Paulina NAPIERAŁA
Uniwersytet Jagielloński

G.W. BUSH'S *FAITH-BASED INITIATIVES POLICY* AND THE IDEA OF THE SEPARATION OF CHURCH AND STATE IN THE U.S.A.

ABSTRACT Artykuł przedstawia politykę G.W. Busha wobec religijnych organizacji charytatywnych. Polityka ta, której głównym założeniem było zwiększenie roli organizacji religijnych w amerykańskim systemie opieki społecznej oraz ułatwienie im dostępu do funduszy federalnych, omówiona została w kontekście relacji państwo–Kościół w Stanach Zjednoczonych. W języku angielskim analizowana polityka określana jest jako *faith-based initatives*. Jest to sformułowanie trudne do przełożenia na język polski. Ponadto używane jest, w zależności od kontekstu, bądź do opisania polityki G.W. Busha w kwestii ułatwienia organizacjom religijnym dostępu do funduszy federalnych przeznaczonych na programy pomocy społecznej, bądź w odniesieniu do samych organizacji religijnych zajmujących się pomocą społeczną (w tym zarówno do organizacji charytatywnych, jak kongregacji i Kościołów).

Polityka G.W. Busha w kwestii religijnych organizacji charytatywnych jest godna uwagi, gdyż wpisując się w skomplikowane relacje państwo–Kościół w Stanach Zjednoczonych, zwraca uwagę na rolę religii w amerykańskim życiu publicznym oraz obrazuje ewolucję w interpretacji I poprawki do Konstytucji.

The United States of America was one of the first countries to introduce the separation of church and state. In 1791 the Bill of Rights came into effect. The First Amendment, which was a part of the Bill of Rights, included two clauses concerning religion: the Establishment Clause and the Free Exercise Clause. It stated

that: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof* (…)"

With time, the idea of church-state separation has become one of the US most important values. But although the US has been promoting it for years now, it has never been clear what "separation" has actually meant for Americans.

The interpretation of the religious clauses of the First Amendment has always been a very controversial issue. Although the Amendment explicitly applied only to Congress, the Supreme Court has interpreted it as applying also to the executive and judicial branches. According to the Due Process Clause of the Fourteenth Amendment the limitations of the First Amendment started to be applied not only to the Federacy but also to each particular state, including any local government within a state. The issue of applying religious limitations of the First Amendment to the states was, however, only one of a great number of controversies concerning the interpretation of the religious clauses. Over the years, several different approaches to the interpretation have evolved. The most important ones are: the accommodationist approach, the non-preferentialist approach (in some cases evolving into the so called *positive neutrality* approach), and the separationist approach.

The first approach, in general, stresses that the only thing that the first clause prohibits is the establishment of religion, but other forms of support for religion are permissible. This approach is based mostly on the narrow interpretation of the Establishment Clause and on historical arguments. The second approach, which to some degree, is a modified version of accommodationism, is based on the belief that while the government is allowed to support religion, it should not favor one religion over another. The separationist approach, on the other hand, uses a broad interpretation of the Establishment Clause. Its proponents hold that the original Constitution grants no power over religion to the federal government, either positive or negative. This belief is based on the writings of Thomas Jefferson, James Madison and some theologians[1] whose teachings on the separation of church and state were prominent at the time of constructing the Bill of Rights. Separationists are known for using Jefferson's argument that only a "wall of separation" between church and state can effectively protect the individual's right of conscience[2].

The issue of G.W. Bush's *faith-based initiatives* policy is strictly connected with the battle over the interpretation of the religious clauses of the First Amendment. The policy, which can be defined as "efforts by the federal government to broaden funding and support for the charitable efforts of religious organizations"[3], has been, ho-

[1] For example: Roger Williams.

[2] More about it in: R.M. Małajny, *"Mur Separacji" – państwo a kościół w Stanach Zjednoczonych Ameryki*, Katowice 1992; and in: The Boisi Center Papers on Religion in the United States, *Separation of Church and State*, p. 9, at <http://www.bc.edu/centers/boisi/meta-elements/pdf/bc_papers/BCP-ChurchState.pdf>.

[3] S.M. Michelman, 'Recent Developments: Faith-Based Initiatives', *Harvard Journal on Legislation* 39, (2002), p. 475.

wever, very controversial not only constitutionally but also politically[4]. Nonetheless, in this paper I would like to concentrate on the constitutional debate around the *faith-based initiatives* policy and present it in the perspective of the chan ging interpretation of the religious clauses.

The *faith-based initiatives* policy was one of the major issues promoted in the G.W. Bush's 2000 campaign[5]. It was presented as a part of *compassionate conservatism*, a term popularized by Marvin Olasky, used to describe a political philosophy that stressed the use of traditionally conservative techniques and concepts in order to improve general welfare of society. In general, the Republican Party defined *compassionate conservatism* as the belief that conservatism and compassion complement each other and that the government should encourage the effective provision of social services rather than provide the service itself. The skeptics, however, as well as the political opponents of G.W. Bush, considered it as a shallow slogan marking Bush's campaign. They claimed that the Republican Party – known for its criticism towards welfare provisions and often viewed as the party of the rich – used it to convince the poor that it actually cares for them.

Despite these controversies, one thing is certain: *compassionate conservatism* was used by G.W. Bush as an ideological background for his *faith-based initiatives* policy. In order to promote the elimination of most formal barriers in the process of granting federal money to religious charities, G.W. Bush often used arguments based on the ideas of *compassionate conservatism*. He stressed that, according to this theory, social problems are better solved through cooperation with private companies and charities, especially religious ones, than directly through government departments. *Compassionate conservatism* was presented as a new way of thinking about the poor. Its most important assumption was that the poor should never be told that they might be victims of racism or economic forces. According to the proponents of *compassionate conservatism* such message is not only false but also destructive, because it makes people expect government to correct such processes through welfare provisions. It is, however, not welfare that can help them. What they need is to hear the message of personal responsibility and self-reliance and to feel society's moral support. They need to know that they cannot blame "the system" for their wrongdoing. Otherwise, they remain helpless and feeling inadequate.

