

**Bending the arc of public policy to make government a partner with
communities and faith: The adoption of Charitable Choice, the
creation of the faith-based initiative, and the approaches and actions
of four presidential administrations**

Paper Two in a Three-Part Series

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During the 1990s and 2000s, the US government social assistance system underwent dramatic reform that fundamentally reshaped the nature of the collaboration between the government and partners in aiding disadvantaged populations. This reform occurred in two phases. The first was the reversal of the church-state requirements in federal funding so that explicitly religious organizations would be eligible for funding. This change was first made with the enactment of the Charitable Choice provision as part of the 1996 federal welfare reform law. The second phase was the modification of grantmaking policies and practices to make them hospitable to civil society organizations, secular and religious. This second phase included the creation of new offices within the White House and in various federal agencies, offices charged with the mission of educating federal officials about the new church-state rules and monitoring compliance with them, proposing pilot projects, pressing reforms to grantmaking, and expanding outreach. This very visible dimension of the faith-based initiative was launched in 2001 soon after the inauguration of President George W. Bush. The first phase—the changes to the church-state rules—began during the Clinton administration, before anyone was talking about a faith-based initiative, with the adoption of the Charitable Choice provision.

Even before Congress enacted Charitable Choice as part of the 1996 welfare reform law, some states were experimenting with how to include religious civil society organizations in their social assistance systems. Mississippi’s “Faith and Families” program and Maryland’s Family Investment Program both partnered government agencies with churches and other social groups that agreed to provide budgeting, networking, and other support services for families seeking help to get off welfare.¹

Transformation 1: Enacting Charitable Choice to bring in religion constitutionally and to deepen American pluralism

The opportunity for fundamental reform arrived in the mid-1990s when Congress took up President Clinton’s challenge to “end welfare as we know it” by creating a program that stressed services over transfer payments in order to help low-income mothers with children become self-supporting. By this time, the Supreme Court was shifting from its “no aid” interpretation of the

¹ These are briefly described in Stanley W. Carlson-Thies, “Don’t Look to Us’: The Negative Responses of the Churches to Welfare Reform,” *Notre Dame Journal of Law, Ethics & Public Policy* 11, no. 2 (1997): 667–89, at 673–75.

First Amendment to a “neutrality” or “equal treatment” interpretation—a momentous change from the requirement that government exclude from its funding organizations regarded as substantially religious to the requirement that no organization be disqualified due to its religious characteristics and practices.²

With prophetic attentiveness to the Court’s new inclination, when Carl Esbeck was asked by a former student who now worked in Senator John Ashcroft’s (R—Missouri) office what the senator should propose to make welfare assistance more effective, Esbeck suggested legislative language in line with the Court’s change.³ His previous research had documented illegitimate secularizing requirements in funding programs; the language he now proposed, which came to be called Charitable Choice, required the opposite: state and local governments using federal funds to obtain welfare services must neither exclude religious organizations nor require them to diminish their religious character or faith-based practices.

This new church-state requirement of equal access to funding became federal law as part of the new federal welfare program, Temporary Assistance for Needy Families (TANF), when President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) on August 26, 1996. Similar language, promoted by Senators Ted Kennedy (D—Massachusetts) and Dan Coats (R—Indiana), was added in 1998 to the Community Services Block Grant program (CSBG) that funds Community Action Agencies (CAAs) to provide services in low-income neighborhoods. And, in 2000, a similar Charitable Choice provision, advanced by the White House and by congressional Republicans, was added to the substance abuse treatment and prevention programs operated by the Substance Abuse and Mental Health

² On the change, see Carl H. Esbeck, “A Constitutional Case”; Monsma, *Positive Neutrality*; Stephen V. Monsma, ed., *Church-State Relations in Crisis: Debating Neutrality* (Lanham, MD: Rowman & Littlefield, 2002); Melissa Rogers, *Faith in American Public Life* (Waco, TX: Baylor University Press, 2019), chs. 6–7; and Chapman and McConnell, *Agreeing to Disagree*. An important transitional Supreme Court decision was *Bowman v. Kendrick* (1988), concerning the Adolescent Family Life Act. Through this law, Congress authorized federal grants to public agencies and to private organizations, including religious organizations, to provide education and services addressing teenage pregnancy and sexuality. The Court upheld the constitutionality of the program, although it directed the lower courts to assess whether constitutional restrictions on funding religion were violated in practice.

³ For Esbeck’s role, see Daly, *God’s Economy*, 53–56; Amy E. Black, Douglas L. Koopman, and David K. Ryden, *Of Little Faith: The Politics of George W. Bush’s Faith-Based Initiatives* (Washington, DC: Georgetown University Press, 2004), 51–52; and Dave Donaldson and Stanley W. Carlson-Thies, *A Revolution of Compassion: Faith-Based Groups as Full Partners in Fighting America’s Social Problems* (Grand Rapids, MI: Baker Books, 2003), 51–52.

Services Administration (SAMHSA) in the Department of Health and Human Services.⁴ Clinton signed into law all of these bills containing Charitable Choice language.

“It seems the churches are the only institutions with any credibility left in some communities,’ Bruce Reed, President Clinton’s domestic-policy adviser says. ‘The family’s broken, the government isn’t trusted. . . . That doesn’t necessarily mean we’ll be seeing religious organizations take over as the main service providers. But if you’re asking whether it’s no longer fashionable to be anti-religion in these matters, the answer is yes.’” — Joe Klein, “In God They Trust” (1997).⁵

The programs governed by these laws were all joint federal-state programs, meaning that Charitable Choice became the rule for much state and local funding of social services, as well. Moreover, the administrations after Clinton—Presidents George W. Bush, Barack Obama, Donald Trump, and Joseph Biden—all would embrace essentially the same principles and apply them to social services funding across federal agencies in the form of regulations termed “equal treatment” or “equal opportunity” rules. In many of these programs, too, the federal funds, carrying these regulations with them, are awarded to state or local agencies, making up a significant proportion of the budgets that they use to support private organizations in providing social services.

Charitable Choice was a radical, even a shocking, change. Notice the reversal: officials had been obligated to ensure that “too religious” organizations were excluded from funding but now were required to allow them to compete. Before, the government prescribed rules about how religious an organization was allowed to be if it was going to be accepted as a collaborator in providing social services; now the government was not permitted to set and guard a threshold of religiosity. It was required instead to allow the wide range of faith-based organizations to compete for funding while protecting their religious character. The government’s power to control its

⁴ On these enactments, see Black, Koopman, and Ryden, *Of Little Faith*, 52–62; David M. Ackerman, “Charitable Choice: Constitutional Issues and Developments Through the 106th Congress,” RL 30388, December 27, 2000 (Congressional Research Service, Library of Congress), 4–7; and Julie A. Segal, “A ‘Holy Mistaken Zeal’: The Legislative History and Future of Charitable Choice,” in Davis and Hankins, *Welfare Reform and Faith-Based Organizations*, 9–27. An insightful overview of the constitutional and policy changes and their significance is Melissa Rogers and E. J. Dionne Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations* (Washington, DC: Governance Studies at the Brookings Institution, 2008).

⁵ Klein, “In God They Trust,” 45.

collaborators was significantly undermined; it was up to civil society organizations themselves—even if they were thoroughly religious—to decide whether to collaborate with the government’s social assistance system. This was one fundamental way to convert collaboration into partnership.

The Charitable Choice and Equal Treatment principles

To the great concern of church-state sentinels, Senator Ashcroft and others who championed Charitable Choice often stressed the positive value of including faith-based services in the government’s social assistance network and their expectation that people facing various kinds of challenges would be particularly helped by the inclusion of religion. However, the Charitable Choice statutory provisions and the later Equal Treatment regulations created not a new theocratic safety net but rather a more pluralistic one, one that protects the religious freedom of both faith-based providers and people seeking assistance. The text of Charitable Choice in the new TANF program announced exactly that, saying that its various provisions would enable religious organizations to compete for and receive federal funding “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 the assistance.⁶

Charitable Choice’s new church-state rules embodied several key features. First, the previous bias against religious organizations was replaced not by a preference for religion but instead by equal opportunity for both religious and secular applicants to secure funding. Second, the rules distinguished between the character and practices of religious organizations, on the one hand, which were specifically protected, and the character of the services the government supports, on the other, which could be required to be “this-worldly,” without explicit religious content. While a faith-based organization could not be barred from funding for being “pervasively sectarian,” it had to follow specific rules about how religion is related to its government-funded services.

⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, sec. 104, subsection (b), codified at 42 US Code §604a, subsection (b).

Third, Charitable Choice stressed voluntariness in religion—not because religion is unimportant but rather because it is so important that no one should be forced into religious practices.⁷

Here are the key Charitable Choice and Equal Treatment principles, which, in broad outline, have been maintained now for nearly three decades:

1. *Equal eligibility.* Faith-based organizations, however religious or pervasively sectarian they may be, are eligible for federal funding equally with secular and religiously affiliated organizations. Officials must be religiously neutral in deciding which applicant will receive funding, being biased neither against nor for faith-based organizations, choosing between applicants without regard to their religious or secular character.

2. *Protected religious character.* To be eligible for funding, and after receiving funding, faith-based providers need not suppress their religious identity. To the contrary, the new rules specifically protect various elements of religious character such as a religious mission, a religious name, the presence of religious icons or symbols, and clergy participation on the governing board. In addition, in recognition of the importance of religious staffing to many faith-based organizations, the rules stress that the organizations do not waive that important right by accepting government funds. (Some federal programs prohibit employment discrimination by grantees, including religious discrimination, but this prohibition may be set aside for faith-based organizations because of overriding religious freedom protections, as discussed later.)

Importantly, while the rules accompanying the most common type of funding require that the funded services not include inherently religious activities (see principle 4a below), faith-based providers nevertheless may offer religious activities and teaching on a voluntary basis, inviting beneficiaries—the people coming for assistance—to participate if they so desire. Recall that, previously, an organization that hired based on religion and that offered religious teachings and

⁷ Voluntariness does not mean that followers of a religion regard the religion not to be obligatory, but only—and vitally—that it is not to be imposed on others by government force. On the importance of voluntariness in religious exercise in America's church-state design, see Carl H. Esbeck, "Governance and the Religion Question: Voluntarism, Disestablishment, and America's Church-State Proposition," *Journal of Church and State* 48 (2006): 303–26; Witte Jr., Nichols, and Garnett, *Religion and the American Constitutional Experiment*, esp. ch. 3; and Kevin Seamus Hasson, *The Right to be Wrong: Ending the Culture War Over Religion in America* (San Francisco: Encounter Books, 2005).

practices among its activities thereby revealed itself to be “pervasively sectarian” and thus presumptively ineligible for government funds.⁸ That presumption now was specifically overturned.

3. *Beneficiary protections.* A person eligible for a funded service may not be turned away by faith-based or secular providers because of the person’s religion or lack of religion. And beneficiaries may not be compelled to participate in inherently religious activities or teaching that may be offered by a provider. Moreover, some versions of the rules specify that a beneficiary who objects to the religious character of a provider must be offered an alternative provider that is not religiously objectionable (this other provider might be faith-based). We can call this a “super” beneficiary protection because unwanted participation in explicitly religious activities is already prohibited by the rules: when a program is grant-funded, such activities and teaching are excluded from the funded program, and if the funding is via voucher, the beneficiary is able to choose a suitable program to begin with (see more on this directly below). Few if any beneficiaries have ever requested a referral,⁹ the point is to fully protect the religious exercise right—which includes the right not to be involved in religious activities—of people who rely on the government to receive needed assistance.

4. *Explicit religion in social services may be funded or not, depending on whether beneficiaries have a full choice of services.* As noted above, some faith-based organizations include explicit religious teaching and elements within the services they offer and others do not. Monsma, in his study of government-funded welfare-to-work programs, termed the former services “faith-based, integrated programs” and the latter “faith-based, segmented programs.”¹⁰ The “segmented” service programs, although inspired by religion, do not include significant specifically religious elements, although a faith-based organization may offer such religious teaching and activities

⁸ See Monsma, *When Sacred & Secular Mix*, 149ff and passim.

⁹ See, e.g., the Department of Health and Human Services Notice of Proposed Rulemaking to amend its Equal Treatment regulations, 80 Fed. Reg. 47272 (August 6, 2015), at 47277, <https://www.govinfo.gov/content/pkg/FR-2015-08-06/pdf/2015-18256.pdf>, and the eventual Consolidated Final Rule, 81 Fed. Reg. 19355 (April 4, 2016), at 19366, <https://www.govinfo.gov/content/pkg/FR-2016-04-04/pdf/2016-07339.pdf>. See also Rogers, *Faith in American Public Life*, 110.

¹⁰ Stephen V. Monsma, *Putting Faith in Partnerships: Welfare-to-Work in Four Cities* (Ann Arbor: University of Michigan Press, 2004), 44–45.

separately from the social service. In such service programs, a beneficiary can receive the service without participating in an inherently religious activity such as prayer or religious discussion. In the “integrated” programs, religious elements are woven into the service; for instance, a program that includes instruction about the value of maintaining a job and of being respectful to one’s employer and fellow employees might include specific teachings from a sacred text. Here a beneficiary has to participate in the religious elements in order to receive the service at all.

4a. *No “direct” funding of explicit religion: appropriate for “faith-based, segmented” programs.* For church-state purposes, government funding of services by the award of a grant or contract to a provider is termed “direct” funding: the government itself selects which organization to support and then provides the funds. The selected organization is often the only service provider for a particular area and thus the only option available to a beneficiary. This is the way social services are usually funded by government.¹¹ Charitable Choice specified that such direct funds may not be used to pay for “inherently” or “explicitly” religious activities, such as prayer, religious instruction, and proselytization.¹² Nor may direct funds be used to pay for religious texts or religious curricula. Similarly, if a church’s youth pastor is employed part-time to teach in the church’s government-funded job-training program, then the pastor’s timecard and the church’s accounting record must reflect that the federal money supported only the jobs program and not the pastoral activity. These rules do not bar a faith-based organization from offering religious activities and inviting beneficiaries to participate in them, but the inherently religious activities must be separated “in time or location” from the government-supported service.

