

The 2005 Kuyper Lecture

Keeping Faith in the Faith-Based Initiative: From Formal Neutrality to Full Pluralism in Government Partnerships with Faith-Based Social Services

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After many years of the faith-based initiative, we have a serious problem when it comes to religion in government-funded social services. I don't mean that there is too much religion in those services, as if the Bush administration had transformed the federal government into a theocracy, as some darkly suggest. Rather, the problem is the opposite: religion continues to be excluded from almost all government-funded social services. The reforms of the faith-based initiative have made possible many new partnerships between government and faith-based organizations. But the playing field remains unlevel because government policies and practices do not fully accommodate faith-based providers. The neutrality rule now dominant in federally funded services requires that religion be treated as irrelevant when the government chooses its social-service partners and then essentially to be excluded from the social services that government agencies support with their grants and contracts.

Yet, to many faith-based providers, to many people seeking help, to many citizens and officials, and to an increasing number of scholars, religion is not irrelevant to social assistance; rather, it is exactly the faith content of certain services that makes those services effective and especially suitable in some instances. For those with this conviction, religion is important in social services and sometimes essential for success, even if others regard religion as irrelevant to social services or properly excluded when government money is involved.

It would be wrong, of course, for the government to force the needy to “get religion” in order to be helped. Yet it cannot be right that effective services that include religious themes and activities must be excluded from government support merely because of the religion. Surely a truly “level” playing field is one where the government supports effective social services of every kind, whether they embody a faith perspective or a secular philosophy. The faith-based initiative will not fulfill its promise unless and until federal, state, and local policy and practice have been changed so that services that incorporate faith, and not only organizations inspired by faith, are welcomed by government officials seeking service providers to help needy neighbors and neighborhoods.

Why is the playing field not yet level? Why, despite many reforms, is there continued pressure on faith-based organizations to downplay and set aside expressions of faith and religious activities when they partner with the government? How can we go beyond a formal neutrality that disregards and excludes religion to a full pluralism that welcomes religious social services alongside their secular counterparts? These are the concerns of this Kuyper lecture. We will look first at what I will call “the impasse of formal neutrality,” then turn to Abraham Kuyper’s suggestion of a “system of parallelism,” and finally consider how to move government policy and practice from formal neutrality to full pluralism.

I. The Impasse of Formal Neutrality

Let me set the stage with some background on the faith-based initiative. One of its central concerns is to change the church-state rules that apply when the government turns to private organizations to supply social services, so that the government can partner with any effective organization. In particular, the goal is to eliminate rules that have excluded faith-based

organizations, because such organizations, as the President has noted, may sometimes be the only ones with the “wonderworking power” needed to overcome deep and persistent problems, and because churches and other religious organizations are often the first refuge and resource for people in need, as we have witnessed yet again with hurricanes Katrina and Rita.

The government’s rules for grants and contracts for many decades conformed to the constitutional doctrine we may call “strict separationism,” which requires the government not to “aid” religion. In our religiously diverse society, how can the government avoid taking sides, curtailing the religion of some citizens and elevating the faith of others, if it gets mixed up with religion? Strict separationists call for a high wall of separation between church and state. That means, in the ringing words of Justice Hugo Black, in the 1947 *Everson* case that inaugurated the doctrine at the Court, not only that the government cannot create a state church but also that “no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”¹

Despite the absolutism of the words, in fact the government never excluded all religious organizations when it sought social-service partners. Rather, it distinguished between “religiously affiliated” organizations, which, despite their religion, could provide nonreligious help in a nonreligious setting, and so-called “pervasively sectarian” organizations—providers so permeated by religion that, if the government supported them, it could not help but aid religion. But the effort to separate out faith-based organizations that are “too religious” to fund and those secular enough to be the government’s partners led to arbitrary and even silly decisions, such as asking the Salvation Army and the St. Vincent de Paul Society to change their names; produced regulations banning certain faith-based organizations from getting government funds even to provide wholly secular services; and rested on the mere presumption of guilt—that certain

religious providers could not help but misuse government money for religion instead of social assistance.

The strict-separationist “no-aid” doctrine is now well on its way out at the US Supreme Court, making way for a new view often called “neutrality” theory. The neutrality doctrine requires officials to stop the effort to categorize faith-based organizations as either safely secular or else too religious to support. Instead, any organization, secular, religious, or even very religious, can be the government’s social-service partner, as long as it will not divert government money from social assistance to pay for religion instead.²

This is the constitutional foundation for the faith-based initiative. In accordance with neutrality theory, during the Clinton administration Congress added Charitable Choice language to four federal social-service programs. And to create the same welcome for faith-based organizations in the other federal programs, under the Bush administration federal departments have eliminated overly restrictive regulations and added to their general administrative rules new regulations on how they will collaborate with faith-based organizations.³

