



FEATURES:

## Why "Faith-Based" Is Here to Stay

By Lew Daly

*The broad shift in strategy for providing services*

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By the time he left office, President Bush's faith-based initiative had become a kind of stand-in for his entire presidency. Whenever something went wrong on Bush's watch it was tarred as yet another "faith-based" policy. As the 2008 presidential election began to take shape, with the Democrats newly in charge of both the House and the Senate and the most aggressively religious president of the modern era plummeting toward record-low poll numbers, there was hope among many that the faith-based initiative would be swept away with the rest of Bush's failed "faith-based presidency."

Instead, on the campaign trail in 2008, Barack Obama defied liberal expectations and pledged to revive the faith-based initiative. Surprised and disappointed civil-libertarian and secularist groups were somewhat consoled by Obama's further pledge to repeal the most controversial element of Bush's policy, so-called religious "hiring rights." On his watch, Obama initially said, receipt of federal funding would disqualify faith-based grantees from exercising religion-based discretion over hiring and employment policies, something they enjoy under civil rights law as a matter of religious liberty.

But when President Obama unveiled his version of the faith-based initiative shortly after his inauguration in 2009, he did not repeal Bush's policy on religious hiring rights, as many assumed he would do by executive order. Instead, he took the issue off the political table, reclassifying it as a technical matter to be handled by White House legal counsel and Department of Justice lawyers. Responding to Obama's inaction, the Director of the ACLU Washington Legislative Office oddly accused him of "heading into uncharted and dangerous waters," when, in fact, he was simply maintaining existing White House policy, itself derived from provisions in social welfare law introduced during the Clinton years.

President Obama has made his differences with Bush quite clear in terms of policy and spending in poor communities: We are not doing enough to create sufficient opportunity for all. Institutionally, however, he did not aggressively restore the pre-Bush status quo as many had hoped — by shutting down the White House faith-based offices Bush established and by repealing Bush's administrative actions on religious hiring rights and other controversial matters. Perhaps Obama is simply cautious enough in his own thinking not to assume the worst about everything Bush did, or perhaps he is making raw political calculations about building religious support for his presidency. To properly assess Obama's motivations and decisions in this area, however, it's important to have a deeper understanding of how the faith-based initiative came to exist, and why.

## Redrawing boundaries

When he launched his signature domestic policy nine days after his inauguration in 2001, Bush's understanding of the evolving legal and political context for government contracting with religious social-service providers was highly developed: The issue of church-state barriers in social aid programs first captured his attention as governor of Texas six years earlier, and he had tried to lower certain barriers there with help from national experts such as Marvin Olasky and Stanley Carlson-Thies. Although ultimately he had little success in expanding public support for faith-based providers in Texas, by the time Bush entered the White House in 2001, federal law had dramatically altered the church-state landscape in social services by establishing "charitable choice" provisions in several major social-welfare statutes, beginning with the welfare reform bill of 1996. Charitable choice essentially gives faith-based providers a statutory right of eligibility in government contracting for social services, coupled with strong protections for maintaining their religious autonomy within federally-funded programs. As of 2001, charitable choice rules applied to programs disseminating nearly \$22 billion in federal funds annually.

Congress's failure to further expand charitable choice across the social safety net was the major early defeat of Bush's presidency (a bill to this effect was passed by the House of Representatives in July 2001, but mostly gutted by the Senate). By that point, however, it was increasingly clear that the White House's strategy of "leveling the playing field" for faith-based providers was, predominantly, an administrative one, and Bush forged ahead, expanding the reach of charitable choice by executive order in 2002. Two basic goals defined the larger transformation Bush envisioned: First, to increase the share of federal social-service funds going to smaller faith-based providers; and second, to expand and enforce protections for the religious autonomy of faith-based grantees, as required under charitable choice.

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Bush's first assignment for his White House Office of Faith-Based and Community Initiatives was to audit current grant-making in the five major executive branch agencies involved in social services: Health and Human Services, Education, Housing and Urban Development, Labor, and Justice. The available grant data revealed that, with a few notable exceptions such as the Adolescent Family Life program (a Reagan-era initiative promoting abstinence-based sex education as well as services for pregnant teens and teen parents), faith-based providers were receiving only a small fraction of the grants allocated by federal social service programs, and smaller faith-based providers were almost completely excluded.