These “direct” funding rules protect beneficiaries from being compelled to participate in explicit religion in order to receive the available service, and they ensure that the government, in selecting a provider, is not, in effect, choosing to fund theological instruction and worship.

¹¹ At the federal level, social services are generally funded by grants (or the similar cooperative agreements), although sometimes by contracts, which involve greater government control. State and local governments often receive federal grant funding—e.g., federal block grants—and then award the support to private organizations in the form of contracts, but such federal funds remain subject to the federal grant rules.

¹² To identify religious content that government may not directly fund, Charitable Choice statutory provisions, Equal Treatment regulations, executive orders, and guidance documents use the phrase “inherently [or explicitly] religious activities, such as worship, religious instruction, and proselytization.” See the discussion in President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *Strengthening Efforts to Increase Opportunity and End Poverty*, 129–30.

However, note the consequence that “direct” funding, this most prevalent form of government aid, excludes from government partnerships those providers whose services integrate elements of religious instruction and religious activities, however effective their services may be and however much some beneficiaries may desire those services. This collateral exclusionary effect of the required restriction of explicit religion that governs most government funding (because the majority of the funding is “direct”) has been from the start strongly criticized by some advocates of faith-based social services and some religious freedom scholars. As we will see, the Equal Treatment regulations over the years have been modified in part to make them more hospitable to the broad range of faith-based organizations while preserving beneficiary protections.

4b. If choice, then explicit religion can be incorporated: appropriate for “faith-based, integrated programs.” Charitable Choice in the welfare reform law also specifically authorized “indirect” or voucher funding of welfare services. The rules for this alternative, less frequently used, way of funding services are specified in the Equal Treatment regulations, although with significant changes in detail over time. Here the government authorizes a beneficiary to obtain some service and awards the beneficiary a scholarship, voucher, child care certificate, or other financial instrument. The beneficiary chooses a provider from a list of qualified organizations and then gives the voucher to the provider in order to obtain the service; the provider turns the voucher over to the government and then is paid for services rendered. In indirect funding, therefore, a provider only receives government funds due to the decision of a beneficiary and not because of a government official’s choice. In these circumstances, the US Supreme Court has ruled, the services that can be chosen—and that therefore will be funded by government—can include services that incorporate explicitly religious teaching and religious activities.¹³ In an indirect-funding system, when a “faith-based, integrated program” is supported by federal dollars, this is the result of a beneficiary’s religious exercise and not because an official unconstitutionally decided to “establish” religion.

¹³ See, in particular, the Supreme Court decision *Zelman v. Simmons-Harris* (2002).

Amy Sherman, who is both a scholar and trainer of faith-based social service providers, advises providers to assess whether they offer “salad” or “brownie” programs when considering applying for government funding. In “salad” programs, explicitly religious activities and teachings are interspersed among secular activities and can be set aside from them; the provider can accept “direct” funding to support the secular services while inviting beneficiaries to participate in the separate religious activities if they desire to. In a “brownie” program, the religious and secular elements are baked together; if the religious parts are extracted, the program loses its coherence and its effectiveness. The requirements of “direct” funding conflict with such religion-inclusive services. The provider thus should see whether voucher (“indirect”) funding is available instead.¹⁴

The use of the “indirect” funding method by government makes it possible for providers that offer “faith-based, integrated” programs to partner with government, for they can receive government aid to serve beneficiaries without first stripping out explicitly religious elements from the services they offer. Such indirect funding is equally hospitable to providers offering strictly secular services and for those offering “faith-based, segmented” services. A network of providers funded indirectly thus can include both religious and secular programs and serve well both beneficiaries who desire a religious aspect to a service and those who object to religion. We can say that “indirect” funding protects beneficiaries’ religious freedom rights both negatively and positively: no beneficiary is compelled to use a service that includes religion, and yet a beneficiary who favors such a service is able to choose it. Thus, services funded in this way embody a valuable deepening of American public policy pluralism, enabling the array of government-supported social services to better match the diversity of those needing assistance.¹⁵

However, it is easier for government simply to award grants to one or two providers in a locale than to create and administer a system of multiple diverse providers, to maintain an information system about the available choices, and to fund the services by providing vouchers to beneficiaries. Indirect funding can be difficult for providers, too, for they must create or expand and then deliver services before funding is received. Nor can a provider be certain how often beneficiaries will choose its services rather than turn to another provider. Yet, as noted earlier,

¹⁴ Amy L. Sherman, *The Charitable Choice Handbook for Ministry Leaders* (Annapolis, MD: Center for Public Justice, 2001).

¹⁵ Voucher funding differs from “direct” funding in multiple ways beyond the church-state differences stressed here and may be selected by policymakers because of these other characteristics. For enlightening analyses of voucher funding and other kinds of government support, see C. Eugene Steuerle, Van Doorn Ooms, George Peterson, and Robert D. Reischauer, eds., *Vouchers and the Provision of Public Services* (Washington, DC: Brookings Institution Press, Committee for Economic Development, and Urban Institute Press, 2000), and Salamon, ed., *Tools of Government*.

ever since the CCDGB program was created in 1990, before Charitable Choice was first adopted, federal support for child care for low-income families has routinely and predominantly used the indirect funding method in which eligible families are offered child care certificates to pay for secular or faith-based child care as they wish.

In addition, as we will see later, the Bush administration's Department of Labor created a pilot program to put into practice "beneficiary-choice contracting"—a form of contracting, not vouchers, that allows beneficiaries to choose among providers, some offering secular services and others services that include religious elements. This kind of indirect funding does not require the complete redesign of social services funding and administration. Moreover, without being identified as doing so, a significant number of social service, health, and education programs fulfill the requirements for indirect funding: informed choice by beneficiaries and payment to the provider only because a beneficiary has chosen it. Government agencies with such programs should ensure that beneficiaries do have diverse choices, including the option of a secular service, and then specifically invite providers offering faith-integrated programs to be among the choices available to beneficiaries. Ensuring multiple choices by including both secular and faith-based services may require additional government effort but has the great benefit of better serving the people the government programs are intended to assist.

The administrations that have followed Clinton's—Bush, Obama, Trump, and Biden—have maintained Equal Treatment regulations modeled on Charitable Choice, albeit with somewhat different interpretations of the church-state requirements, but no administration has pressed toward a theocratic model that would support only faith-based, or only Christian, social service providers, and no administration has pressed to exclude faith-based organizations or even houses of worship as if only secular providers and secular services can achieve public purposes or the common good. The first enactment of Charitable Choice was a turning point, decisively changing American social policy from a secular to a pluralist model.

Faithful to the Constitution while expanding our political pluralism

The Charitable Choice or Equal Treatment revolution in government funding has been validated by a series of US Supreme Court decisions. *Mitchell v. Helms* (2000) ruled that “pervasively sectarian” schools are eligible for direct government aid but the aid cannot be spent on inherently religious activities. *Zelman v. Simmons-Harris* (2002) approved a school voucher program in which parents could choose either private schools offering religious education or secular public or private schools. *Trinity Lutheran Church v. Comer* (2017) ruled that even churches are eligible for government support of their non-worship activities (in this case, playground resurfacing). In *Espinoza v. Montana Department of Revenue* (2020) and *Carson v. Makin* (2022), the Court determined that when a state operates a school funding program that allows parents to choose a private school, it cannot exclude religious private schools, even if the education they provide is thoroughly religious. None of these decisions are about funding social services as such, but the principle is clear: when the government offers funds to private organizations to provide some service, it is not permitted categorically to exclude faith-based providers, even if they offer “faith-based, integrated” programs.

This trajectory of decisions can be interpreted as the movement of the Court from a prime commitment to “no establishment,” via the “no aid to religion” requirement, to a prime commitment to the “free exercise” of religion, requiring the elimination of every restriction on access to funding by faith-based organizations. In my view, this change in the Court’s stance would be a troubling development if it entailed government officials taking no care for the rights of people who are supposed to be able to receive services that the government has funded—for example, if officials may award a grant to provide some kind of service to a single provider that delivers services infused with the teachings and activities of a religion without at the same time arranging for a secular or otherwise religiously acceptable alternative for beneficiaries needing a different choice. I think it is more accurate, however, to understand the string of Court decisions as the development of funding principles that require equal treatment of secular and religious competitors for funding while simultaneously protecting beneficiaries from compelled religious

observance.¹⁶ That is, (1) no kind of organization can be excluded from funding; (2) when beneficiaries have a choice, services that incorporate inherently religious elements can be offered; (3) but when there is no such choice, beneficiaries cannot be required to participate in religion but in fact must have a way to receive a needed service without such participation.

Note that the previous “no aid to religion” rule in government funding also protected beneficiaries from religious compulsion. However, that positive result was purchased at the cost of excluding effective faith-based providers and reducing choice for the beneficiaries. Charitable Choice provides a better way to avoid compulsion and to respect the “no establishment” requirement while simultaneously protecting the free exercise of both beneficiaries and faith-based providers. In this framework of principles and practices, faith-based organizations participate *as* faith-based organizations that offer religious activities and teaching, but without compulsion. If the funding is “direct,” the religious activities and teaching are available separately from the government-supported services; if the funding is “indirect,” then religion can be incorporated into a service, while beneficiaries are able to choose such a service or else a secular service.

Thus, Charitable Choice not only ended the exclusion from funding of organizations thought to be too religious but created a constitutional way to include them in their sectarian diversity—to include them if they could provide services effectively, *despite their religion* (the requirement of no bias against or for them), *with their religion intact* (the various protections for their religious character and activities), and even *because of their religion* (when they would be one of several choices).

“[T]he founding fathers arrived at a faithful consensus that America should be a godly republic rather than either a secular state or a Christian nation.” — John J. DiIulio Jr., *Godly Republic* (2007).¹⁷

¹⁶ Note that in the school funding cases—*Zelman*, *Espinoza*, and *Carson*—parents always had, in addition to the choice of a religious school, the option of a government-supported secular school, either a secular private school or a public school. The *Trinity Lutheran Church* decision authorized government support to improve a church’s playground, but children in general can have no a reasonable expectation to be able to use that particular playground.

¹⁷ DiIulio, *Godly Republic*, 33.

I propose that a social assistance system that incorporates religion in this way fulfills better than does a secular system the constitutional requirements, basic American principles, and the full public good. It implements a more robust American public policy pluralism. American society is heterogeneous, comprised of people with diverse religious, philosophical, and moral convictions and practices—convictions and practices that can be important for the effectiveness and desirability of the social services supported by government. Diverse social services providers and social services are a better match for American society than uniform secularity. But the religion of service providers cannot be dictated by government and it cannot be made obligatory for beneficiaries as the price of receiving a needed service. The Charitable Choice and Equal Treatment rules enable the government social assistance system to better serve beneficiaries. These rules enable religious organizations as well as secular organizations, in all of their distinctiveness—their “sectarian” diversity—to operate as “partners in public service”¹⁸—interpreting “public” here as the diverse reality that it is.

“Since they are co-responsible for ministering to the poor, faith-based charities ought to be willing to engage the state with the confidence that they are equal partners in this enterprise, not just government contractors. Subsidiarity works both ways, and religious charities provide an immense help to the state by providing social services in ways that the state itself simply cannot provide. This should instill in the organizations that make up the religious social sector a deep sense of the importance and uniqueness of their contribution to the general welfare. It should also strengthen their determination, as they cooperate with various levels of government in pursuit of common ends, to guard jealously their religious identity, knowing that it is precisely because of it that they contribute to the common good.” — Luis Lugo, *Equal Partners: The Welfare Responsibility of Governments and Churches* (1998).¹⁹

These religion-inclusive but pluralist principles are rooted in Catholic and neo-Calvinist social teaching traditions that stress both governmental responsibility and the calling of citizens, through civil society organizations, to express love of neighbor. But this interjection of religion into American social policy discussions and action has the aim and effect not of prompting a religious takeover of society but of fostering a more thorough pluralism in the government’s

¹⁸ I am borrowing the title of Salamon, *Partners in Public Service*, without suggesting we share the same understanding.

¹⁹ Luis E. Lugo, *Equal Partners: The Welfare Responsibility of Governments and Churches* (Washington, DC: Center for Public Justice, 1998), 18–19.

social assistance system to match the pluralism of providers and the diversity of convictions and practices of families, individuals, and communities needing assistance.²⁰

“The civic life of a free and pluralistic nation can never be dominated by a particular faith, nor can it be stripped of faith.” — E. J. Dionne Jr. and Ming Hsu Chen, *Sacred Places, Civic Purposes* (2001).²¹

A broad consensus forms

Public polling by the centrist Democratic Leadership Council a few years after Charitable Choice was first enacted in 1996 showed that very large majorities of Democrats, Republicans, and independents agreed that social problems in the United States could be better solved by “closer collaboration” between government and religious and other charitable organizations than by either government by itself or by civil society organizations acting alone.²² However, such closer collaboration, of course, worried church-state separationists, concerned about possible religious coercion and violation of the Establishment Clause, and civil rights advocates, also concerned about coercion and additionally opposed to religious staffing decisions being made by faith-based organizations supported by government funds. These and other issues would continue to be vigorously debated.

Yet acceptance of the Charitable Choice principles was broad. As Charitable Choice was being added to several federal programs, leaders of a diverse group of religious and secular organizations met in Washington, DC, for a series of “In Good Faith” discussions about this significant change in church-state rules. Separationists and partnership advocates could not

²⁰ On the Catholic subsidiarity framework and the neo-Calvinist sphere sovereignty principle as inspiration for the faith-based initiative, see, esp., Daly, *God's Economy*; James W. Skillen, “*E Pluribus Unum* and Faith-Based Welfare Reform,” in Skillen, *Pursuit of Justice: Christian Democratic Explorations* (Lanham, MD: Rowman & Littlefield, 2004), 59–75; Stanley W. Carlson-Thies, “Why Should Washington, DC, Listen to Rome and Geneva About Public Policy for Civil Society?” in Jeanne Heffernan Schindler, ed., *Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives* (Lanham, MD: Lexington Books, 2008), 165–87; and John Chandler, *Faith-Based Policy: A Litmus Test for Understanding Contemporary America* (Lanham, MD: Lexington Books, 2014). Stephen Monsma, in his *Pluralism and Freedom*, shows how these Catholic and neo-Calvinist social principles also reflect American constitutional principles. William A. Galston’s *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002) explains, explores, and defends a similar social pluralism for public policy.

