

Chapter 21

The Adverse Consequences of a New Federal Direction

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Introduction

There is a fundamental shift in the way Washington works that directly affects the civil rights community. It was best articulated by House Majority Leader Dick Arme y and is being implemented with precision by the Bush Administration. In a post-tax cut July 5, 2001, message (<<http://www.freedom.gov/library/retirement/relimit.asp>>), Arme y said, "Did we Republicans come to Washington merely to slow the growth of leviathan government? Or did we come to shrink and re-limit it? *I say we came here to shrink and re-limit it ...* Restraining government [through the tax cut] was step one. Step two is roll-back" (emphasis in original).

It hardly seems necessary to remind any sector of the public of the value of the government or of the need for federal presence. Yet it was not long ago that one of us was downhill skiing on national forest land out west. Going up the chair lift, the other person started to make conversation.

"So where are you from?"

"Washington, D.C."

"Oh, I'm sorry to hear that. Government hasn't done anything worthwhile or right. We should just get rid of it."

Picking up the battle, the dialogue began.

"What about Social Security?"

"Oh, that doesn't count."

"What about laws to prevent discrimination?"

"Oh, that doesn't count."

"What about the Interstate highway you took to get here?"

"I didn't realize that was the federal government."

Then the final blow, "Did you know we are skiing in a national forest?"

"I hadn't thought about that as federal government." The skier could not wait to get out of that chair.

Yet President Bush has ridden the naivete of Americans like this skier to pursue a radical agenda that makes the Reagan Administration appear as though it were liberal. This can be seen on three fronts:

- The disinvestment of the federal government that results from pursuing a tax cut agenda that primarily benefits the wealthy in this country and cutting back on the scope of government;
- The dismantling of regulatory protections that have taken years to develop as evidenced by the roll back of Clinton Administration regulations and the promotion of the faith-based initiative; and
- The devolution of federal responsibilities including enforcement of laws and regulations.

These three Ds — disinvestment, dismantling, and devolution — spell trouble for the civil rights community.

I. Disinvestment

Civil rights issues, including regulation, enforcement, and programs designed to promote political, economic, and social equality and equal access, are intrinsically linked to the federal budget. The budget — who gets what resources — is where the pedal hits the metal in determining whether policies actually get implemented to make civil rights a reality. It is the true measure of our commitment as a nation to social justice. The federal budget is multifaceted, complex, highly politicized, and often difficult to influence. Given its importance to the goal of achieving political, social, and economic equality, some understanding of the politics surrounding the budget is vital. And the story that is currently unfolding is that of a steady disinvestment of federal resources.

Three numbers may best illustrate the historical decline of government spending. In the last year of the Reagan Administration, government spending was roughly 21.2% of the Gross Domestic Product (GDP). In Clinton's last year, spending had dropped to 18.2% of the GDP. By 2006, President Bush proposes to shrink federal spending to 16.6% of the GDP — the lowest percentage of government spending since 1956. These are just the broad strokes showing that government expenditures as a whole are shrinking.² In the last year of the Reagan Administration, domestic discretionary spending was 3.5% of the GDP. At the end of Clinton's term it was 3.3% and under President Bush's budget it would shrink to 3.1% in 2006, lower than at any time from 1962, when these data became available.³

Federal fiscal policy is a reflection of our priorities as a nation as well as a statement about the role of government in our civil society. Conservatives have long recognized this and have launched long-term initiatives to “shrink and re-limit” the role of government through a variety of means, including tax cuts that limit federal and state resources, the erosion of federal regulatory powers, and continued assaults on the efficacy and role of government. Social justice advocates, on the other hand, have largely focused their attention on specific issues without framing their efforts within a broader ideological agenda like overall fiscal policy or the positive role of government. For instance, conservative attacks on the growth of government — measured in dollars — frequently obscure the fact that domestic discretionary spending is actually shrinking as a percentage of the GDP. The fellow on the ski lift referenced in the introduction may be less naive than brainwashed from constant reminders of government waste and inefficiency — which the media is much more apt to report, rather than reporting on the good things that government does.

Conservatives have been very effective in framing their message and in linking up specific issues within a broad long-term ideological position. Thus, the conservative attack on government represents a very effective way to delimit social justice, since a strong federal government is essential to the policies and enforcement and support necessary to achieve that ideal. It is vital that supporters of social justice begin to rehabilitate the idea of government as necessary and important, as well as find ways that government can be more effective — for instance, by forming new partnerships and initiatives.

The voices of ordinary citizens about what they want and expect from government are largely silent — reflected only as polling

results, or, as during the last Presidential campaigns, individual examples of the need for a particular policy. From our perspective, the budget reflects a public means of achieving American ideals and values and it presents an opportunity for strengthening community participation in shaping the role our government plays in civil society. In other words, the federal budget is the means to actually accomplish our national goals and values. This requires a vigorous public and political debate about what our domestic priorities are, a discussion that has long been deferred — to policies of deficit reduction and tax cuts and paying down the debt. The terrible events of September 11 seem to have prompted a long absent debate about our national priorities and the role of the federal government in achieving those goals. The September tragedy starkly revealed the costs of disinvestment, for instance, in public health needs; the limits of the private sector, especially in ensuring the safety of airline passengers; the value of public services we've long taken for granted — firefighters and police officers and emergency medical technicians and "ordinary" Americans rising to big challenges; and, with the economic downturn, we are also seeing the holes in the safety net that were less obvious when the economy was booming. The huge budget surpluses that had been predicted have been sharply reduced due to the passage of a huge tax cut, the economic downturn, and the costs of rebuilding and waging war. Budget deficits are certain for the next few years, although a surplus over the next decade is still predicted. Tax cuts, proposed increases in military spending, and the rapidly rising cost of entitlement programs all threaten domestic spending with future reductions during the next few decades. Whether or not there are surpluses, "fiscal responsibility" encompasses far more than balancing the budget or reducing the debt. It includes the responsibility to

effectively use federal resources to meet our domestic priorities.

Public opinion research indicates that the vast majority of the American people identify the importance of using federal resources to address a variety of domestic priorities and to accomplish important goals such as civil rights and equal opportunity. Public investment that reflects and implements our values continues to have a broad popular appeal, in spite of its virtual disappearance from the public policy debate, and in spite of the bad rap given government by conservatives. Americans recognize that our shared national ideals like assuring each person the opportunity to succeed — to earn a decent wage and be able to support a family, own a home, raise their children in a healthy and stimulating environment — can only be realized through public policy that provides supports to families and communities. Environmental protection and dealing with big issues like global warming and cleaning up the air and water require the expertise and investment of federal resources. Addressing institutionalized racism and its impacts on the lives of Americans requires federal efforts. Policies to ensure that differently-abled children and adults have the opportunity to fulfill their potential, through special education and training and accessible housing, all require federal resources. Education and job training, scientific and medical research and development, transportation, public safety, health care, community economic development and revitalization — all require good policy and the infusion of federal resources.

Furthermore, it is widely recognized that the United States will face new challenges during the next couple of decades. A rapidly aging population will place new demands on health care and housing. Ensuring a decent quality of life for senior citizens, including increased needs for the service work involved with caring for other people, will become more pressing. We are increasingly

ethnically and racially diverse with more and more people living outside a traditional nuclear family structure, whether those are same-sex partnerships, multigenerational households, singles, or grandparents raising grandchildren. While we retain long-standing American values about the value of hard work, individual responsibility, and raising children to be healthy and productive adults, our individual, family, work, and community lives are changing. Effective government programs need to be designed to fit with these shifting demographics and reflect these changes in our social and work lives.

Even many Americans who are reasonably well-off complain about their quality of life — from being stuck in traffic to a shortage of affordable and quality child and elder care to job stress and insecurity and the difficulty of balancing the demands of work and home life. People want affordable housing, safe and liveable communities, environmental protection and clean air and water, safe food, quality education, health insurance — and the opportunities that allow all Americans to have an equal chance at achieving a good life. The way to ensure these benefits is through federal policies and investment. In spite of concerns about government's effectiveness, many people understand the role that the federal government must play in addressing the major challenges that lie ahead.

If investment in America's people became a national priority, innovative new ways of addressing social, economic, political, and environmental problems could be developed and implemented. We could figure out ways to effectively address intractable problems like drug addiction, urban poverty and suburban sprawl, the increase in violence among young people, global warming and environmental degradation, and the continuing entrenchment of racism and homophobia and fear of difference that limit us all. We could provide childcare, pre- and

after-school and summer programs for children, and health care for all children who need it. We could make computer technology and the literacy needed to effectively use it available to all Americans. We could address the economic and social roots that often lead to or contribute to drug addiction and crime. The list could go on and on.

Yet federal policy today is not concerned with implementing big ideas. Policy is increasingly small and disjointed, with no effort being made to link up small steps with farsighted goals. The result is a lack of vision, lack of message, growing apathy about the role of government, and enormous opportunity to fulfill the conservative agenda of dismissing government. Young people express dissatisfaction with politics as usual and the absence of an affirmative vision for the country behind which they can rally. Theories of "the missing middle" point out that the national policy debate has been increasingly focused away from middle-income working Americans and argue that no great national purpose can be accomplished without their inclusion.⁴ Economists write books about the negative effects of long work and commuting hours and job stress and insecurity on family and community life. While "visioning" efforts to develop and implement shared community goals are taking place in communities across the country, there is no similar affirmative process taking place at the national level.

As Robert Kuttner recently wrote in "Opposition as Opportunity," in *The American Prospect*, proponents of the "view that an efficient economy and a just society require active government and politics as well as a vigorous market . . . have been on the defensive for the past quarter-century . . . recent events, however, create new openings."⁵ For the civil rights community, this atmosphere creates a challenge. On the one hand, there remains the need to defend against attacks on federal programs and initiatives that increase income inequality

or further damage the social safety net. Yet if undertaken alone, this defensive action robs the community of the opportunities presented by budget surpluses for making positive demands on government. It is time for civil rights advocates to pick up the mantle of what Robert Reich calls “big think,”⁶ the advocacy of new ideas to strengthen the quality of life for all Americans.

