Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds

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February 9, 2011

Congressional Research Service
7-....
www.crs.gov
R41099

Summary

Beginning in 1996, Congress enacted several pieces of legislation that included provisions that have become known as charitable choice rules. Included in legislation for various federally funded social service programs, charitable choice rules were aimed at ensuring that faith-based organizations could participate in federally funded social service programs like other nongovernmental providers. The rules allow religious organizations to receive public funding to offer social services without abandoning their religious character or infringing on the religious freedom of program beneficiaries. No new legislation has been enacted since 2000, but Congress continues to consider the issues associated with charitable choice as the related programs are reauthorized.

Much of the controversy that has surrounded these programs has centered on the constitutionality of the federal government funding faith-based social service programs and so-called religious hiring rights, the term often used to refer to religious organizations' selectivity in employment decisions. Supporters of faith-based funding argue that religious organizations have a constitutional right to retain their preferences for co-religionists in hiring as a matter of religious identity and exercise. Opponents argue that allowing organizations that receive public funding to discriminate based on religion violates principles of neutrality guaranteed by the U.S. Constitution.

Challenges to programs with funding to religious organizations under charitable choice have had varying results. Supreme Court jurisprudence has shifted over the last decade, which has in some cases lowered the constitutional barriers for aid to religious organizations. However, some cases have indicated that the Court may not favor aid in particular cases of providing funding to religious organizations.

This report will briefly discuss the history of charitable choice provisions and the implementation of the Faith-Based Initiative which extended similar rules to certain executive agencies. It will also analyze the constitutional issues associated with funding faith-based organizations, services, and programs, including the distinction of financial assistance provided directly and indirectly to religious organizations. The report will also detail the legal protections for religious organizations that receive funds under these programs and for the beneficiaries of the services they provide, with particular focus on civil rights and discrimination prohibitions in current law. Finally, the report will analyze who is able to raise judicial challenges to publicly funded faith-based programs and how such lawsuits have been resolved.

Contents

Contacts

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Overview of Charitable Choice Legislation and the Faith-Based Initiative

Charitable choice rules generally direct that religious organizations receiving public funding retain control over their religious identity; prohibit discrimination in awarding funds to applicants based on the organization's religious character; prohibit the government from requiring an organization to alter its internal governance or remove religious symbols as a condition of eligibility; and prohibit the use of public funds received directly by religious organizations for sectarian activities. The rules also specify that receipt of public funds does not alter the exemption that religious organizations have under Title VII of the Civil Rights Act of 1964, which allows such organizations to discriminate based on religion in their employment decisions. The charitable choice provisions also prohibit religious organizations receiving public funds from discriminating against beneficiaries on the basis of religion and provide that the programs must be implemented in a manner consistent with the Establishment Clause of the First Amendment of the U.S. Constitution.

Charitable choice rules were included in programs like Temporary Assistance for Needy Families (TANF), the Community Service Block Grant (CSBG), and substance abuse prevention and treatment programs.[1] In 2001, when Congress did not enact legislation to expand charitable choice rules to other programs, President George W. Bush established the Faith-Based Initiative through a series of executive orders directing a wide range of social programs to follow the rubric of charitable choice.[2] Upon taking office in 2009, President Barack Obama issued an executive order which amended President Bush's initial order but essentially retained the core principles of the initiative.[3] Congress continues to review charitable choice rules when the associated programs are due for reauthorization.

Constitutional Requirements for Public Funding of Religious Organizations

Constitutional questions arise in the context of charitable choice because of potential Establishment Clause conflicts associated with the government providing public assistance to private religious organizations. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...."[4] The U.S. Supreme Court has construed the Establishment Clause, in general, to mean that the government is prohibited from sponsoring or financing religious instruction or indoctrination.[5] But the Court has drawn a constitutional distinction between aid that flows directly to religious organizations and aid that benefits such organizations indirectly as the result of voucher or tax benefit programs. Thus, the permissibility of government aid to religious organizations generally depends on the purpose for which the aid is distributed and the manner in which it is distributed.

Direct Funding

Generally, the government may not provide direct aid to religious organizations that use the aid for religious purposes, but the Supreme Court has allowed aid for non-religious purposes. It appears that the purpose of the aid and the types of programs that it was used to fund are the critical factor in the constitutional analysis of direct aid programs, not the type of organization that received and administered the public funds.[6] In other words, the cases challenging charitable choice expenditures likely will depend on the content of the organization's publicly funded program. The extent to which the organization can demonstrate that the funds are restricted to secular uses likely will determine whether the expenditure was constitutionally permissible.