A deeper analysis of the message of *compassionate conservatism* shows that it is connected with conservative Calvinist teachings, especially, on the conservative

[4] Some of the most important political controversies concern such issues as claims that the Republican Party used *faith-based initiatives* policy in order to limit government responsibility for the poor and that the Republicans promoted G.W. Bush's initiative in order to buy votes of the Religious Right (which at the beginning of the 2000 campaign supported the idea) as well as votes of some minority groups. Some researchers argue that Republicans' use of religious arguments was instrumental and served political gains, what according to them, might be proved by the fact that religious organizations never received the promised sums of money.

[5] It is worth mentioning that during the campaign also Al Gore spoke about his support for *charitable choice*. It is, however, not entirely sure what his approach to the Establishment Clause safeguards was.

Protestant interpretation of original sin. In his book, *Renewing American Compassion*, Olasky underlined that "man is sinful and likely to want something for nothing" and that "man's sinful nature leads to indolence"[6] and therefore, social welfare programs will not solve any problems. Although the proponents of *compassionate conservatism* did not stress the conservatively Protestant dimension of its message directly, during the campaign, they did occasionally mention Protestant work ethic and emphasized that the message of personal responsibility could be brought to people only by religious charities. They were also trying to convince the public that religious charities were effective enough before the introduction of the New Deal welfare provisions, which both diminished their role, and destroyed public morale. In this way, *compassionate conservatism* served as the means to combine traditionally conservative[7] outlook on economy with religious arguments and rhetoric.

Nevertheless, at the beginning of the 21st century, even the strictest conservatives in the Republican Party could not count on disestablishment of the American welfare system. Their aim was, however, to privatize the biggest possible part of it, following the example of Ronald Reagan's Administration. Relying more on the religious organizations could help achieve this aim. To convince the public to this policy, G.W. Bush underlined the reforming impact of religion, having often mentioned his own alcohol addiction recovery. He would stress that religion was the only force that could help change people's hearts and therefore, religious providers of social services needed to be supported in their activities by the government. What is very important, many supporters of G.W. Bush's *faith-based initiatives* policy underlined that it was the anti-religious interpretation of the religious clauses of the First Amendment that prevented faith-based organizations from bringing their good message using federal funds. They also argued that according to the newest decisions of the Supreme Court, all the barriers to funding sectarian charities can be removed, without violating the Establishment Clause.

When G.W. Bush won the elections, one of his first actions as President was to issue two executive orders on January 29, 2001 creating the White House Office of Faith-Based and Community Initiatives (WHOFBCI) and additional Centers for FBCI within five federal agencies: the departments of Education, Health and Human Services, Housing and Urban Development, Justice, and Labor. President Bush's decisions sought to reduce barriers in the federal grant-making process and to boost participation among religious organizations, especially smaller faith-based groups, in providing social services. Soon after, he started the efforts to introduce the new law through Congressional bill. In the new bill, he wanted to widely extend the so called *charitable choice* provisions of the 1996 welfare reform law. These provisions, according to President Bush were not only too limited, but also not implemented properly by the Bill Clinton Administration.

---

6 M.N. Olasky, *Renewing American Compassion*, New York 1996, pp. 41, 64.

7 The term "conservative" here is used to denote the relation to American version of conservatism, which next to its preference for social and cultural conservatism, also endorses free market economy and opposes most of the government's interventionism, especially welfare provisions.

It is very important to understand that *charitable choice* provisions were the actual roots of G.W. Bush's policy. As part of the 1996 welfare reform, they were a subject of a heated political debate in the Republican-dominated Congress. Although the *compassionate conservatism* doctrine was not yet so prominent and widely promoted, the part of the Republican Party, which in the early 1980s had strongly allied with the American Religious Right, already in the 1990s debate showed a tendency to define social problems and shortcomings of the welfare system in the USA using religious and moral terms. Many Republicans argued that most social ills result from lack of morality and therefore, welfare provisions could not be a solution. On the contrary, the fact that the welfare state solutions were introduced in the USA and then expanded in the 1960s and 1970s only made things worse. According to some commentators, this debate was one of the best examples of the Republican use of religious language and religious arguments in order to express traditional opposition of American conservatives against social welfare.

It is worth mentioning that many denominations and religious traditions in the USA do not share such strong views against social welfare, although, in general, Americans are less likely than Europeans to support extended welfare provisions. However, it is mostly the conservative (mostly evangelical) Protestants who oppose the very idea of welfare state. Nevertheless, due to the Republican Party's alliance with the Religious Right, which was created and dominated by conservative evangelical Protestants, the conservatively republican and religious arguments interwove. Religiously oriented Republicans argued that welfare state caused demoralization of the recipients, partly because it eliminated religious charities from providing social help, partly because it made recipients passive. Their opponents agreed that the welfare policy had many shortcomings and that it needed to be reformed, but they defined these problems in radically different terms. For the conservatives, however, religious arguments were at that time predominant. There was also a group of Democrats, who although not criticizing the general idea of welfare provisions, agreed with the Republicans, that it might be a good solution to increase the involvement of religious organizations in healing social ills. They underlined, however, the importance of introducing and respecting legal safeguards protecting the Establishment Clause. Nevertheless, it was John Ashcroft and a group of Republicans who were the most prominent supporters of the solutions which stressed that the government should be free to contract with religious organizations. They stressed that the federal government should concentrate rather on that than on reforming, expanding or creating new federal welfare programs[8]. Apart from blaming welfare system itself, they also argued, similarly to the *faith-based initiatives* supporters, that it was also the incorporation of the separationist interpretation of the First Amendment in the late 1940s that limited participation of religious organizations in federal contracts for agencies providing social services.

