

DEBATE 2

SHOULD THE GOVERNMENT PROVIDE FINANCIAL SUPPORT FOR RELIGIOUS INSTITUTIONS THAT OFFER FAITH-BASED SOCIAL SERVICES?

MODERATOR

*The Honorable Louis H. Pollak**

INTRODUCTION

*Glen A. Tobias***

PANELISTS

*Erwin Chemerinsky****

Barry W. Lynn⁺

Douglas Laycock⁺⁺

Nathan J. Diament⁺⁺⁺

Summary:♦

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⁺ Barry W. Lynn received his law degree from Georgetown University Law Center in 1978. He also earned a theology degree from Boston University School of Theology in 1978, and is an ordained minister in the United Church for Christ. He currently serves as the Executive Director of Americans United for the Separation of Church and State. *Barry W. Lynn* (visited May 8, 2000) <<http://www.au.org/lynn.htm>>. For general information about this organization, visit *Americans United for the Separation of Church and State* (visited May 8, 2000) <<http://www.au.org/default.htm>>.

⁺⁺ Douglas Laycock is the Associate Dean for Research and Alice McKean Young Regents Chair in Law at the University of Texas School of Law. For the professor’s biography, visit School of Law at UT Austin, *Faculty and Senior Lecturers Biographies* (visited Mar. 26, 2000) <<http://www.utexas.edu/law/faculty/bios/fullfac.html#Heading39>>.

⁺⁺⁺ Nathan J. Diament serves as the Director of the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America. To read Mr. Diament’s views on school choice, see Nathan J. Diament, *School Choice is the Right Choice*, NCJW JOURNAL, Winter 1997, as posted at Union of Orthodox Jewish Congregations of America, *School Choice is the Right Choice* (visited May 8, 2000) <<http://www.ou.org/public/statements/schoolchoice122697.htm>>.

The following discussion examines the possible ramifications of Charitable Choice on the separation of church and state. Charitable Choice is a proposed government program in which secular organizations would receive federal funding for programs geared toward assisting the poor. Four prominent legal religious scholars engage in heated debate addressing the long-term effects of this program. They are: Nathan Diament, Director of the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America, Douglas Laycock, a leading constitutional scholar and professor at the University of Texas Law School, Barry Lynn, an ordained minister in the United Church of Christ and attorney affiliated with Americans United for Separation of Church and State, and Erwin Chemerinsky, a constitutional law professor at the University of California School of Law.

Many view Charitable Choice as a way to legitimize and fund activities that already occur in religious communities of all denominations. Churches and synagogues have long been responsible for a great deal of aid to impoverished communities. Through Charitable Choice the government will be able to fund a percentage of these activities as would a private organization. The argument against Charitable Choice stems from its interference with the doctrine of separation of church and state, a guiding principle of the United States Constitution. The government would compel religious organizations that accept public funds to open their books to audits, thereby encroaching into a sector of society it had previously left alone. Opponents of Charitable Choice find the innate evangelical aspects of religion deeply problematic, illustrating a scenario where such organizations would render services only to an individual who complied with the tenets of a particular faith.

MR. GLOVSKY:

It is my pleasure to introduce Glen Tobias to you. Glen is the Chair of Anti-Defamation League [“ADL”]¹ National Executive Committee. And like so many of our national lay leaders, he brings to ADL vitality, enthusiasm, and an energy that makes ADL what it is today.

Glen, you may have heard this, but if you did not hear it loudly enough, is a graduate of this school.² And this is the first time he has ever sat in the front row. He also serves on the Board of Overseers, with Elizabeth Coleman,³ of the law school here. So, it is my pleasure to introduce Glen Tobias to introduce this morning’s debate.

(Applause.)

♦ Articles Editor Cynthia Gentile wrote this summary.

¹ The ADL fights anti-Semitism and bigotry. It “probes the roots of hatred against Jews and serves as a public resource for government, law enforcement agencies, and the public at large.” Anti-Defamation League, *About ADL* (visited Mar. 15, 2000) <http://www.adl.org/frames/front_about.html>. For more information about ADL, visit its web site at Anti-Defamation League, *Anti-Defamation League Online* (visited Mar. 15, 2000) <<http://www.adl.org>>.

² See *University of Pennsylvania Law School* (visited Mar. 15, 2000) <<http://www.law.upenn.edu>>.

³ Elizabeth J. Coleman is the Director of the ADL Civil Rights Division. See *infra Debate 3: Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*

MR. TOBIAS:

Being in the first row I am sure is a cameo appearance.

Whether religious organizations should receive financial support from the government is a question that goes to the very heart of American democracy. The founding fathers did their best to ensure religious freedom by creating what Jefferson called “the wall of separation between Church and State.”⁴

This does not mean, of course, that the Constitution requires the government to be hostile to religion. Nor does it mean that the government should refuse to acknowledge the important work that religious institutions do in areas in which the government also operates, for example, in educating our children or in delivering basic services to the needy. The degree to which the Constitution allows church and state to collaborate to accomplish these goals is the focus of much of our discussion today. By prohibiting the establishment of religion,⁵ the founding fathers were attempting to prevent the kind of government-sponsored religious coercion that was so prevalent throughout Europe in centuries past. But the Establishment Clause had another profoundly positive effect.⁶

Strict separationists, ADL included, like to point out that America has remained such a strong and diverse religious nation precisely because government is forbidden from

⁴ In 1802 Thomas Jefferson said to the Danbury Baptists,

Believing . . . that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.

16 THE WRITINGS OF THOMAS JEFFERSON 281 (Andrew A. Lipscomb & Albert E. Bergh eds., Memorial Edition 1903-1904). See Eyler Robert Coates, Sr., *Thomas Jefferson on Politics & Government: Freedom of Religion* (visited May 19, 2000) <<http://etext.lib.virginia.edu/jefferson/quotations/jeff1650.htm>>.

⁵ The Establishment Clause is included in the First Amendment, which provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

For many Americans the Establishment Clause means that the “government cannot authorize a church, cannot pass laws that aid or favor one religion over another, cannot pass laws that favor religious belief over non belief, cannot force a person to profess a belief. In short, government must be neutral toward religion and cannot be entangled with any religion.” First Amendment Cyber Tribune, *FEEDOM OF RELIGION* (last modified Oct. 14, 1998) <<http://w3.trib.com/FACT/1st.religion.html>>. Cf. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668 (1970) (stating that “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity”).

⁶ U.S. CONST. amend. I. Through cases, mainly involving religion in public schools, the Supreme Court has developed three “tests” to be applied to religious practices for determining their constitutionality under the Establishment Clause. The three tests are the (1) Lemon Test (*Lemon v. Kurtzman*, 403 U.S. 602 (1971)); (2) Endorsement Test (*County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)); and (3) Coercion Test (*Lee v. Weisman*, 505 U.S. 577 (1992)).

meddling in matters of faith.⁷ Many Americans believe, however, that we have taken separation too far. They argue that what is wrong with America today is that we have pushed religion and religious institutions out of the public arena, thus neglecting the source of our greatest strength as a nation, a system of values firmly rooted in the Judeo-Christian tradition. These competing visions of religion and government meet head on in the issue that is about to be debated.

We have already heard from the previous distinguished panel⁸ about the power that religion has to transform the everyday lives of needy Americans. Churches in the inner cities often do their work both more cheaply and more effectively than their government counterparts.

Today's debate addresses what is popularly known as Charitable Choice.⁹ Under a provision of the 1996 Welfare Reform Act,¹⁰ funds are now available to religious institutions providing faith-based welfare services. Unlike the secular programs set up by religious organizations, faith-based programs take place in houses of worship and include, at the very least, the trappings of religious dogma. For example, under Charitable Choice, welfare recipients may be directed to a local church to receive their benefits or to undergo counseling conducted by a member of the clergy.

Some policymakers, as well as two of the leading presidential candidates, have called for extending Charitable Choice for similar policies, beyond welfare, to other areas such as drug rehabilitation, homelessness, and juvenile diversion programs.

Some religious leaders have embraced Charitable Choice as a way of securing sorely needed funds for their social programs. Others are committed to rejecting any government assistance that might force them to compromise their core mission or subject them to the scrutiny of bureaucrats or taxpayers.

Although the Supreme Court has heard numerous cases involving government funding for religious institutions,¹¹ it has not as yet ruled directly on the constitutionality of Charitable Choice. I am sure that the debate that follows will shed light on both the

⁷ See, e.g., Jim Spivey, *Separation No Myth*, 36 SW. J. THEOLOGY 10 (1994), as posted by the Baptist Joint Committee on Public Affairs, *Separation No Myth by Jim Spivey* (visited May 19, 2000) <<http://users.erols.com/bjcpa/pubs/spivey.html>>.

⁸ See *supra* Debate 1: *The Role of Religious Institutions in Providing Social Services and Education in Neglected Communities; Reports From the Field*.

⁹ The Charitable Choice Provision, § 104 of the Federal Welfare Reform Law enacted in the summer of 1996, encourages states to involve community and faith-based organizations in providing federally funded welfare services to the poor and needy. See *The Charitable Choice Expansion Act of 1999* (visited Mar. 28, 2000) <<http://www.senate.gov/~ashcroft/charitable.htm>>.

¹⁰ Personal Responsibility and Work Opportunity Act of 1996, P.L. No.104-193, 110 Stat. 2105 (codified as amended in scattered sections of chapter 42 of the United States Code). See also *id.*, *Faith Based Organizations Succeed at Delivering Welfare Services* (visited Mar. 28, 2000) <<http://www.senate.gov/~ashcroft/charitable.htm>>.

¹¹ See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1 (1947). See also *infra* Debate 4: *Have Recent Court Holdings Enhanced or Eroded Religious Freedom for All Americans?*

practical implications of Charitable Choice, as well as its prospect of passing constitutional muster.

Our debate brings together four of the country's most respected experts on these profound issues: Nathan Diament, Director of the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America, works on behalf of the legal interests of the traditional Jewish community. He is a widely respected expert on issues of law and religion, as well as international affairs.

Douglas Laycock is a professor at the University of Texas School of Law. He is a leading constitutional scholar and an activist for religious liberty.

Barry Lynn is an ordained minister in the United Church of Christ, as well as an attorney who directs Americans United for Separation of Church and State. He is one of the country's most articulate spokesmen for religious freedom for people of all faiths.

Erwin Chemerinsky is a professor at the University of Southern California School of Law. He is a prolific author and lecturer on constitutional law and has served as co-counsel in a number of cases before the United States Supreme Court.

We are truly honored to have as our moderator Judge Louis H. Pollak of the Eastern District of Pennsylvania. Judge Pollak, a long-time friend to both Penn Law School and the Anti-Defamation League, is a former dean of both Yale and Penn Law Schools. He is a distinguished jurist and scholar who has a long-standing interest and expertise in constitutional law issues. It is now my honor to turn the podium over to Judge Pollak. Thank you.

(Applause.)

JUDGE POLLAK:

Thank you very much, Mr. Tobias, for your kind introduction and for introducing all of us, the entire panel, to this distinguished audience.

Mr. Tobias has given us a very good platform for proceeding with this debate. And it is a debate, as I shall note in a moment.

Just within the last couple of days, I have had occasion in a totally different context to review some of the foundation jurisprudence in this field, and it is really a remarkable retrospective.

One goes back half a century to the Supreme Court's decision in *Everson*,¹² in which Justice Black, writing for the Court, sustained New Jersey's program of using state funds for transporting children to private, as well as public schools¹³ - private, of course, including parochial schools, eliciting many dissents¹⁴ on that. The Court was divided 5 to 4.