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[1] *See* P.L. 104-193, Title I, § 104 (August 22, 1996), 110 Stat. 2161, codified at 42 U.S.C. § 604a; P.L. 105-33, Title V, Subtitle A (August 5, 1997), 111 Stat. 251, 577; P.L. 105-285, Title II, § 201 (October 27, 1998), 112 Stat. 2749, codified at 42 U.S.C. § 9920; P.L. 106-310, Title XXXIII, § 3305 (October 17, 2000), codified at 42 U.S.C. § 300x-65; P.L. 106-554, § 1 (December 21, 2000), 114 Stat. 2763, codified at 42 U.S.C. § 290kk. *See also* CRS Report RL32736, *Charitable Choice Rules and Faith-Based Organizations.*

[2] *See* Executive Order 13199 (January 29, 2001).

[3] Executive Order 13498 (February 5, 2009).

[4] U.S. Const. amend. I.

[5] Much of the case law related to public aid to religious institutions has been issued in the context of aid to religious schools. For a more thorough analysis of these decisions, *see* CRS Report R40195, *The Law of Church and State: Public Aid to Sectarian Schools.*

[6] Mitchell v. Helms, 530 U.S. 793 (2000). *Id.* at 826-29.

With respect to direct aid, the Court has typically applied the tripartite test it first articulated in *Lemon v. Kurtzman*.[7] The *Lemon* test requires that an aid program (1) serve a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion. Historically, the primary effect and entanglement prongs were substantial barriers to religious organizations receiving public funds. To avoid a primary effect of advancing religion, the Court had required direct aid programs to be limited to secular use and struck them down if they were not so limited.[8] But even if the aid was limited in such a way, the Court often found the primary effect prong violated anyway because it presumed that some institutions were so "pervasively sectarian" that it was impossible for public aid to be limited to secular use.[9] Alternatively, it often held that direct aid programs benefiting pervasively sectarian institutions were unconstitutional because government had to so closely monitor the institutions' use of the aid to be sure the limitation to secular use was honored that it became excessively entangled with the institutions.[10]

The Court's decisions in *Agostini v. Felton*[11] and *Mitchell v. Helms*,[12] however, have recast these tests in a manner that has lowered the constitutional barriers to direct aid to sectarian organizations. The Court has abandoned the presumption that organizations are so pervasively sectarian that direct aid either results in the advancement of religion or fosters excessive entanglement. It has also abandoned the assumption that government must engage in an intrusive monitoring of such institutions' use of direct aid. The Court still requires that direct aid serve a secular purpose and not lead to excessive entanglement. But it has recast the primary effect test to require that the aid be secular in nature, that its distribution be based on religiously neutral criteria, and that it not be used for religious indoctrination.[13] For example, under the current interpretation, public resources such as teachers, instructional materials, or equipment may be provided to religious schools if the resources are used for secular educational purposes.[14]

The Court's previous assumption that religious organizations were pervasively sectarian implied a belief that any financial assistance to the organization would inevitably support the religious elements of the organization. The Court's abandonment of the presumption indicates a relaxation on the constraints imposed and assumptions made regarding the constitutional permissibility of public funding of certain secular elements of religious organizations, which may be very significant in considering the outcome of future charitable choice cases that may come before the Court.

[7] 403 U.S. 602 (1971).

[8] *See, e.g.*, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[9] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

[10] *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977), overruled by Mitchell v. Helms, 530 U.S. 793 (2000).

[11] 521 U.S. 203 (1997).

[12] 530 U.S. 793 (2000).

[13] *See Agostini*, 521 U.S. 203.

[14] *See id.*; *Mitchell*, 530 U.S. 793.

Indirect Funding

Indirect aid to religious organizations, such as voucher programs where participants use government funds to obtain services from participating providers, has a lesser extent of governmental control than direct aid programs that provide public funds directly to the providers. Accordingly, the Court's jurisprudence has imposed fewer restraints on indirect aid programs and has held aid to be constitutional when the distribution reflects the individual beneficiary's choice.[15] The Court still requires such aid programs to serve a secular purpose; but it does not apply the secular use and entanglement tests applicable to direct aid. The key constitutional question for indirect aid has been whether the initial beneficiaries of the aid had a genuinely independent choice about whether to use the aid for services from secular or religious providers. For example, in the case of school vouchers, the initial beneficiary (typically parents or students) receives a voucher for public funds and makes a choice of which school to attend using the voucher.[16] If the individual who receives the funds can be seen as intervening in the chain of distribution of the funds from the government to a religious organization that is providing services, the aid is considered to be given by the individual beneficiary, rather than the government, thereby negating a threat of establishment.