Now, when federal, state, or local officials use federal funds to pay for social-service grants or contracts, the regulations specify that no applicant can be excluded because it is religious or very religious—or, for that matter, because it is secular. The regulations specifically protect the religious characteristics of faith-based organizations—those indicators of “pervasive sectarianism,” such as religious terms in a mission statement, clergy on the board of directors, and selection of employees according to religious standards (except where otherwise restricted in law). The regulations at the same time safeguard the religious liberty of beneficiaries, who cannot be turned away on religious grounds or compelled to take part in religious activities. In programs governed by Charitable Choice, beneficiaries are even guaranteed an alternative if they

object to a faith-based provider. Furthermore, the new rules acknowledge the freedom of faith-based providers to engage in religious activities such as Bible studies or a daily routine of prayers, and to invite beneficiaries to take part in worship and religious training. In short, under these new rules, faith-based organizations need not divest themselves of their religious characteristics and activities in order to collaborate with the government.

However, the regulations contain one other major provision: an explicit restriction on religious activity by the government's faith-based grantees and contractors. Religious activities must be not only entirely voluntary for beneficiaries but they must be paid for with private, not government, money, and they must be kept separate from the government-funded services. In the language of the regulations, the religious activities must be "separate, in time or location" from the services the government directly supports. More precisely, it is so-called "inherently religious activities," such as "worship, religious instruction, or proselytization," that must be kept separate from the government-funded services.⁴

Why the restriction? Why should faith-based organizations, having been selected to provide services, be told that religion must be kept out of those services? The Supreme Court's neutrality theory, as it currently stands, is one reason. We'll look at that in a moment. Another reason can be seen in the phrase "inherently religious activities": the government money is intended to pay for what Stephen Monsma calls "this-worldly" activities, such as job training, and not for evangelism, fixing a synagogue's roof, or religious rituals. The other reason concerns the very intent and design of the faith-based initiative—to enable the government to collaborate widely with faith-based organizations while honoring the religious convictions of the beneficiaries by protecting them from religious coercion.⁵ These are all valid concerns. And yet,

because of the restrictions on religion, the reforms of the faith-based initiative are only in part liberating, and remain interim, incomplete, and unstable.

I should emphasize that, for many faith-based organizations, the new regulations have indeed leveled the playing field so that they have a fair chance of winning government support for their programs of community service. Grant announcements often now specifically invite faith-based organizations to apply for funds, along with other groups. Officials often seek them out to make sure they know of new opportunities and to provide them, and other inexperienced organizations, with technical assistance. They are warned that religion cannot be part of a service the government supports, but also assured that they can continue to offer religious activities on their own. In response to such changes, many faith-based organizations that never before thought the government could be a safe source of funds are partnering with public programs to serve the needy.⁶

But there is a dark cloud surrounding this bright silver lining. In the first place, many faith-based organizations remain barred from collaborating with the government. These are the organizations whose services are infused with religion, who use religion in the way they address social problems. They don't seek government funds to teach the details of the Book of Revelations or to finance pilgrimages to Mecca, but religious talk, and religious activities such as discipleship training or prayer, are integral to their social services. This is "relevant religion," religion that is a dimension and a part of a social service—a philosophy of service, if you will, just as the services delivered by other organizations reflect behaviorism or feminism or some other perspective.

And yet, activities like prayer and reflection on one's ultimate purposes, however vital they may be to enable some beneficiaries to kick an addiction or triumph over persistent

homelessness, still are clearly religious activities. Thus, social services that incorporate such activities, however relevant they might be, cannot be funded by government grants and contracts. That is what the state of Wisconsin discovered when it awarded federal funds covered by Charitable Choice to Faith Works Milwaukee, a faith-based drug-treatment facility. A federal judge ruled that the state's contract was illegitimate because the services included spiritual counseling, and spiritual counseling cannot be funded by government under the rules of Charitable Choice, the very innovation created to enable states to partner with faith-based providers.⁷ Faith-based organizations whose services are infused with religion, no matter that the religion is relevant, remain excluded from government grants and contracts.

And a dark cloud hovers, too, around those faith-based organizations that clearly are eligible for grants and contracts. These organizations are, to use Amy Sherman's useful imagery, "salad ministries," unlike the "brownie ministries," just discussed, that interweave religion into their social services.⁸ "Salad" ministries use religious talk and offer religious activities, but these are distinct from the social services they provide. They teach job skills without a focus on religion and then invite the participants to a separate class that explores biblical teachings about overcoming hardships and avoiding negative life choices. These ministries, these faith-based organizations, conform to the religion guidelines.

It is not that they believe religion is irrelevant to social assistance. It motivates them and is revealed in their deeds, of course. But they also want to talk about their convictions and engage in religious activities. That is why these organizations provide the option of spiritual counseling or life-skills classes parallel to the government-financed services.⁹ And, without the guarantee of being able to offer these privately funded and voluntary religious activities, they would now, as in the past, reject government funding.