¹² *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1 (1947) (holding that the establishment of religion clause of the First Amendment, at a minimum means that neither a state nor the Federal Government can establish a church, and that the government may not pass laws which aid a religion, aid all religions, or prefer one religion over another).

¹³ *See id.*

¹⁴ *Everson*, 330 U.S. at 18 (Jackson, J., dissenting); *id.* at 28 (Rutledge, J., dissenting). Justice Frankfurter joined both dissents, and Justices Jackson and Burton joined Justice Rutledge's dissent. *Id.*

One of the more memorable of the dissents was Justice Jackson's observation as he considered Justice Black's recital that there was a wall of separation between church and state.¹⁵ Justice Jackson noted that, considering what the Court had done, he was reminded only of the precedent of Byron's heroine Julia, who whispering, "I will ne'er consent," consented.¹⁶

And within a year Justice Black was to write for the Court invalidating the Champaign, Illinois, released time program in the *McCullum*¹⁷ case. And four years after that, Justice Douglas was to write for the Court sustaining New York's released time program in the extraordinary opinion noting that we are a religious nation.¹⁸ Separate

¹⁵ *Id.* at 18.

¹⁶ Justice Jackson wrote,

[i]n fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent' - consented."

Id. at 19 (Jackson, J., dissenting). Justice Jackson refers to Byron's epic satire, *DON JUAN*, in which the exploits of the hero are retold. Byron describes the first of Don Juan's conquests as follows:

And Julia's voice was lost, except in sighs.
Until too late for useful conversation;
The tears were gushing from her gentle eyes,
I wish, indeed, they had not had occasion;
But who, alas! can love, and then be wise?
Not that remorse did not oppose temptation:
A little still she strove, and much repented,
And whispering "I will ne'er consent" – consented.

GEORGE GORDON, LORD BYRON, *DON JUAN*, CANTO ONE CXVII (1818-1819).

¹⁷ See *Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 202 (1948).

¹⁸ See *Zorach v. Clauson*, 343 U.S. 306 (1952). Justice Douglas wrote that:

[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14.

dissenting opinions from Justice Black,¹⁹ Justice Frankfurter,²⁰ and Justice Jackson²¹ were elicited.

That takes us back four decades. We, at the end of this century, stand at the threshold of new times, new programs, new thinking.

It is appropriate against that early background to address today's problems in exploring both the wisdom on a policy level and the validity on a constitutional level of Charitable Choice undertakings.

We have, as Mr. Tobias has pointed out, a panel of real distinction and expertise.

The way we are going to proceed is, as you understand, that this is a debate, with the good guys over here and the bad - no. No. Sorry. I think Mr. Tobias told me I was supposed to be neutral. With one position on my left and one on my right.

Mr. Diament is going to lead off with a ceiling of a ten-minute presentation of the merits, policy and legal, of Charitable Choice. And then he will be followed in response by Mr. Lynn.

Does Mr. Lynn wish to be referred to as Reverend Lynn?

MR. LYNN:

Anything will do.

JUDGE POLLAK:

Anything will do. You understand, of course, do you not, that Barry Lynn is both an ordained minister and a lawyer. Bearing in mind that lawyers are officers of the court,²² that means that Barry Lynn is himself a living embodiment of the breakdown of the separation of church and state.

And after Barry Lynn's ten minutes, we will hear from Douglas Laycock of the University of Texas for ten minutes, and then from Erwin Chemerinsky of the University of Southern California for ten minutes.

And when I say, "ten minutes," gentlemen, regard me as the red light that will go off.

MR. DIAMENT:

Thank you, Judge Pollak, and thanks to the ADL for inviting me to be here today.

I did note our session has been given the title on the program "debate," as opposed to "roundtable discussion." I do not know if that means we have a higher burden of entertaining you, or if it is merely because there is a Texan and a Californian on the different sides. But, nevertheless . . .

¹⁹ See *id.* at 315 (Black, J., dissenting).

²⁰ See *id.* at 320 (Frankfurter, J., dissenting).

²¹ See *id.* at 323 (Jackson, J., dissenting).

²² See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (1999). Under the model rules, lawyers owe certain duties to the court, including candor to the tribunal (Rule 3.3), reasonable expedition of litigation (Rule 3.2), and respecting the impartiality and decorum of the tribunal (Rule 3.5). *Id.* For links to the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT and various state canons of ethics, visit Internet Legal Services, *EthicSites: States* (visited May 19, 2000) <<http://www.legalethics.com/states.htm>>.

JUDGE POLLAK:

You have now used a minute of your time.

MR. DIAMENT:

I will not try to get into the stories, the real-life stories, that you heard from the earlier panel that make the case in the real world if you were for Charitable Choice. But I am going to try to talk on the policy level. And given what the judge said, I am going to try to speak as quickly as David Saperstein.²³

How much policy initiatives do Vice-President Gore and Governor George W. Bush agree upon? This sounds like a bad riddle told in a Washington happy hour. But relevant to us today, the answer is at least one, and that one is Charitable Choice.

On May 24, 1999 Vice-President Gore delivered a speech in which he embraced what he characterized as a new partnership between faith-based organizations and government with regard to the provision of social services.²⁴ This caught some of the traditional supporters of Mr. Gore, including the Anti-Defamation League, somewhat offguard, because in announcing support for this new partnership, Mr. Gore was agreeing with the policy championed by Governor George W. Bush,²⁵ Senator John Ashcroft,²⁶ and others, which is to ensure that faith-based organizations are not shut out from the opportunity to participate in public/private partnerships to deliver social services.

Now, let me be clear here. What is going on in this legislation, as written in the Welfare Reform legislation²⁷ and in the proposed expansion beyond Welfare Reform

²³ See *supra* Debate 1: *The Role of Religious Institutions in Providing Social Services and Education in Neglected Communities; Reports From the Field*.

²⁴ Vice-President Al Gore spoke about the role of faith-based organizations before the Atlanta Salvation Army. See Scott Shepard, *Gore takes broad leap for faith; Vice president advocates subsidies for religious groups fighting social problems*, ATLANTA CONST., May 25, 1999, at A1; *HELP DENIED: Ready, willing, unable*, ATLANTA J., Aug. 26, 1999, at A18 (reporting that Vice-President Gore said, “I think there’s no doubt that [by] working within the framework of the Constitution to establish partnerships between faith-based organizations and social service programs, you can greatly improve the performance results you’re seeking.”). For additional speeches by Vice President Gore, see *Selected Speeches, Al Gore Vice President of the United States* (visited Mar. 26, 2000) <<http://www.whitehouse.gov/WH/EOP/OVP/>>.

²⁵ Governor George W. Bush advocates government first turning “to faith-based organizations, charities, and community groups to help people in need. Resources should be devolved, not just to the states, but to the charities and neighborhood healers who need them most and should be available on a competitive basis to all organizations – including religious ones – that produce results.” Bush for President, Inc., *Faith-Based Initiatives – Executive Summary* (visited May 19, 2000) <<http://www.georgewbush.com/issues/domestic/faith/summary.asp>>. For an index of Governor Bush’s stances on various issues, including faith-based initiatives, visit *id.*, *George W. Bush Policies: A Vision for America* (visited May 19, 2000) <<http://www.georgewbush.com/issues/index.html>>.

²⁶ Senator John Ashcroft authored the Charitable Choice provision of the Welfare Reform and Reconciliation Act of 1996, P.L. No. 104-193, 110 Stat. 2105. See *Policy Statement on Charitable Choice Provision* (visited May 19, 2000) <<http://www.senate.gov/~ashcroft/charitchoice.htm>>. For more information on Senator Ashcroft’s policies, see *John Ashcroft* (visited Mar. 26, 2000) <<http://www.senate.gov/~ashcroft/>>.

legislation, is that, in any context where government already has made the decision to offer the possibility of nongovernmental entities, private organizations and what-have-you, civic groups, et cetera, to bid for and receive government grants, to participate in private/public partnerships, when the government has already made the decision to go down that road, what Charitable Choice says is that you cannot exclude religiously affiliated organizations. So, that is a very important point.

What we are talking about is, the government is already engaged in the private/public partnership arena. The question is, are religious entities, faith-based entities, going to be shut out?

Gore recognized the power of religiously motivated institutions and the work they do.²⁸ He said that they engage in the politics of community, they do what all great religions tell good people to do, like visit the prisoners, help the orphans, feed and clothe the poor. Most of all, they have done what government can never do, in his words, what it takes God's help sometimes for all of us to manage, they have loved them. And the fact that government is inviting them into this process is, again, the essential principle, that they should not discriminate against faith-based organizations in this process.

Now, this has generated a host of criticisms from the proponents of strict separation, some of which are embodied in a brochure put out by the ADL.²⁹ An op/ed was written by the ADL's director, Mr. Foxman.³⁰ And it is an easy way to go through some of the policy points. The first point that is often made is that this notion of including faith-based entities in this enterprise violates the great American tradition of religious freedom, it violates the separation of church and state.

As to the constitutional issues, I will try to leave those for my colleague, Professor Laycock,³¹ who is much better versed in them than I am. But we all know from looking across American history that strict separation, absolute separation, has really never been the rule in this country, and that religion has really played an important role in forming American civic life. Tocqueville called religion the foremost of political institutions in this country, and that their alliance with the government in addressing society's needs is never to be dissolved.³²

The next point made by the critics is that Charitable Choice is going to lead to coercion. In the words of the ADL, the First Amendment prohibits government funding

²⁷ Welfare Reform and Reconciliation Act of 1996, *supra* note 10. See also Institute for the Study of Civic Values, *Welfare Reform* (visited Mar. 28, 2000) <<http://www.libertynet.org/~edcivic/welfref.html>>.

²⁸ See Shepard, *supra* note 24.

²⁹ Anti-Defamation League, *Separation of Church and State: A First Amendment Primer* (visited May 19, 2000) <http://www.adl.org/frames/front_separation_cs.html>.

³⁰ ADL Director Abraham Foxman insists that the government respect the separation of church and state. Bruce Bryant-Friedland, *Watching for bigotry in tolerant times League director wary of millennium*, FLORIDA TIMES-UNION, Feb. 1, 1999, at B1.

³¹ See *infra* notes 70-92 and accompanying text.

³² See generally Charles Grandison Finney & William Ellery Channing, *Alexis de Tocqueville and Religion* (visited Mar. 31, 2000) <<http://xroads.Virginia.edu/~HYPER/DETOC/religion/tocqueville.html>>.

the promotion of religious beliefs.³³ Further, they could easily lead to welfare recipients being coerced to participate in religious activities in order to receive their benefits. This is religious coercion at taxpayers' expense.

Vice-President Gore, in his speech³⁴ and in the Charitable Choice legislation,³⁵ provides that there must be safeguards put in place to ensure that the recipients of social services, who might be offered those services through faith-based entities, have to be advised that there are other options. There must always be a secular option provided. In the words of the legislation, if an individual has an objection to the religious character of the organization, the state in which the individual resides shall provide the individual, within a reasonable period of time after the date of such objection, additional assistance to the individual, and the value of which is not less than the value of the assistance which the individual would have received from the religious organization.³⁶

Additionally, a religious organization shall not, in the words of the legislation enacted into law, discriminate against an individual in regard to rendering assistance funded under any program described in this legislation.³⁷

So, in the law that has been passed,³⁸ and in the law that has been proposed in Congress,³⁹ and in Mr. Gore's speech⁴⁰ and in Governor Bush's statements,⁴¹ all of the responsible proponents of Charitable Choice have said there have to be safeguards in place; we do not want to coerce anybody. And that is a critical point to be made.

