NLWJC - Kagan

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Welfare - Religious Provisions

Dawn Johnsen 10/1/96

THE WHITE HOUSE

WASHINGTON

(1) Orgs providing svcs w/ fed $

Rel org provs can be interpreted in const manner.

Does not req inclusion of all rel orgs, incl. perv. sectarian.

The same sponsors clearly contemplated inclusion - The others did not.

Language - murky. Can be read either way.

States give out this $ -

almost certain that this will be applied unconst'ly.

Probably, fed govt will be sued too. (perhaps can get off hook bec so little role)

What sort of guidance is HHS providing states w/r/t this issue?

Up to states to figure out?

Would state plan make this clear? If so, could/would they approve. If not, then seems HHS would not want to do anything - role in implementing?

Respond to them re this? (rel orgs)

THE WHITE HOUSE

WASHINGTON

(2)

Rel orgs – allowed to discrim on basis of rel w/r/t people administering public funds.

Troubling?

If sep. entity – affil of pow sect – may

~~Doesn't necessarily~~

Hard to know what could do w/r/t implementation.

Memorandum

Subject	Date
Prior Comments on S. 1120, Senate Welfare Bill	September 20, 1995

To
Walter Dellinger
Dawn Johnsen
Richard Shiffrin

From
Pam Harris

This memorandum pulls together in one document all of the comments we already have forwarded to OLA or drafted for our own use with respect to the Senate welfare bill. With the exception of the comment on deeming past citizenship (number 2), none has been cleared by OMB and forwarded to Congress. We have not yet sent the Establishment Clause comment (number 8) to OLA, though we have shared drafts with HHS and the White House Counsel's Office. Finally, because we are still unsure as to whether provisions remain in the bill authorizing states to deny benefits for illegitimate children of minor mothers (number 4) and for additional children of mothers receiving welfare (number 5), I am for now including those comments, as well.

1. Limited Eligibility of Noncitizens

Section 504 of the bill would exclude most legal as well as illegal aliens from eligibility for SSI benefits. Section 501 would allow the states to deny benefits to the same class of legal and illegal aliens under nearly all means-tested public assistance programs supported by federal funds.

Congress, of course, enjoys substantial authority to classify on the basis of alienage and, specifically, to limit the eligibility of aliens for benefits under federal programs. Mathews v. Diaz, 426 U.S. 67 (1976). The states, on the other hand, are constrained significantly by the Equal Protection Clause in their treatment of legal aliens; state denial of welfare benefits to legal aliens is subject to strict scrutiny and rarely, if ever, survives review. Graham v. Richardson, 403 U.S. 365 (1971). Whether Congress can authorize the states, at their option, to deny welfare benefits to legal aliens, as contemplated by section 501, is unclear. Graham, 403 U.S. at 382-83.

At a minimum, state alienage classifications enacted pursuant to section 501, like section 504's exclusion of legal aliens from the SSI program, remain subject to rational basis review. See Diaz, 426 U.S. at 77-84. Therefore, Congress and the states should

be prepared to articulate a rational basis for excluding legal as well as illegal aliens from subsistence welfare programs. In some cases, it may prove difficult to justify the bill's exclusionary policy. Denying benefits to nearly all legal aliens, many of whom have participated productively in the United States economy for years before requiring assistance, is not self-evidently rational, and, in our view, would contribute to the establishment of an objectionable caste system.

2. Limited Eligibility of Certain Naturalized Citizens

Under section 502 of the bill, for a period of time after an individual enters the United States pursuant to a sponsorship agreement, the income of the individual's sponsor would be attributed, or "deemed," to the individual in determining his or her eligibility for nearly all federal need-based programs of assistance. The deeming period would extend for a minimum of five years after entry, or, if longer, for the period agreed to by the sponsor.[1] States would be authorized to adopt the same deeming rules for state assistance programs.

As applied to naturalized citizens,[2] the provisions in question would operate effectively to deny welfare benefits to certain United States citizens because they were born outside the country. This appears to be an unprecedented result. Current federal deeming provisions under various benefits programs operate only as against aliens,[3] and we are not aware of any comparable restrictions on citizen eligibility for federal assistance. As a matter of policy, we think it would be a mistake to begin now to relegate naturalized citizens -- who have demonstrated their commitment to our country by undergoing the naturalization process -- to a kind of second-class status.

Section 502 might be defended legally on the grounds that it is an exercise of Congress' plenary authority to regulate immigration and naturalization, or, more specifically, to set the terms under which persons may enter the United States and become

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[1] We note that § 503 of the bill would require that sponsorship agreements be enforceable until the entrant has worked in the United States for a minimum of 40 qualifying periods, or ten years. Accordingly, it appears that the alternative, longer deeming period set out in § 502 generally would apply.

[2] Our comment here is limited to the application of deeming requirements to United States citizens. As applied to aliens, the deeming requirements' constitutionality would be judged under the standard set out in our first comment, above.

[3] See, e.g., 42 U.S.C. § 615 (AFDC); 7 U.S.C. 2014(i) (Food Stamps).

citizens. See Diaz, supra; Toll v. Moreno, 458 U.S. 1, 10-11 (1982). We are not convinced that this defense would prove persuasive. Though Congress undoubtedly has power to impose conditions precedent on entry and naturalization, the provision at issue here would function as a condition subsequent, applying to entrants even after they become citizens. It is not at all clear that Congress' immigration and naturalization power extends this far:

> While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, apart from the exception noted [constitutional eligibility for President], becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.

Schneider v. Rusk, 377 U.S. 163, 166 (1964) (internal quotations omitted) (statutory restriction on length of foreign residence applied to naturalized but not native born citizens violates Fifth Amendment equal protection component).

Alternatively, it might be argued in defense of the provision that it classifies not by reference to citizenship at all, but rather on the basis of sponsorship; only those naturalized citizens with sponsors will be affected. Again, we have doubts about whether this characterization of the provision would be accepted. State courts have rejected an analogous position with respect to state deeming provisions, finding that the provisions constitute impermissible discrimination based on alienage despite the fact that they reach only sponsored aliens. See Barannikova v. Town of Greenwich, 643 A.2d 251, 263-64 (Conn. 1994); El Souri v. Dep't of Social Services, 414 N.W.2d 679, 682-83 (Mich. 1987). Because the deeming provision in question here, as applied to citizens, is directed at and reaches only naturalized citizens, the same reasoning would compel the conclusion that it constitutes discrimination against naturalized citizens. Cf. Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) ("The important points are that [the law] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.") (invalidating state law denying some, but not all, resident aliens financial assistance for higher education).

So understood, section 502, as applied to citizens, would contravene the basic equal protection tenet that "the rights of

citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." Schneider, 377 U.S. at 165. To the same effect, the provision might be viewed as a classification based on national origin; among citizens otherwise eligible for government assistance, the class excluded by operation of the deeming provision is limited to those born outside the United States. A classification based on national origin, of course, is subject to strict scrutiny under equal protection review, see Korematsu v. United States, 323 U.S. 214 (1944), and it is unlikely that the deeming provision could be justified under this standard. See Barannikova, 643 A.2d at 265 (invalidating state deeming provision under strict scrutiny); El Souri, 414 N.W.2d at 683 (same).

3. Differential Treatment of "Interstate Immigrants"

Section 101 of the bill, in what would now be section 403(b)(2) of the Social Security Act, would authorize the states to discriminate among beneficiaries based on length of in-state residence. Specifically, the Act would allow each state to provide families that have lived in the state for less than one year with the level of benefits, if any, the families would have received in their prior states of residence.

The Supreme Court has held that a state impermissibly penalizes the right to interstate travel when it denies newcomers the "same right to vital government benefits and privileges . . . as are enjoyed by other residents." Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) (one-year residency requirement for free nonemergency medical care invalid as penalty on right to interstate travel); see also Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement for welfare benefits; same result). This is so even if the state acts, as it would here, pursuant to congressional statute. See Shapiro, 394 U.S. at 641. In a related line of cases, the Supreme Court has used a different rationale to come to the same conclusion, holding that distinctions based solely on length of residence violate the Equal Protection Clause under rational basis review. See, e.g., Zobel v. Williams, 457 U.S. 55 (1982) (state lacks rational and permissible interest in granting incrementally higher oil revenue dividend payments to residents of longer duration).

Recent lower court cases have relied on both these theories to invalidate laws that, like those contemplated by the bill, limit new state residents to the level of welfare benefits they received in their prior home states for a substantial period of time. See Mitchell v. Steffen, 504 N.W.2d 198 (Minn. 1993), cert. denied, 114 S. Ct. 902 (1994) (six-month residency requirement); Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993), aff'd, 26 F.3d 95 (9th Cir. 1994) (one-year residency requirement). The Supreme Court granted certiorari in Green, but earlier this year directed vacation of the prior judgments in the case on procedural grounds

without reaching the merits. Anderson v. Green, 63 U.S.L.W. 4162 (U.S. Feb. 22, 1995) (per curiam). Unless and until the Supreme Court revisits this issue, controlling case law renders state laws passed pursuant to this provision of the bill unconstitutional.

4. Denial of Assistance for Out-of-Wedlock Births to Minors

Section 101 of the bill, in what would now be section 406(b) of the Social Security Act, would authorize states to exclude from eligibility for benefits both children born out-of-wedlock to mothers under age 18 and the mothers of such children themselves. The exclusion would continue until the mothers reach age 18.

We have serious constitutional concerns regarding the provision's discrimination on the basis of illegitimacy. On its face, the provision authorizes laws that distinguish among equally needy children based on the conduct of those children's parents. The Supreme Court has held already that for purposes of distributing welfare benefits, "as indispensable to the health and well-being of illegitimate children as to those who are legitimate," such distinctions violate the Equal Protection Clause. See New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (per curiam). Specifically, the Court in Cahill rejected the means chosen by the state to advance its interest in "preserv[ing] and strengthen[ing] family life":

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent.

Cahill, 411 U.S. at 620 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); see also Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships"). We think that this reasoning would likely compel invalidation of state laws enacted pursuant to the provision in question.

The provision also might be challenged by affected mothers on the grounds that it conditions their eligibility for benefits on marital status, and hence interferes with the constitutionally protected "freedom of personal choice in matters of marriage and family life." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974). The Supreme Court has recognized a fundamental right to marry and otherwise to order family relationships, and invalidated under strict scrutiny regulations that interfere "directly and substantially" with that right. See Zablocki v. Redhail, 434 U.S.

374, 385-87 (1978) (state may not require court approval for marriage by person with support obligations); see also Boddie v. Connecticut, 401 U.S. 371 (1971) (state may not condition access to court in divorce action on payment of filing fees). At the same time, the Court has held that benefits classifications that bear only indirectly on intimate relationships may be sustained so long as they are rational. See, e.g., Califano v. Jobst, 434 U.S. 47 (1977) (Congress may terminate benefits when recipient marries); see also Zablocki, 434 U.S. at 386-87 & n.12 (discussing distinction).

Our concern is that where, as here, a benefits classification appears actually to be intended to influence the decision whether to marry, a reviewing court might treat it as an impermissible "direct and substantial" interference with that decision. Cf. Jobst, 434 U.S. at 54 (upholding marriage rule because it "cannot be criticized . . . as an attempt to interfere with the individual's freedom to make a decision as important as marriage"); Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (upholding AFDC family filing unit requirement because its "design" is not to intrude on family living arrangements). Alternatively, because the condition of eligibility at issue -- marriage -- is not wholly within the power of the mother to fulfill, the very rationality of the provision might be open to question.

5. Denial of Assistance for Children Born to Families Receiving Assistance

Section 101 would also, in what would now be section 406(c) of the Social Security Act, permit the imposition of a draconian and, in all likelihood, legally vulnerable cap on benefits. It would authorize states, at their option, to deny additional benefits for a minor child born to a person already a recipient of benefits or a recipient within the last 10 months. The provision contains no exception, not even one for rape. Were a state to avail itself of such option and provide no assistance for a minor child resulting from rape, we believe a challenge to this scheme may very well be successful. Most recently, the House of Representatives has passed legislation containing, inter alia, a ban on the use of federal funds to obtain an abortion, including one for a pregnancy resulting from rape. In light of the possibility of such a provision becoming law, it appears highly irrational and extraordinarily harsh to preclude an indigent woman from terminating such an unwanted and involuntary pregnancy and at the same time deny her benefits to adequately feed and clothe the child.

6. Limitations on Federal Authority

The bill would limit federal authority by providing:

The Secretary of Health and Human Services and the

> Secretary of the Treasury may not regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.[4]

The reach of this provision is unclear. Our assumption is that it is intended to prevent the Secretaries from promulgating substantive regulations that govern the disposition of the particular block grant funds at issue. Our concern, however, is that the provision might be read to extend also to the Secretaries' enforcement of other global statutes and regulations applicable to all federal funding programs.

For instance, the provision could be construed to prohibit application to the states' management of their block grants the provisions of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq., Title IX of the Education Amendments Act of 1974, as amended, 20 U.S.C. § 1681 et seq.; and section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. Broadly read, the provision also would prevent the Secretaries from instituting program fraud civil remedies actions against states under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812, which provides administrative remedies for false claims and statements in connection with the receipt of federal funds. Even the referral of a matter to the Department of Justice for prosecution or civil action might be barred by the provision.

To avoid what we think is an unintended consequence, the provision might be drafted more narrowly to provide that the Secretaries "are not authorized by this Act to regulate . . . ." Such a provision would make clear that the Secretaries may not attach additional conditions to use of the block grants in question, without inadvertently stripping them of authority to enforce preexisting statutory mandates.

7. Technical Comment

We would like to offer one technical comment on the bill as currently drafted.

Section 991(c) of the bill would establish a "grace period" for states "unable to [] comply" with the requirements of Title IX "without amending the State constitution." It is our view that state constitutional provisions generally could not prevent compliance with Title IX, in that state provisions inconsistent with Title IX would be void under the Supremacy Clause in states receiving federal funds. See, e.g., Townsend v. Swank, 404 U.S. 282 (1971) (state law violates Supremacy Clause by imposing AFDC restrictions inconsistent with federal standards). We therefore

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[4] Section 101 (new section 416).

recommend drafting section 991(c) to achieve what appears to be its purpose without suggesting that state law can take precedence over federal standards:

> If a State constitution is inconsistent with any provision of this title, then the State shall not be found out of compliance with any requirement enacted by this title until the earlier of--
>
> (1) 1 year after the effective date of a State constitutional amendment achieving consistency with this title; or
>
> (2) 5 years after the date of the enactment of this title.

8. Services Provided by Charitable, Religious or Private Organizations

Section 102(a)(1)(A) of the bill would authorize states to contract directly with charitable, religious and private organizations to provide services and administer programs under the Act. Section 102's remaining subsections deal primarily with direct participation by religious organizations in programs under the Act, reaffirming that religious organizations are eligible for participation and prohibiting discrimination against organizations based on religious character. Sec. 102(b)-(c). Section 102 further provides that participating religious organizations need not form separate corporate entities to receive and administer government funds nor remove religious symbols from their facilities, and that they may require that their employees adhere to religious tenets. Sec. 102(d)-(e). Section 103 of the bill would prohibit use of government funds provided directly to religious organizations for any sectarian purpose or activity.

Section 102(a)(1)(B) would authorize a different and more indirect form of participation by religious organizations in the welfare program established by the Act. This subsection would authorize provision to beneficiaries themselves of certificates or vouchers redeemable at religious, charitable, or other private organizations. Section 103's restriction on use of funds for sectarian purposes would not apply to this form of assistance.

[Each of these forms of participation by religious organizations is addressed separately below.] [Our analysis below is limited to the special Establishment Clause concerns raised by section 102(a)(1)(A)'s provisions for direct involvement by religious organizations in providing and administering welfare benefits and services.]

a. Section 102(a)(1)(A): Contracts with Religious Organizations

Efforts to involve religious organizations directly in

publicly funded social welfare programs may in some contexts raise serious Establishment Clause concerns. In Bowen v. Kendrick, 487 U.S. 589 (1988), the Supreme Court provided the general constitutional framework under which such efforts are to be evaluated. Under Bowen, two basic principles would appear to govern application of the provisions in question here.

First, the fact that an organization has religious affiliations does not mean that it may not participate equally with other private organizations in public welfare programs. 487 U.S. at 608-09. On the contrary, religious organizations that are not "pervasively sectarian" -- a term discussed at greater length below -- generally may provide social services along with other organizations as part of a publicly sponsored welfare program, consistent with the Establishment Clause. Id. at 610-12. That such religious organizations are direct recipients of government funds does not render their involvement unconstitutional, id. at 608-09, so long as the funds are used to perform secular social services and not for specifically religious activity, id. at 611-13, 621.[5] Nor does an express statutory provision for participation by religious organizations violate the Establishment Clause; Congress may recognize, on the face of a statute, that religious organizations "can help solve the problems to which the [statute] is addressed" without impermissibly advancing religion. Id. at 606-07 & n.11.

The second principle qualifies the first: though all religious organizations are not prohibited from participating in social welfare programs, the government may not enlist pervasively sectarian organizations -- that is, organizations in which "religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission" -- to administer welfare programs paid for with public funds. Id. at 610 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)), 621. Though the outer boundaries of the "pervasively sectarian" category are not well-defined, the category does include certain religious elementary and secondary schools as well as churches and other places of worship devoted entirely or inextricably to religious functions. See, e.g., Meek v. Pittinger, 421 U.S. 349, 366 (1975) (invalidating direct assistance to church-related elementary and secondary schools in which secular functions and religious mission are "inextricably intertwined").[6]

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[5] We note that consistency with this limitation appears to be assured by section 103 of the bill, prohibiting use of government assistance for "any sectarian purpose or activity, including sectarian worship or instruction."

[6] This rule against participation by pervasively sectarian institutions in publicly funded welfare programs is not called into question by the Court's most recent decision in the area. See

As the Court explained in Bowen, the reason for this bar on participation by pervasively sectarian institutions in publicly financed welfare programs is the "risk that direct government funding, even it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's religious mission." 487 U.S. at 610; see also id. at 612. Even if it were possible as a theoretical matter to channel government funds exclusively to secular functions in such organizations, the degree of governmental monitoring necessary to ensure compliance with the requisite funding restrictions would itself raise Establishment Clause concerns. Id. at 616-17.

Application of section 102(a)(1)(A) of the bill to pervasively sectarian organizations would implicate precisely the concerns that underlie the principle described in Bowen. One of section 102's sponsors has explained that the provision is intended to allow religious organizations to perform services, such as "parental training classes, job training and drug rehabilitation,"[7] that may involve significant counseling or educational components. Performance of this kind of sensitive function by pervasively sectarian institutions, the Court has recognized on a number of occasions, inevitably poses a substantial risk that the religious message of the institution will infuse the otherwise secular services provided, so that the state effectively becomes a sponsor of religious views. Bowen, 487 U.S. at 612; see also Meek, 421 U.S. at 371-72; Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385-89 (1985).

Equally problematic is the appearance of a "joint exercise of legislative authority by Church and State" that would be created if pervasively sectarian institutions entered into the close partnership with the government contemplated by section 102. See Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2488 (1994) (internal quotation omitted). On its face, for instance, section 102(a)(1)(A) seems to permit religious organizations to act as direct distributors of state welfare benefits, as well as state benefit program administrators. Were pervasively sectarian institutions to perform these functions for the state, the resulting "close identification" of governmental responsibilities and powers with religion would confer a significant, and impermissible, "symbolic benefit" on religion. Grand Rapids, 473 U.S. at 389-90 (internal quotations omitted); see also Kiryas Joel, 114 S. Ct. at 2488.

Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510, 2523-24 (1995) (acknowledging and distinguishing principle against "direct money payments to sectarian institutions").

[7] Senator John Ashcroft, Uncharitable Criticism, Wash. Post, Aug. 28, 1995, at A23.

Under the principles set out in Bowen, the provisions of section 102(a)(1)(A) would be capable of constitutional application. Religious organizations that are not pervasively sectarian could participate in providing secular welfare services, and they could do so without forming separate corporations to receive or administer the government funds involved. We are concerned, however, that section 102 may be intended to authorize participation by pervasively sectarian institutions, such as churches and some religious schools, as well. References in the bill to the display of religious scripture and symbols, § 102(d)(B), and to requirements that employees adhere to religious tenets, § 102(3), are suggestive of institutions in which religious and secular functions may not be meaningfully separable. See, e.g., Committee for Public Educ. v. Nyquist, 413 U.S. 756, 767-77 (religious restrictions on faculty appointments suggest school is pervasively sectarian). To the extent section 102 contemplates the involvement of pervasively sectarian institutions as direct recipients of government funds, its application would violate the Establishment Clause under the precedent discussed above.

[b. Section 102(a)(1)(B): Provision of Vouchers Redeemable at Religious Organizations

The foregoing analysis, as noted above, is implicated by state efforts to contract directly with religious organizations for the provision and administration of welfare services and benefits. Section 102(a)(1)(B), by contrast, does not authorize direct relationships between states and religious organizations. Rather, assistance in the form of vouchers would be provided by states to individual welfare beneficiaries, who would themselves choose whether to redeem their vouchers at religious organizations or at other institutions.

The Supreme Court has indicated that participation in this kind of program by religious organizations, including those that are pervasively sectarian, will not necessarily violate the Establishment Clause. If any state aid that "ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients," the Court has reasoned, then it may not be "appropriate" to view the state itself as having impermissibly sponsored or subsidized religion. Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 487-88 (1986) (upholding use of government vocational rehabilitation aid provided student for religious instruction at Christian college); see also Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462, 2466-67 (1993).

The scope of this "private choice" theory, which operates as a kind of exception to other Establishment Clause principles, has not yet been defined clearly by the Court. Moreover, the constitutionality of a state program enacted pursuant to section 102(a)(1)(B) may turn on the particulars of its design and

implementation. Accordingly, we are limited here to identifying the factors a reviewing court is most likely to consider in analyzing a voucher program under section 102(a)(1)(B).

At a minimum, a program that allows beneficiaries to redeem vouchers at religious institutions must ensure that the choices made by beneficiaries are "genuinely independent and private." Witters, 474 U.S. at 487. This means, first, that the program must be facially neutral as to religion, making aid available without regard to whether the individual will use the assistance at a religious institution. It also means that the program may not be "skewed" in any way toward religion, and may not provide any incentive for recipients to use benefits at religious institutions. Id., 474 U.S. at 487-88; Zobrest, 113 S. Ct. at 2467. An example may help to clarify this point: in a locality in which there is only one provider of a particular social service, and that provider is a church, an individual's decision to redeem a social service voucher at the church could not be considered "genuinely independent and private" so as to obviate Establishment Clause concerns. Finally, we should note that there is some question as to whether special Establishment Clause problems might be posed if, as a practical matter, a "significant portion" of the total aid expended by a state ended up flowing to religious institutions. Compare Witters, 474 U.S. at 488 (finding "important[]" that no "significant portion" of total aid expended flows to religious education) with id. at 491 n.3 (Powell, J., concurring) (rejecting importance of this factor).]

