online] Available: <http://www.foxnews.com/story/0,2933,83694,00.html> [Accessed, April 20, 2003].

Santorum also argued that the Bush administration has succeeded in rewriting government regulations to open programs to religious groups, making legislation less urgent...The initiative, at the center of Bush's "compassionate conservative" agenda, met stiff opposition from the start. Backers argued that people looking for social services should be able to choose religious providers if they want to. Opponents worried about discrimination against people based on religion and feared the wall between church and state was crumbling.²⁴

All of the current efforts are important to note because although welfare reform has been ongoing, the same problems persist. This most recent bill does not fix welfare at all. The provisions that would have allowed for more religious groups to be involved was stripped after it was opposed by the current bureaucracies just as school vouchers were opposed by the entire educational establishment. It is not surprising that the entrenched groups do not want to let their funding go without a fight. I fear that failing groups often fight for their survival at the detriment of those who they are supposed to be helping. Giving more money to the current secular system is not the answer to welfare problems, as the earlier section discussing the failures of the welfare state made clear. The answer to the problems that currently exist in welfare lies in the private sector.

II. Private Groups Including Non Participating Sectarians Need To Be Included

A. Arguments For And Against Faith Based Initiatives

Jim Towey, head of the White House Office of Faith-Based and Community Initiatives said there would be a continued push for legislation in other bills, saying "There are going to be debates this year on faith-based (issues). You can set your watch on that."²⁵ In order to understand what is needed in terms of welfare reform and change, it is necessary to evaluate the current positions that are being taken in the debate about governmental funding for religious groups. The actions taken by President Bush were met with some skepticism from both the right and the left. This is reflected in the following article:

From the moment President Bush began discussing his plans for diverting your tax dollars to "faith based" organizations, there were many who had grave doubts about the idea. To be expected, voices of alarm were raised by those who have consistently fought the idea that the government should be directly involved in promoting a particular religion. For example, Barry W. Lynn, executive director of Americans United for Separation of Church and State, accused Bush of being so anxious to secure the support

²⁴AP "Senate Allows New Tax Cut for Charitable Giving" Washington, D.C., April 9th, 2003, [online] Available: <http://www.foxnews.com/story/0,2933,83694,00.html> [Accessed, April 20, 2003].

²⁵Quote from OMB Watch, *Senate Republicans Drop Faith-Based Provisions of CARE*, 4/01/2003 web published, [online] Available: <http://www.ombwatch.org/article/articleview/1429/1/3/?PHPSESSID=7ab2c49e94f77150075676b4b8fead02> [Accessed, April 20, 2003].

of the religious right that "he's willing to fund religious extremists."...

What surprised many commentators at the time was that much of the criticism of the Bush initiative was coming from the religious right itself, including Pat Robertson. Early this year, Robertson denounced the Bush proposal, warning that the program is a "Pandora's Box" that could make legitimate religious charities dependent on government and that the government would end up financing "cults that brainwash" prospective adherents. He went on to tell his 700 Club television audience that the groups getting such funding "will begin to be nurtured, if I can use that term, on federal money, and then they can't get off of it." He added, "It'll be like a narcotic; they can't then free themselves later on."²⁶

The recent New York Times Editorial Op-Ed piece²⁷ excoriating Secretary of Education Rod Paige for his statement that he prefers value based education to education that lacks values, illustrates the fear shared by many that the administration has an invidious plot to directly aid religion and do away with the secular state.

That Education Secretary Rod Paige is a Christian eager to declare his fervor publicly is undoubtedly a source of personal strength to him. But for the nation's chief steward of public education to go further and state, as he recently did, that he personally finds Christian schools preferable for the values they teach is an appalling gaffe that cries out for condemnation.

In a religious environment the value system is set," Dr. Paige told an interviewer for Baptist Press, the news service of the Southern Baptist Convention. "That's not the case in a public school, where there are so many different kids with different kinds of values."

Far from apologizing to critics, not to mention those "different kids," Dr. Paige insists no connection should be made between his official duties and the faith he brandished in telling the interviewer: "All things being equal, I'd prefer to have a child in a school where there's a strong appreciation for values, the kinds of values that I think are associated with the Christian communities."

The secretary's blithe avowal is a terrible blow to the Bush administration's much-touted education initiative. Most people took the president at his word when he said that one of his prime objectives was to improve public schools. But Dr. Paige's statements reinforce suspicions that the administration is in sympathy with the religious right's drive to undermine the public school system in favor of a voucher-financed nationwide network of religious schools. Despite Dr. Paige's later claim that his remarks applied only to higher education, they were too destructive to be waved off with a clarification. The

²⁶Henderson, Charles "Are Your Tax Dollars Funding Pat Robertson?" [online] Available: <http://christianity.about.com/library/weekly/aa100302.htm> [Accessed, April 20, 2003]

²⁷New York Times Editorial Op-Ed, "Faith in the Public Square," April 11, 2003. [online] Available: <http://www.nytimes.com/2003/04/11/opinion/11FRI2.html> [Accessed, April 20, 2003]

secretary of education needs either to do some fast fence-mending or step down.

