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Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative

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I. INTRODUCTION

A central tenet of President George W. Bush's "faith-based initiative," launched in 2001, is that the federal government, by entering into more partnerships with religious and community organizations, should put the "power of faith" to work to solve pressing social problems. Now several years old, and still controversial, the faith-based initiative seems an apt topic for this symposium's consideration of separation of powers. Questions concerning the expanded use of partnerships with religious organizations by the government may seem outside the bounds of conventional understanding of separation of powers as addressing the tripartite division within government of executive, judiciary, and legislature. However, this Article suggests that the rhetorical appeal to the power of faith and to "unleash[ing] . . . armies of compassion," as President Bush has put it,[1] to carry out important public purposes invites attention to the relationship between *governmental* power and that of religious organizations. Notably, the initiative is being implemented largely through the executive branch—by executive orders—rather than through federal legislation. Moreover,

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* Professor of Law and the Paul M. Siskind Research Scholar, Boston University School of Law. I benefited from presenting earlier versions of this Article at the Georgetown/PEGS Discussion Group on Constitutional Law, on "Membership, Identity, and Integration: Creating the Constitutional Citizen," the Workshop on "Feminism, Corporations & Capitalism—Policy and Protest," sponsored by the Baldy Center for Law & Social Policy and the Feminism & Legal Theory Project, and held at SUNY Buffalo School of Law, and at faculty workshops at Hofstra Law School and Florida State University School of Law. Thanks to participants in these events for helpful comments, and also to Jim Fleming, Matt Diller, Richard Garnett, Abner Greene, and Norm Silber for instructive discussion about this Article. Thanks for valuable help with research to Connie Lenz (Associate Director for Collection Development, University of Minnesota School of Law and formerly Assistant Director of the Deane Law Library at Hofstra) and reference librarian Cindie Leigh, and to my former research assistants Ken Berke, Vish Pegitara, and Frank Salamone, and to my current research assistant, Jennifer Dixon.

1. President George W. Bush and Sen. Joseph Lieberman, Remarks in Photo Opportunity After Meeting on Armies of Compassion (Feb. 7, 2002), http://www.whitehouse.gov/news/releases/2002/02/20020207-9.html (remarks by President Bush).

the initiative's preference for the *local* over the *national* and its conception of the limits of national government and national organizations to address social problems touch on one of this symposium's topics: federalism, or the division of labor and authority among federal, state, and local government.

More broadly, these partnerships raise intriguing questions about institutional design, or, in other words, about the optimal arrangement of the basic institutions of society. For example, what does the initiative suggest about the ideal relationship between civil society and the state? The faith-based initiative invites consideration of the *place* of religious institutions in society. Faith-based organizations are part of civil society—that is, they occupy the realm of nongovernmental or private associations intermediate between the individual and the state. Yet proponents of the initiative seek to enlist them, as partners with government, to shore up other parts of civil society, such as the family, because of their unique capacity to do so.

By now, much has been written on whether the faith-based initiative poses constitutional problems arising out of the First Amendment's dictate that Congress, and the states through the Fourteenth Amendment, make no law establishing religion.[2] Some lawsuits challenging direct governmental funding of particular faith-infused, or faith-integrated, programs have led to judicial rulings that such funding violates the Establishment Clause. By contrast, following the U.S. Supreme Court's jurisprudence distinguishing direct and indirect funding of religious indoctrination, courts have also upheld voucher schemes or other programs in which individuals, exercising "genuine private choice," channel governmental funds to a religious organization providing a service to that individual.[3] Just last year, the Court ruled that taxpayers do not have standing to bring an Establishment Clause challenge against the Bush Administration's use of taxpayer money to support the White House Office of Faith-Based and Community

2. For an instructive overview of the constitutional issues, see Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution,* 55 DEPAUL L. REV. 1 (2005). In addition, extensive analysis of ongoing developments and legal issues related to the faith-based initiative and faith-based social services is available from the Roundtable on Religion & Social Welfare Policy (a research project of the Rockefeller Institute of Government, State University of New York, with support from The Pew Charitable Trusts). *See* The Roundtable on Religion & Social Welfare Policy, http://www.religionandsocialpolicy.org/ (last visited Sept. 20, 2007). Professors Lupu and Tuttle are co-directors of legal research for the Roundtable.

3. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002); *see also infra* Part II.C (discussing case law).

Initiatives because it was established by executive order, rather than specifically financed by Congress.[4]

This Article does not primarily aim to contribute to this complex constitutional jurisprudence, although the competing imagery of unleashing versus harnessing that I employ may prove a useful organizing device for assessing the constitutional issues raised by the initiative. Instead, my aim is to invite closer attention to the architectural framework of civil society and the state, and to the role of public-private partnerships in carrying out what I have elsewhere called a formative project of fostering self-government.[5] Even seven years into the faith-based initiative, challenging questions remain about what, exactly, it means to put faith to work. Such questions deserve attention, given the institutionalization of the initiative through the establishment of a federal office, the White House Office of Faith-Based and Community Initiatives, Agency Centers for Faith-Based and Community Initiatives within a dozen federal departments and agencies,[6] and significant administrative initiatives in more than half the states.[7] In addition, the unfolding presidential campaign for the 2008 election reveals varying degrees of support by both Republican and Democratic candidates for a continuation of the initiative.[8]

The contrasting imagery of, on the one hand, "unleashing" armies of compassion and, on the other, "harnessing" such forces captures some

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4. Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2565–66 (2007); Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. TIMES, June 26, 2007, at A18.

5. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 17–20 (2006).

6. The White House's website for the initiative lists "Agency Centers for Faith-Based and Community Initiatives" in: The Agency for International Development, the Department of Agriculture, the Department of Commerce, the Department of Education, the Department of Health and Human Services, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of Justice, the Department of Labor, the Small Business Administration, and the Department of Veterans Affairs. White House Faith-Based and Community Initiatives Home Page, http://www.whitehouse.gov/government/fbci/ (last visited Sept. 20, 2007).

7. Mark Ragan & David J. Wright, *The Policy Environment for Faith-Based Social Services in the United States: What Has Changed Since 2002?: Results of a 50-State Study*, Roundtable on Religion & Social Welfare Policy, at 29 (2005), *available at* http://www.religionandsocialpolicy.org/docs/policy/State_Scan_2005_report.pdf (stating that by the fall of 2005, sixty-three percent of states "had designated an individual or an office as a liaison to the faith community").

8. *See* The Pew Forum on Religion & Public Life, Religion & Politics, The Candidates on Faith-Based Initiatives, http://pewforum.org/religion08/compare.php?Issue=Faith_Based_Initiatives (last visited Sept. 20, 2007) (discussing each candidate's position on faith-based initiatives).

of this challenge. The image of "unleashing" connotes turning loose or freeing. A premise of the faith-based initiative is that, prior to the initiative, faith-based groups were unduly restrained from forming partnerships with government because of overly strict notions of separation of church and state; when they did contract with government, they were unduly restricted in their ability to practice their faith.[9] By contrast, the rhetoric of unleashing "armies of compassion" appeals to government setting free the unique power of faith. Unfettered, faith-based groups may proceed in their own way, so long as they get the results that government wants.

How will "unleashing" faith-based groups advance important civic or public purposes? Will unleashing the power of faith advance important public values, or is it necessary and appropriate to *harness* faith-based groups to ensure that they do? Is the better image "harnessing," which connotes yoking or attaching some mechanism to steer or control? Harnessing might simply mean utilizing, that is, enlisting faith-based groups to help government tackle difficult social problems. For example, one working group on the issue, *Harnessing Civic and Faith-Based Power to Fight Poverty,* welcomes the expanded use of governmental partnerships with faith-based groups as part of a needed "broader mobilization of civic energies and resources" to confront America's "widespread poverty and social problems . . . ."[10] But harnessing can also mean restricting. Rather than unleashing the power of faith, to harness implies to limit the way in which groups can put faith to work—for example, they could be required to comply with certain secular requirements in order to receive governmental aid. And harnessing includes the risk of diverting faith-based groups from their own purpose or mission by steering faith-based groups in a direction government chooses.[11]

The tension between these images reflects ongoing disagreement about the proper place and scope of such partnerships in our constitutional democracy. This Article contends that unleashing and harnessing both have a role to play in public-private partnerships between government and religious groups, but that the faith-based initiative, as championed and implemented to date, has emphasized unleashing at the expense of harnessing. Moreover, the Bush

9. *See infra* Part II.A (detailing the argument made for expanding partnerships with faith-based groups).

10. WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, HARNESSING CIVIC AND FAITH-BASED POWER TO FIGHT POVERTY 7 (2003).

11. *See infra* Part III.A (discussing the reasons why the identity of faith-based groups matters).

Administration itself has been internally contradictory over whether it seeks to unleash or harness faith.[12]

The tension between unleashing and harnessing is evident in appeals to *why* government should enlist faith-based providers. Why does the identity of the provider matter? The Bush Administration claims that the objective of the faith-based initiative is simply to create a "level playing field," so that faith-based service providers are treated the same as any other provider.[13] Thus, the criteria for participating in a government program ought to be results rather than the identity of the service provider.

However, the Bush Administration also claims that faith-based groups have a unique capacity to solve difficult social problems precisely because they have faith. President Bush's own personal story of conversion and transformation through changing his heart features in his appeal to faith.[14] This approach leads one to question whether the result sought is effective delivery of services or, rather, religious conversion. Are these two even separable if one properly understands the power of faith? And if they are inseparable, then to what extent and how may government fund such religious work consistent with the constitutional framework of separation of church and state?

The faith-based and community initiative appeals to the unique capacity of religious groups and of local community groups to address human needs that big government and large nonprofit service providers cannot. Thus, President Bush repeatedly speaks of the power of neighborhood healers and of healing America one heart at a time.[15] This suggests that faith is important not only as a *motivator* of good

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12. *See infra* Part III.A (contrasting speeches by Bush with statements by administrators implementing the initiative).

13. *See infra* Part II.A (detailing the rationale for creating the White House Office of Faith-Based and Community Initiatives).

14. *See* President George W. Bush, Remarks to Faith-Based and Community Leaders at Union Bethel Ame Church in New Orleans, La. (Jan. 15, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/print/20040115-7.html [hereinafter Bush, Faith-Based Leaders] ("I was a drinker. I quit drinking because I changed my heart.").

15. *See, e.g.*, President George W. Bush, Remarks to the United States Conference of Mayors (June 25, 2001), *available at* http://www.whitehouse.gov/news/releases/\2001/06/20010625-2.html ("Today, I want to focus on one [important issue] in particular: supporting the good works of charities and neighborhood healers, empowering communities to meet their own needs, and to care for their own members."); President George W. Bush, Remarks to the First White House National Conference on Faith-Based and Community Initiatives: America's Compassion in Action (June 1, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040601-10.html [hereinafter Bush, Compassion] ("America changes one heart at a time, one soul at a time. And while our fellow citizens can't do everything, they can do something to help change America one soul at a time.").

deeds on behalf of the poor but also as a *message* and a *method*—an integral part of the *service* offered to the poor. This distinction between motive, on the one hand, and message and method on the other, is relevant to various constitutional challenges posed to the initiative.

A second cluster of questions concerns how proponents of the faith-based initiative understand the relationship between civil society and government. Are the institutions of civil society "seedbeds of civic virtue," indirectly supporting but remaining separate from—and providing buffers against—government? Or are they better understood as government partners, working with government to achieve public ends? Does the latter role gibe with or have the potential to undermine the former by turning such groups into mere contractors or vendors?

President Bush and other proponents of the faith-based initiative have invoked the eighteenth-century French writer Alexis de Tocqueville's famous observations about the American propensity to join various voluntary associations in their own rhetoric about the power of civil society and of associational life.[16] President Bush has characterized de Tocqueville as saying that "'Americans like to form association[s] in order to help save lives. Americans form association[s] in order to channel the individualistic inputs of our society to enable people to serve a cause greater than themselves.'"[17] The faith-based initiative, he contends, carries forward this vision and philosophy, which "gives . . . those of us responsible for helping lives, a unique opportunity to empower people, encourage people, partner with people to save lives in America."[18] Here, too, the question of unleashing versus harnessing is relevant. It is not clear whether the armies of compassion enlisted to renew civil society would support democratic self-government or supplant government, at least the federal government, whether this civil society exists independent of government, or whether it is significantly constituted by and supported by government.[19] Contemporary invocations of de Tocqueville, after all, usually stress the contribution

16. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., 1963); *see* Elisabeth Bumiller, *Bush Finds Affirmation in a Frenchman's Words*, N.Y. TIMES, Mar. 14, 2005, at A1; President George W. Bush, Address at the Second White House National Conference on Faith-Based and Community Initiatives, (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/print/20060309-5.html.

17. President George W. Bush, Address Highlighting Faith-Based Initiative at Leadership Conference (Mar. 1, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050301-4.html [hereinafter Bush, Highlighting].

18. *Id.*

19. Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 348–53 (2000).

that voluntary associations make to democracy by mediating between individuals and the state, rather than by partnering with the state.[20]

Proponents of an expanded role for religious institutions in solving social problems also appeal to the principle of "subsidiarity," which Pope John Paul II appealed to in his critique of the "Welfare State."[21] This principle, as articulated by Pope John Paul II (drawing on earlier papal teaching), is that the smallest possible unit, or "lower order," in society should be allowed to carry out its function, without interference by "a community of a higher order;" where the lower order needs help, the larger community should "support" it and "coordinate its activity with the rest of society, always with a view of the common good."[22] As applied to welfare, for example, rather than looking to large bureaucracies and public agencies, the principle of subsidiarity holds that human needs "are best understood and satisfied by people who are closest to them and act as neighbours to those in need." [23] Government, in other words, should supplement, not supplant, civil society.[24] Notwithstanding conservative critiques of (liberal) big government, the interest in expanding public-private partnerships also reflects the "triumph of big government conservatism," that is, the belief that government can be used to achieve social ends such as restoring the family, community, and civil society.[25]

This Article contends that the faith-based initiative, with its call for an expanded use of public-private partnerships, provides an occasion to reconsider the division of labor among various sectors of society. Such questions also implicate the separation of powers, broadly conceived. Legal scholar Martha Minow has observed that "three lines vital to our conception of constitutional, free enterprise democracy, are rapidly

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20. *See* MARK E. WARREN, DEMOCRACY AND ASSOCIATION 29–31 (2001) (discussing the influence in American political thought of de Tocqueville's view of the mediating role of associations).

21. *Centesimus Annus*: On the Hundreth Anniversary of *Rerum Novarum*, Encyclical Letter of Pope John Paul II, ch. V, § 48 (May 1, 1991), *available at* http://www.vatican.va/edocs/ENG0214/__P7.HTM. For a normative appeal to the Pope's account of subsidiarity, see THE THEOLOGY OF WELFARE: PROTESTANTS, CATHOLICS, & JEWS IN CONVERSATION ABOUT WELFARE 149–53 (John G. West, Jr. & Sonja E. West eds., 2000) (remarks by Father Robert Sirico), and *infra* note 115 and accompanying text (remarks by Senator Santorum). Earlier, Pope Leo XIII also applied the Catholic doctrine of subsidiarity to the relationship between the family and the state. *See* DON S. BROWNING ET AL., FROM CULTURE WARS TO COMMON GROUND 224 (1st ed. 1997) (discussing *Rerum Novarum*, Encyclical Letter of Pope Leo XIII (May 15, 1891)).

22. *Centesimus Annus, supra* note 21, at ch. V, § 48.

23. *Id.*

24. STEPHEN MONSMA, PUTTING FAITH IN PARTNERSHIPS 185 (2004).

25. Dana Milbank, *A Marriage of Family and Policy: Bush Gives Government A Leading Social Role*, WASH. POST, Apr. 15, 2001, at A01.

fading, shifting, and criss-crossing": the lines between public and private, profit and non-profit, and secular and religious.[26] She asks, "Should it be cause for horror, indifference, or joy that these lines are moving?"[27] As she correctly points out, such movement between lines is not new, given, for example, the long history of government engaging nonprofit groups, including religious organizations, to provide social services, as well as the recurring criticisms of big government as costly and inefficient. What does seem notable is the accelerated rate at which these lines are blurring and the uncertain implications of such blurring.[28]

Part II of this Article examines President Bush's faith-based initiative as a proclaimed cornerstone of "compassionate conservatism."[29] Rather than offering an exhaustive account of the initiative's history, I emphasize the early days of its implementation, some of the obstacles posed to implementing the initiative, both in Congress and through taxpayer lawsuits, and more recent events related to the initiative. I highlight the rationale for the initiative and the emphasis placed by President Bush and other proponents of the initiative on the power of faith. Part III raises a series of questions about why faith matters in social-service provisions and about institutional design, or the proper infrastructure of government and civil society.[30] The contrasting conceptions of unleashing and harnessing help to frame these questions. I also draw on some empirical studies of public-private partnerships to begin to address those questions. Part IV concludes by identifying some issues of institutional design warranting further attention.[31]

II. THE INSTITUTIONAL DESIGN OF "COMPASSIONATE CONSERVATISM": PUTTING FAITH TO WORK

A. "Rallying the Armies of Compassion": Early Days of the Initiative

In January 2001, during his first month in office, President George W. Bush announced the establishment of the White House Office of

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26. Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious,* 80 B.U. L. REV. 1061–62 (2000).

27. *Id.* at 1062.

28. *Id.* at 1062–63.

29. *See infra* Part II (detailing the history of the creation of the White House Office of Faith-Based and Community Initiatives).