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Commission on Law and Social Action

August 8, 1996

Elana Kagan, Esq.
Office of the Counsel
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Dear Elana,

Here is the letter on religious provisions of the welfare bill, as well as copies of two memoranda on the unconstitutionality of its religious provisions.

Sincerely,

Marc D. Stern

drs

~~Binder 1995~~
File 2/A

AJ Congress

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September 6, 1995

TO: Interested Parties

FROM: Marc D. Stern

RE: RELIGION IN THE DOLE WELFARE BILL

COMMISSION ON LAW AND SOCIAL ACTION

Co-Chairs
Marvin E. Frankel
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Summary of Provisions

Senator Dole's welfare bill (H.R. 4, as modified, see Congressional Record of August 11, 1995, p.12428 ff.), provides broadly that a "state is permitted to contract with charitable, religious or private organizations to provide services or administer programs established under the Act." (§ 102(a)(1)(A)). It goes on to say (§ 102(b)) that they may do so "on the same basis as any other provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries." Moreover, "neither the federal government nor a state "shall discriminate against an organization ... on the basis that the organization has a religious character." (§ 102(c)).

Specifically, the Act would bar the federal government from regulating the organization's "practice and expression of its beliefs" (§ 102(d)(1)), apparently even if those impact on recipients, and it may not require the establishment of separate, secular not-for-profit corporations as a condition of receiving funds, a device which the government has frequently used in the past (*e.g.*, Chapter I programs in education) to insure compliance with the Constitution. Moreover, government cannot require a contractor to remove religious symbols from premises where government funds are disbursed (§ 102(d)(2)(B)). Employers may hire only members of their own faith (§ 102(e)(1)) and they may insist that those workers comply with the teachings of the sponsoring denomination (§ 102(e)(2)(A)). Finally, the Act would appear to prohibit the government from insisting that religious contractors modify their programs to make them more effective, a guarantee not extended to secular groups. (§ 102(d)(1)).

As a nod in the direction of protecting the religious freedom rights of recipients, the Act directs that a state shall provide benefits not less than the value of benefits from a religious organization to anyone with a religious objection to dealing with any funded religious organization. (§ 102((i)). Generally, there can be no discrimination based on religion in the program in admitting beneficiaries if it is based on "religion, religious belief, or refusal to

actively participate in a religious practice." (§ 102(f)). Objections to passive participation, *e.g.*, listening to a sermon or a prayer, apparently count for nothing. Finally, federal funds cannot be used for "any sectarian purpose or activity including sectarian worship or instruction" (§ 103) unless the funds come in the form of vouchers, in which case these restrictions do not apply. And in any event, even these limited protections apply only to certain programs funded under the Act. Religious groups receiving grants under other programs are apparently free to use such funds for purely sectarian purposes. Such funding goes to the heart of the Establishment Clause. There is no statutory provision against a state invoking religious criteria to select religious organizations to run programs on behalf of the state, nor is there any prohibition on using vouchers instead of grants or contracts, thus freeing religious organizations to fund religious activities at government expense. And there is no requirement that religious organizations, even pervasively sectarian ones, be employed only when parallel secular programs exist.

The proposed Act does provide persons who object to the religious character of the organization providing benefits may insist that the state provide an alternative of equal value. (§ 102(i)). It provides no mechanism to enforce this right.

It is fair to question whether this latter provision to protect beneficiaries would be enforceable in the real world. For example, how many welfare recipients will be brave enough to demand that the state set up a separate program (at considerable cost) just for them? Will states do so willingly? Will they do so in ways that make the right meaningful? How will poor people have access to alternate programs not physically accessible to them? How will the poor be protected from retaliation for invoking their rights? Will programs be shaped to conform to religious doctrines (*e.g.*, with regard to sexuality, abortion and alcohol) in ways that intrude on the freedoms of beneficiaries but which will be hard to detect? It is worth noting that the Act creates a special judicial right of action for religious groups to protect their right to non-discrimination under the Act, but it creates no parallel right for welfare beneficiaries, not even an administrative appeal. Who is to see to it that the right created by § 102(i) is meaningful? The Dole bill simply does not say.

Moreover, the ban on religious activity does not mean that agencies receiving funds under the Act cannot engage in such activities, only that they must be paid for with private funds, and that no beneficiary bold enough to protest can be excluded because they refuse to participate in a religious activity. A group can engage in such activities so long as it can fund them separately (and it may even encourage (or worse) beneficiaries to participate until some one is brave enough to protest).

Constitutional Concerns

These and other practical considerations deserve careful scrutiny. For present purposes, I focus on the Act's constitutionality. The central thrust of all of the provisions of the Dole bill is that all religious institutions must be treated equally with their secular counterparts in decisions about allocation of federal funds under the bill. This, of course, is a dramatic departure from current law, which imposes special restrictions on the ability of government to fund religious institutions, a principle that Justice O'Connor, who cast the deciding vote in both *Rosenberger v. Rector*, 115 S.Ct. 2510 (1995) and *Bowen v. Kendrick*, 478 U.S. 589 (1988), reaffirmed in both cases. Indeed, although constitutional scholar Professor Michael McConnell supports the equality principle as the touchstone of national policy on religion, he thinks, as he told the House Judiciary Committee in June, it takes a constitutional amendment to achieve it. He is right on that score. The Dole bill is thus an attempt to amend the Constitution by simple majority vote, and without hearings or sustained debate. To the best of our knowledge, never before has Congress attempted such a broad underwriting of religious activity in social welfare programs.

It is settled that religious social welfare agencies are not barred from receiving government grants. See, *e.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988). In that case, however, the majority drew a sharp line between agencies affiliated with religious groups, but in which religion played no major role in the operation of the groups (which could be funded), and pervasively religious agencies where it did (which could not). The Court held that government could not fund pervasively religious organizations. *Id.* at 610-113.

In *Bowen*, the Court found no evidence on the face of the statute that aid would necessarily flow to pervasively sectarian institutions. It accordingly rejected facial challenges to the "Chastity Act," remanding for detailed findings on the operation of the Act.* The present Act, however, is rife with such evidence. First, even in the wake of the holding in *Bowen*, there is no ban now on non-pervasively sectarian groups getting aid, so that the evident purpose of the Act is to allow pervasively religious groups to be funded. Religious groups are free to practice religious discrimination in hiring, and they are free to insist that even in their private lives employees comply with church teachings. The government may not in any way interfere with the groups' religious practice, or remove religious symbols from premises on which government-funded programs take place. Even if this is not enough to invalidate the Act on its face—and we think it is—it suggests that many constitutionally ineligible groups will participate. The result will be continuous litigation over the Act.

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* The case was ultimately settled with a decree favorable to the plaintiffs. Copies of the settlement can be obtained from AJCongress.

It should also be noted that while the Court has held that religious organizations may engage in religious discrimination even in 'secular' employment, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), it has not addressed the question of whether they may do so if they are receiving federal funds. Judge Posner noted that this was a significant Establishment Clause question (*Pime v. Loyola*, (7th Cir. 1981)). A district court in Mississippi held in a case of a Salvation Army employee fired for practicing witchcraft on the job, that they could not. Most important of all, Justice White, dissenting from the Court's invalidation of aid to parochial schools in *Lemon v. Kurtzman*, 403 U.S. at 671, n.2, added an important caveat to his approval of such schemes—that if the schools practiced religious discrimination, the legislation would to that extent be unconstitutional. If Justice White's minimalist reading of the Establishment Clause required a ban on religious discrimination (as well as a ban on requiring students to attend religious instruction), this is *a fortiori* true of the far stricter prevailing Establishment Clause standards.

Time does not permit a full application of *Lemon*'s still governing tripartite analysis, which would, of course, lead to the invalidation of these provisions. It is appropriate to take note, however, of Justice Stewart's warning—in dissent in the Bible reading case, *School District of Abingtown Twshp. v. Schempp*, 374 U.S. 203, 314 (1962)—that the Establishment Clause prohibits "government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets." The present bill not only fails to abide by that restriction, it affirmatively permits such activity by the convenient fiction of the bookkeeping entry that the activity—which may otherwise be wholly funded by the federal government—is privately funded.

Many, but by no means all, religious social welfare agencies have a proselytizing agenda. Inner city missions, for example, although they do wonderful work, have as their chief purpose the spreading of the word of God. That is not tangential to their mission; it is the heart of it. When the government selects such groups to carry out social welfare projects, and for all that appears from the Dole bill, when it can give them a monopoly on such work, it unconstitutionally "throws the weight of secular authority behind the dissemination of religious tenets."

Rosenberger v. Rector, 115 S.Ct. 2510 (1995) is not to the contrary. There, the Court held on free speech grounds that a public university could not deny student activity funds to a religious publication when it awarded such funds to a vast array of secular publications. The Court held that the use of such funds, which were not tax revenues, from which it thought objecting students could opt out, and in which it was happenstance that religion would benefit, did not establish religion. Indeed, a careful reading of the case suggests that the Court viewed it more as a free speech case than a religious clause case. (These caveats are

particularly emphasized in the crucial concurrence of Justice O'Connor, who it should be remembered was a very reluctant vote for upholding the facial constitutionality of the statute challenged in *Bowen*.)

The Dole welfare bill is funded by obligatory taxes from which there is (alas!) no escape. It permits states to hand over entire portions of the social welfare system to religious groups, apparently even on a selective basis, *i.e.* one religious group will run an entire area's programs. This is surely not the wide open forum at issue in *Rosenberger* and which undergirded the Court's Free Speech and Establishment Clause holdings. And if the *Rosenberger* Establishment Clause holding is taken broadly—and nothing in Justice Kennedy's opinion suggests it should be—to impose an equality principle as between religion and non-religion in every area of the government's programming, an opinion purporting to be solidly rooted in existing Establishment Clause law worked a silent revolution overturning all of the aid to parochial school cases, including *inter alia* cases like *Leutkmeyer v. Kaufman* (S.Ct. 1974) which specifically rejected the claim that if public schools are funded, parochial schools must be.

Finally, it should be noted that many state constitutions impose more severe restrictions on funding of religious institutions than does the federal constitution. Presumably, all of these would be preempted by the Dole bill. So much for returning power to the states.

1= C
1= Clinton
1= welfare reform
1= Marc Stern
1= Mark Palmer
1= Steve Steinberg

AJ Congress

American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, NY 10028-0458
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Office of the Executive Director

December 22, 1995

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On behalf of the American Jewish Congress, I urge you to carry out your promise to veto the ill-conceived welfare reform proposal, which has now passed both Houses of Congress. As you have noted repeatedly, this bill is a mean-spirited attack on the most needy Americans which is inconsistent with our traditions and with improving the life of the poor.

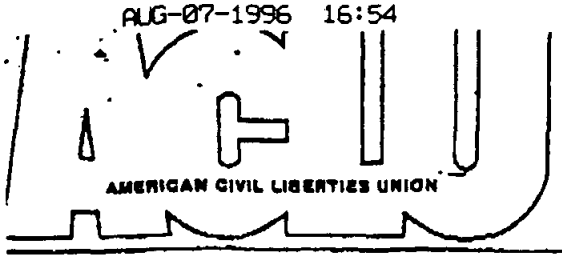
But we believe that the bill should be vetoed as well because it contains provisions which cut a wide swath through the Establishment Clause of the First Amendment. These provisions would require states to provide social services through pervasively sectarian organizations, notwithstanding the unambiguous decision of the United States Supreme Court in Bowen v. Kendrick that such funding violates the Establishment Clause. Paradoxically the bill which purports to grant greater autonomy to states also pre-empts some forty-odd state constitutional provisions prohibiting states from funding religious entities. The changes this bill works in the nation's church-state policy can be achieved only by constitutional amendment, not by simple legislation.

A veto of this bill would vindicate not only the interests of the poor but the integrity of the Constitution.

Sincerely,

Phil Baum

Phil Baum



WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

22 Maryland Avenue, NE Washington, D.C. 20002 (202) 544-1681 Fax (202) 546-0738

TO: Interested Persons

FR: Liz Symonds
Dan Katz
Washington National Office

RE: Church/state issues in the welfare reform bill and the impact of the Cohen Amendment

DATE: September 19, 1995

The Senate version of the welfare reform bill that is now headed for conference contains two sections (102 and 103) regarding welfare services provided by religious organizations. These sections of the bill would explicitly permit the creation of an unprecedented church/government relationship, in which a religious entity could administer a government-funded welfare program (by giving out monthly checks, providing counseling, etc.) in an environment replete with religious symbols.

In an effort to address concern about probable Establishment Clause violations in the implementation of the legislation, the Senate passed an amendment offered by Senator William Cohen (R-ME). The Cohen amendment accomplished two things: (1) it struck language in the original bill that would have prohibited the federal government or a state from requiring a religious organization to form a separate, nonprofit affiliate corporation to administer government welfare programs; and (2) it added language that would exempt a religious organization from eligibility as a welfare provider when the organization's welfare program would not be "implemented consistent with the Establishment Clause of the United States Constitution."

Although the Cohen amendment may have the effect of perhaps decreasing the number of Establishment Clause violations in the implementation of the legislation, the amendment certainly does not remedy the bill's serious First Amendment problems. As Senator Cohen himself recognized, his amendment will not eliminate the potential for as-applied constitutional

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violations.[1]

The ACLU believes that Sections 102 and 103 of the Senate bill must be eliminated in conference. As currently written, these measures create a scheme in which religious and governmental activities in the area of welfare benefits administration could potentially be inextricably intertwined in a manner that could be interpreted as governmental endorsement of religion. To avoid this impermissible entanglement between government and religion, these sections should be deleted.

The combination of a new, block grant approach to the distribution of welfare benefits, coupled with the Senate bill's explicit recognition that religious groups may receive such funding, has the potential to alter fundamentally the manner in which welfare dollars are distributed in this country. Currently, of course, most AFDC benefits are distributed to beneficiaries through state or county welfare offices. They adhere to federal statutory and regulatory requirements that guide program administration in this area.

The Senate bill has the potential to radically transform the traditionally secular nature of government benefits programs, and in some instances permit welfare systems to be run by pervasively sectarian institutions.[2] Even if most states choose to retain their welfare programs as public sector models, the fact that this legislation permits a pervasively sectarian religious organization to administer government welfare programs is extremely troubling. Such a scenario could create enormous confusion on the part of beneficiaries and other members of the public about the relationship between the government and the religious entity administering the program.

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[1] In debate on his amendment, Sen. Cohen stated:

> I think what the Senator from Rhode Island [Chafee] was saying is that the likelihood of a challenge on the basis of the Establishment Clause is less likely by virtue of setting up such a [separate nonprofit] corporation.
>
> You minimize the challenge by creating a corporate entity that is not going to be so heavily influenced or permeated with sectarianism that the court is going to prohibit it from receiving government funding. But each case is decided on an individual basis.

141 Cong. Rec. S13518 (daily ed. Sept. 13, 1995) (statement of Sen. Cohen) (emphasis added).

[2] Nothing in the Senate bill would explicitly prohibit a pervasively sectarian organization from administering a government welfare program. Sen. Cohen raised this issue during debate on his amendment:

> My concern has been that the first amendment may very well be violated if, in fact, we have religious organizations – using the words, once again, of the Supreme Court – that are so permeated with sectarianism that the Court would find that providing them with government funding violates the Establishment Clause.

141 Cong. Rec. S13520 (daily ed. Sept. 13, 1995) (statement of Sen. Cohen).

These problems will be particularly acute for beneficiaries who are not members of a mainstream religion in their jurisdiction. For many members of a religious minority group it will be extremely traumatic to have to collect welfare benefits or participate in welfare-related programs in a religious setting, particularly one that is not of their choosing. It may be hard for them to object to their religious provider and to request an alternate provider (as the bill permits), and they may well fear retaliation (including the future denial of benefits). This is a vulnerable population, and many recipients will not wish to jeopardize their family's welfare benefits by speaking out against a religious provider, especially if the beneficiary is of a faith with few other members in the community.

Description of Provisions of Section 102 of the Senate bill

Section 102 of the Senate bill is modeled closely on S. 842, the Individual Accountability Act introduced by Senator Ashcroft. Section 102 of the Dole legislation contains the following provisions:

General Provisions

1. Religious organizations[3] are permitted to contract with a state[4] to provide services to needy families and children on the same basis as the providers, without impairing the religious character of such organizations.[5]

2. The religious freedom of beneficiaries must not be diminished.

Nondiscrimination Provisions

3. Neither federal nor state government may discriminate against an organization which is a contractor or an applicant for a contractor on the basis that the organization has a religious character. However, a religious organization will not be eligible to participate in a federal welfare program if the program will not be implemented consistent with the Establishment Clause.

4. Religious contractors shall retain independence from government entities, including control over the "definition, development, practice, and expression" of religious beliefs.

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[3] This section also permits charitable and private organizations to provide such services. However, this memorandum will only discuss the implications of this section as it relates to religious organizations.

[4] This section's provisions also cover a religious organization that provides beneficiaries certificates, vouchers or other forms of disbursement.

[5] At a minimum this section will apply to cash assistance benefits (formerly AFDC). It is unclear at this time whether it will apply to other programs in the welfare reform legislation (such as child care and job training).

5. A religious contractor may not be compelled to change its form of internal governance.

6. The government may not require a religious contractor to remove "religious art, icons, scripture or other symbols."

7. Religious organizations may not discriminate against beneficiaries "on the basis of religion, a religious belief, or refusal to participate in a religious practice."

Employment Provisions

8. Religious contractors may require employees "rendering service pursuant to such contract" to obey the "religious tenets and teachings" of the organization. They may also require workers to obey rules forbidding alcohol and drug use.

Limited Audit

9. The provision regarding a limited audit of organizations' funds would create an impermissible entanglement between the government and religious institutions. The provision would permit the government to audit the religious organizations' entire program account, including those funds not received from the government. This entanglement would enable the government to oversee the budgets of religious organizations, threatening their independence.

Remedies

10. A civil cause of action in state court is created for religious organizations whose rights are violated. Both injunctive relief and damages are available.

11. No explicit cause of action is created for beneficiaries. Rather, if they object to the religious character of a contractor, the state must provide them assistance of equal value from an alternative source.

Description of Section 103 of the Senate bill

Section 103 states that no funds provided to organizations to provide services and programs in the areas of cash assistance, child care, and work force development may be spent for any sectarian worship or instruction. However, this section does not apply if the assistance provided is in the form of certificates, vouchers or other kinds of disbursements if the beneficiary may choose where that type of assistance shall be redeemed.

Civil Liberties and Civil Rights Problems Created by These Provisions

The language described above violates important civil liberties and civil rights principles in a number of ways:

1. It makes it possible that state grant money under this Act will be awarded to pervasively sectarian institutions. This makes it almost impossible to separate religious and secular functions in a constitutionally appropriate manner. As the Supreme Court has acknowledged, "Only in the context of aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would knowingly or unknowingly, result in religious indoctrination." Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

It is precisely because of the possibility that government funds could go to pervasively sectarian institutions that we fear that major programmatic changes could occur. There is a greater likelihood that religious proselytizing could occur in such a setting, or that recipients could feel pressured to participate in religious activities in order to receive benefits.

2. We believe that serious Establishment Clause violations will arise when some welfare recipients go to religious agencies distributing government block grant money to receive their payments and see "religious art, icons, . . . or other symbols." Many of them will undoubtedly view these religious symbols as inextricably linked to the government providing them the welfare benefits handed out at this site. As Justice O'Connor noted in her concurrence in Capitol Square Review and Advisory Board v. Pinette[6], 63 U.S.L.W. 4684, 4689 (1995), "[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid." And as Justice Stevens noted in his dissent in that case, "[f]or a religious display to violate the Establishment Clause, I think it is enough that some reasonable observers would attribute a religious message to the State." Id. at 4699.

3. The employment exemption in section 102(e)(2) of the Senate bill should be omitted. Title VII of the Civil Rights Act of 1964 already exempts religious organizations from its general prohibition of religious discrimination in employment.[7] It is thus sufficiently broad -- in our view already too broad -- and needs no further amendment in order to protect the free exercise rights of religious employers. Indeed Title VII is already so protective of their rights in this area that the Supreme Court upheld the dismissal of a janitor who worked for the

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[6] This case admittedly involved private religious displays on public property, but the Court's general analysis of the constitutional pitfalls of government endorsement of religious symbols is nonetheless relevant.

[7] Section 702 of the Civil Rights Act statutes that "[t]his subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Mormon Church, who was discharged because he did not qualify for a "temple recommend."[8] Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

This attempt to expand the religious exemption in Title VII for religious organizations contracting with governments to provide welfare benefits again raises the possibility that these government funds will be given to pervasively sectarian institutions. It is possible that this employment exception was written to accommodate just such religious organizations.

For many reasons we strongly oppose this new exception to the civil rights laws that is proposed in the Senate welfare bill. First, as stated above, there has been absolutely no demonstrated need that current civil rights protections have been insufficient in protecting the rights of religious employers. Second, it is unwise to amend complex civil rights legislation in the context of the far greater debate on welfare reform. Congressional hearings are essential before changes in this area are contemplated. Committee consideration, with vigorous debate about the pros and cons of changing the civil rights statutes, are needed. Here, on the contrary, this language was inserted after the Finance Committee mark-up of the welfare bill. Thus, a potentially dangerous precedent creating an exception to civil rights laws may be passed by the full Senate without any consideration by the Finance Committee or by the Senate Committee with jurisdiction over civil rights laws.

Finally, the language in section (e)(2) is ambiguous. It is unclear exactly how permitting a religious employer to require an employee to "adhere to the religious tenets and teachings of [a religious] organization" differs in practical effect from what that employer could currently do under Title VII as currently in effect.

We also oppose the language in this paragraph because it could be interpreted to permit religious employers to control the off-the-job lifestyles of workers by forcing them to obey "rules forbidding the use of drugs or alcohol." While the ACLU of course believes that prohibitions against drug and alcohol use on-the-job are necessary and appropriate, we believe that these prohibitions should not extend to employees' personal lives when there is no effect on job performance.