³³ The ADL stated that:

The right to freedom of religion is so central to American democracy that it was enshrined in the First Amendment to the Constitution along with other fundamental rights such as freedom of speech and freedom of the press. In order to guarantee an atmosphere of absolute religious liberty, this country's founders also mandated the strict separation of church and state. Largely because of this prohibition against government regulation or endorsement of religion, diverse faiths have flourished and thrived in America since the founding of the republic. Indeed, James Madison, the father of the United States Constitution, once observed that 'the [religious] devotion of the people has been manifestly increased by the total separation of the church from the state.

Anti-Defamation League, *supra* note 29.

³⁴ *See supra* note 24.

³⁵ Charitable Choice Expansion Act of 1999, § 1994A.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Senate Bill 1113 IS was introduced on May 25, 1999.

⁴⁰ *See supra* note 24.

⁴¹ *See supra* note 25.

Finally, you have heard the argument earlier today, with Caesar's coin comes Caesar's strings,⁴² or however you want to phrase it. There are strings attached, and this is going to corrupt or hamper or somehow degrade the religious institutions that are availing themselves of government funds. I think the religious community is entitled to say, "Thank you very much for your concern. Leave it to the religious institutions to decide for themselves whether or not they want to avail themselves of this money." No one is forcing them to take the money. No one is thereby forcing them to accept government regulation.

It can be made perfectly clear what standards they will be expected to fulfill, what regulations they will be expected to obey. But if the question is, should we, at the outset, say that faith-based organizations must be prohibited from being placed on an equal footing with other private entities in their ability to compete for and receive government grants? If your concern is for the religious institutions, we would respectfully suggest, that is very nice, thank you very much, let the individual ministers, rabbis, priests, imams, and boards of directors of these various entities make that decision for themselves.

The Jewish community's experience in this arena has been kind of interesting. And maybe we will get into this later. I picked up an article in the local Jewish newspaper, the Philadelphia Jewish Exponent,⁴³ which discussed how Jewish service entities in the Jewish service entities in the Philadelphia area are really not availing themselves of these programs, even where they are available by law. So that, if nothing else, demonstrates that religiously affiliated institutions are quite capable of analyzing and making these decisions for themselves.

Now, most of the discussion about Charitable Choice is along the lines of what I have been talking about. It also revolves along the lines of what we heard earlier, what these faith-based entities offer to society, and what they offer to the clients, so to speak, the needy, the downtrodden, what they offer them in particular, and what pitfalls or threats are involved to society and to the religious institutions in going down the road of Charitable Choice.

I have also been asked to comment upon what Charitable Choice would do for religion and for religious people in a positive way. To that I believe there are two simple answers with which I will conclude my presentation. First, in an age of rampant secularism, it must be asserted at every turn that our society values religious diversity, as well as the freedom to reject religion altogether. But we do not demand that those animated by religious beliefs are to be discriminated against or belittled in any fashion whatsoever. Charitable Choice again says, faith-based organizations and people motivated by faith can compete on an equal footing with everybody else.

More importantly, the religious person and the religious institution see injustice and are driven to fight injustice; they see suffering, and they are driven to offer comfort; they see poverty, and they are driven to offer sustenance.

⁴² See generally *Matthew 22:21*; *Mark 12:17* (advising, "Render therefore unto Caesar those things which are Caesar's; and unto God the things that are God's.>").

⁴³ Jewish Publishing Group, *Jewish Exponent* (visited Mar. 28, 2000) <<http://www.jewishexponent.com/>>.

Charitable Choice policies will allow people of faith and their institutions to try to bring a little more justice, a little more comfort, and a little more sustenance into the world than their own resources that they have already would otherwise allow.

Thank you very much.

(Applause.)

JUDGE POLLAK:

Thank you very much, Mr. Diament. Now we will hear from Mr. Lynn.

MR. LYNN:

Thank you very much. Because Pat Robertson has recently called me both an intolerant jerk and lower than a child molester, believe me, Mister or Reverend, they are vast improvements.⁴⁴

(Applause.)

MR. LYNN:

Now, at the risk of sounding uncharitable this early in the morning, let me say that Charitable Choice is probably one of the worst ideas in the history of bad ideas.

A single sentence in the prototype of this legislation, the 1996 Welfare Bill, summarizes the problem very well.⁴⁵ The law is designed to make grants available to religious groups, even local faith communities, on the same basis as secular groups - but here is the kicker - without impairing the religious character of such organizations.

I suggest that that phrase contains two overwhelming misunderstandings of the nature, at least, of the church. First, the church is, in its essential character, evangelical. It exists first and foremost to spread a religious salvific message. Second, the church operates as a voluntary agency, supported by those who believe in its mission. That too is an essential character-defining aspect of the church.

For government to give funds to a church and then say, as the welfare bill continues, that it shall not be, "used for sectarian worship, instruction, or proselytization" ignores that the church always has these missions as its goal, inextricably woven into all of what it does.

Now, I am not David Letterman, although someone recently said I look like a cross between David Letterman and Steve Forbes. I do not do top-ten lists, but I am going to do them today.

Here are ten reasons why Charitable Choice is a conceptual concept I believe we ought to reject:

⁴⁴ Mr. Lynn's organization, Americans United for Separation of Church and State, and the Internal Revenue Service forced the Christian Coalition to split into two organizations, one that is tax-exempt and one that is not. *Christian Coalition Aims to Make This World Right*, COMMERCIAL APPEAL MEMPHIS, Oct. 9, 1999, at A14; Richard N. Ostling, *Religious Right still in political arena*, PATRIOT LEDGER QUINCY, Oct. 9, 1999, at 38.

⁴⁵ Welfare Reform and Reconciliation Act of 1996, *supra* note 10.

Number Ten: As Professor Chemerinsky will discuss in much greater detail,⁴⁶ the Constitution clearly prohibits funds to what the Supreme Court has labeled ‘pervasively sectarian’⁴⁷ organizations.

The Establishment Clause of the First Amendment makes it unconstitutional for the government to advance a religious mission. Funding arrangements are always carefully examined because very few things could advance a religion and its mission more than paying for it. Generally speaking, when we determine whether an institution is ‘pervasively sectarian,’ the Supreme Court looks at several factors: whether the program is located in or near a house of worship; whether there is an abundance of religious symbols on the premises; whether the institution discriminates on the basis of religion in its hiring, and so on.⁴⁸ So, bluntly, on its face I do not believe you can reconcile the idea of separation of church and state with the massive program of government funding for churches and other faith communities.

Number nine: As night follows day, regulation of houses of worship will follow the receipt of funds. Government has the right, and indeed the obligation, to scrutinize and regulate the flow of funds to any private entities to ensure that the funds are being used properly. If a church accepts Charitable Choice funding,⁴⁹ it had better be prepared to open its books for audit; it had better be willing to have monitors scrutinize the affairs and conduct of church administrators. And I think this should make them nervous because it can impinge on the very vitality and strength of the mission and ministry of that faith community.

Number eight: Every one of these faith-based Charitable Choice⁵⁰ plans contains the unethical - and I would argue illegal - provision that religious institutions that receive government funds may continue to discriminate in their employment practices at least on the basis of religion. So, for the first time in our history, we have given a group money and allowed it to exclude people of different faiths from government-funded employment. Curiously, at the same time that the Welfare Bill⁵¹ was being moved through Congress, many legislators, in my judgment, properly denounced the Department of Housing and Urban Development⁵² for using federal funds to hire Nation of Islam security to patrol public housing projects in Baltimore.⁵³ A similar concern,

⁴⁶ See *infra* notes 93-110 and accompanying text.

⁴⁷ See *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988).

⁴⁸ See *id.* at 621-22.

⁴⁹ Charitable Choice Expansion Act of 1999, § 1994A.

⁵⁰ *Id.*

⁵¹ Welfare Reform and Reconciliation Act of 1996, *supra* note 10.

⁵² The Department of Housing and Urban Development [“HUD”] is the executive department of the United States Government, responsible for programs concerned with housing needs and the improvement and development of urban areas. For general information about HUD, see U.S. Department of Housing and Urban Development, *homes and communities* (visited Mar. 31, 2000) <<http://www.hud.gov/>>.

unfortunately, should have, but did not, prevail when it came to consideration of this discriminatory Charitable Choice. If you are truly running a secular program, then why in the world would a religious litmus test be necessary? If it is secular, it is secular.

Number seven: There is that ephemeral, toothless language that we have just heard about that says the funds shall not be used for sectarian worship, and so on. But there is no realistic way to track such fungible dollars. Indeed there cannot be any requirement that people be forced to go to a religious provider; however, there is no notice requirement that anyone needs to be informed of that. This invites abuse.

When you are in need of a hot meal, do you think you will really call Steve Shapiro⁵⁴ at the ACLU⁵⁵ and say, “I think my rights may be violated when someone who says to you, ‘Of course I have a hot meal. It’s getting hotter. Until it’s fully prepared, why don’t you sit down and watch this Christian video. I think you will get something out of it.’” I do not think they will have the chance to call Steve, and he might even be busy. Just a few weeks ago a group in Fayetteville, North Carolina, which got state funds, had them revoked because it was inquiring whether visitors to the homeless shelter wanted to be saved first.⁵⁶

Number six: As a true civil libertarian, as much as I detest the ideologies of groups like the Aryan Nations and anti-Semitic groups, I know they have a right to conduct business and seek members; however, I do not want one dime of my taxes going to support them. And since Charitable Choice allows for no discrimination among would-be religious recipients, religious bigots can take our money, and that is simply wrong.

Number five: We are going to see unhealthy competition as religious groups battle over who will get the biggest slice of Charitable Choice pie. The messages of America’s faith communities clearly vary. Competition for souls is inevitable, but competition for the coins of Caesar⁵⁷ is just plain unseemly. I do not want to see state budget battles in my home state of Virginia, between the Methodists, the Scientologists, and Jerry Falwell over the amount of the welfare block grant that is going to each one. And it is not just because in my state I know where it is going to go.

Number four: It is very bad constitutional precedent to have legislation, as this does, that overrides state constitutional provisions in separation of church and state. They are found in about half the states.⁵⁸ They specifically prohibit any diversion of tax dollars to

⁵³ For news coverage of the HUD controversy with the Nation of Islam, see The Detroit News, *HUD Calls for end to Nation of Islam security firm pact* (visited Mar. 28, 2000) <<http://www.detnews.com/menu/stories/24099.htm>>.

⁵⁴ Steven Shapiro is the Legal Director of the American Civil Liberties Union. For his presentation on Supreme Court holdings, see *infra Debate 4: Have Recent Court Holdings Enhanced or Eroded Religious Freedom for All Americans?*

⁵⁵ See generally American Civil Liberties Union, *ACLU: American Civil Liberties Union* (visited May 21, 2000) <<http://www.aclu.org/>>.

⁵⁶ *The State Asks Too Many Religious Questions: Feds Pull Grant From Group Aiding Homeless*, SUNDAY STAR NEWS, July 18, 1999, at 2B.

⁵⁷ See *supra* note 42.