Dr. Paige insists that he is a strict observer of the separation of church and state. But too many in the administration seem more interested in fostering a divisive competition between church and state at taxpayers' expense through proposals to bolster, with public subsidies, religion's role in prisons, housing construction and other sensitive areas. Routine statements of belief in pluralism sound hollow coming from public servants who make a habit of wearing a particular faith on their sleeves.

The vitriol calling for Dr. Paige to step down, is similar to the response one would expect if he had made a value judgment that he prefers drug using to non drug using schools. This is the level of hostility with which sectarians are faced, and it is for this reason that a policy that would allow parents to choose between a secular and a religious option is called immoral by those who have put their faith in a purely secular system.

The hostility of some to federal funding of religious programs had its roots in the origins of the Great Society and the Progressive movement. Harry Hopkins, the chief of welfare administration under President Franklin D. Roosevelt, did not allow any federal money to be used to purchase services from private agencies.²⁸ The growth of the social service sector was a secular growth, and due to a misunderstanding of the First Amendment I will discuss in my section on the legal questions surrounding this issue the governmental offices were hostile to religious funding until the 1960s. After that time the governmental funding was extended only to two mainline groups in any large way, with Roman Catholics and Lutherans receiving an enormous amount of funding. In a forum sponsored by the PEW group, J. Heinrichs noted: "Over the past few decades, large amounts of federal money have poured into religious charities [with] organizations run by the Catholic Church now receiving \$2.3 billion annually, and Lutheran Services in America receiving even more."²⁹ While mainline groups have been willing to work with the government, Protestants have generally been less willing to apply for funds because of concerns that their religious values would have to be compromised. As a result, Evangelicals are currently on the fence in many ways when it comes to faith based groups. For obvious reasons research shows that strongly religious people are the biggest supporters of Faith Based Initiatives, while those with no religious affiliation are the biggest critics.

The reason that Evangelical groups remain skeptical about Faith Based Initiatives is the fear that they will be forced to compromise their religious message or values.

B. Are Faith Based Groups More Effective Than Secular Counterparts

"It seems that the claims that faith-based services are superior to secular ones are more a

²⁸B., S.J., Coughlin, *Church and State in social welfare*. New York: Columbia University Press, p.126 (1965).

²⁹J., Heinrichs, *The PEW Forum on Religion and Public Life*. Fall, p. 2-11. See p. 4, Washington, D.C. (2001).

matter of faith than fact”³⁰ This claim by Marguerite Rosenthal is one that is challenged by some studies but that is valid, mainly because secular non profits are by in large never undergoing outcome based testing. As the former director of the White House Office of Faith-Based and Community Initiatives John J. DiIulio, Jr. said:

How do we know what the results are for all the nonprofit organizations that presently receive government funds? You can count on your fingers and toes the number of these organizations that, over the years, even after literally decades in some cases of grant getting, have ever been subjected to even a single government performance audit, let alone any independent research impact study or evaluation.³¹

While some studies have shown that FBO’s are indeed more effective than secular providers³² the evidence remains largely anecdotal. Nevertheless, those who propose increased involvement for FBO’s are proponents of outcome based testing, while those who oppose it are generally part of the currently untested non profit sector that is receiving funding. Although some have argued that outcome based testing will result in continued funding for the currently funded groups and less for the FBO’s³³ that assertion is fundamentally opposed by the statement made by President Bush that “we must be outcome based insisting on success”³⁴ and his later statement in the same speech that government must not discriminate against FBO’s. If private groups are not more effective at providing services than they would not be a more efficient means of providing services, and they should be excluded. What is the reason behind the push towards outcome based evaluations? The reason is that anecdotal evidence often suggests the claim that private groups that are currently receiving no funding are more effective at doing the very things that funded groups are doing.

There are several objections to measuring outcomes. As Wuthnow et al. point out in their paper, readily measured outcomes like recidivism rates, recovery, and job seekers employed,

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³⁰Marguerite G. Rosenthal, Salem State College, MA “Faith-Based Social Services and the Role of the State” [online] Available: <http://www.independentsector.org/SpringResearchForum/2003/2003SRFpresenters.html> [Accessed April 20, 2003].

³¹Manhattan Institute, 2002 Second Annual Lecture on the State of Religion and Public Life. Address by John J. DiIulio, Jr. Center for Civic Innovation, p.5, (2002).

³²Laura Skaff, Volunteers of America, “Faith and Facts: Measuring and Improving the Effectiveness of Social Services Delivery by Faith-Based Organizations” [online] Available: http://www.independentsector.org/PDFs/srf03/skaff_laura.pdf [Accessed April 20, 2003]. Also see Robert Wuthnow, Conrad Hackett, and Becky Yang Hsu, of Princeton University, *The Effectiveness and Trustworthiness of Faith-Based and Other Service Organizations: A Study of Recipients’ Perceptions* [online] Available: http://www.independentsector.org/PDFs/srf03/wuthnow_robert.pdf [Accessed April 20, 2003], Kevin F. Modesto, Point Loma Nazarene University, *Taken on Faith? Preliminary Findings of an Outcomes Evaluation of a Faith-Based Welfare to Work Program*, [online] Available: http://www.independentsector.org/PDFs/srf03/modesto_kevin.pdf [Accessed April 20, 2003].

³³Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 Geo. J. Poverty Law and Pol’y 167, (2002).