For these “salad ministries,” the requirement to keep inherently religious activities separate from the government-funded services is a complication, but a requirement that they respect. They respect it because it is a condition they voluntarily accepted with the government money. But they respect the restriction, also, because they respect those whom they serve. By applying for government funds, they committed themselves to serving beneficiaries without religious distinction, so they know that some or many of the people they will serve will not share the organization’s religious convictions or may reject religion altogether. These organizations have no desire to exploit their role to force their religion on people needing help. Thus, by conviction, and not only because of the rules, they offer their religious activities separately from the social services that must be useable by all.¹⁰

But this is an interim arrangement and an unstable one. And that is because there is no bright line dividing religious from secular activities. Most social services have an attitudinal component, and attitudes are the territory of religions and not only of secular philosophies. Further, all social services have a relational aspect, and because religion is a vital part of the lives of many beneficiaries and not only of the staff of faith-based organizations, religious talk and religious activities are natural occurrences in interactions.¹¹ A volunteer in a government-funded faith-based mentoring program will certainly inform the teenager who blurts out about the spiritual battle she is waging against some temptation that a religious discussion can only take place after the tax-paid hour of official mentoring is over. But the teen may well wonder what kind of a relationship it is that puts off until later the one thing she is most concerned about. And the mentor, and the faith-based organization, while knowing the rules and fully accepting the need to honor the religious liberty of young people who are looking for guidance and friendship, can only rue the artificiality required by the safeguards.

Furthermore, because the dividing line is not bright, there is continual pressure to drive every expression of religion out when government funds come in. A series of court decisions against particular government partnerships with faith-based organizations has sown uncertainty. To anti-religion activists, the lack of a solid boundary between religion and social services is a compelling reason to ban religion entirely. To lawyers seeking to ensure that the regulations and constitutional requirements are respected, the lack of the bright line is reason to propose that grants and contracts can be used only for activities that can be construed as wholly secular.¹²

I think that these pressures against all religious expression are excessive and ought to be vigorously resisted. But such resistance is not enough—or so I will argue in a few moments.

We can trace the pressure to exclude all religion back to the doctrine of strict separationism, to the insistence that the government may not legitimately “aid religion.” We can say that neutrality theory as implemented has only partially supplanted strict-separationism—that it has only focused it more precisely by permitting “pervasively sectarian” organizations to receive government money, but only if they will exclude all significant religion from the services the government money supports. The Supreme Court is notoriously divided in church-state cases and its decisions favoring neutrality theory have included an admixture of the separationist insistence that no government support be traceable to religious activities.¹³

However, I do not think it right entirely to blame the remnants of strict separationism for the overly broad exclusion of religion from government-funded services. Rather, I propose, the doctrine of formal neutrality itself is an inadequate guide for public policy when it comes to government grants and contracts. In my view, banning religion when the government awards grants or contracts is wrong, for it does not respect the religious freedom of faith-based organizations. And yet, simply removing restrictions on religion would also be wrong, for that

would not honor the religious freedom of people seeking assistance. That is, when the government is awarding grants and contracts for social services, we cannot say that the only requirement is that the aid be distributed neutrally, without regard to whether providers are faith-based or secular, whether their services are infused with religion or wholly secular, whether the philosophy of service they utilize is religious or secular.

The reason has to do with how the government awards grants and contracts for social services. Consider the typical instance. To respond to a particular kind of need in some place, officials normally select a single provider, or at most a small number of providers—however few are required to supply the necessary volume of services. Fewer providers makes it easier to administer and monitor the private organizations; moreover, if a single organization has the most effective services and can meet the needs, what justification is there to engage additional organizations? So, imagine that several providers have competed for a single contract to provide drug-treatment services for a small community, and that the officials, mindful of the neutrality requirement, select the evangelical Protestant applicant because its faith-infused program has a record of success and the lowest costs. Then, from here on, as long as the contract runs, all addicts who rely on government-supported treatment and all prisoners required by a judge to undergo government-supported treatment as a condition of parole—everyone, whether Christian or Jewish, Muslim, or atheist, or something else—everyone will have only a single place to turn and that single place will provide treatment services that embody evangelical Protestant teachings and practices.

Clearly this cannot be right. The problem is not, as strict separationists would have it, that there is religion in this government-funded social service. The government here is simply supporting one variety of drug treatment, a religious variety to be sure, but still just a variety of

drug treatment—moreover, a variety that officials have determined is effective in accomplishing the government’s purpose. No, the problem is that the religious liberty of addicts has not been safeguarded. If every service provider can seek government support, whether their services incorporate or exclude religion, then, at least some of the time the services the government offers to the needy or to which a person is assigned will contain elements that are religiously objectionable to the person. There is nothing in contracting or grantmaking practices, as such, that safeguards the religious freedom of people who seek government-supported social assistance. Those funding practices do not ensure that beneficiaries can select from an array of providers and thereby avoid the necessity of violating their deepest convictions in order to obtain help.