The challenge of balancing defensive and offensive action is made more difficult by President Bush’s initiatives. While the entire \$1.6 trillion Bush tax cut may be viewed as an ill-conceived drain on federal resources that could be better spent, the elimination of the estate tax, which exempts problems with the larger tax cut, should have raised the ire of the entire civil rights community.

A. The Estate Tax

The civil rights community had enormous stakes in the debate over repeal of the estate tax, since repeal of this long-standing tax would:

- Increase concentrations of wealth and power;
- Sharply curtail charitable giving by removing a major incentive; and
- Reduce federal and state revenues, potentially limiting funds for programs serving low-income and vulnerable individuals and families.

As passed, the Bush tax cut slowly modifies and phases out the estate tax by 2010, but because the entire tax “sunsets” in 2011, the estate tax will then return as it existed before the Bush tax cut was passed. That the estate tax is only repealed for a year ensures that this tax will again be debated during the next decade.

The estate tax was very strategically framed by conservatives as a “death tax,” leading to visions of the Internal Revenue Service descending on a grieving family to confiscate over half of the assets of the deceased. In fact, the estate tax is a tax on the assets that are transferred to heirs of the wealthiest Americans, and there are a number of reasons why it is both a valuable and a fair tax.⁷ Also lost on the public is the fact that the tax affects less than 2% of taxpayers, who happen to be the wealthiest among us.

I. Concentrations of Wealth and Power

Without the estate tax, accumulated wealth could be passed from generation to generation, leading to huge concentrations of wealth in the hands of a few and creating a new aristocracy. The United States was founded on the ideal of a meritocracy and a rejection of the strictures imposed by European aristocracy. Throughout history many political theorists and philosophers have been concerned about the negative effects on democracy and social well-being when great inequality of private wealth and resources exists in a society. President Franklin D. Roosevelt supported an estate tax to avoid the “perpetuation of great and undesirable concentrations of control in a relatively few individuals over the employment and welfare of many, many others.”⁸

An inheritance is unearned income. It is a windfall from having the right parents — hardly a well-earned reward for individual initiative, hard work, and the entrepreneurial spirit. In fact, inheritances can have a negative effect on initiative and hard work. Andrew Carnegie, the great philanthropist, felt that the “parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and leads him to lead a less useful and less worthy life than he otherwise would.”⁹ In a curious

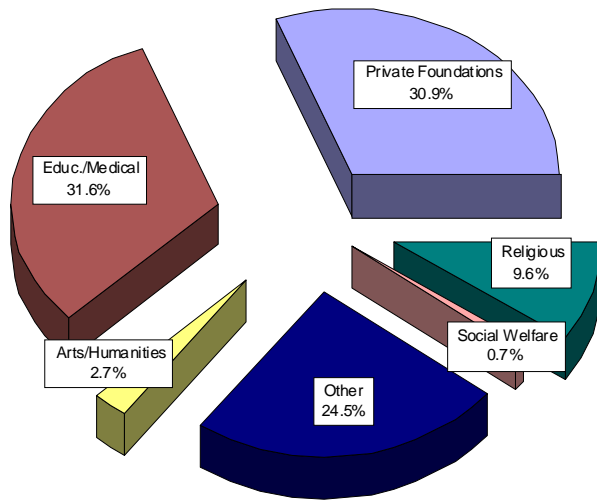
juxtaposition, the repeal of the estate tax entitles the children of wealthy parents to benefit from that wealth, without taxation, while a single mother with small children is no longer entitled to public support but is required to work, pay FICA taxes on each dollar she earns, and even pay income taxes on her earnings if she's fortunate enough to earn a living wage. Further, the loss of federal and state resources as a result of repeal of the estate tax means that services the single mother needs to keep on working, like health care and child care and access to transportation, will be threatened with cuts. This reflects the focus of the entire tax cut – it is a double hit on low- and middle-income families. The tax cut primarily benefits those wealthy Americans who need it least, while at the same time reducing federal and state

revenue to fund programs for those low- and middle-income families who will receive only minimal, if any, benefits from the tax cut.

The debate about the estate tax was greatly enriched by the efforts of the Responsible Wealth project of United for a Fair Economy — a group of wealthy individuals, many of whom, like Bill Gates, Sr., anticipate an estate tax liability. These wealthy individuals expressed their moral obligation to give back to society and to repay the benefits they received from government, which contributed to their success. Before the Responsible Wealth involvement, repeal of the estate tax enjoyed strong support and was practically a given; and it is fair to say that the Responsible Wealth effort was paramount in turning the debate around in

Charitable Deductions Claimed in Estate Tax Returns: 1999					
Size of Gross Estate	No. of Returns	No. with Charitable Deductions	% Claiming Charitable Deductions	Total Charitable Deductions	Average Charitable Deduction Per Return
\$600,000 to \$1 million	49,898	6,640	13.31	\$1,141,747,000	\$171,950
\$1 million to \$2.5 million	40,779	7,354	18.03	2,380,900,000	323,756
\$2.5 million to \$5 million	8,626	2,000	23.19	1,492,748,000	746,374
\$5 million to \$10 million	3,050	896	29.38	1,414,928,000	1,579,161
\$10 million to \$20 million	1,083	409	37.77	1,392,114,000	3,403,702
\$20 million or more	577	261	45.23	6,752,878,000	25,873,096
<i>Total</i>	<i>103,993</i>	<i>17,559</i>	<i>16.18%</i>	<i>\$14,575,316,000</i>	<i>\$830,077</i>
Source: IRS, <i>Statistics of Income</i> , unpublished data, March 26, 2001.					

Bequests by Recipient: 1995



Source: IRS, *Statistics of Income Bulletin*, Summer 1999, Publication 1136 (9-99)

favor of retaining the tax. Repeal of the estate tax, which seemed to be a foregone conclusion after more than ten years of effort by supporters of repeal, was suddenly not so certain after all.

In response, however, Robert Johnson, the billionaire founder of Black Entertainment Television, who is also a member of Bush's committee of Social Security privatization "reformers," gathered together a group of black business leaders and organized a newspaper ad campaign demanding repeal of the estate tax. Mr. Johnson argued that unlike "very wealthy white Americans" who support the estate tax, "[w]e as African Americans have come to our wealth on a different path, a different road than they have," and that elimination of the estate tax "will help close the wealth gap in this nation between African American families and White families." Whether or not the elimination of the estate tax would shrink the income gap between the very richest white families and the much smaller percentage of very rich black families, it would come at the expense of low-income

families, who are disproportionately black, thus ultimately making the wealth gap even wider.

A number of commentators pointed out that Johnson's arguments were weak and self-serving; much of the accumulation of his current wealth was accomplished through "tax free transactions," and, absent an estate tax, much of his wealth would never be taxed, making quite a windfall for his heirs.¹⁰ Johnson's arguments had nothing to do with civil rights and everything to do with preserving the privilege of the wealthy, whatever race.

The estate tax is a source of substantial federal and state revenue, as well as being an incentive for charitable giving. The following sections will discuss those two benefits more fully. In terms of the redistributive aspect of the estate tax, it is important to note that when federal revenue is limited, time and again we see programs for low-income and vulnerable individuals and families being the first to receive cuts. Many charitable organizations, including service providers like soup kitchens and homeless shelters, only exist because of charitable contributions from wealthy individuals and foundations. The estate tax is a means to keep wealth and income inequality from increasing even more rapidly than it is, both by preventing huge concentrations of inherited wealth and by providing federal resources and an incentive for charitable giving so that we can extend a hand up to those in need. While the estate tax may not be the most effective method for redistributing wealth and preventing the widening gap between the very rich and the rest of us, especially because of the many loopholes that allow the wealthy to avoid payment of the tax, it does achieve some benefit as our most progressive tax.

Charitable Bequests by Type of Recipient: 1995			
Type of Recipient	No. of Bequests	Total Funds Requested	Average Bequest Per Return
Private Foundations	981	\$3,127,984,000	\$3,188,567
Educational, Medical or Scientific	7,309	3,194,230,000	437,027
Other	6,355	2,483,781,000	390,839
Arts and Humanities	932	272,800,000	292,704
Religious	8,401	970,445,000	115,515
Social Welfare	611	68,687,000	112,417
Source: IRS, <i>Statistics of Income Bulletin</i> , (Summer, 1999) Publication 1138 (9-99).			

2 Charitable Giving

Since there is no limit on the amount of money that an estate can contribute to charities — and bequests to private foundations are treated the same as those to public charities — charitable giving is a powerful method of lowering estate tax liability.

It is very clear from tax studies that tax incentives help to stimulate certain behavior, including charitable giving. The estate tax, like other taxes, proves to be an incentive to give to charity. Estates that have tax liability give between two and three times as much to charity as estates without tax liability. For example, in 1997 taxable estates gave to charities 2.1 times the amount nontaxable estates did. (Those filing taxable returns gave \$9.6 billion; those filing nontaxable returns gave \$4.6 billion.)

As the table demonstrates, the wealthier the estate the greater the number of tax returns claiming a charitable deduction and the larger the charitable bequest. Roughly two-thirds of the \$14.6 billion in bequests in 1999 came from estates worth \$5 million or

more, and nearly half (46.6%) came from the super-rich estates that are worth \$20 million or more. While 13% of the returns from estates worth between \$600,000 and \$1 million made claims for charitable deductions, 45% of the estates worth \$20 million or more did so. The last column in the table above shows that as the size of the estate grows, so does the average charitable bequest. The smaller estates give \$171,950 on average, whereas the wealthiest estates give an average of \$25.9 million — more than 150 times the size of the average bequest from the smallest estates.

So what happens to charitable giving when the estate tax is repealed? Based on econometric data, most agree that repeal of the estate tax will have an adverse impact on charitable giving. The Treasury Department estimates that between \$5 billion and \$6 billion in charitable gifts will be lost each year when the estate tax is repealed. One respected estate tax attorney says over \$10 billion per year in charitable giving will be lost. The estimates of impact vary, but most conclude the impact will be substantial.

In a number of ways civil rights work is supported through the power of the estate tax; work that is being done through a variety of nonprofit advocacy and research groups, educational institutions, religious congregations, and service providers would be affected by repeal of the estate tax. It is difficult to be precise because there is a paucity of data. The Treasury Department, however, published 1995 data on charitable bequests in its 1999 Statistics of Income Bulletin (see figure and table above). The largest number of charitable bequests went to religious institutions (8,401), but the largest dollar amounts went to educational, medical, or scientific institutions and private foundations.