²¹ Dionne and Chen, “Introduction,” in Dionne and Chen, *Sacred Places, Civic Purposes*, 15.

²² Mark Penn, “The Community Consensus,” *Blueprint: Ideas for a New Century* (Spring 1999): 52–53.

come to full agreement, yet there was significant consensus. Religious organizations should not simply be banned from government funding programs. Government funds are not to be used to promote religion rather than social services. People needing help from government programs must not be forced into religious activities. Religious organizations must be counted as among the valuable providers of services to people and neighborhoods in need.²³

To be sure, religious leaders and organizations were not automatically supporters of Charitable Choice. After President Bush inaugurated the White House Office of Faith-Based and Community Initiatives, its first director, John J. DiIulio Jr., felt compelled to deliver a fiery speech chastising some evangelical Protestants who regarded the initiative as a way to get the federal government to fund the “right religion”—theirs. And earlier, when Charitable Choice was being discussed in Congress, some prominent evangelical Protestants spoke in opposition, claiming that welfare is the responsibility of churches, not government, while some mainline Protestant leaders opposed it because welfare is the responsibility of government and not churches! And the leaders of some religiously affiliated providers that were already working with government warned of changing the rules, fearful that the pragmatic arrangements that they had worked out with government officials might be overturned.²⁴

In 1999, as dueling candidates to replace President Bill Clinton, first Al Gore, a Democrat and the sitting vice president, and then George W. Bush, his Republican challenger, gave major speeches calling for the expansion of the Charitable Choice principles and expanded federal partnerships

²³ “In Good Faith: A Dialogue on Government Funding of Faith-Based Social Services” was the product of discussions convened by the American Jewish Committee and the Feinstein Center for American Jewish History at Temple University and issued May 2001. This report is reprinted in Dionne and Chen, *Sacred Places, Civic Purposes*, 305–20. I was a participant in this project, as was Melissa Rogers, who has been a director of the White House faith-based office under Presidents Obama and Biden. Similarly broad though incomplete agreement is reflected in the final statement issued by another diverse group of leaders, *Finding Common Ground: 29 Recommendations of the Working Group on Human Needs and Faith-Based and Community Initiatives* (Washington, DC: Search for Common Ground of Washington, January 2002). See also Davis and Hankins, eds., *Welfare Reform and Faith-Based Organizations*, an early collection of substantial arguments favoring and questioning Charitable Choice; and Carl H. Esbeck and Stanley Carlson-Thies, “Happy Birthday Charitable Choice, 20 Years of Success: Two Decades of Bipartisan Cooperation on Government Funding and Religion” (blog post), Institutional Religious Freedom Alliance, August 22, 2016, <https://cpjustice.org/happy-birthday-charitable-choice-20-years-of-success/>. Black, Koopman, and Ryden, *Of Little Faith*, discusses throughout areas of agreement and disagreement.

²⁴ DiIulio’s speech, “Compassion ‘In Truth and Action’: How Sacred and Secular Places Serve Civic Purposes, and What Washington Should—and Should Not—Do to Help,” was delivered to the National Association of Evangelicals meeting in Dallas, TX, on March 7, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/text/20010307-11.html>. For the divergent views of various Protestant leaders, see Carlson-Thies, “Don’t Look to Us’.”

with faith-based organizations. Gore proposed the expansion first, urging that “the solutions that faith-based organizations are pioneering” should be “at the very heart of our national strategy for building a better, more just nation.” Accordingly, he proposed extending Charitable Choice, “this carefully tailored approach,” to additional “vital services where faith-based organizations can play a role—such as drug treatment, homelessness, and youth violence prevention.”²⁵ Bush, in his “Duty of Hope” speech a few months later, vowed, “In every instance where my administration sees a responsibility to help people, we will look first to faith-based organizations, charities and community groups that have shown their ability to save and change lives.” He said his administration would “change the laws and regulations that hamper the cooperation of government and private institutions” and promised, “We will allow private and religious groups to compete to provide services in every federal, state and local social program.”²⁶

Additional change needed

The Gore and Bush, Democratic and Republican, commitments to changing federal policies were important indicators of broad support for the new Charitable Choice church-state rules and for a different relationship between government and civil society. But principles and even laws are not self-executing. The new rules had to be communicated to the relevant officials—federal, state, and local—and be transformed into changed practices. For instance, announcements of the availability of funds and also grant documents needed now to include new provisions defining the eligibility of faith-based organizations and specifying their institutional religious protections and also stressing safeguards for beneficiaries. And to overcome the many other obstacles to the inclusion of civil society organizations in the government-funded social assistance system, additional changes were needed to the grants system. Among other reforms, new types of outreach were required in order to gain the attention of organizations sharply focused on fulfilling their missions, who paid little attention to funding announcements, and various

²⁵ Speech on the role of faith-based organizations to the Salvation Army, Atlanta, GA, May 24, 1999. See Ceci Connolly, “Gore Urges Role for ‘Faith-Based’ Groups,” *Washington Post*, May 25, 1999, <https://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/gore052599.htm>.

²⁶ The speech is reprinted in Hilary Sorin, “Today in Texas History: GW Bush delivers first presidential speech,” *Texas on the Potomac* (blog), July 22, 2010, <https://blog.chron.com/txpotomac/2010/07/today-in-texas-history-gw-bush-delivers-first-presidential-campaign-speech/>.

assistance programs needed redesign so that beneficiaries could benefit from the strengths of locally trusted organizations.

The Clinton administration itself was a lukewarm supporter of Charitable Choice and expanded partnerships. Despite signing into law the bills that included Charitable Choice, President Clinton pressed for the continued exclusion from federal funding of “pervasively sectarian” organizations.²⁷ His administration did not issue Charitable Choice regulations to guide states,²⁸ although his Department of Health and Human Services did organize a national conference on Charitable Choice in the revised welfare law, bringing together federal and state officials and faith-based organizations.²⁹ Both Clinton’s first Secretary of Housing and Urban Development (HUD), Henry Cisneros, and his second, Andrew Cuomo, promoted greater interaction between HUD and religious organizations, including congregations active in community development and low-income housing. And Cuomo created the first federal partnership office, the HUD Center for Community and Interfaith Partnerships. But Charitable Choice did not apply to HUD programs, and the Cisneros and Cuomo efforts were hampered by the limitations inherent in the traditional cross-sector collaboration system.³⁰

²⁷ Black, Koopman, and Ryden, *In Good Faith*, 59, 61, 62; Rogers and Dionne, *Serving People in Need*, 19–20; Ackerman, “Charitable Choice,” 7, 9, 14–15, 16.

²⁸ To help fill the gap, the Center for Public Justice, where I worked, issued two guidance booklets: *A Guide to Charitable Choice: The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation With Faith-Based Social-Service Providers* (Washington, DC: Center for Public Justice, 1997), and Stanley W. Carlson-Thies, *Charitable Choice for Welfare & Community Services: An Implementation Guide for State, Local, and Federal Officials* (Washington, DC: Center for Public Justice, 2000).

²⁹ The conference, with the theme “Building New Partnerships,” was organized by the Administration for Children and Families in the Department of Health and Human Services and was held in New Orleans, LA, on November 16–17, 1999. I have in my collection a canvas briefcase from the conference that is emblazoned with the conference theme and sponsor.

³⁰ By my observation, the HUD Center did not regard the introduction of Charitable Choice into its own program laws to be necessary. Later, as the Bush White House Office of Faith-Based and Community Initiatives in its early weeks in 2001 began to explore the legal and process barriers in federal rules and programs that impeded partnerships with faith-based and community-based organizations, officials connected with the original HUD Center unveiled the results of its own survey of barriers. The ultimate Bush White House report, *Unlevel Playing Field*, discussed later, would identify fifteen legal and process barriers. The HUD officials’ survey said that respondents identified only one barrier: neither difficulties in the federal rules nor in program design but simply not enough funds for grantees. Yet this outcome was hardly surprising: the HUD Center had surveyed its contacts and all of them were current or former grantees. These were all, by definition, organizations that had figured out how to negotiate any barriers successfully. They simply sought additional resources.

“Soon after I came to HUD, I established the Religious Organizations Initiative The mission of this initiative is to provide extensive outreach to the faith community and to engage religious institutions as partners in forwarding the priorities we have established for HUD. My colleagues who oversee this initiative have talked with, and made themselves accessible to, hundreds of religious leaders across the country, visiting conferences and conventions, listening to questions and ideas, and exploring ways that HUD’s programs can further their community-building efforts.

“I believe this initiative is paying off—not only by the concrete assistance we have been able to offer but also by simply providing a voice, a face, someone religious leaders feel they can reach out to in government. Government clearly benefits as well, because we have learned from their experiences.”

— HUD Secretary Henry G. Cisneros, “Higher Ground: Faith Communities and Community Building” (1996).³¹

Some states were more eager than the Clinton administration to put the partnership vision into practice. Complying with Charitable Choice was a requirement that accompanied the federal funds they received from the new welfare program and via the Community Development Block Grant and SAMHSA drug prevention and treatment programs. Even before a White House faith-based office was created, five states, both blue and red, had each created a faith-based office or designated a faith-based official—California, New Jersey, Oklahoma, South Carolina, and Texas.³² Texas Governor George W. Bush paid particular attention to the new Charitable Choice rules, convening advisory and working groups to evaluate and modify state policies and practices.³³

³¹ Reprinted in Henry G. Cisneros, *City Scape: A Collection of Essays* (Washington, DC: US Department of Housing and Urban Development, December 1996), 78.

³² Rebecca Sager, *Faith, Politics, & Power: The Politics of Faith-Based Initiatives* (Oxford: Oxford University Press, 2010), appendix C. See also Pamela Winston, Ann E. Person, and Elizabeth Clary, *The Role of State Faith Community Liaisons in Charitable Choice Implementation: Final Report* (Washington, DC: Mathematica Policy Research, 2008). During the Bush administration, more than thirty states had faith-based offices or designated faith-based liaison officials and a very large number of municipalities also designated faith-based liaisons. White House Office of Faith-Based and Community Initiatives, *The Quiet Revolution: The President’s Faith-Based and Community Initiative: A Seven-Year Progress Report* (2008), ch. 5, “Taking Root Across America,” https://georgewbush-whitehouse.archives.gov/government/fbci/fs_takingroot.html.

³³ Governor’s Advisory Task Force on Faith-Based and Community Service Groups, *Faith in Action: A New Vision for Church-State Cooperation in Texas, Full Report* (1996); *Implementing “Charitable Choice” Provisions of Welfare Reform: Report of the Texas Department of Human Services’ “Charitable Choice” Workgroup* (Austin: Texas Department of Human Services, 1997).

Transformation 2: The federal faith-based and neighborhood partnership initiative

Converting the government social services system from collaboration to partnership required not only reversing the church-state rules—that was Track 1, the Charitable Choice innovation—but also transforming the grants system: modifying how funding is announced, changing the size of grants and the bureaucratic requirements that accompany them, giving social service providers the opportunity to be co-responsible for program design rather than only following government directives, and breaking through conventional practices to get resources to small faith-based and community-oriented organizations much more focused on providing vital services in their neighborhoods than to looking for government funding. To promote such changes, and to ensure that the new Charitable Choice principles would be implemented and not ignored, a second line of reform action was established: Track 2, the federal faith-based initiative, sometimes called the partnership initiative. A vital step was the creation of new federal offices with distinctive visionary, leadership, and practical responsibilities.

Executive orders issued by George W. Bush soon after he was inaugurated created new federal institutions: a White House Office of Faith-Based and Community Initiatives in the Executive Office of the President and Centers for Faith-Based and Community Initiatives in major federal agencies that operate social services funding programs. A third Bush executive order, issued the next year, endorsed the Charitable Choice principles as the church-state rules that must guide all federal social services spending, not just in those programs with this statutory language. This third executive order sparked the writing of Equal Treatment regulations across key federal agencies to ensure that religious organizations—whether religiously inspired, religiously affiliated, faith-based with a pronounced religious identity and various religious practices, or even houses of worship that operate programs that serve their neighbors—are able to compete fairly for federal social services funding.

There was solid grounding for these executive orders: the congressional adoption of Charitable Choice multiple times, the Supreme Court's interpretive turn, the broad consensus that had developed in support of Charitable Choice and the partnership vision. Yet these foundational

Bush executive orders also demonstrated a deep, specifically presidential, commitment to transforming the official social assistance system and way government interacts with civil society. These were executive actions in line with but not dictated by statutes or Court rulings. And it is even more notable that succeeding presidents of both parties—Democrat Barack Obama, Republican Donald Trump, and now Democrat Joe Biden—by their own official actions, including their own executive orders, accepted and made their own this federal faith-based initiative: these new institutions, the partnership vision, and the reversed church-state principles.

“I think we have seen about the most dramatic administrative change that is possible for those inside the Beltway to conceive . . . the idea that you go from a government that was in form as well as practice quite hostile to many kinds of religious organizations participating in government funding programs to one that has now institutionalized an expectation—it’s not always practiced, but an expectation of equal treatment. I mean, that’s a remarkable change and that’s a change that didn’t happen because of Charitable Choice although the groundwork was there. It’s happened because of the Faith-Based and Community Initiative.” — Robert Tuttle, George Washington University Law School (2007).³⁴

I will summarize each president’s commitment to the initiative, his administration’s actions regarding the initiative’s institutions and the new church-state rules, and notable innovations to the grants system and to federal programs. Then, in the next section, I will propose substantial new reforms in three policy areas: creating a federal policy that simultaneously secures LGBTQ rights and the protections needed by morally conservative faith-based organizations so that they can remain partners with government; devising ways that the federal government can support historic urban congregations and thereby the many positive civil society programs and organizations they support; and further changing the grants system so that houses of worship and related faith-based organizations in marginalized communities can obtain the government resources they need to support their indispensable work as the pillars of their neighborhoods. In the final section I will assess the declining transformative energy of the initiative over time and recommend how to renew that indispensable transformative drive.

