

Constitutional Issues Regarding Faith-Based & Community Initiatives
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One of the questions that continually surfaces when the topic of faith-based social services is discussed is related to whether or not the Constitution allows it. What about the separation of church and state?

All of us Task Force members have a responsibility to educate ourselves on the legal issues. We want to operate entirely within the bounds of the law. Fortunately, it is not that hard to get up to speed on the issue. The Internet is an amazing research tool. But if you would rather talk to a human being, then you'll be glad to know that we have an expert ex-officio member right here among us—Ken Truitt with the Department of Law.

I'm no legal expert, but let me share with you what my research has uncovered. Ken, please correct anything I get wrong, okay?

- The main question is this: does our Constitution allow religious organizations to receive public funds for providing social services? The answer to that has changed significantly in recent years.
- For the first 150 years of our country's history, this question almost never came up because nobody saw a problem. Religious organizations were the primary providers of social services, and the state and federal governments worked through them all the time.
- However, after WWII the Supreme Court and the governmental agencies began operating under the idea that government cannot "aid" religion. Consequently, the official thinking for many years was that the government should be the primary provider of social services; and that in those cases when services needed to be outsourced to a non-governmental organization then the government could properly fund only secular organizations, or—in a pinch—religiously affiliated organizations, provided that they weren't doing anything very religious.
- This "no aid" interpretation of the Constitution had a number of practical implications.
 1. First, it led the qualified "religiously affiliated" organizations to take rather extreme measures to purge religious elements from their social programs so that they would be secular enough to qualify. Government officials contributed to this by going at times beyond what the law would ever have required and insisting that all religious symbols be removed from locations used for the social service programs, thereby forcing these organizations to use facilities other than their churches—which drove up the cost of the programs, of course.
 2. Second, it led governmental agencies to write restrictions into their internal rules that, sometimes intentionally sometimes not, excluded faith-based organizations from competing for social service programs the government was outsourcing to the private sector.

3. Finally, it definitely affected the nature and extent of the faith communities' involvement in social services. And I think one would have to conclude that their level of involvement today is less than it would have been had the courts and government agencies not taken such a restrictive view during the decades in which the American welfare system was built.
- So if we were answering this question back in 1980, we as a Task Force on Faith-Based and Community Initiatives would probably feel that the implications of the “no aid” interpretation of the Constitution significantly tied our hands.
 - However, over the past two decades the U.S. Supreme Court has been on a steady trajectory away from the “no aid” standard toward a new view called the “neutrality” or “equal treatment” standard. This standard holds that when government funds nongovernmental organizations it should be evenhanded—neither discriminating for nor against religion or secularism. Or, as one writer put it, *“the general principle of law that emerges is that the Establishment Clause of the Constitution is not violated when, for a public purpose, a program of direct aid is made available to an array of providers selected without regard to religion.”*
 - This shift in the legal thinking away from “no aid” to “equal treatment” really hit the national radar screen in 1996 with the passing of the Welfare Reform Act, which became known popularly as Charitable Choice. This legislation was built on four principles consistent with the “equal treatment” standard. These are the principles that we need to most familiarize ourselves with.
 1. No religious organization can be excluded from consideration for government funding merely because it is “too” religious. Nor can religious organizations be favored because they are religious.
 2. The religious organizations may retain their religious character despite accepting government funds. (Specifically, the law allows a religious organization to discriminate on the basis of religion in their hiring practices.)
 3. Government funds may not be diverted from providing specified social services to funding inherently religious activities.
 4. The religious liberty of clients must be respected:
 - The organization may not discriminate against them on the basis of religion or require them to participate in inherently religious practices.
 - The government must ensure that any client who objects to receiving services from a religious organization has an alternative.
 - President Clinton signed the Welfare Reform legislation, and President Bush’s administration is implementing it through regulation.
 - In summary, then, the Constitution allows lots of room for faith-based organization to operate alongside governmental and secular nongovernmental organizations in providing social services and using public funds to do so.
 - One of the key objectives of this Task Force should be to help educate people who are still operating under the old “no aid” standard—both public officials and leaders of faith-based

organizations. Both sides are all too often concerned about legal complications that exist nowhere but in their minds.