Faith, Funding and the First Amendment: Public/Private Partnerships in Community Development

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1. Why should local governments hold private service providers of publicly funded programs accountable?

Government money comes with government rules, regulations, audits, monitoring, interference, and control. Indeed, to satisfy the basic requirement of public oversight, local governments that use private means to fulfill their obligations must evaluate those means and report on and take responsibility for the results.[2] Thus, a local government involved in a community development partnership with a nonprofit organization will often seek to hold the nonprofit accountable for its internal operations and delivery of program services. Public contracts often approach accountability in these areas by focusing on legal compliance issues – making sure the nonprofit is keeping honest books, adhering to the law and delivering what was promised.

2. Why should local governments be particularly concerned about accountability from faith-based organizations?

Communities of faith have participated in community economic development activities since the 1960's. However, the public/private relationship is different today because it involves direct government funding of sectarian organizations. That is, recent federal legislation and policy make it clear that religious organizations no longer need to set up separate, secular nonprofits to receive public funds. Churches mosques, and synagogues can receive funds directly under what has come to be known as "Charitable Choice."[3]

Local governments that contract with these faith-based organizations are plagued with vexing questions on how to assure accountability from their partners. These faith-based organizations are often different in structure than secular nonprofits, thereby removing many of the customary checks and balances. For example, the Revised Model Nonprofit Corporation Act (RMNCA) recognizes that although directors and officers of religious organizations share the same fiduciary duties as their counterparts in other nonprofit corporations, religious organizations must have greater flexibility in structure and operation. Thus, religious organizations can remove directors with greater ease than can other non-profits. [4] Also, with regard to open records, religious organizations need not provide members with rights to inspect membership lists or receive financial statements.[5] Among other existing protections are tax exemptions from lobbying disclosure rules, more restrictive rules for the IRS regarding when it can audit a religious institution, more stringent notice requirements for the IRS regarding advance warning of an audit, and exemptions from filing Form 990.[6]

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This lesser level of organizational and federal oversight might cause a local government to be more vigilant in it own accountability efforts. However, the contractual relationship between government agencies and faith-based organizations implicates a number of additional laws that may thwart the government's usual compliance regulations. The most important of these laws is the First Amendment to the Constitution of the United States of America, which provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The courts have sought to balance the baseline of the Free Exercise Clause – that governments must accommodate individual religious beliefs and the ceiling of the Establishment Clause - that government may not become overly involved in religion.[7] The particular ills that courts seek to root out are sponsorship, financial support, and active participation of government in religion.[8] As a result of the courts' balancing act, local governments may run afoul of either clause as they attempt to impose accountability measures on a faith-based partner.

3. How has the law balanced the need to accommodate faith-based organizations with the need to hold these organizations accountable?

Accountability provisions in a government contract with any faith-based group will be deemed lawful under First Amendment jurisprudence if the provisions have a neutral purpose and effect toward religion and among religions and avoids excessive government entanglement with religion.[9] Thus, the provisions must have the effect of safeguarding the religious integrity and character of faith-based organizations that are willing to accept government funds to provide services to the needy. Conversely, the overall contract must safeguard the religious freedom of beneficiaries, both those who are willing to receive services from religious organizations and those who object to receiving services from such organizations.

Similarly, the "Charitable Choice" language of several federal programs provides that religious organizations are specially recognized and expressly exempted from regulations that otherwise would intrude on their religious character. The provisions of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, for example, "include affirmative statements that religious organizations retain the independence to 'control . . . the definition, development, practice and expression of [their] religious beliefs,' may not be forced to alter their form of governance or 'remove religious art, icons, scripture, or other symbols' from their facilities, and are entitled to discriminate on religious grounds in their employment practices involving positions funded by government."[10] Religious organizations may also segregate federal and nonfederal funds, thereby limiting any program audit to the federal funds even when both funding streams contribute to the program activity.

While making these accommodations, the law also recognizes that too much accommodation can become favoritism toward religion in violation of the Establishment Clause. Thus, in *Texas Monthly v. Bullock*,[11] the Court struck down a sales tax exemption for religious periodicals because the exemption benefited only religious groups. The Court

made clear that permissive accommodations must be designed to alleviate a government-created burden on religion, can not favor particular sects, and can not favor religious groups over nonreligious groups or burden non-beneficiaries.

4. How are accountability considerations different when a local government contracts with a pervasively sectarian faith-based organization?

The First Amendment's prohibition against excessive governmental entanglement in religious affairs means balancing accommodation with accountability is particularly challenging when dealing with pervasively sectarian organizations, as compared to those that are merely religiously affiliated.[12] Pervasively sectarian organizations include houses of worship, such as churches, synagogues, and mosques. These organizations are more likely to engage in religious worship, proselytization, and religious education as part of their social service programs than 501(c)(3), religiously affiliated organizations that typically don't see the advancement of religion as core to their functions. For obvious reasons, local governments run a greater risk of excessive entanglement when they become partners with organizations in programs that are pervasively religious. If the programs require obedience to religious dogma, mandatory attendance at religious services, and study of a particular religious doctrine, local governments should beware. To ensure that their funding is not used to advance religion, they must engage in ongoing surveillance of the programs, which may well constitute excessive entanglement.

