

“Unleashing” or Harnessing “Armies of Compassion”?: Some Questions about the Place of Faith-Based Organizations in Building the “Civic Capital Economy”

Linda C. McClain¹

I. Introduction: Institutional Design and “Compassionate Conservatism”

A. “Rallying the Armies of Compassion”: The Original Initiative

In his first month in office, just over a year ago, President George W. Bush announced the establishment of a “White House Office of Faith-based and Community Initiatives” (“OFBCI”), the purpose of which is to coordinate a national effort “to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America’s communities.”² In introducing his “blueprint,” *“Rallying the Armies of Compassion,”* he explained the creation of OFBCI as a centerpiece of his Administration and of compassionate conservatism as well as a key means to “energize civil society and rebuild social capital.”³ The policy underlying this initiative is faith-based and community groups are “indispensable to meeting the needs of poor Americans and distressed neighborhoods,” and that “[g]overnment cannot be replaced by such organizations, but it can and should

¹Professor of Law, Hofstra University School of Law. An earlier draft was presented at the Georgetown/PEGS Discussion Group on Constitutional Law, on “Membership, Identity, and Integration: Creating the Constitutional Citizen,” and at the Workshop on Feminism, Corporations & Capitalism – Policy and Protest, sponsored by the Baldy Center for Law & Social Policy and the Feminism & Legal Theory Project, held at SUNY Buffalo School of Law. Thanks to participants in both events for helpful comments, to Abner Greene for valuable discussion of the issues discussed in the paper, and to my colleague Norm Silber for helpful comments. Thanks for valuable help with research to Connie Lenz, Assistant Director of the Deane Law Library at Hofstra, and to Ken Berke and Vish Pegitara. Comments are welcome: lawlcm@hofstra.edu.

²Executive Order, Agency Responsibilities With Respect to Faith-Based and Community Initiatives (Jan. 29, 2001), <http://www.whitehouse.gov/news/releases/200010129-3.html>.

³White House, *Rallying the Armies of Compassion*, January 2001, <http://www.whitehouse.gov/news/reports/faithbased.html>

welcome them as partners.”⁴ However, the blueprint, *Rallying the Armies of Compassion*, contends that existing laws and policies unduly constrain such faith-based groups, despite a long tradition of a public-private partnership with the nonprofit sector.⁵ By contrast, OFBCI would expand upon the “Charitable Choice” provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which aimed at greater involvement of religious organizations in contracting with government to deliver social services by allowing them to compete for those contracts and to maintain certain aspects of their religious identity.⁶

Compassionate conservatism, as explained in the blueprint, embraces public-private partnerships because of twin premises about governmental responsibility and institutional design. First, government has “a solemn responsibility to help meet the needs of poor Americans and distressed neighborhoods,” and to assist “individuals, families, and communities who have not fully shared in America’s growing prosperity.” Second, government, however, “does not have a monopoly on compassion”: to the contrary, “we must heed the growing consensus that successful government social programs work in fruitful partnership with community-serving and faith-based organizations.” Indeed, these organizations and programs have a “unique capacity” to “serve people in need, not just by providing services, but also by transforming lives.”

⁴*Id.*

⁵*Id.*

⁶42 U.S.C. Sect. 604a; Child Care and Development Block Grant Program of 1990, 42 U.S.C. Sections 9858c (c)(2)(A)(I)(II), 9858n(2) (1995). The religiously affiliated service provider may display religious art, use religious criteria in employment decisions, and wear religious apparel. It may not discriminate against a recipient of services based on refusal to participate in a religious activity or on the recipient’s religion. Government also provides vouchers to individuals, who can use those vouchers to purchase services from religiously-affiliated service providers. [add cites to later statutes also including “charitable choice”]

Thus, it is important not only to continue to ask “what are the Federal Government’s social responsibilities,” but it is also vital to ask “how the Federal Government should fulfill its social task.”⁷ In the past, the Administration argues, government has readily enlisted as a partner the nonprofit sector to aid in addressing unmet social needs, but it has overlooked and unfairly excluded these important “neighborhood healers” – faith-based programs, volunteers, and grassroots groups.⁸ Thus, compassionate conservatism’s ideal institutional design would entail an alliance – or partnership of government programs, nonprofit service providers, and such healers – to achieve “civic purposes.”⁹ Among those “civic purposes” (or “valid public purposes”) are “strengthening families and neighborhoods” (or, “fortifying” and “renewing” families”) and “overcoming poverty.”¹⁰

The announcement of the faith-based initiative and the creation of OFBCI invoked imagery of “unleashing” the power of “faith-based and community solutions,” indeed, of “rallying armies of compassion.”¹¹ The idea of “unleashing” stems from the premise that, hitherto, such armies have been unduly constrained by strict ideas of separation of church and state and of neutrality. Instead, the initiative invokes “the bedrock principles of pluralism, nondiscrimination, evenhandedness and neutrality,” understood to require that “private and charitable groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Rallying the Armies of Compassion, supra note **.

purposes.”¹² Several months later, charged with investigating barriers to the full participation by faith-based and community-based groups, the White House Office on Faith-Based and Community Initiatives, released a report, *Unlevel Playing Field*, finding, *inter alia*, “widespread bias against faith- and community-based organizations in Federal social service programs” and that “many Federal policies and practices . . . go well beyond sensible constitutional restrictions and what the courts have required, sharply restricting the equal opportunity for faith-based charities to seek and receive Federal support to serve their communities.”¹³

The rhetoric of “energizing civil society and rebuilding social capital” aims specifically at “uplifting small non-profit organizations, congregations and other faith-based institutions that are lonely outposts of energy, service, and vision in poor and declining neighborhoods and rural enclaves.”¹⁴ In an alliterative phrase, the agenda of this government initiative is “to enlist, equip, enable, empower, and expand the heroic works of faith-based and community groups across America.”¹⁵ However, as evidenced by its blueprint for OFBCI, compassionate conservatism’s interest in civil society also extends to the potential armies of compassion found in the “nonprofit” or “independent sector.” Thus, *Rallying the Armies of Compassion* refers to predictions about the nonprofit sector as possibly emerging as the “most dynamic arena for creative problem-solving in the twenty first century.” Indeed, it notes the “inspiring trend among America’s growing class of entrepreneurs of lending their talents as ‘social entrepreneurs’ and predictions of a “civic

¹²*Foreword* by President Bush.

¹³ White House Office on Faith-Based and Community Initiatives, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, (<http://www.whitehouse.gov/news/releases/2001/08/print/unlevelfield.html>) (visited November 25, 2001).

¹⁴*Id.*

¹⁵“*Foreword*” by President George Bush; the same 5 terms appear in the *Blueprint* itself.

capital economy,” in which “enormous sums of money are pooled and targeted to new social enterprises.” It announces the goal of “expanding private giving,” and seeks to encourage increased individual and corporate giving to the nonprofit sector as well as to “capture” intergenerational wealth transmission for such social renewal (presumably by encouraging such entrepreneurship).¹⁶ As the blueprint puts it, “foundations provide private support for the public good.” Here, too, nongovernmental actors may carry out important civic purposes. At a minimum, the blueprint argues, government should not harm such efforts through “over-regulation or providing insufficient legal protections for good-faith volunteers, nonprofit groups, and philanthropic companies.” But government should do more to support such groups – and, thus, “water the garden of civil society” [sic!], through various “innovative” tax reforms concerning individual and corporate charitable contributions and credits.¹⁷

B. “Unleashing [the] Fantastic Armies of Compassion” to “Heal” our Nation’s Wounds: September 11 and the Revised Faith-Based Initiative

Bush’s faith-based initiative encountered many problems from the beginning. In his public statements about the initiative, Director of the OFBCI, John DiIulio, tried to chart a constitutional course that respected the principle of separation of church and state and (as discussed below) some of his attempts to distinguish between funding human services and funding religion itself alienated and angered religious conservatives. Although the House passed legislation (H.R. 7) that would implement Bush’s initiative, legislation stalled in the Senate because of the part of the initiative that would expand “charitable choice,” permitting hiring on religious grounds and raising constitutional concerns over directly funding religious

¹⁶*Id.*

¹⁷*Id.*

activities.¹⁸ When correspondence with the Salvation Army suggested that the Army had pledged support for the initiative if the resulting regulations would permit it to be free from antidiscrimination laws in its hiring, the Administration faced embarrassment and passage of a bill in the Senate became even more remote.¹⁹ A beleaguered DiIulio, after releasing the report *Unlevel Playing Field*, resigned and his position remained vacant for several months.²⁰

After the terrorist attacks and loss of life of September 11, national security (“homeland defense”) and foreign policy (waging a war on terrorism abroad) dominated the Bush Administration, pushing aside much of the domestic agenda. On the one hand, the outpouring of charitable contributions in the wake of September seemed to suggest less of an urgent need for government to “rally” armies of compassion. At the same time, one unintended consequence of this outpouring aimed at causes related to helping victims of the September 11 was that many charities and nonprofit institutions (such as museums and other cultural institutions) experienced an alarming decline in their contributions. Thus, Bush made speeches stressing the need, at this time, “for America to stand by her charities,” the Armies of Compassion, “as they suffer from the economic consequences of September 11,” and turned to the less controversial components of offering new tax incentives for charitable giving.²¹ In a sense, the very phrase “armies of compassion” took on additional meaning, especially as the United States waged war on terrorism.

¹⁸Elizabeth Becker, *Bush is Said to Scale Back His Religion-Based Initiative*, N.Y. Times, Oct. 14, 2001, at A1.

¹⁹ Cite to coverage of this story.

²⁰Cites to coverage and to DiIulio’s statement.

²¹Mary Leonard, *Bush Urges New Tax Incentives for Charity Giving*, Boston Globe, Nov. 8, 2001, at A10; *President Urges Support for America’s Charities*, <http://www.whitehouse.gov/news/releases/2001/11/20011120.html> (visited Nov. 25, 2001).