³⁴ Robert Tuttle, statement at the 2007 annual conference of the Roundtable on Religion and Social Welfare, quoted in Jay F. Hein, *The Quiet Revolution: An Active Faith That Transforms Lives and Communities* (Waterfall Press, 2014), 194.

“[T]here is nothing new about faith-based organizations delivering social services What is new is the effort by mayors, governors and the President himself to encourage and enable faith-based organizations to access government programs to help those in need. This effort represents a substantial shift in approach from two previous polarizing approaches. One of these approaches assumed that government’s responsibility needed to be discharged by government employees operating inside tight rules. The other approach assumed that if government merely got smaller, [then] faith-based organizations and other players in the nonprofit sector would take over important services. Today, however, pragmatic mayors intentionally create partnerships with FBOs to more effectively deliver public goods.” — Stephen Goldsmith, Chris Pineda, and William B. Eimicke (2005).³⁵

Presidential commitments

George W. Bush. Bush’s creation of the faith-based initiative was not a great surprise. As Texas governor, he was open about how religion had saved him from alcoholism, routinely praised the work of civil society organizations, and pressed state agencies to follow the Charitable Choice rules when spending federal money from those programs. Among his informal advisers were Marvin Olasky and John J. DiIulio Jr., very different in their politics but united in their understanding of the vital work of faith-based organizations. Bush publicly chastised Texas agencies and officials that hampered the work of faith-based and community-based organizations. Running for president, he promised a new federal “Office of Faith-Based Action.” And soon after his inauguration, he announced that one of his chief priorities was to “rally[] the Armies of Compassion.” Barriers preventing faith-based organizations from accessing federal funds must go; the federal government must expand its partnerships with civil society organizations and expand also its support for the good they accomplish separately from government. But this was no call to privilege Bush’s own religion or religion as such, nor to diminish the federal government’s own responsibilities. The government, he said, should partner with whichever organization is best, “whether run by Methodists, Muslims, Mormons, or good people of no faith at all.” And while government should “welcome [charities] as partners,” its work could not be replaced by them.³⁶

³⁵ Stephen Goldsmith, Chris Pineda, and William B. Eimicke, *How City Hall Can Invigorate the Faith Community Around a Citywide Housing Agenda*, Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University, fall 2005, <https://ash.harvard.edu/files/ash/files/11119.pdf?m=1632422817>.

³⁶ Bush, *Rallying the Armies of Compassion* (White House, January 2001), foreword, <https://georgewebush-whitehouse.archives.gov/news/reports/faithbased.html>.

“The paramount goal must be compassionate results, not compassionate intentions. Federal policy should reject the failed formula of towering, distant bureaucracies that too often prize process over performance. We must be outcome-based, insisting on success and steering resources to the effective and to the inspired. Also, we must always value the bedrock principles of pluralism, nondiscrimination, evenhandedness and neutrality. Private and charitable groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, like curbing crime, conquering addiction, strengthening families, and overcoming poverty.”— President George W. Bush, *Rallying the Armies of Compassion* (2001).³⁷

Barack Obama. Obama’s commitment to the initiative, in sharp contrast, was a surprise to many and a deep disappointment to not a few. The initiative was identified with Bush and had received much criticism from Democrats. Yet on July 1, 2008, on the campaign trail, Obama said he would continue the initiative, although he said that some of its principles and policies had to be revised to make them constitutional.³⁸ And once elected, his administration made sure to evaluate those principles and policies, introduce institutional innovations, and update the funding regulations to better protect beneficiaries of services.

Obama was an adult convert to Christianity and, early in his career, had worked for a Catholic community-organizing initiative. Campaigning for president, he said that the work of faith-based and other civil society organizations is vital and that the government’s efforts would be strengthened by expanding partnerships with them. “[M]illions of Americans,” he said, due to their religion, “feel they have an obligation to help others.” The organizations they formed, while often faith-based, were “usually working to help people of all faiths or of no faith at all.” And the help they offered was much needed:

As I’ve said many times, I believe that change comes not from the top-down, but from the bottom-up, and few are closer to the people than our churches, synagogues, temples, and mosques. That’s why Washington needs to draw on them. The fact is, the challenges

³⁷ Bush, *Rallying the Armies of Compassion*, foreword.

³⁸ “Obama Delivers Speech on Faith in America”; Obama ’08 (presidential campaign), “Partnering with Communities of Faith.”

we face today—from saving our planet to ending poverty—are simply too big for government to solve alone. We need all hands on deck.³⁹

Obama, like Bush, spoke of a needed extra factor without denigrating the government’s own important role: “[N]o matter how much money we invest or how sensibly we design our policies, the change that Americans are looking for will not come from government alone. There is a force for good greater than government. It is an expression of faith, this yearning to give back, this hungering for a purpose larger than our own, that reveals itself not simply in places of worship, but in senior centers and shelters, schools and hospitals, and any place an American decides.”⁴⁰

“Instead of driving us apart, our varied beliefs can bring us together to feed the hungry and comfort the afflicted; to make peace where there is strife and rebuild what has broken; to lift up those who have fallen on hard times. This is not only our call as people of faith, but our duty as citizens of America, and it will be the purpose of the White House Office of Faith-Based and Neighborhood Partnerships that I’m announcing later today.

“The goal of this office will not be to favor one religious group over another – or even religious groups over secular groups. It will simply be to work on behalf of those organizations that want to work on behalf of our communities, and to do so without blurring the line that our founders wisely drew between church and state. This work is important, because whether it’s a secular group advising families facing foreclosure or faith-based groups providing job-training to those who need work, few are closer to what’s happening on our streets and in our neighborhoods than these organizations. People trust them. Communities rely on them. And we will help them.” — President Barack Obama, National Prayer Breakfast (February 5, 2009).⁴¹

Donald Trump. Trump’s commitment to the initiative is difficult to define. He had no obvious history of involvement with faith-based or community-based organizations, no warm personal witness to religious faith. Both as candidate and president, however, he did proclaim a strong commitment to religious freedom, to the government’s protection of religious exercise—a vital foundational principle of the initiative. While Trump’s actions against Muslim-majority countries and in favor of conservative Christians cast doubt on his sincerity, he undertook major

³⁹ “Obama Delivers Speech on Faith in America.”

⁴⁰ White House Briefing Room, “Obama Announces White House Office of Faith-based and Neighborhood Partnerships,” February 5, 2009.

⁴¹ “Remarks of President Barack Obama, National Prayer Breakfast, Thursday, February 5th, 2009,” <https://obamawhitehouse.archives.gov/blog/2009/02/05/my-hope-my-prayer>.

actions to promote religious freedom, as in his nominees for the Supreme Court and other federal courts, an executive order, “Promoting Free Speech and Religious Liberty,” which led to an extensive Department of Justice memorandum setting out principles on how the federal government must protect individual and institutional religious freedom, and Department of State initiatives.⁴²

“As a general matter, the federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization’s hiring exemptions or attributes of its religious character.

“Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions.” — Attorney General’s Memorandum, “Federal Law Protections for Religious Liberty” (October 6, 2017).⁴³

Yet despite Trump’s promotion of religious freedom and the importance to evangelical Protestants—prominent in his political base—of their expansive universe of faith-based organizations, he did not take official public notice of the faith-based initiative until some fifteen months into his presidency. Then, he issued an executive order, “Establishment of a White House Faith and Opportunity Initiative,” through which he created the position of a White House faith-based adviser in place of a renewed White House faith-based office.⁴⁴ However, the executive order sounded the same notes as Bush’s and Obama’s had: faith-based and community-based organizations provide invaluable services that are different than the help government can offer; the government should partner with such organizations; government funding programs and requirements should do nothing to block the organizations’ access to federal support. There was nothing suggesting that the government’s own action should wither

⁴² Executive Order 13798, May 4, 2017, “Promoting Free Speech and Religious Liberty,” 82 Fed. Reg. 21675 (May 9, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-09/pdf/2017-09574.pdf>; Department of Justice Notice, “Federal Law Protections for Religious Liberty,” 82 Fed. Reg. 49668 (October 26, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-10-26/pdf/2017-23269.pdf>; Department of State Ministerials to Advance Religious Freedom, <https://2017-2021.state.gov/2019-ministerial-to-advance-religious-freedom/>.

⁴³ Department of Justice Notice, “Federal Law Protections for Religious Liberty.”

⁴⁴ Executive Order 13831, May 3, 2018, “Establishment of a White House Faith and Opportunity Initiative,” 83 Fed. Reg. 20715 (May 8, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-05-08/pdf/2018-09895.pdf>.

away or that only religious organizations, or only the “right” religious organizations, should be supported. And although the White House advisory position was only created after a long delay, Trump had not closed the faith-based Centers in the various agencies and his administration maintained, though with important changes, the Equal Treatment regulations so important to the initiative.

“Faith-based and community organizations have tremendous ability to serve individuals, families, and communities through means that are different from those of government and with capacity that often exceeds that of government. These organizations lift people up, keep families strong, and solve problems at the local level. The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other Federal funding opportunities. The efforts of faith-based and community organizations are essential to revitalizing communities, and the Federal Government welcomes opportunities to partner with such organizations through innovative, measurable, and outcome-driven initiatives.” — President Donald Trump, Executive Order 13831, “Establishment of a White House Faith and Opportunity Initiative” (May 3, 2018).⁴⁵

Joe Biden. The Biden administration from the start has been deeply and broadly committed to action by the federal government—to new programs, expanded spending, and new rules designed to end the COVID-19 emergency, to revive the economy, to redress the nation’s deeply rooted racial inequities and income inequality, to vigorously combat climate change, to overcome the marginalization of minority racial, ethnic, and religious communities, and much more. Yet, within a month of taking office, President Biden issued an executive order recreating the White House faith-based office in order to promote government partnerships with civil society organizations.⁴⁶

⁴⁵ Executive Order 13831, “Establishment of a White House Faith and Opportunity Initiative.”

⁴⁶ Some observers regard the Biden administration’s commitment to extensive government action to be a sharp reversal of President Bill Clinton’s 1996 announcement that “the era of big government is over.” See, e.g., Jim Tankersley and Jason DeParle, “Two Decades After the ‘End of Welfare,’ Democrats are Changing Direction,” *New York Times*, March 16, 2021. If so, what might be the consequences for the faith-based initiative? A willingness in the mid-1990s to reconsider the extent of government action and spending, it seems clear, helped to create support for the faith-based initiative—for efforts to engage civil society organizations to deliver services differently than the government does; for the Compassion Capital Fund that helped civil society organizations to improve their effectiveness whether or not they intended to partner with government; and for legislative efforts to incentivize more charitable giving so that civil society organizations are better resourced apart from any government funds they are awarded. Considered from this perspective, the move to “bigger government” now, it seems, must undermine the faith-based initiative. But the reality is more complicated. If the government does more via partnerships, then enlarged government does not mean less civil society—assuming that the rules for funding protect the distinctive characteristics and practices of

That executive order used nearly the same words as Bush’s executive order, specifying that the reestablished White House faith-based office would lead “the Federal Government’s comprehensive effort to enlist, equip, empower, and expand the work of community-serving organizations, both faith-based and secular.” An accompanying fact sheet stressed that this partnership work was not separate from but would advance the administration’s central aims to “address the COVID-19 pandemic and boost economic recovery; combat systemic racism; increase opportunity and mobility for historically disadvantaged communities; and strengthen pluralism.”⁴⁷

In other words, in the view of our second Catholic president, a man well-acquainted with religious organizations and with community-based programs, achieving crucial government aims—public goods—requires not only government spending and action, not only vigorous “community-serving organizations” acting on their own, but expanded partnerships between government and such organizations, both religious and secular. And as with previous administrations, the Biden administration conceives of this expanded collaboration with and support for religious civil society organizations as pluralistic: partnerships must be made “while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion.”⁴⁸

religious and secular civil society organizations. Still, maintaining ample opportunities for civil society organizations to flourish without government funding and without its rules is important. Privately funded organizations can create services—small volume, specialized, very religious—that do not very well fit government specifications.

⁴⁷ Executive Order 14015, February 14, 2021, “Establishment of the White House Office of Faith-Based and Neighborhood Partnerships,” 86 Fed. Reg. 10007 (February 18, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-18/pdf/2021-03424.pdf>; White House, “Fact Sheet: President Biden Reestablishes the White House Office of Faith-Based and Neighborhood Partnerships,” February 14, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/fact-sheet-president-biden-reestablishes-the-white-house-office-of-faith-based-and-neighborhood-partnerships/>.

⁴⁸ Executive Order 14015, “Establishment of the White House Office of Faith-Based and Neighborhood Partnerships.”

“Faith-based and other community-serving organizations are vital to our Nation’s ability to address the needs of, and lift up, low-income and other underserved persons and communities, notably including persons of color. The American people are key drivers of fundamental change in our country, and few institutions are closer to the people than our faith-based and other community organizations. It is important that the Federal Government strengthen the ability of such organizations and other nonprofit providers in our communities to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion. The Federal Government can preserve these fundamental commitments while empowering faith-based and secular organizations to assist in the delivery of vital services in our neighborhoods. These partnerships are also vital for the success and effectiveness of the United States’ diplomatic, international development, and humanitarian work around the world.”
— President Joe Biden, Executive Order 14015, “Establishment of the White House Office of Faith-Based and Neighborhood Partnerships” (February 14, 2021).⁴⁹

The new federal partnership institutions—at the White House

The high-profile institutional innovation was the creation of a White House faith-based office: the Office of Faith-Based and Community Initiatives in the Executive Office of the President. Bush’s executive order creating it gave it a large role in a broadly conceived new federal partnership orientation. The Office was to lead the executive branch in “establish[ing] policies, priorities, and objectives for the Federal Government’s comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations.” The Office would cast the partnership vision widely inside and outside of the government, press for real changes in federal policies and practices, and coordinate federal actions to support civil society organizations and partnerships with them.⁵⁰

⁴⁹ Executive Order 14015, “Establishment of the White House Office of Faith-Based and Neighborhood Partnerships.”