30. *See infra* Part III (comparing and contrasting the unleashing and harnessing of armies of compassion).

31. *See infra* Part IV (discussing the contemporary relevance of de Tocqueville's observations).

Faith-Based and Community Initiatives ("OFBCI"), the purpose of which was to coordinate a national effort "to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America's communities."[32] In introducing his "blueprint," *Rallying the Armies of Compassion*, President Bush explained the creation of OFBCI as a centerpiece of his Administration and of "compassionate conservatism," as well as a key means to "energize civil society and rebuild social capital . . . ."[33] The policy underlying the initiative is that faith-based and community groups are "indispensable" to meeting "the needs of poor Americans and distressed neighborhoods," and that "[g]overnment cannot be replaced by charities, but it can and should welcome them as partners."[34] The blueprint contends that existing laws and policies unduly constrain such faith-based groups, despite a long tradition of governmental partnership with the nonprofit sector.[35] By contrast, OFBCI would expand upon the "Charitable Choice" provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which aimed at greater involvement of religious organizations in contracting with government to deliver social services by allowing them to compete for those contracts and to maintain certain aspects of their religious identity.[36]

Compassionate conservatism, as explained in the blueprint, embraces public-private partnerships because of twin premises about governmental responsibility and institutional design. First, government has "a solemn responsibility to help meet the needs of poor Americans and distressed neighborhoods," and to assist "individuals, families, and

32. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html.

33. THE WHITE HOUSE, RALLYING THE ARMIES OF COMPASSION (2001), *available at* http://www.whitehouse.gov/news/reports/faithbased.html [hereinafter RALLYING THE ARMIES OF COMPASSION].

34. *Id.*

35. *Id.*

36. 42 U.S.C. § 604a (2006); Child Care and Development Block Grant Program of 1990, 42 U.S.C. §§ 9858c (c)(2)(A)(i)(II), 9858n(2) (2006). The religiously-affiliated service provider may display religious art, use religious criteria in employment decisions, and allow staff to wear religious apparel. 42 U.S.C. § 604a(d)(2)(B)(2006). It may not discriminate against a recipient of services based on refusal to participate in a religious activity or on the recipient's religion. 42 U.S.C. § 604a(g)(2006). Government also provides vouchers to individuals, who can use those vouchers to purchase services from religiously-affiliated service providers. 42 U.S.C. § 604a(a)(1)(B)(2006). Subsequent legislation has expanded the charitable choice provisions to additional governmental programs. *See* Community Services Block Grant, Pub. L. No. 105–285, title II, § 201, 112 Stat. 2702, 2749–50 (1998) (codified at 42 U.S.C. § 9920 (2000)). This law was amended to include federal substance abuse programs. Pub. L. No. 106–310, § 3305, 114 Stat. 1101, 1212–15 (2000) (codified at 42 U.S.C. § 300x-65 (2006)).

communities who have not fully shared in America's growing prosperity."[37] However, government "does not have a monopoly on compassion."[38] To the contrary, "we must heed the growing consensus that successful government social programs work in fruitful partnership with community-serving and faith-based organizations."[39] Indeed, these organizations and programs have a "unique capacity" to "serve people in need, not just by providing services, but also by transforming lives."[40] Thus, it is important not only to ask what the social responsibilities of the federal government are, but also to consider "how the Federal Government should fulfill its social task."[41]

In the past, government has readily enlisted the nonprofit sector, including both secular and religiously affiliated service providers, as partners in addressing unmet social needs, but it has overlooked and unfairly excluded important "neighborhood healers"—faith-based programs, volunteers, and grassroots groups.[42] Thus, compassionate conservatism's ideal institutional design would entail an alliance or partnership of government programs, larger nonprofit service providers, and such healers to achieve "civic purposes."[43] Among those "civic purposes" are "strengthening families and neighborhoods" and "overcoming poverty."[44]

The announcement of the faith-based initiative and the creation of OFBCI invoked imagery of "unleashing" the power of "faith-based and community solutions," and of "rallying armies of compassion."[45] The idea of "unleashing" is premised on the argument that, hitherto, such armies have been unduly constrained by strict ideas of separation of church and state and of neutrality. Invoking "the bedrock principles of pluralism, nondiscrimination, evenhandedness and neutrality," the initiative declares the importance of granting private charitable groups, including religious ones, "the fullest opportunity permitted by law to

37. President George W. Bush, *Foreword* to THE WHITE HOUSE, RALLYING THE ARMIES OF COMPASSION (2001), *available at* www.whitehouse.gov/news/reports/faithbased.html [hereinafter President George W. Bush, *Foreword*].

38. *Id.*

39. *Id.*

40. *Id.*

41. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

42. *Id.*

43. *Id.*

44. President George W. Bush, *Foreword*, *supra* note 37.

45. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

compete on a level playing field, so long as they achieve valid public purposes."[46]

The OFBCI subsequently investigated barriers to the full participation of faith-based and community-based groups. Under the direction of John DiIulio, the OFBCI released a report, *Unlevel Playing Field,* finding that there exists "widespread bias against faith- and community-based organizations in Federal social service programs" and that "many Federal policies and practices . . . go well beyond sensible constitutional restrictions and what the courts have required, sharply restricting the equal opportunity for faith-based charities to seek and receive Federal support to serve their communities."[47]

The blueprint's rhetoric of "energiz[ing] civil society and rebuild[ing] social capital" aims specifically at "uplifting small non-profit organizations, congregations and other faith-based institutions that are lonely outposts of energy, service, and vision in poor and declining neighborhoods and rural enclaves."[48] In an alliterative phrase, the agenda of this government initiative is "to enlist, equip, enable, empower and expand the heroic works of faith-based and community groups across America."[49] Compassionate conservatism's interest in civil society also extends to the potential armies of compassion found in the "nonprofit" or "independent sector."[50] Thus, *Rallying the Armies of Compassion* predicts that the nonprofit sector may emerge as the "most dynamic arena for creative problem-solving in the [twenty-first] century."[51] It notes the growing trend for entrepreneurs to lend their

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46. President George W. Bush, *Foreword, supra* note 37.

47. THE WHITE HOUSE OFFICE ON FAITH-BASED AND COMMUNITY INITIATIVES, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (Aug. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html). Prior to the adoption of Charitable Choice and the launching of the faith-based initiative, federal agencies routinely contracted with nonprofit organizations to deliver social services, including faith-based organizations that were "segmented," that is, separated religious elements from the service being delivered and, generally, were set up as a separate corporation from a sponsoring church or synagogue. However, such agencies were routinely excluded from consideration for governmental contracts congregations or faith-based, "integrated" programs, which explicitly incorporated religious elements into their programs. *See* MONSMA, *supra* note 24, at 43–46 (using these terms); Lupu & Tuttle, *supra* note 2, at 21–22 (describing how "pervasively sectarian" institutions "inevitably would have to dilute their religious character or abandon the chase for government resources"). The rationale was apparently to avoid violating the Establishment Clause by funding pervasively sectarian institutions.

48. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

49. President George W. Bush, *Foreword, supra* note 37. The same five terms appear in the "blueprint" itself. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

50. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

51. *Id.*

talent—as "social entrepreneurs"—to nonprofit work and reports predictions of a "civic capital economy," in which "enormous sums of money are pooled and targeted to new social enterprises."[52] The blueprint announces the goal of "expanding private giving," and seeks to encourage increased individual and corporate giving to the nonprofit sector and to "capture" intergenerational wealth transmission for such social renewal, presumably by encouraging such entrepreneurship.[53] As the blueprint puts it, "foundations provide private support for the public good,"[54] thus allowing nongovernmental actors to carry out important civic purposes. At a minimum, the blueprint argues, government should not harm their efforts by over-regulating the nonprofit sector or failing to provide legal protections to good-faith volunteers, nonprofit groups, and philanthropic companies.[55]

The blueprint contends that government should do more to support such groups—and thus "water the garden of civil society" through innovative tax reforms, such as tax credits to encourage individual and corporate charitable contributions.[56] However, these proposed tax credits, projected to create millions of new individual givers to charity and to stimulate billions of dollars in charitable giving, were not part of the large tax cut bill signed by President Bush early in his first term. In his political memoir, *Tempting Faith,* former OFBCI staffer David Kuo contends that although publicly the administration explained the omission by stating that charity tax credits were "so loved by everyone they would pass later with no problems," the actual reason for the omission was that the White House did not regard them as "must-haves" and did not push for them in Congress, in contrast to its support for cutting the inheritance tax.[57]

B. Implementing the Faith-Based Initiative

From its inception, Bush's faith-based initiative encountered many problems in implementation. In his public statements about the initiative, John DiIulio tried to chart a constitutional course that respected the principle of separation of church and state. Some of his attempts to distinguish between funding human services and funding

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION 160–62 (2006). Kuo notes ironically that the inheritance tax had historically been a "huge incentive for the wealthy to give more money to charity." *Id.*

religion alienated and angered religious conservatives. Kuo observes, for example, that some conservative Republican legislators "thought it was time to allow 'real' faith-based groups to receive federal funding," that is, "they wanted to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants—which was far beyond what Charitable Choice was actually intended to do."[58]

If direct government funding of religion-infused service providers was one stumbling block to securing legislation, perhaps the "central obstacle to congressional cooperation" with the faith-based initiative has proven to be the issue of whether religious groups allowed to discriminate based on religion in their hiring practices, under Title VII of the Civil Rights Act of 1964, should receive direct governmental funding.[59] Thus, early on, although the House passed legislation to implement Bush's initiative, legislation stalled in the Senate due to concerns over part of the initiative that permitted hiring on religious grounds and raised constitutional concerns over direct funding of religious activities.[60] When correspondence with the Salvation Army suggested that the Army had pledged support for the initiative if the resulting regulations would permit it to be free from antidiscrimination laws in its hiring, the Administration faced embarrassment and passage of a bill in the Senate became even more remote.[61] After releasing the report *Unlevel Playing Field,* a beleaguered DiIulio resigned (he had agreed to serve only several months, until the report was completed) and his position remained vacant for several months.[62]

After the terrorist attacks and loss of life on September 11, 2001, homeland security and foreign policy dominated the Bush Administration, pushing aside much of the domestic agenda. On the one hand, the outpouring of charitable contributions in the wake of September 11 seemed to suggest less of an urgent need for government to "rally" armies of compassion. At the same time, one unintended consequence of this outpouring for causes related to helping victims of September 11 was that many charities and nonprofit institutions, such as museums and other cultural institutions, experienced an alarming

58. *Id.* at 159–60.

59. Lupu & Tuttle, *supra* note 2, at 35–36. Kuo's memoir also details this controversy over religious hiring. KUO, *supra* note 57, at 163–65.

60. Elizabeth Becker, *Bush is Said to Scale Back His Religion-Based Initiative,* N.Y. TIMES, Oct. 14, 2001, at A1.

61. Elizabeth Becker, *Head of Religion Based-Initiative Resigns,* N.Y. TIMES, Aug. 18, 2001, at A11.

62. KUO, *supra* note 57, at 179–80.

decline in contributions.[63] Thus, Bush made speeches stressing the need "for America to stand by her charities," the armies of compassion, "as they suffer from the economic consequences of September 11," and turned to the less controversial component of offering new tax incentives for charitable giving.[64] In a sense, the very phrase "armies of compassion" took on additional meaning, especially as the United States waged war on terrorism.

In early 2002, a little more than a year after announcing the initiative, President Bush renewed efforts to "unleash" the armies of compassion. He reiterated his belief in the power of faith to solve social problems and now stressed the idea of healing the nation's "soul." First, in his State of the Union address, he appealed to all Americans to dedicate 4000 hours (two years) of their lives to volunteer work to serve their country and announced the creation of the USA Freedom Corps to facilitate such volunteering.[65] Then, on February 1, he announced that DiIulio's successor as Director of the OFBCI was Jim Towey, who, in addition to his political experience, worked with Mother Teresa.[66] He also announced a new Advisory Council on Faith-Based and Community Initiatives.[67]

President Bush explained the purpose of the faith-based initiative as the recognition of the "power of faith in helping heal some of our nation's wounds," declaring that "problems like poverty and addiction, abandonment and abuse, illiteracy and homelessness . . . are incredibly tough problems . . . . [But] I have faith that faith will work in solving the problems."[68] He opined that the best way to "serve our neighbors in need and to serve our community and our country . . . [is] to help change America, one heart, one soul, one conscience at a time."[69] The

63. It now appears that this post-September 11 downturn was temporary. Jacqueline L. Salmon, *Despite Predictions, Charitable Donors Just Keep Giving*, WASH. POST, Jan. 9, 2006, at B1 ("Surveys find that individuals, foundations and corporations that contribute to disaster-relief funds do so in addition to their regular donations to non-disaster charities.").

64. Mary Leonard, *Bush Urges New Tax Incentives for Charity Giving*, BOSTON GLOBE, Nov. 8, 2001, at A10; Press Release, Office of the Press Secretary, The White House, President Urges Support for America's Charities (Nov. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011120.html.

65. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

66. President George W. Bush, Remarks Announcing New Director of the Office of Faith-Based and Community Initiatives (Feb. 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020201-4.html [hereinafter Bush, New Director].

67. *Id.*

68. *Id.*

69. *Id.*

new director, Towey, attested to this power of faith based on his own experience and praised Bush for his vision of "unleashing new armies of compassion that will change countless lives."[70]

In an effort to overcome congressional resistance to the initiative's legislative agenda, President Bush, Senator Rick Santorum, a Republican proponent of "compassionate conservatism," and Senator Joseph Lieberman, a Democrat who supported a faith-based initiative in principle but was critical of Bush's initial proposal, announced agreement on The Charity Aid, Recovery, and Empowerment Act ("CARE"), to be introduced in the Senate.[71] The Act would "not only provide a way for government to encourage faith-based programs to exist without breaching the separation of church and state," but would also "encourage charitable giving."[72] CARE included antidiscrimination provisions clarifying that religious groups cannot be disqualified from receiving federal money simply because of their religious nature.[73] The bill provided over $1 billion of increased funding over the next two years for the Social Services Block Grant, which underwrites many local programs, including faith-based programs, tax incentives to spur charitable contributions, like an $800 charitable tax deduction for married couples who do not itemize deductions, and a $150 million "Compassion Capital Fund," to expand technical assistance for smaller charitable organizations and help them better compete for federal grants and contracts.[74] Significantly, CARE differed from the House version and the original Bush initiative in not exempting religious groups that received federal funds from antidiscrimination laws favoring members of their own faith in hiring.[75]

In rhetoric reminiscent of the blueprint's reference to helping Americans left behind by economic prosperity, in a public appearance with Senator Lieberman, Bush stated that he and the Senator, like other lawmakers supporting the initiative, "share a priority that people who don't have hope can find hope," and that "people who wonder about the

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70. James Towey, Director, White House Office of Faith-Based and Community Initiatives, Remarks Upon Being Named New Director of OFBCI (Feb. 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020201-4.html.

71. President George W. Bush, Remarks Following Meeting on Armies of Compassion (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-9.html.

72. *Id.*

73. *Id.*

74. *Id; see* Press Release, Senator Joseph Lieberman, Lieberman, Santorum Announce Bipartisan Compromise on President's Faith-based Initiative (Feb. 7, 2002), *available at* http://lieberman.senate.gov/newsroom/release.cfm?id=207873.

75. Elisabeth Bumiller, *Accord Reached on Charity Aid Bill After Bush Gives In on Hiring,* N.Y. TIMES, Feb. 8, 2002, at A19.

American Dream will realize the American experience is meant for them."[76] Bush argued that an effective way to help people realize the American Dream is to "unleash these fantastic armies of compassion."[77] He urged government to "stand on their side," and to encourage, without breaching the separation of church and state, the growth of faith-based programs, not to discriminate against them.[78]

Lieberman, who drew attention during the 2000 presidential campaign for his public statements about the importance of religious values in public life, affirmed his belief that "faith, right from the beginning of this country, was one of the great unifiers of the American people."[79] He credited strong faith as unifying the Senators as they worked out a "constitutionally appropriate way" to arrive at a faith-based initiative that would "help people who want to do good works and whose desire to do good works is motivated by their faith."[80]

These statements illustrate different understandings of the power of faith to effect change in society. Senator Lieberman's remarks invoke the power of faith as a *motivator* of good works by service providers. President Bush and Towey invoke the power of faith not only as motivator, but as a *message* and as a *method* that can transform lives. Discussions of the faith-based initiative often note the formative role played by Bush's own experience of sin and salvation when, in middle age, he confronted his drinking problem and embraced Jesus as his Savior. To a gathering of religious and community leaders, President Bush remarked:

> Many of the problems that are facing our society are problems of the heart. Addiction is the problem of a heart—of the heart. I know—I told this story before. I was a drinker. I quit drinking because I changed my heart. I guess I was a one-man faith-based program.[81]

Kuo notes that when Bush spoke to religious audiences, both as governor and as president, he emphasized his personal faith in Jesus Christ.[82] In championing the faith-based initiative as an antipoverty agenda, Kuo reports that Bush's empathy for the poor was "the empathy

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76. President George W. Bush, Remarks Following Meeting on Armies of Compassion, *supra* note 71.

77. *Id.*

78. *Id.*

79. *Id.*

80. Senator Joseph Lieberman, Remarks Following Meeting with President Bush on Armies of Compassion (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-9.html.