[8] This idea was not new for the Republican Party. Already in the 1980 the idea of the decentralization of welfare programs and of contracting with private agencies was vital. In the 1990s Republicans additionally included more religious arguments in their rhetoric.

Following their arguments, one could have the impression that religious organizations in America were totally eliminated from providing social provisions and from contracting with the federal government. It is, however, very important to notice that at the time of the 1996 debate a great number of religious charities were providing social services. Some of them were using only private funds, but some were largely relying on the federal money received through contracts with the government. However, although religious charities were eligible for federal founding, there were certain conditions they had to comply with. Most notably, religiously affiliated charitable organizations could contract with the government as long as they separated from their churches institutionally. That means that religious groups, which wanted to provide social services with the financial help from the government, had to create secular corporations operating with varying degrees of closeness to sponsoring religious bodies, and providing secular services. A lot of religious groups accepted and followed these conditions, and some large religiously affiliated organizations such as the Salvation Army, Catholic Charities USA, Lutheran Services in America, and Jewish Family Services have long been among the leading government contractors in the provision of social services in many parts of the nation[9].

The aim of these requirements was to ensure that federal money would not be spent for religious purposes of churches. Such practice has long been understood by the Supreme Court as a violation of the Establishment Clause. The *secular purpose* standard was considered to be the best way to ensure that government would not try establishing any religion, by financing it. It was also believed that the most effective way to ensure that this *secular purpose* standard would not be violated was to make religious charities separate from churches as such. This practice, contrary to what the supporters of both *charitable choice* and *faith-based initiatives* policy have claimed, was not introduced only after 1940s when the Supreme Court started to show a tendency to use more separationist interpretation of the religious clauses. According to Peter Dobkin Hall's analysis, this practice began in the 19th century, when human services provisions remained a state and local responsibility[10] and when the accommodationist interpretation was dominant. As Hall underlines, "while religious bodies became increasingly active in providing social, health, and educational services after the middle of the nineteenth century, these services were seldom (except in the case of the Roman Catholics[11]) provided through religious corporations"[12]. According to him, "the roots of this practice of separating devotional and social ministry activities within religious communities were both doctrinal and pragmatic[13].

[9] P. Dobkin Hall, 'Historical Perspective on Religion, Government and Social Welfare in America' in A. Walsh (ed.), *Can Charitable Choice Work? Covering Religion's Impact on Urban Affairs and Social Services*, Hartford 2001, p. 78.

[10] Except in the case of selected groups like veterans.

[11] After the Vatican II also Roman Catholics started to prefer providing social services through affiliated secular corporations.

[12] P. Dobkin Hall, 'Historical Perspective on Religion…', p. 107.

[13] Ibid.

During the debate, however, the proponents of *charitable choice* provision argued that such a safeguard of the *secular purpose* standard was not necessary. Additionally, according to them, it discriminated some religious organizations, especially smaller congregations, which were willing to provide social help using financial aid of the government, but did not have the means to create separate corporations. As a consequence, the legislation most commonly referred to as *charitable choice*, designed directly to forestall the need for houses of worship to set up separate, nominally secular, corporations as a prerequisite to receiving government grants, was introduced as part of welfare reform of 1996.

The portion of law, which directly spoke of *charitable choice*, was the *Temporary Assistance to Needy Families Act* (TANF). According to this Act, *charitable choice* applied only to certain programs, notably welfare to work programs funded under TANF. However, later it was included also in the *Children's Health Act* (although in a narrower compass than intended by congressional sponsors), the *Community Renewal Tax Relief Act of 2000* and the *Community Service Block Grants of 1998*[14]. *Charitable choice* authorized states to provide services through private providers, including religious ones, contracting directly with them or through vouchers issued to participants. According to the new law, religious organizations could participate in government voucher and direct grant programs on the same terms as other organizations, provided however, that the assistance was consistent with the Establishment Clause. As long as they adhered to this condition, they were allowed to retain their organizational form without government interference. They could also retain control over the definition, development, practice, and expression of their religious beliefs. Religious contractors were also protected from being required to remove religious symbols from their premises in order to participate in a federally founded program. Moreover, they could receive aid and retain their exemption from the anti-religious discrimination of the employment discrimination laws[15]. TANF also provided for limits on federal audits of religious organizations that would establish segregated accounts for federal funds.

However, due to the strong pressure of the Congressmen concerned that such provision could blur the separation of church and state, especially as a result of audit problems, a safeguard against violating Establishment Clause was included in the Act. It was the rule that the organizations may not use federal funds to support "sectarian worship, instruction, or proselytization". The opponents of the *charitable choice* were also concerned about the rights of the beneficiaries. Therefore, the Act included safeguards that conferred limited rights on beneficiaries. The first one sta-

[14] M.D. Stern, 'Charitable Choice: the Law As It Is and May Be' in A. Walsh (ed.), *Can Charitable Choice Work?…*, p. 157.

[15] Religious organizations are exempt from employment discrimination laws on basis of religion thanks to Civil Rights Act 1964 and Equal Employment Opportunity Act 1972. Nevertheless, the lower courts have divided on whether employers taking governmental funds can invoke a provision of the anti-employment discrimination laws permitting religious organizations to engage in religious discrimination. More in: M.D. Stern, 'Charitable Choice…', p. 158.

ted that no one could be forced to attend a religious program to which they object. It also provided that if an individual objected to the religious character of a program, a secular alternative must have been provided. The second one provided that no participants might have been denied admission to a federally funded program on the basis of his or her religion or religious belief, nor could a participant be coerced to "actively participate in a religious practice"[16]. Some Congressmen and a number of jurists, however, were still concerned. They argued that it was quite easy to get round these safeguards. In fact, it soon turned out that not all of *charitable choice* programs required that beneficiaries were to be notified of their right to a secular alternative, which could have been (and for long had been) a solution not only to the non-religious people, but also to those religious ones, whose religious beliefs conflicted with the religious orientation of the provider.