³⁴President George W. Bush, *Rallying the Armies of Compassion*.

may be more atypical than typical in that many aspects of social services like love and companionship cannot be measured. Other things that are harder to measure include helpful referrals and emotional or spiritual support. There are also problems because individuals who have needs often are recipients of aid from many different programs, making it difficult to measure the impact of any one program by itself. A final criticism has been that outcome based testing is inaccurate when applied to programs where selection has resulted in bias. An example would be The Teen Challenge drug and alcohol addiction program which has consistently had an amazing low recidivism rate for those they treat. Their results may be skewed because the program is rigorous and intensive and requires a commitment level and also a pledge of spiritual renewal that may explain their success rates. In other words, perhaps only the addicts who are motivated to change enter their program, while other programs have to accept everyone and therefore have less success.

All of these concerns can be addressed however and I think have been answered well by Professor Robert L. Fischer³⁵ who has shown methods by which FBO's can follow the model recently set by United Way affiliated organizations that avoided those pitfalls in implementing outcome based evaluative techniques. Outcome based evaluations are being encouraged by those who see something wrong with the status quo and its failures and who think that private organizations can provide a more effective response to the problems we face in the social service sector.

C. Can Sectarian Giving to FBO's be Directed Towards Fighting Poverty?

There is a good deal of statistical information available about private charitable contribution.³⁶ These statistics are very important in that they establish that while Evangelicals give a great deal of money, they give it to their churches and to their sectarian organizations, often leaving them left out of the social services programs that are available. The reason they are excluded currently is because of a deep distrust in any governmental funding because of the long standing hostility with which the government treated Evangelical applicants. Evangelicals by their very nature tend to view proselytization as integral to what they do and they are unwilling and in some cases unable to provide the services they do divorced from their religious message.

Analyzing the most recent information it appears that there are a few trends worth noting. Private charitable giving is vast, despite the current tax burden. Total giving by all Americans is estimated at \$212 billion in 2001.³⁷ One out of every 12 adults (8 percent) gave away at least a

³⁵Robert L. Fischer, Case Western Reserve University, *The Devil is in the Details: Implementing Outcome Measurement in Faith Based Organizations*, [online] Available: http://www.independentsector.org/PDFs/srf03/fischer_rob.pdf [Accessed April 20, 2003].

³⁶The Chronicle of Philanthropy, The Independent Sector, The American Association of Fund Raising Council and the National Center for Charitable Statistics <http://nccs.urban.org/faqs.htm#giving>.

³⁷AAFRC Trust for Philanthropy, *Giving USA: The Annual Report on Philanthropy for the Year 2001* (Indianapolis: Author, 2002), p. 6).

tithe of their income in 2001.³⁸

Those who are giving to their churches (Evangelicals by and large as we will see) are giving a great deal. More than \$60 billion a year is donated to religious nonprofit organizations. The vast bulk of that sum—more than \$40 billion annually—goes directly to churches, almost all of it from individuals.³⁹ These churches cannot receive direct government funding legally as I will discuss later, but they could receive voucher money if they were running an effective program that met a valid secular need.

These next statistics begin to highlight this money that is currently not being tapped into by social services. In a typical month, six out of every 10 U.S. adults donate money to a church or other nonprofit organization; three-fourths of all adults do so during the typical year. Twenty-six percent of adults who give money to a church also donated funds to religious nonprofits other than a church.⁴⁰

Religious observers (as defined by the study only 38 percent of all Americans) give two-thirds of all charitable dollars in the United States according to The Gallup Organization. Religious observers (those who attend weekly services) give 3.4 percent of income annually, while nonreligious people give only 1.1 percent to 1.4 percent. In 2001 evangelicals gave a mean of \$3,601 per capita to nonprofit organizations, which is high when compared to other demographic groups.⁴¹

In 2001, evangelicals gave four times as much, per person, to churches as did all other church donors in 2001. Eighty-eight percent of evangelicals and 73 percent of Protestants donated to churches.⁴² This idea is agreed to by Robert Wuthnow, who states “Evangelical Christians give a higher percentage than liberal Protestant Christians while Catholic giving lags well behind both.” This is also the conclusion of John and Sylvia Ronsvalle, who state, “from 1968 to 2000, members of evangelical Protestant denominations gave larger dollar amounts and larger portions of income to their churches than did members of mainline Protestant denominations.”⁴³

The divide is not just striking between Evangelicals and everyone else, it is also striking

³⁸ George Barna, *Americans Were More Generous in 2001 Than in 2000*, Barna Research Group, April 9, 2002.

³⁹ AAFRC Trust for Philanthropy, Giving USA 1996, in *How to Increase Giving in Your Church: A Practical Guide to the Sensitive Task of Raising Money for Your Church or Ministry*, George Barna, Ventura, Calif.: Regal Books, 1997, p. 20.

⁴⁰ George Barna, *How to Increase Giving in Your Church: A Practical Guide to the Sensitive Task of Raising Money for Your Church or Ministry*, Ventura, Calif.: Regal Books, 1997, p. 20.

⁴¹ George Barna, *Americans Were More Generous in 2001 Than in 2000*, Barna Research Group, April 9, 2002.

⁴² George Barna, *Americans Were More Generous in 2001 Than in 2000*, Barna Research Group, April 9, 2002.