Beyond the impact on religious institutions, civil rights organizations will be significantly affected by a reduction in bequests. Based on the Treasury Department data, it appears that “social welfare” charities — those tax-exempt 501(c)(3) organizations promoting civil rights, community development, social science research, or government effectiveness — would be the least affected by repeal of the estate tax. However, these groups are often heavily dependent on private foundations for support. Given the repeal of the estate tax would adversely affect private foundations, 501(c)(3) groups would also be significantly affected by repeal of the tax. It is estimated that roughly one-third of foundation assets derive from the estate tax.

3. Federal and State Revenues

In addition to the adverse repercussions that full repeal of the estate tax will have on charitable bequests, the tax provides substantial and growing federal revenue that directly aids funding of civil rights initiatives. Since 1996, estate and gift tax revenues have grown at nearly double the rate of the annual increase of other tax

revenue (excepting Social Security and other taxes that are off-budget for accounting purposes) — an annual rate of 14.1% for the estate and gift tax and a 7.25% pace for other tax revenue. This rapid growth in the estate and gift tax is likely to continue as the transfer of intergenerational wealth continues to grow.

In FY1999, the gift and estate tax provided \$27.8 billion in revenue to the federal government, which was expected to steadily increase to \$55 billion over the next nine years, according to the Joint Committee on Taxation. The average annual revenue was projected to be \$33.7 billion, which is roughly 4.6% of total discretionary spending.¹¹

While this may not seem like a huge amount, given total revenue and outlays of the federal government, the following chart shows what programs and services could be supported by the projected annual revenue of \$33.7.

As we are seeing, because of lower surplus estimates due to the economic downturn, depletion of \$1.6 trillion plus of the surplus for tax cuts, and bipartisan agreement to use the Social Security surplus for debt reduction, there is less revenue for spending, causing Congress to be faced with difficult funding choices. Traditionally, cuts in discretionary spending are seldom made in military spending. Given the Bush Administration’s commitment to increases for defense spending, any cuts in spending will likely be made in domestic discretionary programs. It is not uncommon for such cuts to be made in programs with constituents who have less political clout. Usually this means human services, primarily targeted to low-income families. Thus, in very direct ways, the estate tax repeal can result in significant cuts in human needs programs. The repeal of the estate tax will mean that the super-rich get a tax break while the less fortunate get nothing — and possibly could suffer.

Potential Uses of Annual Average \$34 Billion Estate Tax Revenue	
Program	Billions
Education of Disadvantaged Children	\$8.60
Job Training	1.00
Youth Training/Summer Jobs	1.10
Head Start	6.20
Child Care Block Grant	2.00
Runaway, Homeless Youth	0.07
College Work Study	1.00
Low-Income Energy Assistance (LIEHP)	1.40
Individuals with Disabilities Act	7.40
Community Health Centers	1.20
Substance Abuse Block Grant	1.70
Mental Health Block Grant	0.40
Community Services Block Grant	0.60
Refugee Assistance	0.40
<i>Total</i>	<i>\$33.07</i>
Source: OMB Watch estimate, Feb. 8, 2001.	

Besides the loss of federal revenue, most states have state estate or inheritance tax laws that are “piggybacked,” either completely or in part, on the federal estate tax law. An estate’s federal income tax liability is reduced by the amount of a state estate tax credit, thus providing revenue to the state without increasing the federal estate tax payment. The new tax law phases out the state tax credit by 2005. This will have considerable negative impact on state revenues as those that rely solely on a pick-

up tax will have no estate tax after 2005, unless they pass separate legislation.

Estimates are that states will lose between \$65 billion and \$100 billion in revenues due to the new tax law. This is coming at a time when many states are having difficulty balancing their budgets and are struggling with effects of the declining economy and escalating energy costs. The failure of the states to fight repeal of the estate tax, in spite of the fact that they stood to lose considerable revenue, is a good lesson for us all.

Since nearly one-third of charity revenue comes from government support, the repeal of the estate tax would have a triple-whammy on charities and possibly civil rights programs. It would mean less money through charitable contributions, reduced grants from private foundations, and less money in government support.

II. Dismantling

This section is divided into two parts. The first part reviews today’s attack on health, safety, and environmental protections. Where appropriate we draw implications for civil rights issues. The second part reviews the President’s faith-based initiative as an example of how regulatory “reform” and legislation may come together to dismantle the federal grant-making system and the infrastructure for human service delivery.

A. Bush’s Regulatory Agenda

The Bush Administration is currently leading a campaign to dismantle regulatory protections for public health, safety, and the environment. There may be a temptation for civil rights activists to ignore these attacks since they do not appear to directly affect civil rights. But we caution against this. Today’s rollbacks create an ideological

framework, coupled with operational mechanisms, that could affect civil rights issues in the near future.

Moreover, leaving appearances aside, there are direct connections between these attacks and the pursuit of civil rights and social justice. Consider, for example, that industrial pollution is extremely high in poor minority communities; or that children, the elderly, and the disabled are at heightened risk when it comes to environmental contaminants; or that women disproportionately suffer ergonomic injuries — caused by repetitive motion — on the job. These are all civil rights issues.

The administration's initial focus — on health, safety, and the environment — makes political sense. To a large extent President Bush was elected with the backing of industry and conservatives — financially and otherwise — that have long identified regulatory "reform" as a high priority. Industry sees economic gain by reducing or eliminating federal rules.¹² Conservatives see "reform" as a means for rolling back the role of government, as Representative Armeij noted in the quote at the beginning of this paper.

In pursuing this agenda, the Bush Administration has taken a number of steps. Specifically, these includes:

1. Abandoning Unfinished Work from the Clinton Administration

In one of the very first actions of the new administration, President Bush's chief of staff, Andrew Card, issued a memorandum temporarily halting agency regulatory activity — effectively blocking last-minute actions by the outgoing administration.¹³ The memo instructed agencies to withdraw rules that were waiting to be printed in the Federal Register even though the rules had already been cleared by the Clinton Administration. It also instructed agencies to extend by 60 days the implementation of

rules that had been published but had not yet taken effect. Finally, it instructed agencies not to publish any new rules, except in emergency situations, until political appointees were in place to approve them.

The new administration must now decide how to handle these pending regulations and proposed rules that still need to be finalized. For instance, at the end of the Clinton Administration, the Environmental Protection Agency (EPA) proposed new requirements to upgrade many older power plants and industrial facilities with new pollution control equipment. It will be up to the Bush Administration to carry this work forward and issue final standards. Will it happen? There have been no assurances that it will.

2. Rolling Back of Existing Standards

Ever since the Card memo, the administration has been feverishly rolling back health, safety, and environmental protections. This has included tougher standards on arsenic in drinking water, ergonomic protections to protect against workplace injury, the Kyoto Protocol on global warming, restrictions on hard rock mining, and new energy efficiency standards, just to name a few. Given the heavy emphasis on devolution (see discussion in Part III of this paper), also expect retrenchment on various civil rights protections, such as those dealing with the Americans with Disabilities Act and the Family and Medical Leave Act.

3. The Fox-in-the-Hen-House Approach

The Bush Administration is littered with former business lobbyists who are now in the position of regulating the very interests they used to represent. This includes, for instance, the new head of the White House Office on Environmental Quality, James Connaughton, who lobbied Congress on behalf of the Chemical Manufacturers Association, among others, on Superfund

issues. The same is true with people hired within the Department of Health and Human Services (HHS) and the Department of Education.

4. Lax Enforcement of Health, Safety, and Environmental Standards

Without regular inspections and clear penalties for violations, agencies cannot effectively protect the public and the environment. Yet President Bush has put an emphasis on “voluntary compliance” programs, where we must rely on the goodwill of polluters. As an outgrowth of this philosophy, the administration has proposed that EPA’s enforcement budget be slashed dramatically and many responsibilities devolved to states (discussed later in the devolution section). In the past, enforcement has proven difficult to track and thus has received little attention from the public interest community, the media, and Congress. This is likely to further encourage Bush to see lax enforcement as a convenient way to defang regulatory protections without having to pay a heavy political price. This is equally true for civil rights programs. For example, the Citizens’ Commission on Civil Rights demonstrated the difficulty in obtaining data about whether federal resources under the Elementary and Secondary Education Act were being properly targeted to disadvantaged children.¹⁴ This problem will likely be exacerbated under the Bush Administration.

5. A More Aggressive Office of Management and Budget

All agency rules are subject to approval by the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA). During the Reagan and Bush I Administrations, OMB used this review authority to routinely involve itself in

substantively shaping rules protecting public health and the environment — often making them less protective at the urging of affected industry — even though it had no statutory authority and lacked the substantive expertise to do so. This administration appears headed back in this direction with the controversial confirmation of John Graham to head OIRA (the nomination was opposed by 37 senators). Graham, whose nomination was overwhelmingly opposed by the public interest community, has a long track record of siding with industry in regulatory disputes as the former head of Harvard’s Center for Risk Analysis, once telling the Heritage Foundation that “[e]nvironmental regulation should be depicted as an incredible intervention in the operation of society.” During the confirmation process, senators raised possible conflict-of-interest concerns, noting that Graham’s center had received funding from numerous industry sources while producing research that was frequently beneficial to those funders. For instance, after receiving a contribution from AT&T Wireless, the center produced research that argued against regulation of cell phone use while driving.

6. Emphasis on Costs to Business in Regulatory Decisions

The administration has indicated it intends to put greater emphasis on monetized cost-benefit analysis in regulatory decisions (even though many governing laws expressly state that standards must be set based on what’s best for public health). As OIRA administrator, Graham has the power to enforce such monetization, which he has long advocated. Since benefits are often difficult to put in terms of dollars and cents, monetization inevitably has the effect of deflating benefits relative to costs, which are frequently overstated.¹⁵ Cost estimates are generally based on data supplied by

industry and do not take into account adaptive effects, such as technological advancements, that inevitably reduce costs over time. With benefits understated and costs overstated, the process will be biased in favor of inaction. No doubt the Bush Administration will use such cost-benefit analysis to justify its failure to address public health, safety, and environmental problems, as well as its willingness to toe the industry line.