Due to these problems and out of concern about the diminished control over whether the federal money were spent on religious or secular purposes, President Bill Clinton interpreted *charitable choice* as subject to, and to be implemented consistent with, the so called *pervasively sectarian* standard. The *pervasively sectarian* standard was introduced in the second half of the 20th century in order to protect the *secular purpose* rule. In *Roemer v. Bd. Of Pub. Works* (1976) a *pervasively sectarian* institution was defined as such institution in which "secular activities cannot be separated from sectarian ones"[17]. In *Bowen v. Kendrick* in 1988 the Supreme Court stated when *pervasively sectarian* institutions are involved, religious and secular purposes may not be separable. Since the safeguards within *charitable choice* itself prohibited use federal funds to support "sectarian worship, instruction, or proselytization", President Clinton concluded that the application of the *sectarian standard* was necessary. According to him, *charitable choice* will not violate the Establishment Clause only if it adheres to the constrains of *pervasive sectarianism*[18]. This standard dictated in the case of *charitable choice* "that funding to religious nonprofits be earmarked solely for their secular activities; it required that an organization's religious elements be partitioned off from the secular aims of the funded program, so that funds could not be applied to religious uses"[19].

G.W. Bush did not agree with this point of view and argued that *pervasively sectarian* standard was used in order to discriminate against religious groups. His *faith-based initiatives* policy was a manifestation of his opposition to Clinton's interpretation of *charitable choice*. He accused Bill Clinton's Administration not only of avoiding the implementation of the law, but also of hindering the whole idea of

[16] Stern underlines that TANF does not explain whether mandatory but passive attendance at a religious service is considered "active participation in a religious practice". More in M.D. Stern, 'Charitable Choice…', p. 159.

[17] More in: S.M. Michelman, 'Faith-Based Initiatives', p. 489.

[18] His position was supported by such organizations like Americans United for Separation of Church and State or ACLU.

[19] A.E. Black, D.L. Koopman, D.K. Ryden, *Of Little Faith. The Politics of George W. Bush's Faith-Based Initiatives*, Washington 2004, p. 232.

charitable choice. According to him this standard was used not only in order to favor secular nonprofits, but also to prevent religious groups from even trying to apply for federal funding. He also agreed with the sponsors of the *charitable choice*, including John Ashcroft, who argued that the introduction of such provisions alone meant that the *pervasively sectarian* standard limitations were actually eliminated[20]. Additionally, he referred to the recent Supreme Court's decision in *Mitchell v. Helms* (2000), which if fact can be considered as eliminating the *pervasively sectarian* standard[21]. He implied that the use of this standard was the main reason that religious charities had to separate their religious message from charitable activities and that both seprarationist interpretation and *pervasively sectarian* standard were a sheer manifestation of a hostile attitude towards religion. He also presented his new policy as fully constitutional according to standards set forth in the *Mitchell* case. To support his arguments, the proponents of *faith-based initiatives* policy often referred to the so called *positive neutrality*, which was a new approach to the principle of the government's ideological neutrality. It was advocated by the opponents of separationism and promoted mostly in cases concerning federal funding of religious institutions.

The introduction of G.W. Bush's first executive orders concerning *faith-based initiatives* policy on January 29th, 2001 was based on these arguments. Soon after, Bush Administration started to lobby Congress to pass legislation that would expand federal funding to religious social service providers. The Congressional legislation process, however, turned out to be a failure. Despite Bush's supporters insistence that all provisions of *faith-based initiatives* policy were in accordance with *Mitchell* ruling, many Congressmen as well as jurists had serious doubts about it and found his policy constitutionally problematic. Nevertheless, House of Representatives managed to pass the *Charitable Choice Act of 2001*, which authorized religious organizations to receive federal funding for providing social services ranging from hunger relief efforts and housing assistance to juvenile delinquency treatment and crime prevention programs, and which exempted recipient religious organizations from laws prohibiting employment discrimination on the basis of religion. The Act, however, finally stalled in the Senate. A heated debated concerning the interpretation of the Establishment Clause and many other problems connected with the new policy brought out very important arguments.

The opponents of the Act focused on several controversial issues. The first problem was the question of whether granting money to religious institutions under conditions proposed by G.W. Bush in the Act would not violate the Establishment Clause. They stressed that even according to *Mitchell v. Helms* decision, there were still certain requirements guarding *secular purpose* standard, which were not met by the bill. Secondly, *faith-based initiatives* policy's skeptics reminded that since issuing *charitable choice* provisions, the lower courts have been divided on whether employ-

[20] This view was also supported by Center for Public Justice or Christian Legal Society.

[21] It is important to mention that although *Mitchell* eliminated *pervasively sectarian* standard as such, it postulated introducing other safeguards, including safeguards against religious indoctrination.

ers taking governmental funds can invoke a provision of the anti-employment discrimination laws permitting religious organizations to engage in religious discrimination. Such practice, according to them in fact had a subversive effect on civil rights laws. And thirdly, they stressed the problems, which were already mentioned during the *charitable choice* debate, and which concerned the protection of the rights of the beneficiaries. Now, under the new circumstances, the problem of beneficiaries, who might have become subject to religion coercion when receiving aid from pervasively religious organizations, was even more important.

In response to these arguments, a bipartisan group of Senators led by Democrat Joseph I. Lieberman and Republican Rick Santorum introduced a scaled-back version of CCA as part of the Charity Aid, Recovery, and Empowerment Act of 2002 ("CARE"). This Act, however, did not manage to solve all the problems pointed out in the constitutional debate. It also failed to introduce safeguards protecting beneficiaries, especially those concerning a provision of an alternative aid to beneficiaries objecting to certain programs on religious grounds. Therefore, "CARE" also failed.