4. The remedies provisions in this legislation are fundamentally flawed. Incredibly, while creating a private right of action for religious organizations, it fails to do so for beneficiaries whose rights are violated. Thus, the bill's assurances that it is not "diminishing the religious freedom of beneficiaries of assistance" ring hollow, as no meaningful remedy is provided.

Instead, a beneficiary who objects to the religious nature of a welfare program is given the general right to receive an equal amount of assistance from an alternative source. The complaint mechanism to achieve this is not articulated. No forum for deciding these claims is

[8] A temple recommend is a certificate that the holder is a member of the Church. It is only issued to those who observe the Church's rules (such as regular church attendance, tithing, and abstinence from alcohol and tobacco).

Brent Walker

1. Quarterly religion coalition mtg This wkn –
Wed 10:00 a.m.

2. Letter – rel. provision of welfare. [Ashcroft amend.
Like op. to make presentation.
In next few wks – maybe sit down + talk.

PEOPLE FOR THE AMERICAN WAY ACTION FUND

Your Voice Against Intolerance

FAX COVER SHEET

TO: ELENA KAGAN

FROM: KATHI WESTCOTT

DATE: 8-6-96 **FAX #:** 456-1647

 # OF PAGES: 4 **CODE:** _____
(including cover)

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CONFERENCE REPORT ON H.R. 3734, PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (House of Representatives - July 30, 1996)

SEC. 104. SERVICES PROVIDED BY CHARITABLE, RELIGIOUS, OR PRIVATE ORGANIZATIONS.

(a) **In General**:

(1) **State options**: A State may--

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) **Programs described**: The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title IV of the Social Security Act (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that--

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) **Religious Organizations**: The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) **Nondiscrimination Against Religious Organizations**: In the event a State exercises its authority under subsection (a), religious organizations are

eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character

(d) **Religious Character and Freedom**:

(1) **Religions organizations**: A religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) **Additional safeguards**: Neither the Federal Government nor a State shall require a religious organization to--

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) **Rights of Beneficiaries of Assistance**:

(1) **In general**: If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) **Individual described**: An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance

under a program described in subsection (a)(2).

(f) **Employment Practices**: A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1a) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2).

(g) **Nondiscrimination Against Beneficiaries**: Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) **Fiscal Accountability**:

(1) **In general**: Except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of such funds provided under such programs.

(2) **Limited audit**: If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit.

(i) **Compliance**: Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) **Limitations on Use of Funds for Certain Purposes**: No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

(k) **Preemption**. Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

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J. Brent Walker
General Counsel

August 5, 1996

Elena Kagan, Esq.
Office of White House Counsel
130 Old Executive Office Building
Washington, DC 20500

Dear Elena:

As you may know, a number of religious and civil liberties organizations opposed the welfare bill on religious liberty grounds, as well as on policy grounds. I have enclosed a short briefing packet titled, *The "Charitable Choice" Provisions: Bad for Churches, Religious Freedom and States' Rights.* This booklet, along with the executive summary in the front, sets forth our opposition to the so-called "Ashcroft Amendment" allowing public money to go *directly* to pervasively sectarian religious organizations for religious purposes. I hope you find it helpful.

I bring this to your attention because of the president's promise to seek curative legislation in the 105th Congress. We are very interested in having the repeal of the Ashcroft Amendment included among the other provisions you will seek to deal with at that time.

In any case, we would like to be able to discuss this issue with you and other appropriate administration officials sometime between now and then.

Thank you for your attention to this matter.

Yours very truly,

J. Brent Walker

JBW:cb
Enclosure

Alliance of Baptists
American Baptist Churches in the U.S.A.
Baptist General Conference
Cooperative Baptist Fellowship

National Baptist Convention of America
National Baptist Convention U.S.A., Inc.
National Missionary Baptist Convention
North American Baptist Conference

Progressive National Baptist Convention, Inc.
Religious Liberty Council
Seventh Day Baptist General Conference
Southern Baptist state conventions & churches

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LEGISLATIVE BRIEFING PACKET

The "Charitable Choice" Provisions in the Welfare Bill:

A Burden on State Governments and Individual Religious Freedom

The Working Group for Religious Freedom in Social Services

The "Charitable Choice" Provisions in the Welfare Bill:
A Burden on State Governments and Individual Religious Freedom

EXECUTIVE SUMMARY

The "Charitable Choice" provisions were signed into law as part of the Welfare Reform legislation passed by the 104th Congress. These provisions pose particular problems for state governments and the religious liberty rights of taxpayers and social service beneficiaries.

The "Charitable Choice" provisions would force state governments to enter into contracts to provide taxpayer-funded social services with, and engage in government oversight of, "pervasively sectarian" religious institutions – activity that the U.S. Constitution and many state constitutions forbid. States would be forced to enter into such contracts under threat of lawsuit. If a state chooses to abide by the Constitution and refuse to fund a certain religious institution, "Charitable Choice" provides the religious institution with a statutory lawsuit against the state. If the state chooses to fund the institution, it would open itself up to constitutional challenges. Therefore, a state would be subject to litigation no matter what its decision.

The delicate balance between church and state devised by the Founders and embodied in the First Amendment would be greatly disrupted by the "Charitable Choice" provisions. The Establishment Clause of the Constitution was intended to protect the religious liberty of all Americans and allow religion to operate free from government coercion or control. Thus, the Supreme Court has ruled that the government cannot fund or entangle itself with pervasively sectarian religious institutions or programs. In direct contradiction to this caselaw, "Charitable Choice" would authorize any religious institution to claim "discrimination" if the institution is denied government funds because of its pervasively sectarian nature.

"Charitable Choice" also permits religious institutions to discriminate in employment against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Congress should not authorize such government-funded religious discrimination. Beneficiaries of government health or social service programs would also suffer violations of their religious liberty rights. "Charitable Choice" fails to provide beneficiaries with any notice of their right to object to their assigned religious provider.

Finally, "Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to become dependent on government dollars and subject to government oversight and regulation. For these reasons, many religious individuals and denominations have spoken out in opposition to "Charitable Choice."

The "Charitable Choice" Provisions in the Welfare Bill:
A Burden on State Governments and Individual Religious Freedom

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The Working Group for Religious Freedom in Social Services

Member Organizations:

American Baptist Churches USA ι American Civil Liberties Union ι American Council on Education
American Humanist Association ι American Jewish Committee ι Americans for Democratic Action
Americans for Religious Liberty ι Americans United for Separation of Church and State
Anti-Defamation League ι B'nai B'rith ι Baptist Joint Committee on Public Affairs
Church of the Brethren ι People for the American Way ι Presbyterian Church USA
The Rabbinical Assembly ι Religious Action Center of Reform Judaism
Unitarian Universalist Association ι Women's American ORT

For more information call: Dan Katz (202) 675-2306 or Julie Segal (202) 466-3234 ext. 208

SECTION
A

A BURDEN ON STATES

The Federal "Charitable Choice" Scheme:

A Burden on States

The "Charitable Choice" provisions in the Welfare Reform bill will entangle state governments in a web of litigation and override state constitutional protections of religious liberty. The "Charitable Choice" provisions accomplish this by creating a new cause of action that religious institutions can bring against state governments for "discriminating" or denying an institution government funding based on its "religious character." However, under the U.S. and many state constitutions, state governments *must* consider an institution's "religious character" when deciding whether or not to provide funding.

The Supreme Court has ruled, in a series of decisions, that government funding and oversight of "pervasively sectarian" institutions, such as houses of worship, would violate the Establishment Clause of the First Amendment.[1] In addition, numerous state constitutions specifically prohibit such funding in order to protect the religious liberty rights of taxpayers and the fiscal autonomy religious institutions.[2] For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."[3]

"Charitable Choice" will clog state courts with a litigation explosion against state governments. The legislation presents state governments with a "Hobson's Choice" in deciding whether to contract with pervasively sectarian religious organizations to provide government-funded social services. With Charitable Choice in place, the state will be subject to a lawsuit no matter its decision. If a state government declines to contract with pervasively sectarian religious institutions because it determines that the funding of such entities would violate the Establishment Clause, then it will face a multitude of lawsuits from these institutions claiming "religious discrimination" under the "Charitable Choice" provisions. If a state decides to contract with pervasively sectarian institutions to avoid these "Charitable Choice" statutory causes of action, then the state will be sued over the Constitutional violation.

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[1] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[2] For a complete list of these state constitutional provisions, see "State Constitutional Provisions Violated by Charitable Choice" in this section.

[3] Missouri Constitution, Article I, Section 7.

Despite an apparent "non-preemption" clause, many state constitutional provisions that protect religious liberty will be preempted by the Federal "Charitable Choice" scheme. The Charitable Choice provisions contain the following section:

> (k) PREEMPTION: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of *State* funds in or by religious organizations.

(Emphasis Added). The key word in this preemption clause is the word "State" on the third line. Therefore, the only state constitutions that will not be preempted are those that restrict the diversion of *state funds* to sectarian institutions. This raises two issues: 1) the block-granted welfare funds will likely be considered *federal* -- not state -- funds; and 2) most of the state constitutional provisions that contain a funding prohibition restrict any "public" funds – including federal funds – from being diverted to sectarian institutions. Thus, *meaningless* state constitutional provisions will not be preempted, but those that will impact the Charitable Choice scheme could be – and would be under the "actual conflict" doctrine of inferred federal preemption.[4]

The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." State governments would be unable to ensure that beneficiaries of assistance, who in many cases will not be the same religion as the institutions providing services, are not subject to undue proselytization by religious institutions that contract to provide services. The "Charitable Choice" provisions explicitly prevent state governments from ensuring that government-funded social services are provided in areas that do not have excessive sectarian "art, icons, scripture" and "other symbols" on the wall. Furthermore, although section (j) of the provisions ostensibly prohibit the use of government funds for "sectarian worship, instruction, or proselytization," this section is unenforceable, because the government is not permitted to monitor the religious messages of pervasively sectarian institutions.[5]

"Charitable Choice" also renders states powerless to stop religious institutions from engaging in religious employment discrimination against workers who are paid with government funds and are exclusively working on government-funded social service programs. Although states may have law or constitutional provisions that prohibited government-funded religious employment discrimination, the "Charitable Choice" scheme overtly extends the Title VII employment discrimination exemption for private religious institutions to *government-funded* religious institutions and employees paid with taxpayer funds.

---

[4] The state constitutional provisions will likely be found to "frustrate the purposes" of the federal Charitable Choice scheme. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78 (1987); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

[5] *Aguilar v. Felton*, 473 US 402, 412-13 (1985).

State Constitutional Provisions Violated by "Charitable Choice"

The "Charitable Choice" scheme would violate the following state constitutional provisions that protect the religious liberty rights of taxpayers and the fiscal autonomy of religious institutions. The Federal "Charitable Choice" legislation will preempt many of these state constitutional protections:

Arizona Constitution: Art. II, § 2, "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

Art. IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

California Constitution: Art. XVI, § 5, "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination. . . ."

Colorado Constitution: Art. V, § 34: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to . . . any denominational or sectarian institution or association."

Florida Constitution: Art. I, § 3: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

Georgia Constitution: Art. I, § 2, p. VII: "No money shall ever be taken from the public treasury directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."

Hawaii Constitution: Art. VII, § 4: "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of [the Establishment Clause] of this constitution."

Idaho Constitution: Art. IX, § 5: "Neither the legislature, nor any county, city, town, township, school district, or other public corporation, shall ever make an appropriation, or pay from any public fund or moneys whatever, anything in aid of

any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian, or religious denomination whatsoever . . . provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, liens, or other transactions."

Illinois Constitution: Art. X, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or any other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian denomination whatever."

Indiana Constitution: Art. I, § 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

Massachusetts Constitution: Art. XLVI, § 2: ". . . no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

Michigan Constitution: Art. I, § 4: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary . . . ."

Minnesota Constitution: Art. I, § 16:"[No] money [shall] be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries."

Missouri Constitution: Art. I, § 7: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such . . . ."

Art. IX, § 5: "Neither the general assembly nor any county, city, town, township, school district, or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose. . . ."

Montana Constitution: Art. X, § 6: "(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose, or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to nonpublic education."

Nevada Constitution: Art. II, § 10: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes."

New Hampshire Constitution: Bill of Rights, Art. 83: "[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."

Oklahoma Constitution: Art. II, § 5: "No public money or property shall ever be appropriated, applied, donated, or used directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

Oregon Constitution: 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."

Pennsylvania Constitution: Art. III, § 29: "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association: Provided, that appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards an for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology."

South Dakota Constitution: Art. VI, § 3: "No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

Art. VII, § 16: "[T]he state or any county or municipality within the state [shall not] accept and grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes . . . ."

Texas Constitution: Art. I, § 7: "No money shall be appropriated or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes."

Utah Constitution: Art. I, § 4: "There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or

property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

Virginia Constitution: Art. I, § 16: "And the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax . . . for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please."

Art. IV, § 16, "The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association."

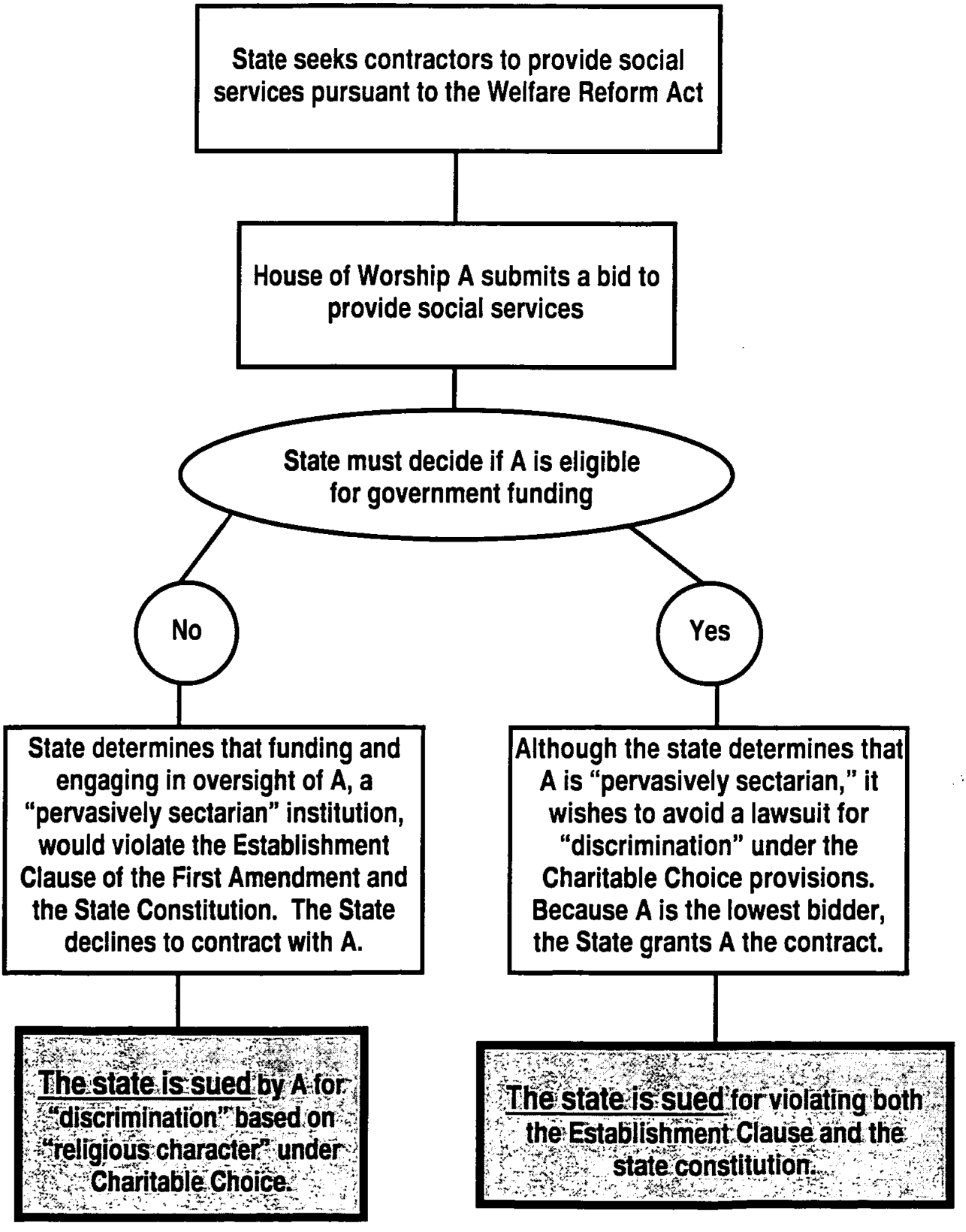
Washington Constitution: Art. I, § 11: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . ."

West Virginia Constitution: Art. III, § 15: "[T]he Legislature shall not . . . confer any peculiar privileges or advantages of [sic] any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax . . . for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please."

Wisconsin Constitution: Art. I, § 18: "[No] money [shall] be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Wyoming Constitution: Art. 1, § 19: "No money of the state shall ever be given or appropriated to any sectarian or religious society or institution."

ANATOMY OF A LAWSUIT:
The Charitable Choice Provisions in Operation



SECTION
B

GROUPS OPPOSING THE "CHARITABLE CHOICE" PROVISIONS AND LETTERS FROM RELIGIOUS LEADERS

Religious, Educational, Health, and Civil Liberties Organizations that oppose the "Charitable Choice" provisions

American Baptist Churches USA
American Civil Liberties Union
The American Ethical Union
American Federation of State, County and Municipal Employees
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Children's Healthcare is a Legal Duty (CHILD, Inc.)
Church of the Brethren, Washington Office
General Board of Church and Society, The United Methodist Church
Hadassah, W.Z.O.A.
National Black Women's Health Project
National Council of Jewish Women
National Education Association
NOW Legal Defense and Education Fund
People for the American Way Action Fund
Presbyterian Church USA
Union of American Hebrew Congregations
Unitarian Universalist Association, Washington Office
United Church of Christ, Office for Church in Society
Wider Opportunities for Women
The Women and Poverty Project of Wider Opportunities for Women
Women of Reform Judaism, The Federation of Temple Sisterhoods
Women's American ORT
Women's International League for Peace and Freedom
The Workmen's Circle / Arbeter Ring
Youth Law Center

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202-544-4226 • FAX: 202-544-2094

CompuServe: 70420,54 • Internet: Baptist_Joint_Committee.parti @ Ecunet.org

J. BRENT WALKER
General Counsel

April 1, 1996

Dear Senator:

The Baptist Joint Committee strongly opposes the inclusion of Senator Ashcroft's "Charitable Choice" provisions in any kind of legislative vehicle.

The so-called "Charitable Choice" provisions are a frontal assault on the First Amendment's Establishment Clause which would provide direct, public funding to pervasively sectarian institutions. As you may know, the Supreme Court has approved government funding of religiously affiliated organizations, such as Catholic Charities, so long as tax dollars do not pay for proselytizing service beneficiaries (*Bowen v. Kendrick*, 487 U.S. 589 (1988)). The Ashcroft language would allow state-funded social services to be provided in houses of worship, the display of religious icons where services are provided, and religious discrimination in the employment of social workers.

The potential for harm to the Constitution is apparent, but the Ashcroft language would hurt churches as well. By accepting government funds, sectarian service providers will be open to government audits and whatever other meddling the state can get away with on threat of cancelling funding. Religious institutions will also suffer when they find that their new dependence on public money compromises their ability to criticize the government. How supportive of the civil rights movement would churches have been if they had been afraid of losing their funding?

As Baptists, we have a long history of defending religious liberty and freedom of conscience. Religion is a voluntary, personal matter which must not be coerced. These provisions would force some individuals to expose themselves to proselytizing influences in order to obtain social services. No mechanism is included to inform beneficiaries of their right to an alternate provider, and no redress is guaranteed to a service recipient who is discriminated against on the basis of religion.

In short, Ashcroft's legislation is less about providing the best social services than it is about funnelling public money to inappropriate uses. This we oppose.

Sincerely,

J. Brent Walker

JBW:pk

Alliance of Baptists
American Baptist Churches in the U.S.A.
Baptist General Conference
Cooperative Baptist Fellowship
National Baptist Convention of America
National Baptist Convention U.S.A., Inc.
National Missionary Baptist Convention
North American Baptist Conference
Progressive National Baptist Convention, Inc.
Religious Liberty Council
Seventh Day Baptist General Conference
Southern Baptist state conventions & churches

Church of the Brethren Washington Office

110 Maryland Avenue, N.E. Box 50 Washington, DC 20002 202 546 3202

March 28, 1996

Dear Senator:

On behalf of the Church of the Brethren, I write to urge you to oppose the "Charitable Choice" provisions which are expected to be offered by Senator John Ashcroft in his effort to provide federal assistance to religious social service agencies.

The proposed provisions would very likely result in competitive and divisive disputes among religious organizations competing for federal funding for community social service programs. If this approach were adopted, essential funding would be directed toward religious organizations with the strongest social and political influence in a given community. Dependence on federal funding for religious missions would have an extremely adverse effect upon these much-needed social programs.

In addition to this troublesome aspect of Senator Ashcroft's proposal, we are also quite concerned about the manner in which the provisions would violate the Constitution's establishment clause. Sen. Ashcroft's proposal would relocate government-funded social service programs to pervasively sectarian religious institutions, such as houses of worship. If this were the case, federal funds could be used in a religious settings in which religious symbols were prominently displayed and where religious proselytizing could take place.

In 1989, the Church of the Brethren Annual Conference—the highest authoritative body in our denomination—adopted the statement, "No Force in Religion: Religious Liberty at the 21st Century." In this important policy statement our church declared, "We believe it essential to avoid government sponsorship of a particular religious body and to assure sensitivity to those who are religious minorities. Cooperation between the state and religious bodies should not involve official recognition or confer special status upon a particular religious body."

I urge you to carefully consider the manner in which Sen. Ashcroft's proposed provisions would seriously jeopardize the essential separation of church and state and would have a devastating effect upon many cherished principles of our American tradition of religious liberty.

Thank you for considering our views on this important and timely concern.

Sincerely yours,

Timothy A. McElwee

Rev. Dr. Timothy A. McElwee
Director

838 Fifth Avenue, New York, NY 10021-7064
212 650-4050, Fax 212 650-4059

Ellen Y. Rosenberg
Executive Director

April 1, 1996

Dear Senator:

I am writing in behalf of Women of Reform Judaism, the Federation of Temple Sisterhoods, comprised of over 100,000 women in 600 affiliated groups nationwide, in opposition to Senator Ashcroft's "Charitable Choice" provisions. We oppose the "Charitable Choice" provisions because they present many problems of constitutionality and impracticability.