In late January and early February 2002, a little over a year from the initial announcement of the “Armies of Compassion” initiative, Bush made renewed efforts to “unleash” those armies and promote the faith-based initiative. His invocation of the power of faith to solve social problems was, arguably, even more explicit, and added the idea of healing the Nation’s “soul.” First, in his State of the Union address, he appealed to all Americans to dedicate 4,000 hours (two years) of their lives to volunteer work to serve their country and announced the creation of the USA Freedom Corps, to facilitate such volunteering. Then, on February 1, he announced that DiIulio’s successor as Director of the OFBCI was Jim Towey, who, in addition to his political experience, worked with Mother Teresa, and also announced a new Advisory Council on Faith-Based and Community Initiatives.²² Bush explained the purpose of the initiative as the recognition of the “power of faith in healing some of our nation’s wounds” and declared that, although “problems like poverty and addiction, abandonment and abuse, illiteracy and homelessness . . . are incredibly tough problems,” “I have faith that faith will work in solving the problems.”²³ He opined that the best way to “serve our neighbors in need and to serve our community and our country” is “to help change America, one heart, one soul, one conscience at a time.” The new Director, Towey, attested to this power of faith based on his own experience and praised Bush for his vision of “unleashing new armies of compassion that will change countless lives.”²⁴

Several days later, Bush and Senator Lieberman and Santorum (Lieberman, in particular, was supportive, in principle, of a faith-based initiative but critical of Bush’s initial proposal) announced an

²²President Names New Faith-Based & Community Initiatives Director, <http://www.whitehouse.gov/news/released/2002/02/20020201-4.html>

²³*Id.*

²⁴*Id.* (remarks by Jim Towey).

agreement on legislation, to be introduced in the Senate, that would “not only provide a way for government to encourage faith-based programs to exist without breaching the separation of church and state,” but would also “encourage charitable giving.”²⁵ In language reminiscent of the initial blueprint about helping Americans whom economic prosperity had left behind, Bush suggested that he, Lieberman and other Senators supporting the initiative “share a priority that people who don’t have hope can find hope,” and that “people who wonder about the American Dream will realize the American experience is meant for them.” Bush continued: “one way to ensure that is to unleash these fantastic armies of compassion which exist all across the country;” “government ought to stand on their side,” and “not discriminate against such faith-based programs,” but “encourage them to flourish.”²⁶ Lieberman, who drew attention during the 2000 Presidential campaign for his public statements about the importance of religious values in public life, affirmed his belief that “faith, right from the beginning, was one of the great unifiers of the American people,” and credited strong faith as unifying the Senators as they worked out a “constitutionally appropriate way” to arrive at a faith-based initiative that would “help people who want to do good works and whose desire to do good works is motivated by their faith.”²⁷

At the time of this writing, the Senate bill, The Charity Aid, Recovery, and Empowerment Act, has not been introduced, but its elements are expected to include: anti-discrimination provisions clarifying that religious groups can not be disqualified from receiving federal money simply because of their religious nature (akin to the “charitable choice” provisions in the Personal Responsibility and Work Opportunity

²⁵*President Bush, Senator Lieberman Discuss Armies of Compassion*, <http://www.gov/news/releases/2002/02/20020207-9.html>

²⁶*Id.*

²⁷*Id.* (remarks by Sen. Lieberman).

Reconciliation Act of 1996); over \$1 billion of increased funding for the Social Services Block Grant (which underwrites many local programs, including faith-based programs) over the next two years; tax incentives to spur charitable contributions (e.g., an \$800 charitable tax deduction for married couples who do not itemize deductions); a \$150 million “Compassion Capital Fund,” to expand technical assistance for smaller charitable organizations and help them better compete for federal grants and contracts.²⁸ Significantly, it reportedly differs from the House version (and the original Bush initiative) in not permitting religious groups to favor members of their own faith in hiring and ignore antidiscrimination laws.²⁹

C. Membership, Identity, Integration: What Place for the “Armies of Compassion”?

The creation of OFBCI seems relevant to the Discussion Group’s topic of “Membership, Identity, and Integration: Creating the Constitutional Citizen” for several reasons. First, “membership”: the faith-based initiative speaks of including those members of society who have not shared in material prosperity and of meeting the needs of poor neighborhoods. Moreover, in focusing upon the “grass-roots,” and upon “neighborhood healers” and heroes, the initiative rejects “the failed formula of towering, distant bureaucracies” in favor of “steering resources to the effective and to the inspired” – those who are members of communities with (superior) local knowledge.

Second, identity: the initiative seeks to enlist, empower, enable, etc. because compassionate conservatism assumes that it is precisely the distinctive character of faith-based groups, in particular, that gives them the unique capacity to be so inspired and effective and “get results.” Partnerships between faith-

²⁸*Id.*; see Lieberman, Santorum Announce Bipartisan Compromise on President’s Faith-based Initiative, <http://www.senate.gov/~lieberman/press/02/02/2002207732.html>. The estimated cost of the bill is \$11-13 billion, with the charitable tax incentives accounting for most of the cost.

²⁹*Id.*; Elisabeth Bumiller, *Accord Reached on Charity Aid Bill After Bush Gives In on Hiring*, N.Y. TIMES, Feb. 8, 2002.

based organizations and government, thus, pose a quandary, well-captured in the title of Charles Glenn's recent book, *The Ambiguous Embrace* (an image presaged by Peter Berger and Richard Neuhaus's caution about a "too eager embrace"): Is it possible to accept government funds (and be subject to regulation) without destroying that distinctive character that makes those groups so effective? Will such groups end up being mere "agents" of government – delivering social services at the government's request – or become genuine "partners" with government, retaining their autonomy and distinctive identity?³⁰ The contemporary fear of the destructive consequences for religion of entanglement with government echoes earlier constitutional jurisprudence, reflective of the "separationist" approach to the religion clauses (that is, to maintain a wall of separation between church and state). It brings to mind the Supreme Court's declaration, in *McCullum v. Board of Education*,³¹ that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere," and, in *Engel v. Vitale*,³² that the "first and most immediate purpose [of the

³⁰CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL SERVICE AGENCIES* 266-95 (2000). Glenn credits Berger and Neuhaus's earlier warnings in their book, *To Empower People*. Glenn, *Id.* at 3.

³¹333 U.S. 203, 211-12 ((1962) (holding unconstitutional a time release program that allowed public school children out of school early, once a week, to attend religious classes held on school grounds). For a helpful discussion of the history of this Establishment Clause jurisprudence, and of the role of Jewish organizations in litigating *McCullum* and other key cases, see Stephen M. Feldman, *The Contribution of Religious Minorities to the Development of Religious Freedom* (unpublished manuscript presented at Georgetown/PEGS Discussion Group on Constitutional Law, Nov. Nov. 30-Dec. 1, 2001, on file with author).

³²370 U.S. 421, 430-31 (1962) (holding that the daily recitation of the Regents' prayer in the public schools violated the Establishment Clause). Again, Feldman offers a helpful history of the role of Jewish organizations in litigating this case.

Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and degrade religion.”

Third, integration: with respect to individual citizens, the faith-based effort seeks to integrate them into material prosperity and, when appropriate, back into community values and shared norms of personal responsibility. With respect to organizations, it calls to expand the use of public-private partnerships to meet social needs, a key concern is how to incorporate faith-based groups into partnerships with government to serve public purposes without sacrificing such groups’ integrity. Appeals to the unique capacities of such groups rest on an idea that the integration of faith-based approaches into the provision of social services would secure better results. These issues of membership, identity, and integration are posed against the constitutional backdrop of the Supreme Court’s church-state jurisprudence, a jurisprudence some proponents of greater use of public-private partnerships urge is “confused” and should move toward an approach of “positive neutrality” or “equal treatment”: that is, “equal treatment says religious groups should have public benefits available to them on the same terms as all other groups.”³³ This neutrality approach is a strand that stands in tension with the separationist approach both in legal scholarship about the First Amendment scholarship and in Supreme Court jurisprudence itself (for example, *Bowen v. Kendrick*, as discussed below).

The Armies of Compassion initiative appears to embrace this idea of “positive neutrality,” or “equal treatment,” as is evident from its report, *Unlevel Playing Field*, noted above. The image of “fair play” and a principle of nondiscrimination against faith-based groups featured in the recently announced compromise

³³STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 177 (1996).

between Bush and Senate leaders.³⁴ To date, much of the controversy over the Armies of Compassion initiative and proposed implementing legislation involves how to envision faith-based groups *as* constitutional citizens (or, better, actors) and how various constitutional commitments and public values should shape the integration of such entities into the political order and the welfare state. For example, a recent District Court decision holding unconstitutional Wisconsin's direct funding of a faith-based drug treatment program may portend difficulties for the faith-based initiative.³⁵ As I discuss below, there is a basic tension between arguing for neutrality or a level-playing field, treating religious groups just like all other potential government partners, and arguing that the unique and distinctive character of these groups – the transformative power of their faith – renders them an especially worthy governmental partner.³⁶

And what about the role of faith-based and community-based groups in creating the constitutional citizen? In several articles, I have argued for governmental responsibility to foster human capacities for democratic and personal self-government (thus, creating citizens). I have referred to this as a “formative project,” and have stated that the institutions of civil society (such as families) have a proper role to play

³⁴*President Bush, Senator Lieberman Discuss Armies of Compassion, supra note **.

³⁵*See Freedom from Religion Foundation, Inc. v. McCallum and Faith Works, Milwaukee, Inc.*, Opinion and Order, 00-C-617-C (W.D. Wis., Jan. 7, 2002) (Crabb, B., Judge) (finding two funding streams for Faith Works, a faith-based, long-term alcohol and other drug addiction treatment program, violated the Establishment Clause). The court, however, stated it was not speaking to the constitutionality of “charitable choice,” generally. See discussion below.

³⁶For an argument that it is precisely this government attempt to “harness religious transformation and commitment to the state’s ends in combating destructive conduct” that renders the faith-based initiative unconstitutional, see Ira Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 46 VILLANOVA L. REV. __ (forthcoming 2001) [this quote is from p. 77 of the draft article, available from http://papers.ssrn.com/paper.taf?abstract_id=270481]

in this project.³⁷ Moreover, because of the vital role played by such institutions of civil society as the family in fostering capacities and the general task of social reproduction, an important aspect of that formative project is supporting the capacities of families to engage in such work.³⁸ The theoretical justifications for this project, which I elaborate in that work and will not discuss here, have roots not only in certain constitutional commitments to self-government, but also in a synthesis of key premises of feminist, liberal, and civic republican political and legal theory.³⁹ Given my concerns about fostering capacity of persons, and about how institutions might engage in that project, what I find especially intriguing about the OFBCI and the call to “unleash armies of compassion” is the notion of government seeking to build the *capacity* of nongovernmental actors better to serve human needs and carry out public purposes.