Thus, the impasse of formal neutrality. Excluding pervasively sectarian providers is not constitutionally acceptable. Making all providers eligible to compete for grants and contracts but only on condition that they separate out inherently religious activities excludes faith-infused services, no matter how effective they might be, and casts a shadow of illegitimacy on all faith-based organizations. And yet, formal neutrality is an insufficient rule, for under it the government may well select a single provider whose services, though effective, are infused with a perspective against which many who are authorized to receive the help have religious objections.

True neutrality, an actual level playing field, is a funding policy that affords equal opportunity to every effective social service, whether secular, religiously inspired, or faith-infused, while simultaneously protecting the religious liberty of the needy—a policy that safeguards simultaneously the freedom of religious expression of providers and the freedom of religious conviction of beneficiaries. But such true neutrality cannot be achieved by requiring

officials to ignore religion when they select providers. Instead, they must pay close attention to religion.

Or so I wish to suggest. Let me explore this suggestion with the help of Abraham Kuyper.

II. Learning From Kuyper

I want to spend a few moments on Kuyper not simply because this lecture series bears his name. Rather the opposite. The series bears Kuyper's name because of his distinguished contributions as both thinker and practitioner to our area of concern this evening: religion in the public square in the special instance of government collaboration with faith-based organizations. I believe that Kuyper can help us to better understand how a government can do justice when citizens and social-service organizations hold diverse convictions.

As a Christian political thinker, strategist, and activist, Kuyper is of particular importance for us because he argued vigorously in defense of two propositions which are often thought to be incompatible. On the one hand, Kuyper insisted that Calvinists, and also everyone else, should let their entire lives, public and private, be shaped by their deepest convictions, by their inner faith. On the other hand, and just as vigorously, Kuyper insisted that the government must not take sides but instead must adopt policies that accommodate the convictions of all citizens. In a famous statement, Kuyper proclaimed that there is not one square inch of the world that is not claimed by Christ. Yet it was the same Kuyper who labored to remove from a historic Calvinist confession the claim that the government is authorized to maintain the true religion and who blazoned on the masthead of his newspaper the slogan "A free church in a free state"—a church free from government dominance in a state free from clerical dominion. In short, Kuyper was a

political thinker and politician committed to equal rights for all without suppressing religious expression—just the dual commitments we need as we rethink governmental neutrality and how truly to level the playing field.¹⁴

When Kuyper became prime minister just over 100 years ago, the Dutch had been struggling for a century over what the government should do about religion in a nation that, though it had an established church, was religiously divided, with many citizens clinging to the state Calvinist (Reformed) church, others seeking a purer, more orthodox Calvinism, yet others adherents of Roman Catholicism, and others committed to one or another secular philosophy as their guide in life. The question of how to devise a just policy, given these different and divergent convictions, had become most pressing in the area of elementary schools. It is Kuyper's response to this problem that I suggest shows us a way forward.

In briefest form, here is how the battle of religion and the schools had developed. The public elementary schools, in keeping with the official religion of the nation, had originally been Calvinist, but the rise to political power of liberals at the midpoint of the nineteenth century had set in motion a tug of war. Conservatives sought to retain the Reformed color of the schools while liberals attempted to drive out all religion, in order, they said, to make the schools suitable for every family. Meanwhile, an expanding group of orthodox or evangelical Calvinists believed that the public schools had never been sufficiently Calvinist, and Catholics increasingly were convinced that only truly Catholic schooling was suitable for their children. Private schools were legal, so orthodox Calvinists and Catholics set about creating their own extensive alternative school systems. But this was no real solution. The common school was caught between those who wanted to retain its Reformed flavor and those who insisted on draining away its religion, while both orthodox Calvinists and Catholics protested the injustice of having to

support schools that were common in name only even as they also had to finance their own schools, the only schools they regarded as fit for their children.¹⁵

Was there a just resolution to this many-sided quarrel? Was it possible for the schools supported by the government to be made satisfactory for everyone—Catholics and orthodox Calvinists, secularists and adherents of the state Reformed church?

Here is Kuyper's analysis and proposal, made to Parliament in 1904, near the end of his four years as prime minister at the head of a coalition of Catholic and orthodox Calvinist parties. He began by underscoring the division of Dutch society between those citizens, religious or not, who believed that religion was not essential to politics or education, and an increasing number of citizens, both Catholic and orthodox Calvinist, who insisted that their religious convictions must shape their political choices and be reflected in the education of their children. This fundamental divide—between the advocates of privatized religion and the adherents of public religions—simply did exist. It could not be wished away. The only real question was how the government should deal with it. Five approaches are possible, Kuyper claimed.