The "Charitable Choice" provisions fly in the face of the Establishment Clause of the First Amendment of the Constitution because they would direct government funds to "pervasively sectarian" religious institutions (such as houses of worship) for social service programs. By allowing the furnishing of social services in houses of worship, with the right to display religious symbols in areas where the government-funded services are provided, the "Charitable Choice" provisions enable these institutions to expose beneficiaries to religious activities and missionizing. This legislation would also grant all religious institutions the right to be eligible to contract with a state to deliver social services and would prevent states from requiring them to do so in a religion-free milieu.

We are also distressed by the explicit discrimination permitted by the "Charitable Choice" language. The exemption from the prohibition on religious discrimination in hiring granted to religious institutions in Title VII of the federal civil rights law should not be expanded to include employees hired to work on social service programs funded by the government. This bill would expand the exemption to include such employees and would moreover permit religious organizations to require that employees follow the religion of the institution.

In many communities religious institutions already provide social services with private funds. Indeed, our local Sisterhoods are active in community food programs, at shelters for homeless people and those for battered women and in countless community education programs. The autonomy and freedom of the churches, synagogues and mosques involved in social service programming could well be harmed by dependence on federal funding.

Deeply rooted in the religious values and prophetic mandate of our tradition, Women of Reform Judaism takes this opportunity to speak out in defense of the

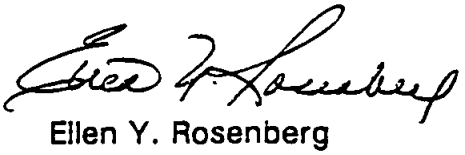
Founded January 21, 1913

15 Countries, 600 Sisterhoods, [illegible] Members

Women of Reform Judaism is an affiliate of the Union of American Hebrew Congregations, the World Union for Progressive Judaism, works on behalf of the Hebrew Union College–Jewish Institute of Religion, and is the founder of the Jewish Braille Institute of America, Inc.

Constitution and of religious liberty. We urge you not to undermine America's unique and valued religious freedoms - we urge you to oppose the "Charitable Choice" provisions.

Sincerely yours,



Ellen Y. Rosenberg
Executive Director

WASHINGTON OFFICE
NATIONAL MINISTRIES DIVISION

PRESBYTERIAN CHURCH (USA)

Dear Senator, May 3, 1996

The "Charitable Choice" provision as introduced by Senator Ashcroft, would harm religion; the religious liberty of taxpayers; social service beneficiaries; and States' rights. The General Assembly of the Presbyterian Church (USA) has historically supported the religious liberty of all Americans and the right of religion to operate free from government coercion or control.

In a 1988 policy statement entitled; **"God Alone Is Lord of the Conscience"**, the General Assembly noted that under the Free Exercise clause the church should be free of both government interference and government regulation in ordering its life and activity, except where truly compelling government interests are at stake. When government appropriates funds for a constitutionally permitted social service to citizens and structures in such a way that private agencies are permitted to act as agents for government in the delivery of the service, we believe that churches should be eligible to receive such funds, but with significant conditions that do not jeopardize the right of the church to control its religious affairs or impose its own doctrine on others from the general public who may come to it for such services.

When public funds come to the church, the area of permissible government regulation of the church's activity is widened; and the church's right to structure its activity to reflect its religious character and purpose is narrowed. Public funds require public accountability and may not be used in ways that advance or support religion, whether or not in the context of charitable service.

The church is not obligated to accept public funds to support its works of humanitarian service and indeed may deem the necessary conditions too harsh to meet. There is no constitutional right to receive such public funds; their denial in order to avoid palpable infringement of the establishment prohibition does not itself constitute a burden on the free exercise of religion. The church may initiate service ministries and operate service agencies, either for its own adherents or for the public, without governmental intervention and regulation when it uses its own resources to do so. When it wishes to use public funds for serving public needs, the church should understand that it gives implied consent to necessary and proper governmental regulation and supervision, and to the civil compact concerning the organic relationship between church and state.

"Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to be subject to government oversight and regulation. The Charitable Choice provision should be defeated.

Sincerely,

Elenora Giddings Ivory

Rev. Elenora Giddings Ivory
Director, Washington Office
Presbyterian Church (USA)

110 Maryland Avenue, N.E. • Washington, DC • 20002 • (202) 543-1126

Unitarian Universalist Association of Congregations

2026 P Street, N.W., Washington, D.C. 20036
(202) 296-4672 fax (202) 296-4673
e-mail: uuawo@aol.com

Washington Office
for Social Justice

May 7, 1996

Dear Senator:

I write to express the opposition of the Unitarian Universalist Association to Senator John Ashcroft's "Charitable Choice" provisions to any public health or social service bill.

The Unitarian Universalist Association stands firmly behind the First Amendment. Senator Ashcroft's "Charitable Choice" provisions would undermine that amendment in several disturbing ways. It would also cause a great deal of trouble if it were implemented in a local community.

For instance, the provisions would permit government social services to be provided in houses of worship. This would mean the government's choosing to fund some religious institutions in a community, and not others--sending funds, for instance, to the local Baptist congregation but not to the Presbyterian one. This would inevitably lead to tensions between church leaders and legislators, and result as well in tensions between various religious groups. It would also cheapen the faith of every religious congregation, by necessitating that some people live out the mandate to feed the poor and clothe the naked by giving generously from their own resources, while others could sit back and let the government provide services under the apparent auspices of the congregation.

Equally disturbingly, the provisions would grant an explicit right for contractors to display religious symbols in areas where government services were provided. This might lead recipients of services to feel discomfort or to feel religiously devalued. If, for instance, a Christian recipient received services in a Hindu shrine, she or he might feel uncomfortable with the unfamiliar imagery and icons.

Also of grave concern is the fact that the provisions allow religious contractors to discriminate in all areas of employment, including the off-the-job conduct of employees. If, for instance, a Muslim House of Worship were funded to provide services, that Mosque could demand that a Christian employee pray to Allah five times per day. Needless to say, the Christian might very likely feel that such enforced prayer was a violation of his or her religious and civil liberties.

On behalf of Unitarian Universalists across the country, I urge you to refuse to support Senator Ashcroft's "Charitable Choice" provisions on any bill.

With warmest wishes,

Meg A. Riley

The Rev. Meg A. Riley
Director, Washington Office for Faith In Action

Nan Rich
National President

April 1, 1996

Dear Senator:

On behalf of the 90,000 members of the National Council of Jewish Women (NCJW), I am writing to urge you to oppose the inclusion of Sen. John Ashcroft's (R-MO) "Charitable Choice" provisions in any public health or social services legislation. These provisions, which would permit states to contract government-funded social services to pervasively sectarian religious institutions, are in clear violation of the First Amendment's Establishment Clause. These "Charitable Choice" provisions would pose a direct threat to our nation's longstanding commitment to the separation of religion and state and the preservation of religious liberty.

NCJW believes that the "Charitable Choice" provisions would promote religious discrimination and the infringement of religious liberty. These provisions explicitly grant a right to religious contractors to provide government services in a house of worship while allowing them to display religious "art, icons, scripture" and "other symbols" where the government-funded services are provided. As a result, beneficiaries of government services would be exposed, often unwillingly, to a church or synagogue's religious beliefs, directly imposing on the individual's religious liberty. These provisions would also allow contractors to engage in religious discrimination against employees who are paid by government funds. Although religious organizations are currently granted a religious discrimination exemption under Title VII of the federal civil rights law, such an exemption should not apply to employees paid through government contracts or funds.

One intent of the "Charitable Choice" provisions is to encourage religious institutions to provide social services in their communities. Many churches and synagogues already provide these services with private funds. NCJW believes that contracting with religious institutions to provide government services with public funds would create the dangerous precedent of government funding of religion and government-sanctioned infringement of religious liberty.

The National Council of Jewish Women strongly believes that religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in our democratic society. As such, we urge you to oppose Sen. Ashcroft's "Charitable Choice" provisions.

Sincerely,

Nan Rich
National President

National Council of Jewish Women • 53 West 23rd Street, 6th Fl. • New York, NY • 10010 • (212) 645-4048 • Fax (212) 645-7466

General Board of Church and Society of The United Methodist Church
100 Maryland Avenue, N.E., Washington, D.C. 20002 • (202) 488-5600

May 10, 1996

Dear Senator:

Senator John Ashcroft has tried to attach the "Charitable Choice" provisions to various public health and social service bills. We believe that, if signed into law, such provisions would threaten the taxpayers' religious freedom and would set a precedent by promoting a specific religion with the use of tax dollars.

The United Methodist Church clearly states its stance on the use of public funds for churches in ***The Book of Resolutions***, p. 469. It states that churches "should not expect all taxpayers, including those who adhere to other religious belief systems, to provide funds to teach religious views with which they do not agree."

The Ashcroft proposal would disrupt the balance between church and state as embodied in the First Amendment. The "Charitable Choice" provisions would permit religious institutions to discriminate against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Further, the proposal does not provide adequate protection for the religious liberty of social service beneficiaries. We believe that the "Charitable Choice" provisions would place at risk the freedom and autonomy that religion has enjoyed in the United States.

As people of faith and freedom, we urge you to oppose any attempts that are antithetical to the American ideal of religious liberty.

Sincerely,

Dr. Thom White Wolf Fassett
General Secretary

TWWF/eyr

SECTION
C

CONSTITUTIONAL AND POLICY ANALYSIS

The Working Group for
Religious Freedom in Social Services

Constitutional and Policy Analysis of the "Charitable Choice" Provisions

The "Charitable Choice" provisions, which were passed as Section 104 of H.R. 3734, the welfare reform bill, present many constitutional and policy problems. This memorandum will outline the dangers the provisions pose to state governments, the religious liberty rights of beneficiaries of assistance, and the mission of religious faiths.

Voices from across the political spectrum have criticized these provisions for the policy problems they present. Organizations ranging from the American Civil Liberties Union to the Institute for Justice have questioned the constitutionality of "Charitable Choice."

The "Charitable Choice" Provisions Violate the Constitution's Establishment Clause

The Charitable Choice provisions create a new federal right that religious institutions will be able to enforce in state court. The provisions authorize religious institutions to sue a state government (or the federal government) for "discrimination" if the state denies the institution a contract to provide social services because of the institution's "religious character." However, as will be explained below, both the U.S. Constitution and many state constitutions require governmental entities to examine the religious character of an institution before declaring it eligible for government funding. Under Charitable Choice, such compliance with constitutional law will now subject states to litigation.

Current law permits "religiously affiliated" organizations, such as Catholic Charities, to provide social services with government funds. These "religiously affiliated" organizations receive government grants for social work because they are not "pervasively sectarian," and thus government funding and oversight of such organizations does not *per se* raise an Establishment Clause violation. However, the Supreme Court has ruled that "pervasively sectarian" institutions, such as houses of worship, cannot receive taxpayer dollars because government funding and monitoring of these institutions would violate the Establishment Clause.[1] The "Charitable Choice"

[1] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988). The *Bowen* Court explained that "[o]nly in the context of

provisions throw off this careful balance of current law, by granting *any* religious institution a statutory *right* to receive funding from the government – whether "pervasively sectarian" or not.

It is clear from the language of the Charitable Choice provisions that it will result in unconstitutional government funding and monitoring of houses of worship and other "pervasively sectarian" institutions. In various cases, the Supreme Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission.[2]

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where government-funded services are provided; 3) allow religious contractors to discriminate against employees based on their religious beliefs -- including employees paid with government funds who work on taxpayer-funded programs.

Furthermore, Section (j), "Limitation on Use of Funds for Certain Purposes," which purports to prohibit the use of government contract funds for "sectarian worship, instruction, or proselytization" is absolutely *unenforceable*. The Supreme Court has made it clear that the government may not monitor the internal religious messages of pervasively sectarian institutions.[3] Such monitoring and oversight would violate religion's autonomy from government and constitute excessive entanglement.

Another entanglement problem with the "Charitable Choice" provisions is that it explicitly subjects religious institutions to government audits and financial regulations. Such regulatory intrusion by the government into a pervasively sectarian institution's financial books would violate the Constitution.[4]

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aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would knowingly or unknowingly, result in indoctrination." *Id. See also Grand Rapids School District v. Ball*, 473 U.S. 373, 384 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[2] *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids*, 473 U.S. at 384 n.6; *Hunt*, 413 U.S. at 743; *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

[3] *Aguilar v. Felton*, 473 U.S. 402, 412-13 (1985).

[4] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Additionally, the "Charitable Choice" provisions raise the constitutional issue of religion acting in the place of government. For example, a state could contract with a religious denomination for the administration of AFDC benefits in a certain geographical area. Thus, the religion could evaluate and determine welfare eligibility and administer and distribute cash assistance – essentially acting as an arm of government. The Supreme Court has held that even the *appearance* of such joint authority by religion and the state is unconstitutional.[5]

The Provisions Authorize Employment Discrimination Based on Religion

The "Charitable Choice" provisions would allow a religious organization to engage in religious discrimination against employees who are being paid with taxpayer funds. Although religious organizations are currently granted an exemption from the prohibition on religious employment discrimination in Title VII of the federal civil rights law, this exemption should not extend to employees who are hired to work on, and are paid through, government grants or contracts.

"Charitable Choice" explicitly extends the Title VII exemption to religious institutions and programs that are funded with taxpayer dollars. Such government-funded religious employment discrimination would raise violations of both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

"Charitable Choice" Does Not Protect Beneficiaries' Religious Liberty Rights

The "Charitable Choice" provisions do not provide adequate protection for the religious liberty of social service beneficiaries. Under the legislation, a state could completely shift government-funded social services for a certain geographic area or a specific social service to a religious denomination. This, of course, would lead to innumerable violations of the religious liberty rights of beneficiaries who are assigned to religious organizations to receive social service benefits and services -- especially those beneficiaries whose religious beliefs will be different than that of the provider.

Despite these obvious problems, the legislation does not provide for notice to be given to beneficiaries informing them of their right to request an alternative provider of services. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits. Furthermore, as noted above, state governments will be constitutionally prohibited from enforcing the prohibition on the use of

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[5] *Larkin v. Grendel's Den*, 459 U.S. 119 (1982).

funds for "sectarian worship, instruction, or proselytization."[6]

The Federal "Charitable Choice" Provisions Trump State Constitutional Rights

Despite an apparent "non-preemption" clause, many state constitutional provisions that protect religious liberty will be preempted by the Federal "Charitable Choice" scheme. The Charitable Choice provisions contain the following section:

> (k) PREEMPTION: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of *State* funds in or by religious organizations.[7]

The key word in this preemption clause is the word "State" on the third line. Therefore, the only state constitutions that will not be preempted are those that restrict the diversion of *state funds* to sectarian institutions. This raises two issues: 1) the block-granted welfare funds will likely be considered *federal* -- note state -- funds; and 2) most of the state constitutional provisions that contain a funding prohibition restrict any "public" funds – including federal funds – from being diverted to sectarian institutions. Thus, *meaningless* state constitutional provisions will not be preempted, but those that will impact the Charitable Choice scheme could be – and would be under the "actual conflict" doctrine of inferred federal preemption.[8]

The Provisions Will Have an Adverse Effect on Religious Mission

The "Charitable Choice" language will adversely effect the religious mission of many houses of worship. Part of the rationale for Charitable Choice is to encourage religious institutions to provide social services to their communities. In fact, many churches, synagogues and mosques already provide these benefits to their communities, and do so very well with *private* funds. Dependence on federal funding, and the oversight and regulations that come with it, will severely undermine the constitutionally-based autonomy that religious institutions enjoy.

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[6] *See* Note 3 and accompanying text.

[7] H.R. 3734, 104th Cong., 2d Sess. § 104(k) (1996) *(emphasis added).*

[8] The state constitutional provisions will likely be found to "frustrate the purposes" of the federal Charitable Choice scheme. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78 (1987); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

Timothy Lamer, an Evangelical Christian critical of the "Charitable Choice" provisions, wrote in *The Weekly Standard* that

> Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.[9]

Mr. Lamer went on to state that

> a basic tenet of [religious liberty] is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars... Whichever sects have the most influence in each state will get the coveted funds.[10]

Marvin Olasky, author of *The Tragedy of American Compassion*, wrote in *USA Today* that the "Charitable Choice" provisions would lead "religious groups into temptation."[11] Olasky explained that Ashcroft's provisions "miss[] an important point" - that "Christian efforts take a bite out of poverty because of Christ," and unless religious groups "cheated by sliding money from one category to another" they would violate the prohibition on the direct use of government funds for sectarian worship or instruction.

If the government begins funding services traditionally funded by the church community, a likely result will be a drop in participation in such activity by church members and increased dependence on government funding. The influence of federal dollars and oversight will surely undermine the mission of religious institutions.

Conclusion

The "Charitable Choice" provisions violate the Constitution and are antithetical to the American ideal of religious liberty. The legislation puts state governments in an impossible position, and will only subject states to an avalanche of litigation. "Charitable Choice" presents both the problem of government funding of religion *and* religion acting in the place of government. Congress would do

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[9] Timothy Lamer, *I Gave at Church*, The Weekly Standard, January 15, 1996, at 13-14.

[10] *Id.*

[11] Marvin Olasky, *Holes in the Soul Matter as Much as Dollars*, USA Today, February 15, 1996, at 12A.

taxpayers and religion greater justice by leaving houses of worship free of federal interference and the influence of government dollars. Religious institutions already provide religious social services -- with parishioners' *private* contributions. Congress should not undermine this tradition by inviting "Big Government" into our nation's houses of worship.

SECTION
D

RESPONSE TO SENATOR ASHCROFT'S TALKING POINTS

POINT-BY-POINT RESPONSE TO SENATOR ASHCROFT'S DOCUMENT ENTITLED:

"CONSTITUTIONAL ARGUMENTS REGARDING THE 'CHARITABLE CHOICE' CLAUSE"

In the Fall of 1995, Senator Ashcroft distributed a document defending the constitutionality of the Charitable Choice provisions. The Ashcroft document was written specifically to support an amendment to the Older Americans Act. This document responds to Senator Ashcroft's document. It is organized consistent with, and bears the same section headings as, the Ashcroft document.

1. The Establishment Clause would be violated if we allowed religious organizations to receive government funds to provide services to older Americans.

What Senator Ashcroft's document does not mention: Religiously-affiliated organizations, such as Catholic Charities, are already eligible to receive government funds to provide non-sectarian social services to government beneficiaries. What the "Charitable Choice" provisions would do is give "pervasively sectarian" religious institutions, such as a house of worship, a statutory "right" to provide government-funded social services.

Senator Ashcroft's document correctly states that the Supreme Court has not permitted the funding of religious institutions that are "pervasively sectarian" because it would violate the Establishment Clause. *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988). However, the document *incorrectly* states that "nothing in the text of the Charitable Choice clause indicates that money will flow to such organizations."

A quick reading of the "Charitable Choice" provisions reveals that it is solely aimed at funding institutions that the Supreme Court has characterized as "pervasively sectarian." In various cases, the Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission. *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 n.6 (1985); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where government-funded services are provided; 3) allow religious contractors engage in religious employment discrimination. Additionally, any services provided in a house of worship would

undoubtedly expose beneficiaries to religious activities and expression of the sanctuary's religious mission. Thus, it is very likely that "pervasively sectarian" institutions will receive government contracts under "Charitable Choice."

2. There is no precedent for allowing religious organizations to receive federal funds to provide services to Older Americans.

What Senator Ashcroft's document does not mention: Although the Supreme Court approved the facial constitutionality of the Adolescent Family Life Act (AFLA), that statute, while allowing religious organizations to participate, did not contain provisions similar to the "Charitable Choice" language. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

The "Charitable Choice" language differs from the AFLA statute in the following ways:

* Unlike AFLA, it would give *all* religious institutions the "right" to be eligible for government funding.

* Unlike AFLA, it would explicitly authorize religious institutions to engage in religious employment discrimination against workers who will be paid with taxpayer dollars.

* Unlike AFLA, it would allow government vouchers and certificates to be used for "sectarian worship, instruction, or proselytization."

* Unlike AFLA, it would explicitly preempt state constitutional provisions that protect the religious liberty rights of state citizens.

* Unlike AFLA, it would explicitly prevent states from ensuring that government funded social services are provided in an environment free of proselytizing symbols and expression.

* Unlike AFLA, it would clog state courts with a new cause of action against the state by religious institutions that were not granted contracts for services.

* Unlike AFLA, it would foster excessive government entanglement with religion by authorizing wide-ranging financial audits of religious institutions that receive, but do not segregate, federal funds under the Older Americans Act.

Additionally, the institutions receiving federal funds under AFLA do so by way of federal *grants*. The "Charitable Choice" provisions do not authorize grants to religious institutions; rather it calls for *contracts* between the government and religious institutions. This is significant because as a contractor, a religious institutions will not simply be funded by the government, but also acting *in place* of the government.

Such activity, in which religious institutions would act as an arm of the state with respect to

social service programs, would violate the Supreme Court's ruling in *Larkin v. Grendel's Den*, 459 U.S 119 (1982), in which the Court overturned a zoning statute that allowed churches to participate "in the exercise of substantial government powers" in violation of the Establishment Clause. The "Charitable Choice" scheme would create the same appearance of joint authority by church and state that the *Larkin* case found to be unconstitutional.

Furthermore, all of the religious groups cited in Senator Ashcroft's document that participate in federal refugee resettlement activities are religiously-affiliated organizations, not pervasively sectarian institutions. These groups are currently eligible to, and do, participate in federally funded social service programs, even without the "Charitable Choice" provisions. The Ashcroft provisions are therefore an intentional departure from the already inclusive current law.

3. Beneficiaries should not be able to redeem vouchers with religious service providers.

What Senator Ashcroft's document does not mention: No court has ever upheld the use of government dollars for vouchers to be redeemed for religious worship or instruction (as the "Charitable Choice" provisions would explicitly allow.) *See PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

The cases cited by Senator Ashcroft involve facts in which only an "attenuated financial benefit" flowed to a sectarian organization. In fact, in one of the cases cited, *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state tax deduction for parents for expenses incurred in providing tuition, textbooks and transportation for their children attending public and private schools, including religious schools. However, the Supreme Court ruled that unlike the actual transfer of funds, the tax deduction for parents provided merely an "attenuated financial benefit" to the religious schools. *Id.* at 399. The Court went on to explain that "the direct transmission of assistance from the State to the [religious institution] themselves" would be unconstitutional. *Id.*

Most recently, the Supreme Court reaffirmed this principle in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ___, 132 L.Ed.2d 700 (1995). The majority decision in *Rosenberger* stated very clearly that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 725.