D. Roadmap: Some Questions about the Place of Faith-Based Organizations

The aim of this paper is to take up some questions raised by the faith-based initiative that bear upon institutional design and fostering self-government. What role do or should public-private partnerships play

³⁷See Linda C. McClain, *The Domain of Civic Virtue: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617 (2001); *Care as a Public Value*, 76 CHI.-KENT L. REV. 1673 (2001); Linda C. McClain & James E. Fleming, *Some Questions for Civil-Society Revivalists*, 75 CHI.-KENT L. REV. 301 (2000); Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221 (2000); *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L. J. 19 (1998).

³⁸I elaborate this in McClain, *Care*, *supra* note *. This point about a public responsibility to support the work of social reproduction is an important contribution of recent feminist scholarship on the role of families, such as that of Martha Albertson Fineman, as well as liberal work and work on the international political economy. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self*, 8 Am. U. J. Gender Soc. Pol’y & L. __ (2000); Engendering Justice (unpublished manuscript)[check title]; cite also Mona Harrington, Eva Kittay, UN literature on human development.

³⁹For elaboration, see McClain, *Toleration*, *supra* note *; McClain, *Toward a Formative Project*, *supra* note *.

in carrying out a formative project and in envisioning the political economy of citizenship? Is the objective of the faith-based initiative simply a “level playing field,” or neutrality, and a focus on “results,” rather than on the identity of the service provider, if it is also claimed that faith-based groups have a unique capacity to solve difficult social problems? In any case, is that premise about capacity warranted? How, exactly, will “unleashing” faith-based groups advance important civic, or public, purposes? Is the better image “unleashing” or “harnessing”? That is, will this unleashing similarly advance important public values, or is it necessary or appropriate to harness such groups to ensure that they do?

What is the underlying understanding of the relationship between civil society and government? Are the institutions of civil society, for example, better understood as “seedbeds of civic virtue,” indirectly supporting democratic self-government, or as government partners and contractors? What does putting the “power of faith” to work to solve social problems mean in the important – and contested – areas of family policy and welfare policy?

And, looking beyond the subcategory of faith-based groups, where does the nonprofit sector, in general, engaged in the delivery of services or in various forms of “social entrepreneurship,” fit into a model of institutional design? And where do for profit corporations fit? With its praise for the “independent” or nonprofit sector as an important part of civil society as well as partner with government, the blueprint to unleash “armies of compassion” says little about the role of for profit corporations, except as a source of funds for the good works of the nonprofit sector.

Usefully setting the stage for considering some of these puzzles, in a recent article, Martha Minow observes that “three lines vital to our conception of constitutional, free enterprise democracy, are rapidly fading, shifting, and criss-crossing”: “the line between public and private, the line between profit and non-profit, and the line between secular and religious.” She asks: “Should it be cause for horror, indifference,

or joy that these lines are moving?”⁴⁰ As she correctly points out, such movement between lines is not new, given, for example, the history of government engaging nonprofits (including charitable organizations) to provide social services, as well as the recurring criticisms of “big” government as costly and inefficient. What does seem notable is the accelerated rate at which these lines are blurring and the uncertain implications of such blurring.⁴¹ One speculation Minow offers for this acceleration – a speculation confirmed by the subsequent “armies of compassion” initiative – is that added to this familiar critique of big government are a critique that government (in contrast to faith-based and community organizations) lacks capacity to address certain human problems, which are moral and spiritual in nature, and a charge that government’s taking action displaces efforts that could arise from institutions of civil society, thus weakening civil society.⁴² Of course, as Minow notes, there is an obvious tension here: “government is criticized for displacing private commitments, yet private providers continue to turn to government for support.”⁴³

Based upon my own work on contemporary calls to revive civil society, I believe the tension about the role of government reflects a decided ambivalence in the civil society movement about whether a renewed civil society would support democratic self-government or supplant government (at least, the federal government), as well as certain unresolved tensions over the proper relationship between government and civil society, i.e., whether civil society exists “independent” of government or whether it

⁴⁰Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000).

⁴¹*Id.* at 1063.

⁴²*Id.*

⁴³*Id.* at 1077.

is, in significant ways, constituted by and supported by it.⁴⁴ In the case of proposing an expanded role for religious institutions in solving social problems, something else at work is reliance upon the principle of “subsidiary,” drawn from the Pope John Paul II’s critique of the “Welfare State”: in contrast to harmfully displacing the responsibilities of smaller groups and associations, government should not interfere with, but rather support such groups and associations in fulfilling their functions.⁴⁵ Perhaps this interest in expanding public-private partnerships also reflects – notwithstanding conservative critiques of (liberal) big government – the “triumph of big government conservatism,” that is, the belief that government can be used to achieve social ends such as restoring the family, community, and civil society.⁴⁶

II. Some Questions About the Place of Faith-Based Organizations

in Building the “Civic Capital Economy”

A. Public-Private Partnerships, Identity, and Public Purposes: Unleashing or Harnessing Civil Society?

1. Why Identity Matters

One puzzle about OFBCI’s anticipated expansion of public-private partnerships arises from how such private partners will serve “civic” or “public” purposes. Does the identity of the private partner

⁴⁴McClain and Fleming, *Some Questions for Civil Society-Revivalists*, *supra* note *, at 348-53.

⁴⁵*See infra* ___ for discussion; for a normative appeal to the Pope’s account of subsidiarity, see THE THEOLOGY OF WELFARE: PROTESTANTS, CATHOLICS, & JEWS IN CONVERSATION ABOUT WELFARE 149-53 (John G. West, Jr. and Sonja E. West eds., 2000) (remarks by Father Robert Sirico), and text accompanying note 109 (Senator Santorum).

⁴⁶Cite to Wash. Post, 4/15/01 (quoting Marshall Wittman). [In later draft, note “surrogate for government services” argument for tax exemption, i.e., rationale for exemption is that government should not be used to achieve social ends that would actually or apparently compromise neutrality of the state.]

matter? One image, used in the blueprint and in subsequent speeches about the OFBCI initiative, is of “unleashing,” which implies a freedom from restraint or interference;⁴⁷ but a competing, liberal view, discussed below, is of harnessing, which implies direction, guidance, or control. The premise behind the faith-based initiative is that “armies of compassion” need to be rallied and, indeed, unleashed, to help “achieve civic purposes.” Invoking a long history of the federal government enlisting as partners the nonprofit sector (including “secular and religiously affiliated providers, civic groups, foundations, and other grant givers”), the initiative claims that governmental role must “move beyond funding traditional non-governmental organizations” because “Americans deserve a rich mix of options because when it comes to conquering addiction, poverty, recidivism, and other social ills, one size does not fit all.”⁴⁸ An animating premise is that these less traditional partners – faith based and grass roots groups – can do what government bureaucrats can’t: “put hope in our hearts and a sense of purpose in our lives,” supply “a quiet river of goodness and kindness that cuts through stone.” Or, as Don Eberly, of DHHS, put it, “government cannot provide love.”⁴⁹ And President Bush’s recent pronouncements have stressed his “faith in the power of faith” to solve social problems, and have spoken of changing America “one heart, one soul, one conscience at a time.”⁵⁰ Thus, I interpret the image of “unleashing” armies of compassion to refer not just to putting faith-based groups on a level playing field in government contracting but setting them free to address human problems with their own distinctive world views and methods.

⁴⁷See discussion *supra* ____.

⁴⁸*Rallying the Armies of Compassion*, *supra* note *.

⁴⁹Cite to story.

⁵⁰See *President Names New Faith-Based & Community Initiatives Director*, *supra* note *; *President Bush, Senator Lieberman Discuss Armies of Compassion*, *supra* note *.

This suggests that the *identity* of the social service provider matters, precisely because of the distinct approach taken by the service provider. And yet, the Armies of Compassion initiative emphasizes that “results,” not who provides the service, should be the key issue (“The paramount goal must be compassionate results”; officials should ask not “Who are you?”, but rather “what can you do, and how well can you do it?”).⁵¹ To be sure, the references in the “blueprint” to helping poor neighborhoods share in economic prosperity might seem to suggest that the solution is redistributive measures, which would seem to be more the provenance of government. Yet the document as a whole, with its references to “healers” and compassion and the examples of such healing efforts as fighting drug addiction and gang membership, reflects the assumption that our most pressing social problems often are rooted in moral problems of unwise and irresponsible choices, behaviors, and in sin and that faith- and community-based providers do best addressing these problems. The Bush Administration’s subsequent speeches about faith and healing being an important solution to problems of poverty reinforce this impression. As one recent study claimed, with respect to the institutional competency of the so-called “third sector” of nongovernmental organizations: the “third sector [contrasted with government and the market] tends to be best at performing tasks that generate little or no profit, demand compassion and commitment to individuals, require extensive trust on the part of customers or clients, need hands on, personal attention . . . and *involve the enforcement of moral codes and individual responsibility for behavior.*”⁵² To this, Charles Glenn adds: “While there are certainly structural barriers to opportunity for poor families, for the handicapped and the addicted, for those whose race or national origin makes them subject to discrimination, it has become

⁵¹For the first example, see *Rallying the Armies of Compassion*, *supra* note *; for the second, *Unlevel Playing Field*, *supra* note *, at 8.

⁵²Glenn, *supra* note *, at 287-88 (citing Osborne and Gaebler, *Reinventing Government*, 46).

increasingly obvious that the choices people make have a major effect upon their life chances. Faith-based organizations are especially well equipped to affect how people make choices.’⁵³

Indeed, one influential architect of “compassionate conservatism,” Marvin Olasky, argued in *The Tragedy of American Compassion*, that where the welfare policy of the New Deal and the War on Poverty of the 1960s went grievously wrong was in departing from earlier principles of good philanthropic practice that shunned “indiscriminate” monetary relief (“foolish” compassion) and insisted upon, *inter alia*, “discernment” of the circumstances of the poor, true compassion, in the sense of personal involvement with the poor, and a faith in the important role of God’s grace as a transformative force in the lives of the poor.⁵⁴ In a recent book, *The Theology of Welfare: Protestants, Catholics, & Jews in Conversation about Welfare*, Olasky and some other conservative religious thinkers stress this theme that sin and repentance are basic features of the human condition that explain much poverty and that personal, local knowledge of the poor, and an insistence by those who would help them that the poor be willing to change (rather than do nothing) is vital.⁵⁵ It is too soon to tell if the faith-based initiative rests on similar assumptions, but it seems to share a focus on personal, or behavioral, rather than structural diagnoses of the causes of poverty, and it certainly affirms the transformative power of personal involvement with the needy.⁵⁶ Compassionate conservative theorist Olasky expresses confidence that a “level playing field” in

⁵³*Id.* at 288.