⁵⁸ See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 YALE L. & POL’Y REV. 113, 144-47 (1996).

religious groups. Where you have a strong state constitutional protection for religious freedom, which you will need in fighting school vouchers⁵⁹ and prayer in the schools,⁶⁰ you should not allow the Congress to trump your right to use that provision; but it does in the Welfare Bill.⁶¹

Number three: It is not discrimination against religion that should not be given these grants. The First Amendment clearly and specifically notes that religion is in a separate category from other activities. You cannot establish. Courts, of course, read that to be promote any or all religions. The government can, of course, freely promote any economic or political ideas; that is why we have elections. And it is no more discriminatory not to provide funds for religious services than it is not to give funds directly to religious institutions. After all, do not most of us think that our faith communities make people and society better? As a nation, though, we made a decision over 200 years ago⁶² that even if the religion was good for us, it would have to thrive with volunteer support.

Number two: The United Church of Christ⁶³ I attend has been known to have three offerings during one service for various outreach ministries. The call to give may fall on deaf ears after your congregants learn that Uncle Sam⁶⁴ is funding those same activities in the basement of your church or synagogue. Then, two years from now, when the church a few blocks down the road gets the grant you used to have, I hope you have a development program with sufficient caliber to get the dollars back to your collection plate. I truly think that if this becomes a widespread phenomenon in America, we will see a significant drop-off of voluntary contributions from and to religious groups that obtain Charitable Choice dollars.

Finally, number one: The genesis of this bad idea was some of the most reactionary members of Congress, the John Ashcrofts of Missouri,⁶⁵ the Newt Gingrich⁶⁶ of place unknown.⁶⁷ Do you remember him? These are people who hate every government

⁵⁹ See *infra* Debate 3: *Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*

⁶⁰ See American Civil Liberties Union, *Lawmakers Want Prayer In Schools* (visited Mar. 28, 2000) <<http://www.aclu.org/news/w091796b.html>>.

⁶¹ Charitable Choice Expansion Act of 1999, § 1994A.

⁶² For an interesting look at some of the dialogue from the 1787 Constitutional Convention, visit Justice Pro Se of Michigan, *Selected Quotes from the Constitutional Convention of 1787* (visited Mar. 25, 2000) <<http://webspacenc.com/selectedquotes/>>.

⁶³ For more information on the United Church of Christ, visit *United Church of Christ* (visited May 23, 2000) <<http://www.ucc.org/ucchp.htm>>.

⁶⁴ For art and history related to Uncle Sam, see David R. Smith, *Uncle Sam Image Gallery* (visited Mar. 30, 2000) <<http://home.nycap.rr.com/content/unclesam.html>>.

⁶⁵ See *supra* note 26.

⁶⁶ See *The Official Homepage of former Speaker of the House Newt Gingrich* (visited Mar. 30, 2000) <<http://www.newt.org/default.htm>>.

program that they have ever met. Since they do not want government to do much of anything except, of course, post the Ten Commandments⁶⁸ in your schools,⁶⁹ they hit upon this magic formula: You drop the poor or the addicted or the hungry on the church steps one day; on the second day you drop a bag of money there; and on the third day you pray that the two find each other. Well, that is no way to run a railroad, and it is no way to run a social welfare system of any kind.

Remember, in a few years, another Congress could cut this available funding. I think that we are all talking about protecting the most vulnerable among us. That is what the religious community has done for its entire history. To do this, we must both improve our own charitable impulses as well as insist that our government not abdicate its social responsibility. I think it is abdicating this responsibility by using the principles of Charitable Choice.

Thank you.

(Applause.)

JUDGE POLLAK:

Now we will return to the good guys. Professor Laycock.

MR. LAYCOCK:

I may be the odd man out in this debate, but I do not think this is about the strictness of your commitment to separation; I think it is about what separation means.

I have worked with and represented the Anti-Defamation League, most notably in the graduation prayer case a few years ago.⁷⁰ In Texas, I tell them they cannot even pray at football games.⁷¹ And I tell my students that, although there are no votes for this in the Supreme Court, the government should not celebrate Christmas.⁷² What separation means to me is that the individual choices that each one of us makes about religious belief or disbelief and about religious practice should be as insulated as possible from the coercive and other influences of government, and, on this point, Barry has it backwards.

I would also say that this is not nearly as big an issue as both sides have made it out to be. This is not an issue about whether billions of government dollars will pass through religiously sponsored organizations. That money has been passing through Jewish

⁶⁷ Mr. Gingrich represented the State of Georgia. *See id.*

⁶⁸ *Exodus* 20:1-17.

⁶⁹ To read the ACLU's response to posting the Ten Commandments in schools, see American Civil Liberties Union, *Ten Commandment Monuments on Public School Grounds Violates Religious Liberty*, *ACLU charges* (visited Mar. 28, 2000) <<http://www.aclu.org/news/1999/n020999a.html>>. *But see* Robert T. Lee, *Society for the Practical Establishment and Perpetuation of the Ten Commandments* (visited Apr. 2, 2000) <<http://www.tencommandments.org/right.html>>.

⁷⁰ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁷¹ *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir.), *cert. granted in part*, 120 S. Ct. 494 (1999).

⁷² *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989). *See also* Jill Nutter Fuchs, *Publicly[]Funded Display of Religious Symbols: The Nativity Scene Controversy*, 51 U. CIN. L. REV. 353 (1982).

charities,⁷³ Catholic Charities,⁷⁴ many of the Protestant charities, the great religious hospitals, the community organizations that we heard about earlier this morning, for decades without litigation.

The last case in the Supreme Court was *Bradfield v. Roberts*⁷⁵ in 1899, when the Supreme Court unanimously upheld Congress' decision to let St. Elizabeth's Hospital be responsible for the indigent, mentally ill in the District of Columbia. There has been tons of litigation about schools,⁷⁶ but there has not been litigation about government funding for religiously sponsored social services. The amounts of money may change a little bit if we open up the eligibility criteria. But the amount of change is going to be trivial in comparison to the amount of money that is being spent.

This is not about the amount of money; this is about the regulation of churches. And Barry told you that. What did he say when he started out? "Here's the kicker."⁷⁷ Remember that? "Here's the kicker." They want to do it without impairing the religious character of their religious organization. That is what Barry wants; he wants regulation of these religious organizations. He wants them told you cannot take this money unless you create a separate corporation; you cannot take this money unless you promise you will never tell anybody that God may have a role in his life while he is getting any benefit; and you cannot have this money unless you agree you will hire anybody, including people who are hostile to what you are trying to accomplish. You agree to those rules and regulations, and you can have the money.

And then he tells us, reason number nine,⁷⁸ Charitable Choice will lead to regulation of churches.⁷⁹ Give me a break, Barry.

The whole issue here, the only thing this bill does that has not been done in the past, is, it takes some discretion away from the states. It says, if you decide to contract out, you cannot discriminate. You do not have to contract out, but if you decide to contract out, you cannot discriminate.⁸⁰

⁷³ For an example of a Jewish charitable activities, see United Way of Massachusetts Bay, *Combined Jewish Philanthropies of Greater Boston* (last visited Mar. 28, 2000) <<http://world.std.com/~cjp100/>>.

⁷⁴ See *Catholic Charities USA* (visited Mar. 22, 2000) <<http://www.catholiccharitiesusa.org/>>.

⁷⁵ *Bradfield v. Roberts*, 175 U.S. 291 (1899).

⁷⁶ For recent cases, see *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (involving action brought against state officials that challenged voucher portion of Ohio Pilot Scholarship Program as violation of the Establishment Clause) and *Kotterman v. Killian*, 972 P.2d 606 (Ariz.) (involving special action wherein challengers alleged that statute allowing state tax credit of up to \$500 for donations to school tuition organizations violated the state constitution and the Establishment Clause of the federal Constitution), *cert. denied*, 120 S. Ct. 283 (1999).

⁷⁷ See *supra* note 45 and accompanying text.

⁷⁸ See *supra* note 49 and accompanying text.

⁷⁹ *Id.*

⁸⁰ Specifically, the provision states that "neither the Federal Government nor a State or local government receiving funds under such a program shall discriminate against an organization that provides assistance

And, second, when you contract out to a religious organization, there are some ways in which you used to regulate that organization, you cannot regulate it that way anymore.⁸¹ This is about a deregulation of those religious providers. It is not about the amount of money. It is about discrimination between secular and religious providers and about regulation of religious providers. And that takes us back to where I started, what do we mean about separation of church and state? How do we best insulate the American people and the organizations they create from the coercive power of government with respect to religion?

Now, I absolutely agree that the beneficiaries of these programs are entitled to be protected from any form of coercion by religious organizations who are providing services. And I absolutely agree that these people are vulnerable and that we have to invest serious effort in enforcing the provisions that make sure that these people are not coerced to participate in a religious service or coerced to change their religious beliefs or practices, as a condition of getting government-funded services.

And I think, frankly, the conservatives in Congress who put that language in, I think they are sincere about it, I think they are in good faith about it. I do not have confidence they are going to invest a whole lot of effort in it. We need more effort invested in those safeguards. But just as the beneficiaries are entitled not to be coerced in their religious practices, it is equally true that the providers of these services are entitled not to be coerced in their religious practices in the provision of these services.

And it is a system in which money is provided through religious providers without requiring them to secularize, without requiring them to provide two corporations, unless they want to create two corporations, without requiring them to change the way in which they deliver the services. This system is more consistent with religious liberty and removes the government from telling these churches how to operate than the present system.

There is not a single dollar in the Charitable Choice legislation, not one dollar that applies only to programs that have already been created and to dollars that have already been appropriated.⁸² And it says, with respect to those dollars, the government can contract out.⁸³ And when it does contract out, it cannot discriminate against churches and it cannot regulate these churches.⁸⁴ So it is not about pouring more money into these religious programs; it is about deregulating. Will the Supreme Court say it is constitutional? I think so, but I do not know.

I think it is fairly well known with respect to money going to schools that the Court is divided 4 to 4 to Justice O'Connor.⁸⁵ And no one knows what Justice O'Connor thinks.

under, or applied to provide assistance under, such a program, under the basis that the organization has a religious character.” The Charitable Choice Expansion Act of 1999, § 1994A(c).

⁸¹ *Id.* at § 1994A(e) (providing that “[government] shall not require a religious organization to alter its form of internal governance or remove religious art, icons, scriptures, or other symbols; in order to be eligible to provide assistance under a program described in subsection (c)”).

⁸² *Id.* at §§ 1994A(c) & (d).

⁸³ *Id.* at § 1994A(c).

⁸⁴ The Charitable Choice Expansion Act of 1999, § 1994A(c).

And both sides are afraid to grant certiorari until they find out, and so they keep denying these cases. It may well be with respect to other social services, that they are also divided 4 to 1 to 4. But there is a very different tradition for several years with respect to other social services. And I suspect that some of those folks are going to switch and that the Court will be much more prepared to uphold voucher-type programs with respect to other social services than it will with respect to education. And I expect Charitable Choice to be upheld in the Supreme Court. I can talk about individual cases or doctrine, but I do not think we learn a whole lot from doing that.

The reason the Court is divided 4 to 4 to Justice O'Connor is that it has had two principles running through its cases ever since *Everson*⁸⁶ in 1947. The Court has tried to make these two principles consistent; it has tried to carve out a sphere of inference for each of them. And it has not been able to do it because, taken to their logical conclusions, they each cover the universe.

On the one hand, the Court has said no money to religious organizations.⁸⁷ And, on the other hand, indeed in the very next paragraph of *Everson*,⁸⁸ right after it said no money to religious institutions, in the very next paragraph it said, no citizen should ever be denied any public welfare benefit because of his religion or lack thereof. What we are talking about in all of these debates is whether the no-aid principle requires active discrimination against various organizations. Barry says it does. He said it is not really discrimination because religion is different in the Constitution; the discrimination is required, and we settled that in the 1780s.