In past indirect aid decisions relating to voucher programs, the Court has held that, if the universe of private choices available was almost entirely religious, the program was unconstitutional because the government, in effect, dictated by the design of the program that a religious option be chosen. But if religious options did not predominate, the Court held the program constitutional even if, in the case of a school voucher program, parents chose to receive services from religious schools. In a 2002 decision also regarding school vouchers, the Court legitimated an even broader range of indirect aid programs by holding that the evaluation of the universe of choices available is not confined to the private providers at which the voucher aid can be used but includes all of the public providers available as well.[17]

Overall, the Court has upheld aid programs in which the aid was distributed to the initial recipients on a religion-neutral basis and the initial recipients had a "genuine choice among options public and private, secular and religious."[18] Furthermore, unlike constitutional requirements for direct aid, programs implemented through indirect aid may include religious organizations that offer services that include religious content. Thus, in the context of charitable choice programs, it appears that, although indirect aid programs may include more religious content than direct aid programs, the indirect aid programs are no more susceptible to constitutional challenges so long as beneficiaries have a variety of choices of secular and religious service providers.

[15] *See* Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[16] *See, e.g.*, *Mueller*, 463 U.S. 388.

[17] *Zelman*, 536 U.S. 639.

[18] *Id.* at 662.

Legal Protections for Faith-Based Funding Recipients and for Program Beneficiaries

Much of the attention generated by the Faith-Based Initiative has revolved around two general issues: selectivity in employment by service providers (i.e., hiring rights) and protections for beneficiaries of the programs that religious organizations administer. The issue of selectivity in employment (e.g., a religious school preferring to hire teachers of the same denomination) may be the most controversial aspect of the faith-based funding debate. The "hiring rights" of religious organizations that participate in social programs covered under charitable choice provisions had been advanced under the Bush Administration's implementation of the Faith-Based Initiative. In 2007, the Department of Justice indicated that it would follow a broad interpretation of the legal protections for religious organizations to hire employees that would administer these programs.[19] The Obama Administration does not appear to have issued guidance related to hiring rights in these programs.

In November 2010, however, President Obama modified the implementation of faith-based funding programs that President Bush had originally created.[20] The amended principles and criteria clarified and expanded the protections for beneficiaries of programs offered by religious organizations with two notable changes. Under the new principles, organizations receiving public funds under these programs must offer referrals to alternative providers if the beneficiary objects to an organization's religious character. The order also requires federal agencies that provide funding for social service programs to make a list of organizations receiving assistance available on the Internet to increase transparency and accountability in the funding process.

Selectivity in Employment of Religious Organizations Receiving Public Funds

Federal law provides protection to employees to ensure that neither the government nor private employers discriminate on the basis of religion. In some cases, however, an employer's preferences in hiring are protected by the First Amendment. The First Amendment ensures the right of religious organizations to exercise their religion without governmental interference,

[19] In 2007, the Department of Justice (DOJ) issued a legal opinion regarding whether the Religious Freedom Restoration Act (RFRA) required an exemption for religious organizations participating in a congressionally authorized departmental grant program that included a nondiscrimination provision. RFRA prohibits the government from substantially burdening religious exercise unless the burden meets a compelling purpose that is achieved by the least restrictive means. 42 U.S.C. § 2000bb-1(b). DOJ concluded that a religious organization receiving funds under the department's charitable choice regulations may be exempt from the nondiscrimination provision. The memorandum reasoned that the government could not demonstrate a compelling interest because many other statutes included exemptions from similar provisions for religious groups. Office of Legal Counsel, Department of Justice, *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007), *available at* http://www.justice.gov/olc/2007/worldvision.pdf. The Obama Administration's position on the issues addressed in this memo is unclear; it has not indicated whether the memorandum has been revoked or whether DOJ will issue a new interpretation.

[20] 75 Fed. Reg. 71319 (November 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/11/17/executive-order-fundamental-principles-and-policymaking-criteria-partner. President Obama issued Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, on November 17, 2010.

which has led to some exceptions in employment nondiscrimination laws for religious organizations. The Civil Rights Act of 1964 and the First Amendment govern the rights of religious organizations to consider religion in employment decisions.

Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 created protections for civil rights across a wide spectrum, including religion. Title VII of the act prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex.[21] Title VII prohibits discriminatory treatment of employees (including applicants for jobs) on the basis of their religious beliefs and requires employers to make reasonable accommodations for employees' religious practices.

Title VII is not an absolute prohibition on religious discrimination, however. It includes an exemption for religious organizations that allows them to consider religion in employment decisions. Title VII's prohibition against religious discrimination does not apply to "a religious corporation, association, educational institution, or society with respect to employment [i.e., hiring and retention] of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[22] The U.S. Supreme Court unanimously upheld this exemption in 1987, allowing a religiously affiliated, non-profit entity to make employment decisions based on religion, even if the position related to non-religious activity of the organization.[23] The Court held that Title VII's exemption allowing a private religious organization to discriminate on the basis of religion was constitutional under the Establishment Clause.[24] However, neither the act, nor the Court decision, addresses whether the exemption applies to entities receiving public funds which may be used to fund the position.