4. Subsection (j) provides that taxpayer dollars made available under certain titles and programs may be expended for "sectarian worship or instruction" in patent violation of the Establishment Clause.

What Senator Ashcroft's document does not mention: Subsection (j) explicitly allows government vouchers or certificates to be redeemed for sectarian worship or instruction. Senator Ashcroft's document defends this use of funds by explaining that "when beneficiaries exercise personal choice in the use of their benefit at similarly situated institutions, whether public, private nonsectarian, or religious, there is no Establishment Clause violation."

However, the Supreme Court has disagreed with this interpretation of Constitutional law. The Supreme Court has found that disbursing benefits through vouchers has the same effect on funding the sectarian activities as aiding the pervasively sectarian institution directly. According to the Court, the government funds merely pass through the voucher recipient to the religious institution in a "legalistic minuet." *PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

Furthermore, Section (j), which purports to prohibit the use of government contract funds for sectarian worship, instruction, or proselytization is absolutely *unenforceable*. The Supreme Court has made it clear that the government may not monitor the internal religious messages of pervasively sectarian institutions. *Aguilar v. Felton*, 473 U.S. 402, 412-13 (1985). Such monitoring and oversight would violate religion's autonomy from government and constitute excessive entanglement.

5. Religious organizations should not be able to discriminate in their hiring practices if they receive government funds.

What Senator Ashcroft's document does not mention: Title VII's exemption that allows religious institutions to discriminate in hiring based on an applicant's religion does not contemplate a government-supported religious institution's ability to engage in discrimination with *taxpayer funds*.

Senator Ashcroft's document states that: "The Supreme Court has never ruled on this issue, so for the time being, Congress should err on the side of allowing as much freedom as possible." How is "freedom" equivalent to discriminating against people based on their religious beliefs and practices? Doesn't "religious freedom" dictate that Americans should be free to practice the religion of their choice, without fear of being fired from government-funded employment?

6. The Charitable Choice provision would violate the religious liberty of aid recipients.

What Senator Ashcroft's document does not mention: Although the legislation states that a voucher for an alternative provider may be given to a beneficiary who objects to a religious provider he or she is assigned to, the "Charitable Choice" language does not require that beneficiaries receive *notice* of their right to object to a religious provider. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits.

7. Subsection (d) specifically allows funding to religious institutions, even if they place sectarian symbols and messages in areas in which they provide government services to clients.

What Senator Ashcroft's document does not mention: The Supreme Court has ruled that one of the factors in determining whether a religious institution is pervasively sectarian, and therefore ineligible to receive government funding, is whether an abundance of religious symbols appear on the institution's premises. *Wolman v. Walter*, 433 U.S. 229, 234 (1977). The

"Charitable Choice" clause explicitly prevents states from ensuring that government benefits are provided in a environment without an undo amount of "religious art, icons, scripture, or other symbols."

Senator Ashcroft's document cites *Otero v. State Election Bd. of Oklahoma*, 975 F.2d 738, 740-41 (10th Cir. 1992), in which the held Tenth Circuit held that the use of church property as a polling place did not violate the Establishment Clause. However, the court relied on the fact that the election activity would likely occur at some "nonconsecrated portion of the church building which can be used as a polling place." *Id.* at 741. Under the "Charitable Choice" provisions, however, religious institutions would not only be permitted to provide government-funded services in a consecrated and heavily sectarian environment, but state governments would be *prevented* from requiring that government services be provided in nonconsecrated areas or environments free of heavy proselytizing expression and symbolism.

8. Subsection (g) fosters excessive government entanglement with religion by apparently authorizing wide-ranging financial audits of any religious institution that receives, but does not segregate, federal funding under the Older Americans Act reauthorization bill.

What Senator Ashcroft's document does not mention: The audit provision only protects the religious institution *if* it chooses to segregate the funds. Since the provisions do not require the funds to be segregated, the religious institution may commingle its own private funds with the government funds. If such commingling does occur, it would either: (1) subject the institution to government oversight of its entire books; or (2) prohibit government accountability over any of the money, including the taxpayer funds.

By instructing religious institutions on how to keep their financial books, the "Charitable Choice" provisions further entangle government in the business of religious institutions. Furthermore, the "nondiscrimination" concept would work both ways, as the government would apply to religious institutions the same oversight and investigatory practices it employs with nonsectarian organizations and businesses it contracts with.

9. Subsection (h) gives religious institutions receiving or desiring federal funding a special right to sue the government, while denying a similar right of legal action to beneficiaries to seek relief from religious discrimination by organizations providing services.

What Senator Ashcroft's document does not mention: The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." As explained in Point #1, the Supreme Court has ruled that "pervasively sectarian" organizations cannot receive government funding, and state governments, in order to avoid a violation of the U.S. Constitution, are required to examine the sectarian nature of an institution before it provides funds to it.

Under the Ashcroft language, if a state government denies contracts because it determines

that the funding of certain "pervasively sectarian" religious entities would violate the Establishment Clause, then it will face a multitude of lawsuits from any number of such religious institutions claiming "discrimination" under the "Charitable Choice" cause of action. This would leave states with a court-clogging "Hobson's Choice" - if funds are distributed to "pervasively sectarian" institutions they would face a Constitutional lawsuit, and if funds are withheld they would face a statutory cause of action under "Charitable Choice."

Furthermore, the federal "Charitable Choice" legislation would likely preempt numerous state constitutions that contain provisions designed to protect the religious liberty of its citizens. For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..." Missouri Constitution, Article I, Section 7. Over half of the states have such a constitutional provision.

10. There is a danger that a religious organization would be the only available service provider in certain areas.

What Senator Ashcroft's document does not mention: While acknowledging that this is a "conceivable hypothetical problem," Senator Ashcroft states that "beneficiaries who object to receiving services from a religious provider have a right to receive services from the state through an alternative provider." However, the legislation does not provide notice to the beneficiary of his or her right to object. Without such notice, a beneficiary might choose to forgo benefits rather than suffer a violation of religious liberty.

SECTION
E

PRESS CLIPPINGS

I Gave at Church

by Timothy Lamer

There's an emerging consensus on the right that religious charities do a better job of helping the poor than does government. Sen. John Ashcroft of Missouri has thus proposed to allow states to funnel federal welfare dollars to churches and other overtly religious organizations so they can provide federal services and federal cash to the poor. But Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.

Ashcroft's proposal is an amendment to the welfare reform bill. It would allow states to distribute their federal welfare block grants to charitable and other private groups, including religious organizations. Although churches and religious charities would not have to alter their religious character to get the federal money, the amendment says: "No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization."

If so, the good senator's proposal is a waste of money. The thing to keep in mind is why Christian charities work so much better than social services provided by government.

Are believers just more effective bureaucrats than non-believers? No, Christian charities do so well because Christ changes lives. When a Christian charity lifts someone out of poverty or drug abuse, the improvement in the person's circumstances or behavior is merely the outward manifestation of a change within the person; it is new fruit from a regenerated tree.

The gospel is the essential agent, the root of the spiritual change. Without proselytizing, then, Christian charities will be no more effective than government or any other charity.

Of course, one could argue that money is fungible. It's a familiar conservative point, and it's true. When the government gives money to the Sierra Club to run a wildlife refuge, it frees up funds that can be used for lobbying, fundraising, and so forth. If it's true for the Sierra Club, it's true for the Southern Baptist Convention. Tax dollars given for "secular" use at Christian charities will free up church funds for proselytizing.

But that should concern all those, including evangelicals, who value religious liberty, a basic tenet of which is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars. In other words, raw political power will prevail. Whichever sects have the most influence in each state will get the coveted funds. Imagine the backlash when evangelicals realize that their money is going to support the Mormon Church in Utah and the Roman Catholic Church in Massachusetts. Or when Mormons and Catholics realize that their tax dollars are supporting the Southern Baptists in Tennessee.

If money really is fungible, then government support of Mormon charities means the Mormon Church can send more missionaries to, say, the South. And the Southern Baptists can do more evangelism in, say, Utah. There's no better way to start a real religious war in America than to coerce the faithful of any church into subsidizing what they view as a false religion.

Conservatives also need to think hard about what Ashcroft's proposal will mean for the future of welfare reform. What happens if a future Congress decides to reduce the amount of money given to states in welfare block grants? Will Christian charities and churches be willing to give up their subsidies when that happens?

It won't be easy. Federal funding is a narcotic. Once addicted, recipients find it hard to live without. As Art Smith of Volunteers of America told the *American Spectator*, government aid "impairs your impetus to go out and raise funds. That's a real danger all nonprofits face—just sitting back and figuring the government will take care of you." Once Christian charities get used to collecting the subsidy, they will develop programs and goals premised on receiving government aid. The threat of losing such aid will be genuinely terrifying. They will surely fight such cuts and thus become what conservatives detest—recipients of federal grants lobbying for "more." Are Christian conservatives prepared for the sight of Christian charities lobbying to keep their place at the federal trough?

Of all people, conservatives should know that federal funding always has unintended consequences. This proposal is no different. The ACLU and other opponents of Senator Ashcroft's amendment are—this time—on the side of the angels.

Timothy Lamer is director of the Free Enterprise & Media Institute of the Media Research Center in Alexandria, Virginia.

Holes in the soul matter as much as dollars

Since faith can be key to changing lives, real welfare reform will include tax credits to help religious groups spread their beliefs.

By Marvin Olasky

Last year's congressional welfare debate centered on the role of dollars in fighting poverty.

This year's should focus on the role of God.

The historical and contemporary research I've done shows that some people are poor through no fault of their own, but others are impoverished because of spiritual problems that manifest themselves in addiction, alcoholism, family abandonment, promiscuity, laziness or crime.

Those troubled poor have holes in their souls that only God can fill.

It's not that the rich have fewer spiritual holes than the poor, but rather that the former are better able to plug those holes with putty, temporarily.

Rich alcoholics eventually become poor, but for a long time their fall is hidden, while the problems of a homeless man with a bottle of Mad Dog are evident to all.

Recognition of spiritual need should not lead the better-off to scorn the troubled poor, but rather to offer effective compassion that is challenging, personal and spiritual — "CPS" for short.

I have seen in inner cities across the country that just as CPR can revive a dying body, so CPS can help to revive a soul sunk into fatalistic defeatism.

Instead of embracing CPS, Congress from 1965 through 1994 passed bills that embodied entitlement, bureaucracy and an attempt to banish God.

But that tide ebbed last year, and leaders from Newt Gingrich on down expressed interest in CPS, including the role of churches, synagogues and other religious organizations in fighting poverty.

Two different paths to bring God back into the equation emerged, but they received little publicity.

Sen. John Ashcroft, R-Mo., and others proposed that Washington distribute grants to religious as well as to secular organizations; church groups would accept federal dollars for anti-poverty work as other providers do, with effectiveness in getting people off drugs or out of poverty the relevant question.

But there was a catch: Government grants could not be "expended for sectarian worship, instruction or proselytization."

Therein lies the rub.

That gag rule forbidding the most serious types of religious expression in government-funded projects was politically necessary, because without it the American Civil Liberties Union and its political allies would not only have opposed the measure, as they did, but also gone thermonuclear.

Shrewd politics, however, makes for ineffective anti-poverty work.

The proposal, which became part of the Republican welfare-reform bill now vetoed by President Clinton, missed an important point.

Christian efforts take a bite out of poverty because of Christ.

Other serious religious groups also attribute their effectiveness not to niceness but to spiritual transformation brought about by worship, teaching and theological advocacy — the very functions that the proposal would disallow.

Furthermore, the proposal did not affect all religious groups equally.

Churches that have become political or social clubs could readily accept government money because they already have lost their salt and become government look-alikes.

But Christian, Jewish and Islamic groups that have remained theologically tough would either turn down the money and the accompanying gag rule, or go soft also — unless they cheated by sliding money from one category to another.

Ashcroft deserves credit for shining a spotlight on current discrimination in funding.

But his proposal, if enacted, would have led religious groups into temptation.

There is a better way, and Ashcroft himself — along with Sens. Dan Coats, R-Ind., and Rick Santorum, R-Pa. — has proposed it for congressional action in 1996: tax credits that would allow individuals to send more money directly to any poverty-fighting organization, religious or secular.

Currently, individual taxpayers can itemize the contributions they make and deduct the sum from their tax payments, generally at a marginal rate of 15%, 28% or 31%.

That is good but not good enough, if the goal is to reinvigorate more Americans' bodies and souls.

Under a 100% tax-credit proposal introduced by Coats, a single taxpayer could send $500, or a couple $1,000, to a local poverty-fighting group and take that amount right off tax payments, sending $500 or $1,000 less to Washington.

The goal of such an approach is to remove power from Washington while promoting local charities and supporting religious liberty. Individuals would fund groups with which they were in theological agreement; religious people would not be forced to fund programs embodying some other faith.

Many different religious and secular groups could compete to create effective programs without the government giving preference to any.

Now that it's back to the drawing board on welfare reform, Congress should move swiftly to adopt a tax-credit proposal.

The concept promotes challenging, personal and spiritual help while doing away with the problem of centralized government bureaucrats deciding among various religious claimants.

The better-off would have the joy of providing effective help, and those in spiritual as well as material need would receive new life.

Marvin Olasky is a senior fellow at the Progress and Freedom Foundation and the author of The Tragedy of American Compassion. *He recently co-founded the Center for Effective Compassion.*

TRB®

FROM WASHINGTON

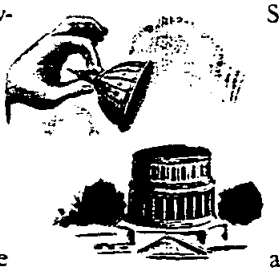
Big church

A few weeks ago, Bob Dole struck a fearless blow for the separation of church and state. He denounced the Department of Housing and Urban Development for using federal funds to hire the Nation of Islam Security Agency to patrol public housing projects in Baltimore. Dole was especially concerned that the Nation of Islam might be violating federal anti-discrimination laws by hiring only African Americans: he also worried that federal taxes were being used to subsidize religious proselytizing. Stung by Dole's criticisms, HUD canceled the contract on November 9.

But Dole's posturing as a defender of Jeffersonian ideals was absurd. His own welfare reform bill would authorize churches to administer federal welfare programs on a grand scale—and would exempt them from anti-discrimination laws in the process. A little-noticed amendment proposed by Senator John Ashcroft of Missouri, and backed by Dole, would prohibit states from discriminating against "religious organizations" if they decide to contract out certain welfare programs to private charities. In other words, states would be free to delegate programs like child care, pregnancy prevention or even cash assistance to the Nation of Islam, which could require the needy to listen to uplifting numerological sermons while cheerfully discriminating against Jewish employees.

If Dole and Ashcroft really cared about religious neutrality, they could have drafted a sane welfare bill while avoiding the Dickensian tangle of constitutional challenges that this scheme is sure to provoke. The basic impulse behind the bill makes sense: in an age where social services are being massively privatized, religiously affiliated charities *should* be tapped to deliver social services to the poor, since they do it better than almost anyone else. New York state, for example, relies heavily on Catholic and Jewish charities to provide publicly funded foster care. And, as Sallie Tisdale has argued in these pages, the Salvation Army is a model of cost efficiency, spending eighty-seven cents of every donated dollar on its service programs. (See "Good Soldiers," TNR, January 3, 1994.) But because the Salvation Army balks at the idea of separating its religious mission from its charity work, as federal law requires, it has been increasingly reluctant to accept federal funds, which now comprise less than 1 percent of its budget.

Senator Ashcroft, however, wants to solve that problem by allowing churches to administer public welfare programs in an openly sectarian way. His tough-love model evokes the welfare program in *Time Bandits*, where John Cleese as Robin Hood hands out coins to a line of dottering old ladies and then, to emphasize the value of work, has his merry men hit them in the stomach. The bill stresses that a church receiving public funds can't be forced to "remove religious art, icons, scripture, or other symbols" while handing out federal money. Direct grants (as opposed to vouchers) can't be used for religious education or proselytizing, but the bill doesn't say explicitly that benefits have to be distributed in a secular manner. If a recipient objects to the religious character of a welfare program, the state has to set up an alternative.



The relevant Supreme Court decisions are a little opaque—they hinge, as usual, on the conflicted impulses of Sandra Day O'Connor—but five justices seem to agree that if religious charities want to administer public welfare programs, they have to do so in a secular way. O'Connor emphasized in the 1988 *Bowen* case that "any use of public funds to promote religious doctrine violates the Establishment Clause." And in *Bowen*, the Court held that religiously affiliated charities can receive government grants to advocate chastity, but "pervasively sectarian" institutions, such as parochial schools, *can't* be directly funded, because of the fear that public funds will be used to advance religion.

The employment discrimination provisions of the bill are also shaky. Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law, contains an exemption for religious organizations; but a Mississippi judge held in January 1989 that exemption doesn't apply when a religious group is administering public funds: therefore, he held, the Salvation Army couldn't fire an employee in its federally funded domestic-violence shelter after learning she was a witch. Senator Ashcroft was furious when he heard about the case. In a meeting with Julie Segal of Americans United for Separation of Church and State, one of his staffers objected to the idea that "with government sheckles come governmental shackles." Accordingly, the Ashcroft amendment says that the religious exemption from Title VII still holds even where public funds are involved.

Unfortunately, the constitutional questions weren't aired in Congress. That's because Ashcroft has quietly decided to tack his amendment onto a slew of social service reform bills—including the recent substance abuse bill—without public hearings or debate. So the courts will have the final say. Rather than waiting for Justice O'Connor to make up her mind, Representative Henry Hyde took matters into his own hands last week by introducing the Religious Equality Amendment to the Constitution: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity." But the Hyde Amendment would also permit direct government funding of religious schools and, therefore, would violate a presumption against direct taxation for the benefit of religion that stretches back to the nineteenth century.

Constitutional worries aside, the Ashcroft-Dole scheme seems like bad policy for churches; it tempts them to become agents of the welfare state in ways that can only compromise their religious autonomy. Unlike Newt Gingrich's libertarian guru, Marvin Olasky, who wants to dismantle the welfare state entirely so that churches can step voluntarily into the breach, the Dole bill is a statist nightmare that would open up church coffers to federal audits if they fail to segregate public and private funds.

Maybe these nightmare scenarios won't materialize; maybe all the churches deputized under the Ashcroft scheme will conduct themselves like those mild-mannered curates in Victorian novels who dispense tea and sympathy to the deserving poor without alarming them by mentioning the Divine. In that case the bill might pass constitutional muster. But the dangers of the Ashcroft scheme could have been avoided. All Dole had to do was to require churches to set up non-sectarian affiliates as a condition of receiving public funds and to prohibit them from proselytizing, or engaging in religious discrimination, while performing state functions. Don't the Grand Rebbe and Louis Farrakhan deserve to be held to the same standards?

JEFFREY ROSEN

Go to Church for Your Check

SEN. DOLE'S welfare reform bill, the latest version of which was dropped in the hopper just as the legislators were leaving town, is a minefield of explosive issues ranging from such subjects as efforts to discourage teenage pregnancy to the treatment of immigrants in need. It will become the order of business on Sept. 6 when the House returns, and though it deserves a searching review and considerable debate, the pressure is on to pass it quickly.

Because the bill contains so many potential revisions in the welfare laws, less obvious changes may be accepted almost inadvertently. An example is a provision added only in this most recent draft of the bill that would alter the role of religious groups as benefit providers. Under current law, religiously affiliated organizations like Catholic Charities, for example, or Jewish hospitals, provide certain services that are paid for by the federal government. These entities are not essentially religious in nature, but have been set up by religious groups to perform a social service function in the community. Whether supported by parish contributions or public funds, they serve people of all faiths. When federal money is involved, they must observe certain guidelines aimed at preserving the nonsectarian nature of their work.

The bill would go beyond this practice by allowing churches themselves to act as service providers. This means that large blocks of public funds could be given directly to religious organizations who would have the responsibility for delivering the services. Presumably, the Bishop of Topeka, the leading Orthodox rabbi in Brooklyn or the Elders of the Mormon Church could become providers of the services taxpayers fund. Benefits could be disbursed inside churches, and temples and recipients who objected would have to ask to be reassigned to some other provider. Since no explanation of this provision was offered when the bill was introduced, and the text is not entirely clear, the number of government programs involved is uncertain. The American Civil Liberties Union believes that "at a minimum this section will apply to cash assistance benefits" like AFDC. Sen. John Ashcroft, who originated the proposal, expects its application to be much broader, extending to feeding programs, job training, drug rehabilitation and a host of other services.

There is no doubt that churches are exemplary social service providers. Many have been engaged in the enterprise for years, raising and spending their own money without the aid of the state. But in this country at least, they are not an arm of government. The potential for confusion about the real source of benefits received is great. The possibility of state favoritism among religious groups is real. The likelihood of subtle proselytizing—even though forbidden in the law—cannot be dismissed. In sum, this kind of entanglement of church and state is simply wrong and probably unconstitutional as well.

The Washington Post

Editorial, p. A-20

August 21, 1995

Separating Church and State

By J. Brent Walker

WASHINGTON

Congress should fix the welfare system, not add new flaws. But flawed is a fitting description of an obscure provision in a Senate Republican reform package that would funnel public subsidies to churches to provide welfare benefits. Such financial linkage between church and state is most likely unconstitutional and would actually harm religion.

Sponsored by Bob Dole, the Senate majority leader, and Senator John Ashcroft of Missouri, this provision would radically change how religious organizations provide day care, hot meals and emergency shelter.

Under current law, religious groups can get Federal money to provide welfare benefits, but such money may not be used to advance religion. For example, a Baptist hospital may spend public funds to care for patients, but not to proselytize.

But under the proposed law, churches could wield taxpayers' money as theological ladles in their soup kitchens. Churches would receive the money directly and could require people to listen to a sermon as they wait in line for a sandwich.

Senators Dole and Ashcroft may be correct when they argue that churches are more effective than Federal agencies in housing the homeless and feeding the hungry.

But Americans should not have to sacrifice religious freedom on the altar of welfare reform. The first 16 words of the Bill of Rights enshrine religious liberty as our "first freedom" and erect a wall of separation between church and state to protect that freedom — a wall that Sen. William Cohen, a Maine Republican, recognized yesterday in his successful amendment to insure that the programs are carried out consistent with the Constitution. But calling it constitutional does not make it so.