81. Bush, Faith-Based Leaders, *supra* note 14.

82. KUO, *supra* note 57, at 124.

of the lost and converted," and, for Bush, the initiative was about changing lives by saving souls.[83]

C. The Faith-Based Initiative, Congress, and the Constitution

This governmental embrace of the power of faith to change lives one heart, mind, or soul at a time captures some of the constitutional dilemmas with the faith-based initiative. Hitherto, one central element of the meaning of separation of church and state has been that government may not directly fund religious services or indoctrination.[84] The Bush Administration claims it advocates separation of church and state. Yet, from Bush's earliest to his most recent speeches calling for unleashing armies of compassion, he has stressed the power of faith *as an element in social service provision* to transform lives.[85] "It's hard to be a faith-based program if you can't practice faith," Bush has often proclaimed.[86] As long as programs can "get results," he contends, government should not "micro manage" how faith-based providers run such programs.[87]

At the first White House Conference on Faith-Based and Community Initiatives, President Bush declared that the initiative was stuck in Congress because Congress focuses on "process," while he focuses on "results."[88] He stated, "[A]ll I care about is making sure that the addict receives help. And if it takes changing a person's heart to change addiction, we ought to welcome the power that changes a person's heart in our society."[89]

In more recent speeches, President Bush has identified a "culture of process instead of results" at all levels of government as a continuing roadblock to governmental funding of faith-based organizations.[90]

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83. *Id.* at 257.

84. For a helpful summary of case law, see Lupu & Tuttle, *supra* note 2, at 66.

85. *See supra* note 40 and accompanying text (describing President Bush's view that faith-based groups have a "unique capacity" to transform lives). For a more recent example, see President George W. Bush, Remarks at 2006 Nat'l Conf. on Faith-Based Leadership (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/print/20060309-5.html [hereinafter Bush, Remarks on Faith-Based Leadership] (arguing that if a faith-based program is going to help change someone's life, the government ought to support the results).

86. Bush, Remarks on Faith-Based Leadership, *supra* note 85; Bush, Compassion, *supra* note 15.

87. Bush, Remarks on Faith-Based Leadership, *supra* note 85. Bush said, "If you're addicted to alcohol, if a faith program is able to get you off alcohol, we ought to say hallelujah and thanks, at the federal level." *Id.*

88. Bush, Compassion, *supra* note 15.

89. *Id.*

90. President George W. Bush, Remarks at 2005 Nat'l Conf. on Faith-Based Leadership (Mar. 1, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/03/20050301-4.html.

Americans are showing compassion in order to follow the biblical mandate to love one's neighbor as oneself, but it is also through such love—something government cannot give—that lives are saved or transformed.[91] Indeed, Bush has linked the initiative to an ongoing "revolution of conscience" in America, in which people adhere to the mandate to "love a neighbor like you'd like to be loved yourself" as a component of "being personally responsible in America," and, as a result, lives are being changed "one person at a time."[92] These beliefs in the transformative power of love and changing hearts by practicing one's faith are consistent with his self-description as a "one man faith-based program." But Bush's insistence on government funding to unleash this transformative power seems to topple any separation between church and state.[93]

Perhaps recognizing the constitutional problem posed by direct funding of faith-infused social service provisions, the Bush Administration has also sounded the theme of empowering individuals to *choose* faith-based services. As legal scholars Ira Lupu and Robert Tuttle observe, the Bush Administration has ardently embraced the U.S. Supreme Court's 2002 decision, *Zelman v. Simmons-Harris*, in which the Court upheld the constitutionality of an Ohio school voucher program, which allowed parents to choose to use public tuition aid for either a public or private school, including private religious schools.[94] *Zelman* distinguished between impermissible direct governmental aid to religious schools and permissible indirect funding, stating that Establishment Clause jurisprudence had "remained consistent and unbroken" on the point that "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," do not offend the Establishment Clause.[95] So long as a government program is "neutral with respect to religion," that is, it allocates aid on the basis of criteria that neither favor nor disfavor religion and has not "deliberately skewed incentives toward religious schools," and government money flows to religious institutions only as a result of "genuine and independent private choice," then such a program cannot be said to carry "the

91. *Id.*; *see also* Bush, Remarks on Faith-Based Leadership, *supra* note 85 (recognizing the contribution of faith-based organizations to reduced crime and addiction rates).

92. Bush, Remarks on Faith-Based Leadership, *supra* note 85.

93. *See id.* (arguing that the role of government should be to fund, not "micromanage," faith-based programs).

94. Lupu & Tuttle, *supra* note 2, at 66–68 (discussing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

95. *Zelman*, 536 U.S. at 649 (citing Mueller v. Allen, 463 U.S. 388 (1983)).

imprimatur of government endorsement" of any particular religious message.[96]

The "architects" of the faith-based initiative, Lupu and Tuttle point out, "quickly recognized the possibilities that *Zelman* opened for public financing of faith-intensive social services."[97] Within a few years after *Zelman,* most federal agencies had promulgated rules identifying the "special constitutional status of indirect financing of social welfare services."[98] In his 2003 State of the Union address, President Bush advocated a voucher program for funding substance-abuse treatment programs.[99] At the various White House National Conferences on Faith-Based and Community Initiatives, he has pledged to support individual choice programs that empower individuals to decide which program suits their needs.[100]

The implication that a faith-infused program is the best choice individuals can make to address certain problems, such as drug addiction, is evident in Bush's speeches endorsing voucher programs. At the First White House Conference on Faith-Based and Community Initiatives, Bush sought Congressional support for his Access to Recovery program, allowing addicts to choose the program that best meets their needs. He stated:

> I will tell you—I will tell you, the cornerstone of any good recovery program is the understanding that there is a Higher Being to which—to whom you can turn your life, and therefore save your life. It is the crux of many, many a successful addiction program. It—and our government ought to understand that. Congress needs to provide ample money for the Access to Recovery initiative to help addicts change their lives, by saving their lives.[101]

Once again, Bush's own personal experience of recovery from alcoholism through salvation seems to undergird his faith in the power of faith.

Perhaps because of congressional concern over constitutional questions posed by governmental unleashing of the power of faith, the

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96. *Id.* at 640–55.

97. Lupu & Tuttle, *supra* note 2, at 66.

98. *Id.* at 66–67.

99. *See* President George W. Bush, State of The Union Address (Jan. 28, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html ("[T]onight I propose a new $600 million program to help an additional 300,000 Americans receive treatment over the next three years.").

100. Bush, Remarks on Faith-Based Leadership, *supra* note 85; Bush, Compassion, *supra* note 15 (mentioning Access to Recovery program, which gives money to the addict to "choose the program that is best for her or him").

101. Bush, Compassion, *supra* note 15.

faith-based initiative, notably, has been implemented largely through Executive Orders by President Bush rather than through federal legislation.[102] The Supreme Court has recently held that this avenue of implementation through the executive branch, rather than Congress, limits taxpayer standing to bring Establishment Clause challenges to the initiative.[103] Concerns about directly funding religion and federal funding of discriminatory religious hiring have proven stumbling blocks to implementing legislation. The Bush Administration has consistently insisted that faith-based organizations should not have to give up their "religious hiring rights" in order to receive federal money, and various attempts to find compromise legislation proved unsuccessful.[104]

One item approved by Congress, at a much lower level of funding than that proposed by the Administration, is the Compassion Capital Fund, intended to function as a source of venture capital for charities.[105] Created in 2002, the Fund authorizes competitive grants to "'intermediary' institutions that bridg[e] the gap between government and small charities."[106] Part of Bush's initiative, after all, was to expand the capacity of the *local* faith-based and community groups and enable them to provide better services. This fund was intended to enable larger nongovernmental groups to expand their own programs as well as help smaller ones.

How funds were initially allocated under the Fund is instructive on the question of unleashing versus harnessing the power of faith. Kuo contends that the initial $30 million grant allocation under the Fund (administered by the Department of Health and Human Services) was

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102. *See* Lupu & Tuttle, *supra* note 2, at 8–14 (outlining a series of Executive Orders in Bush's first term); *see also* Exec. Order No. 13,279, 71 Fed. Reg. 28543 (Dec. 12, 2002) (calling for faith-based organizations to have an equal opportunity to receive federal grant funding); Exec. Order No. 13,397, 71 Fed. Reg. 12275 214 (Mar. 7, 2006) (outlining the Department of Homeland Security's responsibilities with respect to faith-based organizations). President Bush has attributed his use of executive orders to Congress's failure to pass legislation. *See* President George W. Bush, Remarks to Urban Leaders on Faith-Based Initiative (July 16, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/07/print/20030716-2.html.

103. Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2568 (2007).

104. *See* WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY, INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED 1 (2007), *available at* http://www.whitehouse.gov/government/fbci/booklet.pdf (arguing for reduced restrictions on federal funding for faith-based organizations); Bush, Remarks on Faith-Based Leadership, *supra* note 85. For an insider account of Bush's motivation, see KUO, *supra* note 57.

105. KUO, *supra* note 57, at 212. Grants awarded under the Compassion Capital Fund are given pursuant to Section 1110 of the Social Security Act, which authorized "demonstration projects." 42 U.S.C.A § 1310(a)(1) (West Supp. 2005).

106. KUO, *supra* note 57, at 213.

transparently biased toward organizations politically friendly to the Bush Administration, in particular evangelical and conservative Christian groups and against secular nonprofits. The ratings given to applicants by the "overwhelmingly Christian" group of peer reviewers, Kuo contends, were "a farce": well-established national organizations with proven track records, like Big Brothers/Big Sisters of America and Public/Private Ventures, scored lower than the Jesus and Friends Ministry from California, "a group with little more than a post office box," and a completely new group, "We Care America," with a staff of just three Republicans, all Washington insiders.[107] Notwithstanding official grant review instructions to evaluate applicants objectively, such reviewers self-consciously favored Christian applicants over nonreligious ones and, as Kuo observes, this comported with their understanding of what the faith initiative was supposed to do: "help Christian groups" and, in so doing, help people "to know Jesus."[108] Kuo concludes that this bias conflicted with the OFBCI's goal of "equal treatment for faith-based groups, not special treatment for them."[109] However, special treatment does seem to flow logically from the emphasis on unleashing the unique power of faith to "get results" and to save Americans one soul at a time.[110]

D. The Impact of the Faith-Based Initiative

Just how much of an impact has the faith-based initiative had? By what criteria should it be assessed? In this Part, I will consider several different criteria. One criterion is the impact of the initiative on the way that government does business: is the federal government now reaching out more to faith-based and community groups as partners and recipients of governmental funds? In other words, is the "unlevel" playing field the initiative sought to address now more level? Another criterion is what results the initiative has achieved with respect to its stated aim of unleashing more compassion and more money to address poverty and to reach people left out of the American dream. A related

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107. *Id.* at 213–14.

108. *Id.* at 215–16 (recounting personal conversation with member of the initial peer-review group).

109. *Id.* at 216.

110. The Compassion Capital Fund's methods for awarding grants, which are stated to be open to religious and secular groups, have since been upheld against a challenge that CCF impermissibly favored religious applicants. *See* Freedom From Religion Found., Inc. v. Towey, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444 at *28–*29 (W.D. Wisc. Jan. 11, 2005); IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2006: LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 19–32 (2006) (discussing the constitutionality of CCF program).

inquiry, which Part III will take up, is whether faith-based and community groups are proving to be, as the initiative posited, uniquely effective at addressing poverty and other social problems. Finally, what impact is the initiative having on constitutional law and understandings of the separation of church and state?

The initiative has clearly had an impact in terms of new institutional structures. In addition to the OFBCI itself, a dozen federal departments now have "Agency Centers for Faith-Based and Community Initiatives" charged with including faith-based and community groups.[111] The stated purpose of these Centers is to "coordinate" efforts within the respective governmental department to eliminate any "obstacles" to faith-based and community groups' participation in providing "social and community services," both by identifying any discriminatory policies and practices and by affirmative outreach to incorporate such groups "to the greatest extent possible" in departmental programs and initiatives.[112] As an indicator that the initiative is getting "results," the White House reports that "faith-based organizations are consistently winning a larger share of competitive funding."[113] A parallel impact on institutional design is evident at the level of state government. By the end of 2005, twenty-seven states "ha[d] enacted legislation that includes reference to FBOs [faith-based organizations], either as potential participants in social service program functions, or more directly in legislation intended to increase state/FBO partnerships."[114]

If one looks to the stated goal of the original blueprint of the initiative, that is to help the poor and others left out of the American dream to share in material prosperity, a less positive report card is in order. The assessment of the Working Group on Human Needs and Faith-Based and Community Initiatives, a diverse group brought together with the encouragement of Senators Santorum and Lieberman to make recommendations about public-private partnerships to fight poverty, is that "the public investment of governmental resources in effective programs to overcome systemic poverty and injustice has fallen short for many decades."[115] The Working Group points

111. For a listing of these governmental departments and agencies, see White House Faith-Based and Community Initiatives Home Page, *supra* note 6 (listing the departments and agencies).

112. Exec. Order No. 13,397, 71 Fed. Reg. 12275 214 (Mar. 7, 2006).

113. Press Release, The White House, Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need (March 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/print/20060309-3.html (last visited Mar. 8, 2007).

114. Ragan & Wright, *supra* note 7, at i.

115. HARNESSING CIVIC AND FAITH-BASED POWER TO FIGHT POVERTY, *supra* note 10, at 3.

specifically to the fact that Congress has never adopted the charitable tax deductions proposed by Bush in 2001.[116]

Disillusionment over the gap between the initiative's promise to create billions of dollars of investment in antipoverty work through tax reforms and the level of actual funding of the initiative permeates Kuo's assessment of the initiative. Rather than expanding funding of social service provision for the poor, he contends that the initiative has, at best, shifted some funds in the direction of some faith-based groups.[117] He attributes this to a lack of support among Bush's White House staff for the initiative, leading to a failure to push in Congress for implementing legislation, as well as to intractable conflicts over religious discrimination in hiring.[118] The White House, he charges, did use the initiative for political ends—to ensure support for Bush among conservative Christians and to expand Bush's support base among traditionally Democratic groups, like African-American religious leaders and congregations through such methods as holding regional conferences to educate religious groups about the initiative.[119] "In the end," he contends, "the compassion initiative was personally important [to President Bush], politically significant—and policy that wasn't ever going to be implemented."[120]

If one assesses the faith-based initiative through a different lens, say, that of its impact on constitutional law and church-state policy, perhaps a different estimate of its impact is in order. Lupu and Tuttle contend that the faith-based initiative "represents a provocative challenge to our constitutional tradition concerning the relationship between the state and religious institutions."[121] Considering the "roiling social passions and conflicting jurisprudential visions that lie beneath" our dynamic church-state jurisprudence, the faith-based initiative promises to "push the Constitution, but the Constitution will push back."[122]

As an example of the initiative pushing the Constitution, they critique the Bush Administration for failing to give government officials and potential service providers adequate guidance on what government may *not* directly fund. OFBCI guidelines, for example, state, "The United States Supreme Court has said that faith-based organizations may not

116. *Id.* at 15.
117. KUO, *supra* note 57, at 240.
118. *Id.* at 211, 238–40.
119. *Id.* at 212.
120. *Id.* at 258.
121. Lupu & Tuttle, *supra* note 2, at 3.
122. *Id.* at 4–5.

use direct government support to support 'inherently religious' activities," and define such activities as "religious worship, instruction, or proselytization."[123] This statement of constitutional prohibition, Lupu and Tuttle contend, is "accurate, but incomplete," because it may suggest that those three examples exhaust the range of religious activities government may not fund. Thus, a reader of these guidelines might conclude that social services with significant religious content are eligible for direct government funding, which is incorrect.[124] The guidelines stress the permissibility of having a religious *motive* for providing social services, but do not address whether it is permissible to have a faith-infused *message* or *method* in providing the service itself.[125]

However, the Constitution has pushed back. Nearly all the lawsuits challenging government aid to faith-based organizations have involved faith-intensive social services. In each case, the courts have reaffirmed the constitutional principle that direct public aid may not support social services with a religious character.[126] Courts have affirmed that government may not *directly* fund religious indoctrination, even if governmental officials believe it may be the most effective method of addressing a legitimate, secular governmental end, such as rehabilitating prisoners.[127] Notwithstanding some of the Bush Administration's rhetoric about focusing on results, not process, federal officials charged with administering the initiative also seem to recognize this bar on direct funding of religious messages, even if past monitoring efforts have been less than adequate. In explaining the bar on proselytizing,

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123. *Id.* at 76–78 (citing WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT 10 (2006), *available at* http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf).

124. *Id.* at 77.

125. *Id.* at 78. The Department of Health and Human Services ("DHHS") has stated, "Some organizations may regard these same activities as acts of mercy, spiritual service, fulfillment of religious duty, good works, or the like." *Id.* As discussed in Part III, some DHHS officials have clarified that if faith-based groups believe that religious conversion is the key element in their service, then they should not apply for—and will not receive—direct governmental funds. See infra note 128 and accompanying text.

126. *Id.* at 86.

127. *See, e.g.*, Christianson v. Leavitt, 482 F. Supp. 2d 1237, 1243 (W.D. Wash. 2007) ("One of the few absolutes in Establishment Clause jurisprudence is the 'prohibit[ion against] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.'") (citing Bowen v. Kendrick, 487 U.S. 589, 611 (1988)); Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 878 (S.D. Iowa 2006) (enjoining a faith-based rehabilitation program from working with prisoners while it received federal funds).

