

# Charitable Choice Under the *Lemon* Test: Historical and Empirical Support for a Constitutional Defense

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*The White House Office of Faith-Based and Community Initiatives was created by President George W. Bush as a federal extension of the Texas-based Charitable Choice program. Through this initiative the federal government helps community organizations, including faith-based organizations, receive public funding to meet the needs of underserved and low-income individuals. Challenges to this Office have arisen in federal court, which most often claim that the Office's use of funding for such activities violates the Establishment Clause. Yet, by examining the historical roots of Charitable Choice, and by analyzing empirical evidence, this Note argues that a constitutional defense supports the Office's de facto privatization of social services under the Lemon test.*

## I. INTRODUCTION

On January 29, 2001, just days into his presidency, George W. Bush issued Executive Order 13,199, creating the White House Office of Faith-Based and Community Initiatives (“OFBCI”)<sup>1</sup> as

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1. Philip C. Aka, *Assessing the Constitutionality of President George W. Bush's Faith-Based Initiatives*, 9 J.L. SOC'Y 53, 69 (2008). The White House Office of Faith-Based and Community Initiatives is charged with “lead responsibility in the executive branch to establish policies, priorities, and objectives” for federal faith-based initiatives. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001). These initiatives include “entrenched

an extension of his Texas-based Charitable Choice program.<sup>2</sup> This order was accompanied by Executive Order 13,198, which established centers in five federal agencies to support the work of faith-based and community organizations<sup>3</sup> that provide social services.<sup>4</sup> Through these orders President Bush aimed to increase the federal government's aid for the provision of social services and to ensure that religious organizations would not be hindered in obtaining those funds.<sup>5</sup>

Numerous lawsuits followed challenging the OFBCI, mostly on grounds that the program violates the separation of church and state.<sup>6</sup> At present, the Supreme Court has not yet addressed the Establishment Clause question as it relates to the OFBCI.<sup>7</sup> However, many academic articles have provided doctrinal arguments that flesh out both sides of the issue.<sup>8</sup> Despite this aca-

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and politically sensitive multi-billion dollar domestic enterprises," Aka, *supra*, at 78 (footnote and internal quotation marks omitted), and President Bush's program sought to "provid[e] assistance to all charitable groups . . . involved in social services, through new tax incentives," *id.* at 78–79.

2. DAVID J. WRIGHT, TAKING STOCK: THE BUSH FAITH-BASED INITIATIVE AND WHAT LIES AHEAD 16 (2009), available at [http://religionandsocialpolicy.org/final\\_report/](http://religionandsocialpolicy.org/final_report/). After Barack Obama was elected President, the name for this office was changed through Executive Order 13,498 to the White House Office of Faith-Based and Neighborhood Partnerships ("OFBNP"). Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009). To avoid confusion, the acronym "OFBCI," the original name for the office, will be used to refer to the office under both Presidents.

3. Faith-based organizations [hereinafter FBOs] generally comprise two groups: (1) local congregations of churches, synagogues, mosques, and other houses of worship; and (2) nonprofit organizations with some religious or faith-based association. See FREDRICA D. KRAMER ET AL., FAITH-BASED ORGANIZATIONS PROVIDING EMPLOYMENT AND TRAINING SERVICES: A PRELIMINARY EXPLORATION 2–3 (2002), available at <http://www.urban.org/uploadedpdf/410436.pdf>.

4. Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

5. Robert W. Carter, Jr., Note, *Faith-Based Initiatives: Expanding Government Collaboration with Faith-Based Social Service Providers*, 27 SETON HALL LEGIS. J. 305, 315–18 (2003).

6. See *infra* Part II.A (discussing the related cases that have been brought in federal court). See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Locke v. Davey*, 540 U.S. 712 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff'd and rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

7. The most recent challenge arose in *Hein* where the Freedom from Religion Foundation attempted to prevent the Executive Branch from providing public funds to religious entities through OFBCI programs. *Hein*, 551 U.S. at 595 (plurality opinion). The merits of the case were never addressed, since the Court dismissed the claim on standing grounds, finding that taxpayers, as a general class, lacked standing to sue the Executive Branch. *Id.* at 597–615.

8. See Aka, *supra* note 1; Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); David Saperstein, *Public Account-*

demic effort, at least one important issue remains unaddressed: whether the OFBCI could erect a constitutional defense under the *Lemon* test.

In *Lemon v. Kurtzman*<sup>9</sup> the Supreme Court created a three-prong test to adjudicate Establishment Clause claims: “First, the statute [or government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”<sup>10</sup> Accordingly, the Court stated that its intent was to “draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>11</sup> The *Lemon* test remains the applicable standard when addressing Establishment Clause issues.<sup>12</sup>

This Note argues that the White House Office of Faith-Based and Community Initiatives may have a constitutional defense for assisting with the provision of public aid to private, faith-based organizations that operate social service programs. In Part II, the historical roots of the Charitable Choice program and the Faith-Based Initiative are presented. Part III provides a model for Charitable Choice in operation through a case study of the City of Austin, Travis County, and the Gateway Community Church.<sup>13</sup> Part IV applies the historical and empirical evidence to

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*tability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002); Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y 265 (2001).

9. 403 U.S. 602 (1971).

10. *Id.* at 612–13 (citation and internal quotation marks omitted).

11. *Id.* at 612 (internal quotation marks omitted).

12. *Establishment Clause Overview*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/establishment-clause> (last visited Apr. 29, 2011) (“[C]ourts continue to use this test in most establishment-clause cases.”).

13. These entities have been selected as models for Charitable Choice because creation of the federal Charitable Choice program has been credited to President George W. Bush, who had originally implemented the program in his home state as Governor of the State of Texas. See HELEN ROSE EBAUGH, *ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE FAITH-BASED INITIATIVE IN TEXAS: A CASE STUDY 1* (2003). Consequently, Travis County and its largest city, Austin, served as testing grounds for what would grow into the modern federal program.

the requirements of the *Lemon* test to find that a constitutional defense can be made in support of the OFBCI.

## II. THE HISTORICAL ROOTS OF THE FAITH-BASED INITIATIVE AND CHARITABLE CHOICE

Legislative history indicates that the framers of the Charitable Choice program were motivated by more than strictly religious purposes. Specifically, the framers advocated that privatized social services help the government to more efficiently provide welfare to the public, which demonstrates that a rational secular purpose underlies Charitable Choice.

### A. RECENT LEGAL HISTORY

While the Supreme Court has yet to specifically take up the issue addressed by this Note, it has heard several related cases in recent years. In *Bowen v. Kendrick*, a group of federal taxpayers, clergymen, and the American Jewish Congress challenged the Adolescent Family Life Act (“AFLA” or “the Act”) as violating the First Amendment’s religion clauses.<sup>14</sup> The Act allowed the government to award grants to both public and private organizations that provided services for and research on premarital adolescent sex and pregnancy.<sup>15</sup> Pervasively sectarian religious organizations were included within those groups,<sup>16</sup> arousing the ire of some interested parties.

In applying *Lemon*, the Court held that on its face the Act did not violate the Establishment Clause. The goal of eliminating or reducing the social and economic problems caused by teenage sexuality, pregnancy, and parenthood was found to be a valid secular purpose.<sup>17</sup> Furthermore, the Court determined that organizations were not required by the statute to be religious, so the Act avoided the primary effect of advancing religion.<sup>18</sup> Interestingly,

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14. 487 U.S. 589, 597 (1988).

15. *Id.* at 593.

16. *Id.* at 597.

17. *Id.* at 602.

18. *Id.* at 605–09 (“[A] fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee’s status as a sectarian or purely secular

the Court further noted that any “incidental and remote” effects that advance religion did not take away from the Act’s general neutrality toward religious involvement.<sup>19</sup>

Under the third *Lemon* prong, the *Bowen* Court looked for excessive entanglement — mainly whether the Act allowed the federal government to intrude on the day-to-day operations of the religious grantees by monitoring their use of funds.<sup>20</sup> That the Act would require monitoring of grants suggests that the government may have been entangled in religion. Yet the Court found that the monitoring was conducted to specifically ensure that the money was spent consistent with the Establishment Clause — that “religiously affiliated” and not “pervasively sectarian” organizations were constitutionally utilizing the public grants.<sup>21</sup> Thus, to penalize the AFLA for this monitoring would have placed Congress in a double-bind: it could not monitor its grantees without violating the Establishment Clause, but it could not ensure that the money it provided to religiously affiliated organizations was properly used without “supervision” of the aid.<sup>22</sup>

In *Zelman v. Simmons-Harris*, the Court upheld publicly funded vouchers that allowed students to attend private schools, including those that were religiously affiliated.<sup>23</sup> The *Zelman* respondents were a group of Ohio taxpayers who challenged the state’s school voucher system under the Establishment Clause.<sup>24</sup> The Court upheld the voucher system, however, because of the program’s neutrality toward religion and because conferring a voucher to a religious establishment was the result of a discretionary individual choice, not a perceived religious endorsement by government.<sup>25</sup> *Zelman* is particularly interesting because the Court avoided applying *Lemon*. Instead, the Court focused on the question of whether the government or the individual was mak-

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institution. In this regard, then, the AFLA is similar to other statutes that this Court has upheld against Establishment Clause challenges in the past.” (citation omitted)).

19. *Id.* at 607 (internal quotation marks omitted).

20. *Id.* at 615–17.

21. *Id.* at 615. The issue of whether the AFLA, as applied, violated the Establishment Clause was remanded. *Id.* at 622.

22. *Id.* at 616.

23. 536 U.S. 639 (2002). Notably, this determination is presently being challenged before the Supreme Court in *Arizona Christian School Tuition Organization v. Winn*. No. 09-987 (U.S. argued Nov. 3, 2010).

24. *Zelman*, 536 U.S. at 648.

