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“A Legacy of Discrimination”? The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study

Charitable Choice, otherwise known as the Faith-Based Initiative, represents one of the more controversial policy initiatives to come out of Washington, D.C., in recent memory. Enacted in 1996 as part of the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA or the “Welfare Reform Act”), Charitable Choice was an important component of the movement to restructure, reduce, and privatize “welfare as we kn[e]w it.”¹ Charitable Choice authorizes faith-based organizations (FBOs) to participate in government-funded social services programs by requiring federal and state agencies that contract with nongovernmental organizations (NGOs) to allow FBOs to compete for grants and contracts “on the same basis as any other nongovernmental provider without impairing the religious character of such organizations.”²

Charitable Choice does more than guarantee similar access to government programs, however. The legislation contains provisions that favor or protect, depending on one’s perspective, religiously affiliated entities. A participating FBO is guaranteed its independence from all governmental entities, “including such organization’s control over the definition, development, practice, and expression of its religious beliefs.”³ Moreover, FBOs are not required to alter their form of governance to participate in any

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¹ PRWORA’s Charitable Choice provisions are codified in 42 U.S.C. § 604a (2000).

² *Id.* § 604a(b).

³ *Id.* § 604a(d)(1).

contract or grant, or to remove religious art, icons, or other symbols in their buildings where the publicly funded services take place.⁴ Finally, participation in a government-funded grant or contract does not affect the ability of FBOs to discriminate on the basis of religion in their employment practices, as provided under Title VII of the 1964 Civil Rights Act in section 702.⁵

Equally as controversial as the religious discrimination provision is the underlying notion of the government employing religious entities to provide important public services. At the risk of understatement, government funding of religious organizations has traditionally raised Establishment Clause concerns.⁶ While this is true in a general sense, the Supreme Court has long allowed discrete forms of aid to flow to religious institutions to accomplish secular ends.⁷ Thus, more than one hundred years ago the Court upheld a federal construction grant for a new building at a religiously affiliated hospital in the District of Columbia.⁸ Provided the aid funds secular programs or activities of religious organizations—such as Medicare funds paid for health care received at a religious hospital—and sufficient safeguards are in place to ensure that public funds are not expended on religious activities,⁹ the Establishment Clause permits religious organizations to participate in many government benefit programs.¹⁰

Where Charitable Choice becomes controversial is that it blurs

⁴ *Id.* §§ 604a(d)(2)(A)-(B).

⁵ *Id.* § 604a(f). Section 702 is contained in 42 U.S.C. § 2000e-1. For a discussion of the discrimination issue, compare Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002), with CARL H. ESBECK ET AL., *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (2004).

⁶ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“No tax in any amount, large or small, can be levied to support any religious activities or institutions . . .”); see also *id.* at 33 (Rutledge, J., dissenting) (describing that the Establishment Clause “prohibition broadly forbids state support, financial or other[wise], of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.”).

⁷ See *Everson*, 330 U.S. at 17-18 (upholding reimbursement for transportation expenses associated with religious schooling); *Wolman v. Walter*, 433 U.S. 229 (1977) (allowing state funding for textbooks, mandated testing, and diagnostic and therapeutic services at parochial schools).

⁸ See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

⁹ See *Agostini v. Felton*, 521 U.S. 203, 228-29 (1997) (documenting how government funds are not expended on religious activities). Accord *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (“Our cases have permitted some government funding of secular functions performed by sectarian organizations These decisions, however, provide no precedent for the use of public funds to finance religious activities.”).

¹⁰ See *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988).

the line between funding identifiably secular activities (usually permitted) and faith-infused activities (traditionally not permitted) of religious organizations.¹¹ To be sure, Charitable Choice law prohibits any federal funds being spent directly on religious worship, instruction, or proselytization.¹² However, most critics of Charitable Choice view this hard-fought safeguard as ineffectual considering the lack of oversight provisions in the law and the likelihood that program beneficiaries may be disinclined to object to religious elements in their services.¹³ Also, Charitable Choice discards the traditional presumption against funding “pervasively sectarian” organizations: those institutions “in which religion is so pervasive that a substantial portion of [their] functions are subsumed in the[ir] religious mission.”¹⁴ As a result of this last provision, churches, temples, and mosques—not merely religiously affiliated agencies like Catholic Charities USA and Lutheran Social Services—that have no experience in segregating religious from nonreligious activities and are primarily committed to the spiritual transformation of peoples’ lives,¹⁵ may receive public funds for their *religiously integrated* services.¹⁶

The term “religiously integrated” is used purposefully, as extending eligibility to pervasively religious entities is the primary explanation for the enactment of Charitable Choice. As noted above, prior Supreme Court decisions had indicated that the government could partner with religious organizations to further their mutual goals of assisting the poor and dispossessed.¹⁷ For

¹¹ See *supra* note 9.

¹² Charitable Choice prohibits FBOs from using any direct funding (e.g., contracts, grants) on “sectarian worship, instruction, or proselytization,” but this restriction does not apply to funds obtained through a voucher or certificate. 42 U.S.C. § 604a(j) (2000).

¹³ As originally enacted, Charitable Choice did not notify beneficiaries of their rights to receive services through a nonreligious alternative if they objected to receiving services through a religious provider. Certainly, it may be argued that “sectarian worship, instruction or proselytizing” does not constitute the sum total of potential religious activities. See Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 45-46 (2000); Alan Brownstein, *Constitutional Questions About Charitable Choice*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 219-65 (Derek Davis & Barry Hankins eds., 1999).

¹⁴ *Bowen*, 487 U.S. at 610 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

¹⁵ Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values – A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243 (1999).

¹⁶ Consistent with the bulk of the literature, this Article uses the term “FBO” to encompass both religiously integrated and religiously affiliated entities.

¹⁷ See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

example, in 1988 the Court held that religious organizations could constitutionally participate in a federally funded program directed at providing abstinence counseling and family planning to teenage girls, notwithstanding the fact that the counseling services provided by the religious organizations conformed with their religious teachings about premarital sexual relations, contraceptive use, and abortion.¹⁸ *Bowen v. Kendrick* and similar decisions merely recognized the longstanding practice whereby local and state agencies had relied on, and frequently contributed financial support to, the social ministries of religious organizations.¹⁹ But the corresponding rule from *Bowen* was that public funds could not pay for inherently religious activities or for a program in which religion is so intertwined that the functions are inseparable: “[W]e have always been careful to ensure that direct government aid to religious affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are ‘pervasively sectarian.’”²⁰

The Court made clear, however, that in the absence of such factors, it had “never held that religious institutions [were] disabled by the First Amendment from participating in publicly sponsored social welfare programs.”²¹

If this was the state of the law in 1996 when Charitable Choice was enacted (as it was), such that religious organizations could already participate in government grants and contracts,²² then

¹⁸ *Bowen*, 487 U.S. at 609.

¹⁹ See STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 63-108 (1996); STEVE RATHGEB SMITH AND MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 8-9, 48-49 (1993).

²⁰ *Bowen*, 487 U.S. at 609-10.

[W]e have said that the Establishment Clause does ‘prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith,’ and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to ‘advance the religious mission’ of the religious institution receiving aid.

Id. at 611-12 (citation omitted).

²¹ *Id.* at 609. The *Bowen* Court remanded the case to the district court to determine whether any of the recipient organizations were pervasively sectarian or had used public funds for specifically religious activities. *Id.* at 621. The parties eventually settled the case after the district court denied the government’s motion for summary judgment on the ground that genuine issues existed whether some grantees were pervasively sectarian and public funds were paying for religious activities. See *Kendrick v. Bowen*, 766 F. Supp. 1180 (D.D.C. 1991).

²² And quite clearly they did. In 1996, the year Charitable Choice was enacted,

questions arise as to whether the purpose of Charitable Choice was to institute a fundamental change in the rules governing public funding of religiously integrated entities and activities. The logical conclusion is that Charitable Choice sought to extend the existing law to authorize not merely the funding of secular *faith-motivated* programs, but the funding of *faith-integrated* programs, provided that public funds do not pay for actual worship, proselytization, or religious instruction, assuming a distinction exists. Public statements by President George W. Bush support this view: “Faith-based programs are only effective because they do practice faith. It’s important for our government to understand that.”²³ If this is the explanation, then Charitable Choice represents a frontal assault on a core Establishment Clause principle: the prohibition on funding inherently religious activity.²⁴

However, another possible justification exists for Charitable Choice. Charitable Choice proponents argued that a vast gulf existed between constitutional interpretations and actual practice—that misunderstanding of the law, outdated and burdensome regulations, and ingrained prejudice against religious organizations led to subtle if not overt government discrimination against religious organizations, particularly against smaller interchurch or congregationally based programs. Others argued that the old rules requiring essentially secular approaches had discriminated against pervasively religious organizations and evinced a climate of hostility towards using religious solutions to address human problems.²⁵ Enabling and funding congregations to provide social services would make welfare more efficient (by restricting government bureaucracies), less expensive, more personable, and produce more effective results through the transforming power of faith-based approaches.²⁶

the member agencies of Catholic Charities USA received approximately \$1.3 billion in grants and contracts from federal, state, and local sources for their programs. See *infra* notes 137-42 and accompanying text; see also MONSMA, *supra* note 19, at 63-108.

²³ Press Release, The White House, President Speaks with Faith-Based and Community Leaders (Jan. 15, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040115-7.html>.

²⁴ See Green, *supra* note 13, at 45.

²⁵ See, e.g., Carl H. Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics*, in WELFARE REFORM, *supra* note 13, at 173, 180-82.

²⁶ See generally CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000); JOE LOCONTE, *SEDUCING THE SAMARITAN: HOW GOVERNMENT CONTRACTS ARE RESHAPING SOCIAL*

This perspective was best represented by a 2001 White House report entitled *Unlevel Playing Field*, which was prepared shortly into President George W. Bush's first administration and purported to document the myriad ways that FBOs had unfairly been excluded from participating in government-funded social service programs.²⁷ Prepared by the new White House Office of Faith-Based and Community Initiatives (OFBCI), the report examined the percentage of federal grants received by religious nonprofits and concluded that "[t]here exists a widespread bias against faith- and community-based organizations in Federal social service programs."²⁸ The conventional wisdom aired during the debates surrounding Charitable Choice legislation and the underlying premise that has fueled President Bush's Faith-Based Initiative is that overzealous interpretations of constitutional mandates, ingrained prejudice against religion, and bureaucratic red tape have stood in the way of FBOs being full players in the human service network.²⁹ With the discrimination finally lifted, smaller FBOs and congregations (the "armies of compassion") would rush to address the unmet societal need.

This Article examines the rhetoric and assumptions behind this latter claim and compares it to the reality of one test case: Oregon, the most unchurched of the fifty states.³⁰ If any state experience should substantiate the premises underlying Charitable Choice it should be Oregon, known for its independent spirit, liberal environmental policies, and permissive social attitude toward obscenity and end-of-life decisions. In few states is organized religion more suspect. Moreover, in the early part of the twenty-first century, Oregon had the highest unemployment rate in the nation as well as some of the highest poverty and hunger rates.³¹ At the same time, the state budget experienced a major

SERVICES (1997); MONSMA, *supra* note 19; Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

²⁷ THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (2001), available at <http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html>.

²⁸ *Id.* at 2.

²⁹ *Id.* at 11, 13-14.

³⁰ Shelly Oppel, *The Separation Between Church and Oregon*, THE OREGONIAN (Portland, Or.), Sept. 18, 2002, at A1 (noting that thirty-one percent of Oregonians attend places of worship, the lowest figure in the nation).

³¹ See Gail Kinsey Hill, *Oregon Tallies Most Jobs Ever*, THE OREGONIAN (Portland, Or.), Mar. 1, 2005, at A1 (documenting Oregon's 2001-2004 recession).

revenue shortfall, resulting in the slashing of public funding for social programs and public education.³² In essence, between 2001 and 2004, Oregon was a state in need. The State's resistance to contracting and partnering with FBOs to address the suffering of the state's citizenry would support allegations of government discrimination against religious entities and solutions.

Part One of this Article provides an overview of Charitable Choice, examining the arguments for its enactment and subsequent expansion of the Faith-Based Initiative under the Bush Administration. Part Two then considers the history of state contracting with FBOs in Oregon as well as its recent practice to see how it conforms to independent studies and the rhetoric supporting Charitable Choice. Much of the data and information discussed in this Part is based on a 2002-2004 study commissioned by the Oregon Law Commission to examine the Faith-Based Initiative in Oregon.³³ This study concludes that, contrary to the politically charged rhetoric at the national level, the State of Oregon has long maintained a successful relationship with FBOs, a relationship that predated Charitable Choice. Even though state contracting and partnering has traditionally been with established religiously affiliated agencies such as Catholic Social Services and Lutheran Family Services, the State has willingly partnered with pervasively religious organizations and smaller congregational entities on occasion. The study concludes that the failure of the State to contract more frequently with these latter entities is primarily attributable to generic factors such as program complexity and the lack of infrastructure and sophistication among potential religious providers, rather than due to overt or subtle discrimination. Part Two concludes with an analysis of Oregon law to see whether it may serve to inhibit or discriminate against religious organizations.

Finally, Part Three makes an argument for cautious collaboration between government and FBOs. This Part seeks to get beyond the rhetoric to examine more compelling arguments for

³² See James Mayer, *Two Money Measures Approved*, THE OREGONIAN (Portland, Or.), Sept. 18, 2002, at A1.

³³ See OREGON LAW COMMISSION, REPORT OF THE OREGON LAW COMMISSION NON-PROFIT SOCIAL SERVICE DELIVERY STUDY GROUP (2003) [hereinafter REPORT]. The Author served as the reporter for the study. The Oregon Law Commission gave the Author permission to incorporate portions of the Report in this Article. The views expressed in this Article do not represent those of the Oregon Law Commission, Willamette University, or any other entity.

government partnering with religious entities. It argues that religious organizations should be able to participate in many government-funded social service programs and that to exclude their participation is often unnecessary (in a constitutional sense) and undesirable as a policy matter. Generally speaking, congregations and religious organizations contribute to the social good and are a positive influence in our democratic society. Because of their commitment to compassion and alleviating human suffering, religious organizations may be particularly adept at providing important social services. Church-state separationists, who are predominately politically and socially liberal, should embrace religious involvement in social service programs, though they should not yield on their demands for constitutional safeguards under Charitable Choice. As a result, while this Article argues that Charitable Choice may have made a positive contribution in the debate over how to best provide services to people in need, it has been advanced for many wrong reasons, the least of which being partisan political gain. By aggressively pushing the discrimination argument, the Bush Administration has unnecessarily politicized the issue while alienating many who might otherwise embrace partnering between FBOs and the government. At the same time, the Bush Administration has depreciated the constitutional concerns present in the public funding of religiously infused programs.