Nevertheless, arguing that the debate in Senate was not only partisan, but also dominated by non-religious liberals who favored strict separationism, secularism and hostility towards religion, President Bush decided to introduce his policy regardless of the objection in the legislature. Once again, he used his executive orders. He issued them in December 2002 and June 2004 adding five more Faith-Based and Community Initiatives Offices at the Agency for International Development, the departments of Agriculture, Commerce and Veterans Affairs, and in the Small Business Administration. A similar office has also been created within the Corporation for National and Community Service. His executive orders included some basic safeguards protecting the Establishment Clause. According to these safeguards, religious organizations may not use direct government funds to support inherently religious activities such as prayer, worship, religious instruction, or proselytization; any inherently religious activities that the organizations may offer must be offered separately in time or location from services that receive federal assistance; and they cannot discriminate on the basis of religion when providing services.

According to some jurists, however, the safeguards included in G.W. Bush's executive orders, both for the protection of the Establishment Clause and for the protection of the rights of beneficiaries, are not sufficient. According to Justice O'Connor's opinion in *Mitchell* case, a federally sponsored program should include "adequate safeguards against religious indoctrination". The safeguards included by G.W. Bush, according to the opponents of *faith-based initiatives* law, were not efficient enough. This, according to them, was possible to result in government's endorsement of religion and thus, in the violation of the Establishment Clause. Additionally, there was no provision requiring information on secular option for beneficiaries objecting to the program on religious grounds. The safeguards included in the executive orders also did not specify inherently religious activities, and seemed not to consider a religious message or religious indoctrination included in the program as such. What

is more, the proponents of Bush's policy often repeated that religious providers are especially effective because of spiritual dimension of their programs[22]. According to the opponents of his policy, including leaders of religious organizations (especially of Catholic Charities[23]) this approach was to blur the boundaries of proselitysation.

Despite these controversies since 2001, faith-based organizations have been eligible to participate in federally administered social service programs to the same degree as any other group. They have also been exempt from employment discrimination laws. The constitutional dispute, however, has not yet ended. There have been already two Supreme Court cases concerning faith-based initiatives. Additionally, the debate was revived during the latest presidential elections. In the reasoning of both sides of the debate, the different approaches to the interpretation of the Establishment Clause have been more than evident. The supporters of G.W. Bush's policy often blame "strict separationists" and "secularists" for introducing strict laws concerning separation of religious and secular purposes of religious organizations. They also find the separationist interpretation of the First Amendment as anti-religious. Their opponents on the other hand, consider *positive neutrality* approach propagated by G.W. Bush supporters as unrealistic. They also find Bush's approach to religious matters as endangering the whole idea of the separation of church and state and see it as the return to the long-disestablished accommodationism. In order to understand their arguments, it is necessary to take a closer look at the changing interpretation of the religious clauses of the First Amendment over the years. It is also important to analyze the Supreme Court cases concerning funding of religious organizations and take a closer look at the *Mitchell* case, so often used as argument by the proponents of faith-based organizations.

For many years the dominating interpretation of the religious clauses of the First Amendment was accommodationist. Although already in 1802 Thomas Jefferson interpreted the Establishment Clause as the one building a "wall of separation"[24], it was not until 150 years later, in the 1947 case *Everson v. Board of Education* that the phrase would begin to guide the Supreme Court's understanding of the Establishment Clause. Until then the so called "narrow" interpretation used by accommodationists was dominant. According to George M. Marsden, at the time of drafting of the *Bill of Rights* the assumption was that religion, and especially Christianity, should be able to flourish in the republic, without interference from the state. Therefore, "though the federal government was not going to take any new steps to promote religion, neither was it systematically setting up 'a wall of separation' between church and state as

[22] S.M. Michelman, 'Faith-Based Initiatives', p. 479.

[23] E.g., Father Brian Hehir, president of Catholic Charities of Boston often expressed his reservations towards certain aspects of *faith-based initiatives* policy on several occasions, including his lectures at John F. Kennedy School of Government, Harvard and the symposium on May 13th, 2008: 'Faith-Based Organizations: what role should they play in domestic & international public health?'. Symposium transcript at <http://webapps.sph.harvard.edu/content/FaithBased_Unspecified_2008-05-13_05-08-PM_files/flash_index.htm>.

[24] Jefferson used a phrase coined previously by the 17th-century Baptist theologian, Roger Williams.

Jefferson later claimed it was"[25]. Accommodationists would go a step further to hold that the Constitution should not be interpreted to prohibit power of the federal government over religion. According to the narrow (or grammatical[26]) interpretation, the First Amendment allows the government considerable latitude in supporting or promoting religious beliefs and practices. Before religious clauses' limitations of the First Amendment were applied to the states in accordance with the Due Process Clause of the Fourteenth Amendment, a lot of states would favor a dominating religion; using an accommodationist argument that only Congressional establishment of a state religion was illegal. The actual application of the religious clauses to the states took place in the 1940s: the Free Exercise Clause was incorporated in 1940 in *Cantwell v. Connecticut* case and the Establishment Clause in 1947 in *Everson v. Board of Education*. Since then accommodationists, who had to accept the fact that the states were also forbidden from establishing religion, have argued, that most types of aid to religion, especially these that do not reach the level of favoritism, are still legal. Accommodationists nowadays usually support their claims with historical examples and arguments, and generally favor a majority rule. It is important to notice that in the past most accommodationists were Protestants, dedicated to supporting Protestant religions in general, due to their significant role in American history and tradition. In the 19th century this promotion was increasingly oriented against Catholics and other non-Protestant and non-traditional faiths.