Although the available evidence pointed in the opposite direction, suggesting routine exclusion of faith-based providers if not secular bias, the auditing process Bush set in motion raised alarms about a "religious takeover" of the social safety net. In some sense, the critics were right: The faith-based initiative was, indeed, a systemwide effort to adjust church-state boundaries in federal social-service contracting, and this was quite unprecedented in presidential history. But the critics were wrong in how they interpreted this transformation, mostly relying on a monolithic "culture war" narrative about Bush's religious advisers and the White House's strategies with his "religious base."

The faith-based initiative was not foisted on the government by religious zealots bent on creating an "American Theocracy," as Kevin Phillips described the George W. Bush era; rather, it evolved out of existing statutory law — the charitable choice framework established during the Clinton years — as well as a long line of Supreme Court rulings beginning with the "equal access" cases of the 1980s (which overturned secondary and post-secondary school policies denying religious community groups and student clubs access to facilities on the same terms granted to nonreligious groups).

More fundamentally, liberal critics failed to understand how the shifting constitutional and statutory framework that gave momentum to the faith-based initiative had an even deeper provenance in the broader political economy of welfare spending, which, over the previous three decades, had been dramatically transformed in ways that made the comparatively extreme church-state separationism prevalent at the beginning of that era increasingly volatile and unsustainable. Thus, President Bush was not so much redrawing church-state boundaries from the Oval Office as attempting to adapt welfare contracting — the administration of federal social-service grants — to a new church-state landscape forged by the changing political economy of welfare spending over the previous 30 years. The legal and political evolution from equal access, to charitable choice, to the faith-based initiative was shaped if not driven, in other words, by changes in the structure of welfare spending that made closer cooperation between church and state unavoidable.

### The political economy of public welfare

As with so much else in contention today, the beginning of this story lies in the Great Depression and the New Deal. A “new alignment,” Andrew J.F. Morris argues in his important new book *The Limits of Voluntarism*, was established between government aid and private charity during the New Deal.<sup>1</sup> Prior to the New Deal, the prevailing model of social welfare, embraced by both the charitable sector and much of the political class (including then-New York Governor Franklin D. Roosevelt), was a privately-funded and privately-administered system encompassing both “bulk” and “intensive” forms of support — that is, temporary material assistance for the economically displaced on the one hand, and therapeutic casework for the chronically destitute or dysfunctional on the other. Herbert Hoover’s theory of an “associative state” added public coordination and information-sharing to the private vision of charity leaders, but, in general, there was little national support for any form of federal cash assistance or publicly-funded social services on the eve of the Great Depression. In the 1920s, less than one-sixth of one percent of national income was dedicated to public poor relief.

As Morris shows, the winter of 1930–31 was a “decisive turning point” for public welfare, as the demand for material aid, having exploded by 400 percent over the previous two years, brought even the most venerable charitable agencies in many cities to the brink of insolvency. Charity leaders renounced longstanding opposition to public material assistance given directly to households (“outdoor relief”), recognizing, first, the rise of structural unemployment and other economic forms of instability and impoverishment (such as boom-and-bust cycles); and second, that with far greater resources at its command (or potentially so), only the government can afford to put a floor beneath the economy for displaced workers.

When charity leaders gathered at a meeting of the National Social Work Council in October 1931, they were already moving in a public direction and established a Social Work Conference on Federal Action for Unemployment, which sent charity leaders to Washington in support of federal unemployment relief. A successful bill sponsored by Senator Robert Wagner was the first to authorize federal cash assistance for the unemployed, initially administered through state-level offices using grants from Hoover’s Reconstruction Finance Corporation.

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After winning the White House in 1932, Franklin D. Roosevelt established the Federal Emergency Relief Administration (FERA) and appointed social work leader Harry Hopkins as director. From his perch at FERA, Hopkins aggressively set out to validate public welfare as a legitimate function of government and one necessarily distinct from the charitable sector as to purpose, funding, and administration. The emerging vision of public welfare was correlated with the “antisubsidy” position in debates that crystallized around Herbert Hoover’s earlier proposal to subsidize Red Cross relief

programs with federal funds.