I

THE ORIGINS OF AND JUSTIFICATIONS FOR THE FAITH-BASED INITIATIVE

Charitable Choice emerged in 1995 as part of Congress' response to President Bill Clinton's call for welfare reform. Spearheaded by then-Republican Senator John Ashcroft of Missouri, the Senate attached Charitable Choice to the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which replaced the oft-maligned Aid to Families with Dependent Children (AFDC) and Emergency Assistance (EA) programs with a program of capped state entitlements called Temporary Assistance to Needy Families (TANF).³⁴ On its own, the Welfare Reform Act—with its primary goals of

³⁴ See 141 CONG. REC. S11640 (1995); Julie A. Segal, *A "Holy Mistaken Zeal": The Legislative History and Future of Charitable Choice*, in WELFARE REFORM, *supra* note 13, at 9-27.

privatization, devolution of authority, and reduction in welfare roles—was highly controversial, rejecting the presumption of guaranteed benefits or “entitlements” for those in need. In its place, PRWORA limited eligibility to two years of assistance while “encouraging” states to reduce welfare roles.³⁵ Charitable Choice only added to the controversy by ensuring that religious organizations could compete for grants and contracts on an equal basis with nonreligious NGOs while providing protection for a participating FBO’s religious character, internal structure, and staffing.³⁶ And, as discussed above, Charitable Choice dispensed with the distinction between religiously affiliated and pervasively sectarian organizations; under the law, all religious organizations were presumptively eligible to participate in government grant programs. Despite the addition of this controversial element to the Welfare Reform Act, Charitable Choice comported with President Clinton’s overall desire to reform welfare and reach out to the nonprofit and religious sectors.³⁷ The Senate passed Ashcroft’s Charitable Choice provision by a sixty-seven to thirty-two vote, and President Clinton signed the bill into law in August 1996.³⁸

Following its enactment in the Welfare Reform Act, Congress added Charitable Choice provisions to other federally funded social service programs. Charitable Choice requirements now apply statutorily to four federal programs that are distributed as formula grants to the states: the TANF program; the Welfare to Work program (WtW); the Community Services Block Grant program (CSBG); and the Substance Abuse Prevention and Treatment (SAPT) Block Grant and Projects for Assistance in Transition from Homelessness (PATH) programs administered by the Substance Abuse and Mental Health Administration (SAMHSA).³⁹ The U.S. Department of Labor has also applied Charitable Choice requirements to the Workforce Investment Act (WIA), which is distributed through state Workforce Invest-

³⁵ See Lewis D. Solomon & Matthew J. Vissides, Jr., *Faith-Based Charities and the Quest to Solve America’s Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL’Y 265, 271-73 (Spring 2001).

³⁶ 42 U.S.C. § 604a(b), (c), (d)(2), (f) (2000).

³⁷ See Segal, *supra* note 34, at 22-23 (describing the Clinton Administration’s mixed signals of support for Charitable Choice).

³⁸ 142 CONG. REC. S8501, S8508 (1996); Segal, *supra* note 34, at 22-23.

³⁹ See IRA C. LUPU & ROBERT W. TUTTLE, *GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: THE STATE OF THE LAW* 51-70 (2002).

ment Boards to One-Stop employment centers.⁴⁰ In addition, Charitable Choice-like provisions exist in two federal programs administered by states that predate the Welfare Reform Act: the 1990 Child Care and Development Block Grant program (now administered through PRWORA) and the 1981 Adolescent Family Life Act/Abstinence Education Grant Program.⁴¹

Despite supporting all of these subsequent laws, the Clinton Administration was never a strong advocate for Charitable Choice. Some within the White House insisted that constitutional prohibitions on funding of pervasively sectarian organizations constrained the eligibility of some potential participants.⁴² Possibly due in part to the Administration's lukewarm support for the measure, for the first several years Charitable Choice received little public attention outside of social service circles.⁴³

That situation changed dramatically with the election of George W. Bush as President. As Governor of Texas, Bush had embraced the ideas of Marvin Olasky, a religiously conservative University of Texas journalism professor who coined the phrase "compassionate conservatism" while advocating for the religious privatization of many government programs.⁴⁴ Governor Bush had also established an advisory task force to study the implementation of Charitable Choice in his state.⁴⁵ Thus, it was during the 2000 presidential election that most Americans first became aware of Charitable Choice or the Faith-Based Initiative, as it came to be known. Candidate Bush made Charitable Choice a centerpiece of his "compassionate conservatism" campaign. He pledged to enlist "armies of compassion" to address America's social service crisis, a force that would rely primarily on religious and civic organizations: "[W]hen we see social needs in America, my administration will look first to faith-based programs and community groups, which have proven their power to save and change lives."⁴⁶

⁴⁰ *Id.* at 56, 66.

⁴¹ *Id.* at 57-63.

⁴² Telephone Interview with William Marshall, White House Deputy Counsel (Aug. 1, 2000).

⁴³ See Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 *YALE L. & POL'Y REV.* 183, 188 (2002).

⁴⁴ See MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1992).

⁴⁵ See GOVERNOR'S ADVISORY TASK FORCE ON FAITH-BASED COMMUNITY SERVICE GROUPS, *FAITH IN ACTION . . . A NEW VISION FOR CHURCH-STATE COOPERATION IN TEXAS* (1996).

⁴⁶ Press Release, The White House, Remarks by the President in Announcement

In one of his first acts upon taking office on January 31, 2001, President Bush established the White House Office of Faith-Based and Community Initiatives (OFBCI) to oversee and direct his push for a national faith-based initiative.⁴⁷ On the same day, he issued an executive order establishing centers for faith-based and community initiatives within five executive departments: Health and Human Services; Labor; Housing and Urban Development; Education; and Justice, headed by the new Attorney General John Ashcroft.⁴⁸ The purpose of these various offices was to identify and “eliminate regulatory . . . [and] programmatic obstacles to the full participation of faith-based and community organizations in the provision of social services” and to “create a hospitable environment for groups that have not traditionally collaborated with [the] government.”⁴⁹ The first order of business for the OFBCI and departmental offices was to undertake an audit “to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services” and to issue a report on the findings.⁵⁰ Seven months later, the OFBCI issued its report *Unlevel Playing Field*, “confirming” the suspicions of the President about the existence of significant and unjustified barriers to full participation by FBOs and NGOs in federal social service programs.⁵¹

Unlevel Playing Field is more of a manifesto than an empirical report. With the assumptions already laid out in the White House blueprint *Rallying the Armies of Compassion* that accompanied the release of the January 31, 2001 executive orders, the “findings” of the report are hardly surprising. The report declared, “[t]here exists a widespread bias against faith- and community-based organizations in Federal social service programs” as demonstrated through various federal rules, policies, and practices such as: (1) restricting some religious organizations from

of the Faith-Based Initiative (Jan. 29, 2001), <http://www.whitehouse.gov/news/releases/20010129-5.html>; Michelle Dibadj, *The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*, 26 S. ILL. U. L.J. 529, 529 (2002).

⁴⁷ Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

⁴⁸ Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

⁴⁹ See PRESIDENT GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION (2001), available at <http://www.whitehouse.gov/news/reports/faithbased.pdf>.

⁵⁰ Exec. Order No. 13,198, *supra* note 48.

⁵¹ That the report would confirm such suspicions was never in doubt as the Executive Order provided that the report “shall include . . . a comprehensive analysis of the barriers to the full participation of faith-based and other community organizations in the delivery of social services.” *Id.*

applying for funding; (2) restricting religious activities that are not prohibited by the Constitution; (3) not honoring rights that religious organizations have under federal law; and (4) burdening small organizations with cumbersome regulations and requirements.⁵²

The report made clear, however, that these barriers are not inadvertent or otherwise legally justified;⁵³ rather, these rules, policies, and practices represent a pervasive “anti-religious bias” and “systemic discrimination” toward religion.⁵⁴ Much of the evidence of discrimination relied on anecdotal incidents and data indicating that religious organizations receive minimal award amounts under formula and discretionary grant programs.⁵⁵ The report’s use of provocative language (e.g., equating government regulation of religious organizations to “an organizational strip search”) set a clear tone: the government, or at least its social service agencies, was hostile toward religious providers and prepared to “marginalize or eliminate” the religious character and autonomy of any religious organization that had the temerity to participate in a social service program.⁵⁶

The “findings” in *Unlevel Playing Field* relied in part on studies and articles written by religiously conservative social scientists and legal scholars. One such study was a report by the Center for Public Justice, a leading supporter of Charitable Choice, issued immediately before the election on September 28, 2000.⁵⁷ This report provided a self-styled “report-card” on state compliance with Charitable Choice, finding that most states had amassed a “failing grade” (Texas, under the leadership of then-Governor Bush, received an “A+”).⁵⁸ *Unlevel Playing Field* and

⁵² THE WHITE HOUSE, *UNLEVEL PLAYING FIELD*, *supra* note 27.

⁵³ *See id.* at 11 (attacking the “‘no-aid’ strict separationist framework that permitted Federal funding only of religiously affiliated organizations offering secular services in a secularized setting, [while denying] equal treatment to organizations with an obvious religious character.”). Of note, the report distinguishes between religiously affiliated organizations and religiously infused entities where it supports the discrimination argument, while combining the two entities in other places where it discusses the range of potential services offered by FBOs. *Id.* at 11-13.

⁵⁴ *Id.* at 4, 11, 17, 18.

⁵⁵ *See id.* at 4-7 (indicating that in fiscal years 2000 and 2001, FBOs received only 2% and 0.3% of discretionary grant funds from the Departments of Education and Justice, respectively).

⁵⁶ *Id.* at 13.

⁵⁷ *See* CTR. FOR PUB. JUST., *CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD* (2000), [http://www.cpjustice.org/stories/storyreader\\$296](http://www.cpjustice.org/stories/storyreader$296).

⁵⁸ *Id.*

the Center for Public Justice report also relied on a 2000 preliminary study by Amy L. Sherman, Senior Fellow at the Hudson Institute, which indicated that in the three-and-a-half years since the enactment of PRWORA, only 3.5% of FBOs contracting with the government were congregations.⁵⁹ Such studies commonly equated the disparity in funding of FBOs with government discrimination against religion.⁶⁰ Works of other conservative scholars, such as social scientists Stephen V. Monsma of Pepperdine University and Charles L. Glenn of Boston University, documented the corrupting and secularizing effect of government regulations on FBOs participating in social service programs.⁶¹ Finally, Missouri law professor Carl Esbeck, one of the architects of Charitable Choice, transformed such data into a concise legal argument of religious discrimination. Professor Esbeck, later a Senior Counsel to the Deputy Attorney General, has long been one of the more effective advocates for Charitable Choice, arguing as early as 1992 for altering the legal standard to allow government funding of religiously integrated social service programs.⁶² According to Esbeck, “the exclusion of certain religious providers based on what they believe and because of how they practice and express what they believe, is discrimination on the bases of religious exercise and religious speech.”⁶³

The Free Exercise Clause prohibits intentional discrimination against religion, as well as against religious belief and practice. Yet the “pervasively sectarian” test necessarily causes state welfare bureaucracies to discriminate against the religious beliefs and practices of “pervasively sectarian” providers. Moreover, such discrimination puts tremendous pressure on these providers to compromise their spirituality so as not to lose program opportunities. “The current system makes government grant programs

⁵⁹ See Amy L. Sherman, *The Growing Impact of Charitable Choice: A Catalogue of New Collaborations Between Government and Faith-Based Organizations in Nine States* (2000), [http://www.cpjustice.org/stories/storyreader\\$315](http://www.cpjustice.org/stories/storyreader$315).

⁶⁰ See John C. Green & Amy L. Sherman, *Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in 15 States, Executive Summary 1* (2002), http://www.hudsonfaithincommunities.org/fic/articles/fruitful_collab_exec.pdf.

⁶¹ See GLENN, *supra* note 26; MONSMA, *supra* note 19, at 70-108. For a critique of Glenn’s book, see Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692 (2001).

⁶² See Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343 (1992); see also Esbeck, *supra* note 25.

⁶³ Esbeck, *supra* note 25, at 177.

relentless engines of secularization.”⁶⁴

Thus, *Unlevel Playing Field* and its supportive studies and articles provided the Bush administration with a basis on which to argue for the expansion of the Faith-Based Initiative to ameliorate government discrimination against religion.⁶⁵ According to the Roundtable on Religion and Social Policy of the State University of New York, Bush “gave seven speeches on the Faith-Based Initiative in a 17-day stretch [upon the release of *Unlevel Playing Field*], and he has devoted more than 40 speeches explicitly to the Faith-Based Initiative – an average of more than one a month.”⁶⁶ Between 2001 and 2005, Bush’s remarks in support of the Initiative have invariably incorporated claims that government programs and bureaucrats purposefully discriminate against religion.⁶⁷ As Bush stated at the First White House National Conference on Faith-Based and Community Initiatives on June 1, 2004: “[W]e will reverse regulations that discriminate against faith-based organizations. There were regulations on the books that made it nearly impossible for people of faith [to par-

⁶⁴ *Id.* at 180-81 (quoting Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in *EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY* 48 (Stephen V. Monsma & J. Christopher Soper eds., 1998)).

⁶⁵ See ANNE FARRIS ET AL., *THE ROUNDTABLE ON RELIGION AND SOC. WELFARE, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE* 7 (2004) (“*Unlevel Playing Field* became the backbone of an administrative strategy to encourage governmental partnerships with faith-based organizations.”).

⁶⁶ *Id.* at 5.