25. *Id.* at 653.

ing the choice to fund a religious institution.<sup>26</sup> Thus, an alternative, the Private Choice Test, arose as a means of resolving separation issues in education.<sup>27</sup>

In addition, three recent Supreme Court separation challenges have involved the public funding of religious organizations: (1) *Hein v. Freedom from Religion Foundation, Inc.*,<sup>28</sup> (2) *Arizona Christian School Tuition Organization v. Winn*,<sup>29</sup> and (3) *Garriott v. Winn*.<sup>30</sup> *Hein* is particularly important because, had it addressed the merits of the case, the present study would likely be unnecessary. In *Hein*, the Freedom from Religion Foundation (“FFRF”) alleged that the directors of the OFBCI had violated the Establishment Clause by organizing conferences designed to promote religious community groups over secular ones.<sup>31</sup> In short, taxpayer dollars were allegedly being spent to advance religious activities.

Rather than rule on the constitutionality of the OFBCI, the *Hein* Court focused entirely on the issue of standing. Justice Samuel Alito, writing on behalf of a plurality, argued that the FFRF lacked standing to sue for two reasons. First, “the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government.”<sup>32</sup> The plurality reasoned that simply paying taxes failed to provide standing:

Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing would be . . . not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.<sup>33</sup>

Second, the plurality stated that taxpayers had standing only to challenge congressional actions, not discretionary expenditures of

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26. *Id.* at 649–50.

27. See Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 353–55 (2002).

28. 551 U.S. 587 (2007).

29. No. 09-987 (U.S. argued Nov. 3, 2010).

30. *Garriott v. Winn*, No. 09-991 (U.S. argued Nov. 3, 2010).

31. *Hein*, 551 U.S. at 595 (plurality opinion).

32. *Id.* at 593.

33. *Id.* at 600 (internal quotation marks omitted).

the Executive Branch.<sup>34</sup> As a result, the Court never reached the merits of the case concerning the existence of the OFBCI, and the case was reversed and remanded on a procedural technicality.<sup>35</sup>

The next two Supreme Court challenges arose in the consolidated cases of *Arizona Christian School Tuition Organization v. Winn* and *Garriott v. Winn*, for which the Supreme Court heard oral arguments on November 3, 2010. The following issues are presently before the Court: (1) Does a taxpayer have standing to challenge a state tuition tax credit as unconstitutionally violating the separation of church and state; and (2) does a state program that gives parents tax credits for tuition at private schools violate the separation of church and state when most parents use the credits to pay for religious schooling?<sup>36</sup>

These issues arose from a challenge that Arizona's Revised Statute § 43-1089 ("Section 1089"), as applied, violates the Establishment Clause of the First Amendment.<sup>37</sup> Section 1089, first enacted by the Arizona legislature in 1997, gives individual taxpayers a dollar-for-dollar tax credit for contributions to school tuition organizations ("STOs").<sup>38</sup> Nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation.<sup>39</sup> Consequently, some STOs were limiting available scholarships to students who enrolled in religious schools or schools of a particular denomination, implicating a potential Establishment Clause violation.<sup>40</sup>

To compound the Establishment Clause issue, the only proffered injury from the allegedly unconstitutional operation of Section 1089 stems from the challenging party's status as Arizona

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34. *Id.* at 605–09. The second justification for the Court's reasoning regarded the application of a potential standing exception under *Flast v. Cohen*, 392 U.S. 83 (1968). *Id.*

35. WRIGHT, *supra* note 2, at 83–84.

36. *Arizona Christian School Tuition Organization v. Winn*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/arizona-christian-school-tuition-organization-v-winn-garriott-v-winn/> (last visited Nov. 7, 2010).

37. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1006–07 (9th Cir. 2009).

38. *Id.* at 1005 ("A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in 'a nongovernmental primary or secondary school or a preschool for handicapped students' within the state." (quoting ARIZ. REV. STAT. ANN. § 43-1089(G)(2) (2005))).

39. *Id.* at 1006.

40. *Id.*

taxpayers.<sup>41</sup> In short, the taxpayers are alleging that they have Article III standing<sup>42</sup> because of economic harm suffered by them as a group, which results from the state's use of its taxing and spending power to advance religion in violation of the Establishment Clause.<sup>43</sup> The Ninth Circuit, from which these cases were appealed, determined that this allegation was sufficient to find Article III standing.<sup>44</sup> Under *Flast*, the Court noted that an exception applied to the general constitutional prohibition against taxpayer standing when a plaintiff contends that a use of funds violates the Establishment Clause.<sup>45</sup> In addition, the court found that under *Zelman* the overall practice of awarding the scholarship aid "carries with it the *imprimatur* of government endorsement."<sup>46</sup>

Each of the previous cases has helped to uncover some of the shortcomings, ambiguities, and limitations of the landmark decision reached by the Court nearly thirty years earlier in *Lemon v. Kurtzman*.<sup>47</sup> *Lemon* involved two cases that had been consolidated into a single opinion.<sup>48</sup> In both cases, state statutes had authorized public education administrators to reimburse "church-related elementary and secondary schools" for teacher salaries and secular materials.<sup>49</sup> To determine whether these statutes violated the First Amendment's religion clauses, the Court created a three-part test that considered a statute's legislative purpose, its primary effect, and its potential for allowing excessive entanglement by the government.<sup>50</sup> The Court quickly dispensed with the first two prongs and instead focused on the third

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41. *Id.* at 1007–08.

42. *See infra* note 169 for an explanation of Article III standing.

43. *Winn*, 562 F.3d at 1008.

44. *Id.* at 1007–11.

45. *Id.* at 1008.

46. *Id.* at 1005 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)). The Ninth Circuit's ruling is likely to be reversed. George F. Will, Op-Ed., *Slow Learners at the 9th Circuit*, WASH. POST, May 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/18/AR2010051803989.html> ("[T]he Supreme Court should not have to cajole lower courts into acknowledging its rulings. This term, the court has issued 11 summary reversals. Thursday morning it should use its 12th on the 9th Circuit, a slow learner.").

47. 403 U.S. 602 (1971).

48. *Id.* at 606–07.

49. *Id.* at 606.

50. *Id.* at 612–13.



prong as the basis for finding that the statutes in question were unconstitutional.<sup>51</sup>

By itself, the third prong of the *Lemon* test encompasses its own three-part test: “In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>52</sup> To apply this third prong, the Court took into account various physical considerations: What is the proximity of the school to a church; are there religious symbols on the classroom walls?<sup>53</sup> Yet, the primary reason for the statutes’ unconstitutionality was the “danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.”<sup>54</sup> Thus, the Court reasoned that it is “the potential for impermissible fostering of religion” that matters, not actual manifestations of conduct.<sup>55</sup>

Throughout the course of this important constitutional opinion the Court took some noteworthy liberties in its analysis. Perhaps most significantly, the Court stretched the meaning of the First Amendment’s religion clauses to fit the facts of the case. Initially, the Court recounted a portion of the language of the Establishment Clause, focusing on the word “respecting.”<sup>56</sup> According to the Court, a law “respecting” an establishment of religion simply means one that can be characterized as a “step that could lead to such establishment.”<sup>57</sup> This broad definition became the foundation of the Court’s opinion: actions constituting a “step” should be easy to find within the facts of a given case. Next, the Court chose to apply the First Amendment’s language only in part. The clause “Congress shall make”<sup>58</sup> is absent from the Court’s analysis. This omission allowed the Court the freedom to

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51. *Id.* at 613–25. See *infra* Part IV for a description and application of the *Lemon* test.

52. *Lemon*, 403 U.S. at 615.

53. *Id.*

54. *Id.* at 617.

55. *Id.* at 619.

56. *Id.* at 612 (“[T]here should be ‘no law *respecting* an establishment of religion.’” (emphasis added) (quoting U.S. CONST. amend. I)).

57. *Id.*

58. U.S. CONST. amend. I.

apply the separation requirement to the “government” as a whole and not merely to the legislatures,<sup>59</sup> despite the fact that the Amendment clearly limits itself to “Congress.”<sup>60</sup> Thus, the Court exceeded the boundaries of the Constitution when it concluded that “[u]nder our system the choice has been made that *government* is to be entirely excluded from the area of religious instruction and churches from the affairs of *government*.”<sup>61</sup> These analytical liberties are very important considerations in applying the *Lemon* test to separation issues.

### B. THE EARLY YEARS OF THE FAITH-BASED INITIATIVE

The modern roots of the Charitable Choice program<sup>62</sup> can be traced to a movement during the late 1970s and early 1980s that has been termed the “Faith-Based Initiative.”<sup>63</sup> A vocal group of conservative academics and politicians began to challenge what they believed was a “moral crisis” in America.<sup>64</sup> Their beliefs encompassed the idea that “partnering with faith-based organizations will allow government to leverage private resources and achieve an even larger, overarching goal of reducing government spending.”<sup>65</sup> This idea eventually influenced two individuals who

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59. *Lemon*, 403 U.S. at 614 (“[T]he statutes . . . involv[e] excessive entanglement between *government* and religion.” (emphasis added)).

60. Incorporation of the First Amendment to the states occurred in the landmark case of *Everson v. Board of Education*, 330 U.S. 1 (1947). Consequently, state legislatures should properly be encompassed within the word “Congress,” though not government in general.

61. *Lemon*, 403 U.S. at 625 (emphasis added).

62. 42 U.S.C. § 604a(b) (2006). The language of this statute states that Charitable Choice is meant

to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program . . . , 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 assistance funded under such program.

*Id.*

63. ANNE FARRIS ET AL., ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE 3 (2004), available at [http://www.rockinst.org/pdf/federalism/2004-08-the\\_expanding\\_administrative\\_presidency\\_george\\_w\\_bush\\_and\\_the\\_faith-based\\_initiative.pdf](http://www.rockinst.org/pdf/federalism/2004-08-the_expanding_administrative_presidency_george_w_bush_and_the_faith-based_initiative.pdf).

64. *Id.*

65. *Id.*

largely shaped what became the modern Charitable Choice Program: John Ashcroft and George W. Bush.<sup>66</sup>

John Ashcroft has been credited with championing the Charitable Choice provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRA”).<sup>67</sup> This provision, referred to as the “Ashcroft provision,”<sup>68</sup> represented the first time that Charitable Choice initiatives had appeared within a federal statute.<sup>69</sup> Senator Daniel Coats from Indiana, said of the bill:

I urge my colleagues to support the Ashcroft provision, which allows for delivery of social services through religious charities . . . [because] it is much more cost effective than the current Federal bureaucratic system. Utilization of facilities that are already there, that are neighborhood based and utilizing volunteers makes delivery of those services far more efficient than the Government can do.<sup>70</sup>

Ashcroft then stated, “based upon the record of welfare as a failure and the need to employ and tap the resource of nongovernmental, charitable, religious, and other organizations, I urge the Senate to pass this motion . . . .”<sup>71</sup> The motion passed by a vote of 67 to 32.<sup>72</sup>

Charitable Choice provisions were included in several other statutes following the passage of the PRA.<sup>73</sup> However, many scholars have noted that the PRA was the most sweeping legislation of the time<sup>74</sup> because it changed the nature of the relationship

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66. See generally Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1112–13 (2007).