Welfare services should not be tied to religion.

Senator Cohen relied on the 1988 Supreme Court ruling in Bowen v. Kendrick that held that religiously affiliated groups may use tax funds to fight teen-age pregnancy. But the Court went on to say that it would not tolerate such funds going to a "pervasively sectarian" organization, like a church or synagogue.

Yet the Ashcroft-Dole proposal would do just that. It would permit states to give tax dollars to religious organizations that display religious messages in areas where people receive Government services.

The proposal would allow for "sectarian worship and instruction" in the course of delivering welfare benefits, and would enable churches to use Federal funds to discriminate against employees who fail to adhere to their religious tenets.

When government gets involved in advancing religion, it inevitably becomes entangled with religious practice, divides citizens along religious lines and prefers some religions over others. It is hard to imagine a Mormon church winning a welfare grant in Biloxi, Miss. — or a Southern Baptist church winning one in Salt Lake City.

The likelihood of unhealthful competition and burdensome regulation, including invasive audits, explains why many religious groups — Baptists, Catholics, Presbyterians, Methodists and many Jewish organizations — strongly oppose this provision.

There is a place for religious organizations in delivering welfare. But it should be done through separately incorporated affiliates that do not engage in religious education, proselytizing or discrimination.

That way, religious groups can preserve their theological purity and organizational autonomy, while cooperating with the Government to deliver services to those who need them.

The Ashcroft-Dole proposal flouts the First Amendment, further taints the welfare system and threatens our first and most precious liberty.□

J. Brent Walker is general counsel of the Baptist Joint Committee.

The New York Times

Op-Ed, p. A27

September 14, 1995

SECTION
F

LEGISLATIVE LANGUAGE IN THE WELFARE REFORM BILL

CONFERENCE REPORT ON H.R. 3734, PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (House of Representatives - July 30, 1996)

SEC. 104. SERVICES PROVIDED BY CHARITABLE, RELIGIOUS, OR PRIVATE ORGANIZATIONS.

(a) **In General**:

(1) **State options**: A State may--

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) **Programs described**: The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title IV of the Social Security Act (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that--

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) **Religious Organizations**: The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) **Nondiscrimination Against Religious Organizations**: In the event a State exercises its authority under subsection (a), religious organizations are

eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) **Religious Character and Freedom**:

(1) **Religious organizations**: A religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) **Additional safeguards**: Neither the Federal Government nor a State shall require a religious organization to--

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) **Rights of Beneficiaries of Assistance**:

(1) **In general**: If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) **Individual described**: An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance

under a program described in subsection (a)(2).

(f) **Employment Practices**: A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1a) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2).

(g) **Nondiscrimination Against Beneficiaries**: Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) **Fiscal Accountability**:

(1) **In general**: Except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of such funds provided under such programs.

(2) **Limited audit**: If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit.

(i) **Compliance**: Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) **Limitations on Use of Funds for Certain Purposes**: No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

(k) **Preemption**: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

LEGISLATIVE BRIEFING PACKET

The "Charitable Choice" Provisions:

Bad for Churches, Religious Freedom and States' Rights

The Working Group for Religious Freedom in Social Services

The "Charitable Choice" Provisions: Bad for Churches, Religious Freedom and States' Rights

EXECUTIVE SUMMARY

The "Charitable Choice" provisions have been offered on various public health and social service bills in the 104th Congress by Senator John Ashcroft (R-MO). If signed into law, these provisions would harm religion, the religious liberty of taxpayers and social service beneficiaries, and States' rights.

The delicate balance between church and state devised by the Founders and embodied in the First Amendment would be greatly disrupted by the "Charitable Choice" provisions. The Establishment Clause of the Constitution was intended to protect the religious liberty of all Americans and allow religion to operate free from government coercion or control. Thus, the Supreme Court has ruled that the government cannot fund or entangle itself with pervasively sectarian religious institutions or programs.

However, "Charitable Choice" would force state governments to enter into contracts to provide taxpayer-funded social services with pervasively sectarian institutions – activity that the U.S. Constitution and many state constitutions forbid. If a state chooses to abide by the Constitution and refuse to fund a certain religious institution, "Charitable Choice" provides the religious institution with a statutory lawsuit against the state. If the state chooses to fund the institution, it would open itself up to constitutional challenges. Therefore, a state would be subject to litigation no matter what its decision.

Additionally, "Charitable Choice" permits religious institutions to discriminate in employment against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Congress should not authorize such government-funded religious discrimination.

Beneficiaries of government health or social service programs would also suffer violations of their religious liberty rights. "Charitable Choice" fails to provide beneficiaries with any notice of their right to object to their assigned religious provider. Although the legislation requires that an objecting beneficiary be provided with an alternative provider, there is no requirement that the alternative be accessible to the beneficiary.

Finally, "Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to become dependent on government dollars and subject to government oversight and regulation. For these reasons, many religious individuals and denominations have spoken out in opposition to "Charitable Choice."

The "Charitable Choice" Provisions:

Bad for Churches, Religious Freedom and States' Rights

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The Working Group for Religious Freedom in Social Services

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SECTION
A

CONSTITUTIONAL AND POLICY PROBLEMS

Constitutional and Policy Problems with Senator Ashcroft's "Charitable Choice" Provisions

The "Charitable Choice" provisions, which have been offered on various public health or social service bills by Senator John Ashcroft (R-MO), present many constitutional and practical problems. This briefing paper will outline the dangers the provisions pose to the Establishment Clause of the First Amendment, to beneficiaries of assistance, and to the mission of religious faiths.

Voices from across the political spectrum have criticized these provisions for the policy problems they present. Organizations ranging from the ACLU to the Institute for Justice have questioned the provisions' constitutionality.

The "Charitable Choice" provisions violate the Constitution's Establishment Clause

The "Charitable Choice" provisions are a departure from current law and practice because they seek to shift government-funded social service programs to "pervasively sectarian" religious institutions, such as houses of worship. Under current law, religiously affiliated organizations are, in some cases, permitted to provide social services with government funds. Although the Supreme Court has ruled that these "religiously affiliated" organizations, such as Catholic Charities, are not *per se* prohibited from receiving government grants for social work, the Court has not permitted the funding of institutions that are "pervasively sectarian" because it would violate the Establishment Clause.[1]

The Supreme Court, in *Bowen v. Kendrick*, explained that "[o]nly in the context of aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would knowingly or unknowingly, result in indoctrination."[2] In various cases, the Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission.[3]

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where

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[1] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

[2] *Id.*

[3] *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 n.6 (1985); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

government-funded services are provided; 3) allow religious contractors to discriminate in all aspects of employment, including the *off-the-job* conduct of employees. Additionally, any services provided in a house of worship would undoubtedly expose beneficiaries to religious activities and expression of the sanctuary's religious mission, regardless of the limitation on the use of government funds.

The bill not only authorizes pervasively sectarian institutions, such as houses of worship, to contract to take over social services from the government, but it also grants all religious organizations a statutory right to be eligible to contract with a state to administer social services. This right can be enforced with a lawsuit against the state. Furthermore, this federal legislation *prevents states* from requiring that religious social service providers deliver services in an environment free of proselytizing symbols and expression.

Another problem with the "Charitable Choice" provisions is that they would excessively entangle government into the affairs of a religious institution by permitting the government to audit a religious institution's social service program. Under Supreme Court caselaw, such entanglement would violate the Constitution.[4]

Thus, it is not simply the case that the legislation lacks adequate safeguards against unconstitutional activity; rather, it contains many provisions that would ensure violations of the First Amendment religious rights of taxpayers by forcing states to contract with pervasively sectarian providers.

The Provisions Authorize Employment Discrimination Based on Religion

The "Charitable Choice" provisions would allow a religious organization to engage in religious discrimination against employees who are being paid with taxpayer funds. Although religious organizations are currently granted an exemption from the prohibition on religious discrimination in hiring in Title VII of the federal civil rights law, this exemption should not extend to employees who are hired to work on, and are paid through, government grants or contracts.

Furthermore, the bill goes well beyond the statutory exemption in Title VII by explicitly allowing religious organizations to require that employees paid with taxpayer dollars adhere to the "religious tenets and teachings of" the religious institution. The legislation also mandates that employees must follow rules regarding the *off-the-job* consumption of alcoholic beverages. This would allow a religious organization to not only exclude non-believers from government-funded employment, but would allow the group to advance religious doctrines with taxpayer money.

"Charitable Choice" Does Not Protect Beneficiaries' Religious Liberty Rights

The "Charitable Choice" provisions do not provide adequate protection for the religious liberty of social service beneficiaries. Under the legislation, a state could completely shift

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[4] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

government-funded social services for a certain geographic area or a specific social service to a religious institution. This, of course, would lead to innumerable violations of religious freedom and conscience of beneficiaries who are assigned to religious organizations to receive social service benefits and services.

Despite these potential problems, the legislation does not provide for notice to be given to beneficiaries informing them of their right to request an alternative provider of services. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits.

Additionally, the "Charitable Choice" provisions do not require that an alternative provider be set up within a specific time framework, and there is no requirement that the alternative provider has to be as equally accessible to the beneficiary as the original provider. The alternative provider could be set up across the state from where the beneficiary lives and therefore set up a completely impractical alternative. Furthermore, there is no provision for legal recourse for a beneficiary who is discriminated against on the basis of religion by an organization providing social services, although the legislation provides religious institutions with a cause of action against the state to enforce it "right" to contract for social services.

The Federal "Charitable Choice" Provisions Trump State Constitutional Rights

The federal "Charitable Choice" legislation explicitly *preempts* numerous state constitutions that contain provisions designed to protect the religious liberty of its citizens. For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."[5] However, due to the preemption of state law by the federal "Charitable Choice" provisions, Missouri officials will not be able to enforce the state constitution.

The "Charitable Choice" federal directives also bind the hands of state governments under the guise of "nondiscrimination against religious organizations." Under the Ashcroft language, if a state government determines that the funding of certain pervasively religious entities would violate the Establishment Clause, then it will surely face a multitude of lawsuits from any number of religious organizations claiming the "right" to contract with the state. State governments would also be powerless to ensure that its citizens are not subject to proselytization by religious social service offices replete with sectarian "art, icons, scripture" and "other symbols."

The Provisions Will Have an Adverse Effect on an Institution's Religious Mission

The Ashcroft language will adversely effect the religious mission of many houses of worship. Part of the rationale for the Ashcroft provision is to encourage religious institutions to provide social services to their communities. In fact, many churches, synagogues and mosques already provide these

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[5] Missouri Constitution, Article I, Section 7.

benefits to their communities, and do so very well with private funds. Dependence on federal funding will harm the autonomy and religious freedom of these institutions.

Timothy Lamer, an Evangelical Christian critical of the "Charitable Choice" provisions, wrote in *The Weekly Standard* that

> Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.[6]

Mr. Lamer went on to state that

> a basic tenet of [religious liberty] is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars... Whichever sects have the most influence in each state will get the coveted funds.[7]

Marvin Olasky, author of *The Tragedy of American Compassion*, wrote in *USA Today* that the "Charitable Choice" provisions would lead "religious groups into temptation."[8] Olasky explained that Ashcroft's provisions "miss[] an important point" - that "Christian efforts take a bite out of poverty because of Christ," and unless religious groups "cheated by sliding money from one category to another" they would violate the prohibition on the direct use of government funds for sectarian worship or instruction.

If the government begins funding services traditionally funded by the church community, a likely result will be a drop in participation in such activity by church members and increased dependence on government funding. The influence of federal dollars and oversight will surely undermine the mission of religious institutions.

Conclusion

The Ashcroft provisions violate the Constitution and are antithetical to the American ideal of religious liberty. Indeed, the Supreme Court stated this year that, "we have recognized special Establishment Clause dangers where the government makes direct money payment to

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[6] Timothy Lamer, *I Gave at Church*, The Weekly Standard, January 15, 1996, at 13-14.

[7] *Id.*

[8] Marvin Olasky, *Holes in the Soul Matter as Much as Dollars*, USA Today, February 15, 1996, at 12A.

sectarian institutions."[9] These provisions present both the problem of government funding of religion *and* religion acting in the place of government. Congress would do taxpayers and those in need greater justice by leaving houses of worship free of federal interference and the influence of government dollars. Religious institutions already provide religious social services -- with parishioners' *private* contributions. Congress should not undermine this tradition by inviting "Big Government" into our nation's houses of worship.

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[9] *Rosenberger v. University of Virginia*, 132 L Ed 2d 700, 723-24 (1995).

SECTION
B

STATES' RIGHTS PROBLEMS

"Charitable Choice" Tramples States' Rights

Senator Ashcroft's "Charitable Choice" provisions will not only introduce big government dollars and oversight into houses of worship, but it will undermine states' rights and federalism. The "Charitable Choice" legislation overtly overrides state constitutions and will entangle state governments in a web of litigation.

The federal "Charitable Choice" legislation explicitly preempts state law and state constitutions. This is significant because numerous state constitutions contain provisions designed to protect the religious liberty of its citizens and the autonomy of houses of worship. For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."* However, due to the preemption of state law by the federal "Charitable Choice" law, Missouri officials will not be able to enforce their state constitution.

"Charitable Choice" will clog state courts with a litigation explosion against state governments. The legislation presents state governments with a "Hobson's Choice" in deciding whether to contract with pervasively sectarian religious organizations to provide government-funded social services. With Charitable Choice in place, the state will be subject to a lawsuit no matter its decision. If a state government declines to contract with pervasively sectarian religious institutions because it determines that the funding of such entities would violate the Establishment Clause, then it will face a multitude of lawsuits from these institutions claiming "religious discrimination" under the "Charitable Choice" provisions. If a state decides to contract with pervasively sectarian institutions to avoid these "Charitable Choice" statutory causes of action, then the state will be sued over the Constitutional violation.

The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." State governments would be unable to ensure that beneficiaries of assistance, who in many cases will not be the same religion as the institutions providing services, are not subject to undue proselytization by religious institutions that contract to provide services. The "Charitable Choice" provisions explicitly prevent state governments from ensuring that government-funded social services are provided in areas that do not have excessive sectarian "art, icons, scripture" and "other symbols" on the wall. Additionally, "Charitable Choice" renders states powerless to stop religious institutions from engaging in religious employment discrimination against workers who are paid with government funds and are exclusively working on government-funded social service programs.

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* Missouri Constitution, Article I, Section 7.

State Constitutional Provisions
Regarding Public Funding Of Religious Institutions

Below is a small, illustrative sample of specific State Constitutional provisions that the "Charitable Choice" legislation would likely violate. Approximately one-third of the states have similar provisions, which protect the religious liberty of state citizens and allow religious institutions to operate autonomously. "Charitable Choice" would explicitly preempt these state constitutional protections:

CALIFORNIA CONSTITUTION, Article XVI, Section 3 provides:

> No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any ... institution not under the exclusive management and control of the State as a state institution....

Article XVI, Section 5 further provides:

> Neither the Legislature, nor any county, city and county, township, school district or other municipal corporation shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any ... institution controlled by any religious creed, church, or sectarian denomination whatever....

FLORIDA CONSTITUTION, Article I, Section 3 provides:

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid or any church, sect, or religious denomination or in aid of any sectarian institution.

ILLINOIS CONSTITUTION, Article X, Section 3 provides:

> Neither the General Assembly nor any county, city, town, township, school district, or any other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, ... nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

INDIANA CONSTITUTION, Article 1, Section 6 provides:

> No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

(In fact, an Indiana state official who violates this section can be held to reimburse the treasury. *See State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940)).

MICHIGAN CONSTITUTION, Article I, Section 4 provides:

> No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society....

MISSOURI CONSTITUTION, Article 1, Section 7 provides:

> no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof,....

(Missouri's use of federal Title 1 funds to provide services to elementary and secondary school students on parochial schools' premises constituted the use of public funds in aid of a denomination of religion in violation of this provision. *See Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976)).

PENNSYLVANIA CONSTITUTION, Article III, Section 29 provides:

> No appropriation shall be made ... to any denomination and sectarian institution, corporation or association.

Article III, Section 30 further provides:

> No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, ...except by a vote of two-thirds of all the members elected to each House.

TEXAS CONSTITUTION, Article I, Section 7 provides:

> No money shall be appropriated or drawn from the Treasury for the benefit of any sect, or religious society....

(The Texas Supreme Court has held that the purpose of this provision was to prevent public funds from being appropriated to <u>any</u> religious organization, whether they be Christian or of other religions (rejecting the argument of permitting non-preferential aid to all religion). *See Church v. Bullock*, 109 S.W. 115 (Tex. 1908)).

SECTION
C

GROUPS OPPOSING THE "CHARITABLE CHOICE" PROVISIONS AND LETTERS FROM RELIGIOUS LEADERS

Religious, Educational, Health, and Civil Liberties Organizations that oppose the "Charitable Choice" provisions

American Baptist Churches USA
American Civil Liberties Union
The American Ethical Union
American Federation of State, County and Municipal Employees
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Children's Healthcare is a Legal Duty (CHILD, Inc.)
Church of the Brethren, Washington Office
General Board of Church and Society, The United Methodist Church
Hadassah, W.Z.O.A.
National Black Women's Health Project
National Council of Jewish Women
National Education Association
NOW Legal Defense and Education Fund
People for the American Way Action Fund
Presbyterian Church USA
Union of American Hebrew Congregations
Unitarian Universalist Association, Washington Office
United Church of Christ, Office for Church in Society
Wider Opportunities for Women
The Women and Poverty Project of Wider Opportunities for Women
Women of Reform Judaism, The Federation of Temple Sisterhoods
Women's American ORT
Women's International League for Peace and Freedom
The Workmen's Circle / Arbeter Ring
Youth Law Center

200 Maryland Avenue, N.E., Washington, D.C. 20002-5797
202-544-4226 • FAX: 202-544-2094

CompuServe: 70420,54 • Internet: Baptist_Joint_Committee.parti @ Ecunet.org

J. Brent Walker
General Counsel

April 1, 1996

Dear Senator:

The Baptist Joint Committee strongly opposes the inclusion of Senator Ashcroft's "Charitable Choice" provisions in any kind of legislative vehicle.

The so-called "Charitable Choice" provisions are a frontal assault on the First Amendment's Establishment Clause which would provide direct, public funding to pervasively sectarian institutions. As you may know, the Supreme Court has approved government funding of religiously affiliated organizations, such as Catholic Charities, so long as tax dollars do not pay for proselytizing service beneficiaries (*Bowen v. Kendrick*, 487 U.S. 589 (1988)). The Ashcroft language would allow state-funded social services to be provided in houses of worship, the display of religious icons where services are provided, and religious discrimination in the employment of social workers.

The potential for harm to the Constitution is apparent, but the Ashcroft language would hurt churches as well. By accepting government funds, sectarian service providers will be open to government audits and whatever other meddling the state can get away with on threat of cancelling funding. Religious institutions will also suffer when they find that their new dependence on public money compromises their ability to criticize the government. How supportive of the civil rights movement would churches have been if they had been afraid of losing their funding?

As Baptists, we have a long history of defending religious liberty and freedom of conscience. Religion is a voluntary, personal matter which must not be coerced. These provisions would force some individuals to expose themselves to proselytizing influences in order to obtain social services. No mechanism is included to inform beneficiaries of their right to an alternate provider, and no redress is guaranteed to a service recipient who is discriminated against on the basis of religion.

In short, Ashcroft's legislation is less about providing the best social services than it is about funnelling public money to inappropriate uses. This we oppose.

Sincerely,

J. Brent Walker

JBW:pk

Alliance of Baptists
American Baptist Churches in the U.S.A.
Baptist General Conference
Cooperative Baptist Fellowship
National Baptist Convention of America
National Baptist Convention U.S.A., Inc.
National Missionary Baptist Convention
North American Baptist Conference
Progressive National Baptist Convention, Inc.
Religious Liberty Council
Seventh Day Baptist General Conference
Southern Baptist state conventions & churches

Church of the Brethren Washington Office

110 Maryland Avenue, N.E. Box 50 Washington, DC 20002 202 546 3202

March 28, 1996

Dear Senator:

On behalf of the Church of the Brethren, I write to urge you to oppose the "Charitable Choice" provisions which are expected to be offered by Senator John Ashcroft in his effort to provide federal assistance to religious social service agencies.

The proposed provisions would very likely result in competitive and divisive disputes among religious organizations competing for federal funding for community social service programs. If this approach were adopted, essential funding would be directed toward religious organizations with the strongest social and political influence in a given community. Dependence on federal funding for religious missions would have an extremely adverse effect upon these much-needed social programs.

In addition to this troublesome aspect of Senator Ashcroft's proposal, we are also quite concerned about the manner in which the provisions would violate the Constitution's establishment clause. Sen. Ashcroft's proposal would relocate government-funded social service programs to pervasively sectarian religious institutions, such as houses of worship. If this were the case, federal funds could be used in a religious settings in which religious symbols were prominently displayed and where religious proselytizing could take place.

In 1989, the Church of the Brethren Annual Conference—the highest authoritative body in our denomination—adopted the statement, "No Force in Religion: Religious Liberty at the 21st Century." In this important policy statement our church declared, "We believe it essential to avoid government sponsorship of a particular religious body and to assure sensitivity to those who are religious minorities. Cooperation between the state and religious bodies should not involve official recognition or confer special status upon a particular religious body."

I urge you to carefully consider the manner in which Sen. Ashcroft's proposed provisions would seriously jeopardize the essential separation of church and state and would have a devastating effect upon many cherished principles of our American tradition of religious liberty.

Thank you for considering our views on this important and timely concern.

Sincerely yours,

Timothy A. McElwee

Rev. Dr. Timothy A. McElwee
Director

838 Fifth Avenue, New York, NY 10021-7064
212 650-4050, Fax 212 650-4059

Ellen Y. Rosenberg
Executive Director

April 1, 1996

Dear Senator:

I am writing in behalf of Women of Reform Judaism, the Federation of Temple Sisterhoods, comprised of over 100,000 women in 600 affiliated groups nationwide, in opposition to Senator Ashcroft's "Charitable Choice" provisions. We oppose the "Charitable Choice" provisions because they present many problems of constitutionality and impracticability.

The "Charitable Choice" provisions fly in the face of the Establishment Clause of the First Amendment of the Constitution because they would direct government funds to "pervasively sectarian" religious institutions (such as houses of worship) for social service programs. By allowing the furnishing of social services in houses of worship, with the right to display religious symbols in areas where the government-funded services are provided, the "Charitable Choice" provisions enable these institutions to expose beneficiaries to religious activities and missionizing. This legislation would also grant all religious institutions the right to be eligible to contract with a state to deliver social services and would prevent states from requiring them to do so in a religion-free milieu.