⁶⁷ See, Press Release, The White House, President Highlights Faith-Based Initiative at Leadership Conference (Mar. 1, 2005), <http://www.whitehouse.gov/news/releases/2005/03/20050301-4.html> (“[We must] continue to build our culture of compassion by making sure state and local agencies do not discriminate against faith-based and community programs when they hand out federal dollars.”); Press Release, The White House, President Speaks with Faith-Based and Community Leaders (Jan. 15, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040115-7.html> (“[O]ur governments have, frankly, discriminated against faith-based programs. It’s the truth.”); Press Release, The White House, President Discusses Faith-Based Initiative at Power Center Celebration (Sept. 12, 2003), <http://www.whitehouse.gov/news/releases/2003/09/20030912-14.html> (“The discrimination against faith-based programs at the federal level prevents us from using all our resources to save lives. . . . And so one of my missions is to work with people to end the discrimination in Washington, D.C. against faith-based programs.”); Press Release, The White House, President Bush Implements Key Elements of his Faith-Based Initiative (Dec. 12, 2002), <http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html> (“Many acts of discrimination – many acts of discrimination against faith-based groups are committed by Executive Branch agencies.”).

ticipate].”⁶⁸ In an earlier speech to religious and civic leaders in Houston, President Bush remarked:

. . . [I]n Washington, D.C., there is an attitude that we should not welcome faith-based programs into the budgets of our government.

. . . .

. . . [T]he groups that apply have to change their board of directors in order to access the money, or have to take the cross off the wall, in the case of the Christian faith-based program. But it’s hard to be a faith-based program if you can’t practice faith. If the effectiveness of the program is based upon faith, our government must allow that program to practice its faith.⁶⁹

And in a December 2002 speech to 1600 religious leaders in Philadelphia, Bush promised to “clear away a legacy of discrimination against faith-based charities,” stating “[t]he days of discriminating against religious groups just because they are religious are coming to an end.”⁷⁰

Other Administration officials have made similar claims that the Faith-Based Initiative is needed to correct for pervasive discrimination against religious groups. In December 2003, then-Attorney General John Ashcroft, the author of *Charitable Choice*, spoke at a White House faith-based conference in Tampa, Florida. “For many years, faith-based and other community groups were prohibited from competing for federal funding,” Ashcroft remarked.⁷¹ “Charitable Choice was intended to level and broaden the playing field so that secular and sacred organizations could have an equal opportunity to cooperate with government and bring the most effective programs to help feed the hungry, heal the sick, and shelter the homeless.”⁷²

The former and current directors of the OFBCI, John DiIulio and Jim Towey, have made similar claims of government discrimination against NGOs that are either religiously affiliated or run religiously integrated programs. DiIulio, now a professor at the

⁶⁸ See Press Release, The White House, *America’s Compassion in Action* (June 1, 2004), <http://www.whitehouse.gov/news/releases/2004/06/20040601-10.html>.

⁶⁹ President Discusses Faith-Based Initiative at Power Center Celebration, *supra* note 67.

⁷⁰ President Bush Implements Key Elements of his Faith-Based Initiative, *supra* note 67.

⁷¹ Attorney Gen. John Ashcroft, Prepared Remarks at the White House Faith-Based Conference (Dec. 5, 2003), <http://justice.gov/archive/ag/speeches/2003/agfull120503.htm>.

⁷² *Id.*

University of Pennsylvania, has written that “[t]here is growing evidence that grassroots nonprofit social service organizations, especially small community-serving religious groups that serve primarily low-income urban Latino and African-American children, youth, and families, are discriminated against at each and every stage of the government-by-proxy process.”⁷³

These claims of government discrimination against religion find their basis in various sources. On the most basic level, as is demonstrated by many of the President’s remarks, claims of discrimination often rely on anecdotal accounts of unjustified denials of FBO applications or hostile regulation of religious providers.⁷⁴ The authenticity of many such accounts has been difficult to document. According to the Roundtable on Religion and Social Welfare Policy, many funding decisions are made at a subcontract or intermediary level, and government agencies are often unaware of the religious character of an ultimate grant recipient.⁷⁵ Even assuming the basic accuracy of some anecdotal accounts, they usually do not indicate whether nondiscriminatory reasons for a particular denial may have existed (e.g., failure to complete application materials, lack of match between proposal and program goals, etc.). A second source for discrimination claims is statistical data indicating that FBOs have received minimal amounts of government funding under certain programs. *Unlevel Playing Field* relies heavily on such disparities to conclude the existence of religious discrimination.⁷⁶ Some Charita-

⁷³ John J. DiIulio, Jr., *Response Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1277 (2003); see also Statement by Jim Towey, Director OFBCI, available at <http://www.whitehouse.gov/government/fbci/message.html> (“All too often, however, these worthy organizations are excluded from delivering services for which the federal government commits substantial resources. Many are prohibited from applying simply because they have a religious name or identity, even though their programs may be turning lives around.”).

⁷⁴ See President Bush Implements Key Elements of his Faith-Based Initiative, *supra* note 67, (identifying incidents of discrimination based on the name of a FBO and the composition of a FBO’s board of directors).

⁷⁵ LISA M. MONTIEL, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POLICY, THE USE OF PUBLIC FUNDS FOR DELIVERY OF FAITH-BASED HUMAN SERVICES 1-2, 25 (2d ed. 2003) (“It is difficult to determine how much public funding is going to faith-based human service programs because of the fragmentation of funding authority, the lack of centralized monitoring of the contracts, and the deficiency of documentation of any religious affiliation of the contracted organization.”).

⁷⁶ THE WHITE HOUSE, UNLEVEL PLAYING FIELD, *supra* note 27, at 5-7; AMY L. SHERMAN, COLLABORATIONS CATALOGUE: A REPORT ON CHARITABLE CHOICE IMPLEMENTATION IN 15 STATES, EXECUTIVE SUMMARY 4 (2002), <http://www.hudsonfaithincommunities.org/articles/FinalExecSummBroch.pdf>.

ble Choice proponents have interpreted funding discrepancies as “prima facie” evidence of discrimination.⁷⁷ However, as addressed below in greater detail, such data-based claims rarely provide information on the number of successful applications by FBOs or, again, the reasons why some applications may not have been accepted. Third, some discrimination claims are directed at burdensome regulations, both in the application process and in subsequent implementation and review.⁷⁸ While proponents acknowledge that most regulations are not overtly anti-religious or even religion specific, they assert their secularizing pressure dissuades participation by religious groups.⁷⁹ In particular, federal, state, and local program prohibitions against employment discrimination are seen as discriminating against FBOs that hire co-religionists to administer their social programs.⁸⁰ Finally, the discrimination argument rests in part on disagreement with prior Supreme Court holdings against funding pervasively sectarian institutions and programs. Legal scholars such as Carl Esbeck and now-appellate judge Michael McConnell, bolstered by a 2000 plurality decision of the Supreme Court,⁸¹ argue that rules restricting government funding of groups or programs that infuse spirituality and religious tenets into their services amount to “an unconstitutional penalty on religion.”⁸²

Since taking office, President Bush’s efforts to expand congressional authorization for Charitable Choice have stalled, primarily over the issue of whether Charitable Choice facilitates government-funded religious discrimination through the express employment exemptions contained in 42 U.S.C. § 604a(f).⁸³ Consequently, in December 2002, President Bush issued Executive Order 13279 creating two new faith-based offices in the Department of Agriculture and the Agency for International Development and authorizing all federal departments to implement Charitable Choice consistent with existing law.⁸⁴ In June

⁷⁷ STEPHEN V. MONSMA & CAROLYN M. MOUNTS, *WORKING FAITH: HOW RELIGIOUS ORGANIZATIONS PROVIDE WELFARE-TO-WORK SERVICES* 14 (2002).

⁷⁸ *Id.* at 20-22.

⁷⁹ GLENN, *supra* note 26, at 42-61.

⁸⁰ *Id.* at 192-211. *See generally* ESBECK, *supra* note 5.

⁸¹ *Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000).

⁸² Esbeck, *supra* note 25, at 180-85; Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* 48, 51 (1998).

⁸³ FARRIS ET AL., *supra* note 65, at 12.

⁸⁴ *Id.* at 5.

2004, Bush issued an additional executive order adding FBCI offices in four other federal agencies.⁸⁵ According to one observer, the purpose of these executive orders was “to implement administratively as much of the Faith-Based Initiative as possible,” without having to rely on congressional authorization.⁸⁶

Finally, since 2001, the OFBCI, in conjunction with the various agency FBCI offices, has sponsored several regional conferences to drum up support for the Faith-Based Initiative and encourage congregations, small interchurch agencies, and other FBOs to apply for federal and state grants.⁸⁷ High-level administration officials, including former Attorney General John Ashcroft and former HUD Secretary Mel Martinez, have keynoted many of these conferences.⁸⁸ Critics of the Faith-Based Initiative have charged that some of the conferences and other events sponsored by the White House have overemphasized the religious side of the Initiative, with the sessions taking on the characteristics of “a tent revival [rather] than a government-sponsored information session.”⁸⁹

More recently, the White House has been able to claim a degree of success for its efforts. In May 2004, the OFBCI announced preliminary results indicating that federal grants to FBOs have increased dramatically since 2001. Of the \$144 billion awarded in 140 federal non-formula competitive grants, 8%—approximately \$1.7 billion—went to FBOs.⁹⁰ The Departments of Health and Human Services and Housing and Urban Development reported a combined increase of \$144 million in grants to FBOs in fiscal year 2003, with HHS increasing its grants to FBOs by 41%, and HUD funding increasing by 16%.⁹¹ Both Departments also reported an increase in the number and dollar amounts given to first-time FBO applicants.⁹² These grants have funded a variety of FBO-run programs such as abstinence education, child care and mentoring services, and marriage promotion.⁹³ In 2005, the White House announced that funding of

⁸⁵ *Id.* (Departments of Commerce and Veterans Affairs, the Small Business Administration, and the Corporation for National and Community Service).

⁸⁶ *Id.* at 7.

⁸⁷ *Id.* at 15.

⁸⁸ See Attorney Gen. John Ashcroft, *supra* note 71.

⁸⁹ FARRIS ET AL., *supra* note 65, at 15.

⁹⁰ *Id.* at 18.

⁹¹ *Id.* at 18, 22-27.

⁹² *Id.* at 18.

⁹³ *Id.* at 22-25.

FBOs in the previous year had surpassed \$2 billion, accounting for 10.3% of the total funding awarded through 151 programs, a 71% increase over 2003.⁹⁴

Despite these apparent successes at increasing FBO participation in government-funded projects, the Bush Administration has continued to allege ongoing government discrimination against religious entities in the grant process. In several speeches following the OFBCI's May 2004 funding announcement, President Bush claimed the existence of government discrimination against FBOs.⁹⁵ As Bush reasserted on March 1, 2005, at a White House Faith-Based Initiative Leadership Conference, "there are some roadblocks – such as the culture inside government at the federal, state and local level that is unfriendly to faith-based organizations."⁹⁶

That the Administration has persisted with its claims of religious discrimination in light of its own evidence of success has led some to charge that electoral politics have been behind the Initiative and the White House-sponsored events.⁹⁷ Critics allege that the White House has used the Initiative to build a political base among low-income and minority constituencies that might otherwise vote Democratic, with government discrimination against churches serving as the wedge issue, particularly among black churches. At these events, the promise of faith-based funding was allegedly used as a get-out-the-vote motivator.⁹⁸ Accord-

⁹⁴ See Nancy Cook Laver, *State Funding for Faith-Based Groups on the Rise*, TALLAHASSEE DEMOCRAT, March 20, 2005, available at <http://www.religionandsocialpolicy.org/news/article.cfm?id=2500>.

⁹⁵ See America's Compassion in Action, *supra* note 68; President Highlights Faith-Based Initiative at Leadership Conference, *supra* note 67; Press Release, The White House, President's Remarks via Satellite to the Southern Baptist Convention (June 15, 2004), <http://www.whitehouse.gov/news/releases/2004/06/20040615-9.html>.

⁹⁶ See President Highlights Faith-Based Initiative at Leadership Conference, *supra* note 67.

⁹⁷ See Rob Boston, *Bush's Faith-Based Revival*, CHURCH & ST., Mar. 2004, available at <http://www.au.org>; Ori Nir, *Study Suggests Faith-Based Effort Used as a Partisan Tool*, THE FORWARD, Oct. 1, 2004, available at <http://www.religionandsocialpolicy.org/news/article.cfm?id=1974>; see also JO RENEE FORMICOLA, MARY C. SEGERS & PAUL WEBER, FAITH BASED INITIATIVES AND THE BUSH ADMINISTRATION: THE GOOD, THE BAD, AND THE UGLY 149-150 (2003).

⁹⁸ See Boston, *supra* note 97 ("The renewed push also gives Bush an entrée into the African-American community, a segment of the population that remains largely unsupportive of the president. During his speech at Bethel African Methodist Episcopal Church in New Orleans [on January 15, 2004], a black congregation near a public-housing complex, Bush promoted the 'faith-based' initiative and the idea of government funding of religiously tinged social services in a hard-hit area. Bush po-

ing to one report, in the summer leading up to the 2002 midterm congressional election, federal faith-based officials appeared at Republican-sponsored events and alongside Republican candidates in at least six states.

The events often targeted black audiences, including one South Carolina event sponsored by the state Republican Party and attended by 300 black ministers, who later received letters on GOP stationery containing instructions on how to apply for grant money. In the days before the [2002] election, White House OFBCI Director Jim Towey also made a 20-city tour to promote the Faith-Based Initiative. And in the run-up to what is expected to be another close presidential election in 2004, OFBCI regional conferences have been held in battleground states where votes might prove decisive in the outcome.⁹⁹

According to earlier reports, White House politicization of the Initiative was the reason John DiIulio resigned as Director of the OFBCI in 2002. DiIulio apparently felt the Initiative “was not about ‘compassionate conservatism,’ as originally promised, but rather a political giveaway to the Christian right, a way to consolidate and energize that part of the base.”¹⁰⁰

To be sure, all Presidents use popular programs and policies to garner political support. That politics was a by-product of the Faith-Based Initiative is not particularly troubling, provided that the primary rationale for the Initiative was legitimate: to “level the playing field” by eliminating government discrimination against religious entities that had been barred from participating in government grants and social service programs. Ending pervasive government discrimination against religion was the stated justification for the Initiative. The next Part of this Article examines that justification in light of earlier and subsequent studies of Charitable Choice, including the 2002-2004 study of the Faith-Based Initiative in Oregon that was commissioned by the Oregon Law Commission.

litical strategists have talked openly about using the initiative to woo black support, aware that drawing even a few percentage points of the African-American vote away from the Democrats could make a difference in a tight election.”).