Dr. Wade Horn, during his tenure at the Department of Health and Human Services ("DHHS"), explained that if a faith-based organization believes that the "active ingredient" in the delivery of its services is "bringing someone to faith," it should not "under any circumstances apply for and accept federal funds."[128] When the American Civil Liberties Union ("ACLU") brought a constitutional challenge to DHHS's direct funding of an abstinence-only program suffused with Christian content (the Silver Ring Thing ("SRT")), DHHS adopted "required safeguards" for future funding of the program that clarify that religious materials should not be part of a federally-funded abstinence program.[129] DHHS, which settled the lawsuit, has not resumed funding SRT, but Lupu and Tuttle argue that these safeguards are the most important guidance given to date by DHHS about what government may and may not directly fund.[130]

By the same token, following the Supreme Court's allowance, as confirmed in *Zelman*, of indirect funding by government of religious activities as a result of genuine, private choice, courts have upheld governmental schemes that allow money to flow to faith-infused programs where the program is open to secular and religious service providers and where recipients have an array of choices.[131] A simple, if overstated, contrast would be that government, through direct funding, may harness and, through indirect funding, may unleash. When it funds directly, government may harness the energy or power of faith-based groups, motivated by their faith, to help the poor, rehabilitate prisoners, or educate teens about abstinence. To honor the constitutional prohibitions on direct funding of religious indoctrination, government must also harness such groups in the sense of restricting or restraining them from using religion as the "active ingredient" in the social service they provide. One apparent impact of the initiative has been to

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128. *Plenary Session: Pre-Wedding Vows to Say No: Faith-Based Organizations and Abstinence Education, in* PARTNERING WITH FAITH: ASSESSING GOVERNMENT ALLIANCES WITH RELIGIOUS GROUPS IN KEY SERVICES AREAS (Roundtable on Religion and Social Welfare Policy, 2006), *available at* http://www.religionandsocialpolicy.org/docs/events/2006_annual_conference/2006-Abstinence-Education-transcript.pdf (last visited Sept. 15, 2007).

129. Press Release, American Civil Liberties Union, ACLU Applauds Federal Government's Decision to Suspend Public Funding of Religion by Nationwide Abstinence-Only-Until-Marriage Program (Aug. 22, 2005), http://www.aclu.org/reproductiverights/gen/20124prs20050822.html. DHHS suspended federal funding to the Silver Ring Thing as part of a settlement after the ACLU challenged it in federal court. *Id.*

130. Lupu & Tuttle, *supra* note 2, at 101–05.

131. *See* Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 882–84 (7th Cir. 2003) (affirming the dismissal of a suit against a religiously-oriented halfway house because offenders could choose to attend other programs).

reinforce that neither religious ("sectarian") identity nor religious motivation disqualifies religious groups from being direct partners with government, nor renders the social services they provide impermissibly religious.[132]

By contrast, through indirect funding, which results from individual choice, government may unleash the power of faith-based groups, in the sense of setting them free to tackle social problems with the methods and message they choose, even if these are faith-intensive and have religious content. In his emphasis on results, not process, President Bush has stressed this element of unleashing: armies of compassion should be unfettered in their efforts to transform and heal lives one at a time. Admittedly, this unleashing/harnessing contrast is overstated because, even with indirect funding, faith-based groups are harnessed when government, in keeping with Establishment Clause jurisprudence, imposes requirements that they not discriminate among recipients and not compel religious worship. But this contrast serves as a useful device to help address some important, but unresolved, questions about the initiative. Some questions concern the significance of religious identity: are faith-based groups uniquely effective only if they are fully unleashed, and, thus, ineligible for direct governmental funding? If so, will harnessing them, to make them eligible, impair their effectiveness or corrupt their mission or message? Other questions concern what public-private partnerships suggest about the respective functions of civil society and the state. A final cluster of questions concerns the role that public values and constitutional norms should play in such partnerships. I turn now to these lingering questions.[133]

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132. *Christianson*, 482 F. Supp. 2d at 1245 (citing *Bowen*, 487 U.S. at 613).

133. Assessing the impact of the faith-based initiative also requires looking beyond U.S. borders, although such an assessment is beyond the scope of this Article. The Bush Administration has placed an increased emphasis on including faith-based programs in the U.S. Agency for International Development's foreign aid and conservative religious organizations have shown a keen interest in participating in governmental efforts to address global issues like HIV, malaria, and human trafficking. Lupu & Tuttle, *supra* note 2, at 112 (discussing U.S. Agency for International Development rules programs); *First Lady Laura Bush Addresses Compassion in Action Roundtable*, OFBCI NEWSLETTER, Feb. 19, 2007, at 1 (malaria efforts). In early 2007, for example, the OFBCI convened a Compassion in Action Roundtable on "Controlling Malaria in Africa—The Unique Role of Faith-Based and Community NGOs." This global reach of the initiative is striking given that the early speeches about the initiative and the blueprint both stressed addressing the unfulfilled American dream—those who remain in poverty—as the social problem warranting innovative public-private partnerships. Notably, in addressing the Roundtable, current OFBCI Director Jay Hein explained the unique capacity and efficacy of these grassroots NGOs in Africa not in terms of a particular faith-infused message about malaria or method of addressing it. Jay Hein, *The Last Mile of Service*, OFBCI NEWSLETTER, Feb. 19, 2007, at 3. Rather, such NGOs provide "the last mile of service," that is, they are "the only organization that can be found in nearly every village across the continent and

III. LINGERING QUESTIONS ABOUT THE FAITH-BASED INITIATIVE: UNLEASHING OR HARNESSING?

In this Part, I employ the contrasting images of unleashing and harnessing armies of compassion to take up some lingering questions about the faith-based initiative. These questions cluster around (1) whether and why the identity of faith-based and community groups matters, including what role faith plays in effective delivery of social services, (2) how the faith-based initiative relates to broader issues about the relationship between government and civil society, and (3) whether and how important public values and constitutional commitments should inform public-private partnerships.

A. Why Does Identity Matter?

Why does the identity of faith-based and community groups matter? The initiative seeks to enlist, empower, expand, enable, and equip such groups because compassionate conservatism assumes the distinctive character of faith-based groups gives them the unique capacity to be inspired and effective and "get results."[134] The inclusion of *community* groups also highlights the importance of the locality, and of location to the initiative: it situates needy persons and the organizations that help them as part of communities. Proponents of the initiative speak of including those members of society who have not shared in material prosperity and of meeting the needs of poor neighborhoods.[135] The goal is to aid them in achieving material prosperity and, when appropriate, integrate them back into community values and shared norms of personal responsibility.[136] Moreover, in focusing upon the "grass-roots," and upon "neighborhood healers" and heroes, the initiative rejects "the failed formula of towering, distant bureaucracies" in favor of "steering resources to the effective and to the inspired"[137]—

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they are widely seen as a problem-solving institution." *Id.*; *see also Gallup Poll Demonstrates Confidence in Religious Institutions*, OFBCI NEWSLETTER, Feb. 19, 2007, at 1–2 [hereinafter *Gallup Poll*] (reporting that Africans placed a high level of confidence in religious organizations fighting malaria). Moreover, by contrast to the high mistrust of corruption of government and other formal institution, poll data finds that Africans have high levels of trust in religious organizations. *Gallup Poll*, *supra* at 3. A more controversial foreign aid example, where a faith-infused message seems to be an inextricable part of the service provision, would be the Administration's preference for HIV prevention programs that teach abstinence until marriage, to the neglect of contraception.

134. Bush, *Foreword*, *supra* note 37.

135. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

136. *Id.*

137. Bush, *Foreword*, *supra* note 37.

those who are members of communities with presumably superior local knowledge.

Thus, the initiative suggests that identity matters both in terms of faith and of location. It praises faith as a motive for service delivery and favors the small and the local over the large and the national.[138] Identity as "faith-based" appears to matter not only as to motive, but, as I have contended above, as to method and message. The frequent image of "unleashing" faith-based groups implies a freedom from restraint or interference. The premise behind the faith-based initiative is that armies of compassion need to be rallied and unleashed in order to achieve public purposes.[139] The initiative acknowledges the long history of the federal government enlisting the nonprofit sector, including religiously affiliated providers, as partners in this goal.[140] The initiative aims to expand that practice; government's role must "move beyond funding traditional non-governmental organizations."[141] It states, "Americans deserve a rich mix of options because when it comes to conquering addiction, poverty, recidivism, and other social ills, one size does not fit all."[142] An animating premise is that these less traditional partners—faith-based and grass roots groups—can do what government bureaucrats cannot: "put hope in our hearts" and "a sense of purpose in our lives," and supply "a quiet river of goodness and kindness that cuts through stone."[143]

In the blueprint itself, and from his earliest to his most recent speeches, President Bush has stressed that government cannot provide "love."[144] To be sure, my unleashing/harnessing distinction may not always be crisp, since a fair reading of the initiative is that it seeks to *harness* the power of love by utilizing groups motivated to do good works by the religious mandate to love one's neighbor as oneself. But this emphasis on love also suggests a distinctive form of service

138. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

139. Bush, *Foreword*, *supra* note 37.

140. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (noting that when faith-based and grassroots organizations reach out to needy neighbors, "they often help in ways that government programs cannot, providing love as well as services, guidance and friendship as well as a meal or training. These are precious resources, great gifts of American society"); *see also* Bush, Compassion, *supra* note 15 ("Governments can hand out money. But governments cannot put love in a person's heart or a sense of purpose in a person's life."); Bush, Highlighting, *supra* note 17 (remarking, after describing the importance of love in the Teen Challenge program: "See, government can pass law and it can hand out money, but it cannot love").

delivery. Bush has stated his "faith in the power of faith" to solve social problems, and has spoken of changing America "one heart, one soul, one conscience at a time."[145] Describing himself as a "one-man faith-based program," he depicts alcoholism as an "addiction . . . of the heart" and his recovery as due to changing his heart.[146] Thus, I interpret the image of "unleashing" armies of compassion to refer not just to putting faith-based groups on a level playing field in government contracting but also to setting them free to address human problems with their own distinctive world views and methods.

This suggests that the *identity* of the social service provider matters, precisely because of the distinct *approach* taken by the service provider. That is, the service provider provides love—and hope—along with the service.[147] And yet, the faith-based initiative emphasizes that "results," not the identity of the service provider, should be the key issue.[148] But this emphasis on results, not identity, may simply reflect the initiative's conviction that faith-based groups have been wrongly excluded in the past from government contracting and that they deserve a "level playing field."[149] This is entirely consistent with a further conviction that, on this playing field, government has good reasons to reach out to and favor such groups precisely because the fact that they *are* faith-based or located in the community makes them uniquely situated to address certain social problems that require healing and compassion by the provider and personal transformation on the part of the recipient. The Bush Administration's subsequent speeches about faith and healing as an important solution to poverty reinforce this impression.

Is there something unique about the services of faith-based providers in comparison to other nongovernmental service providers? As the initiative was launched, John DiIulio, then head of the OFBCI, stated:

> [W]e do not yet know either whether America's religious armies of compassion, local or national, large or small, measurably outperform their secular counterparts, or whether, where the preliminary evidence suggests that they might, it is the 'faith' in the 'faith factor,'

145. Bush, New Director, *supra* note 66.

146. Bush, Faith-Based Leaders, *supra* note 14 (addressing a New Orleans church concerning his faith-based initiative).

147. RALLYING THE ARMIES OF COMPASSION, *supra* note 33, at 8 (noting that faith-based initiatives attack addiction with faith and love); Bush, Highlighting, *supra* note 17 (discussing the need to provide love to those in need of mentorship and noting that the government can only legislate, not love).

148. *See* Bush, *Foreword*, *supra* note 37 ("The paramount goal must be compassionate results."); UNLEVEL PLAYING FIELD, *supra* note 47, at 18 (stating that officials should ask not "Who are you?" but rather "What can you do, and how well can you do it?").

149. UNLEVEL PLAYING FIELD, *supra* note 47, at 20.

> independent of other organizational features and factors, that accounts for any observed differences in outcomes.[150]

These empirical questions linger. Thus, one report finds "little systematic evidence" on how the effectiveness of faith-based providers compares with that of other social service providers, and "virtually no evidence" on whether and how differences in performance relate to the "faith character" of service providers.[151] The few comparative studies to date do not yield any simple answers to what difference faith makes, and themselves call for further study.[152] As I will explain, such studies also suggest that the line between secular and religious organizations is less salient, in some respects, than other kinds of distinctions: governmental/nongovernmental, nonprofit/profit, large/small, and, among faith-based organizations themselves—nonprofit service organizations versus congregations and faith-segmented versus faith-integrated organizations. Here, I identify and comment on these lingering questions, using the contrasting imagery of unleashing and harnessing to help situate them.

One study suggests that differences in institutional competency may exist between the so-called "third sector" of nonprofit organizations, on the one hand, and government and the market, on the other. The study argues that the "third sector [contrasted with government and the market] tends to be best at performing tasks that generate little or no profit, demand compassion and commitment to individuals, require extensive trust on the part of customers or clients, need hands on, personal attention . . . and *involve the enforcement of moral codes and individual responsibility for behavior.*"[153]

Does it follow, however, that these tasks are something that faith-based groups do best? One scholar, Charles Glenn, contends that:

> While there are certainly structural barriers to opportunity for poor families, for the handicapped and the addicted, for those whose race or national origin makes them subject to discrimination, it has become

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150. J. DiIulio, Jr., *Foreword to Objective Hope—Assessing the Effectiveness of Faith-Based Organizations: A Review of the Literature*, CENTER FOR RESEARCH ON RELIGION AND CIVIL SOCIETY 8 (Dec. 2004), *available at* http://www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf.

151. Mark Ragan, *Faith-Based vs. Secular: Using Administrative Data to Compare the Performance of Faith-Affiliated and Other Social Service Providers*, ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, at Executive Summary (Dec. 2004), *available at* http://www.socialpolicyandreligion.org/docs/research/Benchmarking_report_12-23-04.pdf.

152. *See infra* notes 178–185, 194–200, 203–208 and accompanying text (discussing studies by Stephen Monsma and Robert Wuthnow).

153. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT 46 (1992) (emphasis added).

> increasingly obvious that the choices people make have a major effect upon their life chances. Faith-based organizations are especially well equipped to affect how people make choices.[154]

Indeed, an influential architect of "compassionate conservatism," Marvin Olasky, argued in *The Tragedy of American Compassion* that the welfare policy of the New Deal and the War of Poverty of the 1960s went grievously wrong in departing from earlier principles of good philanthropic practice.[155] Earlier practice shunned "indiscriminate" monetary relief—"foolish" compassion—and insisted upon "discernment" of the circumstances of the poor, true compassion, in the sense of personal involvement with the poor, and faith in the important role of God's grace as a transformative force in the lives of the poor.[156] In a subsequent book, *The Theology of Welfare: Protestants, Catholics, & Jews in Conversation about Welfare,* Olasky and other conservative religious thinkers stress the theme that sin and repentance are basic features of the human condition that explain most poverty and that personal, local knowledge of the poor, and an insistence by those who would help them that the poor be willing to change, is vital.[157]

The faith-based initiative appears to rest on similar assumptions. It focuses on personal, or behavioral, rather than structural diagnoses of the causes of poverty, and it affirms the transformative power of personal involvement with the needy by those closest to them.[158] Compassionate conservative theorist Olasky expresses confidence that a "level playing field" in a new welfare system, which would include religious and non-religious organizations, would vindicate such religious approaches; he calls for a test to see "what really works and what doesn't work," and, invoking the biblical contest between the prophet Elijah and the prophets of Baal, to "see where fire comes down from heaven."[159]

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154. CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL SERVICE AGENCIES 288 (2000).

155. MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION 99–115 (1992).

156. *Id.*

157. *See* THE THEOLOGY OF WELFARE, *supra* note 21, at 156–62 (remarks by Olasky and Amy Sherman, Adjunct Fellow at Manhattan Inst. and Dir. of Urban Ministry at Trinity Presbyterian Church, Charlottesville, Virginia) (stressing that the poor should be given aid as a means to the end of bettering themselves, not becoming complacent in poverty, and that benefactors should take this into account before choosing what form of aid to give).

158. Jim Towey, the new Director of OFBCI, stated: "Mother Teresa introduced me to this joy that comes from befriending those in need, and discovering their tremendous dignity." Bush, New Director, *supra* note 66.

159. THE THEOLOGY OF WELFARE, *supra* note 21, at 160 (remarks by Olasky, referring to 1 *Kings* 18).

The report, *Unlevel Playing Field*, indicates that it is *local,* "grass roots," "neighborhood-based" groups, whether religious or secular, that may be uniquely situated to meet social needs better than the larger, more distant nonprofit groups who "monopolize" government contracts and funding.[160] The proximity of the group to the needy gives it the useful local knowledge it needs to be effective. This preference for the local, or smaller unit, is also an element of the Roman Catholic principle of subsidiarity. Pope John Paul II criticized what he viewed as "an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients," with a resulting "loss of human energies" when these smaller units are deprived of their responsibilities.[161] He stated, "it would appear that needs are best understood and satisfied by people who are closest to [the clients] and who act as neighbours to those in need."[162] Subsidiarity also requires that when the smaller units cannot carry out their function, the larger community must support them and help to coordinate their activity, "always with a view of the common good."[163] A parallel notion of support might be seen in the initiative's emphasis on building the capacity of faith-based and community groups because of their distinctive identity. It assumes that we ought to empower, equip, enable, enlist, and expand faith-based and community-based groups because there is a "growing consensus" that they are especially effective in delivering services and achieving civic purposes.[164]

If the service provider's identity matters then partnerships between faith-based organizations and government pose a quandary, well-captured in the title of Charles Glenn's book, *The Ambiguous Embrace*.[165] Is it possible for faith-based providers to accept government funds and be subject to regulation without destroying the distinctive character that makes those groups effective? Will such groups end up being mere "agents" of government, delivering social services at the government's request, or will they become genuine

160. UNLEVEL PLAYING FIELD, *supra* note 47, at 7–8.

161. Pope John Paul II, *supra* note 21, §48.

162. *Id.*

163. *Id.*

164. Bush, *Foreword*, *supra* note 37 ("[W]e must heed the growing consensus across American that successful government social programs work in fruitful partnership with community serving-and faith-based organizations."). The blueprint offers an agenda to "enlist, equip, enable, empower, and expand the heroic works of faith-based and community groups across America." *Id.*

165. *See generally* GLENN, *supra* note 154. Glenn credits Peter Berger and Richard Neuhaus's earlier warnings about a "too eager embrace" in their 1995 book, *To Empower People: From State to Civil Society. Id.* at 3.