⁵⁰ Executive Order 13199, January 29, 2001, “Establishment of White House Office of Faith-Based and Community Initiatives,” 66 Fed. Reg. 8499 (January 31, 2001), <https://www.gpo.gov/fdsys/pkg/FR-2001-01-31/pdf/01-2852.pdf>. On the creation and significance of this new White House unit, see Black, Koopman, and Ryden, *Of Little Faith*, 190–98, 202–4; and Kathryn Dunn Tenpas, *Can an Office Change a Country? The White House Office of Faith-Based and Community Initiatives, A Year in Review*, Pew Forum on Religion and Public Life, July 2002, updated October 2002. A very personal account is offered by David Kuo, *Tempting Faith: An Inside Story of Political Seduction* (New York: Free Press, 2006), ch. 9.

This broad vision has been maintained despite significant changes in the White House unit.⁵¹ Obama renamed it the White House Office of Faith-Based and Neighborhood Partnerships and created an Advisory Council of nonprofit and religious leaders and experts to advise on federal policy and especially on partnership issues. As noted, Trump decided on a White House faith-based adviser rather than office and renamed the work the Faith and Opportunity Initiative, yet the adviser was supported by legal and policy colleagues and Trump retained the general idea of a broad federal commitment to strengthening civil society and to expanding partnerships. Biden’s executive order was silent about Trump’s changes except to revoke his executive order and return to a White House Office of Faith-Based and Neighborhood Partnerships. Its director, Melissa Rogers, who previously served in the Obama White House faith-based office, has the additional responsibility of advising the White House’s Domestic Policy Council about church-state issues.

“The faith-based office exists because of a clear-eyed recognition of the power and centrality of faith in the spiritual and practical lives of many Americans and their communities. Faith-based organizations do not need the government; the government—if it seeks to serve the people, particularly the vulnerable—needs to partner with faith communities in order to get that work done.” — Michael Wear, an official in the Obama White House Office of Faith-Based and Neighborhood Partnerships, in *Reclaiming Hope* (2017).⁵²

The new federal partnership institutions—in major agencies

The other institutional innovation was less noticed but perhaps more important: the creation of faith-based Centers for Faith-Based and Community Initiatives (hereafter “Centers”) in federal agencies that administer programs through which government collaborates with private organizations to address social problems. It is in these agencies, and not the White House, where programs are designed, grant requirements are specified, and regulations are proposed, finalized, and enforced. It is here that the partnership vision is—or is not—transformed into changed

⁵¹ One significant change over time, with great consequences for the initiative is this: while each succeeding administration has staffed the faith-based offices, the number of partnership officials generally has declined.

⁵² Michael Wear, *Reclaiming Hope: Lessons Learned in the Obama White House About the Future of Faith in America* (Nashville, TN: Nelson Books, 2017), 63.

federal practices.⁵³ The initial Centers were in the Departments of Health and Human Services (HHS); Labor (DOL); Housing and Urban Development (HUD); Justice (DOJ); and Education (ED).⁵⁴ The Bush administration later added Centers in the US Agency for International Development (USAID); Veterans Administration (VA); Department of Commerce (DOC); Department of Agriculture (USDA); Small Business Administration (SBA); and Department of Homeland Security (DHS), in its Federal Emergency Management Agency (FEMA). A team was created in the Corporation for National and Community Service, which operates the AmeriCorps and VISTA volunteering programs, to make sure religious organizations could fully participate in its programs.⁵⁵ Obama later created a Center in the Environmental Protection Agency (EPA).

“President Bush wisely understood—perhaps the benefit of having a president for a father—that without institutional footholds across the federal government, the [White House] office would not have a chance to significantly impact the way government functions.” —Michael Wear, in *Reclaiming Hope* (2017).⁵⁶

The Centers are charged with conducting “audits”—evaluating agency rules, policies, and practices for barriers to partnerships—and proposing reforms, working with agency staff to develop innovative programs that engage civil society organizations, and pushing out information about agency grants and policies to organizations that might be interested. The White House Office and the president can promote the partnership vision and highlight the vital

⁵³ On the creation and significance of these innovative Centers, see Dunn Tenpas, *Can an Office Change a Country?*; Black, Koopman, and Ryden, *Of Little Faith*, 198–201; and Anne Farris, Richard P. Nathan, and David J. Wright, *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*, Roundtable on Religion and Social Welfare Policy (Albany, NY: Nelson A. Rockefeller Institute of Government, 2004).

⁵⁴ Executive Order 13198, January 29, 2001, “Agency Responsibilities with Respect to Faith-Based and Community Initiatives,” 66 Fed. Reg. 8497 (January 31, 2001), <https://www.gpo.gov/fdsys/pkg/FR-2001-01-31/pdf/01-2851.pdf>.

⁵⁵ Executive Order 13280, December 12, 2002, “Responsibilities of the Department of Agriculture and the Agency for International Development With Respect to Faith-Based and Community Initiatives,” 67 Fed. Reg. 77145 (December 16, 2002), <https://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31832.pdf>; Executive Order 13342, June 1, 2004, “Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives,” 69 Fed. Reg. 31509 (June 3, 2004), <https://www.gpo.gov/fdsys/pkg/FR-2004-06-03/pdf/04-12745.pdf>; Executive Order 13397, March 7, 2006, “Responsibilities of the Department of Homeland Security With Respect to Faith-Based and Community Initiatives,” 71 Fed. Reg. 12275 (March 9, 2006), <https://www.gpo.gov/fdsys/pkg/FR-2006-03-09/pdf/06-2362.pdf>. Via Executive Order 13331, February 27, 2004, “National and Community Service Programs,” 69 Fed. Reg. 9911 (March 3, 2004), <https://www.govinfo.gov/content/pkg/FR-2004-03-03/pdf/04-4884.pdf>, President Bush directed that the Corporation for National and Community Service “should expand opportunities for involvement of faith-based and other community organizations.”

⁵⁶ Wear, *Reclaiming Hope*, 61–62.

roles of civil society organizations, but organizations contemplating federal funding need to see that the relevant agency welcomes their participation, with its Center offering clear explanations of the church-state rules, help in navigating requirements, and a ready willingness to fill the ombuds role: intervening when officials try to obstruct faith-based involvement, or ignore the religious freedoms embedded in the regulations, or refuse to entertain more effective ways to provide services. Centers are beacons, entry points, and advocates.

Center directors are chosen by the president, but even when a president is inattentive to the initiative, as Trump initially was, the Centers exist, staffed by civil servants even if no political appointee has been named, just as the Equal Treatment regulations remain the rule for agency funding decisions whether or not an agency's officials are enthusiastic about partnerships. But it is when Centers are backed by the authority and support of the president via the White House Office and also by their respective agencies' chief executives that they can be change agents, pushing against the government's inherent preference for awarding funds again and again to the same nonprofits, positive results or not; its bias for big grants and high volumes of services; its comfort with uniformity in programs rather than local adaptability; its passion for secularism over religion.

Note that the White House Office and the agency Centers are policy, communications, and troubleshooting offices and do not award grants or contracts. Their task is to ensure that those officials who *do* make funding decisions respect the level playing-field rules and incorporate in their programs, as appropriate, unconventional partners and not simply the usual nonprofits and businesses. No faith-based official has been authorized to dole out federal funds to favored houses of worship; a running joke among the initial staffers in the Bush White House Office of Faith-Based and Community Initiatives was that, while journalists spent fruitless hours trying to track down those imagined grants to churches, the Office actually had so little budget authority that its director, John J. DiIulio Jr., had to open his own wallet if visitors were to be served soft drinks!

Audits to uncover barriers

The initial five Centers looked deeply into their respective agencies' regulations, policies, and practices and identified a series of "barriers"—obstacles that "facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations" in their programs.⁵⁷ Their reports were summarized in an overview released by the Bush White House in August 2001 titled *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*.⁵⁸ Six of the fifteen barriers created problems specifically for religious organizations; the rest were difficulties encountered primarily by smaller organizations, whether secular or religious, except for one barrier identified as the occasional "questionable favoritism for faith-based organizations" that discouraged secular applicants.

⁵⁷ Executive Order 13198, "Agency Responsibilities with Respect to Faith-Based and Community Initiatives."

⁵⁸ White House, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, August 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/08/unlevelfield1.html>.

From *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* (August 2001).

Barriers to Faith-Based Organizations Seeking Federal Support

1. A pervasive suspicion about faith-based organizations
2. Faith-based organizations excluded from funding
3. Excessive restrictions on religious activities
4. Inappropriate expansion of religious restrictions to new programs
5. Denial of faith-based organizations' established right to take religion into account in employment decisions
6. Thwarting Charitable Choice—Congress's new provision for supporting faith-based organizations

Barriers to Community-Based Organizations and Other Small and Newcomer Organizations

7. The limited accessibility of federal grants information
8. The heavy weight of regulations and other requirements
9. Requirements to meet before applying for support
10. The complexity of grant applications and grant agreements
11. Questionable favoritism for faith-based organizations
12. An improper bias in favor of previous grantees
13. An inappropriate requirement to apply in collaboration with likely competitors
14. Requiring federal 501(c)(3) status without statutory authority
15. Inadequate attention to faith-based and community organizations in the federal grants streamlining process

The audit results guided reform efforts, including making grant announcements more accessible, clarifying that faith-based organizations do not lose their right to consider religion when hiring simply because they accept federal funds, and the promulgation of new regulations to guide federal funding in programs lacking Charitable Choice statutory language—the Equal Treatment regulations modeled on Charitable Choice. No similar wide-ranging and in-depth audits have been subsequently carried out. But the HHS Center in Trump's administration conducted a limited examination of continuing barriers, and USAID, during the Trump and Biden administrations, has examined obstacles to the involvement of community-based and faith-based organizations in its international relief and development programs and adopted a significant reform agenda to overcome those problems. Both of these instances will be discussed later.

Extending and refining the new level playing-field church-state rules

Bush administration. When Bush created the federal faith-based initiative by establishing the White House Office and the agency Centers, the revised—reversed—church-state rules applied only to the several programs with governing laws that included Charitable Choice language. An attempt by House Republicans, with muted White House support, to extend the principles to additional programs via H.R. 7, a bill with bipartisan sponsors but that met extensive opposition as being one-sidedly pro-religious, was unsuccessful. Although the House adopted the bill, it went nowhere in the Senate. Even an alternative bill, the CARE Act, which featured charitable giving incentives in place of the extension of Charitable Choice rules, did not pass.⁵⁹

Yet the Charitable Choice principles reflected the Court’s revised interpretation. After the principles were extended via the regulatory process to cover the other federal funding programs, church-state expert Ira Lupu proposed that the Bush initiative could be best regarded as an effort to make federal practice catch up with Supreme Court requirements.⁶⁰ Indeed, the few federal court challenges to the new rules validated them: in these cases, either government officials or faith-based organizations were alleged to have violated the new rules, and the court decisions required compliance, not a return to the previous church-state rules.⁶¹

Bush set out what he believed to be the appropriate level playing-field rules for all federal funding programs in a December 2002 Executive Order, “Equal Protection of the Laws for Faith-Based and Community Organizations.”⁶² The next year, the administration issued Charitable Choice regulations⁶³ and began the process of proposing, soliciting public comment on, and then

⁵⁹ See, Black, Koopman, and Ryden, *Of Little Faith*, chs. 3–4, and DiIulio, *Godly Republic*, 128–37.

⁶⁰ See the transcript of his comments, “Opening Remarks and Plenary Session: State of the Law 2004, 2004 Annual Conference, December 9, 2004, Wyndham Washington Hotel, Washington, DC, ‘2005 and Beyond: Next Steps for Faith-Based Social Services,’” Roundtable on Religion and Social Welfare Policy (Albany, NY: Nelson A. Rockefeller Institute of Government, 2004), 5.

⁶¹ *Freedom From Religion Foundation v. McCallum* (FaithWorks Milwaukee case; Seventh Circuit, 2003); *ACLU of Massachusetts v. Leavitt* (Silver Ring Thing case; settlement, 2006); *Americans United v. Prison Fellowship Ministries* (InnerChange Freedom Initiative in Iowa case; Eighth Circuit, 2007). A challenge to the whole faith-based initiative (*Hein v. Freedom From Religion Foundation*) was dismissed by the US Supreme Court in 2007 for lack of taxpayer standing.

⁶² Executive Order 13279, December 12, 2002, “Equal Protection of the Laws for Faith-Based and Community Organizations,” 67 Fed. Reg. 77141 (December 16, 2002), <https://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>.

⁶³ E.g., the TANF Charitable Choice regulations are located at 45 CFR 260.34.

promulgating regulations for federal funding programs lacking Charitable Choice—new regulations variously termed “Equal Treatment” or “Equal Opportunity” rules.⁶⁴ In this way, the principles of Charitable Choice, first enacted into law in 1996, within a decade had come to be implemented as the regulatory requirements governing all federal spending for social services—the regulatory requirements that apply when a federal agency awards funding to private organizations and that also apply to the federal funds sent to state and local governments, which often award the funding to private organizations. The “no aid to religion” era was past. The new principle was “equal treatment,” or a level playing field, in federal funding. Subsequent administrations have introduced modifications to this framework, sometimes in response to developing Supreme Court doctrine, that are intended to ensure greater participation by faith-based organizations or greater protection for the rights of beneficiaries.

Obama administration. When Obama on the campaign trail promised to maintain the faith-based initiative, he also said that he would tighten the Bush rules on religious expression in federally funded programs to avoid what he contended might be unconstitutional government support for religion.⁶⁵ As president, he charged his Advisory Council on Faith-Based and Neighborhood Partnerships to assess the Bush rules and to recommend changes. He put Melissa Rogers, a widely respected liberal church-state expert, in charge of the Council and of this crucial church-state review, which was conducted over a year and a half of discussions and consultations by a religiously and ideologically diverse task force of Council members and outside experts.⁶⁶ The task force determined that the Equal Treatment rules were constitutional but could be improved to better protect beneficiaries.⁶⁷ In November 2010, Obama issued an executive order

⁶⁴ For the Equal Treatment regulations that apply to Department of Health and Human Services funding programs, as an example, see 45 CFR 87.

⁶⁵ “Obama Delivers Speech”; Obama ’08, “Partnering with Communities of Faith.”

⁶⁶ Rogers, *Faith in American Public Life*, 103–4, 110–11. I served as one of the outside experts.