67. FARRIS ET AL., *supra* note 63, at 3–4; see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8 21, 25, and 42 U.S.C.).

68. 142 CONG. REC. S8507 (daily ed. July 23, 1996) (statement of Sen. Daniel Coats).

69. *What Is Charitable Choice?*, U.S. DEPT OF HEALTH & HUM. SERVICES, <http://www.hhs.gov/fbc/choice.html> (last visited Feb. 21, 2011).

70. 142 CONG. REC. S8507 (daily ed. July 23, 1996) (statement of Sen. Daniel Coats).

71. 142 CONG. REC. S8508 (daily ed. July 23, 1996) (statement of Sen. John Ashcroft).

72. *Id.*

73. WRIGHT, *supra* note 2, at 12–13.

74. *Id.* at 12. See also Gilman, *supra* note 66; Steven K. Green, “A Legacy of Discrimination”? *The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 725, 84 OR. L. REV. 725 (2005); Christopher C. Lund, *Of Government Funding, Religious Institutions, and Neutrality: Seeing the Charitable-Choice Debate Through the Lens of Arrow's Impossibility Theorem*, 325, 40 TULSA L. REV. 321 (2004).

between faith-based organizations and the federal government.<sup>75</sup> Religious organizations now had federal authorization, under law, to contract directly with governmental entities to receive funding for providing social services.<sup>76</sup> According to the senatorial proponents of these provisions, a key factor for their incorporation was the cost-efficiency with which privatized social service programs could operate compared to similar public programs.<sup>77</sup>

The importance of these initiatives was not lost on George W. Bush, who was fresh into his first term as Governor of Texas when the PRA was passed.<sup>78</sup> Just one month prior, Bush had been actively pursuing a state-level faith-based initiative by creating a task force to “survey Texas’ legal and regulatory landscape to identify obstacles to faith-based groups, and recommend ways that Texas can lift regulatory barriers for faith-based social service providers.”<sup>79</sup> He had also been in consultation with local Austin leaders and academics to explore increasing the role of faith-based organizations in the Texas welfare system.<sup>80</sup> When the PRA was passed, Bush seized upon the opportunity by immediately ordering the inclusion of similar provisions in the regulations governing several state agencies, becoming the first governor in the nation to do so.<sup>81</sup> In the aggregate, these state-level actions, which had been green-lighted by the Ashcroft provision,

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75. 42 U.S.C. § 604a(b) (2006). The PRA states:

The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, 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 assistance funded under such a program.

*Id.*

76. Gilman, *supra* note 66, at 1111–12 (“[P]rior to the PRA, the government did not fund churches directly.” *Id.* at 1111.).

77. *See supra* notes 68–71.

78. *Biography of George W. Bush*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/about/presidents/georgewbush> (last visited Mar. 8, 2010).

79. TEX. FREEDOM NETWORK, THE TEXAS FAITH-BASED INITIATIVE AT FIVE YEARS: WARNING SIGNS AS PRESIDENT BUSH EXPANDS TEXAS-STYLE PROGRAM AT NATIONAL LEVEL app. A, available at [www.tfn.org/site/DocServer/TFN\\_CC\\_REPORT-FINAL.pdf](http://www.tfn.org/site/DocServer/TFN_CC_REPORT-FINAL.pdf) (last visited Feb. 5, 2011).

80. FARRIS ET AL., *supra* note 63, at 3. One such individual was Marvin Olasky, a journalism professor at the University of Texas at Austin, who was later referred to as the “godfather of compassionate conservatism.” *Id.* (internal quotation marks omitted).

81. *Id.* at 4.

became the model for the federal faith-based initiative in operation today.<sup>82</sup>

### C. THE MODERN FAITH-BASED INITIATIVE

The national impact of Charitable Choice drastically increased when it became a feature of George W. Bush's compassionate conservatism in his role as the forty-third President of the United States.<sup>83</sup> Shortly after his 2000 election, Bush detailed his plan to expand funding for faith-based organizations.<sup>84</sup> An important component of this plan included the recognition that privatized services were not meant to replace public services, but to supplement them.<sup>85</sup> He also recognized that Charitable Choice was fundamentally a social services program that was intended to leverage the strengths that private organizations had to offer<sup>86</sup>: "We recognize that the funds will be spent on social services, not worship services. And we recognize there must be secular alternatives for those who wish to use the services. We respect the separation of church and state, and the constitutional rights of religious people."<sup>87</sup> Consequently, the pervading theme underlying Charitable Choice seemed to be that privatizing social services did not lead to any harm because at the heart of Charitable Choice lay a fundamentally secular purpose.

Bush, in a move reminiscent of his Texas gubernatorial days, jump-started his Federal Charitable Choice plan by issuing several executive orders, beginning with Executive Orders 13,198 and 13,199 on January 29, 2001.<sup>88</sup> In describing reasons for the orders and the foundations of the Charitable Choice program, Bush reiterated:

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82. EBAUGH, *supra* note 13, at 1.

83. WRIGHT, *supra* note 2, at 15.

84. President George W. Bush, Remarks by the President to the United States Conference of Mayors (June 25, 2001) (transcript available at 2001 WL 708228).

85. *Id.* at \*3 ("[G]overnment cannot be replaced by charities . . . . Charities and community groups cannot do everything. But we strongly believe they can do more.")

86. *Id.* at \*4-5.

87. *Id.* at \*4.

88. George Muckleroy, Comment, *Double Entendre: How the Two Interpretations of the Establishment Clause Will Determine the Future of Charitable Choice*, 33 TEX. TECH L. REV. 1197, 1206 (2002).

Government cannot be replaced by charities, but it can and should welcome them as partners. We must heed the growing consensus across America that successful government social programs work in fruitful partnership with community-serving and faith-based organizations — whether run by Methodists, Muslims, Mormons, or good people of no faith at all.<sup>89</sup>

The rationale for these orders was further explained in the White House's final report on the faith-based initiative, which highlighted the large cost to taxpayers from failing to address societal problems, like homelessness and prison recidivism.<sup>90</sup>

Specifically, Order 13,199 created the OFBCI, which served as the structural backbone of Bush's faith-based agenda.<sup>91</sup> The OFBCI was charged with the "lead responsibility in the executive branch to establish policies, priorities, and objectives . . . to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."<sup>92</sup> Order 13,198 was designed to further those goals by spreading the OFBCI throughout the federal government's infrastructure.<sup>93</sup> Five centers were created within some of the largest agencies of the federal government: the Departments of Education, Health and Human Services, Housing and Urban Development, Justice, and Labor.<sup>94</sup> The executive order charged them with coordinating "department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services."<sup>95</sup> Additionally, Bush required the centers to audit their departments for procedural and administrative barriers.<sup>96</sup>

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89. GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION 1 (2001), *available at* <http://archives.hud.gov/reports/rally.pdf>.

90. *See* WHITE HOUSE, INNOVATIONS IN COMPASSION: THE FAITH-BASED AND COMMUNITY INITIATIVE: A FINAL REPORT TO THE ARMIES OF COMPASSION (2008), *available at* <http://georgewbush-whitehouse.archives.gov/government/fbci/pdf/innovation-in-compassion.pdf>.

91. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

92. *Id.* § 2.

93. Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

94. *Id.* § 1.

95. *Id.* § 2.

96. *Id.* § 3.

An additional order shortly followed in the form of Executive Order 13,279, which represented the White House's frustration with the bureaucratic barriers encountered by its faith-based initiative.<sup>97</sup> Results from the audit required by Order 13,198 were provided in a report entitled *Unlevel Playing Field* that was issued by the White House in August 2001.<sup>98</sup> In the report, fifteen barriers to the OFBCI were identified, leading to the report's statement:

It is not Congress but these overly restrictive Agency rules that are repressive, restrictive, and which actively undermine the established civil rights of these groups. Such excessive restrictions unnecessarily and improperly limit the participation of faith-based organizations that have profound contributions to make in civil society's efforts to serve the needy.<sup>99</sup>

Perhaps the most remarkable barrier was the requirement that faith-based organizations were required to obtain 501(c)(3) non-profit status before they were eligible to receive available public funds.<sup>100</sup> Shortly after the report was issued, President Bush signed Executive Order 13,279, which directed the government to end policy-based discrimination and bias against faith-based organizations ("FBOs") and to allow FBOs to retain their religious character despite the receipt of public funds.<sup>101</sup> The order also restricted funding to inherently non-religious activities.<sup>102</sup> Many more executive orders followed, which were mostly intended to

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97. WRIGHT, *supra* note 2, at 40–41.

98. WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (2001), available at <http://webharvest.gov/peth04/20041031105515/http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf>.

99. *Id.* at 14.

100. *Id.* at 24. 501(c)(3) nonprofit status allows an organization to receive various tax exemptions in exchange for adherence to several requirements; for example, none of a 501(c)(3) organization's net earnings may inure to any private shareholder or individual. See generally *Exemption Requirements — Section 501(c)(3) Organizations*, IRS.GOV, <http://www.irs.gov/charities/charitable/article/0%2C%2Cid=96099%2C00.html> (last visited Sept. 27, 2010).