One option is for the government to adopt one of the religions as its own and suppress the other views. That is the scheme of established religion and Kuyper dismissed it curtly as wholly unacceptable as government policy.

Or the government might stay out of any policy area where the different views were manifest. Education could have been left as a private matter, with no public support for any school. This option maximized parental choice and educational diversity but was not relevant once the nation had decided that the government should support elementary education.

The liberals had insisted on a third approach: remove religion from the public schools to make those schools equally suitable for all, with the outlet of private schools for parents favoring

faith-based education. Yet making the public schools religion-less did not make them acceptable to all. This was hardly justice.

A fourth possibility had been tried early in the lengthy “schools battle” as a compromise between religion and secularism. The government, Kuyper said, had concocted a mixture of mild religion and secularism, declared the result “common,” and on that basis gave full taxpayer support to the “common” schools. But the inadequacy of this approach had been exposed as soon as the different groups had worked out the implications of their basic convictions for the schooling of their children.

The only real option was the fifth one, Kuyper claimed: a “system of parallelism.” The government must honor not only citizens who regard religion as irrelevant to education but also their fellow citizens who regard as acceptable only schooling that embodies their particular religious convictions. Because education is a public good that requires taxpayer support, the government must, first, permit each variety of school—secular, Catholic, orthodox Calvinist—to flourish according to its distinctive principles and ethos, and then, second, give equal support to every variety of school. Only in this way can the government do justice in education to all of its citizens and every variety of school. The government must support schools but without taking sides between secular education and faith-infused education.

This concept of full pluralism was incorporated into the Dutch constitution in 1917, and upon it was constructed a pluralistic school system through which the government supports all the varieties of education that different groups of families regard as right for their children.

How should we assess Kuyper’s “system of parallelism”? Does it “establish” religion? Surely it is a misuse of language to call it “governmental indoctrination of religion”—the separationists’ catchphrase—when the government simply supports, evenhandedly, the diverse

religious and secular views of its citizens. And surely it is a misuse of language to say that such a policy constitutes government aid to *religion* when in fact the government is aiding *education*—some of which, according to the choices and convictions of the citizens, embodies one or another religion, and some of which, according to the choices and convictions of other citizens, is secular. Rather, what we should conclude is that the “system of parallelism” made it possible for the Dutch government to support equally the parents who did not want any religion in their children’s schooling, the parents who were committed to Calvinist education, and the parents who desired Catholic schools. A common school was impossible because the citizens held differing views about the appropriate content of education. But there could be a policy of common support for all of those views.

But notice this: in order to achieve this genuine solution, the government had to take note of, not ignore, the different, even divergent, views of the citizens about the proper relationship of religion and the schools. To do justice through its education policy, the government had to acknowledge, and then implement a way to accommodate, the reality that there was no single philosophy of education but that, instead, families and schools held different convictions about education.

III. From Formal Neutrality to Genuine Pluralism

Let us return now to our own situation, to our own quarrels about religion in the public square. Let me propose that we, too, need a “system of parallelism,” a policy of genuine pluralism, of choice, if we are to have a truly level playing field when the government awards funds to private organizations to supply social services. Our current policy, unintentionally, pits the religious freedom of faith-based organizations against the religious freedom of beneficiaries,

requiring one or the other to be at risk in a tug of war that serves neither optimally. But to accommodate the convictions of both providers and beneficiaries, we must go beyond the doctrine of formal neutrality and its requirement that government must be blind to religion in selecting its social-service partners. Instead, an adequate policy will begin by acknowledging that effective social services come in many varieties, each of which reflects one or another perspective, secular or religious. Then, rather than insisting that religion be pushed out of such services as the price of government support, the government must devise a direct way to safeguard the varied convictions, religious and secular, of the people who seek the services the government supports.

What kind of policy can simultaneously accommodate the varieties of social services, faith-infused and secular, and the diverse convictions of beneficiaries—both the religious freedom of providers of help and of seekers after help?

Vouchers, of course, are a prime instance of such a fully pluralistic policy. And the use of vouchers as a way for the government to fund services that incorporate religion has been validated by the Supreme Court in a series of decisions, most recently the 2002 Cincinnati school choice decision, *Zelman v. Simmons-Harris*. In a voucher system, it is the beneficiary, and not a government official, who selects the provider and causes the government aid to go to that provider. If the beneficiary can make an informed choice and is not obligated to go to a religious organization, then, without constitutional violation, the array of providers can include organizations whose services are infused with religion. This is a well-tryed, if not so widely known, mechanism in our social services.¹⁶ Most federally funded child care, for instance, is paid for by vouchers, allowing faith-based organizations to offer their services without having first to strip away religion. Accordingly, the faith-based initiative has always promoted voucher

funding as the essential reform to ensure that faith-infused services and faith-based organizations are fully accommodated. President Bush reiterated his commitment to the voucher solution in a major speech this past March, and his administration has created a special program, Access to Recovery, through which 14 states and one Indian tribe will be offering to drug addicts a wide range of services, including some with a religious approach.