Bowen v. Kendrick[13] is instructive on this issue, although the case involves the constitutionality of a statute rather than a specific contract and the faith-based organizations at issue were not pervasively sectarian. In *Bowen*, the Court noted the dilemma of governments; "the very supervision of the aid to assure that it does not further religion renders [an agreement] . . . invalid."[14] The specific monitoring mechanisms involved in *Bowen* included government evaluations of the services provided, required reports from grantees, and grantee disclosures on application forms as to the nature of the services that would be provided. In addition, the program required the Department of Health and Human Services to review funded programs, including educational materials and visit program offices. In attempting to balance the competing interests, the Court acknowledged that grant monitoring might require a review of the educational materials, or a visit to the site, but it summarily dismissed the idea that such inspections alone would intrude on religion. However, the *Bowen* Court specifically noted that because the government was not monitoring "pervasively sectarian" grantees, intensive monitoring was unnecessary.

5. How can governments set and enforce meaningful public standards for public services, even if delivered privately by an FBO?

Some might argue that religious entities should receive government funding on the same basis as nonreligious groups, but religious institutions should enjoy exemptions from many of the accountability standards to which other entities are subjected.[15] Others counter that this allows religious organizations to have their cake and eat it too, granting them full access to government subsidies yet exemptions from government regulations.[16] In 1990,

the Supreme Court in *Employment Division v. Smith*[17] held that religious groups are subject to neutral laws of general applicability, making it unlikely that claims for mandatory exemptions from regulations will prevail. However, it should be noted that *Smith* did not involve a religious institution seeking exemption from regulation. Rather, *Smith* involved two Native Americans who were fired by a private drug rehabilitation organization after they used peyote at a Native American church ceremony. The state denied their unemployment compensation applications pursuant to a state law that disqualified employees discharged for work-related conduct. The court reasoned that if the state could criminalize conduct, it could also penalize the conduct in its unemployment scheme. The court recognized two exceptions to its holding, however. First, where the free exercise claim is joined with another constitutional protection, that hybrid claim might be entitled to an exemption. Second, where the law at issue provides for individualized determinations of the exemption, the government may not refuse to extend that system to cases of religious hardship without compelling reason.

Thus, it appears that generally applicable government regulations, even those that arguably burden religious groups, are presumptively valid unless:

(1) the free exercise clause is linked with another constitutional violation (a hybrid claim),
(2) the regulation at issue requires some form of individualized determination,
(3) the law at issue is not neutral, or
(4) the regulations violate Establishment Clause rights by excessively entangling church and state.

6. A special case: can faith-based organizations engage in employment discrimination when administering a public program?

The issue of whether a faith-based organization may legally discriminate on the basis of religion involves two separate questions. The first is whether faith-based organizations are covered under federal employment discrimination statutes, namely Title VII of the Civil Rights Act of 1964. The answer to that question is no. Title VII prohibits discrimination in employment on the bases of race, color, religion, sex and national origin. However, Title VII exempts religious discrimination by religious organizations to protect the ability of faith-based organizations to maintain their religious liberty and identity by hiring employees who share their religious beliefs. Reasoning that it alleviated significant governmental interference with the ability of religious organizations to define and carry out their religious missions, the Supreme Court upheld the exemption in *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos.*[18]

The second question is whether accepting public dollars changes the employment discrimination rules for faith-based organizations. It is, after all, one thing to keep government from interfering with religion in a purely private sphere and another to argue that government-funded discrimination deserves the protection of the free exercise clause. The answer to the question, however, is not clear and may depend on the source of funding. The federal programs promoting local partnerships with faith-based organizations vary on

this question. Unlike the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, which makes clear that religious grantees retain the right to make employment decisions based on race, the Community Development Block Grant Program includes language along the following lines: No person shall on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter. This language makes clear that individuals may not be denied services because they are of a different faith or no faith at all. It does not appear to cover employment practices, however, Supreme Court precedent suggests that this language may also prohibit employment discrimination. Community Development programs with language that specifically prohibits employment discrimination include the Department of Labor's Workforce Investment Act and the Omnibus Crime and Control and Safe Streets Act.

Notes

[2] Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1260 (2003).

[3] Michele Erstin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need For Regulation With The First Amendment Religion Clauses, 55 Vand. L. Rev. 799, 811 (2002)

[4] 7.02(a)(2)

[5] 7.20(f)

[6] IRC 7611(a)(1)(A), (a)(2)(2000), 7611(a)(1)(A), (a)(1)(B), (a)(3).

[7] Elizabeth Tobin, Blurring the Line Separating Church and State: California Exposes the Inherent Problems of Charitable Choice, 86 Minn. L. Rev. 1629, 1644 (2002).

[8] Id. at 1645.

[9] See Bowen v. Kendrick Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Lemon test was modified for cases involving aid to religious schools in Agostini v. Felton, 521 U.S. 203, 232-33 (1997).

[10] Steven K. Green, Charitable Choice and Neutrality Theory, 57 N.Y. Ann. Surv. Am. L. 33, 41 (2000) (citations omitted).

[11] 489 U.S. 1, 8 (1989)

[12] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Lemon test was modified for cases involving aid to religious schools in Agostini v. Felton, 521 U.S. 203, 232-33 (1997).

[13] 487 U.S. 589 (1988) (upholding federal grants for teenage sexuality counseling, including counseling offered by faith-based organizations).

[14] Id. at 615.

[15] See e.g., Carl H Esbeck, A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers, 46 Emory, L. J. 1, 21 (1997); Michael W. McConnell, The Problem of Singling out Religion, 50 DePaul L. Rev. 1. 42, (2000).

[16] See Ira C. Lupa, Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause, 42 Wm, & Mary L. Rev. 771, 820 (2001).

[17] 494 U.S. 872, 890 (1990)

[18] 483 U.S. 327 (1987).