101. Exec. Order No. 13,279 § 2(c), 67 Fed. Reg. 77141, 77142 (Dec. 12, 2002).

102. *Id.* § 2(e).

increase the number of OFBCI centers in other federal agencies.<sup>103</sup>

In recent years, the most interesting development concerning the faith-based initiative has been President Obama's support of the faith-based framework that Ashcroft and Bush helped to create. On the National Day of Prayer, Obama stated:

Instead of driving us apart, our varied beliefs can bring us together to feed the hungry and comfort the afflicted; to make peace where there is strife and rebuild what has broken; to lift up those who have fallen on hard times. This is not only our call as people of faith, but our duty as citizens of America . . . .<sup>104</sup>

Later that day he signed Executive Order 13,498, which changed the name of the OFBCI to the White House Office of Faith-Based and Neighborhood Partnerships ("OFBNP") and that detailed what he believed were the underlying purposes of the office.<sup>105</sup> Specifically, Obama stated in Section 1 that the provision of privatized social services would be held accountable through "measurable results in furtherance of valid public purposes," thus indicating that with oversight, privatized social services from faith-based organizations could co-exist with federal funding under our present constitutional framework.<sup>106</sup>

### III. AN EMPIRICAL ANALYSIS OF THE COST EFFICIENCY BETWEEN PUBLIC AND PRIVATIZED SOCIAL SERVICES IN THE AUSTIN METROPOLITAN AREA

There are practical reasons for privatizing social services beyond the strictly religious purposes apparent on the surface of this issue. Specifically, empirical evidence of the cost efficiency with which privatized providers operate compared to public pro-

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103. See, e.g., Exec. Order No. 13,342, 69 Fed. Reg. 31509 (June 1, 2004); Exec. Order No. 13,397, 71 Fed. Reg. 12275 (Mar. 7, 2006).

104. President Barack Obama, Remarks at the National Prayer Breakfast (Feb. 5, 2009) (transcript available at [http://www.whitehouse.gov/blog\\_post/this\\_is\\_my\\_prayer/](http://www.whitehouse.gov/blog_post/this_is_my_prayer/)).

105. Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009).

106. *Id.* § (1)(a) (internal quotation marks omitted).



viders' operations offers a constitutional defense for the federal program.

#### A. SHORTCOMINGS

Empirical studies require assumptions to account for the failure to incorporate every possible issue. This analysis, which supports a constitutional defense of faith-based, privately supplied social services, considers just the "cost of social services" — only one of many potential variables — and utilizes a limited data set. By employing this method, this study attempts to demonstrate how cost effective some specific social service programs can be; an efficiency that supports the OFBCI's creation. Nevertheless, such a study is not without its shortcomings.

First, although the present study considers one church, the Gateway Community Church, it may not be representative of how all faith-based organizations operate; in addition, not all faith-based organizations are churches. Second, the size of faith-based organizations probably affects how efficiently they provide social services. Gateway Community Church in Austin is a large FBO with approximately 4000 members. Many churches have much smaller congregations,<sup>107</sup> and, therefore, are limited in the scope and scale of service they can provide. Third, selecting the measurement for the effectiveness of faith-based organizations is a subjective task. Different variables will produce different outcomes.

The comparability of private and public entities is also potentially problematic. No two privatized or public services are exactly alike. For FBOs, the spiritual focus of many of the church programs raise questions as to their comparability with public service programs and other privatized entities that lack a spiritual element.<sup>108</sup> Furthermore, Travis County, Austin, and Gateway

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107. A recent report on Episcopal Church membership shows that average Episcopal church size is 118 persons. C. KIRK HADAWAY, EPISCOPAL CHURCH CTR., CONGREGATION SIZE AND CHURCH GROWTH IN THE EPISCOPAL CHURCH 9 (2001), available at [http://www.episcopalchurch.org/documents/CDR\\_ChurchSizeandChurchGrowth.pdf](http://www.episcopalchurch.org/documents/CDR_ChurchSizeandChurchGrowth.pdf).

108. See Saperstein, *supra* note 8, at 1374–75 ("There remains little evidence that pervasively sectarian social service providers do a better job than secular, public, or religiously affiliated providers." *Id.* at 1375.); but see Solomon & Vlissides, *supra* note 8, at 267–68 ("Evaluating FBOs through the prism of secular versus sacred misses the point. . . .

Community Church might not be representative of every county, city, or church in the rest of the nation.

In sum, these shortcomings are not exhaustive, but they represent some of the larger issues with the present study. By highlighting them, the choice to use money and costs as measurable variables is better understood. Similarly, the study's focus on the geographic root of the OFBCI, although somewhat myopic, should help to uncover the purpose of the modern federal office.

#### B. THE LOCAL COST OF SOCIAL SERVICES: TRAVIS COUNTY AND THE CITY OF AUSTIN<sup>109</sup>

The bulk of federal monies for social services trickle down to the state and municipal level where they are disseminated as grants and contracts to local governments and non-profits.<sup>110</sup> At the local level, unsurprisingly, these monies are supplemented by local taxpayer dollars, which account for the largest portion of government budgets.<sup>111</sup> Since local governments receive such a large amount of taxpayer dollars, what proportion of that amount is used to provide their citizens with social services? Austin and Travis County have an arrangement in which their Health and Human Services Departments largely work together to provide comprehensive services to all citizens who reside in Travis County.<sup>112</sup> In other words, most services available in the area are provided exclusively from either one entity or the other to avoid duplication. As a result, sufficient data exists to differentiate some of the costs between the public entities under study.

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FBOs' success stems from addressing the spiritual needs of individuals by instilling values that change behavior.").

109. As a newly elected governor, George Bush ensured that Texas became the first state to import the new Charitable Choice provisions from the recently passed PRA of 1996. WRIGHT, *supra* note 2, at 15. Texas has remained in the vanguard of states experimenting with funding faith-based agencies. EBAUGH, *supra* note 13, at 1.

110. WRIGHT, *supra* note 2, at 73.

111. CITY OF AUSTIN, BUILDING A SUSTAINABLE COMMUNITY: FINANCIAL PERFORMANCE REPORT FOR TWELVE MONTHS ENDING SEPTEMBER 30, 2008, at 1 (2009), available at [http://www.ci.austin.tx.us/budget/07-08/downloads/4th\\_qtr\\_Performance.pdf](http://www.ci.austin.tx.us/budget/07-08/downloads/4th_qtr_Performance.pdf) (showing that 59.2% of the city's General Fund comes from taxes).

112. *Austin/Travis County Health and Human Services*, AUSTIN CITY CONNECTION, <http://www.ci.austin.tx.us/health/> (last visited Nov. 15, 2010).

Travis County indicates in its community impact report that it directly and indirectly funds social services programs.<sup>113</sup> Indirect funding occurs through contracts with local providers and makes up a significant contribution from the county.<sup>114</sup> During the 2008 calendar year, Travis County invested roughly \$4.6 million into more than forty contracted providers of programs.<sup>115</sup> Although that sum might seem inadequate to support such a large number of programs, the county's funding generally did not constitute more than 20% of any provider's overall budget requirement.<sup>116</sup> To maintain transparency, the county also produces an annual Community Impact Report, which lists the costs of its social service according to the number of "clients" served by each program.<sup>117</sup> A snapshot of cost ratios for selected programs funded by the county is included below<sup>118</sup>:

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113. TRAVIS CNTY. HEALTH & HUMAN SERVS. & VETERANS SERV., COMMUNITY IMPACT REPORT 2008, at 9 (2009), available at [http://www.co.travis.tx.us/health\\_human\\_services/research\\_planning/publications/cir/cir\\_2008/community\\_impact\\_2008.pdf](http://www.co.travis.tx.us/health_human_services/research_planning/publications/cir/cir_2008/community_impact_2008.pdf) [hereinafter TRAVIS COUNTY COMMUNITY IMPACT REPORT].

114. *Id.* at 21.

115. *Id.* (although this contribution does not reflect the county's total social services contribution, it does reflect the data that the county has been willing to provide).

116. The County has provided for each organization in which it invests the percentage of the program's budget represented by the County's funding. *See generally id.*

117. *See id.*

118. These cost ratios are based on selected social service programs that can be replicated by faith-based organizations. The City of Austin and Travis County provide comprehensive human services that would be exceedingly difficult and cost-prohibitive for FBOs to provide, such as HIV services that treat infected individuals and services for the deaf and hard of hearing. *See infra* Appendix for program descriptions.

Travis County, Texas (2008)<sup>119</sup>

County Program & Provider	Contribution	Number Helped by Gov't. <sup>120</sup>	Per-Capita Cost <sup>121</sup>
<b>Basic Needs</b>			
Capital Area Food Bank	\$57,766	741	\$78.00
Caritas	\$155,480	289	\$537.75
<b>Housing Continuum</b>			
Austin Tenant's Council	\$24,848	3290	\$7.55
Blackland Community Development Corp.	\$9301	9	\$1068.59
Caritas-Best Single Source	\$262,500	270	\$970.95
Foundation for the Homeless	\$13,310	9	\$1451.47
The Salvation Army	\$98,319	96	\$1025.86
Youth and Family Alliance	\$140,107	18	\$7871.62
SafePlace	\$250,336	148	\$1687.75
<b>Workforce Development</b>			
American YouthWorks	\$66,145	6	\$10,510.89
<b>Behavioral Health</b>			
Workers Assistance Program	\$43,503	28	\$1549.25
YWCA of Greater Austin	\$90,596	263	\$345.08
Youth and Family Alliance	\$119,585	143	\$833.41

As the data demonstrate, the number of people affected by county contributions varies by program.<sup>122</sup> Some programs are

119. TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113.

120. The Travis County Community Impact Report for 2008 provides the county's financial contribution (contract) to each listed provider, and the contract's relative financial impact to a contractor's total budget requirement for a given program. See TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113. This impact is demonstrated as a percent. *Id.* For example, the county contributed \$66,145 to American YouthWorks, which represented 3.1% of that program's total budget requirement. *Id.* at 75. The report also lists how many people a given program supported — American Youth Works supported 203 people in 2008. *Id.* at 76. With these qualifications in mind, "Number Helped" is calculated by extrapolating a given program's total budget requirement from the county's contribution as a percent of that requirement, and dividing that result by the number of people who were helped. This calculation results in a per-capita cost. The per-capita cost is then divided into the county's contribution to determine how many people the county was able to service (e.g.,  $\$66,145 / .031 = X$ , the total budget requirement;  $X / 204 = Y$ , the per-capita cost; the county's contribution divided by  $Y =$  the number of persons the county helped — represented by its contribution). The figures in the table number do not take into account county operation costs, such as personnel, utilities, etc., that likely subtract from the county contribution. Thus, "Number Helped" assumes that the entire county contribution gets attributed to the provision of services on a per-person basis.