First Amendment Protections

The Establishment Clause and Free Exercise Clause of the First Amendment prevent the government from interfering with the affairs of religious organizations, whether that interference dictates what the religious organization must do or what it cannot do. The Establishment Clause ensures that the government does not control practices of religious groups because the government is prohibited from becoming intertwined with religion.[25] The Free Exercise Clause guarantees that religious groups will not be controlled by government actions.[26] These principles have been held by the Supreme Court to protect certain hiring decisions by religious groups as a constitutional matter separate from Title VII. The Court held that the "freedom to select the clergy" has "federal constitutional protection as part of the free exercise of religion against state

[21] 42 U.S.C. § 2000e *et seq*. For legal analysis of Title VII, *see* CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, by Cynthia Brougher.

[22] 42 U.S.C. § 2000e-1(a).

[23] Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[24] *Id.* at 334-338 (holding that the government can accommodate religious exercise without violating the Establishment Clause).

[25] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[26] *See* Employment Div., Oregon Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

interference."[27] Without this recognition, Title VII's prohibition on the use of religion in employment decisions would appear to interfere with the constitutional freedom regarding religion.

The judicially created "ministerial exception," as this protection to select clergy has become known, reconciles Title VII with the First Amendment. It allows religious organizations to select clergy without regard to any of Title VII's restrictions, but requires that employment decisions made regarding other positions within the organization comply with Title VII's prohibitions or exemptions.[28] However, the lack of definitive case law regarding issues of faith-based funding and employment leaves the impact of the receipt of public funds on the ministerial exception uncertain. Because the ministerial exception is a constitutional protection, it may be argued that a funding recipient has heightened protection if public funds are used to hire clergy who also provide services under charitable choice.

Limitations Applicable to Government Contractors: Executive Orders 11246 and 13279

Executive Order 11246, in effect since 1965,[29] requires that all federal procurement contracts (Part II) and federally assisted construction contracts (Part III) include provisions that prohibit employment discrimination based on religion. Section 202 of the Order provides:

> During the performance of this contract, the contractor agrees as follows: (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.[30]

E.O. 11246 also requires that the same provisions be included in all federally assisted construction contracts.

In 2002, President Bush issued Executive Order 13279, which amends E.O. 11246 with respect to the prohibition on religious discrimination as it applies to religious organizations.[31] The amendment adds the following language to E.O. 11246:

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[27] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

[28] Each of the eight circuit courts to consider the ministerial exception has recognized the exception to some extent. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 303-04 (3rd Cir. 2006) (citing *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000)); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. Of Amer.*, 83 F.3d 455 (D.C. Cir. 1996)). *Petruska* explains that whether an employee qualifies for the ministerial exception depends on "the function of the position. As a general rule, an employee will be considered a minister if her primary duties include teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship." *Petruska*, 462 F.3d at 304, footnote 6 (internal quotation marks and citations omitted).

[29] 30 Fed. Reg. 12319 (September 25, 1965). As amended, this order can be found in the *U.S. Code* following 42 U.S.C. § 2000e.

[30] E.O. 11246 did not initially include sex among the prohibited grounds of discrimination. That was added two years later by E.O. 11376 (32 Fed. Reg. 14303 (October 13, 1967)).

[31] 67 Fed. Reg. 77141 (December 16, 2002).

> Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.[32]

The amendment mirrors Title VII's exemption for religious organizations.[33] Thus, like the Title VII exemption, the exemption it affords covered religious entities is broad. It applies to *all* of the activities of the covered organizations regardless of whether an employee's functions are secular or religious. But covered religious entities must still comply with the other requirements of the executive order regarding employment nondiscrimination on the bases of race, color, sex, and national origin.

This amendment may not have substantial significance for religious organizations, as it amends part of E.O. 11246 that concerns federal procurement contracts (i.e., contracts for the provision of goods and services directly to the federal government). This part of E.O. 11246 is not applicable to the federal grant and cooperative agreement programs subsidizing the provision of social services that have been the primary focus of debate about charitable choice and religious discrimination by faith-based organizations. Such contracts can range from food services to office supplies to military items and can, obviously, involve substantial sums of money. But it is not at all clear that religious organizations have historically played a significant role in such federal procurement contracts.