There are at least four problems that this new emphasis on cost-benefit will have for civil rights regulations. First, it is very difficult to monetize the benefits derived from civil rights regulations (every major civil rights regulation is subject to cost-benefit analysis). For example, how much is the value of protecting one's liberties or constitutional rights? Second, even when the value can be determined, agency methods for calculating benefits may not be well suited for the economic analysis. For example, will secondary and tertiary benefits be determined and valued? How are qualitative factors such as reducing inequities and strengthening justice included in the equation? Third, because costs are overloaded in favor of the regulated community, it will be harder for agencies to justify that the benefits outweigh the costs. Finally, cost factors will likely be increasingly used as determinative in whether an agency should proceed with a rule. Given the stacked deck, this will likely make it more difficult to proceed with civil rights protections.

7. White House Interference

The previous Bush Administration created the Council on Competitiveness — headed by Vice President Quayle — to further monitor agency rulemakings. The Quayle Council frequently injected itself into agency rulemaking and regulatory reviews at OMB in a constant effort to weaken regulatory

protections. In this way, the Council — which, unlike the agencies, did not have to disclose any of its dealings — acted as a backdoor conduit for special interests seeking to stop agency action, out of public view. Upon taking office, President Clinton immediately terminated the Council on Competitiveness, but Bush's first months in office suggest some new form of White House engagement on regulatory matters. Vice President Cheney, for instance, has been very engaged on energy issues and regulations as they apply to utility companies. While this may not be in the form of a formal Quayle Council, there will likely be more and more substantive involvement by the White House in agency rulemakings.

8. Regulatory Budgeting

During the Reagan Administration there was discussion of a regulatory budget, that is, a means for capping the number or cost of regulatory protections. The idea received little support at the time, but resurfaced as a key component of the Republican Contract with America in 1994. Under that proposal, agencies would be required to identify the cost of all rules and lower such costs by a percentage each year.

The Bush Administration has not embraced either of the earlier proposals. Instead, they have talked about working with agencies during the budgeting process to include the costs of rules. This would allow OMB to give early approval or rejection of agency ideas. Much of this work will likely be tied to the new administration's emphasis on performance-based measures.

The boxes here provide a snapshot of how these regulatory priorities have begun to play out in the Bush Administration. Each of the charts tracks how the Bush Administration has reacted to Clinton era rules. The first section provides examples of rules that were revoked by the Bush Administration within the first six months

The Bush Regulatory Report

Safeguards Revoked in 2001

Contractor Responsibility — Two days after Christmas, with no one around to object, the Bush Administration quietly revoked a Clinton-era rule that promotes greater accountability for federal contractors — to make sure they comply with important public protections. Specifically, this contractor responsibility standard instructed government contracting officers to look at a bidding company's compliance with the law (including tax laws, labor laws, employment laws, environmental laws, antitrust laws, and consumer protection laws) before awarding taxpayer dollars.

Hard Rock Mining — The Bush Administration announced on October 25 that it would roll back environmental and land use protections for "hard rock" mining that were put in place shortly before President Clinton left office. The new, weaker standards were published in the Federal Register on October 30 and go into effect on December 31 of this year.

Roadless Rule — The Bush Administration signaled on July 10 (in an Advanced Notice of Proposed Rulemaking) that it will roll back a rule — completed at the end of the Clinton Administration — that bans new roads and logging in millions of acres of national forests, including much of Alaska's Tongass National Forest. Just weeks earlier, the administration tipped its hand by deciding not to appeal a dubious ruling by a federal judge in Idaho halting implementation of the ban. More recently, the administration has issued several Administrative Directives that cut directly against the roadless rule. Specifically, directives issued on December 20, 2001, eliminate a Clinton Administration moratorium on road building in uninventoried roadless areas. In addition, the directives remove any roadless protection for Alaska's Tongass National Forest and eliminate a provision of the rule that required regional and local forest service officials to conduct environmental and public reviews before logging, mining, and drilling could begin in roadless areas.

Air Conditioner Efficiency — On April 13, the Bush Administration announced its decision to revise and roll back standards established by the Clinton Administration for energy efficiency of air conditioners and heat pumps. The Clinton rule published in January after six years of development would have made new air conditioners 30% more energy efficient by 2006. The Bush Administration will lower that requirement to 20%. In an October 19 letter, obtained by OMB Watch, the EPA criticizes the Department of Energy (DOE) for ignoring the "strong rationale" for using the higher efficiency standard, while overstating the regulatory burden on manufacturers.

Kyoto Protocol — On March 27, the Bush Administration announced that it would withdraw from the Kyoto Protocol, the international agreement to curb pollution that causes global warming.

Chemical Accident Threats — On March 16, the Bush Administration withdrew plans initiated during the Clinton Administration to carry out legal mandates that would have eased public access to data on potential chemical fires and spills.

Carbon Dioxide — On March 14, the Bush Administration reversed the President's campaign pledge to regulate carbon dioxide emitted by electric power plants. Carbon dioxide released by power plants is a major threat to climate change, disrupting weather patterns and causing sea levels to rise, with unprecedented costs to the environment and human civilization.

Ergonomics Protections — On March 6, Congress used the Congressional Review Act, with a nod from the Bush Administration, to repeal an ergonomics rule that would have protected workers from repetitive stress injuries, such as carpal tunnel syndrome. During the ten years since then-Labor Secretary Elizabeth Dole initiated the ergonomics rulemaking, business interests and most congressional Republicans have continuously questioned the need for any ergonomics standard — despite numerous studies that have demonstrated its urgency.

Safeguards in Limbo

Wetlands Protection — Although the Bush Administration announced on April 16, 2001, that it will toughen protections for wetlands by requiring an Army Corps of Engineers permit for a broader range of projects that damage wetlands — including mechanized land clearing, ditching, and stream straightening — the Corps of Engineers issued a policy on October 31 that allows developers to offset losses of wetlands on one site by protecting wetlands, or even dry land, elsewhere.

Total Maximum Daily Loads (TMDL) Program — On October 18, 2001, EPA announced that a Clinton-era rule revising the TMDL Program, which requires states to identify and list waters not meeting water quality standards, will not become effective until April 2003. In the meantime, the administration is expected to make revisions to the standard.

Recordkeeping for Workplace Injuries — This rule, which updates Occupational Safety and Health Administration (OSHA) forms used by employers to list and detail workplace injuries and illnesses, was challenged in a lawsuit brought by the National Association of Manufacturers (NAM) early last year. The Bush Administration settled with NAM, and the rule went into effect on January 1, 2002. As part of the settlement, OSHA agreed not to cite violations within the first 120 days of the rule. OSHA is also delaying specific

provisions in the rule that address recording of hearing loss and musculoskeletal disorders (ergonomics). The Bush Administration announced the delay on October 12, 2001, but said it planned to resolve those issues so that employers can begin reporting injuries for calendar year 2003.

Steel Erection Safety — On July 13, 2001, OSHA announced that the effective date for a rule to protect ironworkers from the dangers of steel erection work, in particular falls from great heights, was delayed six months to January 18, 2002. According to OSHA, the rule is expected to prevent 30 deaths and 1,142 injuries a year and save employers nearly \$40 million annually.

Snowmobiling in Yellowstone — The Department of Interior announced on June 29, 2001, that it will reconsider a rule (completed at the end of the Clinton Administration) that would phase out snowmobile use in Yellowstone and Grand Teton national parks by 2004. The decision came out of a settlement agreement reached between Interior and snowmobile manufacturers, which had brought suit to stop the ban in Federal District Court in Wyoming.

Medical Privacy — The Bush Administration announced April 12, 2001 that it will move forward with new medical privacy standards that limit the information health care providers can divulge without a patient's consent. However, the administration also announced its intent to revise the standards, perhaps substantially, before they are fully implemented two years from now.

Dioxin Report — The chemical, beef, and poultry industries are fighting to further delay the release of an EPA study that shows consumption of animal fat and dairy products containing traces of dioxin can cause cancer. It is unclear whether the Bush Administration will publish it.

Safeguards Moving Forward

Arsenic — On October 31, 2001, EPA Administrator Christie Whitman announced the agency's decision to keep the 10 parts per billion (ppb) standard originally promulgated by the Clinton Administration for arsenic in drinking water. Back in March, the administration announced that it would drop the Clinton-era rule, but ultimately relented after intense political pressure and overwhelming scientific evidence supporting a strong standard.

Black Lung — On August 9, 2001, U.S. District Court Judge Emmett G. Sullivan rejected all of the National Mining Association's (NMA) challenges to numerous provisions of new black lung rules, marking a major victory for the United Mine Workers of America (UMWA) and the Department of Labor (DOL), which defended the standards. Previously, the Bush Administration had provided support to easing or eliminating sections of the rules – which govern the process by which black lung victims can claim their federal disability benefits – leading Sullivan to grant a preliminary injunction against them.

Lead — The Bush Administration approved a new rule on April 17, 2001, that will require thousands of industrial facilities to report toxic lead pollution released to air, land, and water. The new rule – finalized by EPA at the end of the Clinton Administration – lowers the threshold for reporting lead discharges under the Toxics Release Inventory.

Energy Conservation — On April 12, 2001, the administration announced that it would proceed with two Clinton-era energy conservation rules on washing machines and hot water heaters. Washing machines are to become 22% more efficient by 2004 and 35% by 2007 – a standard supported by the appliance industry. Gas water heaters are to be 8% more efficient and electric water heaters 4% beginning in 2004.

Salmonella in School Lunches — On April 4, 2001, the Bush Agriculture Department announced its intent to eliminate salmonella testing of ground beef served in federal school lunch programs, which had been pushed by the meat industry. Less than 24 hours later, however, Agriculture Secretary Ann Veneman announced that a mistake was made by a “low-level” employee, and that the testing, which began under President Clinton, would remain in place.

of office. Many of these rules generated national news. The second section provides some examples of rules that remain in limbo after the first six months of office. The final outcome will likely be decided in court. The third section provides some examples of rules that ran into an uncertain future in the Bush Administration, but ultimately were allowed to go forward. In some of these cases, such as with medical privacy rules, there are caveats suggesting that the rules may still be reviewed and weakened.