⁹⁹ FARRIS ET AL., *supra* note 65, at 16.

¹⁰⁰ Ron Suskind, *Without a Doubt*, N.Y. TIMES, Oct. 17, 2004, (Magazine), at 44.

II

THE EVIDENCE SUPPORTING THE FAITH-BASED
INITIATIVE—OREGON AS A CASE STUDY

Congress enacted Charitable Choice to remove barriers to participation by FBOs—both religiously affiliated agencies and more religiously integrated entities—in government-funded social service programs. Although *Unlevel Playing Field* focused *exclusively* on discrimination and barriers at the federal level, the implications of the report extended to programs administered at the state and local levels as well. The four statutorily implemented Charitable Choice programs are administered primarily by the states through formula grants, so the “discrimination” critique applies equally to state and local programs. Since 1996, states have been required to follow Charitable Choice requirements when contracting for services that included monies originating in these four programs. But as discussed, the second-term Clinton Administration did little to encourage states to implement Charitable Choice, and most states continued to operate according to prior practices.¹⁰¹ The question, therefore, was whether continuing practices were discriminatory, as the Bush Administration alleged.

During the 2001 Oregon Legislative Session, State Senator Frank Shields introduced a resolution calling for a statewide study of Oregon laws and policies that might inhibit participation by faith-groups in social service programs administered and funded by the State.¹⁰² Shields, a Democrat and former Methodist minister, expressed concern that possible legal and policy barriers existed to prevent FBOs from receiving state contracts and grants for their human service programs.¹⁰³ Even though Shields’ resolution did not pass the state legislature, he requested that the Oregon Law Commission conduct a study of the Faith-Based Initiative in Oregon.¹⁰⁴ The Law Commission—a non-partisan state commission established to study and recommend improvements in state law—agreed and adopted a work plan to study publicly funded social service delivery by nonprofits and

¹⁰¹ See CTR. FOR PUB. JUST., STATES FAIL CHARITABLE CHOICE CHECK-UP (2000), [http://www.cpjustice.org/stories/storyreader\\$295](http://www.cpjustice.org/stories/storyreader$295); Sherman, *supra* note 59.

¹⁰² See S.J. Res. 39, 71st Leg. Assem., Reg. Sess. (Or. 2001).

¹⁰³ For a description of Senator Shields’ background and interest in Charitable Choice issues, see <http://www.leg.state.or.us/shields>.

¹⁰⁴ The bill history is found at <http://www.leg.state.or.us/cgi-bin/searchMeas.p1>.

faith-based organizations in Oregon.¹⁰⁵ The work plan directed two inquires:

Identify and summarize various types of state laws, regulations, rules, and official policies and procedures that govern participation in or access to government programs, grants, contracts, and facilities by community-based and faith-based organizations.

Examine the various laws, regulations, rules, and policies and procedures in relation to current federal and state statutory and constitutional law, including "Charitable Choice" law contained in the 1996 Welfare Reform Act and subsequent federal laws, to see whether the former are consistent with federal and state constitutional law or whether they inconsistently allow for greater participation or unnecessarily restrict participation in state administered social service programs or impose burdens on such participation.¹⁰⁶

The preliminary report, issued in December 2003, addressed four interrelated issues: Oregon's current and past practice in contracting with FBOs and NGOs; whether any internal administrative practices affected state contracts and grants with FBOs; whether there were any existing state statutes and regulations governing participation by FBOs; and whether any statutory or regulatory changes were needed to conform Oregon law to Charitable Choice requirements.¹⁰⁷ As part of the study, members of the work group met with various state and local officials responsible for administering programs covered by Charitable Choice and with religious leaders and administrators of state and local FBOs.¹⁰⁸

¹⁰⁵ Members of the Oregon Law Commission include the State Attorney General, the Chief Justice of the Oregon Supreme Court, the deans (or their representatives) of the three Oregon law schools, six members of the bar and public appointed equally by the Governor, the President of the Senate, and the Speaker of the House. Former Oregon Supreme Court Justice Hans Linde serves as a member of the Commission. During the period of this study, the Commission was chaired by Republican Representative Lane Shedderly. The Commission is housed at Willamette University College of Law in Salem.

¹⁰⁶ See REPORT, *supra* note 33, at 1.

¹⁰⁷ *Id.*

¹⁰⁸ The work group reporter met with state officials responsible for administering the following programs covered by Charitable Choice: Temporary Assistance for Needy Families (job skills, child care, refugee resettlement, child safety/foster care, self-sufficiency, mental health, and substance abuse), which is administered by the DHS Offices of Children, Adults, and Families and Community Health Services; Substance Abuse and Mental Health Services Administration (SAMHSA), which is administered through the DHS Office of Alcohol and Drug Abuse; Community Service Block Grant, which is administered through the Oregon Housing and Community Services Department (OHCS); and the Workforce Investment Act (WIA),

*A. Oregon's Past Practice in Contracting with FBOs
and NGOs*

Those state officials responsible for administering various social service programs indicated that Oregon has a long history of contracting and subcontracting with NGOs, including FBOs.¹⁰⁹ According to these officials, this practice predated Charitable Choice and, to a large degree, has continued unaffected by the Charitable Choice laws.

A systematic review of contract data for the Department of Human Services (DHS) indicated that DHS had sixty-one funded contracts with FBOs in 2003 (excluding contracts for medical-health services and residential care facilities and adoptions) with an approximate dollar amount of \$9,248,489.¹¹⁰ Of that number, forty-eight contracts likely involved federal monies from Charitable Choice and other federal programs, with an aggregate dollar amount of \$7,765,592.¹¹¹ Examples of recent contracts or grants included the following:

In 2003, DHS contracts with Catholic Community Services of the Mid-Willamette Valley amounted to \$2,039,614 for services such as shelter, foster care training, and family counseling. According to the Director of Catholic Community Services, this amount had been relatively consistent for several years.

In 2003, DHS contracts with Lutheran Community Services

which is administered through the Department of Community Colleges and Workforce Development. In addition, the reporter met with officials in the DHS Contracts and Procurement Unit and the Attorney General's Office regarding state contracting requirements. Finally, because many of these programs are run at the local level by counties, DHS service delivery area offices, and community action agencies, the reporter also met with administrators in the Marion County Health Department, SDA Region Three (serving Marion, Polk, and Yamhill counties) and the Mid-Willamette Valley Community Action Agencies.

The reporter also met with representatives from Catholic Community Services, the Catholic Conference of Oregon, the United Methodist Church, Lutheran Family Services, the Jewish Federation, the Seventh-day Adventist Pacific Conference, Ecumenical Ministries of Oregon (an interchurch agency of mainstream Protestant churches), and the Salem Leadership Foundation (a FBO intermediary representing evangelical churches). The reporter also attended several meetings of a DHS-sponsored FBO advisory/discussion group.

¹⁰⁹ *Id.* at 3-6. In the report, the term "contracting" included both direct contracts between the State and an NGO/FBO and indirect subcontracts, whereby a state agency contracts with a county, community college, or CAA, which in turn contracts with an NGO/FBO.

¹¹⁰ In 2003, the State had nineteen contracts with FBOs for in-state and out-of-state adoptions for a total amount of \$447,500. *Id.* at 5.

¹¹¹ *Id.*

Northwest amounted to \$2,212,931 for services including adoptions, parent training, alcohol and drug counseling, and sex abuse treatment.

DHS maintains various contracts with St. Mary's Home for Boys for residential placement and treatment. In 2003, contract amounts totaled \$2,310,777.

DHS Office of Alcohol and Drug Treatment contracts with Ecumenical Ministries of Oregon for treatment programs through Oxford House.

In 2002, DHS and Oregon Housing and Community Services Department (OHCS) provided a grant of \$200,000 to the Gospel Mission in Grants Pass for shelter and alcohol and drug rehabilitation housing.

DHS administers various contracts with Ecumenical Ministries of Oregon, Lutheran Social Services, Catholic Charities, and the Jewish Federation for refugee work.¹¹²

This 2003 contract data indicated that all DHS contracts were with either national religiously affiliated agencies (e.g., Catholic Charities/Community Services, St. Vincent de Paul, Lutheran Family Services) or local/regional independent religious agencies (e.g., Ecumenical Ministries of Oregon, St. Mary's Home for Boys). During this time, DHS had no direct contracts with congregations, although state officials indicated that regional DHS service delivery area offices (SDAs), counties, and community action agencies (CAAs) subcontracted with congregations. Examples of state contracts involving federal funds administered at the local level during the 2002-2003 period included:

Marion County Health Department had several contracts with Catholic Community Services to provide mental health, developmentally disabled, and crisis services (using SAMHSA, Medicaid, and state funds) (approximately \$1,000,000).

Mid-Willamette Valley Community Action Agency contracted with Catholic Community Services and St. Joseph's Catholic Church (Mt. Angel) to provide emergency shelter (using CSBG funds, among others) (approximately \$36,400).

DHS Service Delivery Area Three (Marion, Polk, and Yamhill Counties) contracted with Catholic Community Services to provide foster care, job skills, mental health, and drug services (using TANF funds, among others) (annualized amount: \$336,012).

In 2002-2003, Multnomah County reported having partnerships with more than thirty FBOs, with at least nine involving some form of subcontracting or public grants. Some of these

¹¹² See *id.* at 4.

partnerships had existed for twelve to fifteen years.¹¹³

State officials did not keep independent records of the religious identity of subcontractors.¹¹⁴

No attempt was made to compile an exhaustive list of state-administered programs and contracts with FBOs that involve Charitable Choice funding. This approach was selected for several reasons. First, most federal formula grants allow states to use monies in existing state programs or to structure programs to meet their particular needs, resulting in many state-specific programs being funded through a combination of state and federal sources. As a result, there are few Oregon programs that are distinctly federal Charitable Choice programs.¹¹⁵ Second, none of the state departments or offices distinguished FBOs from other entities with which they contract. *In essence, neither DHS nor any other agency had a procedure or mechanism in place to track the number (or identity) of FBOs that contract with the State*, a practice that is consistent with that in many states.¹¹⁶ The above data on FBO participation was compiled manually but was supported through anecdotal information;¹¹⁷ however, there is no reason to assume that this information is inaccurate.¹¹⁸

Although the bulk of federal Charitable Choice grants are administered through DHS, the report also gathered information from the Oregon Housing and Community Services Department, which administers Community Service Block Grant monies, among other funding sources. OHCS identified twenty-nine di-

¹¹³ *Id.*

¹¹⁴ *Id.* at 5-7.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.*; see also MARK RAGAN ET AL., THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POLICY, SCANNING THE POLICY ENVIRONMENT FOR FAITH-BASED SOCIAL SERVICES IN THE UNITED STATES: RESULTS OF A 50-STATE STUDY 4-5, 9 (2003).

¹¹⁷ In 2001, DHS TANF program analyst Jeff Stell compiled an informal district or county list of funded and unfunded “partnerships” between the State and FBOs. The list indicates 406 partnerships with approximately 200 FBOs for services, including food and clothing banks, housing and shelter referrals, teen pregnancy/parenting and domestic violence counseling, transportation, and medical assistance. REPORT, *supra* note 33, at 5.

¹¹⁸ Ramona Rodermaker, the DHS official responsible for liaison with the faith community, estimated that between 2001 and 2003 DHS had 115 contracts with FBOs totaling approximately \$12.5 million. Shelly Oppel, *Oregon Resists Initiative as Bush Revives Faith-Based Goal*, THE OREGONIAN (Portland, Or.), Feb. 9, 2003, at B1. These figures did not include state Medicaid contracts with several religiously affiliated hospitals.

rect grants to FBOs between 1999 and 2003, involving federal and state monies in the amount of \$2,117,696.¹¹⁹ For example, between 2000 and 2003, OHCSO administered three grants for transitional housing to St. Vincent de Paul of Lane County in the amounts of \$175,000, \$175,000, and \$696,696.¹²⁰ Other FBO contracting partners included Oregon Mennonite Residential Services, Gospel Rescue Mission of Grants Pass, and Habitat for Humanity.¹²¹

In summary, the report revealed that Oregon's social service agencies have had a long and active practice of contracting with FBOs for the delivery of social services to Oregonians. In fiscal year 2003, state contracts with and grants to FBOs exceeded \$11.8 million, excluding contracts with religiously affiliated medical and residential care facilities.¹²² Financial contracts involving FBOs exceeded one hundred, while non-funded partnerships with FBOs were possibly more than four hundred.¹²³ The majority of state-administered grants were with established religiously affiliated providers; however, regional SDAs and CAAs did subcontract regularly with congregations and smaller FBOs.¹²⁴ This practice predated the passage of Charitable Choice and did not appear to have changed, increased, or decreased as a result of the federal legislation.

B. Agency Policies with Respect to Faith-Based Organizations

All state officials indicated that their staffs do not distinguish between religiously based and nonreligiously based organizations when it comes to awarding state contracts or grants.¹²⁵ In es-

¹¹⁹ The bulk of OHCSO-administered funds are distributed to counties and CAAs, which may subcontract or partner with FBOs at the local level.

¹²⁰ REPORT, *supra* note 33, at 4.

¹²¹ *Id.* Relatedly, in 2003 the Oregon HUD office compiled a database that indicated that at least \$111 million had been awarded to FBOs in the State of Oregon during the previous seven years. See MONTIEL, *supra* note 75, at 25.

¹²² See REPORT, *supra* note 33, at 5.

¹²³ *Id.* at n.7.

¹²⁴ An OHCSO survey of local CAAs (ten of seventeen agencies reporting) indicated 396 partnerships between CAAs and FBOs, with nineteen of that number involving funded relationships. The vast majority of these partnerships were with congregations. Apparently, the majority of the unfunded relationships were in the nature of referrals. The information contained in this survey covered several years and is very incomplete. For example, the Clackamas County CAA reported having had partnerships with 195 FBOs but did not indicate the years covered, the services provided, or whether the relationships were funded or unfunded.