Preemption of State and Local Civil Rights Laws

Another issue that has raised concerns related to charitable choice is the preemptive effect of federal charitable choice provisions on state and local civil rights laws that bar forms of discrimination that are not barred by federal law, such as discrimination based on sexual orientation or marital status. The preemption doctrine derives from the Supremacy Clause of the U.S. Constitution, which establishes that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[34] Under the Supremacy Clause, state or local laws that conflict with valid federal laws may be preempted in favor of the federal law under certain conditions.[35]

There has been much debate regarding whether charitable choice statutes preempt state and local civil rights laws relating to employment discrimination, but this debate has been largely limited to the policy arena, rather than legal challenges. The debate centers on the charitable choice provision that requires that a participating religious organization "shall retain its independence from Federal, State, and local government, including such organization's control over the

[32] *Id.* at 77143.

[33] 42 U.S.C. § 2000e-1.

[34] U.S. Const. art. VI, cl. 2.

[35] Gade v. National Solid Wastes Management Association, 505 U.S. 88, 97 (1992) ((quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002). *See also* Hines v. Davidowitz, 312 U.S. 52, 61, 77 (1941) (regarding field and frustration of purpose preemption); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) (regarding conflict preemption).

definition, development, practice, and expression of its religious beliefs." Similarly, all of the charitable choice statutes to date have barred the government from requiring that a religious provider "alter its form of internal governance" and have explicitly provided that a religious organization's exemption under Title VII "shall not be affected by its participation in, or receipt of funds from, a designated program."[36]

Although some have argued that these provisions may be read to imply some degree of preemption, it is not clear on the face of the statute whether Congress intended to preempt state nondiscrimination laws. Noted scholars in the field have asserted that allowing organizations to retain independence does not translate to immunity from any government controls by means of preemption.[37] Rather, they suggest that the "provision should be read to mean that agencies of government must not assert leverage or control over the [organization] in matters extraneous to the contract" and do not relate to the effect of the federal statute on state nondiscrimination laws.[38] Furthermore, the charitable choice statutes generally do not indicate the necessary intent of Congress that would be required to find preemption related to employment discrimination laws. The only provision of the charitable choice statute concerning substance abuse programs that expressly addresses the issue states that "nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment."[39]

Protections for Beneficiaries of Services Provided by Religious Organizations Receiving Public Funds

Under charitable choice, one of the major questions is the extent to which beneficiaries of the social service programs are protected in their own constitutional right to religious freedom. That is, the beneficiaries of services provided by religious organizations using funds under charitable choice must be afforded the right to practice their own religious (or non-religious) beliefs without being unconstitutionally influenced by a religious organization providing services through a government program.

Federal law imposes a number of civil rights obligations on the provision of services in programs and activities that receive federal financial assistance. Various civil rights laws bar discrimination on the bases of race, color, national origin, handicap, age, sex, or blindness.[40] These prohibitions on discrimination apply generally and are triggered by the receipt of federal funds, but most of them apply only to the delivery of services and not to the employment practices of the entities

[36] *See supra* note 1.

[37] Ira C. Lupu & Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers: The State of the Law*, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, 48-49 (December 2002), *available at* http://www.religionandsocialpolicy.com.

[38] *Id.*

[39] P.L. 106-554, which added charitable choice provisions to Title V of the Public Health Service Act, prefaced the Title VII exemption language with the following sentence: "Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment."

[40] *See* Civil Rights Act of 1964, title VI, codified at 42 U.S.C. § 2000d *et seq*. (race, color, national origin); Education Amendments of 1972, title IX, codified at 20 U.S.C. § 1681 *et seq*. (sex and blindness (in admissions) in education programs); Rehabilitation Act of 1973, § 504, codified at 29 U.S.C. § 794 (handicap); Age Discrimination Act of 1975, codified at 42 U.S.C. § 6101 *et seq* (age).

that receive federal funds. The applicability of these statutes to federally financed programs and activities is not altered by charitable choice provisions.

In contrast, there is no comparable federal statute that generally bars religious discrimination in federally funded programs and activities. Individual programs, however, may sometimes contain such a prohibition.[41] Likewise, charitable choice legislation has included provisions that bar religious organizations from discriminating against beneficiaries on religious grounds. It also has required the government to make an alternate provider available to any beneficiary who objects to the religious character of a given provider. All of the existing charitable choice statutes, with the exception of the Community Service Block Grants, bar a religious organization that receives assistance from discriminating against beneficiaries on the basis of religion or a religious belief. Three of the four statutes (excluding one of the substance abuse statutes) also bar such discrimination on the basis of a "refusal to actively participate in a religious practice."[42]

Judicial Challenges of Publicly Funded Faith-Based Programs

Because of the many questions that have been raised regarding funding faith-based organizations under charitable choice rules, a plethora of legal challenges have been filed, with varying results. The only case challenging faith-based funding programs to reach the Supreme Court did not address the constitutionality of providing public funding to religious organizations for social programs. Instead, the case addressed the threshold litigation issue of standing—defining the scope of possible litigants who were legally able to challenge programs under the Faith-Based Initiative. Other cases in lower courts in which the litigants had standing to challenge charitable choice rules have had mixed results, indicating that no clear answer has prevailed for the many questions relating to funding of programs implemented by religious organizations.