The following section provides a specific case example of regulatory “reform” as envisioned by the Bush Administration. We use the faith-based initiative as an example that is moving on two tracks – a legislative one and through waiver of administrative rules. The second approach is intended to bypass a Congress that may choose not to enact such legislation.

B. Faith-Based Initiative

As one of his first actions in the White House, George W. Bush established an “Office of Faith Based and Community Initiatives,” which promotes the use of federal funds for social service programs run by religious organizations.¹⁶ While faith-based organizations, such as Catholic Charities, have been receiving federal funds for years, they have traditionally been separate charitable entities, distinct from their houses of worship, and required to adhere to the same standards that govern all charities. The Bush plan allows for direct federal funding of religious congregations’ programs. The initiative blurs the line between church and state, and early indications are it provides preferential treatment to religious groups.

The President’s stated goal is to level the playing field and end “discrimination” against religious congregations in awarding

federal grants. These statements beg the question of the appropriate role of religious congregations in administering federally funded social service programs. As the Friends Committee on National Legislation has pointed out, “The central issue in charitable choice is *not*, as its sponsors claim, discrimination against all programs sponsored by religious groups. Rather, the issue is the use of public funds to support programs that have a pervasive religious content.”¹⁷

The primary component of the President’s initiative is charitable choice, which refers to direct government grants to religious congregations for the purpose of carrying out government programs. In 1996 the first version was championed by then-Senator John Ashcroft and passed as part of welfare reform legislation. A similar provision was included in the Substance Abuse and Mental Health Services Administration’s (SAMHSA) block grants passed in 2000. In all, the 106th Congress included the provision in seven bills, impacting programs on juvenile justice, mental health, fatherhood and child support, and community economic development.

The effects of these provisions have been minimal because participation by congregations has been low, and the Clinton Administration interpreted the law as prohibiting mixing federally funded services with worship activities or proselytizing. In contrast, the Bush Administration is aggressively pushing for a mechanism that will allow mixing religious activity with federal services.

There are both practical and constitutional problems inherent in the concept of funding congregational programs. Nonetheless, on August 16, 2001, the White House nudged the faith-based initiative forward with release of a report, *Unlevel Playing Field*, on barriers faith-based and community organizations face in competing for federal grants. The report was required by

President Bush’s January 29 creating five federal Centers for Faith-Based and Community Initiatives.¹⁸ A second report is expected to focus on recommendations for change.

One bill (H.R. 7) to implement the President’s agenda has passed the House of Representatives but faces closer scrutiny in the Senate. Since charitable choice legislation has bogged down in congressional difficulties, it is not surprising that the August White House report lays the groundwork for regulatory rather than legislative changes to achieve the President’s faith-based agenda. “It is not Congress, but these overly restrictive Agency rules that are repressive, restrictive . . . [They] unnecessarily and improperly limit the participation of faith-based organizations” (page 14).

Overall, this report provides the basis for a “regulatory reform” initiative to undo a host of protections. Assuming this reform follows the tenets of the legislative agenda, we could see a system where:¹⁹

- People in need are forced to opt out of programs with religious content, placing an additional burden on their lives at a vulnerable time;
- Religious congregations that receive federal funds would be allowed to audit themselves, including self-certification of compliance with federal program requirements, such as nondiscrimination;
- Entire federal programs could be dismantled and replaced by vouchers, which would make it impossible for providers to plan and budget and assumes a nonexistent “marketplace” for many services;
- Religious congregations would be allowed to discriminate on the basis of religious affiliation when hiring staff to provide services under federal grants;

Barriers to Participation as Identified in White House Faith-Based Report

The White House report identifies 15 barriers to participation, the first six of which are specific to faith-based organizations:

1. A pervasive suspicion about faith-based organizations. The report states that there is an “overriding perception by Federal officials that close collaboration with religious organizations is legally suspect.”
2. Faith-based organizations excluded from funding. There are some examples where religious organizations are prohibited from applying for funding. The report documents inconsistencies from program to program about who is eligible for funding.
3. Excessive restrictions on religious activities. “Federal grant programs can be inappropriately restrictive,” requiring “faith-based providers to endure something akin to an organizational strip-search.” The report gives an example of local pressure to remove or cover up religious art, symbols, and other items when a Head Start program is located in a house of worship.
4. Inappropriate expansion of religious restrictions to new programs. The report argues that federal departments rely on outdated case law in making decisions about participation of religious groups.
5. Denial of faith-based organizations’ established right to take religion into account in employment decisions. The report makes a legal argument that faith-based organizations that get federal funding should be permitted to discriminate on the basis of religion when hiring employees. Other types of discrimination — race, color, national origin, gender — should not be permitted.
6. Thwarting charitable choice: Congress’ new provision for supporting faith-based organizations. The report argues that HHS and DOL have done an inadequate job in implementing Charitable Choice legislation that has previously passed.
7. The limited accessibility of federal grants information. The report states that while most agencies announce grant availability in the federal register, it is “not everyday reading for small faith based and community groups.”
8. The heavy weight of regulations and other requirements. There is a “dizzying array of statutory and regulatory requirements” that grantees face. (The fact that these rules are developed to ensure accountability and safety for those receiving services is not mentioned.)
9. Requirements to meet before applying for support. Grantees must have an “extensive financial and administrative management system.” Organizations must already have an approved indirect cost rate before applying for grants, excluding many possible grantees. (This last point is factually inaccurate.)
10. The complexity of grant applications and grant agreements. The report notes grant applications are “repetitive and overly long, stating eligibility and other requirements more than once, lifting technical language directly from the authorizing statute, and including information from the legislative history that is only marginally pertinent . . .”

11. Questionable favoritism for faith-based organizations. There is an occasional bias toward faith-based organizations. In some cases, agencies have only opened grants to faith-based service providers.

12. An improper bias in favor of previous grantees. The report states that organizations that have already been awarded a grant in the past are favored in future grant applications. It points out that much of this “favoritism” exists because organizations that have already been awarded a grant are likely to know program officers and know where to find future grant announcements.

13. An inappropriate requirement to apply in collaboration with likely competitors. The report states that requiring grantees to coordinate their services “can be an important way to ensure that Federal funding achieves maximum results,” but then goes on to say that coordination can also force organizations to work with competitors for the same grants.

14. Requiring formal 501(c)(3) status without statutory authority. The report implies that since there is no statutory requirement that an organization be a tax-exempt organization, there should be no need to require charitable 501(c)(3) status. It is indirectly suggested that articles of incorporation or even “demonstrating that the organization provides services in the public interest and uses its net proceeds to improve or expand such services” might be adequate.

15. Inadequate attention to faith-based and community organizations in the federal grants streamlining process. In legislation passed in 1999, Congress directed all major federal grant-making agencies to simplify and improve the grants process. The report states that insufficient outreach has been made to community and faith-based organizations in the reform process.

- Even though federal funds could not be spent on religious activity, worship and promotion of religious beliefs could be seamlessly woven into delivery of federal services; and
- No new federal resources would be made available for housing, drug treatment, job training, childcare or other federal services.

The White House report is based on very little data, possibly none from community-based organizations or grantees. The Department of Housing and Urban Develop-

ment (HUD) was the only agency to seek public comment. According to the American Civil Liberties Union (ACLU), which analyzed the comments HUD received, only one of the 130 people filing comments expressed support for Bush’s version of the faith-based initiative. The report also failed to recognize existing data. For example, a National Association of Community Action Agencies survey of community action agencies found that 40% contract with faith-based organizations to deliver services. This subgrant relationship with federal grantees is not acknowledged in the report.

Overall, the report appears to be a solution in search of a problem. It obfuscates what constitutes a faith-based organization. It appears that the White House is referring to religious congregations, but the report does not distinguish between congregations and their charitable affiliates, which are already eligible for federal money.

The “data” from the White House report largely differ from the results of a survey of nonprofits conducted in September 2000 by OMB Watch, the Advocacy Institute, the National Committee for Responsive Philanthropy, and The Union Institute.²⁰ Roughly 1,000 nonprofits from every state except one rated priorities for recommendations to strengthen the nonprofit sector. These nonprofits highlighted three broad areas: more resources for nonprofits, streamlining the federal grant process, and accountability.

The White House report does not address the need for more money for domestic programs or support to grassroots organizations to build their capacity. Nonprofit organizations regularly note that they are asked to provide services in partnership with the government but have been getting diminishing resources. A church or mosque will run out of funds for assistance just as quickly as a secular nonprofit or government agency. Where concrete help is needed — an affordable apartment, money for the gas bill, access to health care — Americans need more resources. The President seems to think that combining the limited assistance that is available with prayer will change the reality faced by low-income families.

But this approach to social services denies reality and shirks responsibility for what should be an important priority of government. Government has a larger role, since it is in a position to address the root causes of poverty through its domestic policies and spending priorities. Insufficient public investment in low-income communities is still insufficient, whether federal grants are

awarded to religious congregations or other nonprofits.

The White House report does address some issues that would help streamline the grant process, such as reducing grant application burdens. But it does not address the other issues that nonprofits said are problems — the slow speed of reimbursement to smaller groups, grant reporting requirements, and the need for uniformity and simplification in all financial reporting (e.g., IRS Form 990, audits, grant reports).

The report moves in the wrong direction on accountability by suggesting that grantees need not be tax-exempt 501(c)(3) organizations. More accountability problems are raised by provisions of H.R. 7, which would eliminate or sharply reduce audit and accountability requirements. Government audits would be limited to government funds. (Most nonprofits face single-entity audits, meaning that the audit covers all organizational activities. This would not be true for faith-based grantees. Only the federal grant funds would be audited.) However, H.R. 7 also provides for annual “self-audits,” apparently including programmatic operations as well as financial transactions. This provision would eliminate any meaningful public accountability, or enforcement of requirements such as nondiscrimination against beneficiaries who do not wish to participate in worship activities. This self-audit is inconsistent with grant management principles and procedures and would create a special set of rules for faith-based organizations over other types of nonprofit organizations.²¹ The most efficient way to create a workable accountability system is to require congregations to create a separate organization, which could be affiliated with the congregation but not part of it. It also would protect the congregation from liability for any mishaps that occur as a result of publicly funded program activities.