⁶⁷ President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (Washington, DC: White House Office of Faith-Based and Neighborhood Partnerships, 2010), sec. F, <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

affirming the Equal Treatment rules while making two important changes recommended by the Council.⁶⁸ The result in 2016 was a revised set of Equal Treatment regulations.⁶⁹

One change expanded to all funding programs the requirement in some versions of Charitable Choice that a beneficiary who objects to the religious character of a federally funded provider be offered a referral to a religiously acceptable alternative and that providers give beneficiaries notice of this and other rights. This was a “super” religious freedom protection, as noted before, for when funding is “direct,” explicitly religious activities and teachings may not be included in the government-funded services nor may beneficiaries be required to attend separate religious activities, and when funding is “indirect,” beneficiaries may choose among different kinds of services. And recall that there was no evidence that beneficiaries had asked for referrals in programs in which they were able to do so. But broadened protection might be good for some beneficiaries, and it encouraged broad support of the Equal Treatment rules, including by the diverse Advisory Council.⁷⁰ So the administration revised the regulations to provide for a universal right of referral and notice of rights.

The other change clarified what is required if funding is to be considered “indirect” such that providers can offer religion-infused services funded by government. At a minimum, beneficiaries had to have a choice of provider, but neither the TANF Charitable Choice provision, which had authorized both direct and indirect funding, nor the corresponding regulations, had specified that at least one choice must be secular. Yet it cannot be right to force a beneficiary into a service that includes obligatory inherently religious activities. This omission was not so serious at the creation of the TANF program in 1996, when government-funded services for decades had been mandated to be strictly secular due to the “no aid” requirement. Now, however, a broader range of religious organizations were participating in government funding.⁷¹ And in 2002 the Supreme

⁶⁸ Executive Order 13559, November 17, 2010, “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,” 75 Fed. Reg. 71317 (November 22, 2010), <https://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>.

⁶⁹ Consolidated Final Rule, 81 Fed. Reg. 19355 (April 4, 2016).

⁷⁰ Rogers, *Faith in American Public Life*, 110–11.

⁷¹ A broader range of organizations is eligible for funding, but the legacy of the “no aid to religion” principle is strong. The Beneficiary-Choice Contracting pilot project, described later in the text, was designed specifically as an “indirect” funding

Court had issued its *Zelman* decision—the definitive “indirect” funding ruling—which approved as constitutional a school choice program in which it was important that the parents not only could choose among religious schools but also had a secular choice.⁷² The revised Obama Equal Treatment regulations, accordingly, said that for funding to be considered to be “indirect,” beneficiaries needed not only choice as such but also the option of a secular service.

Trump administration. The two Obama administration changes were reversed by the Trump administration, which argued that they hampered participation by faith-based organizations in federal funding. Trump did not issue a separate executive order setting out new church-state funding principles, but his 2018 executive order creating the White House faith-based adviser position struck down the Obama requirement of a universal right of referral and notice of rights.⁷³ In expanding the referral right, the Obama administration had displaced the duty to carry out a requested referral from government to providers, and it had laid both the referral duty and notice of rights duty only on faith-based providers, not also on their secular counterparts. The Trump administration said that this was an unequal burden on religion no longer countenanced by the Supreme Court. Moreover, the requirement that faith-based providers, not government, carry out referrals could violate the Court’s heightened protection of religious organizations’ right to operate in accordance with their religious convictions. Under the Obama regulations, a faith-based provider might have no option but to guide a beneficiary to an organization with policies and convictions diametrically opposed to its own. Faced with such a possibility, some faith-based providers might avoid working with government.⁷⁴

program so that providers with religion-infused programs could participate, and their freedom to incorporate religious teachings and activities was stressed. But grantees found it challenging to draw into participation faith-based organizations that offered faith-integrated services. See Jeanne Bellotti, Michelle Derr, Jillian Berk, and Nora Paxton, *Examining a New Model for Prisoner Re-Entry Services: The Evaluation of Beneficiary Choice. Final Report* (Princeton, NJ: Mathematica Policy Research, March 16, 2011), 16–17, <https://www.mathematica.org/publications/examining-a-new-model-for-prisoner-reentry-services-the-evaluation-of-beneficiary-choice>.

⁷² Rogers, *Faith in American Public Life*, 112, 141–43. On the importance of a secular choice in the logic of the *Zelman* decision, see also Thomas C. Berg, *The State and Religion in a Nutshell*, 2nd ed. (St. Paul, MN: West, 2004), 240–43.

⁷³ Executive Order 13831, “Establishment of a White House Faith and Opportunity Initiative,” sec. 2(b).

⁷⁴ See, e.g., the Health and Human Services Notice of Proposed Rulemaking, “Ensuring Equal Treatment of Faith-Based Organizations,” 85 Fed. Reg. 2974 (January 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-01-17/pdf/2019-26923.pdf>. One story is that the Obama administration decided to assign the referral obligation to the faith-based organizations, albeit while authorizing them to ask government officials for assistance as needed, because, in the interagency discussions about modifying the Bush Equal Treatment regulations, federal officials complained that the referral obligation would put too heavy a burden on government. But, of course, compared to grantees, the federal government has enormous resources!

These are real problems, but their resolution ought to protect beneficiaries as well as providers. The administration could have proposed to return the duty to carry out referrals to government officials, who, after all, know the available options and have greater resources for administering changes, and to make secular providers, too, bear the burden of offering referrals and giving notice of rights. This solution would have preserved the enhanced rights of beneficiaries (the universal right of referral and notice of rights) while strengthening the rights of faith-based organizations (ending the unequal burden and the risk of complicity).⁷⁵ Instead, the administration kept its proposed unbalanced changes while admitting that they were required neither by law nor the Constitution.⁷⁶

The Trump administration also eliminated the Obama administration's requirement of a secular option if funding is to be considered "indirect." When the funding is indirect, then providers whose services include inherently religious activities are supposed to be able to participate, yet with the secular-choice requirement, they would remain excluded if no secular organization also participated, as the Trump administration pointed out. Simply having some choice among providers should be sufficient for funding to be "indirect," the administration argued.⁷⁷

At the same time, it advanced a related change, positive on its own but deeply troubling if there might be no secular choice. The Equal Treatment regulations had always specified that beneficiaries have the right not to participate in religion. With "direct" funding, this means that they cannot be compelled to participate in any explicitly religious activities or teaching offered separately from the government-funded service. The requirement is counterproductive, though, I

⁷⁵ My organization, the Institutional Religious Freedom Alliance, along with the Christian Legal Society, the National Association of Evangelicals, and the Christian Alliance for Orphans, proposed these alternatives via a public comment submitted on February 18, 2020, in response to the HHS Notice of Proposed Rulemaking, <https://www.regulations.gov/comment/HHS-OS-2020-0001-21174>. Others suggested like changes: see, e.g., the Final Rule, 85 Fed. Reg. 82037 (December 17, 2020), at 82069, <https://www.govinfo.gov/content/pkg/FR-2020-12-17/pdf/2020-27084.pdf>, and Melissa Rogers, "Comments on Notice of Proposed Rulemaking 'Ensuring Equal Treatment of Faith-Based Organizations,' RIN 0991-AC13" (February 18, 2020), 10, <https://www.regulations.gov/document/HHS-OS-2020-0001-22690>. The TANF Charitable Choice provision placed the referral obligation on government. The SAMHSA Charitable Choice provision required providers to make the referral, but in the SAMHSA-funded drug treatment programs, it is common for a state agency to provide public lists of funded programs, and federal regulations require officials to assist in making requested referrals.

⁷⁶ Final Rule, 85 Fed. Reg. 82070 (December 17, 2020).

⁷⁷ Final Rule, 85 Fed. Reg. 82072ff (December 17, 2020). Various commentators argued that the administration had misinterpreted the *Zelman* decision in coming to its view that a secular choice need not be present. The administration's response in the Final Rule is wholly unpersuasive.

believe, when the funding is “indirect.” Here, beneficiaries can choose secular providers and services and avoid religion. If, instead, they choose a faith-integrated service offered by a faith-based organization, how can it make sense that they are free to decline to participate in significant parts of the service? The Trump administration proposed eliminating the nonparticipation right when funding is “indirect.”⁷⁸ On its own, this was a positive change. But it became negative when the guarantee of a secular choice was also eliminated. Put the two changes together and beneficiaries opposed to religion might well be able to avoid it only by declining a service they are supposed to be able to receive.

The Trump administration denied the dilemma was serious, claiming that if someone needed a service, surely it was a net positive that the federal government paid to make it available, even if the service included religious elements not wanted by a particular beneficiary.⁷⁹ But this, I think, is unjustifiable. Beneficiaries have the constitutional right to the free exercise of religion, which includes the right not to be involved with religion. Beneficiaries ought to be able to receive a service intended for them without having to engage in undesired religious activities.

Still, the Trump administration was wrestling with a real problem that, as noted before, has been present since Charitable Choice was first enacted to create equal opportunity for faith-based organizations to compete for federal funding. Most funding is and will remain “direct” funding because shifting to an “indirect” or voucher system requires major changes not only by government but also by providers and beneficiaries. However, maintaining the classic requirements for grant or “direct” funding does entail the exclusion of some significant proportion of faith-based providers, no matter how effective their services nor how desirable those services are to particular beneficiaries. The bifurcation into two dramatically different funding and delivery arrangements needs to be reevaluated; a good place to start is with the “beneficiary-choice contracting” pilot project of the Bush administration, described in the innovations section below. However, it is essential that future changes implement a fuller, not a narrower, public policy pluralism. Private organizations, whether their services incorporate

⁷⁸ Final Rule, 85 Fed. Reg. 82075-76 (December 17, 2020).

⁷⁹ Final Rule, 85 Fed. Reg. 82075 (December 17, 2020).

religion or not, should be able to participate without hindrance, and beneficiaries, whether they value religion or not, should be able to find a service provider appropriate for themselves.

“Maintaining a secular option is also important for the sake of faith-based organizations [F]aith-based providers, knowing that some or many beneficiaries who arrive will have significant objections to participating in the explicitly religious activities that are incorporated into their [Department of Health and Human Services]-funded services, will be under significant moral and practical pressure to water down or eliminate those religious activities. The providers will not want to violate the religious freedom of beneficiaries nor to serve beneficiaries who are reluctant to fully participate in the services as designed. Given such concerns, faith-based providers will consider themselves to be less free to offer a robustly religious version of a service under the changed indirect funding rules than when they could be confident that the beneficiaries who arrived for their services had had, after all, the option of selecting a different service that did not include explicitly religious elements.” — Comment submitted by the Institutional Religious Freedom Alliance, Christian Legal Society, National Association of Evangelicals, and the Christian Alliance for Orphans (2020).⁸⁰

Biden administration. The Trump changes only became effective the day before the start of the Biden administration, which quickly expressed its opposition and began to work to reverse them. Biden, like Trump, has not issued a church-state executive order. Instead, he used his Executive Order 14015 that reestablished the White House Office of Faith-Based and Neighborhood Partnerships to revoke Trump’s order, with its requirement to eliminate the guaranteed referral and the notice of rights. However, a simple return to the Obama regulations was not possible, given the recent Supreme Court decisions strongly stressing that, once government has decided to offer funding to private organizations, it may not maintain requirements that exclude faith-based organizations, whether because they are religious or because they do religious things.

In January 2023, the Biden administration proposed for public comment significant reversals of the Trump changes, and in March 2024, after making some changes, issued a revised set of Equal Treatment regulations to govern funding practices in nine federal agencies.⁸¹ Providers once

⁸⁰ Comment submitted on February 18, 2020, in response to the HHS Notice of Proposed Rulemaking.

⁸¹ Consolidated Notice of Proposed Rulemaking, Partnerships with Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (January 13, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-01-13/pdf/2022-28376.pdf> Final Rule, Partnerships with Faith-Based and Neighborhood Organizations, 89 Fed. Reg. 15671 (March 4, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-03-04/pdf/2024-03869.pdf>.

again must give notice of rights, and beneficiaries again can request a referral—but now secular as well as faith-based grantees are subject to these duties and it is the government, not the grantee, that has to carry out the referrals. However, referrals and notice are not required in all programs. In addition, for funding to be “indirect,” it is important again that there be a secular choice; however, if there is no secular provider, faith-based providers with services that include religion will not be disqualified—but, on a case—by-case basis, the government will either arrange for secular services whenever needed or require that the faith-based providers remove the religious elements from their government-funded services. The Biden administration thus has strengthened beneficiary rights while also strengthening the rights of faith-based organizations. Yet, I propose, it cannot be right that a faith-based provider whose services incorporate religion can be awarded funding said to be “indirect” but then, because no secular provider also has been funded, be required to strip religious teachings and activities from its program. Nor is it right for regulations to be vague about how else government officials can ensure that beneficiaries can access services that do not include religion.⁸² I suggest that a real solution requires going further in the pluralist direction, arranging for multiple choices wherever practicable so that both beneficiaries seeking services that include religion and those seeking religion-less services can find a suitable provider. Where only a faith-based option is available, officials ought to be prepared in advance to offer an alternative, perhaps by arranging transportation to a suitable out-of-area provider or by arranging a one-off contract with a local professional.

Confirming the religious staffing rights of faith-based organizations

Federal civil rights law prohibiting employment discrimination has always included an exemption allowing religious organizations to make hiring and firing decisions based on their religious convictions (1964 Civil Rights Act, Title VII), as noted earlier. But it was long the

⁸² See Stanley Carlson-Thies, “Proposed Changes to the Equal Treatment Regulations on Funding Faith-Based Organizations; Opportunity to Comment” (blog post), Institutional Religious Freedom Alliance, February 28, 2023, <https://cpjustice.org/proposed-changes-to-the-equal-treatment-regulations-on-funding-faith-based-organizations-opportunity-to-comment/>; and the comment submitted in response to the consolidated Notice of Proposed Rulemaking by the Institutional Religious Freedom Alliance, the Christian Alliance for Orphans, and World Vision, Inc., on March 14, 2023, <https://www.regulations.gov/comment/HHS-OS-2023-0005-0006>.

common presumption, shared by many faith-based organizations, that this right was forfeited if government funds were accepted.⁸³ This presumption may have grown because the dominant “no aid to religion” interpretation excluded from funding “pervasively sectarian” organizations, and surely an insistence on using religious criteria when assessing employees is a mark of sectarianism. To counter the mistaken presumption, Charitable Choice specifically noted that religious organizations do not give up their religious staffing exemption simply by accepting government funding. This assurance encouraged greater participation by faith-based organizations in federal funding governed by Charitable Choice.