In addition to resolving the tug of war concerning religion in social services, vouchers have other virtues, such as enabling the needy to take a more active role in receiving assistance and, by fostering diversity, making possible closer matches between the varied needs of beneficiaries and the variety of services available to them. But as a practical solution vouchers also have a severe problem. Most government programs use grants or contracts and cannot be converted to vouchers without massive changes. Not only must a different form of payment be instituted, but also a system to qualify providers as authorized to accept vouchers, a way to give accurate information about a shifting set of providers, and a new method of administering the program and monitoring providers. In addition, with vouchers no provider can be assured of payment, so officials need to devise a way to keep capacity in some rough balance with demand.

For such reasons, not to mention heated controversy about the “V” mechanism, the voucher solution has been much more discussed than implemented. States that won Access to Recovery awards more than a year ago are struggling to make vouchers operational. Despite extensive efforts by the Department of Labor’s Center for Faith-Based and Community Initiatives, progress has been slow in incorporating faith-based organizations into the voucher-like system for job training created by the 1997 Workforce Investment Act.¹⁷ Indeed, although the Charitable Choice language in the 1996 welfare reform act specifically authorized vouchers so that states might utilize faith-infused social services, this provision has led to little, if any,

voucher funding of welfare services. The actual implementation of vouchers through the faith-based initiative has been so neglected that frustrated supporters of the initiative in the House of Representatives have turned to the Congressional Research Service for an analysis identifying which federal programs might be suitable for vouchers, and equally frustrated Senate supporters have proposed the creation of a congressional commission to determine how to implement vouchers widely.¹⁸

For all its theoretical and constitutional merits, the voucher solution does not represent a practical alternative to our current grants and contracts system with its exclusion of religion from government-funded social services. Fortunately, the religious-liberty benefits to both providers and beneficiaries of vouchers are available without the need to wholly reconstruct current systems of selecting and funding private social-service providers.

We may call this other “system of parallelism” or choice, this practical alternative, “beneficiary-choice contracting.”¹⁹ Although the outcome was largely ignored by the press, this form of contracting, unlike the conventional version, was approved by the courts in the Faith Works Milwaukee case as a legitimate way to fund spiritual counseling for drug addicts.

As its name suggests, beneficiary-choice contracting is contracting that has been modified to ensure that people seeking a social service have a choice of where to turn. Because it institutionalizes informed choice, includes an alternative to faith-infused services, and delivers government funds only to the extent that a provider’s services have been used, beneficiary-choice contracting is, for constitutional purposes, a form of indirect funding, just like vouchers. Thus there can be no requirement that religion be excluded from the social services supported by the government in this way. This form of contracting safeguards the religious liberty of both providers and beneficiaries but without requiring a ground-up redesign of how a social service is

paid for, delivered, administered, and monitored. It is a practical alternative to conventional contracting.

Beneficiary-choice contracting, to be sure, is more complicated than the typical government practice of selecting a single provider and then requiring the provider to deliver social services devoid of religion. Officials must contract with several providers, including at least one that offers secular services, make sure that beneficiaries understand what they are choosing, and give consideration to the balance of supply and demand for the several varieties of a social service. But this kind of contracting is not significantly more complicated than conventional contracting, and certainly does not require the heated debate, extended redesign, and lengthy implementation travails of converting to vouchers. Indeed, Wisconsin officials created beneficiary-choice contracting without intending to pioneer a new method of engaging faith-based providers. Officials wanted to partner with Faith Works Milwaukee while respecting the diverse convictions of parolees who would be offered drug-treatment services. Pluralizing the contracting, by including secular providers as well as Faith Works Milwaukee, guaranteed choice and secured religious liberty for both the faith-based organization and the parolees. It was the federal district judge in the case against Faith Works Milwaukee who recognized that Wisconsin had created an indirect form of contracting.

I do not wish to suggest that beneficiary-choice contracting is an easy solution to all problems. Although decades of secularizing requirements for government grants and contracts ensures a multitude of secular providers, it may not always be easy for officials to identify an adequately diverse set of good social services in a particular place. For convenience and because of habit, officials are likely to think they need to contract with a range of providers only if they have first decided that, because of its effectiveness, they ought to engage a faith-infused service.

Instead, they should make diversity, faith-based and secular, an administrative standard, despite the somewhat increased staff work and expenditures. And informing a beneficiary about the available services and ensuring a genuine and independent choice (the legal standard) is more difficult than simply assigning the needy to the closest program or the one with the shortest waiting list.