⁵⁴MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 100-115 (1992).

⁵⁵See *The Theology of Welfare*, *supra* note *, at 156-62 (remarks by Olasky and Amy Sherman, Adjunct Fellow at Manhattan Institute and Director of Urban Ministry at Trinity Presbyterian Church, Charlottesville, Virginia).

⁵⁶Jim Tower, the new Director of OFBCI, stated: “Mother Teresa introduced me to this joy that comes from befriending those in need, and discovering their tremendous dignity.”*President Bush, Senator Lieberman Discuss Armies of Compassion*, *supra* note *.

a new welfare system, which would include religious and non-religious organizations, would vindicate such religious approaches; he calls for a “test” to see “what really works and what doesn’t work,” and – invoking the Biblical contest between the prophet Elijah and the prophets of Baal – “to see where fire comes down from heaven.”⁵⁷

The recent report, *Unlevel Playing Field*, indicates that it is the *local*, “grass roots,” “neighborhood-based” group, whether religious or secular, that may be uniquely situated to meet social needs, and do so better than the larger, more distant nonprofit groups who “monopolize” government contracts and funding.⁵⁸ Here it is the proximity of the group that gives it the useful local knowledge it needs to be effective. This preference for the local is also part of the subsidiarity principle. As the Pope expresses it, in criticizing “an inordinate increase of public agencies which are dominated more by bureaucratic ways of thinking than by concern for serving their clients”: “it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbors to those in need.”⁵⁹ To restate this question of whether identity matters, the premise appears to be that results, rather than the identity of the service provider, matter, but that we have reason to empower, equip, enable, enlist, and expand certain types of groups – faith-based and community-based groups – because there is a “growing consensus” that they are especially effective in delivering services and achieving civic purposes.⁶⁰

⁵⁷Id. at 160 and 183 (remarks by Olasky, referring to I Kings 18).

⁵⁸*Unlevel Playing Field*, *supra* note *.

⁵⁹*The Theology of Welfare*, *supra* note *, at 152 (*Centesimus Annus*, Section 48, quoted by Father Robert Sirico).

⁶⁰*Foreword*, *supra* note *, at 1 (“we must heed the growing consensus across American that successful government social programs work in fruitful partnership with community serving-and faith-based organizations”).

2. “Civic Purposes”: Unleashing or Harnessing?

There is, of course, some question about what “civic purposes” mean in this context. There is also the question of what happens when a nongovernmental actor is, with government aid, enlisted to further those purposes. For example, if government enlists a nongovernmental actor, should that actor also promote important public values, such as nondiscrimination in employment or equality? If one of the reasons to turn to nontraditional nongovernmental providers is to allow the unleashing of their distinctive values, then what of a commitment to shared or public values? Is government embracing or endorsing the distinctive messages of the groups it funds, e.g., a drug treatment program (like Teen Challenge) that puts recovery from sin and a personal relationship with Jesus at the core of its program, or a welfare-to-work program that links job readiness to getting right with God?⁶¹ Or must such a service provider refrain from expressing its own message about sin, salvation, moral rectitude and the like and just stick with the business of job training? Or if the civic purpose to be served is promoting responsible fatherhood and marriage, may a service provider also preach that a gendered division of authority and labor within the family is a matter of Biblical command as well as a recipe for a healthy marriage?

Until his resignation, OFBCIDirector DiIulio engendered controversy due to his attempt to comply with constitutional requirements of separation of church and state. He stated that, to receive direct funds, faith-based organizations must refrain from direct proselytizing or efforts at religious conversion, and that groups whose religious message about conversion is indivisibly linked to their service provision (e.g., “A drug treatment program that is all about urging each beneficiary to accept Jesus Christ as Lord and Savior”) may receive government support only through individual vouchers (the individuals may then choose from

⁶¹For Teen Challenge, see Glenn, *supra* note *, at 62-73; Eyal Press, *Lead Us Not into Temptation*, Am. Prospect, April 9, 2001, at 20 (discussing Teen Challenge).

among various service providers).⁶² Presumably, the pertinent constitutional distinction would be: in the case of governmental funding, government is contracting for a service that happens to be provided by a faith-based organization but can be separated from an explicit religious message; in the case of vouchers, government empowers individuals, through government funds, to make their own choice as to service provider – it does not directly “endorse” a religious organization, if an individual happens to prefer a faith-based approach to, e.g., drug treatment or job placement.

This distinction seems to feature in a recent opinion by a Wisconsin federal district court holding that the direct, unrestricted funding by Wisconsin’s Department of Workforce Development of FaithWorks, a faith-based drug-treatment program, violated the Establishment Clause.⁶³ (The court concluded that funding by the Department of Corrections would also represent unconstitutional governmental indoctrination of religion unless defendants could prove at trial that the Department of Corrections offenders choose to participate in Faith Works of their own free choice. In contrast, the court found that a Wisconsin Works program that allows non-custodial fathers to select Faith Works is indirect funding that was not constitutionally problematic.) After receiving an application by Faith Works for funding an “addiction recovery program for men” that was “faith based, long-term residential, holistic program that emphasizes spiritual, physical, emotional and economic wellness,” the Department of Workforce Development allocated to it welfare-to-work funds. The Department official understood that Faith Works was generally Christian-based but did not inquire into or pay attention to the faith component in the program description; “under the department’s contract, faith was not labeled as a deliverable

⁶²See Foer and Lizza, *supra* note *, at 14; Goodstein, *supra* note *.

⁶³Freedom from Religion Foundation, Inc. v. McCallum et al., Opinion and Order 00-C-617-C (W.D. Wis., Jan. 7, 2002) (Crabb, J.).

service.”⁶⁴ The court pointed out the Faith Works was the only *long-term*, residential program available in the relevant geographical area.

In considering the challenge to this funding brought by plaintiffs, the court looked to such evidence of religious indoctrination as “The Faith Works Statement of Faith,” which appeared in the employee handbook. The court pointed out such facts as Faith Works’ reference in its grant proposals to spirituality as a basis of the program’s success, requirements that its staff “[grow] in [their] own faith life by regular church attendance, prayer, Bible study and seeking Spiritual direction from a Pastor/Shepard [sic] in our faith community,” mandatory participation by residents in an “enhanced” 12-step Alcoholics Anonymous program (enhanced by more explicit references to God), discussion of spiritual matters at mandatory meetings, Faith Works’ heavy reliance on the Christian experience of staff members who have combated addiction successfully, and goals of the program such as participants’ openness to “discipleship” and membership in an organized church, attendance at Bible studies, finding a spiritual advisor, and participation in Christian counseling services.⁶⁵ The Faith Works Statement of Faith expressed the goal of bringing “our clients directly to Christ.” The court concluded that it was not possible to separate the religious components of the Faith Works program from the secular ones and that there were not adequate safeguards to ensure that the direct funds were not contributing to a “religious end.”⁶⁶ In conclusion, the

⁶⁴*Id.* at 25.

⁶⁵*Id.*

⁶⁶*Id.* at 55-57.

court stated that the plaintiffs were not challenging the constitutionality of the charitable choice provisions of PRWORA and the court was *not* addressing the issue.⁶⁷

The distinction DiIulio attempted to draw between restricting direct funding and permitting vouchers has been defended as fostering pluralism and nondiscrimination; but it will also depend upon what mix of actual options are available to the voucher recipient. In any event, DiIulio drew wrath for referring to “Bible-thumping” conservatives and unfavorably comparing their efforts to help the poor with those of black churches serving urban areas.⁶⁸ (DiIulio’s “point man”, for example, was Rev. Eugene F. Rivers, a black religious leader praised for his work on Boston’s TenPoint Coalition.⁶⁹) For proponents like DiIulio, the faith-based initiative holds the promise of getting much-needed governmental funds to organizations (that happen to be religious) committed to addressing pressing social problems; conversion is not the point. Yet some other proponents of compassionate conservatism, such as Olasky and some evangelicals, regard such a split as “nonsensical,” for “the mechanism through which faith-based groups work their social wonders – curing addiction, ending recidivism – *is* evangelism.”⁷⁰ Otherwise, if faith-based groups cannot approach social problems in their own distinctive way, they risk becoming mere government “agents,” rather than autonomous partners with government. Instead, proponents of such partnerships appeal to diversity and

⁶⁷*Id.* at 66-67. [add discussion of status of lawsuit challenging Texas’s Jobs Partnership program, mentioned in Steven G. Gey, *Charitable Choice: Would Jesus Have Accepted Federal Funding?*, LIBERTY ONLINE, <http://www.libertymagazine.org/issues/01-01/article5.html>]

⁶⁸Foer and Lizza, *supra* note *.

⁶⁹Gustav Neibuhr, *A Point Man for the Bush Church-State Collaboration*, N.Y. Times, April 7, 2001, at A8.

⁷⁰Foer and Lizza, *supra* note *, at 16 (characterizing Olasky’s view and quoting him concerning the faith-based program Teen Challenge: “[Its] faith is that people stop being addicts when Christ fills the holes in their souls. It cannot separate counseling and evangelism: Evangelism is its counseling.”)

to a “pluralist” understanding of the social and political order, one that “seeks to develop political processes and public policies that will not merely tolerate faith communities and associations and their individual members, but will integrate them fully – as religious structures and persons – into the life of the body politic.”⁷¹ One argument for neutrality and for pluralism is that as government takes on a greater role in social welfare provision, taking over important functions once served by religious groups and other nongovernmental actors, to exclude religious groups from contracts with government is unfair and gives government an unfair advantage in value formation.⁷² (I return to this appeal to pluralism in discussing the proper role of civil society.)

As has been reported, one apparent reason that religious groups have been reluctant to participate in Charitable Choice has been a fear about having to suppress their religious message and mission in order to obtain governmental funding.⁷³ A lively debate continues over whether the faith-based initiative and its lure of government funding could “seduce” faith-based organizations and lead them to lose their distinctive mission and approach; as one critic warns, “Bush’s proposal may transform faith-based charities from institutions that change people’s lives into mere providers of services.”⁷⁴ This seems to reflect a fear that government – through reporting requirements and restrictions on direct funding of “pervasively” religious elements of a program – will seek to harness such organizations for public purposes, rather than mobilize

⁷¹Monsma, *Positive Neutrality* (quoted in Glenn, *supra* note *, at 268-69).