We are also distressed by the explicit discrimination permitted by the "Charitable Choice" language. The exemption from the prohibition on religious discrimination in hiring granted to religious institutions in Title VII of the federal civil rights law should not be expanded to include employees hired to work on social service programs funded by the government. This bill would expand the exemption to include such employees and would moreover permit religious organizations to require that employees follow the religion of the institution.

In many communities religious institutions already provide social services with private funds. Indeed, our local Sisterhoods are active in community food programs, at shelters for homeless people and those for battered women and in countless community education programs. The autonomy and freedom of the churches, synagogues and mosques involved in social service programming could well be harmed by dependence on federal funding.

Deeply rooted in the religious values and prophetic mandate of our tradition, Women of Reform Judaism takes this opportunity to speak out in defense of the

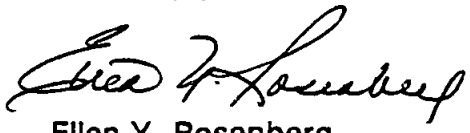
Founded January 21, 1913

15 Countries, 600 Sisterhoods, 13 Districts, 100,000 Members

Women of Reform Judaism is an affiliate of the Union of American Hebrew Congregations, the World Union for Progressive Judaism, works on behalf of the Hebrew Union College–Jewish Institute of Religion, and is the founder of the Jewish Braille Institute of America, Inc.

Constitution and of religious liberty. We urge you not to undermine America's unique and valued religious freedoms - we urge you to oppose the "Charitable Choice" provisions.

Sincerely yours,



Ellen Y. Rosenberg
Executive Director

WASHINGTON OFFICE
NATIONAL MINISTRIES DIVISION

PRESBYTERIAN CHURCH (USA)

Dear Senator, May 3, 1996

The "Charitable Choice" provision as introduced by Senator Ashcroft, would harm religion; the religious liberty of taxpayers; social service beneficiaries; and States' rights. The General Assembly of the Presbyterian Church (USA) has historically supported the religious liberty of all Americans and the right of religion to operate free from government coercion or control.

In a 1988 policy statement entitled, **"God Alone Is Lord of the Conscience"**, the General Assembly noted that under the Free Exercise clause the church should be free of both government interference and government regulation in ordering its life and activity, except where truly compelling government interests are at stake. When government appropriates funds for a constitutionally permitted social service to citizens and structures in such a way that private agencies are permitted to act as agents for government in the delivery of the service, we believe that churches should be eligible to receive such funds, but with significant conditions that do not jeopardize the right of the church to control its religious affairs or impose its own doctrine on others from the general public who may come to it for such services.

When public funds come to the church, the area of permissible government regulation of the church's activity is widened; and the church's right to structure its activity to reflect its religious character and purpose is narrowed. Public funds require public accountability and may not be used in ways that advance or support religion, whether or not in the context of charitable service.

The church is not obligated to accept public funds to support its works of humanitarian service and indeed may deem the necessary conditions too harsh to meet. There is no constitutional right to receive such public funds; their denial in order to avoid palpable infringement of the establishment prohibition does not itself constitute a burden on the free exercise of religion. The church may initiate service ministries and operate service agencies, either for its own adherents or for the public, without governmental intervention and regulation when it uses its own resources to do so. When it wishes to use public funds for serving public needs, the church should understand that it gives implied consent to necessary and proper governmental regulation and supervision, and to the civil compact concerning the organic relationship between church and state.

"Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to be subject to government oversight and regulation. The Charitable Choice provision should be defeated.

Sincerely,

Elenora Giddings Ivory

Rev. Elenora Giddings Ivory
Director, Washington Office
Presbyterian Church (USA)

110 Maryland Avenue, N.E. • Washington, DC • 20002 • (202) 543-1126

Unitarian Universalist Association of Congregations

2026 P Street, N.W., Washington, D.C. 20036
(202) 296-4672 fax (202) 296-4673
e-mail: uuawo@aol.com

Washington Office
for Social Justice

May 7, 1996

Dear Senator:

I write to express the opposition of the Unitarian Universalist Association to Senator John Ashcroft's "Charitable Choice" provisions to any public health or social service bill.

The Unitarian Universalist Association stands firmly behind the First Amendment. Senator Ashcroft's "Charitable Choice" provisions would undermine that amendment in several disturbing ways. It would also cause a great deal of trouble if it were implemented in a local community.

For instance, the provisions would permit government social services to be provided in houses of worship. This would mean the government's choosing to fund some religious institutions in a community, and not others--sending funds, for instance, to the local Baptist congregation but not to the Presbyterian one. This would inevitably lead to tensions between church leaders and legislators, and result as well in tensions between various religious groups. It would also cheapen the faith of every religious congregation, by necessitating that some people live out the mandate to feed the poor and clothe the naked by giving generously from their own resources, while others could sit back and let the government provide services under the apparent auspices of the congregation.

Equally disturbingly, the provisions would grant an explicit right for contractors to display religious symbols in areas where government services were provided. This might lead recipients of services to feel discomfort or to feel religiously devalued. If, for instance, a Christian recipient received services in a Hindu shrine, she or he might feel uncomfortable with the unfamiliar imagery and icons.

Also of grave concern is the fact that the provisions allow religious contractors to discriminate in all areas of employment, including the off-the-job conduct of employees. If, for instance, a Muslim House of Worship were funded to provide services, that Mosque could demand that a Christian employee pray to Allah five times per day. Needless to say, the Christian might very likely feel that such enforced prayer was a violation of his or her religious and civil liberties.

On behalf of Unitarian Universalists across the country, I urge you to refuse to support Senator Ashcroft's "Charitable Choice" provisions on any bill.

With warmest wishes,

Meg A Riley

The Rev. Meg A. Riley
Director, Washington Office for Faith In Action

NCJW

Nan Rich
National President

April 1, 1996

Dear Senator:

On behalf of the 90,000 members of the National Council of Jewish Women (NCJW), I am writing to urge you to oppose the inclusion of Sen. John Ashcroft's (R-MO) "Charitable Choice" provisions in any public health or social services legislation. These provisions, which would permit states to contract government-funded social services to pervasively sectarian religious institutions, are in clear violation of the First Amendment's Establishment Clause. These "Charitable Choice" provisions would pose a direct threat to our nation's longstanding commitment to the separation of religion and state and the preservation of religious liberty.

NCJW believes that the "Charitable Choice" provisions would promote religious discrimination and the infringement of religious liberty. These provisions explicitly grant a right to religious contractors to provide government services in a house of worship while allowing them to display religious "art, icons, scripture" and "other symbols" where the government-funded services are provided. As a result, beneficiaries of government services would be exposed, often unwillingly, to a church or synagogue's religious beliefs, directly imposing on the individual's religious liberty. These provisions would also allow contractors to engage in religious discrimination against employees who are paid by government funds. Although religious organizations are currently granted a religious discrimination exemption under Title VII of the federal civil rights law, such an exemption should not apply to employees paid through government contracts or funds.

One intent of the "Charitable Choice" provisions is to encourage religious institutions to provide social services in their communities. Many churches and synagogues already provide these services with private funds. NCJW believes that contracting with religious institutions to provide government services with public funds would create the dangerous precedent of government funding of religion and government-sanctioned infringement of religious liberty.

The National Council of Jewish Women strongly believes that religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in our democratic society. As such, we urge you to oppose Sen. Ashcroft's "Charitable Choice" provisions.

Sincerely,

Nan Rich

Nan Rich
National President

National Council of Jewish Women • 53 West 23rd Street, 6th Fl. • New York, NY • 10010 • (212) 645-4048 • Fax (212) 645-7466

General Board of Church and Society of The United Methodist Church
100 Maryland Avenue, N.E., Washington, D.C. 20002 • (202) 488-5600

May 10, 1996

Dear Senator:

Senator John Ashcroft has tried to attach the "Charitable Choice" provisions to various public health and social service bills. We believe that, if signed into law, such provisions would threaten the taxpayers' religious freedom and would set a precedent by promoting a specific religion with the use of tax dollars.

The United Methodist Church clearly states its stance on the use of public funds for churches in ***The Book of Resolutions***, p. 469. It states that churches "should not expect all taxpayers, including those who adhere to other religious belief systems, to provide funds to teach religious views with which they do not agree."

The Ashcroft proposal would disrupt the balance between church and state as embodied in the First Amendment. The "Charitable Choice" provisions would permit religious institutions to discriminate against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Further, the proposal does not provide adequate protection for the religious liberty of social service beneficiaries. We believe that the "Charitable Choice" provisions would place at risk the freedom and autonomy that religion has enjoyed in the United States.

As people of faith and freedom, we urge you to oppose any attempts that are antithetical to the American ideal of religious liberty.

Sincerely,

Dr. Thom White Wolf Fassett
General Secretary

TWWF/eyr

SECTION
D

RESPONSE TO SENATOR ASHCROFT'S TALKING POINTS

POINT-BY-POINT RESPONSE TO
SENATOR ASHCROFT'S DOCUMENT ENTITLED:

"CONSTITUTIONAL ARGUMENTS REGARDING
THE 'CHARITABLE CHOICE' CLAUSE"

1. The Establishment Clause would be violated if we allowed religious organizations to receive government funds to provide services to older Americans.

What the document does not mention: Religiously-affiliated organizations, such as Catholic Charities, are already eligible to receive government funds to provide non-sectarian social services to government beneficiaries. What the "Charitable Choice" provisions would do is give "pervasively sectarian" religious institutions, such as a house of worship, a statutory "right" to provide government-funded social services.

Senator Ashcroft's document correctly states that the Supreme Court has not permitted the funding of religious institutions that are "pervasively sectarian" because it would violate the Establishment Clause. *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988). However, the document *incorrectly* states that "nothing in the text of the Charitable Choice clause indicates that money will flow to such organizations."

A quick reading of the "Charitable Choice" provisions reveals that it is solely aimed at funding institutions that the Supreme Court has characterized as "pervasively sectarian." In various cases, the Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission. *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 n.6 (1985); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where government-funded services are provided; 3) allow religious contractors to discriminate in all aspects of employment, including the *off-the-job* conduct of employees. Additionally, any services provided in a house of worship would undoubtedly expose beneficiaries to religious activities and expression of the sanctuary's religious mission, regardless of the limitation on the use of government funds. Thus, the vast majority, if not all, of the contractors that will benefit from the "Charitable Choice" provisions will be pervasively sectarian.

2. There is no precedent for allowing religious organizations to receive federal funds to provide services to Older Americans.

What the document does not mention: Although the Supreme Court approved the facial constitutionality of the Adolescent Family Life Act (AFLA), that statute, while allowing religious organizations to participate, did not contain provisions similar to the "Charitable Choice" language. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

The "Charitable Choice" language differs from the AFLA statute in the following ways:

* Unlike AFLA, it would explicitly authorize religious institutions to engage in religious employment discrimination against workers who will be paid with taxpayer dollars. Employees would be required to obey the "religious tenets and teachings" of the institution, including *off-the-job* rules on use of alcohol.

* Unlike AFLA, it would explicitly allow government vouchers and certificates to be used for "sectarian worship, instruction, or proselytization."

* Unlike AFLA, it would explicitly preempt state constitutional provisions that protect the religious liberty rights of state citizens.

* Unlike AFLA, it would explicitly prevent states from ensuring that government funded social services are provided in an environment free of proselytizing symbols and expression.

* Unlike AFLA, it would clog state courts with a new cause of action against the state by religious institutions that were not granted contracts for services.

* Unlike AFLA, it would foster excessive government entanglement with religion by authorizing wide-ranging financial audits of religious institutions that receive, but do not segregate, federal funds under the Older Americans Act.

Additionally, the institutions receiving federal funds under AFLA do so by way of federal *grants*. The "Charitable Choice" provisions do not authorize grants to religious institutions; rather it calls for *contracts* between the government and religious institutions. This is significant because as a contractor, a religious institutions will not simply be funded by the government, but also acting *in place* of the government.

Such activity, in which religious institutions would act as an arm of the state with respect to social service programs, would violate the Supreme Court's ruling in *Larkin v. Grendel's Den*, 459 U.S 119 (1982), in which the Court overturned a zoning statute that allowed churches to participate "in the exercise of substantial government powers" in violation of the Establishment Clause. The "Charitable Choice" scheme would create the same appearance of joint authority by church and state that the *Larkin* case found to be unconstitutional.

Furthermore, all of the religious groups cited in Senator Ashcroft's document that participate in federal refugee resettlement activities are religiously-affiliated organizations, not pervasively sectarian institutions. These groups are currently eligible to, and do, participate in federally funded social service programs, even without the "Charitable Choice" provisions. The Ashcroft provisions are therefore an intentional departure from the already inclusive current law.

3. Beneficiaries should not be able to redeem vouchers with religious service providers.

What the document does not mention: No court has ever upheld the use of government dollars for vouchers to be redeemed for religious worship or instruction (as the "Charitable Choice" provisions would explicitly allow.) *See PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

The cases cited by Senator Ashcroft involve facts in which only an "attenuated financial benefit" flowed to a sectarian organization. In fact, in one of the cases cited, *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state tax deduction for parents for expenses incurred in providing tuition, textbooks and transportation for their children attending public and private schools, including religious schools. However, the Supreme Court ruled that unlike the actual transfer of funds, the tax deduction for parents provided merely an "attenuated financial benefit" to the religious schools. *Id.* at 399. The Court went on to explain that "the direct transmission of assistance from the State to the [religious institution] themselves" would be unconstitutional. *Id.*

Most recently, the Supreme Court reaffirmed this principle in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ___, 132 L.Ed.2d 700 (1995). The majority decision in *Rosenberger* stated very clearly that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 725.

4. Subsection (j) provides that taxpayer dollars made available under certain titles and programs may be expended for "sectarian worship or instruction" in patent violation of the Establishment Clause.

What the document does not mention: Subsection (j) explicitly allows government vouchers or certificates to be redeemed for sectarian worship or instruction. Senator Ashcroft's document defends this use of funds by explaining that "when beneficiaries exercise personal choice in the use of their benefit at similarly situated institutions, whether public, private nonsectarian, or religious, there is no Establishment Clause violation."

However, the Supreme Court has disagreed with this interpretation of Constitutional law. The Supreme Court has found that disbursing benefits through vouchers has the same effect on funding the sectarian activities as aiding the pervasively sectarian institution directly. According to the Court, the government funds merely pass through the voucher recipient to the religious institution in a "legalistic minuet." *PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

5. Religious organization should not be able to discriminate in their hiring practices if they

receive government funds.

What the document does not mention: Title VII's exemption that allows religious institutions to discriminate in hiring based on an applicant's religion does not contemplate a government-supported religious institution's ability to engage in discrimination with *taxpayer funds*.

Senator Ashcroft's document states that: "The Supreme Court has never ruled on this issue, so for the time being, Congress should err on the side of allowing as much freedom as possible." How is "freedom" equivalent to discriminating against people based on their religious beliefs and practices? Doesn't "religious freedom" dictate that Americans should be free to practice the religion of their choice, without fear of being fired from government-funded employment?

6. The Charitable Choice provision would violate the religious liberty of aid recipients.

What the document does not mention: Although the legislation states that a voucher for an alternative provider may be given to a beneficiary who objects to a religious provider he or she is assigned to, the "Charitable Choice" language does not require that beneficiaries receive *notice* of their right to object to a religious provider. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits.

Additionally, the "Charitable Choice" provisions do not require that an alternative provider be set up within a specific time framework, and there is no requirement that the alternative provider be as equally accessible to the beneficiary as the original provider. The alternative provider could be located across the state from where the beneficiary lives, thereby establishing a completely impractical alternative. Furthermore, there is no provision for legal recourse for a beneficiary who is discriminated against on the basis of religion by an organization providing social services, although the legislation provides religious institutions with a cause of action against the state to enforce it "right" to contract for social services.

7. Subsection (d) specifically allows funding to religious institutions, even if they place sectarian symbols and messages in areas in which they provide government services to clients.

What the document does not mention: The Supreme Court has ruled that one of the factors in determining whether a religious institution is pervasively sectarian, and therefore ineligible to receive government funding, is whether an abundance of religious symbols appear on the institution's premises. *Wolman v. Walter*, 433 U.S. 229, 234 (1977). The "Charitable Choice" clause explicitly prevents states from ensuring that government benefits are provided in a non-proselytizing environment.

Senator Ashcroft's document cites *Otero v. State Election Bd. of Oklahoma*, 975 F.2d 738, 740-41 (10th Cir. 1992), in which the held Tenth Circuit held that the use of church property as a polling place did not violate the Establishment Clause. However, the court relied on the fact that the election activity would likely occur at some "nonconsecrated portion of the church building which

can be used as a polling place." *Id.* at 741. Under the "Charitable Choice" provisions, however, religious institutions would not only be permitted to provide government-funded services in a consecrated and heavily sectarian environment, but state governments would be *prevented* from requiring that government services be provided in nonconsecrated areas or environments free of heavy proselytizing expression and symbolism.

8. Subsection (g) fosters excessive government entanglement with religion by apparently authorizing wide-ranging financial audits of any religious institution that receives, but does not segregate, federal funding under the Older Americans Act reauthorization bill.

What the document does not mention: The audit provision only protects the religious institution *if* it chooses to segregate the funds. Since the provisions do not require the funds to be segregated, the religious institution may commingle its own private funds with the government funds. If such commingling does occur, it would either: (1) subject the institution to government oversight of its entire books; or (2) prohibit government accountability over any of the money, including the taxpayer funds.

By instructing religious institutions on how to keep their financial books, the "Charitable Choice" provisions further entangle government in the business of religious institutions. Furthermore, the "nondiscrimination" concept would work both ways, as the government would apply to religious institutions the same oversight and investigatory practices it employs with nonsectarian organizations and businesses it contracts with.

9. Subsection (h) gives religious institutions receiving or desiring federal funding a special right to sue the government, while denying a similar right of legal action to beneficiaries to seek relief from religious discrimination by organizations providing services.

What the document does not mention: The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." As explained in Point #1, the Supreme Court has ruled that "pervasively sectarian" organizations cannot receive government funding, and state governments, in order to avoid a violation of the U.S. Constitution, are required to examine the sectarian nature of an institution before it provides funds to it.

Under the Ashcroft language, if a state government denies contracts because it determines that the funding of certain "pervasively sectarian" religious entities would violate the Establishment Clause, then it will face a multitude of lawsuits from any number of such religious institutions claiming "discrimination" under the "Charitable Choice" cause of action. This would leave states with a court-clogging "Hobson's Choice" - if funds are distributed to "pervasively sectarian" institutions they would face a Constitutional lawsuit, and if funds are withheld they would face a statutory cause of action under "Charitable Choice."

Furthermore, the federal "Charitable Choice" legislation explicitly *preempts* numerous state

constitutions that contain provisions designed to protect the religious liberty of its citizens. For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..." Missouri Constitution, Article I, Section 7. However, due to the preemption of state law by the federal "Charitable Choice" law, Missouri officials will not be able to enforce the state constitution.

10. There is a danger that a religious organization would be the only available service provider in certain areas.

What the document does not mention: While acknowledging that this is a "conceivable hypothetical problem," Senator Ashcroft states that "beneficiaries who object to receiving services from a religious provider have a right to receive services from the state through an alternative provider."

However, as explained in Point #6, "Charitable Choice" does not require that this "alternative" be located anywhere near the beneficiary. The beneficiary might be required to travel hundreds of miles across the state to receive services in a way that does not violate his or her religious principles. Furthermore, the legislation does not provide notice to the beneficiary of his or her right to object, nor does it require that the alternative be provided within a reasonable time frame.

SECTION
E

PRESS CLIPPINGS

The Weekly Standard

I Gave at Church

by Timothy Lamer

There's an emerging consensus on the right that religious charities do a better job of helping the poor than does government. Sen. John Ashcroft of Missouri has thus proposed to allow states to funnel federal welfare dollars to churches and other overtly religious organizations so they can provide federal services and federal cash to the poor. But Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.

Ashcroft's proposal is an amendment to the welfare reform bill. It would allow states to distribute their federal welfare block grants to charitable and other private groups, including religious organizations. Although churches and religious charities would not have to alter their religious character to get the federal money, the amendment says: "No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization."

If so, the good senator's proposal is a waste of money. The thing to keep in mind is why Christian charities work so much better than social services provided by government.

Are believers just more effective bureaucrats than non-believers? No, Christian charities do so well because Christ changes lives. When a Christian charity lifts someone out of poverty or drug abuse, the improvement in the person's circumstances or behavior is merely the outward manifestation of a change within the person; it is new fruit from a regenerated tree.

The gospel is the essential agent, the root of the spiritual change. Without proselytizing, then, Christian charities will be no more effective than government or any other charity.

Of course, one could argue that money is fungible. It's a familiar conservative point, and it's true. When the government gives money to the Sierra Club to run a wildlife refuge, it frees up funds that can be used for lobbying, fundraising, and so forth. If it's true for the Sierra Club, it's true for the Southern Baptist Convention. Tax dollars given for "secular" use at Christian charities will free up church funds for proselytizing.

But that should concern all those, including evangelicals, who value religious liberty, a basic tenet of which is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars. In other words, raw political power will prevail. Whichever sects have the most influence in each state will get the coveted funds. Imagine the backlash when evangelicals realize that their money is going to support the Mormon Church in Utah and the Roman Catholic Church in Massachusetts. Or when Mormons and Catholics realize that their tax dollars are supporting the Southern Baptists in Tennessee.

If money really is fungible, then government support of Mormon charities means the Mormon Church can send more missionaries to, say, the South. And the Southern Baptists can do more evangelism in, say, Utah. There's no better way to start a real religious war in America than to coerce the faithful of any church into subsidizing what they view as a false religion.

Conservatives also need to think hard about what Ashcroft's proposal will mean for the future of welfare reform. What happens if a future Congress decides to reduce the amount of money given to states in welfare block grants? Will Christian charities and churches be willing to give up their subsidies when that happens?

It won't be easy. Federal funding is a narcotic. Once addicted, recipients find it hard to live without. As Art Smith of Volunteers of America told the *American Spectator*, government aid "impairs your impetus to go out and raise funds. That's a real danger all nonprofits face—just sitting back and figuring the government will take care of you." Once Christian charities get used to collecting the subsidy, they will develop programs and goals premised on receiving government aid. The threat of losing such aid will be genuinely terrifying. They will surely fight such cuts and thus become what conservatives detest—recipients of federal grants lobbying for "more." Are Christian conservatives prepared for the sight of Christian charities lobbying to keep their place at the federal trough?