¹²⁵ REPORT, *supra* note 33, at 6.

sence, the state government has no policy or guideline restricting or qualifying funding collaborations with FBOs. Under Oregon law, all prospective contractors are required to submit a Request for Proposal (RFP) and meet the program and contract requirements.¹²⁶ State officials indicated that they have had no reason to inquire into the religious character of the contracting agencies because NGOs and FBOs contract to perform particular secular services pursuant to the RFP.¹²⁷ Because of this “don’t ask” policy, state officials generally do not distinguish between pervasively sectarian (religiously integrated) FBOs and those that are merely religiously affiliated. In addition, because the RFP and contract specify the services to be provided—which by their description in the RFP are secular—state officials asserted (possibly naively) that the state will not be funding religious activities.¹²⁸ By adopting this approach, state officials believed they were relieved from having to review any funded program for religious content.

All state officials indicated a willingness to contract with FBOs provided the organizations could demonstrate that they satisfy the program requirements/goals.¹²⁹ In fact, no program official indicated that pervasively sectarian providers are ineligible to receive public funds, although a few speculated that a faith-integrated approach might not satisfy the program requirements of particular RFPs.¹³⁰ Most officials expressed an awareness of potential constitutional constraints in contracting with religious organizations, but none indicated that any such problems had arisen with the contracts under their supervision.¹³¹ Although some of these responses could have been self-serving, the reporter did not sense any hesitation or reticence on the part of state officials to contract with FBOs, other than a vague awareness that some constitutional limits exist.¹³² On the contrary, several officials referred to long-standing relationships with established FBOs and expressed their expectations that those contractual relationships will continue.¹³³ More than one state

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

official indicated that the religious character of the FBO was irrelevant provided that it met the contract requirements, while some stated that they were not concerned whether a FBO engaged in unfunded religious activity in conjunction with a state contract.¹³⁴ Conversely, absent two exceptions, no official indicated that his office or program had made special efforts to expand its contracting with FBOs or to recruit underrepresented FBOs to submit RFPs.¹³⁵

In summary, based on information gathered through the interviews and supported with state contracting records, Oregon social services agencies willingly contract with FBOs and have done so for a long time. Most of those collaborations have been with the larger, established social service FBOs (e.g., Catholic Community Services, Lutheran Family/Community Services, Ecumenical Ministries, the Salvation Army) with which the State has long-standing relationships. Apparently, few small FBOs and congregations contract directly with the State, although state and local agencies maintain contacts and unfunded partnerships (e.g., referrals) with many small FBOs.¹³⁶ The bulk of these relationships predate the implementation of Charitable Choice, and funding levels have remained relatively constant, considering funding cutbacks. Finally, the State does not have any official or informal policies that govern or distinguish relationships with FBOs, including any policies that exclude participation by pervasively sectarian organizations. Conversely, the state agencies do not, as a matter of practice, seek out new FBOs with which to partner or contract. Local government and community action agencies are more proactive in developing new relationships with NGOs, including FBOs.

Finally, the report asked religious leaders whether they had been denied the opportunity to apply for state grants and contracts or had otherwise experienced discrimination in their dealings with the State or local governments.¹³⁷ No religious official

¹³⁴ *Id.*

¹³⁵ In October 1999, the OHCSO initiated an agreement to purchase mortgages held by Habitat for Humanity through its Residential Loan Program. *Id.* at n.8. This arrangement has allowed Habitat for Humanity to expend more of its resources on new home construction for low-income Oregonians. *Id.* In addition, a DHS official indicated that the agency has periodically approached Russian Orthodox churches to assist in administering refugee and immigration services to Oregon's Russian immigrant community. (Notes on file with author).

¹³⁶ See *supra* note 119.

¹³⁷ REPORT, *supra* note 33, at app.

contacted indicated that their agency had received unfair treatment because of its religious character. Similarly, no religious official indicated that the State had pressured their FBO to remove religious icons or artwork from its buildings or to change the composition of its board of directors, or that the State had communicated that the FBO was prohibited from hiring co-religionists.¹³⁸ Contrary to the White House's rhetoric, no religious leader claimed that state or local officials were hostile to their agencies or unwilling to work generally with FBOs. The primary barriers identified concerned unfamiliarity with the proposal and contract process, the complexity and red tape associated with contracting with the State, fear of state regulations, and potential interference with the religious functions of FBOs.¹³⁹ An additional complaint was that the State was not doing enough to recruit new FBOs or provide training on the intricacies of the grant and contracting process.¹⁴⁰

C. *The Oregon Experience Compared*

The Oregon findings are consistent with empirical studies regarding FBO participation in government grants and contracts that predate and postdate PRWORA. If Charitable Choice has "initiated" anything, it is an increase in the scholarly study of religious involvement in social services. Despite the rhetoric from the White House, most studies have indicated that: (1) FBOs—both the religiously integrated and religiously affiliated varieties—have long partnered with the government to provide social services—Charitable Choice is not so much a break from the past practice but a continuation of long-standing collaborations; (2) while some faith-integrated FBOs may have been hesitant to apply for government grants and contracts due to fear of burdensome regulations and red tape, smaller FBOs and congregations are generally less likely than mainstream Protestant, Jewish, and Catholic religiously affiliated entities to offer social services or participate in Charitable Choice; (3) the vast majority of FBOs report having *favorable* working relationships with government agencies and officials; (4) government officials generally have not interfered with the religious structure, operation, or ex-

¹³⁸ Notes of interviews on file with author.

¹³⁹ Interviews with Arlene Jensen, United Methodist Church (June 10, 2002), and Sam Skillern, Salem Leadership Foundation (Aug. 7, 2002) (notes on file with author).

¹⁴⁰ *Id.*

pression of FBO providers; and (5) the primary “barriers” or complaints identified by FBOs involve bureaucratic requirements and regulations that are not directed at religious entities but apply to all social service providers that partner with the government. In essence, the studies indicate that government anti-religious bias does not appear to be a problem. What is particularly significant is that much of this data was available before or shortly after the Administration launched the Faith-Based Initiative in 2001, but it had apparently little impact on the Administration’s rhetoric of discrimination. Each of these points is considered in turn.

First, FBOs have long participated in government-funded and unfunded social service grants and programs.¹⁴¹ Religious charity work predates many government welfare programs. For over 150 years, churches have run orphanages and homes for the aged and provided adoption services, foodstuffs, clothing, housing, job assistance, and counseling, often in the absence of government programs.¹⁴² For example, in 1995 the Salvation Army served over twenty-seven million people, while Catholic Charities served eleven million.¹⁴³ This does not count the thousands of social service programs run by local agencies and congregations.¹⁴⁴ In addition, many religiously affiliated agencies such as Catholic Charities USA, Lutheran Social Services, and the Salvation Army have long participated in government grants and contracts to fund their programs. In 1996, the year that Charitable Choice was enacted, Catholic Charities USA received \$1.3 billion in public funding for its programming, accounting for 62% of its overall budget.¹⁴⁵ Catholic Charities USA has long been the

¹⁴¹ See Theda Skocpol, *Religion, Civil Society, and Social Provision in the U.S.*, in *WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE* 21-50 (Mary Jo Bane et al., eds., 2000); Ronald Thiemann et al., *Responsibilities and Risks for Faith-Based Organizations*, in *WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE*, *supra*, at 51, 53-57.

¹⁴² See REPORT, *supra* note 33, at 6; see also DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); RONALD G. WALTERS, *AMERICAN REFORMERS, 1815-1860* (1978).

¹⁴³ See Green, *supra* note 13, at 36.

¹⁴⁴ Stephen V. Monsma, *The “Pervasively Sectarian” Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 322 (1999) (documenting a “lively, continuing partnership between government and nonprofit service organizations, including faith-based ones”); John McCarthy & Jim Castelli, *Religion-Sponsored Social Service Providers: The Not-So-Independent Sector*, 23-31, 48-50 (1997), available at http://www.nonprofitresearch.org/usr_doc/25357.pdf.

¹⁴⁵ See CATHOLIC CHARITIES USA 1997 ANNUAL REPORT, at 24-25. Interest-

largest private social service agency in the nation and receives more public funding than any other private nonprofit entity. Though accounting for less of their budgets, the Salvation Army, Lutheran, and Jewish social services have all received hundreds of millions in public funds for their programs.¹⁴⁶

To be sure, both historically and currently, the majority of FBOs that participate in government-funded social service programs are the established religiously affiliated agencies such as Catholic Charities USA, the Salvation Army, and the Jewish Federations. However, consistent with the Oregon practice, studies indicate that state agencies have not rigorously distinguished between religiously affiliated and religiously integrated organizations and programs when awarding grants and contracts.¹⁴⁷ Apparently, a disconnect has existed between judicial holdings and actual practice,¹⁴⁸ with pervasively sectarian entities being active participants in the publicly funded social service network. As Amy L. Sherman testified before the House of Representatives Subcommittee on the Constitution on April 24, 2001, three months prior to the release of *Unlevel Playing Field*, “despite significant media accounts to the contrary, conservative and Evangelical faith-based organizations are notably involved in charitable choice contracting.”¹⁴⁹ These results were substantiated by a 2002 study of forty-six Welfare-to-Work projects, which found that over 40% of faith-integrated programs surveyed received government funding.¹⁵⁰ According to the report’s authors, “[t]his indicates President Bush’s faith-based initiative . . . is not a wholly new initiative or a sharp break with current practices; instead it is an attempt to regularize and expand what is an existing public policy practice in the United States.”¹⁵¹ Thus, contrary to the rhetoric of discrimination, pervasively religious

ingly, that percentage has not increased but rather has gone down slightly since the enactment of Charitable Choice. See CATHOLIC CHARITIES USA 1999 ANNUAL REPORT, at 21 (noting that government funds account for fifty-eight percent of Catholic Charities’ total budget).

¹⁴⁶ See McCarthy & Castelli, *supra* note 144, at 23-31, 48-50.

¹⁴⁷ See MONSMA, *supra* note 19, at 67-69.

¹⁴⁸ See *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988).

¹⁴⁹ See *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 27 (2001) [hereinafter *State and Local Implementation Hearing*] (testimony of Amy L. Sherman, Senior Fellow, Hudson Institute).

¹⁵⁰ MONSMA & MOUNTS, *supra* note 77, at 13-14.

¹⁵¹ *Id.* at 14.

organizations such as the Salvation Army and the Union Gospel Missions have received public funding for their social service programs.¹⁵²

That said, there is little disagreement that the primary players in the religious-provider system have been the larger, established religiously affiliated providers.¹⁵³ The Oregon Law Commission Report substantiates this fact. Whether this reflects an ingrained government bias against smaller FBOs and congregations (which tend to be more faith-integrated in their approaches) is difficult to assess, but assuming Oregon is representative, two explanations arise: (1) government agencies tend to work with the familiar and established NGOs and are disinclined to seek out new collaborators due to budgetary cutbacks and increased staff workloads; and (2) smaller FBOs and congregations often lack organizational infrastructure and familiarity with the contracting process to be active participants.¹⁵⁴ Nonetheless, faith-based proponents argue that the Initiative is necessary to open the door to smaller FBOs and congregations, many of which will likely take a religiously integrated approach to government-funded services.¹⁵⁵ There is some evidence that the Initiative has encouraged greater participation by such entities, with a significant increase in first-time participants.¹⁵⁶ Charitable Choice may be a catalyst to increased participation in government grants by smaller and minority-based FBOs.¹⁵⁷

On the other side, studies suggest that there may be a limit to long-term participation in Charitable Choice by congregations and smaller faith-integrated entities. The assumption underlying the Faith-Based Initiative has been that smaller congregations and FBOs—the “armies of compassion”—are ready and willing to participate in funded social service programs once the barriers are lifted. University of Arizona sociologist Mark Chaves has been testing this assumption since 1999, utilizing data collected as

¹⁵² See GLENN, *supra* note 26, at 212-25; MONSMA, *supra* note 19, at 70-80.

¹⁵³ See RAGAN ET AL., *supra* note 116, at 22.

¹⁵⁴ Interviews with Arlene Jensen, United Methodist Church (June 10, 2002), and Sam Skillern, Salem Leadership Foundation (Aug. 7, 2002) (notes on file with author).

¹⁵⁵ See generally GLENN, *supra* note 26; MONSMA, *supra* note 19.

¹⁵⁶ See JOHN C. GREEN & AMY L. SHERMAN, FRUITFUL COLLABORATIONS: A SURVEY OF GOVERNMENT-FUNDED FAITH-BASED PROGRAMS IN 15 STATES 14 (2002).

¹⁵⁷ *Id.*; Sherman, *supra* note 76, at 3-4; MONSMA & MOUNTS, *supra* note 77, at 10.

part of the 1998 National Congregations Study.¹⁵⁸ Chaves has found that, contrary to those assumptions, only approximately one-third of congregations expressed an interest in applying for government funds to support social services programs.¹⁵⁹ This is the case even though approximately 85% of congregations offer some form of social services.¹⁶⁰ Additionally, theologically liberal congregations traditionally provide more social services than conservative/evangelical congregations, and interest in receiving government funding is much greater among liberal to moderate Protestant churches and Catholic congregations than among evangelical churches, the archetype of the new FBO.¹⁶¹ Finally, Chaves found that congregations favor particular types of social service programs, such as housing, clothing, and food assistance rather than engaging in long-term programs and commitments dealing with health, education, domestic violence, tutoring/mentoring, substance abuse, or job training.¹⁶² According to Chaves, these findings lead to two conclusions: (1) the results “contradict the widely held assumption that religious organizations provide social services in a distinctively holistic or personal way”; and (2) the “assumption that charitable choice initiatives are likely to involve *new* sorts of religious congregations in providing publicly funded social services—those that have not been involved before—is questionable.”¹⁶³ While more recent studies indicating an increase in collaboration by newer FBOs may contradict some of Chaves’ findings, they generally support the conclusion that congregational participation in Charitable Choice will likely be modest, both in the types of programs offered and

¹⁵⁸ See Mark Chaves, *Testing the Assumptions: Who Provides Social Services?*, in SACRED PLACES, CIVIC PURPOSES 287, 287-96 (E.J. Dionne Jr. & Ming Hsu Chen eds., 2001) [hereinafter *Testing the Assumptions*]; Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335 (2000); Mark Chaves, *Religious Congregations and Welfare Reform: Who Will Take Advantage of “Charitable Choice”?*, 64 AM. SOC. REV. 836-46 (1999) [hereinafter *Religious Congregations*].

¹⁵⁹ See *supra* note 158.