⁷²See discussion *infra* __; Lupu and Tuttle, *supra* note *, at __.

⁷³Cites.

⁷⁴Michael Tanner, *Corrupting Charity: Why Government Should Not Fund Faith-Based Charities*, CATO Institute Briefing Paper No. 62 (March 22, 2001). Cf. Joseph Loconte, *the Right’s Doubting Thomases Are Wrong*, Wall St. J., May 22, 2001, at A26 (“recent experience shows that faith-based groups can learn to negotiate government support, keep their spiritual bearings, and respect the First Amendment.”)

and unleash them. (However, it is notable that, even as Monsma warned of the need to protect religious organizations' identity from governmental pressures, his study of government contracting with nonprofits, published before "charitable choice" went into effect, found that the great majority of religious nonprofits felt no pressures from government officials to eliminate religious practices and experienced mostly positive effects of such government involvement.⁷⁵)

In recent work, liberal political theorist Stephen Macedo has argued that "there may be good public reasons to rely on civil society institutions to a greater extent than we have in the past – whether for education or the delivery of social services," but also that "we should do what we reasonably can to insure that publicly subsidized civil society institutions serve liberal democratic values."⁷⁶ In contrast to OFBCI's imagery of unleashing civil society, Macedo envisions "attaching strings" to public moneys flowing to nonprofit institutions to insure that public purposes are served.⁷⁷ If you will, this civic liberal approach would harness, rather than unleash. For example, he discusses school voucher programs, which permit children to attend sectarian and nonsectarian private schools at public expense. To ensure furthering public purposes through such public monies, Macedo argues that it is appropriate for government to impose such conditions as requiring that such schools are "relatively open to all the children in the polity on a nondiscriminatory basis," and allowing children to opt-out from religious activities that they or their parents

⁷⁵Monsma, *supra* note *.

⁷⁶Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000). These concerns seem especially apt given a rise in the proportion of the economy organized as not for profit [cite]; my colleague Norm Silber suggested to me that if their nonprofit status affords them a freedom to discriminate, in contrast to the antidiscrimination norms imposed on for profit employers, then this may make the not for profit form even more attractive.

⁷⁷*Id.* at 418, 450-51.

find objectionable.⁷⁸ As with the debate over OFBCI’s proposed distinction between providing services and saving souls, some religiously affiliated schools oppose this opt-out; “the provision is most objectionable to conservative Protestant schools for whom ‘the fingerprints of faith are nearly everywhere,’ schools ‘that connect academic subjects to biblical themes, from science classes that probe the origins of life, to history lessons that emphasize the religious faith of the America’s founders.’”⁷⁹ Nonetheless, Macedo contends that “the public educational purposes that have influenced the design and growth of public schooling for 150 years” – not only striving for academic achievement, but also for “equal educational opportunity, and the pursuit of inclusion and mixing across boundaries of religion, race, class, and other important divisions” – “will not and should not be put aside just because new instruments of public policy are being utilized.”⁸⁰

My own view of the unleashing versus harnessing question is close to Macedo’s. I am intrigued by the rhetoric of pluralism and diversity, and I am persuaded that it is useful to draw upon diverse actors in civil society to address pressing social problems. At the same time, it is important to keep in mind important public values as experiments in institutional design seek greater utilization of nonprofit organizations to carry out public purposes. Of course, there is considerable debate over just what those public values should be, and sometimes “official” pronouncements of such values may be quite problematic.

Bowen v. Kendrick is illustrative of the question of when, and how, religious and public values may coincide or diverge. In that case, the Supreme Court upheld the Adolescent and Family Life Act

⁷⁸*Id.* at 438-41 (discussing certain features of the Milwaukee plan).

⁷⁹*Id.* at 439 (quoting Joe Laconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, POL’Y REV., Jan-Feb. 1999, at 30, 34).

⁸⁰*Id.* at 441.

(“AFLA”), in which Congress found that “the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex” and recognized that the best solution to such problems would come from a “variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as services provided by publicly sponsored initiatives.”⁸¹ The AFLA authorized grants to promote, among other things, “self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations.” The funded demonstration projects “shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations and voluntary associations.”⁸² Grant applicants were required to describe how they would involve “religious and charitable organizations” and other actors; this broad involvement was to help in the development of “strong family values and close family ties”.⁸³ In this model of using some parts of civil society to shore up others, we see an important precursor to the Armies of Compassion’s idea of partnerships between government and faith-based groups to, among other ends, strengthen families.

The Court, in a 5-4 opinion, upheld the constitutionality of the Act against a facial challenge and concluded that any as applied challenge to particular grants required further proceedings in the District Court. The Court concluded that “it is clear from the face of the statute that the AFLA was motivated

⁸¹Bowen v. Kendrick, 487 U.S. 589, 595-96 (1988) (quoting the Act).

⁸²*Id.* at 596.

⁸³*Id.* (quoting Act at Sect. 300z-5(a)(21), 300z(b)(3), 300z(a)(10)(A) and 300z(a)(10)(C)).

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.” Indicative of the shift among some members of the Court away from a separationist approach and toward neutrality with respect to the treatment of religious institutions, the Court stressed that the grants authorized by Congress did not go *only* to religious organizations, and that religious organizations were only *one* of the entities that a grant recipient must involve in an integrated approach to how to address teen pregnancy.⁸⁴ The Court found that the “particular approach” the AFLA takes toward dealing with adolescent sexuality and pregnancy – “promoting self-discipline and other prudential approaches to the problem of adolescent premarital sexual relations,” and to “promot[ing] adoption as an alternative” – was an approach that “is not inherently religious, although it may coincide with the approach taken by certain religions.” The Court further opined that “nothing in our previous cases prevents Congress from making [a judgment that religious organizations can help to solve social problems] or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems.” Thus, in light of Congressional findings that “prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and family ties,” it was “quite sensible” for Congress to recognize that religious organizations “can influence values and can have some influence on family life,” and that the effect on advancing religion was at most “incidental and remote.”⁸⁵ Finally, in a critical passage, the Court concluded that “the facially neutral projects authorized by the AFLA . . . are not themselves ‘specifically religious activities,’ and they are not converted into such activities by the fact that they are carried out by

⁸⁴*Id.* at 602-604.

⁸⁵*Id.* at 607-08.

organizations with religious affiliations.”⁸⁶ In her concurrence, Justice O’Connor stated that “government has a strong and legitimate secular interest in encouraging sexual restraint among young people”; although she acknowledged that the goal of using religious organizations to advance the “secular goals of the AFLA, without thereby permitting religious indoctrination” is inevitably more difficult than in other projects, “such as ministering to the poor and the sick,” she concluded that the partnerships need not result in constitutional violations (leaving any appropriate remedy to a lower court determination of actual grants).⁸⁷

Thus, the majority opinion in *Bowen v. Kendrick* seems to set the stage for a constitutional engagement by government of religious organizations to solve social problems where those organizations can carry out “neutral” activities aimed at addressing an important social (“secular”) problem. Similarly, when the problem itself requires a shoring up of important values, e.g., strong family values, and when religious institutions contribute to value formation, it is “quite sensible” (and constitutionally permissible), according to the majority, to enlist those institutions to shore up other parts of civil society, such as the family. What foundation does this case lay for “unleashing armies of compassion”? Arguably, *Bowen* seems quite apt in providing a blueprint for the faith-based initiative: there is a difficult social problem (the failure of economic prosperity) to reach all Americans; evidence suggests (it is claimed) that government may not be the best actor to address this problem and that faith-based and community-based groups (“healers”) are especially effective in doing so. *Bowen* noted that the federal government properly adopted a course of “neutrality,” in requiring grantees to describe how they would involve religious *and* nonreligious organizations in solving the problem; the faith-based initiative is defended in terms of neutrality and a level-

⁸⁶*Id.* at 612.

⁸⁷*Id.* at 623.

playing field. However, the initiative actually goes further in affirming the unique and distinctive “power of faith” to solve “tough” social problems, suggesting a preference for faith-based approaches.⁸⁸

And what of the values implicated? Proponents of the initiative may readily claim that faith-based groups simply aim to bring the needy and the poor back in touch with core American values like family, work, and personal responsibility (goals, for example, of PRWORA). And yet accounts of compassionate conservatism’s approach to the welfare state, like that of Olasky, suggest that sin and redemption are defining tropes for thinking about how to engage in the “healing” needed to solve these problems, a suggestion strengthened by Bush’s reference to healing America one heart and conscience at a time. This suggests a very distinctively religious diagnosis of social problems as rooted in moral failure and sin and the solution as rooted in personal healing and redemption. To be fair, there are certainly secular counterparts to diagnoses of poverty that focus on behavioral, rather than structural causes: consider the long history of distinguishing between the worthy and unworthy, or deserving and undeserving, poor,⁸⁹ and the more contemporary liberal/conservative debate between structural inequality and personal irresponsibility as explaining poverty. But my point here is to suggest that the “armies of compassion” initiative may rest upon a distinctively religious view of the social problems it seeks to address, and it is a view that is not shared by all religious traditions and may be in tension with certain public values concerning equality of opportunity and social responsibility. For example, the very idea of economic justice and social justice seem absent from *Rallying the Armies of Compassion*, but these ideas have been rallying cries for some religious

⁸⁸Steven Gey argues that “against the background” of *Bowen* and other cases similarly hinging upon religious institutions being able to segregate their religious from secular activities, the charitable choice statutes are unlikely to withstand constitutional scrutiny. Gey, *supra* note *.

⁸⁹Cite to Joel Handler; other basic sources.

groups seeking to address the problem of poverty. Thus, one recent account of faith-based community organizations (defined as groups whose membership is comprised primarily of local congregations) contends that they “arguably represent the most widespread movement for social justice in America.”⁹⁰ Ultimately, the faith-based initiative’s appeal to important “public purposes” invites attention to whether it correctly identifies what those purposes are and what are the proper means to achieve them. Assessing whether these claims are justifiable requires evaluating both the reasons given to support the initiative and the empirical assumptions underlying it.