Interestingly — in light of today's debate — Hopkins's determination to build a thoroughly public relief apparatus, free of private entanglements, was partly influenced by bitter church-state controversies over the issue of public subsidies for Catholic orphanages, which he encountered as a social worker in New York City in the 1910s. As June Hopkins depicts the conflict in her biography of her grandfather, Harry Hopkins: Sudden Hero, Brash Reformer, while the Catholic Church fought to defend its orphan care stronghold against "pagan philanthropy" (i.e., the city's demand for modern social work methods and standards), it was assailed by social reformers for its "vicious immunity" from public control. Clearly, some religious orphanages were badly deficient even by the most basic standards of nutrition and education, but the conflict over public support for religious orphan care escalated sharply as social reformers, allied with progressive politicians, increasingly saw themselves as engaged in a battle to cleanse society of premodern influences such as priestly authority and belief in miracles. In New York City, a massive "charity investigation" ensued (including wiretapping of priests) amid a bitter press war, leading to policy changes that eventually supplanted traditional orphanages with modern foster care and adoption programs (with much continuing involvement of religion agencies, of course).

For Hopkins, who later worked as a Red Cross field agent, it was just as much a question of protecting charitable providers from becoming dependent on public funds and thereby subject to fiscal and policy changes from one election to the next. Yet the impetus to dismantle the patchwork public-private subsidy system (prevalent mainly in orphan care and health care to that point) largely came from the shifting terrain of social need, as unemployment swept the country in the 1930s. For the first time, significant federal funds were earmarked for direct assistance to households based on their economic status, a large-scale public function extending far beyond the reach of social services on the then-prevailing casework model of scientific charity. Over the three years of its existence, *fera* spending (mostly through state agencies) reached nearly \$3.1 billion and by the first quarter of 1935 the federal share of national spending on relief was nearly 80 percent. When *fera* was shut down in 1935, unemployment benefits became part of the Social Security system passed into law that year along with Aid to Dependent Children (*adc*) for the chronically poor. Overall, according to economist Peter Lindert, the New Deal brought a near tenfold increase in public relief as a share of national income, rising to approximately 1.5 percent of gdp.

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Government and charity were cleaved apart by the rise in federal relief spending during the Great Depression. Urged to codify *fera* spending according to anti-subsidy principles, the first regulation Harry Hopkins issued required that public relief funds be administered by public agencies staffed with government personnel. With state and local subsidies dwindling across the country by the mid-1930s, Hopkins's "Regulation No. 1" for *fera*, later described as "epoch-making" by his assistant Josephine Brown (in her 1940 study *Public Relief, 1929–1939*), "effectively ended all public subsidies to private agencies," June Hopkins argues. And as Brown further explained, this started "a process of reorganization wherever the subsidy system was in effect."

An essay published in 1934 by Linton Swift, head of the Family Welfare Association of America, proved highly influential as charity leaders struggled to redefine private welfare in a context of structural economic failure. Swift's essay, "New Alignments between Private and Public Agencies in a Community Family Welfare and Relief Program," proposed a clear "division of labor" between public and private agencies. The burden of material relief would be shifted entirely onto the government, leaving the charitable sector to focus on intensive casework incorporating advanced therapeutic methods such as psychoanalysis. When President Truman, in a national radio address in 1946, described the "significant change in our thinking about charity," now that "this government,

through its public welfare program, has long since accepted this responsibility, to see that no citizen faces hunger, unemployment, or destitute old age," he was reconfirming the "new alignments" proposed by Swift a decade earlier. As Morris argues, Truman's "vision matched perfectly the direction that charities such as the members of the Family Welfare Association of America were headed: toward new needs that could be met by the skills of their social workers, rather than money." Essentially, the charitable sector had gotten out of the relief business, while the government stayed out of the business of subsidizing social services.

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Sustained into the early 1960s, this policy structure is discernible in federal budget data as well as revenue data from the charitable sector. In Bixby's tabulations, as of 1960, federal expenditures on welfare for the poor totaled approximately \$2.1 billion, nearly all of which was provided in the form of material assistance to households under Aid to Dependent Children and other antipoverty programs. In 1960, there was essentially no funding for social services in federal antipoverty programs.<sup>2</sup> Smith and Lipsky's assessment of revenue sources for a group of 13 nonprofit social-service agencies in New England correlates with the federal spending pattern. Except for certain kinds of institutionalized care, the "absence of public funding of nonprofits remained the norm," they write. In 1960, 11 of the 13 agencies they studied received no government funds, and the other two received only 5 percent and 32 percent from government (the latter, notably, was a provider of institutionalized child care).<sup>3</sup> A 1960 study of 23 urban centers, Smith and Lipsky further report, found that only 8 percent of public spending for family services and foster care was used to purchase services from private agencies. As late as 1965, they add (citing a study by the Family Service Association of America), public funds accounted for only 8 percent of nonprofit agency revenue.