121. "Per-Capita Cost" assumes complete cost of contracted provision of service, including but not limited to personnel and general operation costs.

much more expensive and comprehensive, per-capita, such as the American YouthWorks workforce preparation program. Through this program, youth between the ages of 16 and 25 are provided with job-readiness training, occupation-specific training, job-search and job-placement assistance, and coaching or counseling,<sup>123</sup> which appears difficult for private, faith-based organizations to replicate. Consequently, county contributions in 2008 could only help six youth at a staggering cost of roughly \$10,500 per person.<sup>124</sup> On the other hand, food banks are much more prevalent in both private and public spheres, perhaps because of their cost efficiency and impact potential. The Capital Area Food Bank, for example, provided meals for roughly 300,000 persons during the 2008–2009 fiscal year at a cost of roughly \$2.46 per meal.<sup>125</sup>

Austin provides an even larger number of services for citizens, likely because Austin residents make up the majority of Travis County's population.<sup>126</sup> For 2009, Austin's Health and Human Services Department appropriated roughly \$24.48 million to social service programs.<sup>127</sup> Similar to Travis County, Austin has also provided cost ratios for many of its services<sup>128</sup>:

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122. Notably, Travis County provides \$15 million in funding for social service programs. E-mail from Courtney Bissonnet Lucas, Research and Planning Division Planner, Travis Cnty. Health & Human Servs. & Veterans Serv., to author (Nov. 4, 2009, 17:48 EST) (on file with author). However, allocations and program specific data for the remaining \$10.4 million are unavailable since, at present, the county is only willing to provide a glimpse of services rather than a total picture. See *supra* note 115. Thus, extrapolations are based on data provided but may not entirely reflect comprehensive cost ratios.

123. See TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113, at 75.

124. For a full explanation of how this calculation was performed, see *supra* note 120.

125. CAPITAL AREA FOOD BANK OF TEX., ANNUAL REPORT 2008–2009, at 1 (2010), [http://www.austinfoodbank.org/about-us/assets/Annual-Report\\_for-website-with-lists.pdf](http://www.austinfoodbank.org/about-us/assets/Annual-Report_for-website-with-lists.pdf). This figure was calculated by dividing the Food Bank's total expenses of \$42,409,635, *id.* at 11, by the 17.2 million meals it provided, *id.* at 1.

126. According to Census Bureau data, in 2009 Austin residents made up approximately 74% of Travis County's population. *Travis County Profile*, TEX. ASS'N OF COUNTIES, <http://www.txcip.org/tac/census/profile.php?FIPS=48453> (last visited Feb. 4, 2011).

127. CITY OF AUSTIN, 2008–2009 CITY OF AUSTIN PROPOSED BUDGET: PERFORMANCE DOCUMENTS 69 (2010), <http://www.ci.austin.tx.us/budget/08-09/downloads/RevisedFY09ProposedPerformanceDocs.pdf>.

128. See *infra* Appendix for program descriptions. These figures were calculated by the city without explanation and are based on a proposed, not actual, budget. See generally 2008–2009 CITY OF AUSTIN PROPOSED BUDGET, *supra* note 127. There is often a variance between the city's overall contribution to a particular program and the per-capita cost multiplied out across the number of people helped by that program. Furthermore,

City of Austin, Texas (2009)<sup>129</sup>

City Program	Contribution	Number Helped by Gov't.	Per-Capita Cost
<b>Basic Needs</b>	\$2,892,945	9132	\$192.74
<b>Homeless Services (Shelter Services)</b>	\$5,375,614	2957	\$1684.81
<b>Self-Sufficiency</b>	\$425,031	441	\$999.01
<b>Workforce Development</b>	\$3,563,161	248	\$9955.04
<b>Substance Abuse</b>	\$774,329	361	\$1782.56
<b>Violence &amp; Victimization</b>	\$1,232,730	290	\$2637.45

At first glance, these figures reflect a wide range of costs — what do “Basic Needs” and “Self-Sufficiency” mean, and why are their costs so different, despite the cursory view that the programs appear to address the same needs? The City of Austin operates neighborhood centers, which were acquired from non-profit organizations in the early 1970s and are now used to provide “Basic Needs” services directly to citizens, which are also augmented with contracted providers.<sup>130</sup> Austin describes these neighborhood centers and the “Basic Needs” services as

[l]ocated in low-income neighborhoods, the six (6) centers and their services are now funded by the Federal Community Services Block Grant (CSBG) and by the City’s General Fund . . . . [B]asic needs [include] food; clothing; information and referral regarding housing, employment, educational, and health care services; seasonal resources and services, such as, blankets in the winter, fans in the summer, food baskets and toys at Thanksgiving and Christmas . . . .<sup>131</sup>

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Austin’s report may provide the per-capita cost for a particular service within a program, and the number of people helped by that particular service, but may not explain the same for other services and costs within that program. *Id.* For example, under “Homeless Services” the city has listed 470 people (proposed) as receiving case management services, but it’s unclear whether the cost of that service has been factored into the per-capita cost it provides for the Homeless Services program. *Id.* at 73.

129. 2008–2009 CITY OF AUSTIN PROPOSED BUDGET, *supra* note 127.

130. See *ePerformance Measures for Basic Needs and Self-Sufficiency Services*, AUSTIN CITYCONNECTION, [http://www.ci.austin.tx.us/budget/eperf/index.cfm?fuseaction=home.Activity&DEPT\\_CD=HHS&DIV\\_CD=7SOC&GP\\_CD=7BNS](http://www.ci.austin.tx.us/budget/eperf/index.cfm?fuseaction=home.Activity&DEPT_CD=HHS&DIV_CD=7SOC&GP_CD=7BNS) (last visited Feb. 20, 2010).

131. *Id.*

The “Self-Sufficiency” program also operates out of the neighborhood centers and is funded in the same fashion.<sup>132</sup> This program does not, however, give handouts. Instead, case managers assist low-income persons by assessing the client’s basic, economic, and psycho-social conditions and needs.<sup>133</sup> Accordingly, a significant investment is involved to facilitate the case manager-client relationship. The costs of this service not only include budget planning resources, but also case managers’ salaries. Consequently, a roughly \$700 difference separates the per-capita costs of these two programs.

### C. THE LOCAL COST OF SOCIAL SERVICES: THE GATEWAY COMMUNITY CHURCH

The Gateway Community Church (“Gateway”) is a large, non-denominational<sup>134</sup> church in Austin, Texas.<sup>135</sup> Founded in 1999 by a handful of people, the church has since burgeoned to more than 4000 members.<sup>136</sup> Led by John Burke,<sup>137</sup> Gateway’s mission has been to reach the “unchurched,” or those in the population who have been put off by traditional settings. In fact, Pastor Burke has stated, “We believe it’s important to speak the language of our culture . . . .”<sup>138</sup> The church has worked to offer its patrons an informal and contemporary environment, largely reflecting the Austin community of which it is a part.

A primary mission of the church is global social service<sup>139</sup>:

People in need cross our path everyday. We believe one of the main roles of the Church is to serve and care for the poor, oppressed and marginalized in our communities, our city and beyond. We’re always on the lookout for ways to

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132. *Id.*

133. *Id.*

134. *FAQ*, GATEWAY CHURCH, <http://www.gatewaychurch.com/faq> (last visited Feb. 19, 2011).

135. GATEWAY CHURCH, ANNUAL REPORT 2009, at 1 (2010), *available at* <http://www.gatewaychurch.com/images/2009-annual-report.pdf>.

136. *Id.*

137. *Id.*

138. *Mission Values Beliefs*, GATEWAY CHURCH, <http://www.gatewaychurch.com/values> (last visited Mar. 6, 2011).

139. *Serve Globally*, GATEWAY CHURCH, <http://www.gatewaychurch.com/serve-globally> (last visited Feb. 6, 2011).

serve through Gateway, as well as in your own neighborhood and workplace.<sup>140</sup>

To accomplish this goal, Gateway offers a variety of social service programs through its Compassion and Mobilization ministry and has stated that more than half of its members participate in community service.<sup>141</sup> Some of these programs include many of those offered or funded by the local governments.

#### Gateway Community Church, 2008<sup>142</sup>

Church Service Program	Contribution <sup>143</sup>	Number Helped <sup>144</sup>	Per-Capita Cost <sup>145</sup>
Benevolence Fund	\$36,000	90	\$400.00
Feed the Community	\$6945.45	1920	\$3.61
12-Steps to Recovery	\$4545.45	70	\$64.94
1 to 1 Crisis Counseling	\$4545.45	208	\$21.85
Stay the Course	\$4545.45	100	\$45.45
Divorce Care	\$4545.45	45	\$101.01
Divorce Care for Kids	\$4545.45	30	\$151.52
Comfort and Hope	\$4545.45	30	\$151.52
Forgiven and Set Free	\$4545.45	15	\$303.03
Grief Support	\$4545.45	30	\$151.52
Good Sense	\$4545.45	90	\$50.51

Like the City of Austin, the church's program names can obscure their purposes. Gateway's "Benevolence Fund," for example, is almost identical to the city's "Basic Needs" program.<sup>146</sup> A key difference, though, derives from what some scholars have

140. *Mission Values Beliefs*, *supra* note 138.

141. GATEWAY CHURCH, ANNUAL REPORT 2008, at 8 (2009) (on file with author).

142. E-mails from Charles Dishinger, Executive Director, Gateway Church, and Betsy Lawson, Director of Mobilization, Gateway Church, to author (on file with author).

143. With the exception of the Benevolence Fund and Feed the Community, the \$4545.45 figure was created by evenly dividing the church's total contribution across nine programs. Each of the nine programs receives funding from the same budget allocation. Telephone interview with Betsy Lawson, Serve Director, Gateway Church (Nov. 12, 2010).

144. "Number Helped" is the church's cost of one full-time equivalent ("FTE") and facilities for a program. Volunteers make up a large portion of personnel needs.

145. "Per-Capita Cost" assumes complete cost of contracted provision of service, including but not limited to personnel and general operation costs.