A group of faith-based organizations²² has developed a code of conduct for congregations that receive federal funds to run service programs. The code requires that congregations only participate in federal programs to the extent the activity is part of their overall mission. It also requires compliance with federal regulations, transparency with the public, protection of their religious character, and financial accountability. Coercion of beneficiaries to participate in religious activities is prohibited.²³

The issue of effectiveness is central to the debate, although little attention has been paid to it. Proponents of a pervasively religious approach to social services claim it is more effective than programs traditionally offered by government. These claims rarely address the traditional role of secular nonprofits in providing social services, but assume religious groups get better results than community-based nonprofits. President Bush has stated that faith-based programs achieve “uncommon results,” but there is very little evidence that either supports or contradicts these claims. Most of what has been offered is anecdotal. There is a small body of research on the impact of religion on behavior, which tends to show that religious devotion deters some behaviors but not others, and that faith-based programs may be better at rehabilitation than deterrence. However, other studies indicate that religion is no more statistically significant in deterring crime or rehabilitating addicts than educational ability and aspiration, gender, or family and community connectedness. The most that can be said about the few studies focusing on this issue is that the findings are inconclusive.²⁴

Although the administration says federal programs will be judged according to their effectiveness, no detail has been offered on how this will be done, how standards will be developed and outcomes defined. The administration should consult with

nonprofits to establish appropriate performance measures and goals for federally funded social service programs, and ensure that evaluation factors are equally applied to faith-based and secular nonprofits. There should be no presumption that a “faith factor” makes a program more effective.

The administration has placed a heavy emphasis on the Government Performance and Results Act (GPRA) to emphasize performance-based decisions. Extending GPRA requirements to federal grantees raises at least three issues. First, who decides what measures performance will be based on? GPRA does not require stakeholder involvement in the development of agency performance measures. Second, GPRA requires agencies to develop *quantifiable* performance measures; in fact, agencies must seek special permission to use qualitative measures. In the area of social services, this may present enormous challenges. Third, it may mean that nonprofits begin to provide services in a manner that meets the quantifiable measures in order to assure that they do not lose their grants. In some cases, this may mean no longer serving the hardest to serve.

The Bush Administration has also emphasized relaxing programmatic standards. Charitable choice legislation, such as under SAMSHA, allowed religious congregations to substitute “life experience” for training and education in determining the qualifications of employees of the faith-based groups. A provision like this could be a disaster for drug and alcohol treatment centers, where qualified medical supervision is often critical to the patient’s health. For example, in Texas, where Bush implemented many elements of charitable choice, a drug rehabilitation program approached drug addiction as a moral failing, not a disease, and provided Bible reading and prayer as treatment. This could be deadly for a patient who is encouraged to quit a heroin addiction “cold turkey” and offered prayer instead of

methadone. The provision also creates a more lenient standard for congregations than is applied to secular nonprofits, a preference that violates constitutional standards.²⁵

A sad example from Texas underscores this concern. In 1997 then-Governor Bush exempted faith-based groups from state health and safety regulations. Roloff Homes, which ran a residential program for troubled youth using Christian teachings, had been forced out of Texas years earlier after complaints of physical abuse of teenage girls became public. They returned to Texas and reopened as a faith-based provider in the late 1990s. Within three years two employees were arrested for physical abuse that landed one teenage boy in the hospital. A June 21, 2001, *Washington Post* story reports that a jury convicted the employee in charge of unlawful restraint.²⁶ The Texas legislature recently allowed the law exempting youth homes from health and safety standards to expire.

There is concern that unless specifically addressed, congregations could be immune from federal safety regulations, such as OSHA requirements or Food and Drug Administration (FDA) rules. This could put the federal government in the position of funding daycare centers with unsafe electrical systems or soup kitchens without adequate sanitation facilities, endangering the recipients of the services as well as employees. H.R. 7 may address this with a provision that says religious organizations providing federal services “shall be subject to the same regulations as other nongovernmental organizations . . . for the use of such funds and performance of such programs.” However, the Bush Administration’s regulatory “reform” initiative may undo some of the programmatic standards.

While each of the above concerns are civil rights issues, three other aspects of the faith-based initiative raise specific civil rights issues. These include beneficiary

rights, hiring discrimination, and conversion of entire programs to vouchers. Each is discussed below.

The most important stakeholders in the debate on the President’s faith-based initiative are the people in need of assistance offered through federal programs. These beneficiaries are forced by circumstances or even court orders to seek help with meeting basic needs, such as food, shelter, and health care. The system that offers this help should be easily accessible and equally available to all who qualify. It should not further burden beneficiaries with unnecessary delays or administrative requirements.

Charitable choice fails to meet this standard by placing the burden on program beneficiaries to object to placement in a religious program, participation in worship activities, or being subjected to proselytizing. This burden makes charitable choice far from neutral, by creating a Catch-22 for our most vulnerable households. People in need of service usually do not have the option of objecting to a particular service provider and starting over. They face real and immediate crises, and cannot afford to risk having the lights turned off or delaying medical treatment in order to seek a secular alternative. The opt-out approach places an affirmative burden on exercise of their religious freedom. It is not realistic or fair to expect beneficiaries to speak up and object to religious activities when they are vulnerable and seeking help.

Usually a household must go through a screening process conducted by a service provider to qualify for assistance. During this process all applicants should be informed of the religious nature of any service offered by the provider, and given information about secular alternatives, whether they ask for it or not. Once beneficiaries begin participation in a program, they should not be required to participate in worship activities, either actively or passively. As a practical matter

it would be difficult, if not impossible, for federal agencies to monitor religious grantees for compliance with this requirement, or to enforce it. Self-certification of compliance, as called for in H.R. 7, is insufficient to protect the religious freedom of beneficiaries.

Pressure to participate in religious worship is the inevitable outcome of mixing government services with religious activity. But that is what the administration wants to allow, and it is the only reason to promote charitable choice legislation.

Under the Bush Administration's proposal, congregations would be permitted to discriminate on the basis of religious belief or affiliation in hiring for positions funded with federal grants. However, provisions in the bill reauthorizing the Elementary and Secondary Education Act allowing private groups to provide supplemental educational services do not permit discrimination in employment. H.R. 7 also allows this practice, despite changes that eliminated a congregation's ability to base hiring decisions on religious practices. Section 702 of the Civil Rights Act of 1964 permits congregations to base hiring decisions on religious factors (for example, a Jewish temple does not have to consider hiring a Methodist to be its rabbi). However, the intent of this exemption from civil rights laws is to respect the character of religious activities. Since federal programs are not supposed to include religious activity, the rationale for the exemption does not extend to staff hired to implement public programs. This provision was included in the original charitable choice legislation in the welfare reform and is currently the subject of litigation.

Proponents of charitable choice have sought to solve the many constitutional problems and contradictions inherent in the plan by proposing social service vouchers. The theory is that people in need will be able to shop for services, and only choose a

program with religious content if they wish to share in the religious activity. While vouchers create an appearance of choice by providing federal dollars directly to program beneficiaries, the net result is the same as directly funding pervasively religious services.

The voucher concept assumes there is a social service marketplace, and that service providers can afford to front the money for federal programs in the hope that people will come with their vouchers, and that vouchers will be swiftly paid by federal agencies. None of these assumptions bears up to reality. Social service agencies are more often than not in short supply. While there may be a limited market for day care or affordable housing, there is no market for many services, such as heating assistance or homeless shelters.

Vouchers also destroy a provider's ability to plan and budget effectively, since there is no way of knowing how many clients may come through the door. Resources that are needed for services would have to be spent on advertising. Only the largest agencies could participate, because the small, grassroots groups the President says he wants to involve could never afford to hire staff, lease office space, or purchase equipment and supplies without knowing whether or not they would ever be reimbursed.

The federal government would abdicate responsibility for ensuring an adequate infrastructure for administering federal programs if it left this issue up to a non-existent marketplace. What would happen if no providers were able to offer services in a particular city? In addition, a voucher system creates new administrative headaches, since qualifications for providers must be established and a process for approval of agencies and expenses would be necessary for accountability purposes. In the end, vouchers create more headaches than they avoid.

Despite claims that the goal of charitable choice is to achieve neutrality in awarding grants and level the playing field for congregations, the rhetoric and follow-up activity to the President's faith-based initiative clearly demonstrate a desire to redirect federal grants to religious congregations whenever possible. Secular nonprofits, including those allied with denominations or interfaith providers, are relegated to the status of "other" groups. They might be surprised (or offended) to hear themselves described by the President as "good people of no faith at all."²⁷ The White House report, *Unlevel Playing Field*, unfairly criticizes nonprofits that currently receive federal grants: "there is a striking disjunction between the service organizations that federal grant funds predominantly support, and the organizations that actually provide most of the critical social services."²⁸

Any preference shown toward religious congregations in grant activities, from outreach to potential applicants and technical assistance with completing grant applications to the awarding of grants, would violate even the most flexible of standards for separation of church and state. It is one thing to declare religious groups should not be excluded, but another altogether to actively favor them in the process, thereby truly creating an unlevel playing field.

III. Devolution

Going all the way back to the Civil War and extending through the days of Jim Crow, "states' rights" has served as the battle cry for those hostile to civil rights. Today, the "states' rights" mantra is frequently thrown around by our leaders, including President Bush, with no apparent connection to civil rights. Yet the connection remains.

Beginning with the Contract with America in 1994, Congress has aggressively pushed to "devolve" more and more responsibility to the states. While giving states more responsibility in certain areas may not always be a bad thing, this push has been deeply ideological, with devolution seen as an end in itself. In some cases, the Clinton Administration resisted this new states' rights movement, and in others, it relented, as in the case of welfare reform.

Now with Bush in office, the devolution crusaders think they have a more steady ally, which could be an ominous sign for civil rights protections. In particular, it will be important to watch the actions of the Bush Administration in the following areas:

A. Judicial Appointments

Since the mid-1990s, the Supreme Court (through a series of 5 to 4 votes) has been flirting with a radical notion of federalism that seems to have us headed back to the Articles of Confederation — leaving the federal government fewer and fewer powers to protect civil rights. For instance, last year the Court ruled in separate cases that state government employees were constitutionally prohibited from suing states in federal court under the Age Discrimination in Employment Act and the Americans with Disabilities Act. Also last year, the Court struck down the Violence Against Women Act — which creates a civil rights remedy for victims of sexual violence — again citing states' rights principles.