The Equal Treatment regulations, from their origins in the Bush administration, have included similar language—no forfeit of the exemption simply by accepting government funds—while noting that some funding programs do prohibit employment discrimination, thus banning religious staffing. The Bush administration took three actions to confirm the important religious staffing freedom for faith-based organizations. In 2003 it published a booklet setting out the constitutional and statutory reasons that religious organizations are free to hire by religion despite receiving government funding, except in specific programs that have employment nondiscrimination statutory language.⁸⁴ Four years later, a memorandum from the Office of Legal Counsel (OLC) in the Department of Justice determined that, due to the Religious Freedom Restoration Act, signed into law by President Bill Clinton in 1993, faith-based providers may be able to retain their religious staffing practices even in those funding programs with a statutory ban on employment discrimination.⁸⁵ The third action was to add a religious exemption

⁸³ However, Title VII itself says nothing about government funding, and Title VI, which does specify nondiscrimination obligations when an organization accepts federal funds, bars only discrimination based on race, color, and national origin, and does not cover employment practices (except in the specific instance where a program is funded in order to provide apprenticeships).

⁸⁴ White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved*, June 23, 2003, <https://georgewbush-whitehouse.archives.gov/government/fbci/religious-hiring-booklet-2005.pdf>.

⁸⁵ Office of Legal Counsel, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” US Department of Justice, June 29, 2007, <https://www.justice.gov/file/494856/dl?inline>.

like the one in Title VII to the regulations for federal contracting, which have their own prohibitions of various kinds of employment discrimination.⁸⁶

Candidate Obama, as noted, had promised to end religious hiring by the government's faith-based partners, and his administration was constantly pressured to fulfill this promise. Instead, his administration accepted the legality of the practice and maintained the existing rules. Notably, it did not overrule the OLC memo protecting religious staffing. Rather, after Congress added to the Violence Against Women Act an express prohibition of religious and other employment discrimination, the administration specifically announced that, as the OLC memo stated, faith-based grantees could appeal to the Religious Freedom Restoration Act to continue to staff on a religious basis while accepting the funding.⁸⁷ The Trump administration also affirmed the religious staffing freedom, for example, in the Department of Justice's memo setting out the major protections for religious freedom in federal law and in a revision of the "religious discrimination" section of the Equal Employment Opportunity Commission's compliance manual.⁸⁸ The Biden administration has maintained these positions. However, as will be discussed later, new prohibitions of employment discrimination on the bases of sexual orientation and gender identity have complicated the religious staffing freedom and have been treated differently by the Obama, Trump, and Biden administrations.

⁸⁶ Executive Order 13279, "Equal Protection of the Laws for Faith-Based and Community Organizations" (December 12, 2002), sec. 4. Federally supported social services are mainly funded by grants or vouchers, not contracts; however, the Bureau of Prisons funds some social services via contracts, and the Department of Defense uses contracts to pay entities that supply religious workers (e.g., Christian youth workers to lead religious youth groups on military bases) or that supply religious goods (e.g., sacred items needed by chaplains conducting religious rites such as the Eucharist). Moreover, some religious universities contract to conduct federally funded research, and some faith-based organizations, such as the Center for Public Justice, have been subcontractors to provide, for example, training and technical assistance (TTA) on behalf of the federal government—in one instance, TTA to ensure that a state and its faith-based providers understood the Charitable Choice rules that apply to their partnership.

⁸⁷ Office for Civil Rights, Office of Justice Programs, *Frequently Asked Questions, April 9, 2014, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, US Department of Justice. See Q&A 5 and 6, https://www.justice.gov/d9/ovw/legacy/2014/06/20/faqs-ngc-vawa_0.pdf.

⁸⁸ Department of Justice Notice, "Federal Law Protections for Religious Liberty," p. 49670. Equal Employment Opportunity Commission compliance manual, sec. 12, "Religious Discrimination," dated January 15, 2021, near the end of the Trump administration, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

Innovations in government interactions with civil society

The successive federal administrations' commitment to the partnership vision, now stronger, now less focused, has resulted in various constructive changes in the default government ways of operating, though these are generally not well-documented and not all have persisted. A few are summarized below. I have highlighted several programs that I call "pilot programs" because they were specifically designed to utilize the particular strengths of civil society organizations. Section 1 notes several reforms in the government's system of collaborating with private organizations to deliver government-funded services. Section 2 notes a few broader changes in how the federal government interacts with civil society organizations.

1. Reforming the collaboration system.

There have been innumerable small but important pro-civil society modifications to the grants system, such as making some grants more accessible by making them smaller (smaller volume, fewer dollars) or introducing tiers (a small organization can compete for a large grant against large organizations or try instead for a small grant); pushing out information about the availability of funding by providing notice through civil society networks as well as official government channels; and specifically naming faith-based and community-based organizations as eligible for the funding. Another important change has been to decomplexify (a bit) grant announcements and grant documents while providing additional information so that newcomer and smaller organizations, and faith-based organizations particularly concerned whether they will be able to retain their freedom of religious exercise, can better assess whether to apply.

Making the grants process more hospitable for civil society organizations—Trump administration. During the Trump administration, USAID and its faith-based Center worked extensively to reform its processes and rules in order to expand its partnerships with unconventional partners—faith-based organizations, smaller nonprofits, locally rooted religious organizations overseas, and organizations new to working with government. As USAID Administrator Mark Green said in 2018, "In order for us as an agency to be able to accomplish

our core purposes, our core mission, whether it be in development assistance or in humanitarian relief, we need to reach corners in communities where governments cannot effectively go or where they have chosen not to go.”⁸⁹ Among the extensive reforms made by this USAID New Partnerships Initiative, which has been maintained by the Biden administration, are making smaller awards, which are more manageable for smaller organizations; more often asking potential partners to define the needs and propose solutions rather than prescribing what is to be done; eliminating reporting and other requirements that are not essential; creating a special website to guide newcomers through the complex grant-application process; and providing information and training to agency staff on their obligation not to exclude faith-based providers from consideration.⁹⁰

Modifying grant requirements to accommodate faith-based organizations’ religious parameters—Obama administration. Both USAID and the Administration for Children and Families (ACF) in the Department of Health and Human Services amended their funding requirements so that faith-based organizations could participate in providing services even when, for religious reasons, they could not carry out every specified service. The ACF policy spelled out three ways to accommodate such a faith-based organization: (1) it could serve as a subgrantee, with the grantee ensuring that beneficiaries can access all services; (2) it could be part of a consortium of providers that would divide up service responsibilities such that the organization could participate; or (3) the organization could be the grantee and then notify the government to step in to arrange the provision of a service the organization could not in good conscience supply. The USAID policy similarly required the government to arrange for an alternative

⁸⁹ USAID, “U.S. Agency for International Development Administrator Mark Green’s Remarks at the Ministerial to Advance Religious Freedom,” July 26, 2018, <https://2017-2020.usaid.gov/news-information/press-releases/jul-26-2018-usaid-administrator-mark-green-remarks-ministerial-advance-religious-freedom>.

⁹⁰ See, e.g., USAID, “Effective Partnering and Procurement Reform: External Listening Tour Summary Report,” November 7, 2018, <https://www.usaid.gov/documents/1868/report-effective-partnering-and-procurement-reform-external-listening-tour-summary>; USAID, *Acquisition and Assistance Strategy*, December 2018, <https://www.usaid.gov/sites/default/files/2022-05/AA-Strategy-02-04-19.pdf>; USAID, “New Partnerships Initiative (NPI)” 2019; James M. Roberts and Max Primorac, eds., *USAID 2017–2021: The Journey to Self-Reliance*, Special Report 249, November 18, 2021 (Washington, DC: Heritage Foundation Douglas and Sarah Allison Center for Foreign Policy), <https://www.heritage.org/sites/default/files/2021-11/SR249.pdf>. The website is www.workwithusaid.gov.

provider when a faith-based organization could not supply some part of a service, rather than either excluding the organization from funding or pressing it to violate its convictions.⁹¹

Pilot program. President’s Emergency Plan for AIDS Relief: Engaging faith-based organizations to reach further and deeper. The President’s Emergency Plan for AIDS Relief (PEPFAR) was designed by the Bush administration to utilize grassroots groups, particularly faith-based organizations, to deliver AIDS prevention and treatment services. In an early statement, the State Department noted that “[i]n many focus countries, more than eighty percent of citizens participate in religious institutions. In certain nations, upwards of fifty percent of health services are provided through faith-based institutions, making them crucial delivery points for HIV/AIDS information and services.” Moreover, once trained, faith-based grassroots groups “often design the most culturally appropriate and responsive interventions and have the legitimacy and authority to implement successful programs that deal with normally sensitive subjects.”⁹² More recently, the program dedicated one hundred million dollars of its funding to expand the participation of faith-based and community-based organizations, saying that “a trusted messenger with access to those most in need of care is an essential prerequisite to effective delivery of life-saving messages about HIV prevention, care, and treatment as well as to preventing sexual violence and securing justice for children.”⁹³ PEPFAR, still in operation, is often termed one of the most successful global health programs ever, saving twenty-five million people’s lives and additionally preventing many millions of deadly infections.⁹⁴

Pilot program. Access to Recovery: Using vouchers for drug treatment to add types of services and service providers. Recall that Charitable Choice was added during the Clinton administration to the main federal substance abuse treatment program, which is operated by

⁹¹ See the discussion of the accommodative HHS and USAID rules in Stanley Carlson-Thies, “Must the Government Enforce Uniformity?” (blog post), Institutional Religious Freedom Alliance, September 25, 2013, <https://cpjustice.org/must-the-government-enforce-uniformity/>. For the HHS policy, see also Rogers, *Faith in American Public Life*, 116–18.

⁹² Office of the US Global AIDS Coordinator, “The President’s Emergency Plan for AIDS Relief: Community and Faith-Based Organizations,” 2005, 2, 1.

⁹³ PEPFAR, Faith and Community Initiative (FCI) Fact Sheet, 2020, <https://www.state.gov/wp-content/uploads/2020/12/PEPFAR-Faith-and-Community-Initiative-Fact-Sheet-1.pdf>.

⁹⁴ Tom Daschle and Bill Frist, *PEPFAR: 20 Years of Progress, Partnership, and Impact* (Washington, DC: Bipartisan Policy Center, June 2023), 3. See also KFF, “The U.S. President’s Emergency Plan for AIDS Relief (PEPFAR),” July 26, 2023, <https://www.kff.org/global-health-policy/fact-sheet/the-u-s-presidents-emergency-plan-for-aids-relief-pepfar/>.

SAMHSA in the Department of Health and Human Services. SAMHSA funding is used by states and tribes to award grants or contracts to service providers, and the addition of Charitable Choice language was intended to ensure the eligibility of faith-based providers. However, because this SAMHSA funding is “direct,” the treatment services may not include religious content. The Access to Recovery (ATR) program adopted a different approach, using “indirect” funding—vouchers—to maximize options for beneficiaries, including services that incorporate religious teaching and activities.⁹⁵ Rather than funding only medically based treatment, ATR funded a range of services to support recovery; as the director of the Connecticut Department of Mental Health and Addiction Services described that state’s ATR program in 2006, this broader range of services aimed to “assist people in establishing an environment supportive of recovery and in gaining the skills and resources needed to initiate and maintain recovery.”⁹⁶ For some, religious or spiritual resources, and services rooted in their religiously influenced local community, are particularly valued and effective helps. The ATR program developed by the Montana-Wyoming Tribal Leaders Council, which won a grant in 2010, provided, beyond chemical dependency treatment, support for “firewood for sweat lodges, sober housing, transportation, child care, job training and faith-based spiritual support.” The director of the program emphasized the importance of “faith-based and traditional spiritual support” in promoting personal strength and as a key element of the local community that clients rely on for recovery.⁹⁷

Notably, as opioid deaths spiraled upward, the Trump administration encouraged states to utilize vouchers when expending SAMHSA funding designated for opioid addiction treatment. With “indirect” funding, beneficiaries could be offered a greater range of treatment and recovery options. “Faith is a central element of treatment and recovery for many individuals,” SAMHSA

⁹⁵ For brief discussions of the ATR program, see Carlson-Thies, “Faith-Based Initiative 2.0,” 940–41; David J. Wright, *Taking Stock: The Bush Faith-Based Initiative and What Lies Ahead*, Roundtable on Religion and Social Welfare Policy (Albany, NY: Nelson A. Rockefeller Institute of Government, [2009?]), 63–66; White House Office of Faith-Based and Community Initiatives, *Innovations in Compassion: The Faith-Based and Community Initiative: A Final Report to the Armies of Compassion*, December 2008, 4–5, <https://georgewbush-whitehouse.archives.gov/government/fbci/pdf/innovation-in-compassion.pdf>.

⁹⁶ Thomas A. Kirk Jr., “Connecticut Access to Recovery” (slideshow), Federal Substance Abuse and Mental Health Service Administration National Advisory Council meeting, June 2006, <https://portal.ct.gov/-/media/DMHAS/Presentations/SAMHSA06pdf.pdf>.