In the 1780s, however, we were talking about a fundamentally different issue. The issue in the 1780s was, "How do we finance the church itself?"⁸⁹ And in an era of minimal government and a night-watchman state, the proposal in Virginia was to levy a special tax for the support of ministers of the Christian religion and subsidize religion when we were not subsidizing anything else.⁹⁰ And not only was it not neutral, it was discrimination in favor of religion; but more importantly, in my view, there was no

⁸⁵ Chief Justice Rehnquist, Justices Scalia, Thomas, and Kennedy to Justices Souter, Stevens, Ginsberg, and Beyer to Justice O'Connor. See generally Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1 (1996).

⁸⁶ *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1 (1947).

⁸⁷ *Everson*, 330 U.S. at 16 (advising, "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

⁸⁸ *Id.* at 15-16. See generally Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

⁸⁹ See Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986). See also Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).

⁹⁰ In 1784 Patrick Henry proposed a bill "Establishing a Provision for Teachers of the Christian Religion." The state was to support ministers' teaching of the gospel, though each taxpayer was to be able to choose the Christian church to which his tax would run. The bill is reprinted in *Everson*, 330 U.S. at 72-74 (appendix to opinion of Rutledge, J., dissenting).

pretense there would be any secular value except the value that people believed that religious belief, in itself, provides.

The key to all of these current programs, all the debates about Charitable Choice, and for that matter about schools, is, they make sense if, and only if, the government gets full secular value for its money. Right? If the government is buying wine or sausage, it does not care that the bid comes from a Catholic abbey. If the government is buying the service of feeding people or treating drug addicts or whatever, it should not care that the bid comes from a religious organization, providing that a religious organization can do the job the most effectively and at the lowest cost.

If the government gets full secular value for its money, then we should not care that the religious organization continues to spend its own money on religious things, and we should not even care that these are not rigidly segregated. What we should protect is not the accounting books. What we should protect are the individual beneficiaries of that program to make sure they are not coerced, and that the option of an alternative provider is real and that they know about it.

The new legislation, the Charitable Choice Extension Bill⁹¹ does have a notice provision in it.⁹² We have to make that real. We have to make that work.

Those are real concerns about implementation. I share those concerns about implementation. I do not share the concerns about principle. What this debate is about in principle is not the money; it is about the extent to which government regulates these churches. So do not tell me I am concerned about strings on churches, but we have to keep all the strings we have, and we cannot have Charitable Choice. Charitable Choice removes the strings on churches, and that is what Barry objects to. That is what he said the real kicker is.

(Applause.)

JUDGE POLLAK:

Now Professor Chemerinsky.

MR. CHEMERINSKY:

It is truly an honor to be here as part of this terrific program. Underlying this debate are two different conceptions of the Establishment Clause.

One sees it as being fundamentally about equality that religion should not be treated better or worse than any other secular group.⁹³ The other sees the Establishment Clause as being about creating a wall that separates church and state.⁹⁴ From the perspective of the equality approach, Charitable Choice is desirable and constitutional and even

⁹¹ The Charitable Choice Expansion Act of 1999, § 1994A(g)(2).

⁹² *Id.* (providing, “The appropriate Federal, State, or local governmental entity shall ensure that notice is provided to individuals described in paragraph (3) of the rights of such individuals under this section.”). Paragraph 3 describes all individuals who receive or apply for assistance under any program subject to the Act.

⁹³ *See supra* note 5.

⁹⁴ *See id.*

constitutionally required. From the perspective of the separation of church and state, Charitable Choice is undesirable and unconstitutional.

I deeply believe that the First Amendment, in the words of Thomas Jefferson, in the words of Justice Black in *Everson*, is about creating “a wall that separates church and state.”⁹⁵ From this perspective, nothing more offends that wall than for the government to be subsidizing churches and religious groups. Frankly, I am baffled by how someone who professes a belief in separatism could also tell you that Charitable Choice is constitutional.

I want to make two arguments today as to why Charitable Choice violates the First Amendment. The first is that the Supreme Court has never adopted the equality theory, and that government aid to religion does violate the First Amendment. My second argument is going to be, under any theory of the Establishment Clause, Charitable Choice is unconstitutional.

At the onset, let us be clear about how the law changed as a result of the 1996 Welfare Bill.⁹⁶ Prior to it, religious groups always could get government money if they set up a separate corporation that was completely secular and built what has been earlier today called fire walls.⁹⁷ What the 1996 law does, however, is allow religious groups to directly receive government funds. And it is that which I believe clearly violates the Establishment Clause. There is no doubt that the Establishment Clause limits the ability of the government to give aid directly to religion. The Supreme Court has never adopted the equality theory of the Establishment Clause.

If you think about it, the equality theory would not only permit the government to give money to religious groups. It would even require that the government give money to religious groups, for the government would not be able to discriminate against them whenever it is providing money to secular groups.

This has never been the jurisprudence of the Establishment Clause. The Supreme Court has consistently said that the Establishment Clause limits the ability of the government to give aid to parochial schools.⁹⁸ In fact, in the Charitable Choice context, the Supreme Court has said that the government cannot give aid to ‘pervasively sectarian’ institutions.⁹⁹

⁹⁵ *Everson*, 330 U.S. at 16 (advising, “[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State’”) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). *See also supra* note 4.

⁹⁶ Personal Responsibility and Work Opportunity Act of 1996, *supra* note 10.

⁹⁷ The term “fire wall” describes a legal condition which results when an entity is divided into separate parts so that the facts and/or legal rights and duties of one part can not be imputed to another part. More specifically, the “fire wall” suggested by Mr. Chemerinsky results when a religious organization establishes a separate secular corporation, where in terms of the Establishment Clause concept of separation of Church and State, the religious organization, as the “Church,” becomes sufficiently separated from the secular corporation (which would be a product of state law) to enable government, in funding the corporation, to lawfully, albeit indirectly, fund the religious organization.

⁹⁸ *See generally* *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

⁹⁹ *Bowen v. Kendrick*, 487 U.S. 589 (1988). *See also* *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736

The primary Supreme Court case dealing with Charitable Choice was a case from a decade ago, *Bowen v. Kendrick*,¹⁰⁰ involving a federal program, the Adolescent Family Life Program, which allowed both secular and religious groups to receive money. The Supreme Court in a 5 to 4 decision upheld the program.¹⁰¹ Chief Justice Rehnquist wrote the opinion for the Court.¹⁰² But what is key, Chief Justice Rehnquist says, is ‘pervasively sectarian’ institutions could not receive money.¹⁰³ This would include things like churches, synagogues, and mosques. The fact that the Supreme Court said that pervasively sectarian institutions cannot receive government funds shows that religion is treated differently under the Establishment Clause. There is no equality theory.

What is troubling to me about Mr. Diament and Professor Laycock’s position is that nowhere do they say there has to be even this continuation of a limit on receiving aid by ‘pervasively sectarian’ institutions. Their position would violate even what the Rehnquist Court defines to be the Establishment Clause.¹⁰⁴

Moreover, it is essential that there continue to be limits on the ability of the government to give aid that is called Charitable Choice or anything else, to churches and synagogues. Thomas Jefferson said, there is nothing more objectionable or offensive than for the government to tax some to give money to the religion of others.¹⁰⁵ I do not want my tax dollars to go to support religions that believe that my religion is unacceptable or to teach beliefs that I find abhorrent.

The whole idea of the separation of church and state is that the government, the public realm, should be secular. The place for religion is in the private realm. The ability of minority religions to thrive in this country has been based on the fact that there is an Establishment Clause that prevents the government from using its tremendous power and resources to support the majority religions, and that is what Charitable Choice would mean. It would be the majority religions that are going to be receiving the vast amount of aid. The minority religions will be further marginalized.

But I would go further and make to you a second argument. And that is, under any theory of the Establishment Clause, Charitable Choice is unconstitutional. I would offer a couple of reasons here.

(1976); *Tilton v. Richardson*, 403 U.S. 672 (1971).

¹⁰⁰ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

¹⁰¹ *Id.* at 622.

¹⁰² *Id.* at 593.

¹⁰³ Chief Justice Rehnquist reaffirmed the standard established in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), which enables a court to invalidate a funding statute only if it is motivated wholly by an impermissible purpose, if its primary effect is the advancement of religion, or if it requires excessive entanglement between church and state. *Bowen*, 487 U.S. at 602.

¹⁰⁴ *Id.*

¹⁰⁵ Originally written by Thomas Jefferson, the Virginia Bill for Religious Liberty stated in its preamble that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical” The Virginia Bill for Religious Liberty (1785).

The first is that Charitable Choice inevitably will lead to government-sponsored religious indoctrination. If there is anything that the four of us seem to agree to, it is that the government should not be involved in religious indoctrination or coercing people to participate in religious indoctrination. And yet, I see no way that that can be avoided under Charitable Choice.

Imagine a small town, where the only recipient of federal funds happens to be a faith-based organization. Imagine that it is a drug counseling program, and the only one in this small town is one that is getting money from the federal government, and it happens to be a Catholic or a Christian or Jewish organization. The person who wants to receive drug counseling has no choice, then, but to go to that institution where religion is very much a part of it.

Or think of a large city, where all of the nonfaith-based providers have all of their slots filled, and all that remains for a person who wants services is to go to a faith-based organization, where religion is at the very core of what it is doing. How is the government going to make sure that religious indoctrination is not part of what is going on in these organizations?

Mr. Diament actually misspoke to you in one regard. He said that the 1996 law requires that the government tell people of their right to have nonfaith-based providers.¹⁰⁶ There is nothing in the law that requires that. It does say that people could choose a nonfaith-based alternative, but nothing tells them of their right to do that or what alternatives are there.¹⁰⁷

Furthermore, there is another reason why Charitable Choice violates the Establishment Clause; it offends the *Lemon* test.¹⁰⁸ Since 1971 the Supreme Court has said that the government violates the Establishment Clause if it acts with the purpose of advancing religion, if the effect is to advance religion, or if there is excessive government entanglement with religion.¹⁰⁹ I would suggest Charitable Choice violates all three prongs.

Let me focus on the latter two. The effect undoubtedly is to advance religion. Charitable Choice will take government funds and put them in the coffers of churches, synagogues and mosques. What could be a clearer effect than that of advancing religion? Charitable Choice is going to mean many individuals are going to get religious instruction at government expense. Moreover, it is inevitable that Charitable Choice will lead to undue government entanglement with religion. How is the government going to make sure that these organizations are not proselytizing? The law says that they are not supposed to proselytize.¹¹⁰ But how is the government going to check up on that?

¹⁰⁶ Personal Responsibility and Work Opportunity Act of 1996, *supra* note 10.

¹⁰⁷ *Id.*

¹⁰⁸ *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* (internal citations omitted).

¹⁰⁹ *Id.*

Does it not mean that government has to go into the churches, synagogues and mosques and see how they are providing the services and what the teachings are? Is that not inherently entanglement with religion? There is no requirement in these laws that there be a separate entity that provides the services. The religious institutions, namely the churches themselves, can provide the services. That makes it inescapable that if the government is going to monitor, there will be excessive entanglement with religion.

If the Establishment Clause has meant anything for 200 years, it is that the government should not be subsidizing churches and religious groups; yet that is exactly what Charitable Choice does. That is why I believe the United States Supreme Court will and should declare it unconstitutional.

(Applause.)

JUDGE POLLAK:

We have had these four excellent speakers. You are pushed into a dull conformity, which I much appreciate.

They have spoken sequentially, and I think that now they are entitled to respond to each other for a few minutes. So we will have a few minutes of back and forth among the panel, and then we want to turn it over to you for questions and comments from the floor.