⁴³ John L. and Sylvia Ronsvalle, *The State of Church Giving through 2000*, Champaign, Ill.: Empty Tomb, 2002, p. 23.

between Protestants and Catholics. In 2001, Protestants in the United States donated an average of \$1,093 to their churches in 2001. That figure was more than double the average amount given by Catholics to their churches, \$495.⁴⁴ In 2001, Protestants in the United States gave away an average of 57 percent more money to nonprofit organizations than did their Catholic counterparts—\$1,379 compared to \$878⁴⁵

The numbers are also skewed when one looks at volunteering. Fifty-four percent of those who regularly attend religious services volunteer, while only thirty-two percent of the non-attendees do so. Further, frequent attendees, 29 percent of all people, account for nearly 70 percent of the hours volunteered each month.⁴⁶

Why do these statistics matter? These statistics show that there are vast resources to be tapped into in faith based groups. Evangelical groups that would be included under a voucher system but who are not now because of their fear of governmental entanglement could make a big difference within the social service sector. One would think that Evangelicals would be at the forefront of applying for government funding given how active they are in giving to private organizations, but it is not the case at all. Robert Wuthnow explained it this way:

In "Mobilizing Civic Engagement: The Changing Impact of Religious Involvement" (Civic Engagement in American Democracy, edited by Theda Skocpol and Morris P. Fiorina), I examined the statistical relationships between participation in religious activities and participation in other kinds of community organizations, comparing mainline Protestants with evangelical Protestants. For mainline Protestants, the more active a person is at church, the more likely that person is to be a member of a wide variety of community organizations. Church involvement among mainline Protestants is also positively associated with filling leadership roles in other community organizations, volunteering for service agencies, and participating in electoral and partisan political activities. The pattern for evangelical Protestants is quite different: The more often a person attends church, the more likely that person is to hold memberships in other church-related groups and to do volunteer work at the church; but church involvement is not positively associated with engagement in the wider community.⁴⁷

These sectarians are not currently involved outside their church groups, but they would be willing oftentimes to be used as a resource, as long as they do not have to compromise their religious message. The governmental hostility towards these "sectarians" that the Supreme Court disavowed in recent decisions as we will see led to the creation of an entirely separate system that can be brought into partnership with governmental efforts to fight poverty, if the

⁴⁴George Barna, *Americans Were More Generous in 2001 Than in 2000*, Barna Research Group, April 9, 2002.

⁴⁵*Id.*

⁴⁶*Id.* see at <http://www.independentsector.org/PDFs/faithphil.pdf>

⁴⁷Robert Wuthnow, "The Moral Minority," *The American Prospect* vol. 11 no. 13, May 22, 2000 [online] Available: <http://www.prospect.org/print/V11/13/wuthnow-r.html> [Accessed, April 20, 2003].

groups are assured the aid will come with no strings attached. If they received grants they would be getting a good deal of strings, if they received tax credits they would only be giving more to their isolated churches, but if they are offered the opportunity to receive vouchers from individuals who want to participate within their organization, they can be engaged to direct their energies towards positive change. Governmental control is seen as essential for those who fear that religion will take over government, but is anathema to those who understand the true wall of separation principle to be about keeping the government from imposing its will on religious groups.

There are those who argue that federal funding for FBOs will result in a decrease in private giving, that the private money will be "crowded out". This argument does not seem to have much merit based on the research that has been done on the issue,⁴⁸ indicating that governmental funding of FBOs would actually lead to an increase in private donations to those groups.

D. Why Are Vouchers The Most Effective Method to Fight Poverty?

The idea for vouchers has been around for a long time and has been linked to Christian conservatives⁴⁹ leading to protests that it threatens the separation of church and state and forces funding of religious organizations. This is the central reason that vouchers are effective. They allow individuals to make a private choice within an array that includes a secular option/s and once that choice is made that organization can use that funding no strings attached. When I say no strings I mean only the strings regarding racial and gender equality that every organization that accepts governmental funding must accept, I am aware of no FBO's that have a problem with those regulations. Vouchers unlike grants would allow a soup kitchen for instance to accept funding and say a prayer with every meal..

Vouchers are going to reach those who need help. A poignant example, from the private sector, of our not spending our dollars intelligently to address a problem is business's "investment" in education, graphically described by Vernon R. Loucks, Jr.:

Of the \$ 2.4 billion spent by corporations in gifts to education in 1990, only 11 percent of the money was focused on the "raw material"--children in elementary and secondary schools. Further, only 4 percent of the estimated 141,000 "partnerships" between business and schools address the needs of our least successful students, those who are economically disadvantaged.⁵⁰

⁴⁸Christopher Horne, David Van Slyke and Janet L. Johnson, Georgia State University *Attitudes Toward Public Funding for Faith-Based Organizations and the Potential Impact on Private Giving*, [online] Available: http://www.religionandsocialpolicy.org/docs/events/2003_spring_research_conference/horne.pdf [Accessed April 20, 2003].

⁴⁹Annie Laurie Gaylor, *Contract on the Family Sets the Agenda of Congress*, *Freethought Today*, April 1996[online] Available: <http://www.fff.org/fttoday/april96/gaylor.html> [Accessed, April 20, 2003].

⁵⁰Vernon R. Loucks, Jr., *The Failing Business Drive in Education R & D.*, *Stan. L. & Pol'y Rev.*, Winter 1992-93, at 153 (footnotes omitted).