In the 20th century, however, the growth of non-Protestant faiths was so significant that it was impossible to keep the accommodationist interpretation without violating the rights of non-Protestants. Some of the biggest problems were: obligatory reading of the Protestant version of the Bible in public schools, public prayers before classes and religion lessons in public schools[27]. Especially, Catholics and Jews felt discriminated by these practices. The problem of reading the King James Version of the Bible troubled Catholics since the mid-19th century and led them to establishing their own private, parochial schools. To block these Catholic schools from receiving government financial aid, Protestants who opposed to Catholic immigration amended many state constitutions to prohibit all public funding of religious schools. They achieved it through introducing of the so called Blaine Amendments[28]. On the other hand, the Protestant religious practices in public schools were still legal in the 20th century. The opposition against the disregard for the religious feelings of the growing number of non-Protestant students led to several court cases, in which the Supreme Court manifested a shift away from accommodationism and delegalized public prayers at public schools. The turning point in the interpretation of religious clauses of

[25] G.M. Marsden, *Religion and American Culture*, Orlando 1990, p. 46.

[26] More about it in: R.M. Małajny, *"Mur Separacji"*…, p. 261.

[27] More about it: S.V. Monsma, *When Sacred and Secular Mix. Religious Nonprofit Organizations and Public Money*, Lanham (Md.) 1996.

[28] The Pew Forum on Religion and Public Life, 'Religion and the Courts: the Pillars of Church-State Law. Shifting Boundaries: the Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations', p. 4, at <http://pewforum.org/docs/?DocID=327>.

the First Amendment, however, was the *Everson v. Board of Education* case, which concerned a New Jersey law that authorized payment by local school boards of the costs of transportation to and from schools – including private schools (mostly religious). In his decision Justice Hugo Black wrote:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'"[29].

While setting the standards for the separationist interpretation of the First Amendment, the Justices at the same time rejected the claim of improper government aid to religion in this particular case. The majority of Justices decided that the help was neutral in the sense that all citizens (religious and non-religious) had equal right to certain social services. It is interesting to analyze the arguments of the separationists in greater detail as their voice in the religious cases that reached the Supreme Court after 1940s was very significant.

Separationists underlined that the Free Exercise Clause was created out of respect for the plurality of faiths in the USA, a land of religious refugees. They urge, however, not to forget that even though most of these refugees were Protestant, the church-state separation was intended to protect the plurality of all beliefs, not only the Protestant ones. Therefore, the situation which happened in the 19th and at the beginning of the 20th when Protestant religions seemed to have been favored, for example in public schools, despite a growing number of non-Protestant students, was not acceptable. The non-discriminational treatment of all religious and non-religious beliefs, however, was possible, only if the Establishment Clause was to be interpreted broadly. The reason for this, according to the separationist, was that any official (federal or local) support (financial or symbolic) for a particular religion might in result cause discrimination against other religions and against the non-believers. For most of the separationists, however, due to a long and religious history of the USA, it did not mean a total elimination of religion from public sphere. As long as religion was not supported by an official governmental authority, the public expression of it was, according to them, absolutely legal.

[29] Justia. US Court Center, 'Everson v. Board of Education, 330 U.S. 1 (1947)', pp. 15-16, at <http://supreme.justia.com/us/330/1/case.html>.

In their reasoning, the proponents of the separationist approach refer to the founding fathers who largely discussed religious matters in their writings and were the actual architects of the religious clauses in the First Amendment. They argue that Thomas Jefferson and James Madison, both influenced by Enlightenment thought, intended the Constitution to grant the government no power over religion, either positive or negative. They often quote James Madison, who emphasized that not only will American society enjoy moderation and harmony if the care of the soul will be treated as private matter, but also religion will benefit from the church-state separation. According to Madison, "history shows that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation" causing "pride and indolence in the clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution"[30]. Separationists also underline that both Jefferson's and Madison's support for the idea of the church-state separation grew out of concern for protecting the individual's right of conscience. Madison wrote about this in his "Memorial and Remonstrance against Religious Assessments" (1785). Jefferson often stressed that "building a wall of separation" was to be undertaken on "behalf of the rights of conscience"[31]. Therefore, separationists emphasize that Jefferson's intention was not only to prohibit government from favoring one religion over another, but also from favoring religion over non-religion. Eventually, Jefferson and many other influential Enlightenment intellectuals were liberals and Deists. Additionally, from the analysis of Jefferson's and Madison's arguments in the Virginia debate in the 1780s (concerning the bill that was supposed to provide public funds to support teachers of Christianity); the separationists infer that the intention of the architects of the religious clauses was to prohibit the use of tax money to support religious activities.

Most historians today agree that the institution of secular government was established mostly thanks to the small but influential group of statesmen influenced by Enlightenment philosophy and their alliance with those evangelicals[32] who were willing to compromise. However, "the population of religious enthusiasts rejected Enlightenment reliance upon reason and by 1830 evangelicalism and populism had become the dominating trends in American public life"[33]. Yet the alliance between evangelicals and Enlightenment liberals resulted in a unique combination of mechanisms to sustain religious freedom. According to separationists, the idea of the "wall of separation" is the guarding principle of these mechanisms, and the logical consequence of the very idea is the standard of the state's ideological neutrality, which is necessary to protect the conscience rights of all Americans.

[30] Fragment from 'Memorial and Remostrance' in The Boisi Center Papers on Religion in the United States, *Separation of Church and State*, p. 9.

[31] Ibid.

[32] Mostly those who followed the theological teachings about the separation of church and state, propagated by Roger Williams and by certain mostly Baptist theologians.

[33] The Boisi Center Papers on Religion in the United States, *Separation of Church and State*.