Legal Standing to Challenge Faith-Based Funding Programs

Standing is a constitutional principle that serves as a restraint on the power of federal courts to render decisions.[43] Under general standing rules that apply to any case, an individual must have an individualized interest that has actually been harmed under the law or by its application to bring that case to court.[44] In some instances, such as the Establishment Clause, an individual may wish to challenge a governmental action that injures the individual as a member of society (e.g., the individual as a taxpayer challenges the expenditure of funds under charitable choice). The U.S. Supreme Court has construed the requirements to raise such challenges narrowly.

[41] *See, e.g.*, 42 U.S.C. § 9849(a) (nondiscrimination provision in Head Start program).

[42] *Cf.* P.L. 106-554.

[43] *See* U.S. Const. art. III, § 2, cl. 1.

[44] There are generally three constitutionally required elements to standing: (1) the individual must have personally suffered an actual or threatened injury; (2) the injury must be fairly traced to the challenged action; and (3) the injury must be likely to be redressed by a favorable decision. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

As discussed earlier, the Faith-Based Initiative implemented charitable choice provisions at the agency level through executive orders, rather than through statutory programs authorized by Congress. Although the provisions of the congressional authorizations were very similar to those implemented through agency regulations, the Supreme Court drew an important legal distinction between the two. According to a plurality of the Court in a 2007 decision, *Hein v. Freedom From Religion Foundation*, only taxpayers challenging the expenditure of funds through charitable choice provisions authorized by Congress have standing to litigate related lawsuits under the Establishment Clause.[45] In other words, taxpayers cannot challenge expenditures made through general disbursements to the executive branch, including some that funded programs under the Faith-Based Initiative.

In *Hein*, a group of taxpayers challenged the constitutionality of events held for programs under the White House Office of Faith-Based and Community Initiatives, an executive office created to remove barriers to religious and community groups seeking federal assistance.[46] The Court found that the taxpayers did not have standing to challenge the actions, in contrast to precedent known as the *Flast* exception, which conferred standing to taxpayers challenging specific congressional appropriations pursuant to a direct congressional mandate.[47] The taxpayers in *Hein* were not challenging "any specific congressional action or appropriation; nor [were they asking] the Court to invalidate any congressional enactment or legislatively created program as unconstitutional."[48] Rather, the expenditures challenged in *Hein* were "general appropriations to the Executive Branch to fund its day-to-day activities" and "resulted from executive discretion, not congressional action."[49]

The Court held that the expenditures by the executive branch alleged to violate the Establishment Clause could be treated differently than legislative actions. The *Hein* opinion noted the broad impact that a decision to the contrary would have, stating that "because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court."[50] Furthermore, the Court stated that the "relaxation of standing requirements is directly related to the expansion of judicial power, and lowering the taxpayer standing bar to permit challenges of purely executive actions would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."[51] In other words, if the Court were to broaden taxpayer standing requirements, individual litigants could effect changes in the courts rather than through the national political process.

The *Hein* decision has had a notable impact on charitable choice litigation. Many recent charitable choice lawsuits have challenged executive branch programs that provide funding to religious organizations under the Faith-Based Initiative. The *Hein* decision has left the probability of reaching the merits in such lawsuits uncertain. Several courts have dismissed such lawsuits,

[45] 551 U.S. 587 (2007).

[46] *Id.* at 592-94.

[47] *Id.* at 604.

[48] *Id.* at 605.

[49] *Id.*

[50] *Id.* at 610.

[51] *Id.* at 611.

ruling that the litigants lacked standing in light of *Hein*.[52] Other litigants have voluntarily dropped their lawsuits, expecting that *Hein* would cast skepticism on their standing to bring the case. However, some lawsuits have proceeded successfully.[53]

Constitutional Analysis in Challenges to Faith-Based Funding Programs

Although many of the questions related to charitable choice have not been resolved, some courts have addressed specific questions on some of the issues of concern in the charitable choice debate. Among the issues addressed to at least some extent in court decisions are the constitutionality of certain aid programs, the proper remedies for programs that violate legal church-state requirements, and monitoring requirements necessary for programs operated under charitable choice.