There is also the problem of the money going to the wrong groups with the tax credit and the insulation model. A tax deduction will not provide charitable contributions evenly where the need is greatest. This is a criticism that comes from those on both sides of the political spectrum. As William Landes observed “While many of the new millionaires have started writing large checks to charities, that money goes far more often to the local art museum, than to a Big Brother/Big Sister program. People usually volunteer to help causes close to them — like the local museum or their kid's baseball team. Only the government goes looking in neighborhoods where no one else wants to go.”⁵¹ What the voucher system does is it allows those in the horrible neighborhoods, to make choices between every service provider without distinction of religious or non, and when the private choice is made they can be helped effectively, without the government endorsing anything.

Vouchers uniquely address the concerns of culture of poverty scholars. Culture of poverty theorists⁵² argue that unique traits make poor people poor, their group identity creates a climate in which success is either impossible or highly improbable.⁵³ These cultures inculcate themselves in each subsequent generation. An effective way to deal with these cultures is to provide a new framework whereby the factors keeping cultures and groups from achieving success are eliminated to the degree possible. For schools this means allowing people to choose from an array of options that includes good schools of secular and religious varieties, for substance abuse this means allowing effective religious organizations to be offered alongside secular ones, for job training this means allowing groups that emphasize accountability and discipline in a religious context to compete on equal footing with secular institutions for the privilege of training and placing those who want to succeed.

Vouchers by providing payment within these communities ensures that the poor will be provided with options. It also links those who qualify to some meaningful review and oversight, allowing those entrenched in failing social services, like failing public schools, the ability to escape to an option they prefer. Vouchers also work best to eliminate the legal concerns of the currently marginalized Evangelicals and other sectarians who do not want governmental control over their organizations.

III. Legal Issues

Introduction to Legal Issues

⁵¹William Landes, Gridlock and Load, web published [online] Available: <http://www.gridlockmag.com/rumblings/compassionism.html> [Accessed, April 20, 2003].

⁵²For perhaps the best known of the early proponents of the culture of poverty, see Edward C. Banfield, *The Unheavenly City* (1970); Michael Harrington, *The Other America* (1962); Oscar Lewis, *La Vida: A Puerto Rican Family in the Culture of Poverty-San Juan and New York* (1968). More recent proponents include Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (1984); and William J. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

⁵³See, Cynthia M. Duncan & Ann R. Tickamyer, Poverty Research and Policy for Rural America, 19 Am. Sociologist 243, 244 (1988)

There are no cases directly on point when it comes to the constitutionality of social services vouchers, because the vouchers do not exist, and have never been challenged in a court of law. However there is a good deal of analogous case law that bears directly on the question of whether or not religious organizations would be free to operate as they pleased if they were receiving direct aid, if they were receiving grants, or if they were receiving vouchers. The closest thing to the vouchers I am proposing are the school vouchers that I will discuss. An understanding of the legal issues involved, and the shift in the attitude of the federal government towards faith based organizations that accompanied the judicial pronouncements must begin with a history of Establishment Clause jurisprudence.

A. The Establishment Clause History

The Establishment Clause stems from the part of the First Amendment to the U.S. Constitution which provides, "Congress shall make no law respecting an establishment of religion." The Supreme Court has ruled in various ways, making Establishment Clause jurisprudence among the murkiest areas of federal law. The Court acknowledged their difficulty in understanding the application of the Establishment Clause in *Tilton v. Richardson*, 403 U.S. 672 (1971), when they said, "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area."⁵⁴ Those who argue that the Establishment Clause creates a high wall of separation between church and state,⁵⁵ are among those who most strongly oppose efforts to encourage the involvement of FBO's. The Establishment Clause jurisprudence that has created the seeming animosity towards faith-based groups stems from *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson* the court said:

No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may called, or whatever they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State"⁵⁶

The case itself was actually upholding a public policy that reimbursed parents for the cost of transportation for sending their children to religious schools. The Supreme Court's reliance on a wall continued in *Lemon v. Kurtzman*, 403 U.S. 602, 640 (1971) as demonstrated by Justice Douglas concurrence:

We said in unequivocal words in *Everson v. Board of Education*, 330 U.S. 1, 16, "No tax

⁵⁴Id at 678

⁵⁵This phrase was taken from a private letter by Thomas Jefferson to the Danbury Baptist Association in which he was alluding to an earlier metaphor by Roger Williams the famed Baptist minister who said the garden of the church must be protected by a fence from the wilds of the State.

⁵⁶Id. at 16

in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach v. Clauson*, 343 U.S. 306, 314, and in *McGowan v. Maryland*, 366 U.S. 420, 443, and in *Torcaso v. Watkins*, 367 U.S. 488, 493. We repeated the same idea in *McCollum v. Board of Education*, 333 U.S. 203, 210, and added that a State's tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the State's compulsory public school machinery."⁵⁷

A more recent case that dealt with use of religious organizations providing publicly funded social services was *Bowen v. Kendrick*, 487 U.S. 589 (1988). In that case a religious group had received federal funding under the federal Adolescent Family Life Act, to provide services relating to teen sexuality and pregnancy. The Supreme Court ruled 5-4 that the Act was not facially invalid because it allowed religious groups to participate. The Court discussed however, the possibility that the Act could be applied in an unconstitutional manner. It held that it would not be constitutional for the funds to go to a grantee that was "pervasively sectarian" or to fund "specifically religious activities". Justice O'Connor provided the swing vote in the case, as she often does in Establishment Clause cases, and her concurrence explained her opinion. She said "any use of public funds to promote religious doctrines violates the Establishment Clause." She discussed a valid secular purpose but said, it must be fulfilled "without thereby permitting religious indoctrination. . . ."⁵⁸ Under this ruling, those who receive grants would not be allowed to have any funding if they could not isolate their funding from their religious activities. This leaves out many "sectarian" groups that otherwise would be providing social services, as I discussed earlier.