"partners" with government, retaining their autonomy and distinctive identity?[166] Stanley Carlson-Theis, a policy analyst who was formerly with the OFBCI, uses the term "vendorism" to describe a process in which government grants end up diverting the priorities of charities, changing their direction and turning them into mere vendors of government programs.[167]

Much of the controversy over whether religious organizations that receive direct governmental funding should retain their exemption from antidiscrimination laws concerning hiring stemmed from a concern that prohibiting them to use religion in hiring would compromise their religious mission. As noted above, President Bush and Olasky have strongly urged that restricting groups from using religious methods would destroy their effectiveness.

Appeals to the unique capacities of such groups rest on an idea that the integration of faith-based approaches into the provision of social services would secure better results. A key concern for proponents of expanding the use of public-private partnerships to meet social needs remains the question of how to incorporate faith-based groups into partnerships with government without sacrificing the groups' integrity. Strict separationists, by contrast, worry that any step down this path of funding faith-based groups establishes taxpayer-supported religion because there are inadequate safeguards against proselytizing and excessive entanglement of government with religion.[168]

The dual scheme of harnessing, in the form of barring recipients of direct governmental funding from proselytizing, and unleashing, in the form of indirect funding like voucher schemes, is one way that the Bush Administration has responded to this concern. But this leads to a puzzling state of affairs, which former DHHS official Wade Horn

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166. *Id.* at 266–95 (discussing the problems encountered and benefits derived from the choices of faith-based organizations).

167. Stanley Carlson-Thies, *Faith-Based Institutions Cooperating With Public Welfare: The Promise of the Charitable Choice Provision, in* WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 29, 36 (Derek Davis & Barry Hankins eds., 1999). On this concern, see also David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1367 (2003) (noting that government funding can both divert an organization's mission and erode its character).

168. The website for Americans United for Separation of Church and State, for example, states: "The so-called 'faith-based' initiative is a euphemism for taxpayer-supported religion. The initiative funnels taxpayer dollars to religious and social service providers without adequate safeguards to prevent proselytism. In addition, these groups seek to discriminate in hiring based on religion even though their programs are publicly funded." Americans United for Separation of Church and State, Our Issues: "Faith-Based" Initiatives, *available at* http://www.au.org/site/PageServer?pagename=issues (visited October 4, 2007)

implicitly identifies. Horn admonishes that groups who believe that "bringing someone to faith" is the "most active ingredient" in their service provision should not apply for and accept federal funds.[169] But he further admonishes that if such a group takes out the active ingredient just to get federal funds, then they have transformed their social service delivery system into merely a "placebo."[170] The risk he points to is that faith-based groups will remove the very quality that supposedly makes them uniquely effective merely to get government funds.[171] In other words, government does not wish to harness the power of faith when doing so compromises it. A different risk, in terms of establishing religion, is undetected unleashing: such groups will remove explicit religious references, but the religiously-based messages, however veiled, will remain.[172]

The foregoing discussion suggests that, for proponents of the initiative, the identity of faith-based groups matters not only because they are motivated to do good works, but also because, it is argued, their religious method of providing services is uniquely effective. Three lines of response seem apt. First, the emphasis on personal transformation as key to healing the poor and disenfranchised seems to displace a different rhetoric about poverty: that of advancing economic and racial justice. References in the "blueprint" to helping poor neighborhoods share in economic prosperity might seem to suggest that the solution is redistributive measures, which would seem to be more the provenance of government.[173] Yet the document as a whole, with its references to "healers," compassion, and the examples of healing, efforts such as fighting drug addiction and gang membership, reflects the assumption that pressing social problems often are rooted in moral problems of unwise and irresponsible choices, behaviors, and in sin.[174] The document further assumes that faith-based and community providers do best addressing these problems. Kuo reports that he became enamored of then-Governor George W. Bush when he spoke of an agenda to help the poor to realize the American Dream in his

169. *Plenary Session*, *supra* note 128, at 8.

170. *Id.*

171. *Id.*

172. I will address this risk in Part III.C. A practical example of this risk is when religious groups create public school versions of abstinence-only programs, eligible for public funding, which eliminate explicit religious references but not religiously-based messages about marriage as the only proper place for sex. *See* JANICE M. IRVINE, TALK ABOUT SEX: BATTLES OVER SEX EDUCATION IN THE UNITED STATES 98–106 (2002) (discussing the religious influence seeping through the "virtual boundary" courts have created between secular and nonsecular teaching).

173. RALLYING THE ARMIES OF COMPASSION, *supra* note 33, *passim.*

174. *Id.*

presidential campaign.[175] Kuo believed that he had finally found a Republican ready to carry on the unfinished business of Robert F. Kennedy.[176] Kuo's own enthusiasm for the initiative, similar to that of DiIulio's, viewed it as a way to get much-needed social services to the poor. In effect, faith was relevant as a motivator to do good works, not, obviously, as a message or method. Kuo notes that themes of personal transformation remained central to Bush's rhetoric about the initiative. Notably, when Kuo wrote a speech for candidate Bush to address the National Association for the Advancement of Colored People ("NAACP"), Kuo's references to "economic justice," "racial justice," and the discussion of wealth and poverty were cut out.[177] Thus, an emphasis on personal conversion takes the place of a discussion of larger, arguably non-religious, social issues.

Second, claims about the unique capacity and competence of faith-based groups invite empirical examination. A study by political scientist Stephen Monsma of six types of welfare-to-work programs in four cities, described in *Putting Faith in Partnerships,* casts doubt on such claims. Monsma's six types of programs are government, for-profit, nonprofit/secular, community-based, faith-based segmented, and faith-based integrated.[178] Faith-based/segmented programs, as Monsma defines them, are programs that keep religious elements separate from social services.[179] Faith-based/integrated are those that "integrate" religious elements into their social services.[180] Several findings are particularly interesting. For one, Monsma's study offers the "preliminary conclusion" that "it is difficult, if not impossible, to distinguish between the levels of concern for clients" on the part of the staff members at the six different providers.[181] Further research is necessary, he concludes, on "the level of compassion, concern, and caring exhibited by the different types of welfare-to-work providers" in order to support or discredit the "conventional wisdom" that workers at government agencies, for profits, and large professional nonprofits are "less caring" than those at smaller community-based and faith-based agencies.[182]

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175. KUO, *supra* note 57, at 126–28.

176. *Id.*

177. *Id.* at 131–32 (balancing a sense of personal disappointment with a sense of optimism that Bush was addressing the NAACP at all).

178. MONSMA, *supra* note 24, at 41–45 (defining these categories).

179. *Id.* at 44.

180. *Id.* at 44–45.

181. *Id.* at 211.

182. *Id.*

Another interesting finding is that both secular and faith-based welfare-to-work programs seek to change clients' values, behaviors, and attitudes.[183] Faith-based groups appeal to general religious values to encourage clients to become self-sufficient and change self-defeating attitudes and behaviors; secular groups do not appeal to religion but, in their own way, try to "convert" the poor to behaviors and attitudes suitable for success in the workplace.[184] Accordingly, he proposes, as a policy guideline, that no program receiving government funds be permitted to require clients to participate in sectarian worship, instruction, or proselytizing, but "broad, value-expressive instruction that is relevant to the goals of a social service program is appropriate even when mandatory or government funded."[185]

How might this distinction play out in specific contexts? For example, in response to a constitutional challenge to a contract between the Iowa Department of Corrections and InnerChange and Prison Fellowship Ministries to provide a "values-based pre-release program," Prison Fellowship argued that its curriculum merely instructed in universal "civic virtues," such as responsibility, that just happened to be presented in an Evangelical Christian form.[186] The federal district court rejected this claim because the program's basic premise was that "an authentic religious experience is the means by which society's civic, or secular, goal—a rehabilitated, pro-social, and productive ex-inmate—is met."[187] Despite InnerChange's invocation of universal civic virtues, the actual curriculum taught to the prisoners was "pervasively sectarian in nature"[188] and it was not possible to separate the "so-called secular civic values . . . from the larger intent of the curriculum, which is to make Christian disciples in the belief that doing so will transform the inmates into pro-social individuals who will not choose to re-offend when released from incarceration."[189]

Governmental funding of nonprofit (including faith-based) groups to engage in abstinence and "healthy marriage" education is another context in which this line drawing about types of value instruction is relevant. As noted above, after a legal challenge, DHHS stopped funding the Silver Ring Thing, an abstinence program emphasizing

183. *Id.* at 210.

184. *Id.* at 113–16.

185. *Id.* at 202.

186. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 875 n.13 (S.D. Iowa 2006).

187. *Id.* at 878.

188. *Id.* at 907.

189. *Id.* at 920.

teens forming a personal relationship with Jesus and adhering to Biblical ideals of purity. By contrast, in *Christianson v. Leavitt*, a federal district court recently rejected a taxpayer challenge to the constitutionality of federal funding of the Northwest Marriage Institute ("NMI"), which provided Bible-based pre-marital and marriage counseling.[190] To qualify for governmental funds, NMI removed all religious references from its website and materials and "shifted its mission" to providing marriage workshops without religious references, adopting a curriculum it claimed was based on secular psychological and sociological principles.[191] The court held that while funding the Institute's initial Bible-based marriage counseling would have violated the Establishment Clause, funding its new, secular services was permissible.[192] To the argument that the new program was the religious curriculum, without reference to religion, the court responded that the fact that some "tenets of a healthy marriage, such as avoiding extra-marital affairs," happen to coincide or harmonize with tenets of some or all religions does not make those tenets sectarian.[193] In other words, if the value instruction is, to use Monsma's term, "relevant to the goals of" marriage education, then it should be permitted.

Robert Wuthnow's book, *Saving America?*, a study of social service provision by religious congregations, is also instructive on whether and why the identity of faith-based groups matter.[194] It challenges some of the basic assumptions about service provision by faith-based groups. Wuthnow concludes that a gap exists between "political rhetoric and local realities."[195] For example, President Bush and other proponents of the initiative repeatedly stress that government cannot love, but that local healers, motivated by love, can transform lives through their loving acts. However, it is not clear that faith-based services provide "love" to a greater degree than secular groups. Wuthnow concludes that faith-based services do make a positive contribution to important "*cultural* norms undergirding civil society, especially by reinforcing trust," but that "they communicate ideals of unconditional love far less often than might be supposed from thinking about these ideals only within the context of religious teachings."[196] In fact, religious

190. Christianson v. Leavitt, 482 F. Supp. 2d 1237, 1247–48 (W.D. Wash. 2007).

191. *Id.* at 1241.

192. *Id.* at 1245–48.

193. *Id.* at 1246.

194. *See generally* ROBERT WUTHNOW, SAVING AMERICA?: FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY (2004) (providing research on faith-based agencies).

195. *Id.* at xvii.

196. *Id.*

congregations, although more numerous than specialized faith-based service organizations, are "less important than more specialized faith-based service organizations as service providers."[197] Wuthnow's findings resemble an earlier study of religious congregations, which found that, in contrast to the blueprint's picture of veritable armies of compassion and neighborhood healers, while most congregations do some social service activity, "only a small minority [of congregations] actively and intensively engage in [social service] activity."[198] The study also found that the empirical picture of congregations contradicts the assumption that "religious organizations engage in social services in a distinctively holistic or personal way."[199] Rather, their service provision is "more commonly characterized by attention to short term emergency needs . . . ."[200]

Religious congregations primarily provide services through informal activities as opposed to formal programs, for example through fellowship circles, Bible studies, classes, and worship services.[201] Yet the activities that religious congregations do best "cannot be replaced by or even reinforced through government support."[202]

Wuthnow echoes other studies finding different faith-based organizations emphasize faith to varying degrees.[203] Faith-based organizations do not usually emphasize religion as much as congregations do, because "there are probably norms of service and professional standards in faith-based organizations that erode the distinctions between these organizations and nonsectarian agencies."[204]

What about claims about the greater effectiveness of faith-based organizations? Wuthnow concludes that although the research is lacking, "it is probably their ability to forge encompassing whole-person, personally transforming relationships with clients that accounts for any special success they may have."[205] He offers the example of Teen Challenge, a Christian substance-abuse program that believes its high success rate is due to personal transformation, encouraged by an

197. *Id.* at xvi.

198. Mark Chaves, *Religious Congregations and Welfare Reform: Assessing the Potential, in* CAN CHARITABLE CHOICE WORK?: COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES 124 (Andrew Walsh ed., 2001).

199. *Id.* at 125.

200. *Id.*

201. WUTHNOW, *supra* note 194, at xvii.

202. *Id.*

203. *Id.* at 149.

204. *Id.*

205. *Id.* at 159.

intensive religious program, stemming from a client's "decision to surrender his or her will to Jesus Christ and to establish a personal relationship with him."[206] Citing other studies, Wuthnow observes:

> What studies like these suggest is that faith-based organizations work best at producing change in individuals and communities when those organizations imitate congregations. That is, the vital ingredient includes religious teachings about hope and redemption, but also grounds these teachings in social relationships that resemble those that occur in congregations.[207]

If this is so, "the faith-based service organizations that are most effective *are* effective for reasons that probably disqualify them from receiving government funding, at least under prevailing understandings of the separation of church and state."[208]

If we modify Wuthnow's statement to say "direct government funding," in light of the Supreme Court's approval of voucher schemes, then he usefully identifies a constitutional problem with directly funding groups that get "results." However, "it is very important to recognize that *relatively few* faith-based organizations actually fit this model," and they concentrate on "a particular kind of client," like a recovering addict or a rehabilitating prisoner, "whereas the wider variety of needs being met by service organizations may not be so easily met in this way."[209] Wuthnow's conclusions lend support to my observation, above, that for President Bush, conversion and transformation are at the core of the faith-based initiative. That model, however, may be inapt for many needed forms of social services.

These studies also suggest that, in any case, the emphasis on building the capacity of neighborhood-based faith- and community-based groups may well be warranted, given empirical studies suggesting that many, if not most, such groups lack the capacity to deliver services on the scale contemplated by the initiative.[210] Monsma's study, for example, finds

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206. *Id.*

207. *Id.* at 160. Indeed, in finding that an Iowa prison's contract with an evangelical Christian program for prisoner rehabilitation violated the Establishment Clause, the federal district court noted that, in effect, prison officials had allowed the establishment of an Evangelical Christian congregation right inside the state prison. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 922 (S.D. Iowa 2005).

208. WUTHNOW, *supra* note 194, at xvii.

209. *Id.* at 160–61.

210. CAN CHARITABLE CHOICE WORK?: COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES (Andrew Walsh ed., 2001) (including several essays finding that what these congregations mostly do is deliver emergency services such as food, shelter, clothing, or money); *see also* Chaves, *supra* note 198, at 124–25 (discussing how more congregations have food projects than health, education, domestic violence, tutoring/mentoring, substance abuse or

that faith-segmented, faith-integrated, and community groups all have "capacity" issues: they tend to be small and would need to grow in size and get help with record-keeping and reporting requirements in order for government to expand partnerships with them.[211] Of course, if government builds capacity in this way, it raises a fairness issue. Why single out these groups because of a belief that if their capacity is greatly expanded, they can serve civic purposes if there are other worthy groups that could also do so, if their capacity was expanded through government aid? Monsma reports, for example, that for-profit and nonprofit/secular providers, with experience and track records as government partners, do not suffer the same lack of capacity problems, but are also eager to expand their services.[212] Why not invest more of the limited governmental funds available in such partnerships? On the logic of the initiative, presumably the rationale for differential investment in capacity building is that the smaller community and faith-based groups need help to ensure a level playing field.[213]

Moreover, a crucial question as to whether government should shift more from governmental to nongovernmental providers in general, and to faith-based and community-groups in particular, depends on whether these faith-based and community groups offer services in a valuably different manner than their secular and for profit counterparts do.[214] Studies to date differ on this question. Wuthnow, for example, cautions against crediting religious organizations for doing more than they actually do, and finds "little evidence that faith-based service organizations necessarily function better than nonsectarian organizations."[215] Other observers find that the distinction between secular and faith-based organizations may be less significant than other distinctions between providers, and that, for both secular and faith-based programs, a key issue is how affinity and hospitality are blended with professional expertise.[216] Moreover, they contend that the broader policy discussion should acknowledge the fact that the efficiencies of some community faith-based groups come from the fact that staff

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work programs).

211. MONSMA, *supra* note 24, at 174.

212. *Id.* at 173–74.

213. *Id.* at 174.

214. *Id.* at 174–75.