Of all people, conservatives should know that federal funding always has unintended consequences. This proposal is no different. The ACLU and other opponents of Senator Ashcroft's amendment are—this time—on the side of the angels.

Timothy Lamer is director of the Free Enterprise & Media Institute of the Media Research Center in Alexandria, Virginia.

TRB FROM WASHINGTON

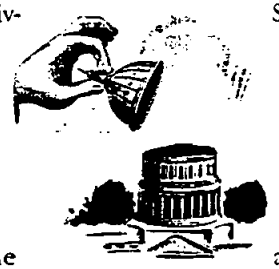
Big church

A few weeks ago, Bob Dole struck a fearless blow for the separation of church and state. He denounced the Department of Housing and Urban Development for using federal funds to hire the Nation of Islam Security Agency to patrol public housing projects in Baltimore. Dole was especially concerned that the Nation of Islam might be violating federal anti-discrimination laws by hiring only African Americans: he also worried that federal taxes were being used to subsidize religious proselytizing. Stung by Dole's criticisms, HUD canceled the contract on November 9.

But Dole's posturing as a defender of Jeffersonian ideals was absurd. His own welfare reform bill would authorize churches to administer federal welfare programs on a grand scale—and would exempt them from anti-discrimination laws in the process. A little-noticed amendment proposed by Senator John Ashcroft of Missouri, and backed by Dole, would prohibit states from discriminating against "religious organizations" if they decide to contract out certain welfare programs to private charities. In other words, states would be free to delegate programs like child care, pregnancy prevention or even cash assistance to the Nation of Islam, which could require the needy to listen to uplifting numerological sermons while cheerfully discriminating against Jewish employees.

If Dole and Ashcroft really cared about religious neutrality, they could have drafted a sane welfare bill while avoiding the Dickensian tangle of constitutional challenges that this scheme is sure to provoke. The basic impulse behind the bill makes sense: in an age where social services are being massively privatized, religiously affiliated charities *should* be tapped to deliver social services to the poor, since they do it better than almost anyone else. New York state, for example, relies heavily on Catholic and Jewish charities to provide publicly funded foster care. And, as Sallie Tisdale has argued in these pages, the Salvation Army is a model of cost efficiency, spending eighty-seven cents of every donated dollar on its service programs. (See "Good Soldiers," TNR, January 3, 1994.) But because the Salvation Army balks at the idea of separating its religious mission from its charity work, as federal law requires, it has been increasingly reluctant to accept federal funds, which now comprise less than 1 percent of its budget.

Senator Ashcroft, however, wants to solve that problem by allowing churches to administer public welfare programs in an openly sectarian way. His tough-love model evokes the welfare program in *Time Bandits*, where John Cleese as Robin Hood hands out coins to a line of dottering old ladies and then, to emphasize the value of work, has his merry men hit them in the stomach. The bill stresses that a church receiving public funds can't be forced to "remove religious art, icons, scripture, or other symbols" while handing out federal money. Direct grants (as opposed to vouchers) can't be used for religious education or proselytizing, but the bill doesn't say explicitly that benefits have to be distributed in a secular manner. If a recipient objects to the religious character of a welfare program, the state has to set up an alternative.



The relevant Supreme Court decisions are a little opaque—they hinge, as usual, on the conflicted impulses of Sandra Day O'Connor—but five justices seem to agree that if religious charities want to administer public welfare programs, they have to do so in a secular way. O'Connor emphasized in the 1988 *Bowen* case that "any use of public funds to promote religious doctrine violates the Establishment Clause." And in *Bowen*, the Court held that religiously affiliated charities can receive government grants to advocate chastity, but "pervasively sectarian" institutions, such as parochial schools, *can't* be directly funded, because of the fear that public funds will be used to advance religion.

The employment discrimination provisions of the bill are also shaky. Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law, contains an exemption for religious organizations; but a Mississippi judge held in January 1989 that exemption doesn't apply when a religious group is administering public funds; therefore, he held, the Salvation Army couldn't fire an employee in its federally funded domestic-violence shelter after learning she was a witch. Senator Ashcroft was furious when he heard about the case. In a meeting with Julie Segal of Americans United for Separation of Church and State, one of his staffers objected to the idea that "with government sheckles come governmental shackles." Accordingly, the Ashcroft amendment says that the religious exemption from Title VII still holds even where public funds are involved.

Unfortunately, the constitutional questions weren't aired in Congress. That's because Ashcroft has quietly decided to tack his amendment onto a slew of social service reform bills—including the recent substance abuse bill—without public hearings or debate. So the courts will have the final say. Rather than waiting for Justice O'Connor to make up her mind, Representative Henry Hyde took matters into his own hands last week by introducing the Religious Equality Amendment to the Constitution: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity." But the Hyde Amendment would also permit direct government funding of religious schools and, therefore, would violate a presumption against direct taxation for the benefit of religion that stretches back to the nineteenth century.

Constitutional worries aside, the Ashcroft-Dole scheme seems like bad policy for churches; it tempts them to become agents of the welfare state in ways that can only compromise their religious autonomy. Unlike Newt Gingrich's libertarian guru, Marvin Olasky, who wants to dismantle the welfare state entirely so that churches can step voluntarily into the breach, the Dole bill is a statist nightmare that would open up church coffers to federal audits if they fail to segregate public and private funds.

Maybe these nightmare scenarios won't materialize; maybe all the churches deputized under the Ashcroft scheme will conduct themselves like those mild-mannered curates in Victorian novels who dispense tea and sympathy to the deserving poor without alarming them by mentioning the Divine. In that case the bill might pass constitutional muster. But the dangers of the Ashcroft scheme could have been avoided. All Dole had to do was to require churches to set up non-sectarian affiliates as a condition of receiving public funds and to prohibit them from proselytizing, or engaging in religious discrimination, while performing state functions. Don't the Grand Rebbe and Louis Farrakhan deserve to be held to the same standards?

JEFFREY ROSEN

Holes in the soul matter as much as dollars

Since faith can be key to changing lives, real welfare reform will include tax credits to help religious groups spread their beliefs.

By Marvin Olasky

Last year's congressional welfare debate centered on the role of dollars in fighting poverty.

This year's should focus on the role of God.

The historical and contemporary research I've done shows that some people are poor through no fault of their own, but others are impoverished because of spiritual problems that manifest themselves in addiction, alcoholism, family abandonment, promiscuity, laziness or crime.

Those troubled poor have holes in their souls that only God can fill.

It's not that the rich have fewer spiritual holes than the poor, but rather that the former are better able to plug those holes with putty, temporarily.

Rich alcoholics eventually become poor, but for a long time their fall is hidden, while the problems of a homeless man with a bottle of Mad Dog are evident to all.

Recognition of spiritual need should not lead the better-off to scorn the troubled poor, but rather to offer effective compassion that is challenging, personal and spiritual — "CPS" for short.

I have seen in inner cities across the country that just as CPR can revive a dying body, so CPS can help to revive a soul sunk into fatalistic defeatism.

Instead of embracing CPS, Congress from 1965 through 1994 passed bills that embodied entitlement, bureaucracy and an attempt to banish God.

But that tide ebbed last year, and leaders from Newt Gingrich on down expressed interest in CPS, including the role of churches, synagogues and other religious organizations in fighting poverty.

Two different paths to bring God back into the equation emerged, but they received little publicity.

Sen. John Ashcroft, R-Mo., and others proposed that Washington distribute grants to religious as well as to secular organizations; church groups would accept federal dollars for anti-poverty work as other providers do, with effectiveness in getting people off drugs or out of poverty the relevant question.

But there was a catch: Government grants could not be "expended for sectarian worship, instruction or proselytization."

Therein lies the rub.

That gag rule forbidding the most serious types of religious expression in government-funded projects was politically necessary, because without it the American Civil Liberties Union and its political allies would not only have opposed the measure, as they did, but also gone thermonuclear.

Shrewd politics, however, makes for ineffective anti-poverty work.

The proposal, which became part of the Republican welfare-reform bill now vetoed by President Clinton, missed an important point.

Christian efforts take a bite out of poverty because of Christ.

Other serious religious groups also attribute their effectiveness not to niceness but to spiritual transformation brought about by worship, teaching and theological advocacy — the very functions that the proposal would disallow.

Furthermore, the proposal did not affect all religious groups equally.

Churches that have become political or social clubs could readily accept government money because they already have lost their salt and become government look-alikes.

But Christian, Jewish and Islamic groups that have remained theologically tough would either turn down the money and the accompanying gag rule, or go soft also — unless they cheated by sliding money from one category to another.

Ashcroft deserves credit for shining a spotlight on current discrimination in funding.

But his proposal, if enacted, would have led religious groups into temptation.

There is a better way, and Ashcroft himself — along with Sens. Dan Coats, R-Ind., and Rick Santorum, R-Pa. — has proposed it for congressional action in 1996: tax credits that would allow individuals to send more money directly to any poverty-fighting organization, religious or secular.

Currently, individual taxpayers can itemize the contributions they make and deduct the sum from their tax payments, generally at a marginal rate of 15%, 28% or 31%.

That is good but not good enough, if the goal is to reinvigorate more Americans' bodies and souls.

Under a 100% tax-credit proposal introduced by Coats, a single taxpayer could send $500, or a couple $1,000, to a local poverty-fighting group and take that amount right off tax payments, sending $500 or $1,000 less to Washington.

The goal of such an approach is to remove power from Washington while promoting local charities and supporting religious liberty. Individuals would fund groups with which they were in theological agreement; religious people would not be forced to fund programs embodying some other faith.

Many different religious and secular groups could compete to create effective programs without the government giving preference to any.

Now that it's back to the drawing board on welfare reform, Congress should move swiftly to adopt a tax-credit proposal.

The concept promotes challenging, personal and spiritual help while doing away with the problem of centralized government bureaucrats deciding among various religious claimants.

The better-off would have the joy of providing effective help, and those in spiritual as well as material need would receive new life.

Marvin Olasky is a senior fellow at the Progress and Freedom Foundation and the author of The Tragedy of American Compassion. *He recently co-founded the Center for Effective Compassion.*

Separating Church and State

By J. Brent Walker

WASHINGTON

Congress should fix the welfare system, not add new flaws. But flawed is a fitting description of an obscure provision in a Senate Republican reform package that would funnel public subsidies to churches to provide welfare benefits. Such financial linkage between church and state is most likely unconstitutional and would actually harm religion.

Sponsored by Bob Dole, the Senate majority leader, and Senator John Ashcroft of Missouri, this provision would radically change how religious organizations provide day care, hot meals and emergency shelter.

Under current law, religious groups can get Federal money to provide welfare benefits, but such money may not be used to advance religion. For example, a Baptist hospital may spend public funds to care for patients, but not to proselytize.

But under the proposed law, churches could wield taxpayers' money as theological ladles in their soup kitchens. Churches would receive the money directly and could require people to listen to a sermon as they wait in line for a sandwich.

Senators Dole and Ashcroft may be correct when they argue that churches are more effective than Federal agencies in housing the homeless and feeding the hungry.

But Americans should not have to sacrifice religious freedom on the altar of welfare reform. The first 16 words of the Bill of Rights enshrine religious liberty as our "first freedom" and erect a wall of separation between church and state to protect that freedom — a wall that Sen. William Cohen, a Maine Republican, recognized yesterday in his successful amendment to insure that the programs are carried out consistent with the Constitution. But calling it constitutional does not make it so.

Welfare services should not be tied to religion.

Senator Cohen relied on the 1988 Supreme Court ruling in Bowen v. Kendrick that held that religiously affiliated groups may use tax funds to fight teen-age pregnancy. But the Court went on to say that it would not tolerate such funds going to a "pervasively sectarian" organization, like a church or synagogue.

Yet the Ashcroft-Dole proposal would do just that. It would permit states to give tax dollars to religious organizations that display religious messages in areas where people receive Government services.

The proposal would allow for "sectarian worship and instruction" in the course of delivering welfare benefits, and would enable churches to use Federal funds to discriminate against employees who fail to adhere to their religious tenets.

When government gets involved in advancing religion, it inevitably becomes entangled with religious practice, divides citizens along religious lines and prefers some religions over others. It is hard to imagine a Mormon church winning a welfare grant in Biloxi, Miss. — or a Southern Baptist church winning one in Salt Lake City.

The likelihood of unhealthful competition and burdensome regulation, including invasive audits, explains why many religious groups — Baptists, Catholics, Presbyterians, Methodists and many Jewish organizations — strongly oppose this provision.

There is a place for religious organizations in delivering welfare. But it should be done through separately incorporated affiliates that do not engage in religious education, proselytizing or discrimination.

That way, religious groups can preserve their theological purity and organizational autonomy, while cooperating with the Government to deliver services to those who need them.

The Ashcroft-Dole proposal flouts the First Amendment, further taints the welfare system and threatens our first and most precious liberty.□

J. Brent Walker is general counsel of the Baptist Joint Committee.

The New York Times

Op-Ed, p. A27

September 14, 1995

Go to Church for Your Check

SEN. DOLE'S welfare reform bill, the latest version of which was dropped in the hopper just as the legislators were leaving town, is a minefield of explosive issues ranging from such subjects as efforts to discourage teenage pregnancy to the treatment of immigrants in need. It will become the order of business on Sept. 6 when the House returns, and though it deserves a searching review and considerable debate, the pressure is on to pass it quickly.

Because the bill contains so many potential revisions in the welfare laws, less obvious changes may be accepted almost inadvertently. An example is a provision added only in this most recent draft of the bill that would alter the role of religious groups as benefit providers. Under current law, religiously affiliated organizations like Catholic Charities, for example, or Jewish hospitals, provide certain services that are paid for by the federal government. These entities are not essentially religious in nature, but have been set up by religious groups to perform a social service function in the community. Whether supported by parish contributions or public funds, they serve people of all faiths. When federal money is involved, they must observe certain guidelines aimed at preserving the nonsectarian nature of their work.

The bill would go beyond this practice by allowing churches themselves to act as service providers. This means that large blocks of public funds could be given directly to religious organizations who would have the responsibility for delivering the services. Presumably, the Bishop of Topeka, the leading Orthodox rabbi in Brooklyn or the Elders of the Mormon Church could become providers of the services taxpayers fund. Benefits could be disbursed inside churches, and temples and recipients who objected would have to ask to be reassigned to some other provider. Since no explanation of this provision was offered when the bill was introduced, and the text is not entirely clear, the number of government programs involved is uncertain. The American Civil Liberties Union believes that "at a minimum this section will apply to cash assistance benefits" like AFDC. Sen. John Ashcroft, who originated the proposal, expects its application to be much broader, extending to feeding programs, job training, drug rehabilitation and a host of other services.

There is no doubt that churches are exemplary social service providers. Many have been engaged in the enterprise for years, raising and spending their own money without the aid of the state. But in this country at least, they are not an arm of government. The potential for confusion about the real source of benefits received is great. The possibility of state favoritism among religious groups is real. The likelihood of subtle proselytizing—even though forbidden in the law—cannot be dismissed. In sum, this kind of entanglement of church and state is simply wrong and probably unconstitutional as well.

The Washington Post

Editorial, p. A-20

August 21, 1995

SECTION
F

LEGISLATIVE LANGUAGE

The "Charitable Choice" Provisions

(as it appeared in the Senate Welfare Reform Bill)

19 SEC. 102. SERVICES PROVIDED BY CHARITABLE, RELI-
20 GIOUS, OR PRIVATE ORGANIZATIONS.
21 (a) IN GENERAL.—
22 (1) STATE OPTIONS.—Notwithstanding any other
23 provision of law, a State may—
24 (A) administer and provide services under
25 the programs described in subparagraphs (A)

1 *and (B)(i) of paragraph (2) through contracts*
2 *with charitable, religious, or private organiza-*
3 *tions; and*
4 *(B) provide beneficiaries of assistance under*
5 *the programs described in subparagraphs (A)*
6 *and (B)(ii) of paragraph (2) with certificates,*
7 *vouchers, or other forms of disbursement which*
8 *are redeemable with such organizations.*
9 *(2) PROGRAMS DESCRIBED.—The programs de-*
10 *scribed in this paragraph are the following programs:*
11 *(A) A State program funded under part A*
12 *of title IV of the Social Security Act (as amend-*
13 *ed by section 101).*
14 *(B) Any other program that is established*
15 *or modified under titles I, II, or X that—*
16 *(i) permits contracts with organiza-*
17 *tions; or*
18 *(ii) permits certificates, vouchers, or*
19 *other forms of disbursement to be provided*
20 *to beneficiaries, as a means of providing as-*
21 *sistance.*
22 *(b) RELIGIOUS ORGANIZATIONS.—The purpose of this*
23 *section is to allow religious organizations to contract, or*
24 *to accept certificates, vouchers, or other forms of disburse-*
25 *ment under any program described in subsection (a)(2), on*

1 *the same basis as any other provider without impairing the*
2 *religious character of such organizations, and without di-*
3 *minishing the religious freedom of beneficiaries of assist-*
4 *ance funded under such program.*

5 *(c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANI-*
6 *ZATIONS.—Religious organizations are eligible, on the same*
7 *basis as any other private organization, as contractors to*
8 *provide assistance, or to accept certificates, vouchers, or*
9 *other forms of disbursement, under any program described*
10 *in subsection (a)(2) so long as the programs are imple-*
11 *mented consistent with the Establishment Clause of the*
12 *United States Constitution. Neither the Federal Govern-*
13 *ment nor a State receiving funds under such programs shall*
14 *discriminate against an organization which is or applies*
15 *to be a contractor to provide assistance, or which accepts*
16 *certificates, vouchers, or other forms of disbursement, on the*
17 *basis that the organization has a religious character.*

18 *(d) RELIGIOUS CHARACTER AND FREEDOM.—*

19 *(1) RELIGIOUS ORGANIZATIONS.—Notwithstand-*
20 *ing any other provision of law, any religious organi-*
21 *zation with a contract described in subsection*
22 *(a)(1)(A), or which accepts certificates, vouchers, or*
23 *other forms of disbursement under subsection*
24 *(a)(1)(B), shall retain its independence from Federal,*
25 *State, and local governments, including such organi-*

1 *zation's control over the definition, development,*
2 *practice, and expression of its religious beliefs.*
3 *(2) ADDITIONAL SAFEGUARDS.—Neither the Fed-*
4 *eral Government nor a State shall require a religious*
5 *organization to—*
6 *(A) alter its form of internal governance; or*
7 *(B) remove religious art, icons, scripture, or*
8 *other symbols;*
9 *in order to be eligible to contract to provide assist-*
10 *ance, or to accept certificates, vouchers, or other forms*
11 *of disbursement, funded under a program described in*
12 *subsection (a)(2).*
13 *(e) RIGHTS OF BENEFICIARIES OF ASSISTANCE.—*
14 *(1) IN GENERAL.—If an individual described in*
15 *paragraph (2) has an objection to the religious char-*
16 *acter of the organization or institution from which*
17 *the individual receives, or would receive, assistance*
18 *funded under any program described in subsection*
19 *(a)(2), the State in which the individual resides shall*
20 *provide such individual (if otherwise eligible for such*
21 *assistance) with assistance from an alternative pro-*
22 *vider the value of which is not less than the value of*
23 *the assistance which the individual would have re-*
24 *ceived from such organization.*

1 *(2) INDIVIDUAL DESCRIBED.—An individual de-*
2 *scribed in this paragraph is an individual who re-*
3 *ceives, applies for, or requests to apply for, assistance*
4 *under a program described in subsection (a)(2).*
5 *(f) NONDISCRIMINATION IN EMPLOYMENT.—*
6 *(1) IN GENERAL.—Except as provided in para-*
7 *graph (2), nothing in this section shall be construed*
8 *to modify or affect the provisions of any other Federal*
9 *or State law or regulation that relates to discrimina-*
10 *tion in employment on the basis of religion.*
11 *(2) EXCEPTION.—A religious organization with*
12 *a contract described in subsection (a)(1)(A), or which*
13 *accepts certificates, vouchers, or other forms of dis-*
14 *bursement under subsection (a)(1)(B), may require*
15 *that an employee rendering service pursuant to such*
16 *contract, or pursuant to the organization's acceptance*
17 *of certificates, vouchers, or other forms of disburse-*
18 *ment adhere to—*
19 *(A) the religious tenets and teachings of*
20 *such organization; and*
21 *(B) any rules of the organization regarding*
22 *the use of drugs or alcohol.*
23 *(g) NONDISCRIMINATION AGAINST BENEFICIARIES.—*
24 *Except as otherwise provided in law, a religious organiza-*
25 *tion shall not discriminate against an individual in regard*

1 *to rendering assistance funded under any program de-*
2 *scribed in subsection (a)(2) on the basis of religion, a reli-*
3 *gious belief, or refusal to actively participate in a religious*
4 *practice.*

5 *(h) FISCAL ACCOUNTABILITY.—*

6 *(1) IN GENERAL.—Except as provided in para-*
7 *graph (2), any religious organization contracting to*
8 *provide assistance funded under any program de-*
9 *scribed in subsection (a)(2) shall be subject to the*
10 *same regulations as other contractors to account in*
11 *accord with generally accepted auditing principles for*
12 *the use of such funds provided under such programs.*

13 *(2) LIMITED AUDIT.—If such organization seg-*
14 *regates Federal funds provided under such programs*
15 *into separate accounts, then only the financial assist-*
16 *ance provided with such funds shall be subject to*
17 *audit.*

18 *(i) COMPLIANCE.—A religious organization which has*
19 *its rights under this section violated may enforce its claim*
20 *exclusively by asserting a civil action for such relief as may*
21 *be appropriate, including injunctive relief or damages, in*
22 *an appropriate State court against the entity or agency*
23 *that allegedly commits such violation.*

1 *SEC. 103. LIMITATIONS ON USE OF FUNDS FOR CERTAIN*
2 *PURPOSES.*
3 *No funds provided directly to institutions or organiza-*
4 *tions to provide services and administer programs described*
5 *in section 102(a)(2) and programs established or modified*
6 *under this Act shall be expended for sectarian worship or*
7 *instruction. This section shall not apply to financial assist-*
8 *ance provided to or on behalf of beneficiaries of assistance*
9 *in the form of certificates, vouchers, or other forms of dis-*
10 *bursement, if such beneficiary may choose where such assist-*
11 *ance shall be redeemed.*