Nevertheless, long before conservatives gained a foothold in national politics by calling for welfare reform, liberal policy leaders such as Wilbur Cohen began to contemplate a greater role for social services in antipoverty programs; they moved decisively in this direction upon returning to the White House under John F. Kennedy in 1960, fundamentally transforming the New Deal division of labor between public relief and private services. In 1962, Kennedy signed into law a set of Public Welfare Amendments under the Social Security Act, initiating "a more or less distinct category of grants to the states for social services," Martha Derthick writes.<sup>4</sup>

Under Lyndon Johnson and the Great Society, criticism of the charitable sector from the civil rights movement and the antipoverty left pushed the government in new directions, redefining the scope and function of social services around embattled racial groups and a social-structural analysis of urban poverty. The Office of Economic Opportunity, created in 1964 and initially led by Sargent Shriver, funded a range of community-based programs such as Head Start and Project enable (Education and Neighborhood Action for Better Living Environment). oeo spending on these services rose from \$52 million in 1965 to \$752 million in 1970. In 1967, another set of amendments to the Social Security Act further revised the national focus on social services, moving away from the therapeutic approaches long favored in scientific charity to work-related services such as job training and child care support, along with financial incentives for work.

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As Morris argues, the War on Poverty and the growing emphasis on concrete welfare-to-work services opened the door "to the wider interpenetration of the voluntary and public sector." Indeed, "The funding of voluntary agencies with public money on a wide scale, combined with the creation of new nonprofit agencies supported entirely by government," he explains, "created a new nonprofit

sector that blurred the lines between traditional charity and public institutions." As a fiscal matter, this transformation was extremely significant. According to Bixby, between 1960 and 1970, federal spending on social services in antipoverty programs rose from essentially \$0 to \$522 million. By 1980 it rose to \$1.76 billion, and by 1995 to \$2.8 billion. Derthick finds an increase from \$194 million in 1963 to \$1.69 billion in 1972.<sup>5</sup> By 1980, all of the nonprofit social-service providers studied by Smith and Lipsky were receiving substantial government funds, with an average public revenue share of 61 percent and as much as 78 percent in one case. By 1974, government funding (at all levels) was responsible for nearly 50 percent of total nonprofit revenue in the United States, and by the early 1990s many of the country's largest social service providers, such as Catholic Charities and the Jewish Board of Family and Children's Services, were receiving most of their funding from the government.

afdc benefits and other material aid programs were cut during the Reagan years, but new statutes such as the Adolescent Family Life Act of 1981 (sex education and teen pregnancy services) and, later, the Child Care and Development Block Grant Act of 1990 (the first major federal child-care initiative) continued to redirect federal resources and policy toward social services. Then, with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, the shift toward social services entered a new policy-driven phase, as benefit time limits and other new compliance rules brought welfare-to-work services from the experimental margins to the very center of federal poor relief. By 2001, only 44 percent of funding authorized under Temporary Assistance for Needy Families (which replaced afdc as the main cash assistance program for the poor), was being spent on direct cash benefits; most of the money was being spent on child care and other services to help move the poor from welfare to work. While the severe economic downturn in 2008 and 2009 has driven up welfare enrollment and cash benefit claims in some states, generally speaking, it is clear that the New Deal alignment of social welfare has been transformed and in some ways reversed: Government increasingly has gotten out of the relief business, while private provision of welfare services is now heavily subsidized by the government and increasingly at the center of policy development.

### Church-state separation

As the new deal division between public relief and private services was fundamentally transformed in the 1960s and 1970s, "nonprofit agencies," Smith and Lipsky argue, "became agents of government in the expansion of the American welfare state," part of what Donald Kettl famously described as a new "government-by-proxy" system. Although widely studied and increasingly understood in policy history, this political transformation of the social safety net in recent decades, dramatically shifting government contracting for social services from the outer margins to the center of welfare policy and federal welfare spending, remains a well-kept secret in much of the debate surrounding the faith-based initiative, most conspicuously so in the church-state controversy at the heart of the debate.