¹⁶⁰ *State and Local Implementation Hearing*, *supra* note 149, at 28 (testimony of Amy L. Sherman). Chaves puts the figure of formal social service programs by congregations at fifty-seven percent. *Religious Congregations*, *supra* note 158, at 838.

¹⁶¹ *Testing the Assumptions*, *supra* note 158, at 293. Black congregations are five times more likely than white congregations to apply for government funds for social service programs. *Religious Congregations*, *supra* note 158, at 841; see also Anna Greenberg, *Doing Whose Work? Faith-Based Organizations and Government Partnerships*, in WHO WILL PROVIDE?, *supra* note 141, at 178.

¹⁶² *Testing the Assumptions*, *supra* note 158, at 289.

¹⁶³ *Id.* at 289, 293.

the number of clients served.¹⁶⁴

More significant than the figures on FBO collaboration is the survey data discussing the relationships between participating FBOs and government social service agencies. Consistent with the Oregon Law Commission Report—and contrary to the rhetoric of discrimination—pre- and post-2001 studies indicate that FBOs overwhelmingly have had *favorable* working relationships with government agencies and officials. Interestingly, several of these studies were conducted by social scientists who support the Faith-Based Initiative. A 2002 study of faith-based programs in fifteen states conducted by the Hudson Institute concluded that “[f]ully 93 percent of the FBOs expressed satisfaction [with their relationship with the government]. Overall, nearly one-half reported that their experience with government was ‘very positive’ and 46 percent claimed a ‘somewhat positive’ experience.”¹⁶⁵ The study went on to state that faith-based providers generally did not see government officials as intrusive: “more than three-fifths claimed there had been ‘very little intrusion’ and about one-third reported only ‘some intrusion.’”¹⁶⁶ This 2002 study supports the 2001 testimony of one of its authors, Amy L. Sherman, before the House of Representatives approximately three months *before* the release of *Unlevel Playing Field*. Sherman testified that she had “uncovered almost no examples of faith-based organizations [FBOs] that felt their religious expression had been squelched in their collaborative relationship with government.”¹⁶⁷ A separate 2002 faith-based study conducted by Stephen V. Monsma for the Center for Research on Religion and Urban Civil Society reached similar conclusions, describing it as “noteworthy” that

[P]rograms of all types reported largely being satisfied with their contacts with government In fact, not one of the 18 faith-based/integrated programs receiving government funds (the very programs one would expect would most likely have run into this problem) reported having to curtail any of their

¹⁶⁴ Green & Sherman, *supra* note 156, at 15.

¹⁶⁵ *Id.* at 27.

¹⁶⁶ *Id.*

¹⁶⁷ *State and Local Implementation Hearing, supra* note 149, at 17 (testimony of Amy L. Sherman). Sherman made the same observation one year earlier in a preliminary review of her findings in nine states, noting that “the study uncovered almost no examples of FBOs who felt their religious expression had been ‘squelched’ in their collaborative relationship with government.” Amy Sherman, *Should We Put Faith in Charitable Choice?*, RESPONSIVE COMMUNITY, Fall 2000, at 22, 26.

religious practices.¹⁶⁸

These studies directly contradict the Administration's claims that the government has discriminated against the religious character of FBOs.

These findings cannot be attributed to the educational efforts of the White House OFBCI as most of the data was gathered before or early into the Bush administration and substantiates published research that predates the Initiative.¹⁶⁹ As Professor Monsma wrote in 1996, not only are "deeply religious organizations able to participate fully in this partnership, but they are also apparently able to do so without having to compromise—for the most part—their religious missions as they see them."¹⁷⁰ In addition, these conclusions were substantiated by a fifty-state study conducted by the Roundtable on Religion and Social Welfare Policy in 2003, which reported there are no state requirements that participating FBOs alter their organizational structure so as to minimize religious influences and that only one state required FBOs to remove religious art, icons, scripture, etc., in their places of funded service.¹⁷¹

Finally, empirical studies indicate that the primary "barriers" to FBO participation in government programs do not concern issues of discrimination or systematic bias but involve complaints about uniform regulations: application forms and prerequisites; licensing, insurance, and indemnification requirements; employment restrictions; and general government bureaucratic red tape. As one pro-Initiative report concluded, "[t]here was little pattern to the complaints of the dissatisfied FBOs: they appear to be largely idiosyncratic, perhaps reflecting the peculiarities of the particular organizations or government officials. . . . Burden-some reporting – 'red tape' – was the chief cause of com-

¹⁶⁸ MONSMA & MOUNTS, *supra* note 77, at 17-18 (noting that seventy percent of FBOs report that they are very or usually satisfied with their contacts with government). "Many may be surprised at the lack of reported government limitations on religious practices in programs it helps fund. The more one actually gets out in the field and observes on-going programs, the more irrelevant many of the Washington and academic government-funding debates appear." *Id.* at 18.

¹⁶⁹ See MONSMA, *supra* note 19, at 98 (noting that "70 percent or more [religious nonprofits] reported no problems [in their relationships with the government].").

¹⁷⁰ *Id.*; see also Chaves & Tsitsos, *supra* note 158, at 342 ("[I]t is extraordinarily uncommon for congregations to be denied permission by government authorities to engage in the activities in which they wish to engage.").

¹⁷¹ RAGAN ET AL., *supra* note 116, at 15. The identity of the state was not provided.

plaint.”¹⁷² Importantly, none of the studies reported that states were imposing requirements solely on FBOs; rather, the complaints concerned general state regulations that apply irrespective of the religious or secular identity of a provider.

Regulations can have more than one effect. First, they can serve as “gatekeepers”—a way for state officials to weed out religious providers or dissuade them from engaging in the grant/contract process. Second, regulations can have a debilitating effect on participating FBOs by requiring that they compromise some of their religious values by altering their programs, leading to secularization of their religious mission (i.e., “mission creep”).¹⁷³ There is little evidence to substantiate the first claim, as it contradicts data discussed above about ongoing and positive collaborations between governments and FBOs, including those that are religiously-integrated. According to a 2000 study by Professor Chaves, approximately one-fifth of congregations nationwide have sought licenses or permits for activities such as day care, soup kitchens, or building expansion, with only *one percent* reportedly having been denied.¹⁷⁴ “The nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock.”¹⁷⁵

There is more evidence of the second effect of regulations on FBOs—that they sometimes impose a Hobson’s choice between participating in a government grant and compromising some religious tenet or value.¹⁷⁶ Oregon, like many states, requires all NGOs with state contracts to have liability insurance, indemnify the state, conduct criminal background checks, and make available for inspection all “books, documents, papers and records directly pertinent to the contract for the purpose of making audit[s], examination[s], excerpts and transcripts.”¹⁷⁷ Oregon also requires certification for all substance abuse counselors working in programs that are state funded, licensed, or ap-

¹⁷² Green & Sherman, *supra* note 156, at 34.

¹⁷³ LOCONTE, *supra* note 26, at 33-54; GLENN, *supra* note 26, at 225-34, 241-47.

¹⁷⁴ Chaves & Tsitsos, *supra* note 158, at 341 (“[O]f the 429 congregations that sought a permit/license in [1999], *only 5 (1 percent) reported having been denied.*”). These results are consistent with a national study of congregations by the Presbyterian Church (U.S.A.). *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See LOCONTE, *supra* note 26, at 33-54.

¹⁷⁷ OR. ADMIN. R. 125-020-0400(3) (2005).

proved.¹⁷⁸ Such regulations and accompanying oversight may appear unduly invasive to some smaller FBOs who fear not only the increased reporting workload, but the subtle secularizing effect of standardization as well.

Conversely, there is also some evidence that nonparticipating FBOs engage in a fair amount of self-selection with respect to government regulations.¹⁷⁹ According to one study, “fear for their religious freedom, a more general fear of cumbersome, time-consuming government regulations, or not being able to pursue the programs they feel called to pursue (or all three)” are the primary factors dissuading congregations and small FBOs from participating in government-funded programs.¹⁸⁰ Based on a study discussed above, however, many of these fears are unsubstantiated, as the vast majority of those FBOs that do participate in government programs report few complaints.¹⁸¹

Requiring FBOs to surrender their ability to hire coreligionists for government-funded staff positions presents a unique “barrier,” as such requirements may undermine the ability of a FBO to maintain a distinctive and collective working ethos.¹⁸² As mentioned, the various Federal Charitable Choice statutes contain express provisions that allow FBOs to enter into public contracts while retaining the ability to discriminate in employment decisions on religious grounds. This privilege is based on an exemption to Title VII of the 1964 Civil Rights Act, otherwise known as § 702, which provides that the Title VII prohibition on

¹⁷⁸ OAR 415-051-0057 requirements for certification include 750 hours of supervised experience in alcohol/drug abuse counseling, 150 contact hours of education and training in alcoholism and drug abuse related subjects, and successful completion of a written examination or portfolio review by the certifying body.

OAR 415-051-0055 sets out the minimum requirements for certification as a clinical supervisor, which may include a combination of college education and work experience. In addition, a supervisor must have 4000 hours of supervised experience in alcohol/drug abuse counseling, 300 contact hours of education and training in alcoholism and drug abuse related subjects, and successful completion of a written examination or portfolio review by the certifying body.

¹⁷⁹ See MONSMA & MOUNTS, *supra* note 77, at 14 (“The reason faith-based organizations most frequently gave for not receiving government funds was a self-conscious decision not to seek government funds.”).

¹⁸⁰ *Id.* at 15. (“[T]he seemingly endless paperwork and a fear of not being able to pursue certain desired programs seem to play as large a role in staying away from government funding as does the fear of compromising their faith-based practices.”).

¹⁸¹ See Green & Sherman, *supra* note 60, at 3 (indicating that ninety-two percent of FBOs maintained they would seek a similar government contract in the future).

¹⁸² See GLENN, *supra* note 26, at 196-99; see also ESBECK ET AL., *supra* note 5, at 87-98.

employment discrimination “shall not apply to . . . [religious entities] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities.”¹⁸³ In 1987, the Supreme Court upheld the constitutionality of this religious exemption.¹⁸⁴

Three caveats limit the breadth of this exemption. Most importantly, even though Charitable Choice expressly allows FBOs to retain their Title VII exemption for religious-based employment practices, the federal law does not preempt state laws that impose different requirements.¹⁸⁵ Second, courts have universally held that religious organizations remain subject to the other prohibitions under Title VII, such that a FBO cannot make employment decisions based on race, gender, or national origin.¹⁸⁶ And third, it is unclear whether the § 702 exemption applies in situations where the positions or activities are funded with public monies. Section 702 does not speak to this issue, and the Supreme Court’s 1987 decision involved employment positions that were *privately* funded.¹⁸⁷ While most scholars agree that a religious organization does not lose its § 702 exemption merely by receiving some public funding (e.g., a church-related hospital may receive Medicare funds or may be awarded Hill-Burton grant monies without forfeiting its ability to hire a chaplain of its own faith), they are split over whether the exemption would apply to particular positions that are publicly funded.¹⁸⁸ In 2003, the White House OFBCI released a paper supporting arguments that FBOs should retain their ability to discriminate on religious grounds when engaged in publicly funded contracts.¹⁸⁹

A general requirement of employment nondiscrimination would have a gatekeeping affect, with many religiously inte-

¹⁸³ 42 U.S.C. § 2000e-1(a) (2000).

¹⁸⁴ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335-36 (1987).

¹⁸⁵ *See* 42 U.S.C. § 604a(k).

¹⁸⁶ *E.g.*, *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982).

¹⁸⁷ *See* Green, *supra* note 1, at 37. Recently, a federal district court has held that a religious grant recipient may engage in religious employment discrimination without violating the Establishment or Equal Protection clauses. *See* *Lown v. The Salvation Army*, 2005 WL 2415978 (S.D.N.Y. Sept. 30, 2005).

¹⁸⁸ *Compare* Esbeck, *supra* note 26, *with* Green, *supra* note 1.

¹⁸⁹ *See* WHITE HOUSE OFF. OF FAITH-BASED AND CMTY. INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED, <http://www.whitehouse.gov/government/fbci/booklet.pdf>.

grated FBOs opting not to participate in funding programs.¹⁹⁰ While the debate over the appropriateness of making all funded contracts and programs subject to the same nondiscrimination requirement continues in Washington and academia,¹⁹¹ the fact is that current Charitable Choice regulations allow FBOs to engage in such practices, and few if any states have imposed different requirements. According to a 2003 Roundtable study, most states follow the § 702 exemption and allow for employment decisions on the basis of religion, even in funded programs.¹⁹² Studies also indicate a majority of FBOs that rely on staff rather than volunteers do not make employment decisions on the basis of religion, although that figure is likely different with respect to newer religiously integrated programs.¹⁹³ Thus, while uncertainty in the law regarding the ability of FBOs to hire coreligionists in publicly funded programs may dissuade some pervasively religious FBOs from participating, the facts are that both Charitable Choice statutes and state practices generally permit such actions.

Again, the situation in Oregon fits the general practice. Neither the *Oregon Revised Statutes* nor the *Oregon Administrative Rules* impose any restrictions on employment practices specific to FBOs.¹⁹⁴ As such, neither state law nor the personal services contracts contain language prohibiting FBOs from hiring only coreligionists to perform work under a state-funded contract. This last statement is qualified, however, by section 659A.030 of the *Oregon Revised Statutes*, Oregon's general non-discrimination statute. Section 659A.030 prohibits discrimination in employment on the basis of "race, religion, color, sex, national origin, marital status or age." An employer is defined as any person who "engages or uses the personal services of one or more employees."¹⁹⁵ Section 659A.030 applies irrespective of the exist-

¹⁹⁰ See Green & Sherman, *supra* note 156, at 40.

¹⁹¹ See *supra* notes 5 and 160.

¹⁹² RAGAN ET AL., *supra* note 116, at 15 ("In 23 states, or 57.5 percent of the states for which information is currently available, FBOs may select employees on the basis of religion.").

¹⁹³ See Green & Sherman, *supra* note 156, at 21 (indicating that less than one-third of FBOs consider faith commitments when hiring staff).

¹⁹⁴ In addition to requiring contractors to comply with Title VII of the 1964 Civil Rights Act, section V of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA), the State requires all contractors to comply with section 659A.142 of the *Oregon Revised Statutes*, Oregon's disability nondiscrimination law.