This makes future judicial appointments — and not just those to the Supreme Court — extremely important. Ominously, President Bush has said he would model his judicial choices after Clarence Thomas and Antonin Scalia, the two most aggressive proponents of the states' rights agenda on the Supreme Court.

B. Federalism Initiatives

Currently, the Bush Administration is in the process of drafting a new executive order on federalism that would seek to defer regulatory authority to states. The first federalism executive order (E.O. 12612) was issued by President Reagan on October 26, 1987, mandating that agencies conduct a federalism assessment for rules sent to OMB for review. That order was kept in place until May 14, 1998, when President Clinton issued his own version, Executive Order No. 13083.

Even though the Reagan executive order had gone largely unenforced for years (even in the Reagan and Bush Administrations), Clinton's action — intended to make federalism relevant — drew fire from the National Governors' Association (NGA) and the National Conference of State Legislatures (NCSL), as well as conservative groups, none of which had ever raised a peep about the lack of enforcement of the Reagan order.

The Heritage Foundation and the Free Congress Foundation, for instance, claimed that the President was not only attempting to enhance the strength of the federal government but attempting to "legitimize all the abuses of power promulgated by a gaggle of federal agencies since the time of FDR."²⁹ Or, as the Heritage Foundation said, "President Clinton's new executive order on federalism is a serious affront to the federalist framework established in the U.S. Constitution."³⁰

This created momentum for legislation in Congress to codify principles of the Reagan executive order.³¹ This effort, however, was opposed by the Clinton Administration, the public interest community, and perhaps surprising to some, the business community, which does not want to have to comply with 50 different standards in 50 different states.

With this broad opposition, the legislation ultimately died.

Yet throughout the battle, the Clinton Administration continued to negotiate with NGA and NCSL on yet another federalism executive order more to their liking, which it also hoped would undermine the push for legislation. The result was E.O. 13132 — put into effect on August 4, 1999 — which, while not pleasing conservatives, did assuage the organizations representing state and local governments. These organizations, including NGA and NCSL, sent a letter to President Clinton on August 3, 1999, thanking him for "consulting extensively with us" prior to the issuance of the new executive order. They also said, "The executive order constructively responds to the concerns we raised during the consultations and provides to federal agencies strengthened guidance on the importance of federalism and state and local government authority. We welcome your commitment to implement and enforce this executive order."

Specifically, the order directs federal agencies to:

- Closely examine statutory authority supporting any action that would limit the policymaking discretion of state and local governments and carefully assess the necessity for such action;
- Construe federal statutes to preempt state law only where the exercise of state authority directly conflicts with the exercise of federal authority under the federal statutes or there is other clear evidence to conclude that Congress intended the agency to have the authority to preempt state law;
- Not submit legislation that would directly regulate the states in ways that would interfere with functions essential to the states' separate existence; and

- Not attach to federal grants conditions that are not reasonably related to the purpose of the grant.

Conservatives, however, have been stewing over the inadequacies of the Clinton executive order. Accordingly, the Bush Administration quickly established a Federalism Task Force under the leadership of a top White House aide, John Bridgeland. The Task Force has decided that it will recommend a new federalism to replace the Clinton version, and that it should be completed some time in the fall of 2001.

The new executive order reportedly instructs federal agencies to “refrain, to the maximum extent, from establishing uniform, national standards for programs and when possible defer to the States to establish standards”³² — a philosophy the Sept. 2 *Washington Post* reports will be overseen by a new executive branch entity, suggesting the administration’s commitment to enforce such principles.

Of course, it will almost always be “possible” to defer to states. And in some cases, where states set stronger standards than the federal government, it will be preferable. However, on many occasions it will not be appropriate. The first responsibility of the federal government should not be to protect the discretion of states, as the above quote implies, but rather to serve the broad interests of the American people. In the case of worker health and safety, environmental and consumer protections, or civil rights, this frequently means setting strong national standards. “States’ rights” should not be an excuse for the federal government to abdicate its responsibility in these areas.

It should also be pointed out that national standards can help protect the interests of states. Some states may want stronger health and safety standards but fear losing business to other states with more relaxed standards. National leadership can help

prevent a race to the bottom. Moreover, one state may be adversely affected by pollution from a neighboring state yet powerless to change the situation. This again necessitates federal intervention.

There are also other very legitimate reasons to establish uniform, national standards. Common methods of measurement across states are often needed to adequately assess government performance, which has been one of the key lessons in implementing the Government Performance and Results Act — a stated priority of the administration. Indeed, the administration at least seems to recognize this in the context of its education bill, which seeks new national testing.

Any federalism executive order should recognize these legitimate and necessary reasons for the federal government to set strong national standards. States deserve to be at the table and have their concerns heard, but true federalism demands national leadership.

C. Budgetary Allocations

Devolution advocates have been strong proponents of block grants to states — funds that are provided with very few strings attached and minimal oversight. In the past, this has given way to abuses, with states shifting funds from one area, such as health care or education, to another, such as road construction.

Bush has expressed sympathy for block grants, often saying the federal government should just “get out of the way.” Yet the federal government has a responsibility to taxpayers to make sure that money is spent in the intended way. And again, Bush’s rhetoric assumes there is no legitimate need to set national priorities.

Budgetary decisions to devolve responsibility to states also frequently impact the quality of federal regulatory protections. For

instance, the administration's budget proposed cutting EPA's enforcement staff by 8%, or 270 positions, while providing \$25 million in new grants to states for enforcement activities.³³ This move came despite recent evidence that many states do not adequately enforce environmental protections. According to an Aug. 22 report from EPA's inspector general, states are doing a poor job of monitoring and punishing water polluters, and nearly 40% of the nation's waters are not meeting standards set for them. Moreover, at least six states failed to report numerous serious violations of the Clean Air Act, according to a 1998 audit by the EPA inspector general.

Such a move to devolve enforcement may have a significant impact on the ability of the federal government to hold state and local governments accountable. Some in the civil rights community have already begun tracking enforcement issues. However, this will become even more difficult — yet even more imperative — as resources are devolved to states and localities. The difficulty will involve several factors.

First, will states and localities be given the resources that are needed to implement enforcement initiatives? Many states have complained about unfunded mandates, and many of those complaints have been legitimate. The federal government mandates a requirement but leaves it to the states to implement without the money to properly do so. Many of these mandates are strongly supported by the civil rights community. To the extent that any of these requirements are devolved to the states, it will become an issue of whether the states can afford to properly implement the requirement.

Second, will states and localities be given the criteria by which to enforce matters? Generally, when the federal government block grants resources or devolves programmatic responsibilities, there has been an effort to grant full responsibility to the

state or local government. For example, federal grant rules, which carry non-discrimination requirements, are not in effect for block grant funds. The states must develop their own rules, if they choose to. When it comes to devolving program responsibilities to the states, will the federal government articulate the standards by which the programs are to be judged and require the states to track those standards? This is part of the current debate about educational reform and will likely be a part of most future federal debate.

Third, even if there are standards and resources to enforce federal intentions, how will information be collected and disseminated? Congress has asked federal agencies to reduce information collections by 5% per year under the Paperwork Reduction Act. While that requirement has been unenforceable, the law is up for reauthorization. Conservatives, along with industry, are ramping up to make that an enforceable requirement. Even if the requirement of 5% reduction were not there, the devolution model suggests granting major powers to the intergovernmental "partner." Does this mean that 50 states might have 50 different ways of collecting information that may be necessary? The answer to this question has enormous impact. For example, let's assume there is an effort to track employment discrimination by company. If each state collects the information it raises in a slightly different manner it will be impossible to create a national perspective on employment discrimination or possibly even compare companies that reside in different states. Moreover, the devolution of information collection could also impair the public's right-to-know, which has accelerated in the age of the Internet.

D. Civil Society

Today it is often difficult to discern the difference between the devolution of responsibility from federal to state and local governments and the shifting of federal tasks to the nonprofit voluntary sector. Both are ideological objectives fostered by conservatives and effectively manifested in the Bush 2000 Presidential campaign.

The civil society debate was stirred by Robert Putnam's 1995 thesis that "social capital" in America is declining, and, as he put, we are "bowling alone."³⁴ Putnam noted that:

- Voter participation has declined rapidly since the 1960s (nearly 25% drop in voter turnout);
- Participation in town halls, and public or school meetings, dropped by one-third from 1973 to 1993; and
- There have been equal or greater declines in responses to questions about attending political rallies or speeches, serving on a committee of some local organization, or working for a political party.

According to Putnam, "By almost every measure, Americans' direct engagement in politics and government has fallen steadily and sharply over the last generation, despite the fact that average levels of education — the best individual-level predictor of political participation — have risen sharply throughout this period." Many have effectively rebutted the Putnam thesis, noting that his measures of participation are inadequate.³⁵ However, conservatives have noted that Putnam's data suggest that America has lost the spirit that Alexis de Tocqueville saw when he visited the United States in the early part of the 19th century.

Tocqueville was impressed by the role of civic associations and considered them as key to making democracy work. "Americans of all ages, all stations in life, and all types of disposition are forever forming associations," he wrote. "There are not only commercial and industrial associations in which all take part, but others of a thousand types — religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . . Nothing, in my view, deserves more attention than the intellectual and moral associations in America."³⁶ More recent observers, such as John Gardner and Brian O'Connell, have made the same point, adding that nonprofit involvement in public policy is critical to the healthy functioning of democracy, making it possible for the voice of all Americans to be heard.³⁷

Conservatives have built on this, arguing that to reinvent America we must downsize the federal government and allow greater local citizen control, possibly through nonprofit organizations — a return to the good old days of what Tocqueville saw. Theda Skocpol criticizes this mindset by providing some historical context to the "Tocqueville romanticism," as she calls it.³⁸ The Tocqueville direct democracy model assumes that voluntary groups were created on their own at the local level to associate to get things done outside of government or as an alternative to government.³⁹ According to Skocpol, this is not an accurate picture: "[R]esearch on America in the early 1800s shows that religious and political factors also stimulated the growth of voluntary groups. . . . In addition, the American Revolution, and the subsequent organization of competitive national and state elections under the Constitution of 1789, triggered the founding of newspapers and the formation of local and translocal voluntary associations much faster and more extensively than just nascent town formation can explain."