The Supreme Court first mentioned an ideological neutrality of the state in *Everson v. Board of Education*, concluding that the First Amendment requires from the state a neutral position towards believers and non-believers.[34] The problem of neutrality was also discussed by Justice Clark in the majority opinion in *Abington v. Schempp* (1963) concerning Bible reading in public schools. He emphasized that the realization of religious freedom requires the government not to engage in religious practices and not to force anybody to apply them. It also requires that the government does not favor any sect or religion against non-religion and that it does not fight any religious beliefs[35]. This is why, according Justice Clarke, a government law can neither support nor restrict religion. It does not mean, however, that the paths of government and the church can never cross. Basic public services should be provided to religious and non-religious organizations alike[36]. A strict separation which would deny it, would also create a negative atmosphere for religion[37]. On the other hand, if a public school required a prayer from all the students, not only would the non-believers be discriminated, but the state would also be involved in promoting religion and therefore, ideological neutrality of the state would be violated.

In the search for the best way of protecting state's neutrality the Supreme Court over the years was trying to construct the so called tests, which would help to decide whether legislation was neutral toward religion. The most famous test was created in the *Lemon v. Kurtzman* case (1971). It consisted of three prongs and stated as follows: firstly, the government's action must have a secular legislative purpose; secondly, the government's action must not have the primary effect of either advancing or inhibiting religion; and thirdly, the government's action must not result in an "excessive government entanglement" with religion.

Nevertheless, although the idea was to create such a test in order to protect and guard state's ideological or religious neutrality, the opponents of the separationist approach argued that it was created and, more importantly, used in order to favor non-religion over religion. Therefore, according to them, it had nothing to do with real neutrality. For them, reviving the "wall of separation" metaphor and application of the Lemon test was an introduction of strict separationism, which aimed at promoting so called "secular humanism". The secularity of the state and its religious non-involvement was treated by the opponents of separationism as an ideology competing against religion in general. For them, the Supreme Court's decisions banning public prayers at public schools were an actual promotion of secularism. The separationistsʼ explanation that it was the only way not to discriminate against any reli-

[34] R.M. Małajny, *"Mur Separacji"*..., p. 279.

[35] L.H. Tribe, *American Constitutional Law*, Mineola (N.Y.) 1978, p. 822, cited in: R.M. Małajny, *"Mur Separacji"*..., p. 280.

[36] 'Government Neutrality and Separation of Church and State: Tuition Tax Credits', *Harvard Law Review*, Vol. 92 (1979), pp. 697-699, cited in: R.M. Małajny, *"Mur Separacji"*..., p. 281.

[37] Ibid.

gion or non-religion was not convincing for their opponents. For them it was obvious that lack of support for religion was equal with promoting a secular world view.

Those who have shared this opinion are both accommodationists and non-preferentialists[38]. The latter group interprets the Establishment Clause similarly to accommodationists, but stresses that the government's support for religion is legal only as long as it is not preferential. The accommodationist approach in its original form was very difficult to defend after the Due Process Clause of the Fourteenth Amendment was applied to religious matters in the states. Therefore, a lot of accommodationist changed their argumentation, stopped advocating the majority rule and accepted the non-preferentialist approach. Non-preferentialists consider themselves to be the advocates of the truly neutral approach, as opposed to the notion of neutrality defined by separationists. However, although their main argument nowadays is that the separationist Supreme Court should stop promoting non-religion over religion and treat them equally, a lot of them would actually allow to promote religion over non-religion. It is important to remember that this group has always stressed that, according to their interpretation, the Constitution allows the government to support or even promote religious beliefs and practices so long as that support favors no one religious sect or belief. According to the analysis by Professor Ryszard Małajny, who examined historical arguments used by some major non-preferentialists, they consider the "wall of separation" to be only a false slogan. According to them, the First Amendment never required an equal treatment of believers and non-believers[39]. In their argumentation, they pay more attention to the Free Exercise Clause than to the Establishment Clause, arguing that the intention of the Founding Fathers was not the separation of church and state but only solving a problem of multiple denominations. According to Małajny, they refer to historical practice denouncing Jefferson's writings as sheer courtesy[40]. They also try to avoid analyzing Madison's writings on the issue of separation of church and state, instead quoting speeches of the US presidents, which refer to the importance of religion. In the dispute concerning the Supreme Court religious cases, they supported prayers at public schools, opposing only to those that would be sectarian. As long as a prayer was non-sectarian and general enough not to offend any theist it was considered by them as acceptable and desirable. They have also generally promoted federal financial aid for religious organizations as long as it was non-preferential, and have not opposed to the incorporation of religious practices into government activities as long as those practices are non-sectarian.

There is, however, a group of non-preferentialists who strongly believe in an equal treatment of religion and non-religion. One of the areas of church-state relations,

[38] There are many more variations within approaches to the interpretation of the First Amendment. More about it: M. Corbett, J. Mitchell Corbett, *Politics and Religion in the United States*, New York 1999, pp. 233-235.

[39] R.M. Małajny, *"Mur Separacji"…*, p. 263.

[40] Ibid., pp. 263-264.

which they have been paying a special attention to, is federal funding of religious organizations providing social services. They would wish that religious and non-religious non-profits would be treated equally, in such a sense that they would be, funded by the government on an equal basis. Moreover, according to them, the government should actually turn a blind eye on whether an organization is actually religious or not and to what extent the religious message or instruction is present in its activities. Such an approach has been called *positive neutrality*[41] and has often been referred to by the supporters of G.W. Bush's *faith-based initiatives* policy. The proponents of *positive neutrality* have advocated the introduction of their notion of neutrality instead of the separationist one, arguing that it is the only way to end "discrimination against religion". What they do not mention are the possible problems with protecting the Establishment Clause. If the incorporation of religious instruction will be disregarded during funds granting process, it is possible that federal money will be spent on promoting certain religious beliefs. Additionally, this promotion might turn out to be preferential because the government has no possibility to ensure that all religious organizations of all denomination would be funded equally[42]. The notion of religion is very broad in America, and the number and variety of sects in the USA makes talking about religion in general almost impossible. Therefore, the government's ideological neutrality introduced in the late 1940s seems to be very useful.