Far from being a "new front in the culture war," as some argued, increasing church-state cooperation in social welfare followed a clear structural pattern in policy history, recognizable in two basic phases. First we need to recognize that the modern American social safety net was founded on "anti-subsidy" principles, separating public and private functions in a way that largely insulated faith-based social services from church-state requirements attached to the public purse. Yet, as welfare spending was significantly restructured beginning in the mid- 1960s, creating a larger public role for social services, faith-based providers were thrust into church-state conflict by the new political economy of welfare spending. The prevailing separationist church-state legal culture of the time (forged in heated battles over parochial school funding and prayer in public schools) was ill-fitted to the emerging policy landscape of public support for social services, and rigidly unresponsive to the large fiscal impetus this created for closer cooperation between faith-based providers and government agencies. "No-aid separationism," as legal scholar Carl Esbeck has termed it, was driving a constitutional wedge between religion and government even as federal policy and spending

were restructuring the social safety net in ways that increasingly overlapped with the work and mission of faith-based providers.

Justice Hugo Black's remarkable dissent in *Board of Education v. Allen*, a 1968 decision upholding a New York State textbook loan program for which religious schools were eligible, was the *ne plus ultra* of no-aid separationism. With undisguised animus against the Catholic Church, no other judicial opinion of the era matched the sheer conspiratorial vitriol of Black's "slippery slope" reasoning:

It is true, of course, that the New York law does not, as yet, formally adopt or establish a state religion. But it takes a great stride in that direction, and coming events cast their shadows before them. The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can, and doubtless will, continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.

Black's argument, whereby a textbook loan program leads to the Catholic Church's "domination" of America, went to extremes; over the next decade, however, the bar of separation was increasingly raised to Black's desired standard of "no aid" and "no contact" between religious institutions and the government. In *Lemon v. Kurtzman* (1971), *Committee for Public Education v. Nyquist* (1973), and *Meek v. Pittenger* (1975), no-aid separationism was consolidated, erecting a self-declared Jeffersonian "wall of separation" between government and religious institutions by throwing out even modest forms of indirect aid such as maintenance and repair grants, eligibility for programs supplying instructional materials and auxiliary services, and tax benefits related to private school tuition. The most important legal principle which unified the no-aid era was the second rule of the so-called "Lemon test" formulated in *Lemon v. Kurtzman* (the rule was actually inherited from *Abington v. Schempp*, decided in 1963) — that the "primary effect" of any government aid to religious institutions must be one that "neither advances nor inhibits religion." As Laurence Tribe argues in his constitutional law textbook, when the "primary secular effect" standard was applied after *Lemon* it was analytically transformed into a screening point for even remote or incidental religious effects, so that any such effects disqualified aid even when the main effect was secular. This shift is "analytically significant," Tribe wrote, because it promoted "a more searching inquiry, and comes closer to the absolutist no-aid approach to the Establishment Clause than the primary effect test did."

In their influential 1977 work on mediating structures, *To Empower People*, Peter Berger and Richard John Neuhaus shed a powerful analytical light on the situation, revealing how the growing entanglement between public welfare and private services was being managed, not by excluding religious providers, but by their secularization:

Where government agencies are not directly taking over areas previously serviced by religious institutions, such institutions are being turned into quasi-governmental agencies through the powers of funding, certification, licensing, and the like. The loss of religious and cultural distinctiveness is abetted also by the dynamics of professionalization within the religious institutions and by the failure of the churches either to support their agencies or to insist that public policy respect their distinctiveness.<sup>6</sup>

One kind of criticism of these trends focused on the idea of government "crowd out," that is, how expanding public welfare may distort or suppress charitable giving and activities. Although research in this area — a small subfield of public economics — is in its relative infancy, some studies suggest that there are significant crowd-out effects in the history of American public welfare.<sup>7</sup> To Carl Esbeck, the primary legal architect of charitable choice, no-aid separationism in social welfare was

not a benign, value-neutral ideal but an organized system of secular compulsion:

With the advent of the welfare/regulatory state in the middle third of this century, continuing to enforce a strict rule of no aid has the effect of confining religious social ministries to ever smaller enclaves of private life. If the charities of faith-based groups are to participate along with secular organizations in meaningfully serving civil society, they are put to a cruel choice. No-aid separationism demands that religious ministries either secularize and thereby qualify for government aid, or close their doors for lack of funding. Thus, in its present-day impact, no-aid separationism is hostile toward faith-based charities. The changed circumstances work such unfairness that denial of all aid is no longer a plausible ordering of church/state relations. The absence of evenhandedness not only suffocates social and religious pluralism by creating a monolithic, secular-dominated structure for the delivery of welfare services, but the no-aid view eliminates a fuller range of provider choices for the poor and needy.<sup>8</sup>

Government expansion into social services also prompted an institutional growth mentality that led to monopolistic qualities in contracting regimes, as John Dilulio and others have emphasized. Large organizations like Catholic Charities obtained built-in advantages that denied entry to smaller and possibly more effective groups with new ways of doing things on the ground. Critical perspectives on this oligarchical trend (even somewhat corporatist, arguably, when combined with lobbying effects of related bodies such as the National Conference of Catholic Bishops), initially blended with bureaucratic reform efforts more generally. What galvanized active religious dissent, however, were the apparent secularizing effects of government expansion in sensitive areas such as schooling and welfare. As the "religious right" stood up to be counted in the 1970s, initially provoked by *Roe v. Wade*, government exclusion of religion from schools and other institutions became a major national issue. This was the moment when the definable features of a charitable-choice-type reform of government systems began to emerge.

#### From separation to cooperation

In constitutional law, the movement away from strict separationism began in the early 1980s, with the development of "equal access" principles. In *Widmar v. Vincent* (1981), the Supreme Court decided that a university's prohibition on the use of school facilities by religious student groups during nonschool hours (when these facilities were available to nonreligious student groups) violated the Free Exercise Clause of the First Amendment while being unnecessary under the Establishment Clause (contrary to the university's view that its policy was required by the Establishment Clause). Congress extended the Court's "equal access" principle to cover secondary schools in the Equal Access Act of 1984, which was upheld against an Establishment Clause challenge in *Board of Education v. Mergens* (1990).

While the Equal Access Act was a "religious liberty" bill, aimed at preventing government discrimination against religious speech in secondary schools, other legislative developments began an equally significant push to give religious social-service agencies access to government aid programs, most importantly, as contractors or grantees in the provision of government-funded services. These legislative developments challenged the secularizing ethos of federal welfare contracting in an incremental way that would culminate in the positive protections afforded by charitable choice law. The Supreme Court followed the lead of legislators by significantly modifying Establishment Clause restrictions pertaining to government aid programs in a well-known series of cases: *Bowen v. Kendrick* in 1988 (upholding a law stipulating eligibility of religious providers to deliver public services in sex education and family planning); *Rosenberger v. Rector and Visitors* in 1995 (finding a university policy denying student-activity funds for a religious magazine to violate the religious liberty of student petitioners while not being required by the Establishment Clause); *Agostini*



v. Felton in 1997 (overturning an earlier Supreme Court decision prohibiting public school teachers from teaching in parochial schools); and Mitchell v. Helms in 2000 (upholding eligibility of religious schools for material aid under a federal education law). Together these cases established an “equal treatment” approach to faith-based social services, providing for “neutral” (open to all faiths and no faith alike) accommodation of religious providers as contractors, grantees, etc., yet maintaining a categorical persuasion against “pervasively sectarian” programs or programs not sufficiently segregated from congregations/houses of worship, as well as a strict separation of government funds from religious activities and content. Although the category of “pervasively sectarian” was ultimately set aside as unworkable (in Mitchell v. Helms), neutral eligibility of religious providers, contingent on strict separation of public funds from religious activities, is now the prevailing constitutional standard for faith-based initiatives on the Bush model.

Increasing church-state cooperation in social welfare followed a clear structural pattern in policy history.