After recounting a number of historical factors, she concludes, "so Tocqueville

romanticists are wrong to assume that spontaneous social association is primary while government and politics are derivative. On the contrary, U.S. civic associations were encouraged by the American Revolution, the Civil War, the New Deal, and World Wars I and II; and until recently they were fostered by the institutional patterns of U.S. federalism, legislatures, competitive elections, and locally rooted political parties.” She warns that conservatives are using the Putnam literature to invigorate a new sense of local, nongovernmental control that is not based on historical accuracy.

This academic perspective may help to frame the language and policies of the Bush

Administration. On the one hand, the administration wants to devolve federal responsibility and on the other it wants to downsize government as Representative Dick Armey stated at the beginning of this article. Talking about the valuable role of nonprofits, whether faith-based or otherwise, comes with no new resources and generally with the notion of dumping federal responsibilities on the private sector. The mantra is local control. All of this is what we classify under our description of devolution — much of it overlapping with the first two parts of this paper.

Endnotes

¹ All are employees of OMB Watch in Washington, D.C. Cate Paskoff also contributed to this article.

² A closer look reveals that nonmilitary spending drops from 15.4% to 15.2% to 14% of GDP. If you then look at the percentages for all domestic and international discretionary spending (excluding military spending), which encompasses almost all of government's activities except for mandatory programs like Social Security, the decrease is even more startling.

³ All figures from the *Historical Tables* volume of the *Budget of the United States Government, Fiscal Year 2002*.

⁴ Theda Skocpol, *The Missing Middle: Working Families and the Future of American Social Policy*, A Century Foundation Book (New York: W.W. Norton 2000).

⁵ Robert Kuttner, "Opposition as Opportunity," 11 *The American Prospect* (2000).

⁶ Robert B. Reich, "On Thinking Bigger," 11 *The American Prospect* (1999).

⁷ The estate tax currently only impacts those estates valued at over \$675,000. That "exemption" would have increased to \$1 million in 2006. Under the new tax law, prior to full repeal, the exemption will increase to \$3.5 million. While estate tax rates can be as high as 55%, the actual effective tax rate is much lower. The new tax law (P.L. 107-16) reduces marginal rates to 45% before full repeal.

⁸ Message to Congress by Franklin D. Roosevelt, in H.R. Rep. No. 1681, 74th Congress, 1st Session at 2 (June 19, 1935), qtd. in James R. Repetti, "Democracy, Taxes, and Wealth," 76 *New York University Law Review* 825-873 (2001).

⁹ Andrew Carnegie, *The Gospel of Wealth and Other Timely Essays* (Cambridge, MA: Belknap Press of Harvard University Press 1962).

¹⁰ Reactions came from the academic community as well as syndicated columnists and journalists. See New York University Professor Dalton Conley's Apr. 5, 2001, article, "How to Widen the Black-White Wealth Gap," in the online magazine Salon.com at <http://www.salon.com/politics/feature/2001/04/05/black_wealth/> or journalist Jonathan Chait, "Painted Black," *The New Republic Online* (Aug. 16, 2001) at <http://www.thenewrepublic.com/082701/chait082701_print.html> and Michael Kinsley, "Dead Wrong," *Slate* (Apr. 5, 2001) at <<http://slate.msn.com/readme/01-04-05/readme.asp>>.

¹¹ Full and immediate repeal of the tax was estimated by the Joint Committee on Taxation (JCT) to cost more than \$660 billion over the next ten years. JCT estimated that the repeal plan that was finally signed into law on June 7, 2001, which modifies exemption levels and tax rates with one year of full repeal, will cost \$138 billion over the next ten years — more than half of which will be lost in 2011, after the first full year of repeal. Source: Joint Committee on Taxa-

tion, *Estimated Budget Effects of the Conference Agreement for H.R. 1836* (JCX-51-01), May 26, 2001, <http://www.usajournal.com/new_federalism.htm>.

¹² There is irony here since it has been industry that has argued for national standards when it sees multiple or redundant standards being developed in the 50 states. See the history of hazard communications in the workplace, for example.

¹³ Memorandum from Andrew Card, "Regulatory Review Plan" (Jan. 20, 2001). OMB Director Mitchell Daniels issued a memo to agencies on Jan. 26, 2001, that provided additional details on implementing the Card memo.

¹⁴ Citizens' Commission on Civil Rights, *Title I in Midstream: The Fight to Improve Schools for Poor Kids* (Washington, D.C.: Citizens' Commission on Civil Rights 1999).

¹⁵ See, e.g., Eban Goodstein and Hart Hodges, "Polluted Data: Overestimating Environmental Costs," *The American Prospect*, at 64 (Nov./Dec. 1997); Office of Technology Assessment, *Gauging Control Technologies and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach* (1995).

¹⁶ On January 29, 2001, President Bush issued two executive orders. One created an Office on Faith-Based and Community Initiatives within the White House. The other created faith-based centers at the Departments of Justice, Labor, Education, Health and Human Services, and Housing and Urban Development.

¹⁷ FCNL *Perspectives*, No. 4 (Feb. 2001).

¹⁸ Each departmental faith-based center was to submit a report to the White House Office of Faith-Based and Community Initiatives, headed by John DiIulio, who announced his resignation a day after the report was released. The report from each center was to include an analysis of barriers to the "full participation of faith-based and other community organizations in the delivery of social services," a summary of technical assistance provided by the department to help in preparation of grant applications, and annual performance indicators and measurable objectives for departmental action. The report is to be released annually.

¹⁹ The legislative agenda is articulated in H.R. 7, as passed by the House of Representatives.

²⁰ Advocacy Institute, National Committee for Responsive Philanthropy, OMB Watch, and The Union Institute, *Nonprofit Agenda: Recommendations to President George W. Bush to Strengthen the Nonprofit Sector* (Jan. 22, 2001). Available at <<http://www.ombwatch.org/npagenda/>>.

²¹ See: (a) cost principles such as OMB Circular A-122, "Cost Principles for Non-Profit Organizations"; (b) administrative requirements such as OMB Circulars A-102, "Grants and Cooperative Agreements with State and Local Governments," and A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"; and (c) audit requirements such as OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," which was issued to implement the Single Entity Audit Act.

²² "A Code of Conduct," *The Christian Century*, at 2000 (July 5, 2000), WL 9857739.

²³ *Id.*

²⁴ For a summary of this research see Lewis D. Solomon and Matthew J. Vlissides, Jr., The Progressive Policy Institute, *In God We Trust? Assessing the Potential of Faith-Based Social Services* (Feb. 2001), at <<http://www.ppionline.org>>.

²⁵ It violates constitutional standards because it gives a preference that is not related to maintaining church-state separation. In this way it is different from exemptions such as allow-

ing congregations not to file IRS annual tax forms (e.g., Form 990).

²⁶ Hanna Rosin, "Faith-Based Youth Homes' 'Lesson'; Texas Backs Away from Unregulated Programs After Abuse Charges," *The Washington Post*, June 21, 2001, at A3.

²⁷ Forward to *Rallying the Armies of Compassion*.

²⁸ *Unlevel Playing Field* at 7.

²⁹ Jon E. Dougherty, "The New Federalism," *USA Journal Online* (1998). Available at <http://www.usajournal.com/new_federalism.htm>.

³⁰ Executive Memorandum No. 536 from Adam D. Thierer, The Heritage Foundation, "President Clinton's Sellout of Federalism" (June 25, 1998).

³¹ The legislation (S. 1214 and H.R. 2245 of the 106th Congress) contained two main parts. First, it required agencies to conduct federalism assessments for their regulatory proposals — which unlike the previous executive orders would be judicially reviewable and could be challenged in court. Second, it sought to override years of court doctrine on preemption. Where Congress or an agency intended to preempt state or local law, the legislation required that there be a specific statement of preemption within the bill or rule. Where no such statement appears, state and local laws would have presumed authority. This part of the legislation raised serious judicial concerns and was strenuously opposed by the Clinton Justice Department.

³² This was reported in the Bureau of National Affairs' *Daily Report for Executives* on Aug. 2, 2001.

³³ Funding was restored by the Senate, but the Bush proposal survived in the House. The issue must now be resolved in conference committee.

³⁴ Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," 6 *Journal of Democracy* 68 (1995).

³⁵ See for example, Michael Schudson, "What If Civic Life Didn't Die??" 7 *American Prospect* (1996). This article is part of a series called "Unsolved Mysteries: The Tocqueville Files."

³⁶ Alexis de Tocqueville, *Democracy in America*, at 513-17 (J.P. Mater ed., Garden City, NY: Anchor Books 1969).

³⁷ See, for example, Brian O'Connell, The Foundation Center, *People Power: Service, Advocacy, Empowerment* (New York 1994). In an article summarizing existing research about nonprofit advocacy, Elizabeth Reid argues that nonprofits "offer citizens many choices for participation and action. Nonprofits are places in civil society where people associate with each other and join mutual action, including political action, to address their concerns and interests." See Elizabeth J. Reid, "Nonprofit Advocacy and Political Participation," *Nonprofit Organizations and Government: The Challenge of Civil Society* conference paper, Urban Institute (June 9, 1998).

³⁸ Theda Skocpol, "Unravelling from Above," 7 *The American Prospect* (1996).

³⁹ Peter Dobkin Hall provides historical context for the assertion why the Tocquevillian model has been used by conservatives who believe in less government. His main point is historically those who wanted to roll back government believed the alternative was the growth of voluntary associations. "Initially, the traditionalists — or Federalists, as they came to be known — favored strong government and advocated the delegation of state power to groups of respectable individuals for public purposes. By the 1790s these purposes included eleemosynary ones such as the establishment of schools, colleges, and hospitals, as well as such commercial enterprises as banks, bridges, canals, and turnpikes. The dissenters, who came to be known as the Democratic Republicans, favored minimal government and looked to individuals and unincorporated voluntary associations to perform the basic tasks of production and social palliation" (at 7).