215. WUTHNOW, *supra* note 194, at 310.

216. The Roundtable on Religion and Social Welfare Policy, *Breakout Session: The Promise and Performance of Faith-Based Social Services—2005 and Beyond*, at 10 (2004 Annual Conference), *available at* www.religionandsocialpolicy.org [hereinafter *Breakout Session*] (remarks by David Campbell about California's Community Faith-Based Initiative).

members do not receive union wages, in contrast to a government employee at a social service program.[217]

Monsma, by contrast, concludes that faith-based services are distinguishable in several ways and have a distinct contribution, although he also finds similarities among all the six providers he studied, and even moreso between governmental and nonprofit/secular programs. Faith-based programs "offer a higher proportion of life-oriented services" (that is, life skills) in their programs, a large number of them are run mainly by and serve African Americans, and the faith-based/integrated programs "introduce many religious elements" into the services they offer.[218] These differences, in his view, signify the "value added" by faith-based programs, particularly in an area like welfare-to-work, where clients vary greatly in terms of what they need and what approach will be most effective.[219]

Greater diversity does seem to be an appropriate goal in service provision. However, there is little evidence, Wuthnow's study concludes, that governmental funding is an effective tool for achieving this goal.[220] To the contrary, the government contracting process and concerns for public accountability impose a degree of uniformity. In addition, as noted above, the large majority of faith-based service organizations already follow a professional "service-provider model," analogous to secular nonprofits, stressing standards of efficiency and effectiveness.[221] Moreover, he urges religious congregations and the small segment of "specialized faith-based organizations that function like congregations," for which faith is the essential basis for "communal interaction and life-transforming experiences," to be wary of governmental support and to guard against the loss of religious freedom that government contracting would bring.[222]

In a notable point of common ground, Monsma is also wary of governmental funding of congregations. He recommends a policy change in the current initiative—and related Charitable Choice provisions: government should not fund the social service programs of churches and other religious congregations, unless they set them up as

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217. *Id.*

218. MONSMA, *supra* note 24, at 175. A study of California's Community Faith-Based Initiative found that faith-based groups served significantly higher numbers of hard-to-employ individuals, which seemed to explain their lower efficiency in job placement than other groups. *Breakout Session*, *supra* note 216, at 10.

219. *Breakout Session*, *supra* note 216, at 3–4 (remarks by Stephen Monsma).

220. WUTHNOW, *supra* note 194, at 307.

221. *Id.* at 309.

222. *Id.*

separate nonprofits such as 501(c)(3) organizations.[223] His rationale is that, even if such congregations' programs are not any more religious than those of nonprofit religious organizations, such direct governmental funding unnecessarily mixes church and state and seems, more than anything else, to evidence the "slippery slope toward greater and inappropriate church-state collaborations."[224] Moreover, given the comparatively small percentage of programs run by congregations, government does not need such direct funding of congregations to have robust government partnerships with faith-based providers.[225]

My third line of response addresses the fear that partnering with government will destroy or dilute the religious identity or mission of faith-based groups. On this issue, there seems to be a gap between perception and actual experience. One reported reason that religious groups have been reluctant to participate, initially, in Charitable Choice and, more recently, in the faith-based initiative has been a fear they must suppress their religious message and mission in order to obtain governmental funding.[226] A lively debate continues over whether the faith-based initiative and its lure of government funding could "seduce" faith-based organizations and lead them to lose their distinctive mission and approach. As one critic warns, "Bush's proposal may transform [faith-based] charities from institutions that change people's lives [in]to mere providers of services . . . ."[227] This seems to reflect a fear that government, through reporting requirements and restrictions on direct funding of "pervasively" religious elements of a program, will seek to harness such organizations for public purposes, rather than mobilize and unleash them.

This fear seems overstated. The work of Stephen Monsma is an interesting case in point. In *When Sacred and Secular Mix*, his study of government contracting with nonprofits, published before "Charitable Choice" went into effect, even as he warned of the need to protect religious organizations' identity from governmental pressures, he found that the great majority of religious nonprofits felt no pressures from

223. MONSMA, *supra* note 24, at 205.

224. *Id.*

225. *Id.* at 206.

226. *See id.* at 130.

227. Michael Tanner, *Corrupting Charity: Why Government Should Not Fund Faith-Based Charities*, CATO INSTITUTE BRIEFING PAPERS No. 62, Mar. 22, 2001, at 1, *available at* http://www.cato.org/pubs/briefs/bp62.pdf. *Cf.* Joseph Loconte, *The Right's Doubting Thomases Are Wrong*, WALL ST. J., May 22, 2001, at A26 ("[R]ecent experience shows that faith-based groups can learn to negotiate government support, keep their spiritual bearings, and respect the First Amendment.").

government officials to eliminate religious practices and experienced mostly positive effects of such government involvement.[228] His more recent book, *Putting Faith in Partnerships,* noting that there is little systematic research on the problem of vendorism, reaches similar conclusions based on a study of welfare-to-work service providers.[229] He again reports fears by religious organizations of a loss of autonomy, and of intrusive governmental reporting requirements. At the same time, in a section of his book entitled *Shekels without Shackles,* Monsma reports that most nongovernmental entities he studied who did receive governmental funds reported positive effects from their contracts with government.[230] He found that "nongovernmental organizations that enter financial partnerships with [the] government [do not surrender] their autonomy."[231] Thus, "the pluralism of social structures is able to survive even financial partnerships with government."[232] Specifically, faith-based programs (including faith-based/integrated ones) were able to receive governmental funding without curtailing any religious practices.[233] One intriguing finding is that those secular nonprofits that, in contrast to religious organizations, are entirely or nearly dependent upon government for funding may be at greatest risk of such vendorism.[234] Accordingly, he proposes that one way to protect institutional autonomy is to avoid being 100% dependent on government for funding.[235]

This gap between perception and experience brings to mind Kuo's recounting that, while Jim Towey was Director, the OFBCI was supposed to prepare a White House report on "how faith-based groups were being discriminated against because some federal programs

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228. *See* STEPHEN V. MONSMA, WHEN SACRED & SECULAR MIX: RELIGIOUS NONPROFIT ORGNIZATIONS AND PUBLIC MONEY 2, 98 (1996) (discussing how government funding of such groups has put them in a vulnerable position, however, the majority of religious nonprofit organizations questioned reported no problems of government pressures or restrictions).

229. MONSMA, *supra* note 24, at 131, 153–66.

230. *Id.* at 153–57.

231. *Id.* at 157.

232. *Id.*

233. *Id.* Monsma found that faith-based groups are less likely than for profits and nonprofits to receive governmental funding. However, some reasons for this difference are that faith-based groups do not apply because of a self-conscious policy not to accept governmental funds, either because they do not wish to take on all the paperwork or because they do not want to compromise their religious message. From this, Monsma draws a policy recommendation that greater effort be made to protect the autonomy of faith-based groups who contract with government. *Id.* at 167–69, 187–96.

234. *Id.* at 169–70.

235. *See id.* at 197–99 (discussing the public policy goal of increasing the independence of organizations currently receiving government funding).

prohibited them from hiring as they desired."[236] As Kuo recalls, they had a small number of examples but Towey charged the staff to find more: "There was only one problem. Hundreds of calls were made and not one additional example was found."[237]

B. Separation of Powers and Subsidiarity: Positioning State and Civil Society

A second cluster of lingering questions about the faith-based initiative involves institutional design. The call for expanded use of public-private partnerships with faith-based and community groups because of their unique qualities warrants a broader inquiry about civil society and the state, and the respective competencies and functions of various sectors of society.

A useful framework within which to consider these questions is the premise, by proponents of the initiative, that compassionate conservatism is "subsidiarity conservatism."[238] This invites a closer look at how proponents understand subsidiarity and how this mirrors or perhaps distorts other conceptions of it. In a sense, this inquiry also raises questions of separation of powers in two respects: separation among levels of government and separation between governmental and nongovernmental power.

In what sense does the initiative reflect a form of subsidiarity? One similarity is that it envisions faith-based and community-based groups as playing a vital role in meeting human needs and government as having a responsibility to build up the capacity of such groups to do so. The Catholic doctrine of subsidiarity, as explained above, posits that the state should not interfere with smaller units of society, as they carry out their respective functions, but it should give support to them and coordinate such support for the common good of society.[239] Capacity, or capability, is also a relevant notion: each person and each particular human community, including the family and the church itself, has

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236. KUO, *supra* note 57, at 238.

237. *Id.* at 238.

238. The Honorable Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next Millenium*, 26 J. LEGIS. 93, 93 (2000) (quoting John J. DiIulio Jr., *The Political Theory of Compassionate Conservatism*, THE WEEKLY STANDARD, Aug. 23, 1999, at 10).

239. Patrick McKinley Brennan, *Harmonizing Plural Societies: The Cases of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131, 156–60 (2006), *available at* http://law.bepress.com/villanovalwps/papers/art78 (discussing Catholic teachings).

certain capacities to exercise particular functions, and the state may be called upon to aid them.[240]

In my book, *The Place of Families,* I offered an argument, grounded in liberal and feminist principles, for governmental responsibility to foster human capacities for democratic and personal self-government, thus creating citizens.[241] I explain there that "[t]he aim is to facilitate persons' use of their moral powers, or capacities, so that they can take part in public life (democratic self-government), and conceive and live out a good life, including forming relationships and associations (personal self-government)."[242] I have referred to this as a "formative project," and have stated that the institutions of civil society, such as families, have a proper role to play in this project.[243] Moreover, such institutions of civil society as the family play a vital role in fostering capacities and the general task of social reproduction, that is, caring for family members and preparing them to be capable, responsible, self-governing members of society. An important aspect of that formative project is that government and civil society support the capacity of families to engage in such work.[244] Given my concerns about fostering capacity of persons, and about how institutions might engage in that project, what I find especially intriguing about the faith-based initiative's call to "unleash armies of compassion" is the notion of government seeking to build the *capacity* of nongovernmental actors better to serve human needs and carry out public purposes.

A puzzle about public-private partnerships is how best to envision the institutions of civil society: as "seedbeds of virtue," as government contractors, or both? That is, one model envisions civil society in a complementary role, supporting democratic self-government simply by existing and functioning without undue governmental interference, while the other enlists civil society to provide services that government owes citizens. As noted above, the faith-based initiative calls for not only enlisting civil society but also through government funding,

240. *Id.*

241. MCCLAIN, *supra* note 5, at 3–5.

242. *Id.* at 4.

243. *See id.*; *see also* Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality,* 69 FORDHAM L. REV. 1617, 1619 (2001) (discussing government's responsibility to pursue a formative project); Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism,* 76 CHI.-KENT L. REV. 1673, 1681 (2001) (stating a government's formative project describes the "government's responsibility to prepare persons for democratic and personal self-government"); McClain & Fleming, *supra* note 19, at 348 ("[G]overnment should engage in a limited formative project of instilling civic virtue and promoting public values, and . . . citizens should adhere to a duty of civility.").

244. McClain & Fleming, *supra* note 19, at 348.

expanding its capacity and empowering it better to serve human needs and carry out civic purposes.

As I have written elsewhere, a prominent theme in recent calls to revive civil society is that America's experiment in "ordered liberty" depends upon a vital realm of civil society to generate the dispositions, traits of character, and virtues that are indispensable to personal and democratic self-government.[245] As it were, it is in institutions such as families and religious organizations that people learn how to "govern the self" so that democratic self-government is possible.[246] Because of this role, families are called schools for citizenship—seedbeds of civic virtue. This formative process of constituting citizens does not take place by government direction. To the contrary, some proponents of civil society claim that the robust, independent operation of such institutions as families and religious organizations provides the general moral foundation and instruction in virtue on which civic virtue and good citizenship depend. I accept this basic premise of the formative role of the institutions of civil society. However, as I elaborate in *The Place of Families*, government also has a complementary, sometimes compensatory, role to play in fostering good citizenship and it is misleading to think of civil society as a realm wholly independent of—or distinct from—the state, since government appropriately regulates the family and other institutions of civil society.[247]

If the civil society model envisions the institutions of civil society spontaneously generating virtues in their members, simply through participation and moral education, the OFBCI proposal envisions increasing government's direct funding of institutions of civil society through public-private partnerships and through the use of vouchers. The initiative fosters an image of the federal government discharging its social responsibility by enlisting, equipping, enabling, empowering, expanding, and unleashing armies of healers, who are more likely than government actors to be compassionate and effective. True, the image is of tapping the resources already within a community, if underdeveloped, to serve distressed neighborhoods and families, but the point is that government has a responsibility to utilize nongovernmental actors to meet its responsibility and to enhance their capacity to meet human needs and save lives.

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245. *See id.* at 306 ("The responsible exercise of rights that makes 'ordered liberty' possible requires that persons possess certain virtues and traits of character.").

246. COUNCIL ON CIVIL SOCIETY, A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS 7 (Institute for American Values 1998).

247. *See* MCCLAIN, *supra* note 5, at 22, 76–78 (discussing government's role in fostering individuals and families by taking affirmative measures while also exercising restraint).

Of course, this dichotomy is too sharp because leading proponents of reviving civil society have also supported the expansion of "charitable choice."[248] One reason for this is the perception that America's most pressing problems are caused by moral decline and that faith communities and religious institutions have a vital role to play in moral as well as civic renewal.[249] Another reason that civil society proponents favor public-private partnerships is they believe that such institutions of civil society need to help in the task of strengthening families: although families should be foremost among the "seedbeds of civic virtue," they are in crisis.[250] Some versions of this argument in favor of expanding "charitable choice" and government's use of partnerships with faith-based and community groups stress defending civil society against usurpation by the state. Using government funds to shore up civil society to serve such ends may be necessary, from this view, because through government-provided social services, as with public schooling, the state has "absorb[ed] into itself the traditional value-shaping mission of churches and other institutions of the civil society and taken over important functions once served by civil society and is tempted to do so in a fashion that drives those competitors in value-formation from the field."[251]

Different understandings of subsidiarity appear to be at work in these various arguments for government enlisting civil society. One, prominent in the conservative political thought associated with compassionate conservatism, is simply devolution: political power—and the responsibility for addressing social problems—should devolve from the federal government to state and local governments. And people, individually and in associations, should be empowered to do things for themselves before turning to government.[252] The blueprint for the faith-based initiative thus states: "We must not only devolve Federal support to state and local governments where appropriate, but move support out to neighborhood-based care givers."[253] Some

248. *See* A CALL TO CIVIL SOCIETY, *supra* note 246, at 21 (recommending that the President and Congress strengthen and expand the 1996 "charitable choice" legislation); *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (Nat'l Comm'n of Civic Renewal) 1997, at 21.

249. A CALL TO CIVIL SOCIETY, *supra* note 246, at 21.

250. *See id.* at 7, 15–16; *see also* MCCLAIN, *supra* note 5, at 50–56 (juxtaposing the erosion of civil society with family breakdown).

251. GLENN, *supra* note 154, at 18.

252. Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103–07 (2002) (examining the relationship between subsidiarity and devolution).

253. RALLYING THE ARMIES OF COMPASSION, *supra* note 33.

proponents of the initiative, as discussed above, have explicitly invoked the Catholic doctrine of subsidiarity as consistent with "compassionate conservatism" in this respect. Senator Rick Santorum has invoked Pope John Paul II's statement on the principle of subsidiarity and the damage done when the state seeks to replace the role of family and community in caring for those in need, to explain why compassionate conservatism embraces a limited role for government as a "silent partner," "enabling communities, organizations, and individuals to be innovative in rescuing those for whom American prosperity has been so elusive."[254]

When proposals to renew civil society advocate a move away from federal governmental programs to, in the first instance, nongovernmental efforts and, in the second, local governmental solutions, they sometimes appeal to subsidiarity as an "organizational norm" that "social institutions of every description should be ordered so that decision making and the responsibility for acting remain at the lowest capable level."[255]

This notion of government as a silent partner squarely raises the issue of what government's proper role and responsibility is in the specific areas in which the help of nongovernmental actors is sought. Is the faith-based initiative just one more manifestation of skepticism about the federal government? Undoubtedly, some proponents of the faith-based initiative envision it as a way to shift power away from government to civil society and from the national to the local. In a sense, it could be viewed as a form of devolution or privatization. Bush's blueprint for OFBCI acknowledges a federal responsibility to address poverty and other social problems; its claim is that government should make more and better use of nongovernmental actors as it discharges that responsibility. Although some rhetoric about civil society seems to suggest that civil society would supplant government, or could more readily solve problems if government would just get out of the way, public-private partnerships retain a role for government. Government retains a role by funding, but the image of unleashing the power of faith implies that once it provides funds, government should get out of the way allowing nongovernmental actors to do what they will. This raises significant issues about the accountability of government and nongovernmental actors, but it seems to negate an idea that government should have no role at all.

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254. *See* THEOLOGY OF WELFARE, *supra* note 21, at 149–53 (discussing the government's supplementary function). Santorum elaborates in RICK SANTORUM, IT TAKES A FAMILY (2005).