146. Interview with Betsy Lawson, *supra* note 143.



characterized as a “holistic” approach to the service.<sup>147</sup> Not only does Gateway’s program provide funding for emergency needs — food, rent, clothing, utilities, etc. — but staff members and volunteers also focus on meeting the spiritual needs of the individual.<sup>148</sup> Moreover, Gateway’s recovery programs are almost identical, regarding goal and needs identification, to the city’s prevention and intervention substance abuse programs, and the functions provided by the county’s behavioral health contractors.<sup>149</sup> In all, the church’s programs appear comprehensive, covering needs from nutrition, to substance abuse, physical abuse, abortion, death, divorce and marital counseling. Despite their scale and scope, the skill sets of available counselors and case managers limit church programs. Since church programs lack technical competencies like medical training and resources like hospitals and clinics, the government is left to meet the more costly needs in the community.

#### D. THE COMPARATIVE COSTS OF SOCIAL SERVICES

Mel Martinez, then-Secretary of the U.S. Department of Housing and Urban Development, remarked, “Faith-based organizations should be judged on one central question: Do they work?”<sup>150</sup> This question is not as easy to answer as it was to ask — how do you measure whether or not faith-based organizations are working? To what do you compare those measurements? Some studies have opted, for example, to measure the success of a program by the number of complaints.<sup>151</sup> Other studies have elected to utilize “[f]ield research, client surveys, administrative data, and a clinical trial research design.”<sup>152</sup> The present study uses per-

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147. See Maya Anderson, Note, *The Constitutionality of Faith-Based Prison Programs: A Real World Analysis Based in New Mexico*, 37 N.M. L. REV. 487, 507 n.201 (2007) (describing the FaithWorks program being studied as providing a more holistic service).

148. See *Serve Globally*, *supra* note 139.

149. *Support and Recovery*, GATEWAY CHURCH, <http://www.gatewaychurch.com/support-and-recovery> (last visited Feb. 21, 2011).

150. WRIGHT, *supra* note 2, at 17 (internal quotation marks omitted).

151. MARK RAGAN, FAITH-BASED VS. SECULAR: USING ADMINISTRATIVE DATA TO COMPARE THE PERFORMANCE OF FAITH-AFFILIATED AND OTHER SOCIAL SERVICE PROVIDERS 6 (2004), [http://www.religionandsocialpolicy.org/docs/research/Benchmarking\\_report\\_12-23-04.pdf](http://www.religionandsocialpolicy.org/docs/research/Benchmarking_report_12-23-04.pdf).

152. *The Roundtable’s Research, THE ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY*, <http://www.religionandsocialpolicy.org/research/> (last visited Feb. 6, 2011).

capita costs to compare governmental entities to a faith-based organization in Austin.

Distinguishing among the costs by entity is a simple task. Yet, many factors can potentially negate the comparative reliability of such a study. In the end, when variability in basic costs has been accounted for and clients have been identified and treated, two important questions still remain: How much do these programs cost taxpayers; and is there a more efficient way of providing a similar service? These questions could be answered by comparing programs at private, faith-based entities with similar programs provided by public entities.<sup>153</sup>

Although some services are unique to a particular entity, others have been replicated, such as those represented in the “Basic Needs” and “Benevolence Fund” categories in the tables above. Both of these services provide a financial or material distribution to meet some emergency need. What is important to consider when comparing the costs of these programs is not which program operates more cheaply. For instance, much of Gateway’s contribution is financial.<sup>154</sup> If Gateway were giving away less money than the government, one could argue that the church is failing to rise to the level of public entities’ provisions. Conversely, the higher figure could simply reflect wasted resources, such as supplying extravagant furniture, clothing or monetary grants in excess of what was required to meet the need.

From the data, the cost of meeting “Basic Needs” per individual served ranges from the Capital Area Food Bank’s \$78 and Caritas’ \$537.75 (county contractors) to Austin’s \$192.74 and Gateway’s \$400. Importantly, these figures differ significantly in how, and whether, they incorporate the costs of supplying food. Travis County has separately categorized the Capital Area Food Bank as meeting a “Basic Need”; although food is certainly such a need, perhaps combining that cost with Caritas’ expenses would be preferable. The City of Austin has combined the food provision func-

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153. This comparison assumes that the services are, indeed, similar. “Similarity” in this study is met by matching the needs and goals identified by a given program with the needs and goals of another program. If an identified need is resolved in the terms of the program’s goal, then the study assumes the program’s success. For that reason, all of the methods and capital employed in the provision of the service should be demonstrable as a product of cost.

154. Interview with Betsy Lawson, *supra* note 143.

tion with other basic needs in reaching its cost calculation, and Gateway's "Benevolence Fund" does not include a food provision at all; this need is met by its "Feed the Community" program.<sup>155</sup> Despite these differences, an important similarity is found in the cost of meeting basic needs. The range of costs across the entities is roughly \$200 to \$540, with the church falling somewhere in the middle. Consequently, with regard to costs, Gateway's provision appears to be in the range of public provisions.

The food provision by itself is not as uniform as the "Basic Needs" and "Benevolence Fund" categories. As mentioned, the county is spending \$78 per person to provide meals to its clients, while Gateway is spending \$3.61 a person. This disparity does not stem from asymmetric goals;<sup>156</sup> rather, Gateway's food program appears to benefit from economies of scale. According to a recent audit the food bank spent \$681,967 on operating costs ("Management and General") and \$694,023 on fund-raising costs ("Fund-Raising").<sup>157</sup> Operating costs, for example, include personnel salaries, professional fees, and capital maintenance or purchases.<sup>158</sup> Gateway's "Feed the Community" program has almost no overhead costs: "Gateway is supported solely through the financial contributions of those who call Gateway their church home."<sup>159</sup> From individual contributions the church supports all of its service programs, including the modest salaries of those who operate the programs.<sup>160</sup> Furthermore, Gateway relies completely on donated food, while the county purchases a large

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155. E-mails from Dishinger & Lawson, *supra* note 142.

156. The mission of the Capital Area Food Bank of Texas is to "nourish hungry people and lead the community in ending hunger." CAPITAL AREA FOOD BANK OF TEX., <http://www.austinfoodbank.org/> (last visited Feb. 6, 2011). To accomplish this mission the organization engages in "food distribution." CAPITAL AREA FOOD BANK OF TEX., *supra* note 125, at 7. Gateway's mission is the same. See *Serve Locally*, GATEWAY CHURCH, <http://www.gatewaychurch.com/serve-locally> (last visited Feb. 6, 2011).

157. CAPITAL AREA FOOD BANK OF TEX., INC., & CAPITAL AREA FOOD BANK FOUND., FINANCIAL STATEMENTS AND OTHER FINANCIAL INFORMATION, SEPTEMBER 30, 2009 AND 2008, at 4 (2010), available at <http://www.austinfoodbank.org/about-us/assets/CAFBAudit-09.pdf>.

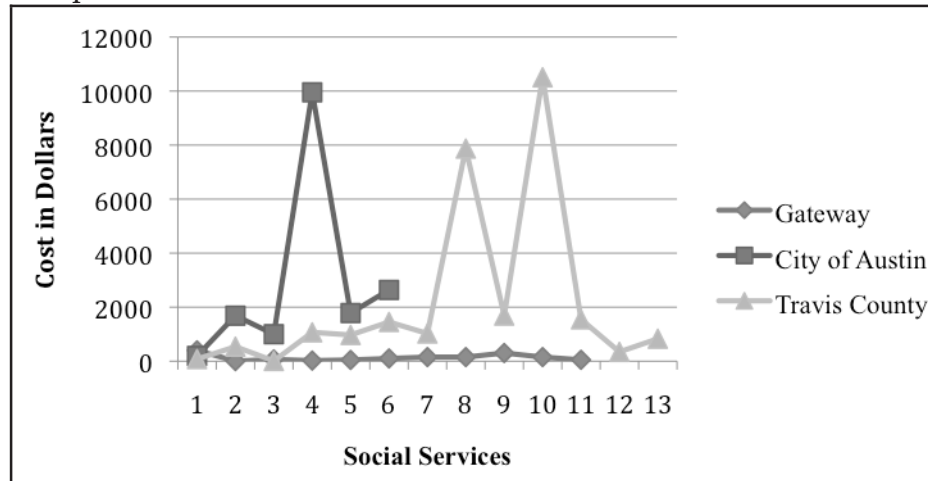
158. *Id.* at 6.

159. See GATEWAY CHURCH, ANNUAL REPORT 2008, *supra* note 141.

160. The combined salary for personnel running all of Gateway's programs for 2008 was \$50,000. E-mail from Charles Dishinger, Executive Pastor, Gateway Church, to author (Nov. 15, 2009, 17:34 EST) (on file with author).

amount of its food.<sup>161</sup> Gateway's food program, therefore, appears to benefit from economies of scale, since the same resources and personnel are used to accomplish each of its program's goals.

#### Comparative Cost of Services 1



Aggregate comparisons of these programs also reveal relative costs. The graph above, Comparative Cost of Services 1,<sup>162</sup> represents such a comparison. The most noticeable trend is that the per-capita costs of Gateway's programs are low across the board, relative to the other entities. Travis County represents the middle level of per-capita costs; some of its programs are as cost efficient as Gateway's and others a bit more expensive. Austin's trend line represents the highest cost of three, although these costs are only marginally higher. Interestingly, the highest point on Austin's cost line, Program 4, represents its workforce development program, which commands a dramatically higher per-capita cost (\$9955.04) compared to other city programs. Without that program, the City's cost line would be reduced to just above the count's cost line.

161. For 2008, the Capital Area Food Bank had \$69,076 worth of purchased food on hand. See CAPITAL AREA FOOD BANK OF TEX., *supra* note 157, at 3.

162. The services listed along the X-axis of the graph are based in the order in which they appear in the cost ratios tables, starting at the top of the tables and proceeding downward. In presenting this graph the assumption is made that the ordering of services has no particular effect on the general trend of per-capita cost lines.

A final observation is that Travis County's per-capita cost line also oscillates between low-cost programs and very expensive programs. Point 8 on Travis County's line represents its contract with the Youth and Family Alliance housing program. This service provides 24-hour emergency shelter and services for young adults from the ages of 10 to 23.<sup>163</sup> Among the services provided are access to "education, GED preparation, hygiene supplies, washer and dryer services, educational groups, alternative activities, medical care, food, clothing, drug and alcohol assessments, transportation services, immunizations, HIV counseling and testing, pregnancy testing, mental health services, drug and alcohol counseling, and case management services."<sup>164</sup> Consequently, such a comprehensive provision of services for a specific demographic of the population can present substantial costs to almost any provider.