Just as the *Bowen* majority seems to provide a blueprint for at least a partial defense of the faith-based initiative, the *Bowen* dissent offers a blueprint for the case for a critique, or at least for caution about its conception and implementation. The dissent called into question the practical possibility of religious organizations carrying out these activities in a way that did not inevitably implicate *religious* values. The dissent did not disagree with the majority that the AFLA had an “essentially secular purpose,” but found the “effect” of the statute to be advancing religion. Giving numerous examples of the explicitly religious teaching about sexuality and procreation employed by recipients of public funds, Justice Blackmun concluded that the AFLA, unlike any statute the Court had upheld, “pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment.”⁹¹ Blackmun further argues that: “Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious

⁹⁰Timothy Matovina, *Latino Catholics and American Public Life*, in CAN CHARITABLE CHOICE WORK? 58 (2001) (quoting sociologist Richard Wood).

⁹¹487 U.S. at 638 (Blackmun, J., dissenting).

figures, those values take on a religious nature.” Drawing on prior precedents like *Abington School District v. Schempp*, the dissent contends, in effect, government may not attempt to harness religion, or put it to work, to achieve secular purposes (even “the promotion of moral values”), when it does so by utilizing religious dogma itself.⁹² One passage bears quotation in full since it so clearly captures the tensions between envisioning faith-based groups as just another social service provider and uniquely capable actors because of the President’s “faith in the power of faith”:

There is also, of course, a fundamental difference between government’s employing religion *because* of its unique appeal to a higher authority and the transcendental nature of its message, and government’s enlisting the aid of religiously committed individuals or organizations without regard to their sectarian motivation. In the latter circumstance, religion plays little or no role; it merely explains why the individual or organization has chosen to get involved in the publicly funded program. In the former, religion is at the core of the subsidized activity, and it affects the manner in which the “service” is dispensed. For some religious organizations, the answer to a teenager’s question, “Why shouldn’t I have an abortion?” or “Why shouldn’t I use barrier contraception” will undoubtedly be different from an answer based solely on secular considerations. Public funds may not be used to endorse the religious message.⁹³

As discussed above, although some proponents of the faith-based initiative appear to embrace the distinction Blackmun draws about two ways to engage religious organizations, Bush’s own remarks and comments by compassionate conservatives like Olasky suggest that the distinction may be illusory if faith permeates and makes the activity effective. (The dissent, for example, distinguished running a soup kitchen or hospital from “counseling teens on how to make the difficult decisions facing them.”) But before taking up whether the distinction is viable, I want to dwell a bit longer on the specific challenge of identifying public values with respect to sexuality and reproduction. In 1996, pursuant to its goals of reducing illegitimacy

⁹²*Id.* at 639-40.

⁹³*Id.* at 641-42.

and promoting marriage, PRWORA authorized millions of dollars of federal funds for states that provide “abstinence only” sex education, a funding commitment that is increasing in the current administration. This is so, despite the conservative religious content of many of these programs,⁹⁴ which some scholars persuasively argue cannot be justified by appealing to public reason or public values.⁹⁵ Moreover, this increase in funding is taking place despite the “woefully inadequate” efforts to evaluate the efficacy of these programs,⁹⁶ and the lack of any conclusive evidence about such programs,⁹⁷ and despite recent studies suggesting that this approach conflicts with what a majority of parents want schools to provide: more, not less, education, one that would include not only abstinence, but also birth control, sexually transmitted diseases, and sexual orientation.⁹⁸ And abstinence only continues to be the method of sex education funded by the federal government despite recent findings by the National Campaign to Prevent Teen Pregnancy that the curricula of the most of effective sex and HIV education programs not only “deliver and consistently reinforce a clear message about abstaining from sexual activity *and/or using condoms or other forms of*

⁹⁴See Diana Jean Schemo, *Sex Education With Just One Lesson: No Sex*, N.Y. Times, Dec. 28, 2000, at A1 (reporting that “the growth of abstinence courses appears to reflect inroads by conservative, often religious based groups on local schools boards and at the federal and state level”).

⁹⁵Cite to law review article: *Putting the Sex Back in Sex Education*.

⁹⁶National Campaign to Prevent Teen Pregnancy, *Evaluating Abstinence-Only Interventions* 1 (August 1998).

⁹⁷See Douglas Kirby, *Emerging Answers* 5 (May 2001) (National Campaign to Prevent Teen Pregnancy).

⁹⁸Diana Jean Schemo, *Survey Finds Parents Favor More Detailed Sex Education*, N.Y. Times, Oct. 4, 2000, at A1 (reporting on survey by Henry J. Kaiser Family Foundation, finding that parents believe schools should discuss abstinence, but also advise students about how to use condoms, discuss birth control with a partner, and get tested for AIDS). [get study itself].

contraception,” but also “provide basic, accurate information about the risks of teen sexual activity and *about ways to avoid intercourse or use methods of protection against pregnancy and STDs.*”⁹⁹

Public policy about adolescent sexuality and, more generally, about reproductive health is a troubling example of how, in my view, sectarian religious beliefs capture public policy agendas. Here there may be a close correspondence between stated policy goals and religious values precisely because sectarian religious values have played an impermissible role in grounding public policy, that is, the policies cannot be justified by appeal to secular values. But whatever the problems that already exist, they may be compounded when government utilizes – or “unleashes” – faith-based groups to carry out public purposes. One cautionary historical example appears in Nina Bernstein’s powerful book, *The Lost Children of Wilder*. In addition to documenting how Shirley Wilder and her children suffered at the hands of faith-based child service agencies, she shows how the injury was compounded when Wilder, a troubled young woman who sought to obtain contraception to avoid having more children, was denied contraception by the Catholic facility in which she was housed. Contemporary reports suggest that the danger of women’s reproductive health being compromised by denial of contraceptive and abortion services continues when religious institutions assume the operation of services such as child protection and running hospitals (notwithstanding the *Bowen* dissent’s assumption to the contrary).¹⁰⁰

Given that fortifying families is a central civic purpose that OFBCI mentions, public-private partnerships to carry out family policy will offer many illustrations of the unleashing versus harnessing tension. With respect to promoting “responsible fatherhood,” for example, some view cultural decline as

⁹⁹Kirby, *supra* note *, at 6.

¹⁰⁰See Minow, *supra* note *, at ___.

the chief problem, while others would direct focus to structural economic conditions and empowering low-skilled and low-income men.¹⁰¹ If government funds go to Promise Keepers, for example, or to the Nation of Islam, or the National Fatherhood Initiative, will government attempt to exert any influence on the message delivered in such organizations' public education campaigns or efforts to help fathers? Is the point to unleash these various organizations to advance their diverse views and agendas? Can they, or should they, be harnessed to advance important public values and constitutional commitments as sex equality, reproductive self-determination,¹⁰² and toleration of diversity?

In sum, I have argued that it is precisely the religious identity of faith-based institutions that makes them, according to the blueprint, *Rallying the Armies of Compassion*, attractive government partners. This in turn raises questions about how such entities may serve civic purposes and remain faithful to their own religious mission. Instead of unleashing, harnessing may be more in order, when that mission may be in tension with important public values.

B. Positioning Civil Society: Seedbeds of Virtue, Government Partner, or Both?

A second puzzle about public-private partnerships is how best to envision the institutions of civil society: as "seedbeds of virtue," government contractors, or both? That is, one model envisions civil society in a complementary role as supporting democratic self-government simply by existing and functioning without undue governmental interference; the other enlists civil society to provide services that

¹⁰¹For a helpful discussion of these tensions, see [author], *Fatherhood Matters*, AM. PROSPECT [date] (reviewing several recent books on the movement).

¹⁰²I list this as a public value, given constitutional precedents about reproductive liberty; however, this is, at best, a shaky a public value, given Bush's opposition to legal abortion, the efforts of social conservatives to pursue an anti-choice agenda, and the current problems of how poverty and inadequate access limit women's freedom to have and not to have children.

government owes citizens. As noted above, the Armies of Compassion calls for not only enlisting civil society but, through government funding, expanding its capacity and empowering it better to serve human needs and carry out civic purposes.

As I have written elsewhere, a prominent theme in recent calls to revive civil society is that America's experiment in "ordered liberty" depends upon a vital realm of civil society to generate the dispositions, traits of character, and virtues that are indispensable to personal and democratic self-government.¹⁰³ As it were, it is in institutions such as families and religious organizations that people learn how to "govern the self," so that democratic self-government is possible.¹⁰⁴ This formative process of constituting citizens takes place not by government direction; to the contrary, some proponents of civil society claim that such institutions as families and religious organizations provide the general moral foundation and instruction in virtue, on which civic virtue and good citizenship depend.

In contrast, the OFBCI proposal seeks to increase government's direct funding of institutions of civil society through public-private partnerships and through the use of vouchers. Rather than the image of institutions of civil society spontaneously generating virtues in their members, simply through participation and moral education, there is the image of the federal government discharging its social responsibility by enlisting, equipping, enabling, empowering, and expanding (and unleashing) armies of healers, who are more likely (than government actors) to be compassionate and effective. True, the image is of tapping the resources already within a community to serve distressed neighborhoods and families, but the point is that government has a responsibility and utilizes nongovernmental actors to meet that responsibility.

¹⁰³McClain and Fleming, *Some Questions for Civil Society-Revivalists*, *supra* note *.

¹⁰⁴Cite to A Call to Civil Society and A Nation of Spectators.

Of course, this dichotomy is too sharp, for leading proponents of reviving civil society also support the expansion of “charitable choice.”¹⁰⁵ One reason for this is the perception that America’s most pressing problems involve moral decline and that faith communities and religious institutions have a vital role to play in moral as well as civic renewal.¹⁰⁶ Some versions of this argument stress defending civil society against usurpation by the state: that is, using government funds to shore up civil society to serve such ends may be necessary because, through government-provided social services (as with public schooling), the state has “absorbed into itself the traditional value-shaping mission of churches and other institutions of the civil society and taken over important functions once served by civil society and is tempted to do so in a fashion that drives those competitors in value-formation from the field.”¹⁰⁷ Another reason that civil society proponents favor public-private partnerships is they believe that such institutions of civil society need to help in the task of strengthening families: although families should be foremost among the “seedbeds of civic virtue,” they are in crisis and in decline (manifest especially in the decline of “intact,” marital families).

One way to reconcile these competing visions of civil society as seedbed and as government contractor is that because certain parts of civil society are endangered, or weakened, government must enlist and equip other parts to address the crisis. To give one example concerning families: the increasing use of kinship care as a form of foster care could be viewed as an instance where government enlists and pays family members in a public-private partnership to meet the needs of children; this may support the efforts of family members to provide care (who are best situated to provide such care and would, in an

¹⁰⁵A Call to Civil Society; A Nation of Spectators.