¹⁹⁵ See OR. REV. STAT. § 659A.001(4) (2003).

tence of public funding. Moreover, it does not exclude religious organizations from the definition of “employer,” which suggests that congregations and other FBOs must comply with the prohibitions on religious discrimination, among others. However, section 659A.006(2) of the *Oregon Revised Statutes* provides:

[T]his section shall not be construed to prevent a bona fide church or sectarian religious institution, including but not limited to a school, hospital or church camp, from preferring an employee or applicant for employment of one religious sect or persuasion over another when:

(a) That religious sect or persuasion to which the employee or applicant belongs is the same as that of such church or institution;

(b) In the opinion of such bona fide church or sectarian religious institution, such a preference will best serve the purposes of such church or institution; and

(c) The employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity which has no necessary relationship to the church or institution, or to its primary purposes.

As a result, a FBO would be exempt from complying with Oregon’s prohibition on religious employment discrimination provided the employee is: (1) a member or adherent of the same religion as the FBO; (2) the FBO believes (presumably in good faith) that engaging in a religious preference “will best serve the purposes” of the FBO; and (3) the employment position is “closely connected with or related to the primary [religious] purposes” of the FBO, which, broadly conceived, could include charitable work. This last provision sets up a potential inconsistency, however. If the “primary purpose” of the FBO is to share its faith, and the employment duties are closely connected with that purpose, then those duties would not normally qualify for public funding. Because only secular programs of a FBO can be funded, it is unclear whether secular employment functions would qualify under section 659A.006(2)(c) as being closely connected with or related to the primary purposes of the FBO.¹⁹⁶

¹⁹⁶ Additionally, under the language of section 659A.006(2), the exemption may not apply to a FBO that is not a “church or sectarian religious institution,” such as an interdenominational organization like Ecumenical Ministries of Oregon. Even then, the ability to favor an employee of one faith over others extends only to employees or applicants belonging to the same “religious sect or persuasion” as the FBO. Apparently, an interdenominational Christian organization (assuming it qual-

In sum, Oregon's experience in contracting with FBOs to provide social services tracks the national data. Contrary to the Administration's rhetoric of discrimination, Oregon has a long history of contracting and collaborating with FBOs, albeit with the larger and more established players. Consistent with studies that both predate and postdate the Faith-Based Initiative, there has been no evidence of government discrimination or bias against religious entities, even against those FBOs that would be classified as pervasively sectarian or prefer religiously integrated approaches (although religiously integrated programs may not satisfy a particular offering contained in a RFP). As the national studies confirm, the smaller FBOs and congregations in Oregon that do not participate in government-funded programs do so out of perceived concerns about state regulations, bureaucratic red tape, and the complexity of the application process, not out of a sense of government hostility toward religion. While these factors may constitute "barriers" in the broadest sense, these requirements are not imposed any differently on FBOs and are a far cry from a "legacy of discrimination" against religion, as the President has asserted.

D. Oregon Constitutional Constraints

The final "barrier" or basis for discrimination rests in the constitutional prohibition against the funding of pervasively sectarian or religiously integrated organizations.¹⁹⁷ This rule, contested by conservative legal scholars, is the source of much criticism by Charitable Choice proponents.¹⁹⁸ The pervasively sectarian standard has been under attack for more than a decade, and its future before the Supreme Court is in serious doubt.¹⁹⁹ As discussed in the Introduction, the closest decision on the subject remains *Bowen v. Kendrick*, where the Court upheld partici-

ifies for the exemption) could prefer Christians but not be more sect-specific in its preferences, whereas a church could prefer members of its particular denomination or sect. These limitations under the exemption, which appear to favor more sectarian FBOs over their more ecumenical counterparts, may run afoul of holdings by the Oregon Supreme Court prohibiting unequal treatment of religious organizations. See *Employment Div., Dept. of Human Res. v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989); *Salem Coll. & Acad. v. Employment Div.*, 298 Or. 471, 695 P.2d 25 (1985).

¹⁹⁷ See *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

¹⁹⁸ See *supra* note 62.

¹⁹⁹ See *Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000).

pation by FBOs in federal grant programs but at the same time reaffirmed that some religious organizations and programs might be “too religious” if religion is so intertwined in the services that the secular and religious functions are inseparable.²⁰⁰ More recently, however, the Court has appeared less concerned about public funds flowing to religiously integrated institutions under general benefits programs, provided there is no evidence the funds are paying for religious indoctrination.²⁰¹ And in 2000, a plurality of the Court opined that the pervasively sectarian standard is “born of bigotry, [and] should be buried now.”²⁰²

The legitimacy of the pervasively sectarian standard need not be addressed here,²⁰³ because the rule, as a bar to participation by FBOs, has not been rigorously enforced by state entities or served to prevent participation by faith-integrated organizations.²⁰⁴ As addressed above, this practice holds true in Oregon.

Practice and law do not always conform, however. Notwithstanding Oregon’s permissive practices, its constitutional interpretations may potentially serve as barriers to FBO participation in government contracts and programs in two ways: (1) interpretations of the state constitution’s prohibitions on funding religious institutions,²⁰⁵ and (2) the extent to which Oregon courts

²⁰⁰ “[W]e have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are ‘pervasively sectarian.’” *Bowen*, 487 U.S. at 609-10.

²⁰¹ See *Agostini v. Felton*, 521 U.S. 203, 225-26 (1997).

²⁰² *Mitchell*, 530 U.S. at 829.

²⁰³ For a discussion, see Noah Feldman, *Non-sectarianism Reconsidered*, 18 J. L. & POL. 65 (2002).

²⁰⁴ See *MONSMA*, *supra* note 19, at 70-80. *But cf.* *Freedom from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002). There, the Wisconsin Department of Workforce Development entered into a contract with Faith Works to fund a residential substance abuse treatment program that integrated spiritual principles. *Id.* at 962-64. The court held the direct financing of the program violated the Establishment Clause because the public funds were supporting counselor salaries, such that any religious indoctrination that occurred in the program was directly “attributable to the state.” *Id.* at 971. Significantly, the court rejected Faith Works’ argument that because only twenty percent of the counselors’ time was spent on spiritual counseling—and twenty percent of Faith Works’ income came from private sources—the arrangement was constitutional. *Id.* at 973-74. Because Faith Works commingled public and private funds and integrated spirituality throughout its counseling program, the government was effectively paying for a religious program.

²⁰⁵ See OR. CONST. art. I, § 5 (“No money shall be drawn from the Treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly.”).

would recognize a free exercise claim or defense to the enforcement of a state regulation.²⁰⁶

Generally speaking, the Oregon courts have interpreted the religion clauses of the Oregon Constitution in ways consistent with interpretations of the federal Religion Clauses.²⁰⁷ With respect to Oregon's nonestablishment provision, the Oregon courts have generally applied the same analytical standards to article I, section 5 as the U.S. Supreme Court has applied to the Establishment Clause.²⁰⁸ This suggests that the Oregon courts would likely follow decisions such as *Bowen v. Kendrick* and hold that section 5 does not bar FBOs from participating in state contracts and grants, provided the State does not favor religious providers and the funds are spent on secular services. As the Oregon Supreme Court remarked in 1961: "Neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization. The proscription is against aid to religious *functions*."²⁰⁹ Apparently, the Oregon courts do not view section 5 as imposing any stricter separation of church and state than that provided under the federal First Amendment.²¹⁰ As the Oregon Court of Appeals stated recently: "[T]he Oregon Constitution does not embrace an unusually strict principle of separation of church and state. Rather, Oregon's religion clauses were intended to ensure that the state does not cross the line between neutrality toward religion and support of religion."²¹¹

Despite such statements, the Oregon courts have at times demonstrated a willingness to depart from federal standards when interpreting the Oregon Constitution.²¹² In *Dickman v.*

²⁰⁶ See OR. CONST. art. I, § 3 ("No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience.").

²⁰⁷ See *Portland v. Thornton*, 174 Or. 508, 512, 149 P.2d 972 (1942).

²⁰⁸ See, e.g., *Eugene Sand and Gravel v. City of Eugene*, 276 Or. 1007, 1020-23, 558 P.2d 338, 346-48 (1976); *Powell v. Bunn*, 185 Or. App. 334, 355-56, 59 P.3d 559, 575-76 (2002).

²⁰⁹ *Dickman v. Sch. Dist. No. 62C*, 232 Or. 238, 256, 366 P.2d 533, 542-43 (1961).

²¹⁰ See *Dickman*, 232 Or. at 246, 366 P.2d at 537 ("Article I, § 5 . . . was designed to keep separate the functions of state and church and to prevent the influence of one upon the other. In this respect our constitution follows the general pattern of other state constitutions and may be regarded as expressing, in more specific terms, the policy of the First Amendment . . .").

²¹¹ *Powell*, 185 Or. App. at 357, 59 P.3d at 576.

²¹² See *Cooper v. Eugene Sch. Dist.*, 301 Or. 358, 371, 723 P.2d 298, 307 (1986) ("This court in fact has interpreted the meaning of these guarantees independently,

School District No. 62C, the Oregon Supreme Court interpreted section 5 as prohibiting textbook aid to parochial schools, something that the U.S. Supreme Court later allowed.²¹³ Even more recently, “the Oregon Supreme Court has adopted an independent approach to state constitutional analysis” and has expressed a “willingness to reexamine its holdings in prior cases.”²¹⁴ The point is that the Oregon Supreme Court has not ruled on a funding issue in recent years, at least not since it has adopted its more independent approach to interpreting the Oregon Constitution. Under current—and likely future—interpretations of section 5, however, state contracts with and grants to FBOs to provide secular social services would likely be allowed, provided the State can assure that public funds are not being spent on religious activities and it is not preferring or endorsing religious organizations or their programs.²¹⁵

With respect to the indirect funding of a FBO through a certificate or voucher, it is less clear whether the Oregon Supreme Court would follow the U.S. Supreme Court’s lead in *Zelman v. Simmons-Harris* and interpret section 5 as permitting the use of a state voucher in a religiously infused program.²¹⁶ On the one hand, the *Dickman* court noted that section 5 should *not* be interpreted as preventing every conceivable benefit from accruing to a religious institution.²¹⁷ The court there distinguished between “direct and substantial” benefits and “financial aid [that] flows indirectly and incidentally . . . through an expenditure for a governmental purpose clearly within constitutional limits.”²¹⁸ This last statement, though, begs the question of what types of expenditures are “within constitutional limits.” On the other hand, the same court indicated a willingness to scrutinize the degree of a benefit afforded to a religious organization, irrespective of the funding mechanism, stating that “[w]e do not regard as

sometimes with results contrary to those reached by the United States Supreme Court.”).

²¹³ See *Dickman*, 232 Or. 238, 366 P.2d 533. In so doing, the court rejected the “child benefit” theory that the U.S. Supreme Court had embraced. See *id.* at 250, 366 P.2d at 539-40; see also *Fisher v. Clackamas County Sch. Dist.*, 13 Or. App. 56, 507 P.2d 839 (1973) (striking program providing secular educational services in a parochial school).

²¹⁴ *Powell*, 185 Or. App. at 357, 59 P.3d at 576.

²¹⁵ *Cooper*, 301 Or. at 373, 723 P.2d at 308.

²¹⁶ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²¹⁷ 232 Or. at 247-48, 366 P.2d at 538-39.

²¹⁸ *Id.* at 247-48, 366 P.2d at 538-39.

significant the fact that [the Oregon] constitution does not contain the phrase ‘directly or indirectly’ as some constitutions do.”²¹⁹ Once again, what appears to be key is whether the public funds are aiding “religious *functions*.”²²⁰

Oregon courts have interpreted Oregon’s “free exercise clause,” article I, section 3, in a like manner of consistency and divergence.²²¹ Generally, the Oregon Supreme Court has applied a standard similar to that applied by the U.S. Supreme Court in *Employment Division v. Smith*²²²—a case that arose in Oregon—where the Court held that free exercise interests are not implicated by laws and regulations that apply equally to religious and nonreligious entities. As the Oregon Supreme Court described the standard in 1995:

A law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.²²³

This means that the State could require contracting FBOs to adhere to the same performance, employment, financial, reporting, and audit standards that it requires of nonreligious providers. Because the funded services performed by the FBOs are to be secular in the first instance, there would be no cognizable free exercise infringement by requiring the FBOs to follow the same neutral and generally applicable regulations. This approach is borne out in the following examples:

The Oregon courts have consistently held that requiring churches and religious organizations to pay unemployment compensation tax for their employees, including clergy, does not infringe on free exercise interests.²²⁴ As the Supreme

²¹⁹ *Id.* at 258 n.31, 366 P.2d at 534 n.31.

²²⁰ *Id.* at 256, 366 P.2d at 543.

²²¹ See *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or. 490, 498, 770 P.2d 588, 592 (1989) (“In a line of cases beginning with *City of Portland v. Thornton*, 174 Or. 508, 512, 149 P.2d 972 (1944), this court has treated the First Amendment Free Exercise clause as ‘identical in meaning’ with the Oregon constitutional provision covering the same subject.”).

²²² 494 U.S. 872 (1990).

²²³ *Meltebeke v. Bureau of Labor and Indus.*, 322 Or. 132, 149, 903 P.2d 351, 361 (1995).

²²⁴ See *Newport Church of the Nazarene v. Hensley*, 335 Or. 1, 56 P.3d 386 (2002); *Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588; *Salem Coll. and Acad. v. Employment Div.*, 298 Or. 471, 695 P.2d 25 (1985).