Among the several key legislative efforts behind these constitutional developments, the first (mentioned earlier) was the Adolescent Family Life Act of 1981 (afla). Challenged and upheld in the Supreme Court in Bowen v. Kendrick, the program is now housed within Health and Human Services’ Office of Population Affairs; in 2008–09 it supported 66 teen-pregnancy prevention and care initiatives with a budget of \$29.8 million. Another seminal bill in the trajectory of faith-based initiatives was the Act for Better Child Care, introduced in 1988. Responding to the growing number of mothers and young women entering the labor force, the bill did not specifically call for the inclusion of religious groups but rather assumed their involvement (the 1980s saw a significant rise in the number of church-based child-care centers) and provided detailed guidelines in what appeared to be a very aggressive effort to separate religion from the services funded by government. The guidelines for faith-based child-care centers receiving federal funds under the bill included the removal or covering of religious symbols, and required compliance with state and local licensing laws even where some states themselves provided certain exemptions. Nondiscrimination in religion pertaining to both beneficiaries and employees paid with public funds was strictly required: The afla was the first effort to explicitly prohibit “government-funded religious discrimination” in a contracting regime — a commonly heard slogan in the later battle over the faith-based initiative.<sup>9</sup> In a compromise worked out with the U.S. Catholic Conference and other religious groups, the final version of the bill, renamed the Child Care and Development Block Grant Act (ccdbg) and signed by the elder President Bush in 1990, temporarily quelled the growing church-state conflict in social legislation by incorporating a voucher mechanism through which religious child-care providers would be eligible to receive government funds directly from individuals, thereby insulating them from Establishment Clause restrictions (such “voucherization” of public aid to religious institutions was later upheld against an Establishment Clause challenge in the Supreme Court’s landmark school voucher case, Zelman v. Simmons-Harris, 2002).

These earlier battles over afla and the ccdbg set the stage for further efforts to expand the participation of religious service providers in federal aid programs and to codify a new general regime of protections to insure their religious integrity. With its entrance into sex education and child care, two areas of longstanding traditional concern to religious communities, the American welfare state had clearly reached a cultural tipping point in its social expansion, generating significant legislative countercurrents and Supreme Court advances toward a more accommodating, functional neutrality between government programs and religious groups. As no-aid separationism proved increasingly unworkable in a social welfare system transformed by nonprofit contracting with the government — and conspicuously unworkable given the prevalence and experience of faith-based providers in this realm — a new church-state settlement steadily emerged in the law.

A faith-based future?

In light of the argument here, it is interesting to reconsider one prominent church-state proposal of recent years: Noah Feldman's, in his much-debated 2005 book *Divided by God*. A leading constitutional law scholar, Feldman argued for a new church-state compromise allowing more room for government religious speech (school graduation prayers, public religious displays, etc.) in exchange for reining in government aid to faith-based organizations. He based this idea on a historical reading of interpretations of the religion clauses of the First Amendment, finding that "institutional separation," most importantly in the form severing religion from government money, was a more or less consensual view in the past. While the historical case for a no-aid consensus is far from clear and perhaps not so venerable where it ruled (see Philip Hamburger's persuasive argument about the role of anti-Catholicism in separationist thought in his magisterial 2002 book *Separation of Church and State*), Feldman fatally ignores precisely the question of why there is no such consensus against government aid to religious groups today.

The Court is simply keeping pace with the government-by-proxy trends in social policy and delivery.

The Supreme Court, in fact, is moving in the opposite direction, allowing more funding for religious groups while maintaining clear and reasonably strong restrictions on government religious speech. The reason should be obvious: The Court is simply keeping pace with the government-by-proxy trends in social policy and delivery, which have forced the issue of faith-based aid on a much larger scale than in the past. The Court has become more accommodating of religious providers, in keeping with the needs of government, while holding a firmer constitutional line on the more controversial (because more visible and symbolic; less "structural") issue of government promotion of religious speech.

In an important article published in 2001, legal scholar Ira C. Lupu drew attention to this emerging pattern in Supreme Court decisions, comparing *Santa Fe Independent School District v. Doe* (2000), a "sweeping opinion" prohibiting a public high school's policy allowing student-led prayer over the public address system during football games, to *Mitchell v. Helms* (2000), upholding (albeit in a split decision) a program of government school aid for which religious schools are eligible.<sup>10</sup> These cases are emblematic, Lupu argues, of an epochal shift in Supreme Court religion clause concerns. "What remains of the once popular notion of 'separation of church and state' has little if anything to do with churches; rather, the remnants of separationism attach most doggedly to questions of state sponsorship of religious messages and themes." While religious entities, he adds, "are in an ever-expanding political partnership with the state in the provision of public services," conflicts over public religious speech and religious displays "have never been more strident."