255. Thomas C. Kohler, *Civic Virtue at Work, in* SEEDBEDS OF VIRTUE (Mary Ann Glendon & David Blankenhorn eds., 1995).

To the extent that the imagery of devolution seems to imply redistributing power from one source to another, it is at odds with the Catholic doctrine of subsidiarity in at least two respects. Subsidiarity, Catholic thinkers explain, assumes a "normative structure of plural social forms, not a trickling down of power or aid."[256] Subsidiarity as an expression of pluralism is also evident in Monsma's defense of governmental funding of religious groups, including indirect funding of faith-integrated methods, as a way of preserving value pluralism. He argues that "the appropriate role of government is to supplement—not supplant—families, houses of worship, self-help organizations, block clubs, community development corporations, and other manifestations of civil society."[257]

The second flaw is that the language of devolution fails adequately to capture the positive dimension of subsidiarity. As Robert Vischer argues, political rhetoric about compassionate conservatism insufficiently recognizes subsidiarity's premise of the affirmative governmental obligation to foster the vitality of mediating structures in society and to ensure "the ability of individuals to take responsibility for themselves and their surroundings."[258] He further points out that subsidiarity is meant to be "a practical framework for solving real problems," not a kneejerk rejection of any use of federal power, if that power proves necessary to solve those problems, and not a rejection of state responsibility to the poor.[259] Here, the doctrine appears to converge with what I have referred to as government's own formative responsibilities to foster capacity. Just as government should seek to supplement—not supplant—the work of civil society, so the nonprofit sector, among it the faith-based and community groups, should supplement—not supplant or substitute for—governmental work to eliminate poverty.

Indeed, some of the most passionate critics of this idea of an "independent" civil society were those religious organizations providing services, and their supporters, such as DiIulio, who argued that they could not possibly meet the social needs of their communities *without* strong governmental support.[260] These organizations also expressed

256. Brennan, *supra* note 239, at 158 (quoting Russell Hittinger, *Introduction to Modern Catholicism, in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 3, 23 (John Witte Jr. & Frank Alexander eds., 2006)).

257. MONSMA, *supra* note 24, at 185.

258. Vischer, *supra* note 252, at 116, 119.

259. *Id.* at 120.

260. John J. DiIulio, *The Lord's Work: The Church and Civil Society, in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA 50–57 (E.J. Dionne, Jr. ed., 1998)

concern that their assumption of responsibility to meet such social need would invite governmental abdication of its responsibility.[261]

Both the concern that government supplement, not supplant, the responsibilities and functions of civil society and the caution that civil society supplement, not supplant, governmental functions and responsibilities raise significant questions about institutional design. These questions arise as certain lines thought "vital" to our conception of "constitutional, free enterprise democracy"—between secular and religious, public and private, and profit and non-profit—are becoming less distinct.[262] Perhaps one positive consequence of the faith-based initiative will prove to be spurring innovative thought about the continuing relevance of and justifications for these distinctions. For example, legal scholar Evelyn Brody, who has written extensively about the nonprofit sector, challenges the traditional split of our political and legal system into three distinct sectors: public (government), proprietary (business), and nonprofit (charity and mutual benefit).[263] The public, she contends, holds popular beliefs and expectations concerning that division, for example, that nonprofits "satisfy the social needs that fall between the cracks" of government and business.[264] Looking to history, however, Brody contends that a "clear tripartition of these three sectors has never existed in the United States."[265] She provocatively argues that no activity falls squarely within one sector and that "once we recognize the irrelevance of organizational form—as public agency, business corporation or nonprofit charity—society can focus on the aspects of firm activity that it needs to regulate more productively."[266]

One lingering issue to be addressed in such a fresh look is the question of government's proper role in various partnerships with nongovernmental actors. Is the better image that government unleashes or harnesses the power of faith? The idea behind the initiative is that

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(describing efforts of African-American inner-city ministers to prevent juvenile violence in Boston).

261. *See, e.g.*, Amy Waldman, *Bush's Call to Churches is Discussed With Skepticism*, N.Y. TIMES, Mar. 23, 2001, at B6, *available at* http://query.nytimes.com/gst/fullpage.html?res =950DE4D6143CF930A15750C0A9679C8B63; Sara Mosle, *The Vanity of Volunteerism*, N.Y. TIMES, July 2, 2000, § 6 (Magazine), at 22, *available at* http://query.nytimes.com/ gst/fullpage.html?
res=980DE2DC1230F931A35754C0A9669C8B63.

262. Minow, *supra* note 26, at 1062.

263. Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 434 (1996).

264. *Id.*

265. *Id.*

266. *Id.* at 490.

public-private partnerships are utilized to advance civic, or public, purposes. If government enlists a nongovernmental actor, should that actor also promote important public values and commitments, such as nondiscrimination in employment or equality? If one of the reasons to turn to nontraditional nongovernmental providers is to allow the unleashing of their distinctive values, then what of a commitment to shared or public values?

Lurking in this set of questions is the issue of when, for constitutional purposes, a nongovernmental actor may be deemed a state actor and thus subject to constitutional restraints, as well as when governmental funding of religious activities constitutes endorsement of religion and thus violates the Establishment Clause. As Establishment Clause jurisprudence has evolved, indirect funding seems, as Justice Rehnquist put it in *Zelman*, to break the connection between government and a religious message. Does this direct/indirect funding distinction adequately address the question of whether and how governmental enlistment of religious groups renders them governmental agents? Even if indirect funding alleviates constitutional concerns about establishing religion, what about other constitutional concerns, like upholding commitments such as equality? And what about government's interest in advancing important public values, whether or not they are constitutionally anchored?

Presumably, the pertinent constitutional distinction would be that in the case of direct governmental funding, government contracts for a service that happens to be provided by a faith-based organization but can be separated from an explicit religious message. In the case of vouchers, government empowers individuals, through government funds, to make their own choice as to service provider—it does not directly "endorse" a religious organization, if an individual happens to prefer a faith-based approach to, e.g., drug treatment or job placement. As noted above, *Zelman* has affirmed that this distinction is solidly rooted in First Amendment jurisprudence and the Bush Administration has relied heavily on this case to support indirect funding of religious organizations with a faith-infused approach to delivering services. Recall again President Bush's frequent references to empowering addicts to choose recovery programs that put a relationship with a higher being at the core of recovery. Similarly, Olasky has stated that "the mechanism through which faith-based groups work their social wonders—curing addiction, ending recidivism—*is* evangelism."[267]

267. Franklin Foer & Ryan Lizza, *Holy War*, THE NEW REPUBLIC ONLINE at 16 (characterizing Olasky's view and quoting him concerning the faith-based program Teen

Competing models of pluralism may help to illuminate this issue of the place of public purposes or values in direct and indirect governmental partnerships with religious groups. For example, Stephen Monsma, a prominent proponent of such partnerships, appeals to diversity and to a "pluralist" understanding of the social and political order, one that "seeks to develop political processes and public policies that will not merely tolerate faith communities and associations and their individual members, but will integrate them fully—as religious structures and persons—into the life of the body politic."[268] If faith-based groups cannot approach social problems in their own distinctive way, they risk becoming mere government agents, rather than autonomous partners with government.

Monsma draws upon Catholic social thought in his conception of pluralism, stressing that a healthy, vibrant society depends upon a pluralism of associations, groups, and structures, rather than a "statist" model in which government tries to "dictate to and control the membership, goals, and direction of a social structure."[269] On this pluralist model, government funding neither turns a faith-based organization into a government agency nor turns its actions into the actions of government.[270] Another argument for neutrality and for pluralism is that as government takes on a greater role in social welfare provision, assuming important functions once served by religious groups and other nongovernmental actors, it is unfair to exclude religious groups from contracts with government because it gives government an unfair advantage in value formation.[271]

I am intrigued by the appeal to foster pluralism and diversity through greater use of public-private partnerships. However, this model of pluralism seems at risk of insufficiently attending to both accountability of government for private partners and government's interest in advancing important constitutional and public values, even when it acts through the mechanism of public-private partnerships. Indeed, these governmental concerns have a place even when government acts through indirect funding. I am also persuaded that it is useful to draw upon diverse actors in civil society to address pressing social problems. A different model of pluralism, which emphasizes harnessing, rather

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Challenge: "[Its] faith is that people stop being addicts when Christ fills the holes in their souls. It cannot separate counseling and evangelism: Evangelism is its counseling").

268. GLENN, *supra* note 154, at 268–69 (quoting MONSMA, *Positive Neutrality*).

269. MONSMA, *supra* note 24, at 23–27.

270. *Id.* at 192.

271. *See supra* note 251 and accompanying text.

than unleashing, armies of compassion, may be a better way to envision such partnerships. For example, civic liberal political theorist Stephen Macedo has argued that "[t]here may be good public reasons to rely on civil society institutions to a greater extent than we have in the past—whether for education or the delivery of social services," but that "[w]e should do what we reasonably can to insure that publicly subsidized civil society institutions serve liberal democratic values."[272] In contrast to OFBCI's imagery of unleashing civil society, he envisions "attaching strings" to public moneys flowing to nonprofit institutions to ensure that public purposes are served.[273]

For example, Macedo discusses school voucher programs, which permit children to attend sectarian and nonsectarian private schools at public expense. To ensure furthering public purposes through such public monies, he argues that it is appropriate for government to impose conditions like requiring schools to remain open to all children in the community on a nondiscriminatory basis, and allowing children to opt-out from religious activities that they or their parents find objectionable.[274] The program upheld in *Zelman,* in fact, attached such strings. As with the debate over OFBCI's proposed distinction between providing services and saving souls, some religiously affiliated schools oppose this opt-out: "the provision is most objectionable to conservative Protestant schools for whom 'the fingerprints of faith are nearly everywhere,' schools 'that connect academic subjects to biblical themes, from science classes that probe the origins of life, to history lessons that emphasize the religious faith of the America's founders.'"[275] Nonetheless, Macedo contends that "[t]he public educational purposes that have influenced the design and growth of public schooling for 150 years"—not only striving for academic achievement but also for "equal educational opportunity, and the pursuit of inclusion and mixing across boundaries of religion, race, class, and other important divisions—will not and should not be put aside just because new instruments of public policy are being utilized."[276]

My own view of the unleashing versus harnessing question is closer to Macedo's than Monsma's. Notions of subsidiarity, to be sure, can contribute to civic liberal understandings of civil society and state. In

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272. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values,* 75 CHI.-KENT L. REV. 417, 418 (2000).

273. *Id.* at 418, 450–51.

274. *Id.* at 438–41 (discussing certain features of the Milwaukee plan).

275. *Id.* at 439.

276. *Id.* at 441.

particular, the embrace of affirmative governmental responsibility to facilitate families and other institutions of civil society as they exercise their functions resonates with my own conception of a formative project. But, as Catholic thinkers themselves acknowledge, a full embrace of subsidiarity, under which the government has an obligation to aid, or provide subsidy to, the Church in "fulfilling her mission," is ruled out in the United States because of our constitutional commitments.[277] Unleashing the power of faith in this way is not the proper business of government. As experiments in institutional design seek greater utilization of nonprofit organizations to carry out public purposes, it is essential to keep important public values in mind. Concerns for such values, as well as for accountability, seem especially apt given the growing prominence of the nonprofit sector and the advent of various forms of partnership between nonprofit and for profit organizations.[278]

Of course, there is considerable debate over just what those public values should be. Sometimes, "official" pronouncements by governmental actors of such values may be quite problematic, particularly when they seem to advance a particular religious world view. As discussed in Part II.C, a disturbing example is the Bush Administration's approach to funding nongovernmental actors to advance abstinence-only-until-marriage sex education despite its lack of effectiveness and the criticism that such education advances religious ideology at the expense of public health.[279]

C. Whither Public Values in Public-Private Partnerships?

The faith-based initiative expresses the aim of unleashing armies of compassion to advance civic, or public, purposes. Some questions arise about what these purposes are and how public-private partnerships may advance them. Government's use of vouchers instead of direct funding may address some of the constitutional concerns about government engaging in religious indoctrination. However, most funding of social

277. Brennan, *supra* note 239, at 161.

278. *See* The Nonprofit Sector in Brief: Facts and Figures from the *Nonprofit Almanac 2007* (Urb. Inst., Wash. D.C.), 2006 at 1. ("Approximately 1.4 million nonprofit organizations are registered with the IRS. . . . [T]he nonprofit sector accounts for 5.2 percent of gross domestic product (GDP) and 8.3 percent of wages and salaries paid in the United States.") For example, from 1994 to 2004, the number of public charities grew by nearly fifty percent. *Id.* at 3. My former colleague Norm Silber suggested to me that if their nonprofit status affords them a freedom to discriminate, in contrast to the antidiscrimination norms imposed on for profit employers, then this may make the not for profit form even more attractive.

279. *See* MCCLAIN, *supra* note 5, at 256–89.

service programs is—and probably will continue to be—direct rather than indirect.[280] Thus, challenging questions remain about how values may be at stake in service provision by private partners, especially faith-infused or faith-integrated programs. Revisiting *Bowen v. Kendrick,* a case that provides some foundation for the initiative, may be helpful to illustrate the question of when, and how, religious and public values may coincide or diverge. The competing images of unleashing and harnessing help to illuminate how *Bowen* set the stage for the initiative.

In *Bowen,* the Supreme Court upheld the Adolescent and Family Life Act ("AFLA"), in which Congress found that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex" and recognized that the best solution to such problems would come from a "variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as services provided by publicly sponsored initiatives."[281] The AFLA authorized grants to promote, among other things, "self discipline and other prudent approaches to the problem of adolescent premarital sexual relations."[282] The funded demonstration projects "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations and voluntary associations."[283] Grant applicants were required to describe how they would involve "religious and charitable organizations" and other actors; this broad involvement was to help in the development of "strong family values and close family ties"[284]

In this model of using some parts of civil society to shore up others, we see an important precursor to the faith-based initiative's idea of partnerships between government and faith-based groups to, among other ends, strengthen families. Moreover, this model is consistent with an important aspect of the Catholic principle of subsidiarity: families are the "first and vital cell" of society, and when families need help carrying out their functions, society should provide that aid, or subsidy.[285] Here, the family function at stake is educating children, and

280. Lupu and Tuttle, *supra* note 2, at 74–75.

281. Bowen v. Kendrick, 487 U.S. 589, 595–96 (1988) (quoting 42 U.S.C.A. § 300z(a)(8)(A)).

282. *Id.* at 593 (quoting 42 U.S.C.A. § 300z(b)(1)).

283. *Id.* at 596 (quoting 42 U.S.C.A. § 300z-2).

284. *Id.* (quoting 42 U.S.C.A. §§ 300z-5(a)(21), 300z(b)(3), 300z(a)(10)(A)).

285. Brennan, *supra* note 239, at 156–65 (discussing Catholic teaching about subsidiarity and

government, on a subsidiarity model, has a proper role in coordinating efforts to help families carry out their educational mission.[286] As Richard Garnett has elaborated, earlier constitutional precedents, such as *Pierce v. Society of Sisters*, resonate with this notion of complementary responsibility, since they acknowledge that a "primary function and freedom" of parents is educating children, and that this freedom puts limits on how the state may carry out its own educational mission.[287]

The *Bowen* Court, in a 5–4 opinion, upheld the constitutionality of the Act against a facial challenge and concluded that any as applied challenge to particular grants required further proceedings in the district court.[288] The Court concluded that "it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood."[289] Indicative of the shift among some members of the Court away from a separationist approach and toward neutrality with respect to the treatment of religious institutions, the Court stressed that the grants authorized by Congress did not go *only* to religious organizations, and that religious organizations were only *one* of the entities that a grant recipient must involve in an integrated approach to how to address teen pregnancy.[290] The Court found that the "particular approach" the AFLA takes toward dealing with adolescent sexuality and pregnancy—promoting self-discipline and other prudential approaches to the problem of adolescent premarital sexual relations,"[291] and to "promot[ing] adoption as an alternative"[292]—was an approach that "is not inherently religious, although it may coincide with the approach taken by certain religions."[293]

The Court further opined that "nothing in our previous cases prevents Congress from making [a judgment that religious organizations can help

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the functions of families).

286. *Id.* at 163.

287. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1875–81 (2001); *see also* Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 (2000).

288. *Bowen*, 487 U.S. at 593, 625.

289. *Id.* at 602.

290. *Id.* at 603–04.

291. 42 U.S.C.A. § 300z(b)(1).

292. 42 U.S.C.A. § 300z(b)(2).

293. *Bowen*, 487 U.S. at 605.

to solve social problems] or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems."[294] Thus, in light of Congressional findings that "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and family ties," it was "quite sensible" for Congress to recognize that religious organizations "can influence values and can have some influence on family life," and that the effect on advancing religion was at most "incidental and remote."[295] Finally, in a critical passage, the Court concluded that "the facially neutral projects authorized by the AFLA . . . are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations."[296]

In her concurrence, Justice O'Connor stated that "[g]overnment has a strong and legitimate secular interest in encouraging sexual restraint among young people."[297] She acknowledged that the goal of using religious organizations to advance the "secular goals of the AFLA, without thereby permitting religious indoctrination is inevitably more difficult than in other projects, such as ministering to the poor and the sick."[298] Nonetheless, she concluded that the partnerships need not result in constitutional violations.[299]

Thus, the majority opinion in *Bowen v. Kendrick* sets the stage for a constitutional engagement by government of religious organizations to solve social problems where those organizations can carry out "neutral" activities aimed at addressing an important social ("secular") problem. Similarly, when the problem itself requires a shoring up of important values, e.g., strong family values, and when religious institutions contribute to value formation, it is "quite sensible" and constitutionally permissible, according to the majority, to enlist those institutions to shore up other parts of civil society, such as the family. Arguably, *Bowen* seems to provide a blueprint for the faith-based initiative: there is a difficult social problem (the failure of economic prosperity) to reach all Americans; evidence suggests (it is claimed) that government may not be the best actor to address this problem and that faith-based and community-based groups ("healers") are especially effective in doing

294. *Id.* at 607.
295. *Id.*
296. *Id.* at 613.
297. *Id.* at 623 (O'Connor, J., concurring).
298. *Id.*
299. *Id.*

so. *Bowen* noted that the federal government properly adopted a course of "neutrality," in requiring grantees to describe how they would involve religious *and* nonreligious organizations in solving the problem; the faith-based initiative is defended in terms of neutrality and a level-playing field. However, the initiative actually goes further in affirming the unique and distinctive "power of faith" to solve "tough" social problems, suggesting a preference for faith-based approaches.