Moreover, while I believe choice ought to be the routine standard whenever the government assigns a beneficiary to a provider or whenever the government pays for services intended to be available to all with some particular need, I do not think such choice is a constitutional requirement when the government makes discretionary awards, such as funding an afterschool program in one school district but not in other districts. Nor is it necessary for the contracted providers to mirror the great diversity of religions and philosophies in America. Most of that diversity is not reflected in different styles of social services, and the constitutional requirement is not that each beneficiary will be able to choose exactly the philosophy of social service that he or she desires, but that no beneficiary will be coerced into a violation of conscience.²⁰

Such issues require attention. But they certainly do not make switching to beneficiary-choice contracting anywhere as complex as converting to vouchers—complexities that preclude widespread adoption of this other variety of indirect funding. A solution to the impasse of formal neutrality that is unlikely ever to be widely implemented is not a real solution. Justice delayed is justice denied. Across the wide expanse of government-funded services, vouchers are a theoretical alternative, not a practical one. Beneficiary-choice contracting, in sharp contrast, is thoroughly practical.

Conclusion

I will conclude very briefly. In my view, the faith-based initiative, as we know it, is a positive and vital reform. I suggest that all of us, as citizens, and not only those who are religious, should salute George W. Bush, Bill Clinton before him, and every member of Congress, from both sides of the aisle, who have carried it forward. The legislative and regulatory changes of the faith-based initiative have not compelled the government to “aid religion” but rather have enabled it to come closer to the constitutional mandate of respecting religious liberty when it expends its hundreds of billions of dollars annually to pay for social services.

But the reforms urgently need to be carried further. It is not right that effective social services that include any significant religion are almost totally barred from government support because the rules for direct funding exclude them and almost all social services are paid for directly by government. And yet that wrong cannot be put right simply by removing the restriction on religion in directly funded services. Most people of faith, like secularists, do not think it is right to compel the needy to “get religion.” No one should be forced to accept Jesus, or Moses, or Mohammed in order to get a cup of cold water, shelter from the elements, or counseling for an addiction. To say this is not to capitulate to a cheap tolerance, to imply that all religions and all philosophies of service are equally true and effective. It is, rather, an acknowledgement that every person, whether someone needing help or a helper, has inherent dignity and a right to freedom of religion and conscience. As Abraham Kuyper said, matters of the spirit must be fought with spiritual weapons, not government coercion.

Compelling the needy to utilize faith-infused social services is no solution to the current requirement that religion essentially be evacuated from the wide sweep of the social services

funded by government. Fortunately, we need not be caught between these two equally unacceptable options. A “system of parallelism” will enable the government to honor and fully accommodate, at the same time, both the religious or secular convictions of social-service providers and the religious or secular convictions of social-service beneficiaries. Vouchers are one such pluralist system. But vouchers are a limited solution, and a limited solution is not good enough. But there is an alternative to vouchers that can be widely implemented without great delay: officials can adjust their contracting practices to conform to the pattern of beneficiary-choice contracting.

Not to vigorously pursue this alternative condemns the faith-based initiative to a half-reform plus a rhetorical solution. It is time to go beyond rhetoric to implementation.

Thank you.

¹ Quoted in Stephen V. Monsma, “The Wrong Road Taken,” in Jo Renee Formicola and Hubert Morken, eds., *Everson Revisited: Religion, Education, and Law at the Crossroads* (Lanham, MD: Rowman & Littlefield, 1996), p. 124.

² On the two doctrines and the transition from the one to the other, see, esp., Stephen V. Monsma and J. Christopher Soper, eds., *Equal Treatment of Religion in a Pluralistic Society* (Grand Rapids, MI: William B. Eerdmans, 1998), and Stephen V. Monsma, ed., *Church-State Relations in Crisis: Debating Neutrality* (Lanham, MD: Rowman & Littlefield, 2002).

³ The Bush administration’s standards are articulated in Executive Order 13279, “Equal Protection of the Laws for Faith-Based and Community Organizations” (Dec. 12, 2002). For overviews of the administration’s faith-based reforms, see Stanley W. Carlson-Thies, “Implementing the Faith-Based Initiative,” *The Public Interest*, no. 155 (Spring 2004); Stanley W. Carlson-Thies, Testimony for the Legislative Hearing, “Authorizing the President’s Vision: Making Permanent The Faith-Based and Community Initiative,” Subcommittee on Criminal Justice, Drug Policy, and Human Resources, U.S. House of Representatives’ Committee on Government Reform, June 21, 2005; Anne Farris, Richard P. Nathan, and David J. Wright, *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative* (Roundtable on Religion and Social Welfare Policy, August, 2004).

⁴ See, e.g., the Department of Health and Human Services’ equal treatment regulations, 45 CFR 87.1 (discretionary grants) and 87.2 (formula and block grants).

⁵ Charitable Choice as enacted in the 1996 welfare reform law, for example, says that the purpose of the provision is to enable states to procure services from faith-based organizations “on the same basis as any other nongovernmental provider[,] without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries” of the services. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, sec. 604a (b).