Feldman's historical theory against government aid to religious organizations fails to seriously consider the very different political context that is driving the expansion of such aid today. Or to put it another way, restricting government funding of religious social service providers, as James Madison may have wanted it, is historically obsolete today. And more than that, if the effectiveness of faith-based methods pans out in any significant measure (I agree with liberal critics that the existing evidence is ambiguous at best), church-state restrictions may be genuinely counterproductive, and convincingly portrayed as such by politicians. In any case, the structural reality should be clear: Welfare restructuring has created the space, and demand, for constitutional accommodation of faith-based providers. A new universal social assistance state, Scandinavian style, could stop these changes, as the structural need for religious providers would probably diminish, but the more likely scenario is further operational devolution of social services, leading to further legal accommodation of faith-based providers.

The Supreme Court's trajectory in material aid cases strongly suggests that Bush-style faith-based initiatives will survive fundamental constitutional challenges. One important question, then, is whether the current standard of strict separation of religious content from government-funded

services will hold, as it does in both charitable choice law today and in the regulatory framework put in place by the faith-based initiative. If it becomes increasingly clear that faith-based helping methods are more effective — something John Dilulio and others continue to investigate — it is possible that the current barriers separating religious activity from public services will be lowered. If people are persuaded that religion is truly making a difference in troubled lives, abstract legal arguments barring government support for effective religious solutions, simply because they are religious, will only seem more discriminatory for being counterproductive as well.

There is nothing to suggest that President Obama, a former constitutional law professor, would embrace political changes that bring government and religion further together in this more “substantive” and not merely functional way, incorporating religious beliefs and practices into federally funded social services. But the transformation of a government (and of thinking about government) is a powerful thing, often with dramatic constitutional effects, as any student of American labor law understands. The transformation that occurred over four decades of welfare reform generated further constitutional changes, now in terms of what is permissible under the Establishment Clause. The result is a new church-state order in areas of social need, evolving as the purposes of government and the social mission of religious groups have increasingly converged. That Bush’s departure from the White House brought no wholesale repeal of the faith-based initiative is indicative of these deeper roots. And President Obama’s controversial position on religious hiring rights suggests that this surprising reprieve is more considered than some may think, a point all the more notable given his strongly liberal arguments and approaches on most of the other key aspects of domestic policy.

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- <sup>1</sup> The argument I outline here builds on Morris’s *The Limits of Voluntarism: Charity and Welfare from the New Deal through the Great Society* (Cambridge University Press, 2009).
- <sup>2</sup> Ann Kallman Bixby, “Public Social Welfare Expenditures, Fiscal Year 1995,” *Social Security Bulletin* 62:2 (1999).
- <sup>3</sup> Steven Rathgeb Smith and Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (Harvard University Press, 1993), 236–237.
- <sup>4</sup> Martha Derthick, *Uncontrollable Spending for Social Services Grants* (Brookings Institution, 1975), 7.
- <sup>5</sup> Derthick, *Uncontrollable Spending*, 8.
- <sup>6</sup> Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (American Enterprise Institute, 1977), 28.
- <sup>7</sup> Daniel M. Hungerman, “Are Church and State Substitutes? Evidence from the 1996 Welfare Reform,” *Journal of Public Economics* 89 (2005). See also Jonathan Gruber and Daniel M. Hungerman, “Faith-Based Charity and Crowd Out During the Great Depression,” *nber Working Paper Series 1132* (May 2005), available at <http://www.nber.org/papers/w11332.pdf>.

<sup>8</sup> See Carl H. Esbeck, “Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause,” *Notre Dame Journal of Law, Ethics & Public Policy* 13 (1999).

<sup>9</sup> On the church-state conflict in child care, an important phase in the longer evolution toward the faith-based initiative, see Abbie Gordon Klein’s excellent study, *The Debate Over Child Care, 1969–1990* (suny Press, 1992).

<sup>10</sup> Ira C. Lupu, “Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause,” *William and Mary Law Review* 42:3 (March 2001).

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