⁹⁷ Adrian Jawort, “Access to Recovery Promotes Native-style Community Treatment,” ICT News, December 7, 2010, updated September 13, 2018, <https://ictnews.org/archive/access-to-recovery-promotes-native-style-community-treatment>.

reminded states, telling them that they could “use indirect funding in order to enhance the ability of new providers to participate.”⁹⁸

Pilot program. Mentoring Children of Prisoners: Using intermediaries to facilitate partnerships with churches and other civil society organizations. The use of intermediaries is an important way to enable big government to connect effectively with and support small, locally focused community-based and faith-based organizations, including houses of worship. Intermediaries are experienced high-capacity organizations that are expert in handling government funds, understanding and following government rules, managing programs, delivering services, compiling reports, providing training to others, assessing outcomes, and coordinating the work of other organizations. Some of them have extensive connections with community-based and faith-based organizations. Their role is to implement a large grant by awarding subgrants to small community organizations that are each able to deliver some portion of the overall total of services, and then training the subgrantees and helping them to manage the funds, generate outcomes data, follow program requirements, and deliver and improve the services. A program utilizing intermediaries combines the managerial strength of a large organization with the local rootedness and connections of smaller community-based and faith-based organizations.⁹⁹

This intermediary design was at the heart of the Mentoring Children of Prisoners (MCP) program that operated from 2003 to 2010. MCP’s model and inspiration was the Amachi program, which offered mentoring by trusted and trained adults to children with one or both parents behind bars. Amachi was created in 1999 by W. Wilson Goode Sr., formerly the Black Democratic mayor of Philadelphia, with the help of John J. DiIulio Jr., Big Brothers Big Sisters,

⁹⁸ See the letter from Shannon Royce, director, HHS Center for Faith and Opportunity Initiatives, to state health officers, August 3, 2018, and the accompanying document, Substance Abuse and Mental Health Services Administration (SAMHSA), “State Opioid Response (SOR) Frequently Asked Questions (FAQs),” questions 7 and 8.

⁹⁹ White House Office of Faith-Based and Community Initiatives, *Breakthrough Performance: Ten Emerging Practices of Leading Intermediaries*, 2008?, http://www.socialworx.org/wp-content/uploads/2018/05/breakthrough_guide-for-intermediaries.pdf, and Amy L. Sherman, “Strengthening the Street Saints: Intermediaries Providing Capacity-Building Assistance to Faith-Based Organizations,” in Roland V. Anglin, ed., *Building Organizations That Build Communities: Strengthening the Capacity of Faith- and Community-Based Organizations* (Washington, DC: US Department of Housing and Urban Development, Office of Policy Development and Research, 2004).

and Public/Private Ventures, a social policy and program management organization. Amachi recruited mentors particularly from city congregations; Goode noted that a city church was often the one thriving institution in a neighborhood and that city churches have a tradition of mobilizing volunteers and other resources to offer multiple services for the good of their neighbors.¹⁰⁰

“In a spiritual sense, I have felt an obligation to work on behalf of this invisible population: the children of inmates. And I believe the route of my earlier journey—in public service as chairman of the Public Utility Commission, managing director of the City of Philadelphia and then a two-term mayor—prepared me to lead Amachi to success.

“This journey has also been like a dream. I know it happened, but I can’t quite explain how it was done. I did not start out to create a national program; I just wanted to help a few thousand children over a few years to stay out of jail. I wanted to demonstrate that parents in prison for the most part loved their children and wanted the best for them. I wanted to prove that if one adult mentored one child, for one hour, once a week for at least one year, we could change the outcome for that child. I wanted to demonstrate that people of faith could add value to the lives of these children.”

— W. Wilson Goode Sr., afterword to Thomas J. Smith’s *The Least of These* (2012).¹⁰¹

Amachi’s success inspired the Bush administration to create in 2003 the similar federal MCP program. In MCP, funding was provided to grantees that, like Amachi, were able to design and operate a program to recruit and assess potential mentors, make and monitor matches with interested children, and provide training. The mentor organizations worked with congregations and other civil society organizations that did not have the desire or capability to compete for federal funding and perform to federal standards but that could participate by encouraging volunteers to come forward, promoting the program, and encouraging children to ask for a mentor. In its final years, MCP was made even more hospitable to unconventional partners when a voucher-funding component was added. The grant-funded part of MCP had to insist that mentoring would not include religious activities; the voucher-funded part did not carry that

¹⁰⁰ W. Wilson Goode Sr., “Amachi: Mentoring the Children of Prisoners,” in W. Wilson Goode Sr., Charles E. Lewis Jr., and Harold Dean Trulear, eds., *Ministry with Prisoners & Families: The Way Forward* (Valley Forge, PA: Judson Press, 2011), 66–73.

¹⁰¹ Thomas J. Smith, *The Least of These: Amachi and the Children of Prisoners* (Philadelphia: Public/Private Ventures, [2012]), afterword by W. Wilson Goode Sr., <https://search.issuelab.org/resources/14138/14138.pdf>.

restriction, easing the involvement of faith-based and community-based organizations and houses of worship.¹⁰²

Pilot program. Beneficiary-Choice Contracting: Modifying direct funding to accommodate faith-infused services. Beneficiary-Choice Contracting (BCC) was a pilot program designed in 2007 by the Department of Labor to offer diverse varieties of job training services to people returning to their communities after incarceration. In order to expand choices, the requirements for “indirect” funding were followed—but in the form of a revised version of conventional government contracting for services. Grants and contracts are the usual way that government pays for services provided by others; by modifying a familiar “direct” funding mechanism, expanded choice, including services incorporating religion, could be offered without the need to create a wholly new voucher system. As part of the pilot’s design, a manual was produced that explains the unique church-state design in order to facilitate changes in other programs.¹⁰³

The inspiration and parameters for this unusual but promising modification of “direct” funding to fit the church-state specifications of “indirect” funding came from a federal court case in Milwaukee, Wisconsin. The state had offered job training services when people were released from prison. One of the contractors was FaithWorks, whose services included religious teaching and activities. The contract was challenged as violating the direct-funding requirement that explicit religion be kept separate from the government-supported service. But on appeal, the federal judge upheld the state’s program and the inclusion of FaithWorks because the beneficiaries were offered a choice of provider after being informed about their varied choices, secular options were available, and any provider was paid only when a beneficiary had decided to utilize its services.¹⁰⁴

¹⁰² Wright, *Taking Stock*, 62–63.

¹⁰³ Stanley Carlson-Thies, Stephen Lazarus, Bernard Antkowiak, and James Callahan, *Beneficiary-Choice Contracting Implementation Guide* (US Department of Labor, Contract DOLJ061A20365, Task Order #18, 2009).

¹⁰⁴ *Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950; *Freedom from Religion Foundation, Inc. v. McCallum and Faith Works, Milwaukee, Inc.*, 324 F. 3d 880 (Seventh Circuit, 2003). For an analysis, see Ira C. Lupu and Robert W. Tuttle, “Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,” *Notre Dame Law Review* 78 (May 2003): 917–94. The Obama administration stated that funding would be considered “indirect,” even without the use of vouchers or scholarships or the like, if the federal government chose “to pay the provider directly after asking the beneficiary to indicate his or her choice,” citing the *McCallum* decision. See the HHS Notice of Proposed Rulemaking to amend the department’s Equal Treatment regulations, 80 Fed. Reg. 47272 (August 6, 2015), at 47274.

In the BCC program, the Department of Labor awarded grants to service coordinator organizations which each then contracted with faith-based and community-based providers to create a network of varied service providers. Ironically and unfortunately, the message that government funding must not be used to pay for religion has been so strongly internalized not only by government officials but also by civil society organizations, including faith-based organizations, that the service coordinators had great difficulty finding faith-based organizations operating faith-infused programs that were willing to participate in a social service program funded with federal dollars.¹⁰⁵ This experience is a reminder that substantive transformation of the government system requires not only constitutional reinterpretation and the rewriting of regulations and program parameters but also the extensive and creative training of both officials and civil society organizations to counteract church-state presuppositions that, while no longer valid, are nonetheless firmly held.

2. Supporting civil society organizations other than through the collaboration system.

Strengthening civil society organizations: The Compassion Capital Fund—Bush administration. The Compassion Capital Fund (CCF) was a program of support for civil society organizations, designed to help them improve their capacity to manage, fund, and offer services. The program awarded grants to a range of organizations, both secular and faith-based, that in turn designed and provided training and technical assistance to smaller and newer organizations, sometimes also awarding mini-grants that the civil society organizations could use to purchase computers, software, or other needed items. By funding a diverse set of training organizations, the federal government improved the chances that a grassroots organization seeking help could find a training provider that it trusted and that could provide the specific aid it needed.¹⁰⁶ Whether or not a CCF recipient ever partnered with government, its increased effectiveness was

¹⁰⁵ For the difficulty, see Bellotti et al., *Examining a New Model for Prisoner Re-Entry Services*, 16–17. For careful and illuminating analyses of job training programs that include explicitly religious elements, see Monsma, *Putting Faith in Partnerships*, and Stephen V. Monsma and J. Christopher Soper, *Faith, Hope, and Jobs: Welfare-to-Work in Los Angeles* (Washington, DC: Georgetown University Press, 2006).

¹⁰⁶ Abt Associates, *Improving Capacity Among Nonprofits—Impact Study of the Compassion Capital Fund Demonstration Program*, prepared for the Office of Community Services, Administration for Children and Families, US Department of Health and Human Services, 2010, and White House Office of Faith-Based and Community Initiatives, *Innovations in Compassion*, 35.

a gain for the good of society. Similarly, the Obama administration created the Strengthening Communities Fund (SCF) to provide help to small organizations whose viability was undermined by the Great Recession of the late aughts.¹⁰⁷

Supporting the functioning of faith-based organizations—multiple administrations. Actions by several administrations have removed the “no aid”-era restrictions on federal aid for faith-based organizations, including houses of worship, that have been damaged by natural disasters or are threatened by hate crimes or terrorist attacks. We can consider all of these to be varieties of level playing-field reforms, though here not having to do with eligibility to receive federal funds to provide social services. For example, the Bush administration’s Department of Justice issued a ruling that the Establishment Clause does not prevent historic preservation grants from being awarded to historic religious buildings that continue to be used as houses of worship, such as Boston’s Old North Church.¹⁰⁸ Since 2005, synagogues and other houses of worship have been eligible to receive Nonprofit Security grants to improve their defenses against terrorism and hate crimes.¹⁰⁹ The Biden administration has been particularly vigorous in informing congregations about these grants, providing training about how to secure facilities, and expanding funding for the grants. In 2018, in response to a court ruling, the Trump administration swiftly changed FEMA policy to make houses of worship eligible for the FEMA program of disaster assistance for “community centers.”¹¹⁰

Partnering with civil society organizations outside of funding—Obama administration. The Obama administration added to the faith-based initiative’s commitment to invite civil society

¹⁰⁷ Carol J. De Vita et al., *Final Report: An Assessment of the Strengthening Communities Fund Capacity-Building Program*, Urban Institute, July 2, 2013. Some states, too, provide capacity-building technical assistance and grants to faith-based and community-based organizations. See, e.g., the 2020 annual report of the Ohio Governor’s Office of Faith-Based Community Initiatives, <https://governor.ohio.gov/priorities/faith-based-initiatives/news-and-events/2020-annual-report>, and the New Jersey Department of State’s Office of Faith-Based Initiatives’ Project Atlas capacity-building grants program, <https://www.nj.gov/state/assets/pdf/ofbi/fy23-project-ATLAS-grant-guidelines.pdf>.

¹⁰⁸ Office of Legal Counsel, “Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church,” US Department of Justice, April 30, 2003, <https://www.justice.gov/file/18941/download>.

¹⁰⁹ See, e.g., Orthodox Union Advocacy Center, “IPA Memo on Department of Homeland Security Funding,” December 8, 2004, <https://advocacy.ou.org/ipa-memo-on-department-of-homeland-security-funding/>.

¹¹⁰ Federal Emergency Management Agency, “Public Assistance: Private Nonprofit Houses of Worship” (fact sheet), January 26, 2018.

organizations into funding programs a strong parallel commitment to what it termed “nonfinancial” partnerships. These are formal partnerships “in which no money passes hands from the government to the religious organization, but the two parties nonetheless work together toward a common goal.”¹¹¹ However vigorous the reforms, federal dollars are accompanied by multiple restrictions; removing the dollars and the many accompanying requirements and restrictions made possible additional new partnerships. Joshua DuBois, the Obama administration’s first White House faith-based director, and Melissa Rogers, the second, noted that this change opened the door to collaboration for smaller organizations, religious organizations disinclined to sharply set apart religious activities from their services, and organizations not tolerant of the requirements that accompany government funds.¹¹²

The White House Office and the various Centers created a wide range of such common-cause arrangements through which the convening and coordinating power of the federal government assisted civil society organizations to accomplish social good. For instance, the Department of Labor’s Center for Faith-Based and Neighborhood Partnerships, acknowledging the reality that the unemployed often need assistance beyond information about job openings and training in job searching, developed a “jobs club” program through which more than a thousand congregations organized volunteers to provide networking, counseling, and other help. In another initiative, congregations and other neighborhood organizations served as summer meal sites for impoverished children who during the school year participated in the federally funded school breakfast and lunch programs.¹¹³

While the faith-based initiative has succeeded in expanding its collaborative reach, it will take “all hands on deck” if society and government are successfully to respond to unmet needs and new challenges, to use the terminology of presidential candidate Obama when he promised to

¹¹¹ Rogers, *Faith in American Public Life*, 104.

¹¹² Joshua DuBois, “A Vision for Faith-Based and Neighborhood Partnerships: Speech to the Brookings Institute [sic]” (blog post), White House, February 18, 2010, <https://obamawhitehouse.archives.gov/blog/2010/02/18/a-vision-faith-based-and-neighborhood-partnerships>; Rogers, *Faith in American Public Life*, 118.

¹¹³ On various nonfinancial partnerships, see Rogers, *Faith in American Public Life*, 105–6; Melissa Rogers and Dana Mayber, “The Power of Partnerships” (blog post), White House, November 29, 2016, <https://obamawhitehouse.archives.gov/blog/2016/11/29/power-partnerships>; and Wear, *Reclaiming Hope*, 64–65.

maintain the faith-based initiative. These challenges await new creativity and transformative energy.

“By serving as a convener, by sharing critical information, by building organizational capacity, by catalyzing private support, and still – where appropriate – informing organizations of grants they may apply for, we seek to be a nimble, creative and flexible supporter of faith-based and secular nonprofit organizations around the country. It’s no longer about just dollars and cents. Instead, it’s about impacts on individuals, families and communities.” —Joshua DuBois, director, White House Office of Faith-Based and Neighborhood Partnerships, “A Vision for Faith-Based and Neighborhood Partnerships” (2010).¹¹⁴

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¹¹⁴ DuBois, “Vision for Faith-Based and Neighborhood Partnerships.”