Religious Organizations' Participation in Public Funding Programs

One of the leading concerns about charitable choice programs is the role of religious organizations in government-funded programs—whether their participation is required, permitted, or prohibited. Since charitable choice and the Faith-Based Initiative were implemented, the Supreme Court has indicated that religious organizations may receive public assistance in some circumstances. In a 2004 decision that had general implications for the charitable choice debate, the Court held that the Establishment Clause of the U.S. Constitution permitted participation of religious organizations in public programs, while noting that state law may impose higher restrictions and even ban the inclusion of religious participation.[54] At the same time, the Court indicated that the Free Exercise Clause does not require the government to include religious organizations in public assistance programs.[55]

As discussed earlier, the requirements for ensuring that public funds provided to religious organizations differ depending on the manner in which the aid is distributed. Indirect aid (e.g., vouchers) has fewer constitutional concerns compared with direct aid programs. The Supreme Court's interpretation of the Establishment Clause indicates that indirect aid can ultimately flow even to religious providers who exercise selectivity in hiring and whose programs include religious content, so long as the initial recipient of the voucher (the beneficiary) has a true choice among service providers. Thus, the critical question for indirect aid is whether there is a genuinely independent decision maker between the government and the entity that ultimately receives the funding. All of the charitable choice measures, with the exception of the Community Service Block Grants, require that those who object to a particular religious provider be given an alternative that is either secular or not religiously objectionable. However, they may not require that a voucher recipient have a choice of secular and religious providers initially. Whether this is sufficient to meet the Court's standards seems uncertain.

[52] *See, e.g.*, Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly, 506 F.3d 584 (7th Cir. 2007).

[53] Americans United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007).

[54] Locke v. Davey, 540 U.S. 712 (2004).

[55] *Id.*

Whether direct aid to religious entities that consider religion in their hiring practices, as allowed by all charitable choice statutes, can pass constitutional muster seems more complex but still likely. Although the Court sometimes used such employment practices in determining whether an entity was eligible for direct aid, it had never relied on that factor alone; other factors entered into the constitutional analysis.[56] Thus, it seems that religious discrimination in employment, by itself, might not be enough to render a direct aid program unconstitutional. *Mitchell* seems to strengthen that possibility, at least for certain kinds of direct aid like in-kind assistance. In that case, the Court upheld a direct aid program providing educational supplies and equipment to entities that the Court had previously held to be constitutionally barred from receiving such aid—sectarian elementary and secondary schools. The resulting shift in focus from the nature of the organization receiving the aid to whether the aid is distributed in a religiously neutral manner and whether it is used for religious indoctrination appears not to be impacted by whether the entity bases its hiring decisions on religion.

The more critical question concerns the role of faith in carrying out social services programs that are directly subsidized. The Court's decisions make clear that direct public aid cannot be used for religious indoctrination, and all of the charitable choice measures seem to meet this requirement by explicitly prohibiting direct aid from being used for religious worship, instruction, or proselytizing. However, the underlying assumption of charitable choice has been that religious organizations ought to be able to retain their religious character and employ their religious faiths in carrying out the subsidized programs. That, it is said, is what makes their programs distinctive and more effective. Thus, given this assumption and the various possibilities for how particular subsidized programs might be implemented, it seems likely that constitutional questions will inevitably arise in the implementation of direct aid programs under charitable choice, notwithstanding its prohibitions on the use of direct aid for religious worship, instruction, and proselytization.

In addition, it should be noted that *Mitchell* involved an in-kind aid program—educational supplies and equipment—whereas charitable choice programs appear to contemplate direct grants of money to religious organizations. All of the Justices in *Mitchell* expressed doubt that direct grants of money to religious entities could pass constitutional muster even under the Court's loosened standards for direct aid programs.[57] Because these doubts were not part of the holding of the case, they do not indicate with any certainty how the Court might rule on a case involving a particular grant or cooperative agreement, but they do provide additional insight into possible considerations that the Court may make in future cases on this issue.

Permissibility of Selectivity in Employment Decisions

Although the matter of selectivity in employment decisions is perhaps the most contentious of any issue associated with charitable choice, there is little case law addressing the question

[56] *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding construction of a wing at a hospital run by an order of Catholic nuns on the condition that the wing be used for medical care of the poor); Tilton v. Richardson, 403 U.S. 672 (1971) (allowing religiously affiliated colleges to be eligible for federal construction grants because the schools focused on academic freedom rather than religious indoctrination).

[57] *Mitchell*, 530 U.S. at 818-19 ("we have seen 'special Establishment Clause dangers' ... when money is given to religious schools or entities directly rather than ... indirectly") (Thomas, J., plurality opinion); *id.* at 841-43 ("This Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.") (O'Connor, J., concurring in the judgment); *id.* at 890 ("from the start we have understood the Constitution to bar outright money grants of aid to religion") (Souter, J., dissenting).

specifically. The leading case on the issue is a 2005 federal district court decision, *Lown v. Salvation Army*, which held that selectivity by the religious provider could not be attributed as a government action.[58] Thus, the leading precedent on this issue indicates that selectivity by religious organizations receiving government assistance may be constitutionally permissible.