The highest point on the county's cost line, Program 10, represents its contract with the American YouthWorks workforce development program. Like the Youth and Family Alliance, American YouthWorks invests heavily in the services it provides to a specific demographic.<sup>165</sup> Moreover, the ability for a faith-based organization to provide a completely similar program would be difficult.

To present an alternative perspective, the outliers of the data set are removed — the last two programs that were just described, as well as Austin's Workforce Development program. The results are depicted in the graph below:

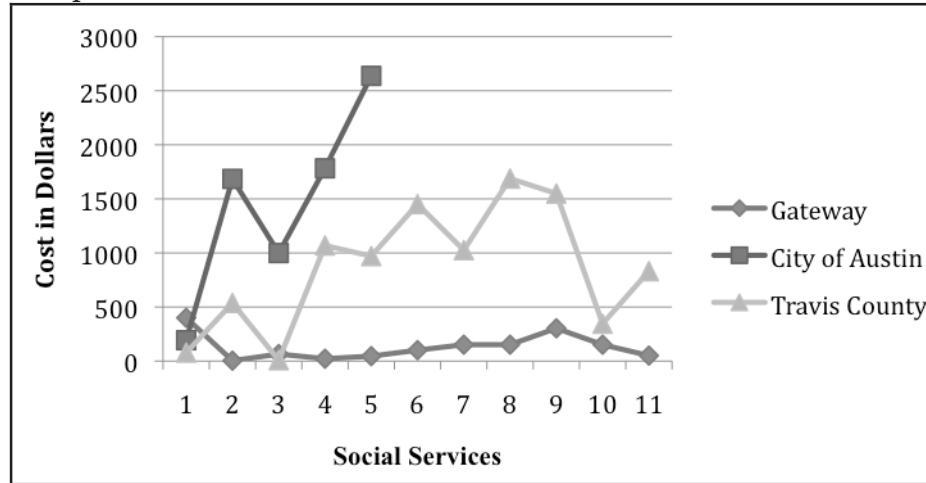
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163. See TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113, at 67.

164. *Housing Programs*, LIFEWORKS, [http://www.lifeworksaustin.org/site/c.jqLSIX-OBKpF/b.1504639/k.6E8C/Housing\\_\\_Homelessness.htm](http://www.lifeworksaustin.org/site/c.jqLSIX-OBKpF/b.1504639/k.6E8C/Housing__Homelessness.htm) (last visited Jan. 4, 2010).

165. See TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113, at 75.

## Comparative Cost of Services 2



Removing the county's outliers brings its cost line below the city's line. Even with these subtractions, Gateway's trend line remains significantly below the levels of the governmental entities.

As previously mentioned, the explanation for this result is likely attributable to the absence of overhead costs in the church's operations. Gateway is an organization whose primary function is to provide a structure for people to form a community around a shared belief system. Services provided for the community are collateral benefits to its primary cause. Thus, for example, the costs of building note payments, utilities, maintenance, etc., all go toward providing activities for the members, such as regular church services.<sup>166</sup> Furthermore, only two staff members are utilized to coordinate Gateway's social service programs.<sup>167</sup> The remaining personnel are volunteers, which include case managers with specialized skill sets to whom other non-profits would most likely have to pay salaries.

Compare this method of operation with the county's heavy reliance on contracted providers, who by definition only operate to provide the service that they have been contracted to provide. Building costs, personnel costs, capital costs, and the like must be figured into the cost of providing a given service. As a result,

166. See GATEWAY CHURCH, ANNUAL REPORT 2008, *supra* note 141, at 16.

167. E-mails from Dishinger & Lawson, *supra* note 142.

overhead likely represents an enormous part of the difference between the per-capita cost lines in the graphs above. This implication does not necessarily lead to the conclusion that faith-based organizations are better suited to provide social services. Faith-based organizations would have a difficult time replicating many of the services offered by the government. Furthermore, the tables above show that government contributions are helping greater numbers of people, on average, than are church contributions.

What these findings do entail is that FBOs, when providing services within their means, operate at a level of cost efficiency as effective, if not more so, than their governmental counterparts. Simply stated, FBOs should have a place along with the government in meeting social needs — on account of the relative efficiency of FBO operations the government should not shy away from providing them with public funds. Yet, economic efficiency alone is not a sufficient justification in U.S. courts of law where church-state separation issues have been alleged; a complete constitutional defense must satisfy the three-prong *Lemon* test.<sup>168</sup>

#### IV. HISTORICAL AND EMPIRICAL EVIDENCE SUPPORTS A *LEMON* TEST DEFENSE

The historical and empirical evidence from this Note's study establishes a constitutional defense under the *Lemon* test for the OFBCI's privatization of social services. This determination, of course, assumes that a party has demonstrated standing to sue, an expectation that should not be taken for granted.<sup>169</sup> As previously stated, the *Hein* plurality argued that taxpayers generally

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168. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

169. To have standing under Article III of the U.S. Constitution, a litigant must satisfy three requirements. First, that he or she has “suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (alterations in original) (footnote, citations, and internal quotation marks omitted). The Court further explained that “[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.1.

lack standing to sue over discretionary executive actions.<sup>170</sup> The OFBCI is a White House office that, without a legislative mandate, provides public funding to religious organizations.<sup>171</sup> By itself, the *Lemon* prohibitions would seem to include the OFBCI, since the Court applied the Establishment Clause broadly to the entire government, not merely to Congress.<sup>172</sup> Yet, for the purpose of determining whether a party has standing, the more recent *Hein* opinion distinguished between actions of the Executive and Legislative Branches,<sup>173</sup> thus making uncertain the direction the Court may take in future litigation. Resolution will likely depend on the specific injuries claimed by future parties challenging the Office.<sup>174</sup>

Regardless of the standing issue,<sup>175</sup> under the first prong of the *Lemon* test, the OFBCI must have a secular purpose.<sup>176</sup> The Court in *Lemon* and *Bowen* demonstrated a willingness to accept as secular purposes the goals of resolving specific social or economic issues.<sup>177</sup> Accordingly, historical evidence provided by this

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170. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608–09 (2007) (plurality opinion).

171. Aka, *supra* note 1, at 69 (“Following the failure of Congress to enact his program into law, the President did it on [his] own, turning to executive orders to implement his program.” (alteration in original) (footnote and internal quotation marks omitted)). *But see* Lauren S. Michaels, *Hein v. Freedom from Religion Foundation: Sitting this One Out — Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 HARV. C.R.-C.L. L. REV. 213, 228–30 (arguing that Congress was intimately involved in creating the OFBCI because “Congress deliberately funded the OFBCI programs after President Bush issued the Executive Orders establishing them,” *id.* at 228).

172. *See Lemon*, 403 U.S. at 612–13; *supra* text accompanying notes 58–61.

173. *Hein*, 551 U.S. at 608–09 (plurality opinion).

174. For example, the plurality stated that a shortcoming of the *Hein* taxpayers’ challenging of the appropriation of congressional funds was that the claim lacked an individual injury. *Id.* at 599–601. Had the taxpayers’ standing been based on a collection of a specific tax, “real and immediate economic injury to the individual taxpayer” would have provided standing. *Id.*

175. The issue of standing is beyond the scope of this Note, but is an important consideration. Rather, this Note focuses on the application of the *Lemon* test itself; not whether a claim can be brought by a certain party.

176. *Lemon*, 403 U.S. at 612.

177. *Id.* at 613; *Bowen v. Kendrick*, 487 U.S. 589, 602–03 (1988). In *Bowen*, the Court stated that “it is clear from the face of the statute that the [Adolescent Family Life Act] 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.” *Bowen*, 487 U.S. at 602. Similarly, the *Lemon* Court found the “purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the



Note supports such a defense. First, the founders of the Faith-Based Initiative indicated that one of their primary goals was to reduce government spending.<sup>178</sup> Next, the congressional record reveals that the proponents of Charitable Choice wished to increase welfare for the general public.<sup>179</sup> Finally, when Presidents Bush and Obama described the goals of the OFBCI, they each emphasized the desire to strengthen the role of community organizations in the economic recovery; reduce unintended pregnancies, support maternal and child health, and reduce the need for abortion; promote responsible fatherhood and strong communities; and promote interfaith dialogue and cooperation.<sup>180</sup> Accordingly, the historical roots of Charitable Choice and the Faith-Based Initiative strongly indicate that secular purposes underlie the program.

The Court in *Lemon* skirted over the second prong of its test because, according to the Court, the violation of the third prong was so egregious.<sup>181</sup> Nevertheless, *Bowen* and *Zelman* help to make sense of the second prong — that the government's action must neither advance nor inhibit religion.<sup>182</sup> In applying the second prong to a given fact pattern, the strong relationship between the first two prongs becomes evident. The first prong asks for a purpose, the second for an effect, so that the legal question concerns whether the stated purpose matches the resulting effect.

The *Zelman* Court was satisfied if the statute in question was generally neutral in application toward religion and the choice to directly fund religion fell on the individual.<sup>183</sup> *Bowen* clarified that incidental effects of advancing religion could not diminish a generally neutral effect.<sup>184</sup> The *Bowen* Court also upheld the federal statute since its purpose was not religious in nature, and participating organizations were not required by the statute to be

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legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon*, 403 U.S. at 613.

178. See 142 CONG. REC. S8507 (daily ed. July 23, 1996) (statement of Sen. Daniel Coats); see *supra* notes 67–72 and accompanying text.

179. 142 CONG. REC. S8507–08 (statement of Sen. John Ashcroft).

180. *Office of Faith-Based and Neighborhood Partnerships: Policy Goals*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/administration/eop/ofbnp/policy> (last accessed May 17, 2010).

181. *Lemon*, 403 U.S. at 613–14.

182. See *supra* Part II.A for an extended discussion on *Bowen* and *Zelman*.

183. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–55 (2002).