Court described the standard recently: “[W]e . . . conclude that the unemployment compensation program is a valid and neutral law of general applicability, from which the church and its ministers are not exempt upon the ground that the church is a religious organization.”²²⁵

The Oregon Supreme Court has held that section 659A.030, Oregon’s nondiscrimination in employment law described above, applies to religious employers:

A general scheme prohibiting religious discrimination in employment, including religious harassment, does not conflict with any of the underpinnings of the Oregon constitutional guarantees of religious freedom . . . : It does not infringe on the right of an employer independently to develop or to practice his or her own religious opinions or exercise his or her rights of conscience, short of the employer’s imposing them on employees holding other forms of belief or nonbelief; it does not discourage the multiplicity of religious sects; and it applies equally to all employers and thereby does not choose among religions or beliefs.²²⁶

The *Meltebeke* holding was particularly important in that it identified the primary free exercise interest to be protected by section 659A.030 as being that of the *employee*, not the religious employer.²²⁷

Therefore, the Oregon courts are unlikely to hold that Oregon’s religion clauses protect FBOs from following general performance, employment, financial, reporting, or audit requirements. The State may generally require such adherence without burdening the free exercise interests of the FBOs.²²⁸

²²⁵ *Newport Church*, 335 Or. at 13, 56 P.3d at 392-93. The court held against the church on both general free exercise and autonomy grounds: “The church autonomy doctrine might insulate the church from the dictates of a secular court regarding liturgy and leadership, but it does not permit a church, as a general matter, to cloak its decisions and actions in secrecy when the law requires compliance with the requirements of civil law.” *Id.* at 15, 56 P.3d at 394.

²²⁶ *Meltebeke*, 322 Or. at 148, 903 P.2d at 360. As discussed above, however, a religious organization may meet the limited exception contained in section 659A.006(2) of the *Oregon Revised Statutes*.

²²⁷ “The law prohibiting religious discrimination, including religious harassment, honors the constitutional commitment to religious pluralism by ensuring that employees can earn a living regardless of *their* religious beliefs.” *Id.* at 148, 903 P.2d at 360.

²²⁸ Recently, in *Corporation of the Presiding Bishop v. City of West Linn*, 338 Or. 453, 111 P.3d 1123 (2005), a case involving the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000), the Oregon Supreme Court took a narrow view of the imposition necessary to constitute a substantial burden on religious practice.

Such judicial interpretations could serve as barriers to FBOs by dissuading them from applying to participate in state grants and contracts.

A limited caveat to this rule would be those possible instances where a neutral regulation interfered in matters of church tenets, liturgy, or decisions regarding the training, selection, and retention of clergy.²²⁹ In such instances, the State may be required to grant an exemption to the legal requirements. The *Meltebeke* decision also muddied the waters regarding the “neutrality” standard that the Oregon courts otherwise apply. There, the court appeared to provide slightly higher protection of religion in a neutral regulation context by requiring the State to prove a heightened mental awareness of harassment when it is done for a religious reason:

When a person engages in a religious practice, the state may not restrict that person’s activity unless it first demonstrates that the person is consciously aware that the conduct has an effect forbidden by the law that is being enforced With respect to an employer whose activity that violates BOLI’s rule constitutes a religious practice, as in the case here, the employer must know that that activity created an intimidating, hostile, or offensive working environment.²³⁰

It is unclear whether this rule that the State must afford greater latitude to religiously motivated actions that otherwise violate neutral regulations applies outside the employment (or harassment) context. Some general language in *Meltebeke* suggests broader application.²³¹ However, in the more recent holding of *Newport Church*, the court reverted to its narrower description of the legal standard discussed above, without indicating any potential discrepancy represented in *Meltebeke*.²³²

In conclusion, although the Oregon courts have not ruled on a religious funding case recently, it is unlikely that they would strike down a direct-funding program or contract involving FBOs

²²⁹ *Newport Church*, 335 Or. at 15, 56 P.3d at 394.

²³⁰ *Meltebeke*, 322 Or. at 152, 903 P.2d at 362.

²³¹ *Id.* at 153, 903 P.2d at 363 (“Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in religious practice without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer’s enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.”).

²³² *Newport Church*, 335 Or. at 13, 56 P.3d at 392-93.

where the State could demonstrate the public funds were not used for religious activity. How the courts would approach a challenge to the funding of a religiously integrated program or organization is unclear, although it is more likely that such a program would be upheld where it could be demonstrated the public funds did not pay for “religious functions.” Interpretations of the Oregon Constitution’s free exercise clause, article I, section 3, indicate that FBOs would likely be subject to neutral state regulations, even though such regulations might arguably burden a FBO’s free exercise interests. While such constitutional interpretations may serve as barriers to FBOs by dissuading their participation in state grants and contracts, they do not evince a “legacy of discrimination” against religious organizations.

III

THE CASE FOR COLLABORATION

This Article has argued that the primary justification for the Faith-Based Initiative—to end discrimination against religious organizations—is not supported by the facts. Studies of religious participation in government social service programs that both preceded and followed the issuance of *Unlevel Playing Field* indicated a lack of bias, discrimination, or purposeful exclusion of FBOs, at both the federal and state levels. The 2003 Roundtable Study and the Oregon Law Commission Report both substantiate these earlier studies. While most data confirms that small FBOs and congregations—many of which follow a religiously integrated approach to services—do not participate at the same levels as their larger, more secular counterparts, these disparities are usually explained by factors other than government discrimination or bias (e.g., unfamiliarity with the grant process, fear of government regulations).²³³ Much of the failure of small FBOs and congregations to participate is attributable to self-selection based on weakly supported or unsubstantiated fears rather than on affirmative actions by the government. Finally, while there is some evidence that participation by small FBOs and congregations has increased since the advent of Charitable Choice, studies indicate that conservative/evangelical congregations are less likely in the long term to collaborate with the government than mainstream and ecumenical congregations, and that the types of

²³³ MONSMA & MOUNTS, *supra* note 77, at 15-16.

services provided by congregations will likely be limited to those areas that involve less investment and infrastructure. For the foreseeable future, the established religiously affiliated agencies will continue to provide the bulk of FBO charitable services.²³⁴

All of this information was available to the White House OFBCI before it embarked on its rhetoric of discrimination. As the Bush Administration knew, or should have known, the explanations for past disparities in participation by FBOs—those disparities being significantly more modest than the Administration has alleged—rest on a host of causes. Rather than acknowledging the complexity of the issue, the Administration chose to oversimplify and mischaracterize it. By aggressively pushing the discrimination argument, the Administration unnecessarily politicized matters while it alienated many in the mainstream religious and civil rights communities who might otherwise support increased collaboration between FBOs and the government.²³⁵

That said, the failings of the Faith-Based Initiative should not condemn faith-based and government collaborations, funded or otherwise. The history of cooperation, as evidenced in Oregon and most other states, is too long and important to abandon. The government should be able to encourage and initiate partnering with religious organizations and, in some instances, acknowledge the unique contributions that FBOs may provide in addressing human suffering. Provided sufficient safeguards are in place to ensure public accountability—including that public funds are not paying for religiously infused services—and that beneficiary rights are protected, religious organizations should be able to participate in many government-funded social service programs. To exclude their participation is often unnecessary (in a constitutional sense) and undesirable as a policy matter.

Generally speaking, congregations and religious organizations contribute to the common good and are a positive influence in our democratic society. Because of their commitment to compassion and alleviating human suffering, religious organizations may be particularly adept at providing important social services.²³⁶ Religious organizations, such as the Salvation Army and

²³⁴ See Chaves, *Religious Congregations*, *supra* note 158, at 836-46.

²³⁵ See David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1361-64 (2003).

²³⁶ WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN WELFARE, *supra* note 141, at 12-13.

Catholic Charities, have long been at the forefront of ministering to those in need and possess the expertise and experience to be effective service providers.²³⁷ Religious organizations and congregations also have frequently been the leading advocates for political, economic, and civil equality and justice, spearheading the abolition, civil rights, and peace movements. And many religious organizations and congregations are located in inner cities and rural areas where the need is greatest, thus having already established relationships—and trust—with people in need.²³⁸

The value of religious inclusion rests on more than the pragmatic, however. Religious organizations, and potentially nonreligious civic associations, often serve an important mediating role between people and their civil institutions.²³⁹ Religion is an important source of normative values that contribute to the democratic commonweal. The Framers, while establishing a secular form of government, recognized the important role that religion plays in American culture, particularly as a source of civic virtue, compassion, and moral example.²⁴⁰ Religion can express these values in ways that the government often cannot, and should not, express them. For many people, religious institutions may be a greater source of important civic values and may be more legitimate than government institutions.²⁴¹ But these values are no less legitimate or important for the common good merely because they are expressed most frequently by religious organizations. This being the case, the government should be able to acknowledge the “unique” attributes of religion (and of similar nonreligious private institutions) and initiate collaborations where they achieve mutual goals. This does not mean that government should turn a blind eye to collaborative consequences that result in government advancement or endorsement of religious doctrine or the coercion of belief. But conversely, the government should not be disabled from recognizing the unique qualifications of religion and its contributions to the commonwealth.

²³⁷ See Skocpol, *supra* note 141, at 21-50.

²³⁸ Several of these points are addressed in more detail in David Cole, *Faith and Funding: Toward an Resressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 566-73 (2002).

²³⁹ See GLENN, *supra* note 26, at 3-8; Cole, *supra* note 238, at 573.

²⁴⁰ See John Adams, *Thoughts on Government*, in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 1760-1805, 401, 401-09 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

²⁴¹ Cole, *supra* note 238, at 566-73.

Returning to the Oregon experience, a possible example of this collaborative approach may be section 409.180 of the *Oregon Revised Statutes*, which authorizes DHS case workers to contact a beneficiary's religious congregation or other intermediary organization in an effort to coordinate services. This new law requires state workers to inform beneficiaries of this option, which necessitates inquiry into a person's religious affiliation, if any. While this policy raises concerns about confidentiality and the State placing subtle pressure on beneficiaries to establish or maintain relationships with congregations, those issues can be addressed through training and guidelines. What the law allows is for the State to acknowledge a potential community as a resource and collaborate with it in serving a beneficiary's needs.

This is not to argue that religious social service organizations are preferable to their secular counterparts or are more effective in their programs. The battle over effectiveness of services rages, and it is unlikely that a definitive answer will ever emerge, primarily because different people are receptive to different approaches.²⁴² Rather, this Article argues that, based on characteristics that are common to many FBOs (though not necessarily exclusive to religion), religious organizations may offer some uniquely beneficial approaches to addressing human need. The Framers thought that religious organizations performed distinct functions in our society and wrote the Constitution in a manner that called for distinctive treatment. The Framers also believed that religion promoted values important to the Republic.²⁴³ In a like manner, contemporary government should be able to recognize the unique or distinct attributes of religious organizations and seek to access those qualities in certain circumstances. While permitting such recognition is pregnant with risks, it also promises rewards that may be too valuable to ignore.

This call for inclusion has its limits, both constitutionally and practicably. One of the chief failings of Charitable Choice—

²⁴² Compare Stephen V. Monsma, *Are Faith-Based Programs More Effective?*, PUB. JUST. REP. (2001), [http://www.cpjustice.org/stories/storyReader\\$545](http://www.cpjustice.org/stories/storyReader$545), with CTR. FOR URBAN POLICY AND ENV'T, IND. UNIV.-PURDUE UNIV. INDIANAPOLIS, FAITH-BASED SOCIAL SERVICE PROVISIONS UNDER CHARITABLE CHOICE: A STUDY OF IMPLEMENTATION IN THREE STATES, http://ccr.urbancenter.iupui.edu/project_descrip.html (last visited Oct. 11, 2005); Alan Cooperman, *Faith-Based Charities May Not be Better, Study Indicates*, WASH. POST, May 25, 2003, at A7.

²⁴³ Those values would be instilled in individuals, however, through a voluntary and consensual system of membership and affiliation without interference by the government.

aside from the constitutional concerns²⁴⁴—is that it has been subsumed in arguments for privatization and devolution of government responsibility toward the needy. Charitable Choice and its “armies of compassion” are not the solution to the dilemma of poverty and need. First, FBOs alone can never address the bulk of human suffering. Even with increased funding, many FBOs lack the organization, structure, and sophistication to do more than supplement government programs.²⁴⁵ Second, privatization, with its emphasis on market competition and consumer participation, may well lead to the abdication of government responsibility for the needy.²⁴⁶ Third, even though FBOs promote important normative values, those values can never supplant other important democratic principles that the government must guarantee, such as equality and fairness. As Martha Minow has argued, privatization of social services may “undermine public commitments both to ensure fair and equal treatment and to prevent discrimination on the basis of race, gender, religion, or sexual orientation.”²⁴⁷ For all of these values to be respected, Charitable Choice must remain truly *collaborative* with the government—and not a substitute for government responsibility—with FBOs understanding the necessary costs that must accompany any such partnership. Namely, that government funded programs must remain politically accountable.

Assuming that balance can be found, church-state separationists, who are predominately politically and socially liberal, should cautiously embrace religious involvement in social service programs, although they should not yield on their demands for constitutional safeguards under Charitable Choice. The vast majority of religious organizations that provide human services

²⁴⁴ The constitutional issues are addressed in Green, *supra* note 13, at 33-48.

²⁴⁵ Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 496 (1999); Thiemann et al., *supra* note 141, at 56-58.

²⁴⁶ See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) (“The new versions of privatization potentially jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs.”); see also Cole, *supra* note 238, at 576-77; Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1082 (2000).

²⁴⁷ Minow, *Public and Private Partnerships*, *supra* note 246, at 1230; see also Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000).

to their greater communities do so out of a commitment to values that political liberals often share and should embrace.²⁴⁸ Separationists must learn to cautiously welcome the larger message of collaboration, while rejecting the rhetoric of discrimination and division.

CONCLUSION

Charitable Choice has made two positive contributions to the commonweal. First, it has heightened awareness of the role that religious organizations have long played in providing important services to people in need. Much of that need would be unmet if religious organizations and the government did not participate as partners in providing important social services. If that awareness has encouraged state officials to be more receptive to collaborating with FBOs, and to refine some requirements and procedures to facilitate collaboration, then it has been a positive contribution. Second, Charitable Choice has likely increased participation in government grants and programs by some FBOs that previously felt unwelcome or were suspicious about collaborating with the government. While many of those fears were unfounded, they still served as a self-imposed barrier to participation. To the extent that religious organizations can exercise their values of compassion, nurture, and respect, society will be made a better place.

Yet, while Charitable Choice may have made a positive contribution to the debate over how to best provide services to people in need, it has been advanced for many wrong reasons, the least of which being partisan political gain. The rhetoric of discrimination has been unfounded, unfortunate, and divisive. Moreover, the extent to which the failings of Charitable Choice remain—the marginalization of establishment clause and employment discrimination concerns, the loss of public accountability, and the abdication of government responsibility for the poor—may undermine the possible gains promised by greater collaboration between religious organizations and the State.

²⁴⁸ Cole, *supra* note 238, at 562.