B. Recent Establishment Clause Jurisprudence

What once was murky has been cleared up considerably with a line of cases in which the marked trend has been away from the prior hostility towards religion and towards neutrality. Faith-based programs are allowed to fill the secular purpose of a state program where the participants voluntarily elect to participate and secular alternatives are available. The first case to focus the inquiry on private choice was *Mueller v. Allen*, 463 U.S. 388 (1983), a case that dealt with a tax deduction that provided indirect support to parochial schools. Because the support was the product of the private choice of those who received the deduction, it was allowable under the three part test elucidated in *Lemon*. The line of inquiry continued in *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481 (1986). In *Witters* a blind student was allowed to use his vocational rehabilitation assistance payments to acquire religious training. The Supreme Court ruled that the funding was permissible because the Christian college was not receiving direct aid, but a private individual was exercising his right to attend the college of his

⁵⁷Id., at 212

⁵⁸Id., at 623

choosing. The case law continued in a similar vein in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In *Zobrest* a school district was allowed to pay for an interpreter to accompany a deaf child to a sectarian school. The Court ruled that the Individuals with Disabilities Education Act (IDEA) that funded the student's education was a neutral government program that dispensed aid to students with disabilities and that the student could use the funding as he/she wished.

In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the court held that the University could not withhold funding from a Christian journal on the basis of Establishment Clause concerns and that the denial of funding was in fact unconstitutional. The fact that there were numerous other student publications that were funded meant that under the neutrality principle, the Christian group could not be singled out for denial on the basis of its sectarian beliefs. Neutrality mandated that they be treated in the same way as non religious groups.

The real shift away from previous Establishment Clause jurisprudence that had been hostile towards religion occurred in *Agostini v. Felton*, 521 U.S. 203 (1997). The case overruled a prior holding of the Supreme Court that the Establishment Clause prevented a city from sending public school teachers into parochial schools to provide education to disadvantaged children pursuant to a congressionally mandated program. The Court held that the instruction was valid when it was given on a neutral basis and safeguards were followed to ensure that the schools were not using the money to directly subsidize their religious activities. O'Connor announced the Court's shift in its Establishment Clause jurisprudence in overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and set forth a new modified Lemon test. The Petitioners who sought relief from the earlier order prohibiting the teachers pointed to *Witters*, *Zobrest* and *Rosenberger* in order to show that a shift had occurred that justified a declaration that *Aguilar* was no longer good law. *Agostini* adopted a modified *Lemon* test that the Court now uses in its Establishment Clause analysis. The test is now just the first two prongs of the old test, whether a statute (1) has a secular purpose, and (2) has a primary effect of advancing or inhibiting religion. They applied the entanglement inquiry only as it related to the effect of a statute in advancing or inhibiting religion. They now use different criteria to establish whether that impermissible effect has occurred or not. The criteria for establishing whether or not the governmental aid had the effect of advancing or inhibiting religion is whether or not it resulted in governmental indoctrination, whether recipients were defined by reference to religion, and whether or not excessive government entanglement was created. The case also held that direct aid that does not serve a religious function is permissible. The Court cited *Witters* and *Zobrest* again for the proposition that a private choice is not attributable to state decision making. The Court next examined the issue in *Mitchell v. Helms*, 530 U.S. 793 (2000).

This decision matters most when examining the mechanism that would be constitutionally acceptable to the Supreme Court. The Court looked at whether or not governmental materials and equipment being furnished to private schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981⁵⁹ created a violation of the Establishment Clause. The case involved computer hardware and software that was being given directly to

⁵⁹20 U.S.C.S. §§ 7301-7373 (Chapter 2)

primary and secondary parochial schools. The Court had allowed parochial schools to receive secular textbooks in the past, but never something like computers that was so easily divertible to religious use. The decision was 6-3 but Justice O'Connor again provided the most important decision. Justice Thomas wrote a four justice plurality opinion that said that direct aid to a parochial school that was easily divertible to religious use was not a First Amendment problem. Although the program was not a single private choice, but numerous private choices by individual parents that led to the governmental aid for the private schools, those choices made by individuals screened by neutral eligibility criteria, insulated the government from any claim of Establishment. Using this analysis the Court looked back at *Zobrest* and *Agostini* and held that the direct/indirect funding distinction did not matter very much so long as a private choice occurred. As Justice Thomas pointed out, a government-funded interpreter was allowed to be a mouthpiece of religious instruction in *Zobrest* because of these principles of neutral eligibility funding criteria and private choice. The plurality opinion held that the program in question could be labeled either direct or indirect and it would in no way further the constitutional analysis. They then agreed that the aid to the religious schools could not be religious in nature but said that it could be divertible, for religious use. Any non divertibility provision they argued would be unworkable and also unnecessary because the indoctrination is not occurring at the behest of the government or because of its funding choices, the focus is on the individual. *Zobrest* as they point out did not address divertibility and if it had indeed been impermissible then the Court could not have held that the sign language interpreter could act without placing the imprimatur of governmental approval on the religious indoctrination that would undoubtedly occur. *Mueller* and *Witters* similarly required no proof of non divertibility. The plurality opinion ended with a strong reproach for those who would seek to exclude sectarians from funding, calling it an impermissible hostility:

The inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) (collecting cases). Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing, see post, at 39-41, we find it profoundly troubling. In addition, and related, the application of the "pervasively sectarian" factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981).

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Cf. *Chicago v. Morales*, 527 U.S. 41, 53-54, n. 20, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," post, at 1, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the

history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, *The Blaine Amendment Reconsidered*, 36 *Am. J. Legal Hist.* 38 (1992). Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S. at 743, it coined the term "pervasively sectarian" -- a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools. See post, at 20-21, 39-41 (SOUTER, J., dissenting).

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.⁶⁰

Similarly, when there is private individual choice and secular alternatives, disqualification of faith-based groups from a funding scheme takes away its neutrality and results in impermissible discrimination. Neutrality cannot mean hostility as the cited authorities make clear.

Justice O'Connor who was joined by Justice Breyer held that the plurality opinion was over broad and ruled that the provision of computers was acceptable but only because of several factors. The factors were that the aid was distributed according to neutral, secular criteria, the funds were supplementary, controlled by the public schools and never reached the parochial schools (the public schools purchased the equipment and gave it to the parochial schools), the parochial schools signed contracts promising not to divert the computers to religious usage, and there were adequate safeguards to ensure that the contract was kept. Grant programs would fail this analysis because the funding would be direct, and monitoring would not be effective because it would create entanglement when the government tried to check up on the organization. The crucial fact in this case is that Justice O'Connor's analysis hinged on the directness of the funding. She held that diversion to religious activities is not a problem if true private choice directs the aid. Justice O'Connor argued that the difference between *Witters* and *Zobrest* and the instant case was that in the aforementioned cases the aid was given directly to the individuals and they made an independent and private choice. She felt that a per-capita aid program was different and should be viewed as closer to a direct subsidy, which carried with it requirements of secular use and non divertibility for religious purposes. Justice O'Connor's argument would allow vouchers, but would not allow grants.

Another case that reinforces the principle of neutrality is *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). In *Good News Club*, a school sought to exclude a Christian group on Establishment Clause grounds and the Supreme Court held that they did not have the right to do so. Establishment in this case was not created by the use of school facilities by a

⁶⁰*Mitchell v. Helms*, 530 U.S. 793 (2000) at 828-9

Christian group after hours, and the school was not allowed to single out religious groups for exclusion, just as the government is no longer supposed to exclude religious groups from funding when the remaining prongs of the modified *Lemon* test are satisfied.

The most recent Supreme Court case dealing with the Establishment Clause is *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002). In *Zelman* the Court reiterated the position that private choice insulates against all accusations of government imprimatur in the funding of religious schools. The Court held that a voucher program in Cincinnati, Ohio that distributed some funds to private religious schools did not create an Establishment clause violation because the statute was neutral towards religion and did not have the intent to encourage religion, and the vouchers represented a true private choice between religious and secular options. The Court began by looking at the tremendous problem of the failing public schools in Cincinnati, a problem that created a profound secular purpose in offering vouchers. The valid secular purpose of fighting poverty in any number of ways is sufficient and the question becomes the same that occurred in *Zelman*, whether or not the program has the forbidden effect of advancing or inhibiting religion. Chief Justice Rehnquist's majority opinion quoted *Agostini* for that proposition. He went on to contrast direct aid, with aid that flows towards religious organizations as the result of a private choice.

He then discussed the lack of financial incentives that would skew aid towards religious schools. This would be another hurdle to be cleared by programs benefitting the poor. If the only programs around are religious obviously the aid would be skewed.

The question of whether or not a poverty program carries the imprimatur of government endorsement is addressed best by the argument advanced in the recent Wisconsin District Court decision I will discuss later. The reasonable observer is deemed to be aware of the history and context underlying the challenged program as the Court cites from *Good News Club*. In context as in *Zelman*, a reasonable observer would view many currently denied programs as part of a broader effort on the part of the State authorities to fight poverty.

Justice O'Connor's concurrence illustrates her firm belief that the decision was in line with prior precedent and her strong conclusion that other secular choices were being offered. In discussing the history of Establishment Clause jurisprudence she cites numerous examples, from tax benefits, to Medicare payments to religious hospitals and Pell grants and other federal aid that ends up benefitting religious institutions.