And what of the values implicated? Proponents of the initiative may readily claim that faith-based groups simply aim to bring the needy and the poor back in touch with core American values like family, work, and personal responsibility (goals, for example, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).[300] As discussed above, for example, Monsma found that both secular and faith-based welfare-to-work programs seek to inculcate the value of personal responsibility and to change attitudes and behaviors better to foster self-sufficiency.[301] And yet accounts of compassionate conservatism's approach to the welfare state, like that of Olasky, suggest that sin and redemption are defining tropes for thinking about how to engage in the "healing" needed to solve these problems, a suggestion strengthened by Bush's frequent references to healing America one heart and conscience at a time and to himself as a "one man faith-based program."[302] This suggests a very distinctively religious diagnosis of social problems as rooted in moral failure and sin and the solution as rooted in personal healing and redemption. To be fair, there are certainly secular counterparts to diagnoses of poverty that focus on behavioral, rather than structural causes: consider the long history of distinguishing between the worthy and unworthy, or deserving and undeserving, poor,[303] and the more contemporary liberal/conservative debate between structural inequality and personal irresponsibility as explaining poverty.[304]

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300. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FACT SHEET: THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, *available at* http://www.acf.dhhs.gov/programs/ofa/prwora96.htm.

301. *See supra* notes 183–185 and accompanying text.

302. *See supra* notes 78–81, 155–159 and accompanying text.

303. On the history and continuing relevance of these categories, see generally Joel F. Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L. J. 1499 (1991).

304. *See* HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY (1995) (critiquing labeling the poor as an undeserving underclass and addressing structural causes of poverty); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996) (critiquing models of responsible and irresponsible reproduction

My point here is to suggest that the faith-based initiative may rest upon a distinctively religious view of the social problems it seeks to address, and it is a view that is not shared by all religious traditions and may be in tension with certain public values concerning equality of opportunity and social responsibility. For example, the very ideas of economic justice and social justice seem absent from *Rallying the Armies of Compassion,* but these ideas have been rallying cries for some religious groups seeking to address the problem of poverty. Thus, one account of faith-based community organizations (defined as groups whose membership is comprised primarily of local congregations) contends that they "arguably represent the most widespread movement for social justice in America."[305] The Working Group on Human Needs and Faith-Based and Community Initiatives opens its report, *Harnessing Civic and Faith-Based Power to Fight Poverty,* with this line: "The haunting call for justice for the poor echoes across the decades of our history."[306] Justice, not personal conversion.

Ultimately, the faith-based initiative's appeal to important "public purposes" invites attention to whether it correctly identifies what those purposes are and what are the proper means to achieve them. Just as the *Bowen* majority seems to provide a blueprint for, or at least a partial defense of, the faith-based initiative, the *Bowen* dissent offers a blueprint for a critique, or at least for caution about its conception and implementation. The dissent called into question the practical possibility of religious organizations carrying out these activities in a way that does not inevitably implicate *religious* values.[307] The dissent did not disagree with the majority that the AFLA had an "essentially secular purpose," but found the "effect" of the statute to be advancing religion.[308] Giving numerous examples of the explicitly religious teaching about sexuality and procreation employed by recipients of public funds, Justice Blackmun concluded that the AFLA, unlike any statute the Court had upheld, "pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment."[309]

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evident in 1990s welfare reform debates for ignoring issues of public responsibility for inequality).

305. Timothy Matovina, *Latino Catholics and American Public Life, in* CAN CHARITABLE CHOICE WORK? 56, 58 (Andrew Walsh ed., 2001) (quoting sociologist Richard Wood).

306. HARNESSING CIVIC AND FAITH-BASED POWER TO FIGHT POVERTY, *supra* note 10, at 7.

307. Bowen v. Kendrick, 487 U.S. 589, 636 (1988) (Blackmun, J., dissenting).

308. *Id.* at 634.

309. *Id.* at 638.

Blackmun further argues: "Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature."[310] Drawing on prior precedents like *Abington School District v. Schempp,* the dissent contended that government may not attempt to put religion to work to achieve secular purposes, even "the promotion of moral values," when it does so by utilizing religious dogma itself.[311] One passage from Blackmun's dissent bears quotation in full, because it so clearly captures the tensions between envisioning faith-based groups as just another social service provider and as uniquely capable actors because of the President's faith in the power of faith:

> There is also, of course, a fundamental difference between government's employing religion *because* of its unique appeal to a higher authority and the transcendental nature of its message, and government's enlisting the aid of religiously committed individuals or organizations without regard to their sectarian motivation. In the latter circumstance, religion plays little or no role; it merely explains why the individual or organization has chosen to get involved in the publicly funded program. In the former, religion is at the core of the subsidized activity, and it affects the manner in which the "service" is dispensed. For some religious organizations, the answer to a teenager's question, "Why shouldn't I have an abortion?" or "Why shouldn't I use barrier contraceptives?" will undoubtedly be different from an answer based solely on secular considerations. Public funds may not be used to endorse the religious message.[312]

Once again, the question of the role played by faith surfaces. Is faith a motive or a message and method? Government, both the majority and dissent in *Bowen* agree, may not unleash the power of faith by subsidizing religious messages. While Justice O'Connor concedes it is difficult, in the context of abstinence education, to harness faith-based groups, in the sense of advancing government's secular goals without also advancing religious indoctrination, the dissent finds it well nigh impossible to separate the social service from the religious message.

Nearly twenty years after *Bowen*, this same challenge of harnessing without unleashing remains as the federal government has added additional revenue streams for faith-based groups (and other nongovernmental groups) to engage in abstinence-only until marriage

310. *Id.* at 639.
311. *Id.* at 639–40.
312. *Id.* at 641–42.

education and, most recently, promotion of "healthy marriage."[313] To harness in this way requires careful governmental monitoring as well as adequate governmental guidelines. *Bowen* itself directed the lower court, on remand, to determine "whether [HHS] has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[314] Subsequently, the parties reached an agreement on conditions for future AFLA funding, including a strict monitoring system by HHS.[315] Even with these guidelines in place, some critics argue that although many religious organizations prepared versions of their materials that ostensibly removed religious references, this "virtual boundary" between religious and public school versions failed to eliminate religiously-based messages about sex and marriage.[316] As Lupu and Tuttle observe, DHHS is no longer bound by the settlement agreement, but it is bound by the Establishment Clause and, in implementing the faith-based initiative, it has failed to provide adequate guidelines or monitoring to protect against governmental funding of religious messages.[317] DHHS's direct funding of the Silver Ring Thing abstinence program discussed above, in which abstinence instruction was linked to a personal relationship with Jesus, offers one example of this problem. It took a legal challenge to such funding to engender, on the part of DHHS, a set of safeguards for future funding of that program. As Lupu and Tuttle argue, the problem those safeguards addressed—failing to distinguish between religious and secular aspects of a government-funded program—must be confronted by "any government-funded social service that involves transformation of character or behavior."[318] If more widely applied by DHHS to all grant recipients, those safeguards would clarify that when it funds directly, government must harness—not unleash—the power of faith.

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313. Title V, Section 510, of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 included a provision, "Abstinence Education," authorizing funding for states to engage in abstinence-only sex education (for example, by contracting with nonprofit groups, including religious groups, for curricula). Another funding stream is for community-based programs that engage in abstinence only education. Since 2002, the Department of Health and Human Services has had a Healthy Marriage Initiative, which has made various grants to faith-based and other nonprofit groups. *See* DHHS, Healthy Marriage Initiative, http://www.acf.hhs.gov/healthymarriage/ (last visited Oct. 12, 2007). Congress approved a dedicated stream of funds for DHHS to use for promoting healthy marriage and responsible fatherhood in the Deficit Reduction Act of 2005.

314. *Bowen*, 487 U.S. at 621.

315. Lupu & Tuttle, *supra* note 2, at 8–9.

316. IRVINE, *supra* note 172, at 98–106.

317. Lupu & Tuttle, *supra* note 2, at 9.

318. *Id.* at 11.

Public policy about adolescent sexuality and, more generally, about reproductive health is a troubling example of how, in my view, sectarian religious beliefs capture public policy agendas. Here there may be a close correspondence between stated policy goals and religious values precisely because sectarian religious values have played an impermissible role in grounding public policy, that is, the policies cannot be justified by appeal to secular values.[319] But whatever the problems that already exist, they may be compounded when government "unleashes"—rather than harnesses—faith-based groups to carry out public purposes.[320]

One cautionary historical example appears in Nina Bernstein's powerful book, *The Lost Children of Wilder.* In addition to documenting how Shirley Wilder and her children suffered at the hands of faith-based child service agencies, she shows how the injury was compounded when Wilder, a troubled young woman who sought to obtain contraception to avoid having more children, was denied contraception by the Catholic facility in which she was housed.[321] Contemporary reports suggest that the danger of women's reproductive health being compromised by denial of contraceptive and abortion services continues when religious institutions assume the operation of services such as child protection and running hospitals (notwithstanding the *Bowen* dissent's assumption to the contrary).[322]

In sum, important questions linger about how government can embrace religious groups as partners in advancing public purposes without also endorsing and advancing religious values. Given that fortifying families is a central civic purpose that the faith-based initiative mentions, public-private partnerships to help promote responsible fatherhood and healthy marriage are likely to offer additional illustrations of the unleashing versus harnessing tension.

IV. CONCLUSION

In this Article, I have submitted that the faith-based initiative invites attention to significant questions about separation of powers as it relates to the relationship between governmental power and that of religious

319. I argue that abstinence-only-until-marriage policy is not a defensible policy. *See* MCCLAIN, *supra* note 5, at 276–81.

320. For example, some states have inadequately guarded against direct funding of abstinence curriculum with religious messages. ACLU v. Foster, No. 02-1440 (E.D. La. 2002) (upholding a constitutional challenge to abstinence curriculum that employed skits with a character named "Bible Guy" and appealed to Mary and Joseph as a model of sexual purity).

321. NINA BERNSTEIN, THE LOST CHILDREN OF WILDER (2001).

322. *See* Minow, *supra* note 26, at 1089.

organizations. I have used the contrasting imagery of unleashing and harnessing armies of compassion to pursue a number of significant lingering questions about the faith-based initiative's call for an expanded use of public-private partnerships to deliver social services and further public purposes. My contention has been that the tension between these images mirrors ongoing disagreement about the appropriate place and scope of such partnerships in our constitutional democracy. I have argued that unleashing and harnessing both have a role to play in partnerships between government and religious groups, but that, to date, the initiative has emphasized unleashing at the expense of harnessing. Explicating how the Bush Administration has championed the power of faith, this Article has critically evaluated claims about why the identity of faith-based service providers matters, that is, whether faith serves as a motive, a method, or a message. By continually emphasizing an interest in results, in terms of saved or transformed lives, rather than process, President Bush's testimony to the power of faith has often implied an impatience with current constitutional constraints on governmental funding of religion. At the same time, federal administrators charged with implementing the initiative have publicly affirmed the prohibition against direct governmental funding of religious indoctrination, while avidly embracing the method of indirect funding. The contrast between unleashing and harnessing, I have argued, helps better to understand some of the constitutional challenges posed by—and to—the initiative.

It is possible that the initiative, launched by President George W. Bush and intended to be a hallmark of his "compassionate conservatism," will not survive the next presidential election. It seems more likely, however, given that many presidential and other political candidates express support for public-private partnerships and the importance of enlisting religious organizations to address social problems, that the initiative will continue in some form. Already, the initiative has left its mark in terms of institutional design: the Office of Faith-Based and Community Initiatives and new offices within federal departments and many state governments. I believe that the initiative raises broader questions of institutional design that warrant continuing study. I propose a few avenues for further inquiry about public-private partnerships.

First, it may be useful to reflect further on the legacy of the 1960s as it bears on contemporary calls to expand public-private partnerships to address poverty and other social problems. As another presidential election cycle unfolds, candidates, commentators, and the public talk about the 1960s and offer contending interpretations of their legacy.

The same is true of the faith-based initiative. The initiative's very language of armies of compassion brings to mind the 1960s rhetoric of a War on Poverty, even though conservative politicians generally decry social programs of the 1960s as a huge failure. Some proponents of the initiative, as this Article has shown, interpreted President Bush's call to enlist and empower community and faith-based groups as taking up the unfinished business of Robert F. Kennedy, assassinated in 1968. As this Article goes to press, the year 1968 is very much in the news. A new book on the 1960s by journalist Tom Brokaw has triggered cover stories with titles such as: *1968: The Year That Made Us Who We Are*.[323]

Positing the question of how 1968 (and the 1960s more generally) "made us who we are" with respect to contemporary appeals to unleashing the power of faith-based and community groups could be illuminating. What, for example, did the Democratic and Republican political party's platforms for 1968 say on the topic of public-private partnerships? Both parties, for example, espouse the importance of orderly progress and invoke the role of communities. Seeds of the initiative might be found in the Republican platform's vow to "create a new mix of private responsibility and public participation in the solution of social problems," its reference to "encouraging communities to solve their own problems," and its approach to poverty of "maximum reliance on community leaders utilizing the regular channels of government to provide needed public services."[324] In addition, in 1968, the Republican party championed "decentralization of power" so that states and localities could better engage in self-government. The Democratic platform praised President Johnson for launching a national war on poverty. It further affirmed that "cities can be saved only by the people who live there," and recounted the role of Democratic leadership in invigorating local efforts by neighborhood associations to fight poverty, efforts entailing "full participation and leadership by the neighborhood residents themselves."[325]

What is striking, on a preliminary look back at these party platforms, is the presence of a commitment to enlisting local communities to solve poverty and other social problems and the absence of an explicit appeal to enlisting the power of faith, that is, the unique capacity of religious

323. *1968: The Year That Made Us Who We Are*, NEWSWEEK, Nov. 19, 2007 (covering Tom Brokaw's new book, BOOM! VOICES OF THE SIXTIES (2007)).

324. Republican Party Platform of 1968, available at The American Presidency Project, www.presidency.ucasb.edu/ws/print.php?pid=25841 (visited Nov. 30, 2007).

325. Democratic Party Platform of 1968, available at The American Presidency Project, www.presidency.ucasb.edu/ws/print.php?pid=29604 (visited Nov. 30, 2007).

groups to do so. Further study would illuminate the role of religious groups in such efforts as community empowerment. Such study might also fruitfully explore parallels between these earlier appeals to community empowerment and self-help and contemporary appeals to the principle of subsidiarity.

Second, assessing the faith-based initiative requires a broader consideration of the respective places of civil society and of government. It may be useful to return to Alexis de Tocqueville's much-quoted observations about associational life in America. President Bush, this Article has recounted, invokes de Tocqueville for the proposition that: "Americans like to form associations in order to help save lives."[326] The faith-based initiative, he continues, simply carries forward this American vision by government making partnerships with people to "save lives in America."[327] At best, this distillation around the project of salvation seems a reductive reading of de Tocqueville's account of the various functions served by associations. I will not attempt a full reading here, but will note a few points for further consideration.

First, de Tocqueville warns about the problem of government usurping the role of private associations and that the exercise of too much governmental power will diminish the habit of individuals combining together in associations.[328] This is an argument for pluralism in the sense of a separation of spheres of power. It is consistent with some aspects of subsidiarity as well as civic republican and liberal conceptions of the importance of a healthy civil society.

Second, de Tocqueville spoke of associations operating in lieu of government, not of government actively partnering with associations. Indeed, he observed that a distinctive American habit is forming associations to carry out various social ends where other nations would resort to offices of government or to the nobility.[329] Such observations do not provide any sort of blueprint for public-private partnerships, notwithstanding President Bush's crediting de Tocqueville for discerning "the conscience of our country."[330] One might as easily invoke de Tocqueville for a worry that public-private partnerships would crush the independent spirit of American associations because if

326. Bush, Highlighting, *supra* note 17.

327. *Id.*

328. DE TOCQUEVILLE, *supra* note 16, at 108–09.

329. *Id.* at 106.

330. Bush, Highlighting, *supra* note 17.

government went beyond its proper political sphere, it would hinder the individual initiative to join groups.[331]

Third, and finally, de Tocqueville stressed an important relationship between the myriad associations formed in civil life and political associations. He saw a reciprocal relationship between these two. On the one hand, "civil associations . . . facilitate political association," because in joining together for various purposes, citizens learn skills of association. On the other hand, he continued, "political association singularly strengthens and improves associations for civil purposes," because political life "makes the love and practice of association more general."[332] Political associations, he contended, give people a "taste for association," and the experience of being "mutually stimulated to all sorts of undertakings;" they then "transfer to civil life the notions they have thus acquired and make them subservient to a thousand purposes."[333] Perhaps it would be useful to look back to de Tocqueville to call for a more robust commitment to political association, given the formative role he saw for it. The call to armies of compassion looks to neighborhood and faith-based healers, but perhaps a necessary counterpart is to call for a reinvigoration of ordinary democratic citizenship and a commitment to utilize the political process to advance public purposes, such as fighting poverty and inequality and bringing people closer to the American dream.

331. *Cf.* DE TOCQUEVILLE, *supra* note 16, at 109 (warning about government attempting to go beyond its political sphere and the problem of government replacing associations).

332. *Id.* at 115.

333. *Id.* at 119.