¹⁰⁶A Call, at 21.

¹⁰⁷Glenn, *supra* note *, at 18.

ideal world, provide such care even without government aid). To give another, there is a keen interest in enlisting faith-based groups to promote responsible fatherhood and to promote marriage (through, for example, clergy providing pre-marital counseling and signing community-wide covenants not to marry couples until they complete such education).

The subsidiarity principle also plays an important role: prominent proposals to renew civil society (similar to some communitarian ones) advocate a move away from federal governmental programs to, in the first instance, nongovernmental efforts and, in the second, local governmental solutions. This principle is an “organizational norm” that “social institutions of every description should be ordered so that decision making and the responsibility for acting remain at the lowest capable level.”¹⁰⁸ As discussed above, compassionate conservatism’s appeal to “unleashing” grass roots and local communities – armies of compassion – embraces this subsidiarity principle. Indeed, DiIulio has referred to compassionate conservatism as “subsidiarity conservatism.”¹⁰⁹ One United States senator recently invoked Pope John Paul II’s statement on the principle of subsidiary, and of the damage done when the state seeks to replace the role of family and community in caring for those in need, to explain why compassionate conservatism embraces a limited role for government as a “silent partner,” “enabling communities, organizations, and individuals to be innovative in rescuing those for whom American prosperity has been so elusive.”¹¹⁰

¹⁰⁸Thomas C. Kohler, *Civic Virtue at Work, in* SEEDBEDS OF VIRTUE (Mary Ann Glendon and David Blankenhorn eds., 1995). The idea has roots in Catholic doctrine.

¹⁰⁹Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next Millenium*, 26 J. Legis. 93 (2000) (quoting DiIulio, *The Political Theory of Compassionate Conservatism*, The Weekly Standard, Aug. 23, 1999, at 10).

¹¹⁰*Id.* at 93-94; *see also* THE THEOLOGY OF WELFARE, *supra* note *, at 149-53.

This squarely raises the issue of exactly what government's proper role and responsibility is in the specific areas in which the help of nongovernmental actors is sought. Is OFBCI just one more manifestation of skepticism about the federal government? OFBCI at least acknowledges a federal responsibility; its claim is that nongovernmental actors should play a larger role in discharging that responsibility. As noted above, although some rhetoric about civil society seems to suggest that civil society would supplant government, or could more readily solve problems if government would just get out of the way, this does not seem to be OFBCI's stance. At least, the role of government funding keeps it from being simply another case of devolution or privatization. The better account seems to be that unleashing means government gets out of the way by funding, and then letting these nongovernmental actors do what they will. Although this raises significant issues about the accountability of government and these nongovernmental actors, it is not an idea that government should have no role at all. Indeed, some of the most passionate critics of this idea of an "independent" civil society were those religious organizations providing services, and their supporters (such as DiIulio), who argued that they could not possibly meet the social needs of their communities *without* strong governmental support.¹¹¹ These organizations also expressed concern that their assumption of responsibility to meet such social need would invite governmental abdication of its responsibility.¹¹²

¹¹¹John DiIulio, *The Lord's Work: The Church and Civil Society*, in COMMUNITY WORKS 50-58 (E.J. Dionne, Jr. ed., 1998) (describing efforts of African-American inner-city ministers to prevent juvenile violence in Boston).

¹¹²*See, e.g.*, Amy Waldman, *Bush's Call to Churches is Discussed With Skepticism*, N.Y. Times, March 23, 2001, at B6; Sara Mosle, *The Vanity of Volunteerism*, N.Y. Times (Section 6, Magazine), July 2, 2000, at 22. [cite to study by California churches on this point]

In defining social problems, for example, more in terms of dependency and failings of personal responsibility than in terms of economic and social injustice and inequality, the faith-based initiative identifies faith-based groups as having unique competence to address such problems (government can't give "love"); as I suggested above, not all religious groups accept this diagnosis of the causes of poverty and related pressing social problems. In any case, the emphasis on building the capacity of neighborhood-based faith- and community-based groups may well be warranted, given empirical studies suggesting that many, if not most, of such groups lack the capacity to deliver services on the scale contemplated by the initiative.¹¹³ Of course, if it is necessary to build capacity in this way, it raises an issue of fairness: why single out these groups because of a belief that if their capacity is greatly expanded, they can serve civic purposes if there are other worthy groups that could also do so, if their capacity was expanded through government aid.

To address this question of fairness requires looking at whether the case for government unleashing armies of compassion has been made. Is there empirical support, for example, for the assumptions made in Bush's blueprint about the "unique capacity" of faith-based groups to solve "tough" social problems? For example, one recent study of American congregations offers some reason for doubt. Thus, it concludes: "the empirical picture of congregations contradicts the assumption that religious organizations engage in social services in a distinctively holistic or personal way"; rather, their service provision is "more commonly characterized by attention to short-term emergency needs." In contrast to the blueprint's picture of veritable "armies" of compassion and neighborhood healers, the study finds while most congregations do some social service activity, "only a small minority of congregations [10%] actively and intensively engage

¹¹³One recent book, *CAN CHARITABLE CHOICE WORK? COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES* (Andrew Walsh ed., 2001), includes several essays finding that what these congregations groups mostly do is deliver emergency services (food, shelter, clothing, money).

in social service activity.”¹¹⁴ [in subsequent draft, include more studies evaluating the social service capacity and activities of religious institutions; including significant distinctions among congregations based on denomination, size, ethnicity, race (disproportionately higher involvement by African-American churches in political activity and contracting with government); urban/suburban; the significant role of collaborations between congregations and other actors, including secular nonprofits and government; I will draw on essays in book, *Can Charitable Choice Work?* (Andrew Walsh ed., 2001) and other reports on “charitable choice” and the capacity of congregations and other faith-based groups.]

Finally, apart from a role as government contractor, what other roles does or might religious institutions play in fostering the capacities for self-government? In what sense may they be described as “seedbeds”? Does carrying out those roles depend upon partnerships with government? [complete based on research; for example, some studies find that although the primary task of religious congregations is a spiritual one (that is, worship, deepening congregants’ religious lives, and providing religious education for children), participation in congregations has indirect effects of fostering good citizenship and providing a place to practice civic skills.]

C. Nonprofits as Partners with Government: Social Entrepreneurs or Independent Sovereigns?

When I was in college at Oberlin in the late 1970s, the “bible” of left-of-center student activists was *Global Reach*, which warned of the power and control exerted by (and bad deeds done by) multinational corporations. Today, it is still a commonplace to observe that the annual budget/profits of such corporations exceed that of many national economies. The OFBCI announcement, in contrast, points to the growing power of the “independent,” or “nonprofit” sector, predicting that it “will emerge as perhaps

¹¹⁴Mark Chaves, *Religious Congregations and Welfare Reform: Assessing the Potential*, in *CAN CHARITABLE CHOICE WORK?*, *supra* note *, at 124-25.

the most dynamic arena for creative problem solving in the 21st Century,” and also noting that some envision a “new ‘civic capital economy’ in which enormous sums of money are pooled and targeted to new social enterprises.”¹¹⁵ The OFBCI initiative seeks to aims at encouraging the “inspiring trend among America’s growing class of entrepreneurs of lending their talents as ‘social entrepreneurs.” Noting the “tens of trillions of dollars that will be passed from “today’s retired generation to their children,” it also states: “we must act affirmatively to capture this wealth for purposes of generating social renewal” (one assumes, in part, by encouraging those children to be social entrepreneurs and contribute to the “civic capital economy”).¹¹⁶

The OFBCI appeal to the nonprofit sector is striking. Moreover, it touches upon an important trend: the rapid growth in philanthropic spending and in high impact philanthropy. The invocation of the civic capital economy raises questions about how to envision the role of nonprofit organizations as social and political actors. As a matter of institutional design, how should one understand nonprofits? Some observers suggest that philanthropy has undergone a transformation from operating “at the margins of policy” to the current situation, in which “donors today increasingly practice ‘high impact’ philanthropy, in which they look to transform an entire field.”¹¹⁷ One recent report indicated that foundations gave out \$27.6 billion last year, continuing five years of increases that not even a volatile stock market and slowing economy could stop.¹¹⁸ This type of growth makes it far more possible than before for foundations to have

¹¹⁵*Rallying the Armies of Compassion, supra note **.

¹¹⁶*Id.*

¹¹⁷Tamar Lewin, *Foundation Grants Surged Last Year Despite Slowing Economy*, N.Y. Times, March 27, 2001, at A17.

¹¹⁸*Id.*

a major influence on social policy, not only domestically, but internationally (e.g., think of efforts by George Soros, William Gates, and Ted Turner).¹¹⁹ And by what measures, if any, are they accountable?

At the same time, corporations have become more strategic about their philanthropic activities and, rather than simply giving money, are entering into partnerships with nonprofit organizations. In a recent book, *Common Interest, Common Good*, Shirley Sagawa and Eli Segal argue that these “New Value Partnerships” arise out of a “big idea” emerging in America: “that business models and social values provide a powerful combination.” These partnerships are “part of a movement to reinvent the way American mobilizes resources to solve problems.”¹²⁰ There is a parallel here to the theme of building capacity through public-private partnerships: one key theme in these “new value” partnerships is how corporations can help to build the capacity of nonprofit organizations to solve social problems. (And, to complicate matters further, some suggest that a model for the future is nonprofit groups partnering with faith-based groups to build the latter’s capacity to carry out their social service mission.¹²¹)

How should one assess these developments? Here I raise, without attempting to answer, a few questions for consideration.¹²² How should such foundations feature in an idea of institutional design for a good society? What role should they play in a formative project of fostering human capacities for democratic and personal self-government? By what means could they be harnessed for (or unleashed for) such a project? Given the increasing power of nonprofit organizations with respect to shaping policy

¹¹⁹*Id.*

¹²⁰SHIRLEY SAGAWA AND ELI SEGAL, *COMMON INTEREST, COMMON GOOD* xii (2000).

¹²¹Naomi Aoki, *Program Gives Faith-Based Groups Money to Serve Those Most in Need*, *Boston Globe*, Nov. 18, 2001, at F3 (describing “Black Church Capacity Building Program”).