Our last speaker was Professor Chemerinsky. So I would turn to Mr. Diament and Professor Laycock to see if you have some response to Professor Chemerinsky's platitude.

MR. LAYCOCK:

I would say a couple of things; one is just factual. I am not sure whether Professor Chemerinsky misspoke.

First, there is no notice requirement that the state tell beneficiaries they are entitled to a secular provider in the existing Charitable Choice legislation, the bill that has already been passed. But, there is such a provision in the proposed extension. There is no political resistance to putting that into the existing bill without an extension. I think the sponsors of the bill agree that people need to be told that they have this choice.

Second, I do not understand the great significance that is attached to whether we do or do not create a separate corporation. There are advantages of creating a separate corporation. One advantage is that then you plainly have a separate pot of money and the government does not get to audit the church's books; they only get to audit the separate corporation's books. That is written into the bill.¹¹¹

¹¹⁰ The Charitable Choice Expansion Act of 1999, § 1994A(h)(1) (advising that a religious organization providing assistance shall not discriminate, in carrying out its program, against an individual in the program on the basis of religion, refusal to hold a religious belief, or refusal to actively participate in a religious practice).

¹¹¹ The existing legislation provides that if a religious organization segregates its federal funds, then only the federal funds are subject to audit; if the federal funds are not segregated, then all commingled accounts are subject to audit. 42 U.S.C. § 604a(h). The proposed Charitable Choice Expansion Act of 1999 provides that religious organizations "shall segregate government funds provided under such program into a separate account." § 1994A(i).

But if what you are worried about is that these religious providers may suddenly coerce people to participate in religious services, they can do that whether they are in a church or in a separate corporation. That is not something that happens on the books or at the Secretary of State's¹¹² office. That is something that happens on the scene. The only way the government can prevent that is to monitor and entangle; but we have got that risk already.

But protection will mostly flow from complaints of the people availing themselves of these services, and the experience of religious providers. That is not an effective way to save souls or make converts anyway.

I think this is a moderate problem; but whether it is a big or little problem, it is a problem in the existing funding scheme, and a separate corporation will not do anything to eliminate it.

MR. CHEMERINSKY:

Can I respond to the separate corporation?

JUDGE POLLAK:

Indeed, yes.

MR. CHEMERINSKY:

Thank you. I think there is a huge difference between allowing the money to go to a separate secular corporation and allowing the money to go directly to the church or the religion.

In part, I think the difference is whether the government's money is going to be used to subsidize religious activities. If the money goes to the church, or if it goes to the synagogue, then it can be used, ultimately, for any purposes the church or synagogue desires. It is part of the pot of money that is held by the church or synagogue. If, however, it goes to the separate corporation, then it is only used for that separate corporation's activities. There is that preservation of the wall that separates church and state.

Second, there is a huge symbolic difference whether the money is going to the church or synagogue or a separate corporation. Even some of the most conservative justices¹¹³ on the United States Supreme Court say that what the Establishment Clause is about is preventing symbolic endorsement of religion.¹¹⁴ If the government is directly subsidizing the church or synagogue, it is a symbolic endorsement of religion.

Also, it matters in terms of where and how the services are provided. If it is given to a separate corporation, then the message is that it must be provided in a secular manner. If, however, it goes to the church or the synagogue, then it is clear that it can be provided with religious doctrine, as well.

¹¹² The Secretaries of State administrate incorporation pursuant to applicable state law. *See, e.g.*, 8 Del. Code Ann. Tit. 8 § 102 *et. seq.* (1999).

¹¹³ Legal scholars generally regard Justices Scalia, Kennedy, and Thomas as being conservative Justices of United States Supreme Court. *See* Vaughn, *supra* note 85.

¹¹⁴ *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988).

And so from the symbolic endorsement perspective, I think what was done prior to 1996 and what has been done since 1996 makes all of the difference.

JUDGE POLLAK:

May I ask a question? Perhaps I should direct it to Mr. Diament, Professor Laycock, or to the Lynn-Chemerinsky team.

The last two exchanges have suggested that Professor Laycock sees the difference between a corporate form and the church institution itself as a relatively trivial distinction. Professor Chemerinsky sees the corporate form as of real consequence. Maybe this whole thing can be settled. If these gentlemen are willing to agree that funding of corporations, which are themselves established by churches, is an okay way to go, are you not willing to make that kind of a deal?

Would you rather not talk publicly? We can ask those people to leave.

MR. DIAMENT:

It is not up to me to determine. Perhaps a way to answer the question, since we are at an ADL event, is to talk about what happens in the Jewish community for a moment. This was previously referenced by Professor Laycock.

Our community has built an incredible social service system over the last number of decades, such as hospitals, family services, and child care. When I travel around and meet and talk to people who are involved in the Jewish Charities that are under the aegis of that system - probably many of you are involved in them in this room - people identify them as Jewish charities.

They are not just Jewishly affiliated because their board might happen to have a preponderance of Jewish people on them; they are Jewish charities. People write their checks of support, work as volunteers, and do everything that they do with these entities because they view it as part of living out their religious commitments. A huge amount of government money funds these charities.¹¹⁵ And do you know what? They also, on occasion, have religious-content programming in what they do. They do Passover Seder meals in geriatric care centers; they do Chanukah plays in their daycare centers.

The Jewish community had better think about these charities; they have set themselves up officially as these nonsectarian entities so that they can go about getting these millions and millions and millions of government dollars. Our community is not hypocritical. Rather, our community knows what this is really all about and should feel comfortable with the notion that, if we put the proper safeguards in place, if we make sure that we are serving everyone who comes through the door that needs our services, that we can still do that and do it proudly in a way that is identified with, and even contains some components that disseminate, our religious heritage.

While I am intrigued by the suggestion, I understand why people like Reverend Flake¹¹⁶ set up these nonprofit corporate entities. I have to wonder whether it is just a

¹¹⁵ See Julie A. Segal, *Welfare for Churches: Buyers and Beneficiaries Beware*, 5 GEO. J. ON FIGHTING POVERTY 71, 71 (1997) (advising “many ‘religiously-affiliated’ organizations, such as Catholic Charities U.S.A., Lutheran Services in America, and Jewish Family Services, already compete for and receive government benefits on the same basis as other non-religious groups”).

convenient artifice that is merely used because of the state of government regulation until the Charitable Choice revolution has been proposed.

MR. LYNN:

Well, it may be an artifice, but it is an awfully easy way to determine what is and is not going on in that facility. I think some of the arguments we have heard this morning from the other team here are interesting. Professor Laycock talked about where you can buy the wine, the most effective at the lowest price. That is an interesting theory, but it has nothing to do with the constitutional principle. There is no cost benefit analysis in the Constitution.

As my partner has suggested, however, there is a very important principle here. We are not simply talking about the state and the recipient. We are also talking about the taxpayers who are themselves essentially being asked in this system to promote, with their tax dollars or a portion thereof, religious ideologies that they may find deeply offensive. I think that must always be maintained as a part of the calculus of this decision.

JUDGE POLLAK:

I may be taxed to pay out money to support some enterprise whose principles I totally disagree with? Is that a constitutional problem?

MR. LYNN:

Well, I think if they are religious principles, they are. Remember, in view of the Constitution, there is a real and meaningful distinction between religion and every other enterprise.¹¹⁷ If I have to pay money to support a school that is teaching something I do not like, it may well not be a constitutional issue. If, however, we are talking about raising tax dollars to support a religious operation, I think that is and remains a constitutional principle on the basis of any way one reads the establishment principle.¹¹⁸

MR. LAYCOCK:

In my view of the Constitution and religion, there is also a real significant difference between religion and everything else. Religion is the most protected set of beliefs and activities from governmental influence.¹¹⁹ That is what Charitable Choice is really trying to address.¹²⁰ I continue to believe a separate corporation is not a big deal. With it or

¹¹⁶ Reverend Flake is a minister and a former United States Congressman for the City of New York. See *supra* Debate 1: *The Role of Religious Institutions in Providing Social Services and Education in Neglected Communities; Reports From the Field*.

¹¹⁷ U.S. CONST. amend. I.

¹¹⁸ *Id.*

¹¹⁹ *Id.*; see also *County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989) (holding that government may not endorse views on religion); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (invalidating “governmental endorsement” of the New York Regent’s prayer).

¹²⁰ The proposal states,

without it, when you take the money from the government, you have to account for that money and your books are subject to audit. If you commingle it with other church funds, then the whole church's books become subject to audit.

The Seder dinner in the old folks' home either is permissible in a home funded with government money or it is not permissible in a home funded with government money. Whether or not it is permissible does not depend upon whether we created a separate entity to own the old folks' home. I think the Seder is permissible. The issue of government coercion is about the government telling the people who are managing that home, "You can't do the Seder if you are taking government money because somebody, some anti-Semite someplace, might be offended by it." Right?

I do not think Charitable Choice is nearly as big a deal as either side has made it out to be. And I think Gore, Bush, and Ashcroft are all demagoguing on this,¹²¹ and I think maybe some of the opponents are, too. But to the extent that it matters, the provisions that matter are not about the separate corporation. They are provisions that say when the religious provider does not have to secularize its facility, it does not have to refrain from providing a prayer service or a seder, take the religious art off the wall, or change its hiring and appointment practices. We will regulate these religious providers to the extent necessary to protect the recipients from coercion, but we will not regulate them unnecessarily, because that regulation is coercing their actual religious behavior.

We agree that religion is special; but I think it is special because it is protected from government influence. I do not understand why you think it is special; but separation is some sort of artifact. I want to separate the religious practices of the American people from the power of the government. Deregulating religious institutions to the maximum extent feasible is the way to separate government from religion.

MR. CHEMERINSKY:

Judge Pollak, can I respond to your direct question? You asked whether there is a constitutional principle that protects taxpayers from having their money used to support religions they find offensive. The only place where the Supreme Court allows taxpayers to bring a lawsuit is to enforce the Establishment Clause of the First Amendment.¹²² The Supreme Court said the reason for that is that the Establishment Clause was meant as a

The purposes of this section are –

- (1) to prohibit discrimination against nongovernmental organizations and certain individuals on the basis of religion in the distribution of government funds . . . and
- (2) to allow such organizations to accept such funds to provide assistance to such individuals without impairing the religious character of such organizations or the religious freedom of such individuals.

Proposed Charitable Choice Expansion Act of 1999, § 1994A(b).

¹²¹ See *supra* notes 24-26.

¹²² See *Flast v. Cohen*, 392 U.S. 83 (1968). "In *Frothingham v. Mellon* . . . this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." *Id.* at 88. However, the Court realized that it had to "decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.*

limit on the government's taxing and spending power. The Establishment clause protects taxpayers from having their tax dollars used to subsidize religious beliefs that they find offensive.

I think when Professor Laycock describes Charitable Choice to you as the geriatric home providing a Seder, he is sanitizing the program.

What often is the case with regard to Charitable Choice is a teenager who needs family planning counseling, who is in a small town, and the only place she can go is to the Catholic Church, where she gets to hear the Catholic Church's views with regard to birth control or abortion. And certainly the Catholic Church has the right to promote its doctrine. But it should not be at government expense.

It is the person in the big city who needs drug counseling, and the only slot that is available is at a church program that teaches from a religious perspective why the person should not use drugs. Again, that church has the right to teach it, but it should not be the government using its funds to promote the indoctrination of religion; and that is what Charitable Choice inevitably leads to.