⁶ Still the best analysis is John C. Green and Amy L. Sherman, *Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in 15 States* (Charlottesville, VA: Hudson Faith in Communities, The Hudson Institute, Sept. 2002).

⁷ See the discussion of the case in Ira C. Lupu and Robert W. Tuttle, “Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,” *Notre Dame Law Review*, 78 (2003), pp. 917-994.

⁸ For the distinction, see Amy L. Sherman, *The Charitable Choice Handbook for Ministry Leaders* (Washington, DC: Center for Public Justice, 2001).

⁹ For discussions of religion as a component of social services, see Amy L. Sherman, *Restorers of Hope: Reaching the Poor in Your Community With Church-Based Ministries that Work* (Wheaton, IL: Crossway Books, 1997); Ronald J. Sider, Philip N. Olson, and Heidi Rolland Unruh, *Churches That Make a Difference: Reaching Your Community With Good News and Good Works* (Grand Rapids, MI: Baker Books, 2002); and Stephen V. Monsma, *Putting Faith in Partnerships: Welfare-to-Work in Four Cities* (Ann Arbor: Univ. of Michigan Press, 2004). The organizations need not be “fundamentalist” or evangelical-Protestant in order to believe that religious activities ought to be part of a holistic social service. See, e.g., Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, MD: Rowman & Littlefield, 1996), ch. 3.

¹⁰ See the discussion in Sherman, *Charitable Choice Handbook*, and note the “Faith-based Ministries’ Code of Conduct” proposed therein. Unfortunately, some faith-based organizations do use their position of power to try to force their convictions on people seeking assistance.

¹¹ For an illuminating discussion of the values and relational aspects of even job-training services, see Monsma, *Putting Faith in Partnerships*, ch. 3.

¹² See, e.g., Ira C. Lupu and Robert W. Tuttle, “The Faith-Based Initiative and the Constitution,” *DePaul Law Review*, 55, no. 1 << <http://ssrn.com/abstract=727744> >>.

¹³ On this uneasy mixture, see “Statement of Carl Esbeck, Senior Counsel to the Deputy Attorney General, Before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives, Concerning Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act, Presented on June 7, 2001”; Carl H. Esbeck, “Equal Treatment: Its Constitutional Status,” in Monsma and Soper, eds., *Equal Treatment*; Vernadette Ramirez Broyles, “The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations,” *Harvard J. of Law and Public Policy* 26 (2003), pp. 315-353; Stuart J. Lark, “Religious Expression, Government Funds, and the First Amendment,” *West Virginia Law Review*, 105 (2003), pp. 317-368.

¹⁴ On Kuyper’s worldview and its significance, see, e.g., James D. Bratt, ed., *Abraham Kuyper: A Centennial Reader* (Grand Rapids, MI: William B. Eerdmans; and Carlisle, Cumbria, UK: Paternoster Press, 1998), and Luis E. Lugo, ed., *Religion, Pluralism, and Public Life: Abraham Kuyper’s Legacy for the Twenty-First Century* (Grand Rapids, MI: William B. Eerdmans, 2000).

¹⁵ On the “schools battle,” see Charles L. Glenn, Jr., *The Myth of the Common School* (Amherst: Univ. of Massachusetts Press, 1988). I deal with how religious disputes shaped Dutch public policy (including education), political mobilization, and public institutions in my doctoral dissertation, “Democracy in the Netherlands: Consociational or Pluriform?” Univ. of Toronto, 1993. I’ve adapted the discussion of Kuyper’s proposal, below, from pp. 229f.

¹⁶ C. Eugene Steuerle, et al., eds., *Vouchers and the Provision of Public Services* (Washington DC: Brookings Institution Press, Committee for Economic Development, and Urban Institute Press, 2000).

¹⁷ Some faith-based organizations are reluctant to get involved because WIA does not allow them to take account of religion in making staffing decisions.

¹⁸ CRS Memorandum to the House Subcommittee on Criminal Justice, Drug Policy, and Human Resources, “Programs Administered by Human Services Agencies That Might Be Administered Using a Voucher Model” (Dec. 16, 2004); Sen. Rick Santorum (R-PA), S. 1560: “Congressional Commission on Expanding Social Service Delivery Options Act.”

¹⁹ The mechanism concerns contracting, not grants, because grants are payments of fixed amounts, whereas the beneficiary-choice requirement is that a provider is only paid to the extent that beneficiaries have selected it as the service provider. “Beneficiary-choice contracting” is discussed in Lupu and Tuttle, “Zelman’s Future,” pp. 982ff.

²⁰ Charitable Choice, which includes the guarantee of an alternative that is not religiously objectionable to a beneficiary, ought not also to restrict religious expression within grant- or contract-funded services. However, the courts are not yet ready for this, as the Faith Works Milwaukee ruling about conventional contracting shows.