¹²²With a caveat to workshop participants that this is my first foray into the intricacies of nonprofits and so I rely in this discussion on the scholarly work of others.

agendas and solving social problems, how accountable are they? To what extent, if any, may processes of deliberative democracy influence the agendas of such organizations? For example, with respect to accountability, some scholars suggest that the “nondistribution constraint” placed on nonprofits (i.e., that they do not distribute their profits) keeps nonprofits honest and worthy of trust; but other scholars find the question of nonprofit accountability more difficult since, for example, “nonprofits generally are as untethered to their donors as large for-profit firms are to their shareholders.”¹²³ That is, although one might view nonprofits as accountable because they depend upon donations, in fact, a much greater percentage of their resources come from sources other than donations.¹²⁴ Historically, a source of anxiety concerning the regulation of nonprofits has been the issue of the inadequacy of the supervision of nonprofits and, hence, of their accountability.¹²⁵

If nonprofits are so powerful as to be able to shape policy agendas, this issue of accountability seems pressing. Evelyn Brody suggests that the special tax treatment afforded nonprofit charitable organizations is explained by “thinking of charity as a co-sovereign to the state.”¹²⁶ This idea of co-sovereignty is particularly striking with respect to the question of institutional design and how to envision the social contract. The OFBCI announcement, for example, clearly links nonprofits to achieving civic purposes. Similarly, in the scholarly literature as well in tax regulations, tax-exempt nonprofits are

¹²³Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 534-35 (1996) (discussing and critiquing Henry Hansmann’s idea of the “nondistribution constraint”).

¹²⁴Brody, *supra* note *, at 535; Minow, *supra* note *, at ___.

¹²⁵See NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR* (2001).

¹²⁶Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 586 (1998).

distinguished from for profit corporations in part by reference to the idea that they serve “public” purposes.¹²⁷ Brody suggests that “our political and economic system traditionally splits into three distinct sectors: public (government), proprietary (business), and nonprofit (charity and mutual benefit),” and the public holds popular beliefs and expectations concerning that division (e.g., that nonprofits “satisfy the social needs that fall between the cracks” of government and business). Looking to history, however, she contends that a “clear tripartition of these three sectors has never existed in the United States.”¹²⁸ She provocatively argues that “there is no ideal sector for any particular activity” and that “once we recognize the irrelevance of organizational form – as public agency, business corporation or nonprofit charity – society can focus on the aspects of firm activity that it needs to regulate more productively.”¹²⁹

The growing prominence of the nonprofit sector invites attention to this kind of fresh look at institutional design. For instance, does our constitutional order, as Chris Eisgruber has recently argued, with its “fragmentation” of governmental power both among three separate levels of government (national, state, and local) and among three branches of national government, play “a largely unappreciated role in securing liberty and in shaping the character of American citizens and American public life”?¹³⁰ Eisgruber contends that this fragmentation has two consequences for religious institutions, but these points also are apt when

¹²⁷SILBER, *supra* note *; Brody, *Institutional Dissonance*, *supra* note *, at 477-78 (discussing distinction between nonprofit laws permitting nonprofits to be formed for any lawful purposes and requirement that charity qualify for federal income tax exemption only if it has a specified public purpose).

¹²⁸Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433 (1996).

¹²⁹*Id.* at 463, 490.

¹³⁰Christopher L. Eisbruger, *Fragmented Authority & American Religiosity* (unpublished manuscript presented at Georgetown/PEGS Discussion Group on Constitutional Law, Nov. 30-Dec. 1, 2001) (on file with author).

applied more generally to nonprofit organizations: (1) “insofar as the government is incapable of supplying social services (such as hospitals, schools, child care, and welfare services), people will look to private institutions, including churches, to fill the void,” and (2) “the complex structure of American government means that private groups, including churches and religious special purpose groups, will have multiple ‘entry points’ at which they can affect policy.”¹³¹ [In subsequent draft, pursue this “fragmentation of power” idea and wrap up discussion of whether there is an ideal sector for any particular activity]

D. “Armies of Compassion”: Where are “For Profit” Corporations in the New Social Capital Economy?

Where do “for profit” corporations feature in the new social capital economy? Do they, too, have an “indispensable” role to play in carrying out civic purposes? What is to be implied from the apparent absence of such corporations from the team of partners used by government to carry out its responsibility to help citizens share in prosperity? Absent in the announcement of the faith-based initiative is the idea of (for profit)corporations’ social responsibility or the idea of such corporations as part of civil society. Rather, government and the “armies of compassion,” drawn from faith-based groups as well as the broader nonprofit sector (including social capital entrepreneurs), are to address human needs. This might reflect an assumed division of labor between the business and nonprofit sector: “the business sector exists to capitalize on market opportunities to realize profits for owners and investors. The social sector is by nature compensatory. It exists because of market failures. It remedies, rescues, repairs.”¹³² On this view, public-private partnerships could be seen as ameliorating the effects of the market rather than altering the dynamics

¹³¹*Id.* at 8-9.

¹³²Sagawa and Segal, *supra* note *, at 10.

of the market. The new paradigm of corporate-nonprofit partnerships aims to “eliminate[] barriers between the sectors while preserving their core missions.”¹³³

The Blueprint seems to refer to these New Value Partnerships in noting that “All across America, successful businessmen and women are creating or ‘adopting’ local charities, supplying both funds and business management savvy.”¹³⁴ The omission of any other consideration about how nonprofits figure into ideal institutional design is striking, given that for profit corporations increasingly contract with government to provide services, such as private prisons, schools, and welfare services.¹³⁵ In this sense, they are in direct competition with nonprofits also seeking to provide those services. But do corporations have any other possible roles and responsibilities, for example as “seedbeds of virtue”? What is the relationship between the social capital economy and the capital economy? [to be completed]¹³⁶

E. Public/Private Partnerships and the Social Contract: Whither Family Policy? Welfare Policy?

One of the valid “civic purposes” to be pursued by faith-based and community organizations is “strengthening families.” Another is “fighting poverty.” I am interested in what this initiative may portend for family policy, both with respect to the never-ending “family forms” issue and the goal of promoting marriage, as well as with respect to helping parents better to meet market and caregiving responsibilities.

¹³³*Id.* at 1066 (quoting SHIRLEY SAGAWA AND ELI SEGAL, COMMON INTEREST, COMMON GOOD: CREATING VALUE THROUGH BUSINESS AND SOCIAL SECTOR PARTNERSHIPS (2000)).

¹³⁴*Rallying the Armies of Compassion, supra note **.

¹³⁵Minow, *supra note **, at __; Cheryl Wade on for profits operating schools; Sharon Dolovich on private prisons.

¹³⁶To discuss: how for profits appear in compassionate conservatism and in civil society literature. Can they be harnessed? What are their social responsibilities? Consider, e.g., recent arguments for a right to (decent) work? What division of labor between government and for profits, if there were such a right?

What are the valid “civic purposes” that government advances when it seeks to fortify families? How are families best to be fortified? As it has unfolded so far, the current Administration’s family policy has a strong theme of promoting marriage and responsible fatherhood, as well as a theme (at least as expressed by DHHS head Tommy Thompson) of supporting “working families.” If, as the current budget proposal anticipates, millions of federal dollars are to be allocated to nonprofit organizations to promote responsible fatherhood,¹³⁷ what, if any, “strings” should government attach to that money? What are the salient public values? How about gender equality and the rejection of patriarchal marriage? May government’s partners reject such values? (In this regard, one encouraging feature of the current Responsible Fatherhood Act is the embrace of “nonviolence” as a value and a requirement that the nonprofit organization that develops public campaigns to promote marriage and fatherhood consult with a domestic violence organization.) Bush supports initiatives to promote “responsible fatherhood”(as did the Clinton/Gore administration) and so does the new head of DHHS, Governor Tommy Thompson. The pending bi-partisan legislation to promote responsible fatherhood (by, inter alia, promoting marriage) would seem to be precisely the type of public-private partnership that Bush has in mind, for it would authorize federal grants to nongovernmental actors (responsible fatherhood groups) to engage in public education campaigns, pilot programs, and the like.

Promoting marriage has emerged as a central theme in unfolding debates over the reauthorization of PRWORA and here, too, there is already recognition of an important role for public-private partnerships and , in particular, of faith-based groups. And the marriage movement seeks to affect marital behavior across the economic spectrum, not just among low-income persons who rely on welfare. Applying the *Bowen* majority’s logic, one could argue that, in enlisting nongovernmental groups, including faith-based

¹³⁷Cite to Tommy Thompson’s testimony about the DHHS budget (\$60 million), and to latest status of Responsible Fatherhood Act and Fathers Count Act.

organizations, Congress is recognizing that government can play only a limited role in addressing the pressing social problems of a declining marriage rate and a high divorce rate and that the solution has to come from changing “hearts, minds, consciences, and souls” (to use Bush’s phrase), and that religious values play a distinctive role in undergirding “strong family values.”

OFBCI’s plan is described as “pluralistic” and “nondiscriminatory,” although this is with reference to governmental treatment of faith-based service providers. How “pluralistic” or “nondiscriminatory” is OFBCI likely to be in its conception of how to strengthen or fortify families, given the keen interest among legislators and social conservatives¹³⁸ in promoting and strengthening marriage as the sine qua non for strengthening families and fighting poverty? (For example, if social scientists and the medical establishment conclude that two same-sex parents can provide a healthy environment for children, will this hold sway if faith-based partners of government reject such unions on religious grounds?) Recent discussions of the responsible fatherhood movement suggest lively points of tension, for example, between those who stress a need to focus on marriage as the most important goal and those who stress helping to connect fathers to their children, whether they are married to the mother or not.¹³⁹ [To be completed¹⁴⁰]

¹³⁸See Mary Leonard, *Right Seeks Action on Social Goals, Federal Effort on Marriage, Abortion Urged*, Boston Globe, Feb. 11, 2000, at A1 (reporting on lobbying and legislative efforts of Values Action Team, coalition of three dozen House members and equal number of interest groups that share social conservative agenda aimed at strengthening traditional marriage and furthering abortion restriction; one proposal is to establish federal office to promote marriage).

¹³⁹With respect to addressing work/family conflict: although the Responsive Communitarian Network recently raised the question of whether Bush was a communitarian (given his emphasis upon civil society and nongovernmental solutions), it also noted that Bush had not, as yet, embraced communitarian proposals to restructure workplaces to make them more family-friendly. Cite to Communitarian Network web communication.

¹⁴⁰**Note to readers:** I am currently working on a draft paper, “(How) Should Government Promote Marriage?” Most of my discussion about family policy will be in that draft, but in this current

Conclusion

[still to be done!]

paper I will try to set up the basic issues that need to be addressed.