184. *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988).

religious.<sup>185</sup> These factors securely apply to the OFBCI, because of the program's basis in the Executive Branch, its avoidance of direct funding of religious organizations, and its focus on community organizations including, but not limited to, religiously affiliated organizations. Consequently, under *Bowen* and *Zelman*, the historical foundation of the OFBCI supports finding a neutral primary effect.

Empirical evidence also supports finding that the effects from the OFBCI match its stated purposes, as some privatized, religiously based welfare programs are demonstrably cost efficient.<sup>186</sup> Specifically, social services can be quantified in terms of per-capita cost. When so analyzed, evidence shows that some faith-based organizations appear to have a comparative advantage in the provision of specific services. The White House Office of Faith-Based and Community Initiatives understood that advantage when it opened the doors to public funding for private, religious providers. Thus, the courts should find that similar empirical evidence supports the conclusion that the OFBCI satisfies the second prong of the *Lemon* test.

The third and final prong of the *Lemon* test is the most difficult to satisfy, because the signals from judicial interpretation are mixed. In *Lemon*, the Court clearly indicated that the potential for aiding faith, or "a step that could lead to . . . establishment," was sufficient to find unconstitutional entanglement.<sup>187</sup> Moreover, the Court clarified that

[o]bviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . . The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.<sup>188</sup>

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185. See *supra* notes 17–19 and accompanying text.

186. See *supra* Part III.D.

187. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

188. *Id.* at 621 (internal quotation marks omitted).

Based on the earlier analysis that the *Lemon* restrictions applied to “government” and not merely “Congress” the Court could find direct subsidization by the Executive Branch, if *Lemon* were the only precedent.<sup>189</sup>

Yet, more recent cases have provided departures from the Court’s earlier sentiments. Specifically, the OFBCI should argue under *Bowen* that any involvement by the government into the affairs of religious organizations is limited to ensuring that “public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause.”<sup>190</sup> The *Bowen* Court did express hesitancy at the prospect of the government directly funding “pervasively sectarian” religious organizations.<sup>191</sup> Conversely, in the more recent case of *Mitchell v. Helms*, a plurality reversed this position: “In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . . This doctrine, born of bigotry, should be buried now.”<sup>192</sup> In aggregate, there are many paths that the Court could take in applying the *Lemon* test’s third prong. If recent history provides any indication, the strictness of the test has waned, and the OFBCI, on account of historical and empirical support, has a strong chance of withstanding judicial scrutiny.

## V. CONCLUSION

While, understandably, some may oppose the OFBCI on religious grounds, it has a constitutional defense that satisfies each of the three prongs of the *Lemon* test. Historical evidence reveals that the proponents of Charitable Choice and the OFBCI had secular purposes in mind when they created the programs. These purposes include reducing the cost of social services for the public in general and combating economic and social problems in communities across the country. Empirical evidence on the cost of social services in Austin, Texas — the birthplace of the modern

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189. See *supra* notes 58–61.

190. *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988).

191. *Id.* at 610 (“One way in which direct government aid might have [the primary effect of advancing religion] is if the aid flows to institutions that are pervasively sectarian.” (internal quotation marks omitted)).

192. 530 U.S. 793, 829 (2000) (plurality opinion).

Faith-Based Initiative — shows that the primary effects of the grants awarded by the OFBCI and Charitable Choice matches their stated purposes. Moreover, the Supreme Court has wavered in finding excessive entanglement in the provision of public funds to religious organizations: recent legal precedent supports the proposition that the Court has loosened the *Lemon* test's entanglement restriction. Accordingly, under the three prongs of the *Lemon* test, the OFBCI should have a reasonable constitutional defense.

APPENDIX: SOCIAL SERVICE PROGRAM DESCRIPTIONS<sup>193</sup>

## Travis County Social Service Programs

Issue Area	Issue Area Goals and Services	Contracted Service Providers and 2008 Awards
Basic Needs	Goals: Meet urgent, short-term food, housing, clothing and transportation needs.	Capital Area Food Bank of Texas (\$57,766)
	Services may include: Provision of adequate and healthy food; financial assistance for rent, mortgage, or utilities; needed clothing; and assistance or transportation to meet specific public health or safety needs.	Caritas of Austin — Basic Needs (\$155,480)
Housing Continuum	Goals: Promote both availability of and access to temporary shelter and long-term housing retention for persons who are homeless or at risk of losing their housing.  Services may include: Safe and affordable transitional housing; emergency shelter including food, bedding and needed supplies; case management and tenant education to promote housing stability; and repair of housing to prevent homelessness or energy inefficiency.	Austin Tenant's Council (\$24,848)
		Blackland Community Development (\$9301)
		Caritas of Austin — Best Single Source (\$262,500)
		Foundation for the Homeless (\$13,310)
		The Salvation Army (\$98,319)
		Travis County Domestic Violence and Sexual Assault Survival Center (SafePlace) (\$250,336)
		Youth and Family Alliance (LifeWorks) — Housing and Homeless Services (\$140,107)
Workforce Development	Goals: Provide employment and training services to help individuals improve workplace skills, obtain employment, and succeed in the workforce. In turn, this support will help employers secure a skilled workforce.	American YouthWorks (\$66,145)
	Services may include: Job readiness training; occupation-specific training; job search and job-placement assistance; employment counseling and earnings gain.	
Behavioral Health	Goals: Provide prevention, intervention, and treatment to adults and children who have been impacted by issues of mental illness, substance abuse, and developmental disabilities.  Services may include: Mental health, psychiatric, marriage and family counseling, as well as substance-abuse treatment and services.	Worker's Assistance Program, Inc. (\$43,503)
		Young Women's Christian Association of Greater Austin (YWCA) (\$90,596)
		Youth and Family Alliance (LifeWorks) — Counseling (\$119,585)

193. Tables contain programs provided and shared by each entity in the study: county, city, and faith-based organization. Those programs not shared by the three entities were omitted. See generally TRAVIS COUNTY COMMUNITY IMPACT REPORT, *supra* note 113; Interview with Betsy Lawson, *supra* note 143; 2008–2009 CITY OF AUSTIN PROPOSED BUDGET, *supra* note 127; and AUSTIN CITYCONNECTION, *supra* note 130 (providing source information for these tables).

## City of Austin Social Service Programs

Issue Area	Issue Area Goals and Services	2008 Proposed Allocation
Basic Needs	<p>Goals: Provide emergency food, clothing, transportation support, and other essential services to low-income persons in order to meet their immediate basic needs.</p> <p>Services may include: Food distribution; information and referral services; in-home care; transportation; and life skills instruction.</p>	(\$2,892,945)
Homeless Services	<p>Goals: Provide a continuum of services that facilitates the transition of homeless persons to permanent housing.</p> <p>Services may include: Emergency shelter and transitional housing for families, single adults, and youth; day resource center services for homeless persons; and supportive services such as case management, health care, and counseling.</p>	(\$5,375,614)
Self-Sufficiency	<p>Goals: Provide case-management services to low-income households in order to increase their income above the federal poverty level or otherwise improve the quality of their lives.</p> <p>Services may include: Assessment of a client's basic, economic, and psycho-social conditions; development of a service plan; implementation of the plan; and follow-up.</p>	(\$425,031)
Workforce Development	<p>Goals: Provide workforce development services for eligible individuals so that they can obtain and retain employment at a livable wage.</p> <p>Services may include: Job training; GED preparation; basic skills improvement; job placement; computer literacy; career development; and job-readiness workshops for individuals, including veterans, welfare recipients, school drop-outs, and homeless persons.</p>	(\$3,563,161)
Substance Abuse	<p>Goals: Provide an array of services for eligible individuals so that they will abstain from substance use or abuse.</p> <p>Services may include: Treatment; pre-readiness services; Accudetox; detoxification; residential treatment; day treatment; outpatient treatment; prevention; case management; and substance abuse education.</p>	(\$774,329)
Violence and Victimization	<p>Goals: Provide public safety, violence, and victimization services to eligible individuals to reduce the number of individuals in a violent or abusive situation.</p> <p>Services may include: 24-hour crisis hotline; emergency shelters for battered women and their children; case management; client placement; assessment and referrals; abuse prevention; and community education programs for schools and community groups covering related prevention issues.</p>	(\$1,232,730)

## Gateway Community Church Social Service Programs

Issue Area	Issue Area Goals and Services	2008 Contribution
Benevolence Fund	Goals: Meet financial or spiritual needs for families or individuals experiencing crises.  Services may include: Counseling; prayer; and financial assistance for utilities, food, clothing, and housing needs.	(\$36,000)
Feed the Community	Goals: Provide food for families in need.  Services may include: Assistance with completing food stamp forms and provision of food from donated supplies.	(\$6945.45)
12 Step Support and Recovery Groups	Goals: Help people to overcome substance and behavioral addictions.  Services may include: Meetings and support groups lead by volunteer counselors.	(\$4545.45)
1-to-1 Crisis Counseling	Goals: Provide a "plan of action" to navigate crisis situations and help people to join the Gateway community.  Services may include: One-on-one meetings with crisis counselors.	(\$4545.45)
Staying the Course in Marriage	Goals: Help people who are struggling in their marriage but who desire to stay together or to reconcile.  Services may include: Marriage mentoring; counseling; and care through volunteer counseling.	(\$4545.45)
Divorce Care	Goals: Help adults to cope with divorce.  Services may include: 13-week program for people who are in the process of divorce.	(\$4545.45)
Divorce Care for Kids	Goals: Help children to cope with divorce.  Services may include: 13-week program for kids whose parents are in the process of divorce.	(\$4545.45)
Comfort and Hope	Goals: Provide support for women as they seek healing from physical, emotional, and sexual abuse and assault.  Services may include: Support groups moderated by a volunteer counselor.	(\$4545.45)
Forgiven and Set Free	Goals: Offer support and emotional healing for women with past abortions.  Services may include: Abortion recovery support groups moderated by a volunteer counselor.	(\$4545.45)
Grief Support	Goals: Provide support for anyone dealing with the death of a loved one.  Services may include: Support groups moderated by a volunteer counselor	(\$4545.45)
Good Sense	Goals: Provide opportunities for people to focus on finances and obtain financial freedom and peace.  Services may include: Weekend workshops and individual counseling sessions.	(\$4545.45)