MR. DIAMENT:

Can I make one point on what Professor Chemerinsky said? This is the second time you talked about the small town. So I would just like to put one point on this. And I will just quote again from Vice-President Gore's speech. He said, "As long as there is always a secular alternative for anyone who wants one, and as long as no one is required to participate in religious observances as a condition for receiving services, faith-based organizations can provide jobs."¹²³ That is a provision in the existing law - that the state shall provide an alternative upon an objection.¹²⁴ If the expansion law¹²⁵ gets put in place, with its notice requirement,¹²⁶ and if the Gore model¹²⁷ gets put into place, those

¹²³ See generally *supra* note 24.

¹²⁴ Charitable Choice Expansion Act of 1999, § 1994A.

¹²⁵ Senate Bill 1113 IS was introduced on May 25, 1999.

¹²⁶ This provision states,

RIGHTS OF BENEFICIARIES OF ASSISTANCE –

(1) IN GENERAL - If an individual described in paragraph (3) has an objection to the religious character of the organization from which the individual receives, or would receive, assistance funded under any program described in subsection (c), the appropriate Federal, State, or local governmental entity shall provide to such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection, assistance that -

(A) is from an alternative organization that is accessible to the individual; and
(B) has a value that is not less than the value of the assistance that the individual would have received from such organization.

(2) NOTICE- The appropriate Federal, State, or local governmental entity shall ensure that notice is provided to individuals described in paragraph (3) of the rights of such individuals under this section.

kinds of things are going to be addressed, because people are going to be able to demand their secular alternative. And that is something that we would support.

JUDGE POLLAK:

Mr. Chemerinsky, let me ask you one more question, which you are entitled to tell me is nonrelevant.

MR. CHEMERINSKY:

I would never say that to a question of yours.

JUDGE POLLAK:

I think I understand the proposition. James Madison and Thomas Jefferson explained it to us a couple of centuries ago.¹²⁸ In this country, we are not supposed to tax Presbyterians or agnostics to pay the salaries of members of the Anglican clergy.

Now, if we can bring it up to date, I suppose if I am a Quaker, which I am not, I would have the same ground for objecting to having my tax dollars go to pay the salaries of the Lutheran clergy, or Druid priests, or those trying to advance the worship of the Norse gods here in the United States. I understand that concept.

I suppose, however, as a Quaker, I would also be a pacifist as part of my religious cosmology. I would not only be interested in seeing to it that my tax dollars do not go to support the worship of Norse gods, who think that war is even better than the World Series, but I also would have the same conscientious objection to seeing my tax dollars going to support an Air Force Academy or West Point.

Is there some kind of a distinction there that I should be aware of?

MR. CHEMERINSKY:

I think there is. And I think it is written right into the First Amendment.

There is a whole range of beliefs and ideologies that people can have; but one particular kind of belief is singled out for different treatment by the First Amendment, and that is religion. And it is singled out in two ways. One is, there is a protection for religion that is given to no other set of beliefs, and that is the Free Exercise Clause. The other is, there is a limit with government power with regard to religion that exists as to no other set of beliefs, and that is with regard to religion.

We may object to many things the government does with our tax dollars, but there is one place that the Constitution makes clear that there is a limit, right in the First Amendment, on what the government can do, and that is with regard to aid to religion.

(3) INDIVIDUAL DESCRIBED- An individual described in this paragraph is an individual who receives or applies for assistance under a program described in subsection (c).”

Charitable Choice Expansion Act of 1999, § 1994A(g).

¹²⁷ See *supra* note 24.

¹²⁸ See *supra* note 5; James Madison, *Memorial and Remonstrance – 1785* (visited Mar. 28, 2000) <<http://odur.let.rug.nl/~usa/P/jm4/writings/memor.htm>>.

And so to me the Free Exercise Clause and the Establishment Clause are all about protecting religion as part of a private secular realm that should not be part of the public realm.

MR. LAYCOCK:

We found something we can agree on. I agree that the Quaker has to pay his military taxes, and none of us has to pay a tax to support anyone else's religious operation. And I certainly agree with the last sentence of what Erwin just said. This is all about protecting people from religious coercion.

Our disagreement here ultimately goes to the facts. What is the greatest form of religious coercion? The most coercive thing the government can do is use its power of criminal punishment to execute you or send you to jail. That is not an issue anymore, thank heavens.

If we get past that, the most coercive thing left the government can do is say, "Here is a big pot of money; we have got a third of the gross national product now. If you secularize, you can have some of it. If you stay religious, you cannot have any of it." That is coercion. And that is what the safeguards for religious practices and Charitable Choice are trying to do.

JUDGE POLLAK:

I think it is time now for us to invite our audience to participate for a few minutes. Questions and comments?

AUDIENCE MEMBER:

Professor Chemerinsky, you mentioned that you did not like to see your tax dollars used to support religion, and the symbolic endorsement of religion was the other thing you were very concerned about. How do you view what I think is the most massive infusion of money into religion in this country, which is that contributions to churches are tax deductible?¹²⁹

It seems to head in the direction of the other side that says there should not be discrimination. It clearly is a massive infusion; and they are your dollars, because if you do not give to your church or faith, and I do, your money has to go to pay for something that I should have been giving my money to, but instead I got a tax deduction.

MR. CHEMERINSKY:

You are right. This is a way in which we indirectly have provided for religion; but there are all sorts of places where the law draws a line between indirect and direct. Here, there is a difference between saying, "What you give to the religion you can take a tax deduction for," and saying, "The government should directly give a pot of money right to the coffers of the church." To me, with regard to the symbols, there is a huge symbolic

¹²⁹ The editors assume the audience member is referring to 26 U.S.C. § 170, which provides that "[a]ny charitable contribution to (i) a church or a convention or association of churches . . . shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year." 26 U.S.C. § 170(b)(A) (1994).

difference between one and the other. I would even say in terms of practical difference, there is a significant distinction between one and the other.

Yes, you are right, there is equality between charitable deductions for religion and nonreligious purposes;¹³⁰ but I do not draw from that the conclusion that, therefore, the government should be able to subsidize religion directly in any way the government wants.

AUDIENCE MEMBER:

Professor Chemerinsky, I wanted to address the hypothetical that you brought up twice now, the small town where the only drug rehab center is religious, or the big city where there are no more slots left. If the argument is assuming that without this Charitable Choice money, that those centers are still going to be there, then I do not see how the alternative facing the individual can be any different.

On the other hand, if you are saying that without this Charitable Choice subsidy, these centers would cease to be, then I fail to see how the alternatives, or for that matter, how the general welfare is going to be any better off when they have no alternative, nowhere to go for this rehabilitation.

MR. CHEMERINSKY:

Charitable Choice is not expanding the pot of money that is available; it is redirecting the money so that money that would otherwise go to secular groups now is going to religious groups.¹³¹

Take the example of the big city. The government is going to only be subsidizing so many drug rehabilitation centers. If all of that money went to secular groups, then all of the slots that would be there would be secular ones. Now, however, some of that money - because it is the same pot - is going to religious groups; and so, in the end, some of the slots available might just be in religious groups.

The problem I have with what Mr. Diament says and what Vice-President Gore says is, how can we ever structure a system to ensure that for every person who wants secular provision of services, it will be there? There are going to be instances where the last slots that are available are in the religious organizations. There are going to be small towns where there is only enough money that is there in that small town for one provider. The one provider is the church provider. And so it is not like we are expanding the pot to also include religion groups; instead, we are taking the limited pot of money and we are diverting some of it to religion. And that is what is objectionable about Charitable Choice.

AUDIENCE MEMBER:

I want to just follow through about the redirection of money.

I am the only Jewish member of the Majority Caucus in the Pennsylvania House of Representatives.¹³² The end result in Pennsylvania, particularly dealing with vouchers, is

¹³⁰ *See id.*

¹³¹ Charitable Choice Expansion Act of 1999, § 1994A.

¹³² Visit the Pennsylvania House of Representatives web page at *House of Representatives* (last modified Dec. 4, 1998) <<http://www.state.pa.us/mainrep.html>>.

that there is an enormous pot of money sitting there because the administration is advocating seriously putting those funds into school vouchers; therefore, we are neglecting special needs, special education, and crime prevention. We are building prisons because it creates employment without putting the funds into well much needed programs because that pot of money is sitting there for school vouchers. I think that it creates an enormous danger, and this is the result of both federal and state legislation dealing with Charitable Choice.

(Applause.)

JUDGE POLLAK:

Yes.

AUDIENCE MEMBER:

Let us forget about proselytizing for the divinity of Jesus or for the virginity of Mary and consider a certain other type of what might not be considered proselytizing activity, but condemnatory activities.

What protection does this legislation have to protect against preachers who will condemn gays, lesbians, bisexuals, and trans-persons, and who will potentially also interfere in family relationships with their children in the course of their family counseling?

MR. LAYCOCK:

The principle and obvious protection is the right to another provider.¹³³ I certainly agree that that requires more attention in implementation than Ashcroft ever gave it. Second, I study church and state. I do not study the delivery of these social welfare services, so I am not as familiar with these programs as I would like to be. But I do not know any of the programs we are talking about that give much scope for the provider to take a child away from his or her family or interfere in that sort of fashion.

Now, I do suspect that beneficiaries whose problems are, in part, the consequence of irresponsible personal behavior, dealing with sex or drugs or whatever, some of these providers are going to be more loving and some are going to be more condemning. They have all got to compete on their success rate. If condemnation does not work, they are not going to get the contract. I do not think that the solution here is to either regulate the churches or to insist that fairness consists, as Erwin said a minute ago, that all of the providers are secular and none are religious.

There are a lot of religious people in this country,¹³⁴ including a lot of religious, poor people in this country. I agree small towns are a problem. A fairly structured system, however, would have a variety of providers, some religious and some secular.

¹³³ This right is provided by § 1994A(g)(1) of the proposed Charitable Choice Expansion Act.

¹³⁴ The composite of religious beliefs in the United States are as follows: Christianity - 86.2% of the total population; Nonreligious - 7.5% of the total population; Judaism - 1.85% of the total population; Agnostic - 0.7% of the total population; Islam - 0.5% of the total population; Unitarian Universalist - 0.3% of the total population; Buddhism - 0.4% of the total population; Hinduism - 0.2% of the total population; Native

MR. LYNN:

But of course you may also be dealing with very young, vulnerable people. If, upon going in for counseling you say, "I have a question about my gender," and they say, "No, you were born one way; God gave you one way to be, and that is the way you ought to be," then how are you going to get answers? How is that person going to know that he or she has an opportunity to go to another provider? Some of these messages, even if they are not directly condemnatory, have the same effect; and these will be some of the same recipients of the funds under this program.

Additionally, I think the analogy with vouchers is very clear. One of the reasons I do not want to give vouchers to private religious schools is because they are going to be promoting these religious ideologies that I find deeply offensive.

AUDIENCE MEMBER:

I am interested in the Supreme Court's 4 to 4 to 1 division.¹³⁵ Will it make any difference whether a Republican or a Democrat is elected to the White House?

MR. LAYCOCK:

It will make a difference subject to the pervasive risk of error that most presidents have experienced through our history. It is divided 4 to 1 to 4 at the moment, although it is divided 7 to 2 in terms of whether Republicans or Democrats appointed justices.

JUDGE POLLAK:

It will not make any difference until somebody figures out a way to get to the Senate Judiciary Committee.