In *Lown*, various employees of the Salvation Army sued the organization after it implemented a policy which permitted discrimination based on religion in employment, which the employees claimed created a hostile environment and permitted use of government funds for religious purposes. The court rejected the argument that, by allowing religious organizations that receive public funds to consider religion in hiring, the government is advancing religion in violation of the Establishment Clause. Instead, the court noted that religious organizations may exercise their faith in their employment decisions, yet offer programs that are implemented in a secular manner from the perspective of beneficiaries and in line with the objectives of the authorization of funds. The court noted that Congress was free to decide not to accommodate the employment practices at issue when authorizing publicly funded service programs. Because current law protects such hiring practices, and Congress did not exercise its discretion to limit such actions by religious organizations receiving public funds, the practices were upheld as lawful.

Remedies for Violations of Charitable Choice Rules

One case in particular has been cited in the legal debate over charitable choice regarding how to remedy violations that occur after religious organizations receive government funding. In 2008, the U.S. Court of Appeals for the 8th Circuit held that the religious organization providing services under the charitable choice program was not required to repay funds used in good faith that the program was constitutional. The court clarified that the organization was required to repay funds used after an initial injunction was ordered in the case regarding the constitutionality of the use of funds.[59]

The lawsuit challenged an anti-recidivism program in an Iowa state prison operated by the InnerChange Freedom Initiative. At the trial level, the district court declared the program to be unconstitutional and ordered that InnerChange return all money received since the program began. On appeal, the 8th Circuit agreed that the distribution of funds was unconstitutional because the program included an evangelical Christian perspective and offered special privileges to inmates who participated. However, the 8th Circuit held that the authorization of funds for charitable choice programs such as the one InnerChange offered were presumptively valid. Therefore, InnerChange's receipt of money was not clearly unlawful from the outset of the program. After the district court ruled the program unconstitutional and enjoined future assistance, InnerChange could not properly rely on the funds as constitutional assistance for the program and according to the court, could be required to repay that portion of the aid received.[60]

Monitoring of Requirements Imposed on Religious Providers

The adequacy of oversight of religious organizations using government funds under charitable choice programs has been questioned throughout the debate on charitable choice.

[58] 393 F. Supp. 2d 223 (S.D. NY 2005).

[59] Americans United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007).

[60] *Id.*

Constitutionality of public aid to such organizations in many cases depends on the extent to which the organizations prevent the improper use of funds for religious purposes (in the direct aid context). In 2006, the U.S. Government Accountability Office (GAO) issued a report examining the practices of various religious organizations receiving funds under charitable choice programs.[61] The report raised questions regarding the adequacy of information about restrictions on the use of funds provided to organizations that receive aid under charitable choice and recommended guidance for the government to monitor the implementation of the programs.[62] The report noted arguments that special attention paid to religious organizations may imply unequal treatment based on religion. However, the report stated that "creating a level playing field for [faith-based organizations] does not mean that agencies should be relieved of their oversight responsibilities relating to the equal treatment regulations."[63]

The most significant guidance for monitoring the use of funds and content of programs under charitable choice has come from the Department of Health and Human Services (HHS). In 2005, a lawsuit was filed to challenge charitable choice grants to an organization called Silver Ring Thing, which conducted sexual abstinence programs for teens.[64] The lawsuit alleged that the programs included religious content in violation of charitable choice rules and constitutional requirements. No issue was resolved by a court, however, because the parties settled the case in 2006.[65] Shortly after the complaint was filed in the lawsuit and HHS determined that the program lacked adequate safeguards, HHS issued a list of safeguards that would be required for religious organizations to qualify for aid from the agency, and the list was later incorporated into the settlement agreement. The safeguards required by the agency included separate and distinct programs, separate presentations, elimination of religious materials from the funded program, development of cost allocation recordkeeping, broad scope in advertising for beneficiaries, etc.[66]

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[61] Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GAO-06-616 (June 2006), available at http://www.gao.gov/new.items/d06616.pdf.

[62] *Id.* at 8-9.

[63] *Id.* at 55.

[64] ACLU of Massachusetts v. Secretary of Dep't of Health and Human Services (D. Mass 2005), *available at* http://www.aclu.org/files/FilesPDFs/teeneducomplaint.pdf.

[65] The settlement agreement can be found at http://www.religionandsocialpolicy.com/docs/legal/cases/SRT-HHS-ACLU_Settlement%202-24-06.pdf.

[66] *Id.*