The next step of her analysis takes her into the history of various establishment clause tests⁶¹ and she lays out the *Lemon* test of whether a statute has a "secular legislative purpose," with a "principal or primary effect" that "neither advanced nor inhibited religion", and that did "not foster an excessive government entanglement with religion." She discusses her modified test which is essentially an endorsement test focused on two inquiries, whether or not the program is administered in a neutral fashion, and whether or not the beneficiaries of indirect aid have a genuine choice among religious and non religious organizations. The stringent

⁶¹She mentions, *Lemon v. Kurtzman* 403 U.S. 602, 612, 91 S.Ct. 2105-613 (1971), *Agostini v. Felton*, 521 U.S. 203, 232-233, 117 S. Ct. (1997), and concludes the test is the same today as *School Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560 (1963).

requirements for staffing and accreditation may exclude some from the ability to provide a similar program, but as long as there is a secular option it is allowed. Stringent requirements are also allowed as long as they are necessary and justified by a compelling state interest. She points out that although Justice Souter thinks the new Establishment test is a departure from *Everson*, it is in keeping with the spirit of Justice Black's opinion in that case which said that the First Amendment requires state neutrality towards secular and religious groups but that neutrality does not place the state in an adversarial role vis a vis religious groups. Even if the religious option is more attractive and in that sense the effect of the aid is to encourage religion, it is still neutral according to O'Connor.

C. The Circuit Breaker Theory: Social Service Vouchers in Application

The most relevant case showing how the circuit breaker theory plays out is *Freedom from Religion Found., Inc. v. McCallum*, 214 F. Supp. 2d 905 (2002). The case involved a suit under 42 U.S.C. S. §1983. Plaintiffs contended that the use of a corporation (Faithworks) as a rehabilitation option for offenders under the supervision of the Department of Corrections (DOC) violated the Establishment Clause of the First Amendment. After a trial, the court issued judgment as a matter of law in favor of defendants and the corporation. The court found that the corporation engaged in religious indoctrination, but that the indoctrination could not be attributed to the state through the DOC's funding of the Faith work's program. The court noted that each offender was offered a specific secular alternative to the corporation's program because of the religious content. Each of the offenders in the program independently consented to participate after being informed of the religious component and none of the participants objected to the religious aspect of the program. Offenders were not deprived of a real choice. The court found that the state, through the DOC was not endorsing religion because the corporation only received funding from the DOC if an offender specifically elected, through his own private decision, to participate in the program.

In this case there was not another similar program available for residential treatment. This may be the case with some poverty programs in that they may be the only program able to offer certain perks, i.e. job training, wage guarantees, etc. Faith works is explicitly Christian and is not accommodating in terms of who they will take into their program, they only take those who want to strengthen their faith. This results in the exclusion of atheists. This was allowed however because the DOC was very careful not to let anyone enter the Faith works program who had not been informed of its religious nature and who had not voluntarily agreed to forgo their secular option in order to take advantage of the religious one. Referrals by federal agencies for poverty fighting programs would operate in a very similar manner.

The court in this case used the *Agostini* test and determined that the aid that resulted in the indoctrination was indirect, comparing it to the vouchers in *Zelman*.

One of the main arguments of the plaintiff was that the Faith works program in its uniqueness represented an option that had no substitutable alternative. Judge Crabb discussed Faith Works as being unique in length (nine to twelve months instead of 30 to 90 days) and its

holistic approach (offering joy training and working with families instead of just drug rehabilitation) and its religious foundation. Although Souter would undoubtedly disqualify this option because of its uniqueness, Judge Crabb chose to follow more closely the opinion of O'Connor. She points out that the Constitution requires reasonable alternatives not identical ones. To further bolster her argument she cites an appellate case that concluded the same thing.⁶² She then addressed the preselection argument that the offender has a restricted choice and that constitutes an Establishment Clause violation. She pointed out numerous cases where the government pre approves service providers⁶³ and concludes that the choice is still genuinely private and independent.

In regards to the imprimatur argument proposed that the government violated the Establishment Clause by funding Faith works, the court looked to *Zelman* and to the circuit breaker theory that held that no imprimatur can be noted by a reasonable observer when the funding is the private choice of an individual with secular options. Addressing the plaintiff's argument that the money never actually went to the individual prisoner, but passed directly from the DOC to Faith works, the court noted that such a formality was ruled unnecessary in *Mitchell*.

Conclusion

Vouchers for Social Services are the most effective means of combating poverty in America. Tax credits would as we have seen result in more funding for museums and suburban PTAs but would fail to address the fundamental needs within deprived communities. Direct governmental funding, whether through subsidies or grants would result in the essential religious message of the group being compromised, and would in no way insist on outcome based evaluations since the grant recipients would continue to be the same as they always have been. Vouchers that are the result of a truly private individual choice of a faith based group over a secular alternative, completely insulate the governmental funding from any imprimatur of governmental approval and allow the faith based groups to provide their services without compromising their religious values. Furthermore the old principle of not funding groups that are pervasively sectarian is inherently prejudiced towards secular liberalism and constitutes impermissible disfavoring of religion by the government. While the Supreme Court has retreated from that hostility, Justice O'Connor's crucial vote still hinges on whether the choice is a private one, and whether the aid is direct or indirect, and as a result vouchers are the only option available that will allow previously unfunded sectarian organizations to help in the fight against poverty while maintaining the religious values that make them effective.

⁶²*Kerr v. Farrey*, 95 F.3d 472 (1996).

⁶³See, e.g., *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062 (1983) (schools receiving public funding accredited by state); *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 106 S. Ct. 748 (1986) (same); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S. Ct. 2462 (same).