AUDIENCE MEMBER:

Let us say an individual is convicted of driving under the influence of alcohol. At least one state supreme court has decided that it is a violation of the Establishment Clause for the judge to make a condition of probation that you attend Alcoholics Anonymous ["AA"] meetings.¹³⁶ I think there is a Second Circuit decision saying the same thing.¹³⁷ Could somebody please explain to me whose religion is established by these conditions of prevention, that you attend AA?

MR. LAYCOCK:

American Religions - less than 0.1% of the total population; Scientology - less than 0.1% of the total population. *Adherents.com* (visited Mar. 27, 2000) <<http://www.adherents.com/>>.

¹³⁵ See Vaughn, *supra* note 85.

¹³⁶ *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478 (Tenn. 1997) (granting cause of action for prisoner who claimed that requiring him to attend Alcoholics Anonymous meetings violated the First Amendment and finding that prisoner did not waive right to such a claim under the First Amendment).

¹³⁷ *Warner v. Orange County Dep't of Probation*, 173 F.3d 120 (2d Cir.) (affirming lower court ruling that probation condition that required probator to attend Alcoholics Anonymous meetings did not cause probator to waive First Amendment claim), *cert. denied*, 120 S. Ct. 495 (1999).

The AA program explicitly relies on a higher power,¹³⁸ which I think most people understand to be God. Although it is nondenominational and nonsectarian, it plainly has a religious component to which some beneficiaries understandably object. I think the judges got that one right. You cannot force someone to take that route to straighten his or her life out.

There is a much smaller, less-well-established, human secular alternative to AA. I think it makes perfect sense for judges to say, “You have got to get some kind of help with this alcohol problem.” I do not, however, think they can say it has to be through an organization with a significant religious component.

AUDIENCE MEMBER:

I would like to make a comment first and then ask a question.

It seems to me that a point of view can be thought to be suspect if, in defense of itself it says, well, referring to Professor Laycock, that coercion can occur in the present system. A person may be coerced to do some religious activity, even if you set up the separate corporation, because how can we monitor everything that is going on there?

It reminds me also of the situation of the Pennsylvania legislature. As the Representative said, while we spend so much money in this state on religious schools, why should anyone quibble now about a few more hundred million that we might spend?

It seems to me there is a basic problem here. If what we are doing is already suspect and coercion can occur in these circumstances, should we go private? Should we not perhaps stop and look at what we are doing and see if what we are doing is correct at all, and if there is not a better way to do it?

MR. LAYCOCK:

I do not think I ever said what we were doing was suspect. I did say what we are doing now and what we would be doing in Charitable Choice both presents a serious implementation problem that requires serious attention.

AUDIENCE MEMBER:

I am intrigued by that St. Elizabeth’s case, in which it is constitutionally permissible for the District of Columbia, not a small town, to contract with a religious-based hospital through a provision of services to the mentally ill in that area.¹³⁹ What was the fallout of that case? Did they have to take the crucifixes down? Did they have to close the chapel?

¹³⁸ Specifically,

The majority of A.A. members believe that we have found the solution to our drinking problem not through individual willpower, but through a power greater than ourselves. However, everyone defines this power as he or she wishes. Many people call it God, others think it is the A.A. group, still others don’t believe in it at all. There is room in A.A. for people of all shades of belief and nonbelief.

A.A. World Services, Inc., *A Newcomer Asks* (visited May 23, 2000) <<http://www.alcoholics-anonymous.org/ep24doc1.html>>.

¹³⁹ See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

Did the nuns have to take off their habits? Or could that hospital remain true to its religious foundation and treat the mentally ill for their mental illnesses?

If that is constitutional, then I do not see the objection to all of the other faith-based programs that are out there in the secular versus the religious marketplace. If the District of Columbia and the federal court could approve St. Elizabeth's taking care of all the mentally ill within the confines of D.C., what is the rest of this debate about?

MR. LYNN:

I think the funding there is the fact that hospitals have not traditionally been considered 'pervasively sectarian' institutions. The only things that the *Bowen v. Kendrick*¹⁴⁰ case that Professor Chemerinsky talked about earlier categorized as 'pervasively sectarian' were schools and churches and church-like institutions; and I am not entirely happy about the way that some of the previous lower court decisions on hospitals in particular have gone.

Additionally, I am not at all happy by the current trend, where you have a public hospital that is having great difficulty raising enough money to continue, and all of the sudden it merges with a public hospital, and it merges with a religious hospital. Then you find doctors being told not only that they cannot perform reproductive health services in that facility, but also in some cases they are told if they perform them at any other facility, they will be fired from what is now the only hospital in town. So I am very troubled by some of those decisions.

MR. CHEMERINSKY:

There is a point at which a difference in degree does become a difference in kind. There are ways in which the government inescapably is going to provide forms of assistance to religion, but generally they have all been indirect.

The fact that we accept those variety of reasons does not mean that, therefore, we should go to the other end of the continuum and say the government should be able to give pots of money directly to churches and synagogues. Once we cross that line, it really does become a difference in kind, and that is what Charitable Choice does.

JUDGE POLLAK:

We have got time for about three or four more questions. Then we will have a luncheon recess.

AUDIENCE MEMBER:

I want to pick up on the comment that was just made and go back to the question that the lady in red made. Since what is at stake here is not the issue of more money but of regulation, should not those concerned with Charitable Choice, in order to be true to their faith or true to their values, be in court now trying to close down Catholic Charities or other entities that do receive dollars?

If you took a tour while you were here in Philadelphia and visited some of the faith-based social service agencies, you would see that there are religious people of various religious denominations clearly providing for the sick, the poor, and the homeless; and

¹⁴⁰ See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

yet Philadelphia, for better or worse, is surviving. In fact, the government is looking for ways to expand that relationship rather than end it.

So the question is, “Why aren’t we stopping what’s already in place today?” Is it because Professor Dilulio,¹⁴¹ among others, has said it is a billion-dollar enterprise and would shut down the city, and, therefore, we have to practice it and override our concern?

MR. CHEMERINSKY:

I think you misunderstood my position, and let me make it clear. I think it is terrific that there are faith-based organizations providing social services. I think Catholic Charities and Jewish charities should continue to exist to provide social services. I support that; I do not oppose it. I personally donate money to some of those.

The issue here, however, is whether the government should be subsidizing churches. Should the government be subsidizing synagogues in providing social services? Should faith-based organizations receive government funds? It is at that place, I think, that there is a line drawn by the First Amendment. To the extent that programs are violating the First Amendment, under the 1996 Welfare Rights Bill,¹⁴² there are and there should be constitutional challenges.

AUDIENCE MEMBER:

Medicare¹⁴³ and Medicaid¹⁴⁴ provide big pots of money to healthcare organizations that are faith-based. That seems to me to degrade your argument about the distinction being direct subsidies.

MR. LYNN:

Again, I do not think it does, because we are not making the local church the administrator of the Medicaid or Medicare program; and I would not be surprised to see that as a proposal somewhere down the line, if this concept becomes emboldened by more and more presidential candidates supporting it. But I do not want to see the local church on the corner compete with the synagogue on the other corner and the temple on the third corner to decide who is going to be the administrators of the Medicaid program. I think that is exactly where you go if you let this concept fester.

MR. LAYCOCK:

But you will let each of those three institutions create a separate corporation that can then compete with each other for that program. So the safeguard you propose as a

¹⁴¹ Mr. Dilulio is a professor of politics at the University of Pennsylvania and a Senior Fellow at the Manhattan Institute and Brookings Institution.

¹⁴² Charitable Choice Expansion Act of 1999, § 1994A.

¹⁴³ For more information about Medicare, see *Medicare – The Official U.S. Government Site for Medicare Information* (visited Mar. 27, 2000) <<http://www.medicare.gov/>>.

¹⁴⁴ For more information about Medicaid, see *Medicaid Information* (visited Mar. 27, 2000) <<http://www.hcfa.gov/medicaid/medicaid.htm>>.

separate corporation, which may be a formality that matters only to lawyers, is an audit of every dollar that goes into the account that contains the government funds.

JUDGE POLLAK:

We are going to give the last question to Rabbi Saperstein. I want to make clear it is not because he is a faith-based enterprise, but because he talks so fast.

RABBI SAPERSTEIN:

I am going to aim this, for a time, at you, but anyone else can jump in. Under the logic of your argument that it ought not to impede or impair the religious beliefs and the implementation of them in carrying it out, can the recipients, so long as there is an option, discriminate in whom they serve and why? Additionally, is exempting only religious groups, as I understand this does in effect, from the regulations everyone has to live with, raise *Texas Monthly*¹⁴⁵ questions?

MR. LAYCOCK:

The first question is the easy one. As the legislation is written, the providers cannot discriminate on the basis of the religious belief or affiliation of the beneficiaries or on the basis of those beneficiaries' refusal to actually participate in any religious observance that the provider offers.¹⁴⁶

RABBI SAPERSTEIN:

Do you think it would be constitutional?

MR. LAYCOCK:

Do I think it would be constitutional? I do not; I think it would be constitutional only under the most ideal circumstances in which there is no shortage of services. We had ten years of litigation about this in New York years ago where Catholic Charities running children's care and Jewish charities running children's care were each given priority, understandably, to their own communities and, to the extent they had spaces, they were taking other people in.¹⁴⁷

It had the unfortunate effect that the Protestant population, which was African-American and which did not have such large and well-funded charities, was left underserved, and so race and religion intersected. I had some sympathy with the positions of the Catholic and Jewish children's homes in that case, and I am not troubled by preferences in sorting people out when everyone is served. But we are in a world where it is very rare for everyone to really be served.

¹⁴⁵ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (striking down as unconstitutional a Texas statute that provided a sales tax exemption for religious periodicals).

¹⁴⁶ See *supra* note 126.

¹⁴⁷ See *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986). For discussion and background on this case, see Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209 (1987); Burt Neuborne & Frederick A. O. Schwarz, Jr., *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177 (1987).

I think whatever the constitutional minimum might be, I certainly think it is a better policy to have it written the way they have written it and to require nondiscrimination. I think it is very important to require nondiscrimination on the basis of your refusal to participate in any religious observance that is being offered.

The second question about *Texas Monthly*¹⁴⁸ is harder. The Supreme Court said ten years ago that a Texas tax exemption for Wilkson Publications that only applied to religious books and publications, and indeed only to pro-religious books and publications, and not anti-religious books, and not philosophical books, and not books questioning or calling into account religion, was unconstitutional discrimination.¹⁴⁹ I think that decision is right on its facts.

I think some of the language in the various opinions or with the majority is troublingly overbroad. It has caused a number of people to question whether exempting churches and religious believers from regulation might raise an Establishment Clause problem.

I am quite clear you do not establish a religion by leaving it alone. That failing to regulate churches as much as you regulate everybody else is not a form of establishment, and I think *Texas Monthly* is consistent with that. What they say is, an exemption is okay, as long as it does not burden anybody else. It is okay if it removes a burden from a religious practice.

They did not view an incidental sales tax where the transaction that was taxed produced the revenue to pay the tax; they just did not view that as a burden. They may have been right or wrong. I think as long as we are relieving a burden on religious practice and an exemption from regulation, it is not a serious constitutional issue.

JUDGE POLLAK:

It is time for us to recess this program. Very similar problems, of course, are going to be discussed in the ensuing program,¹⁵⁰ which is due to get underway in twenty minutes. Judge Adams is monitoring, and with Judge Adams in the chair, you do not want to be late.

We have box lunches awaiting us - Kosher, I understand. You are encouraged to bring them back here into the auditorium.

(Applause.)

¹⁴⁸ *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1 (1989).

¹⁴⁹ *Id.* at 18-19.

¹⁵⁰ See *infra* Debate 3: *Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*