Nevertheless, the non-preferentialists concentrate on stressing that the separationist view of neutrality leaves religious organizations discriminated, serves the promotion of a secular world view and is a result of strict separationism. However, according to the analysis both by Ryszard Małajny and Tadeusz Zieliński, and many American jurists, there are in fact very few strict separationists who would advocate an absolute church-state separation. The general idea among most of separationists is that such total separation is neither possible nor desirable[43]. Just like Justice Black, who even in the *Everson* case allowed religious schools' busing be funded by public money, most of them agree to some form of government help for religious institutions. They stress, however, that there have to some safeguard standards which would ensure that such support will have nothing to do with the support of religious beliefs. This attitude can be noticed in Justice Clark's majority opinion in *Abington v. Schempp* (1963). He rejected an idea of total separation, underlining that it is natural that the paths of government and the church can sometimes cross and that denying equal public services to religious organizations would create atmosphere negative for

[41] S.V. Monsma, *When Sacred and Secular Mix…*

[42] In fact, due to these problems with *positive neutrality* approach, Religious Right withdrew its support for G.W. Bush's policy. Understanding that a proper application of this approach would require to fund religious organizations associated also with such religions as Scientology or the believers of Hare Krishna on equal basis, Pat Robertson distanced himself from the idea of *faith-based initiative* policy.

[43] More about it: T. Zieliński, *Państwo wobec religii w szkole publicznej według orzecznictwa Sądu Najwyższego USA*, Toruń 2008, p. 54; R.M. Małajny, *"Mur Separacji"…*, p. 267.

religion[44]. Justice Black also stressed that neutral aid respects the fact that that all citizens (religious and non-religious) have equal right to certain social services. In *Everson*, for example, it was not the religious organizations that profited from the financial help but all children equally. If the Court had decided otherwise it would also have to refuse religious organizations any access to public roads, police protection or fire and rescue service.

For non-preferentialist, however, the neutrality standards used by separationist Justices seemed to have been too strict. Especially, the introduction of the Lemon test was considered as hostile to religion. In fact, Lemon test ceased to be a unifying factor in jurisprudence[45] although it remained the nominal starting point for and Establishment Clause inquiry[46]. There are several reasons for this. The most important one is the fact that it has been extremely difficult to apply the test in all cases concerning religion in public sphere. Additionally, even when applied, it was almost impossible to implement all three of its prongs, which in some cases seemed to have been contradictory. Therefore, the Justices were searching for a better neutrality tests. Another reason is the fact that non-preferentialists approach has become much more influential in the 1980s. Also, since the 1980s, when the Republican Party allied with the Religious Right, there were more conservative Justices appointed to the Supreme Court and their views also influenced the decisions.

Instead of using the Lemon test, Courts started to use an array of divergent approaches applied by Court in different contexts of religious cases[47]. To give a general view of different approaches applied by the Supreme Court in religious cases, it is useful to point out several examples. In cases involving school curricula and classroom activity, the Court tends to apply the strictest standard, viewing with suspicion all infusions of religion into the classroom and searching carefully for an underlying religious purpose. In cases concerning the involvement of religious organizations in activities that assume the appearance of government functions, the Court uses a similar approach, inquiring whether the government has impermissibly "delegated" its authority to a religious organization. In considering prayer at public school extracurricular functions, the Court's test is whether the religious activity amounts to "coercion". In cases involving public religious displays, the Court usually asks whether there has been government "endorsement" of the displays. When free expression rights are involved, as in cases involving the availability of public fora to religious groups, the Court generally requires the government to adhere to a "neutrality" standard, neither favoring nor disfavoring religious groups. Finally, in the cases addressing government grants to religious social service providers, the constitutionality of

[44] 'Government Neutrality and Separation of Church and State: Tuition Tax Credits', *Harvard Law Review*, Vol. 92 (1979), pp. 697-699, cited in: R.M. Małajny, *"Mur Separacji"*…, p. 281.

[45] S.M. Michelman, 'Faith-Based Initiatives', 481.

[46] *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 314 (200), cited in: S.M. Michelman, 'Faith-Based Initiatives', p. 481.

[47] S.M. Michelman, 'Faith-Based Initiatives', p. 481.

the grant program depended on whether recipient organizations used the money for secular purposes. In order to secure this secular purpose, in the second half of the 20th century, the Court introduced the *pervasively sectarian* standard.

For the discussion about *faith-based initiatives* policy, the most important is to analyze the changing argumentation of the Supreme Court in cases concerning the funding of religious organizations. This analysis will show a gradual shift away from the Lemon test, but it will also prove that despite shifting toward the new "neutrality", the Supreme Court has never fully adopted this approach. In this perspective it will be easier to look closer at the *Mitchell* case, often referred to by *faith-based initiatives* policy proponents, and to analyze whether the process of funding religious charities under G.W. Bush's law is in all aspects in accordance with the standards set forth in this case, and thus constitutional.

Analyzing Court's rulings in cases concerning government grants to religious institutions, it is important to remember that there are actually quite few cases directly concerning religious charities. Therefore, jurists usually refer to decisions in Court cases concerning religious schools. Before 1947, there were only two Establishment Clause disputes concerning government funding of religion that reached the Supreme Court: *Bradfield v. Robertson* (1899) and *Quick Bear v. Leupp* (1908). In both of them, the Court decided that the funding was constitutional, but refrained from providing broad pronouncements on the clause's meaning. It was, however, already in 1899 that the Court used the *secular purpose* standard as the main argument in the case. In *Bradfield v. Robertson* the Supreme Court upheld the federal funding of a religiously owned and operated hospital because the hospital's primary function was to provide secular care and treatment.

In 1947 the *Everson* case revived the "wall of separation" metaphor, which started to shape Court's interpretation of the First Amendment[48]. After this, the Supreme Court did not hear a single case involving public funding of religion for more than 20 years. Beginning in 1968 and over the next 10 years, however, the high court heard a rapid succession of funding cases[49]. It was caused by the fact that some states in 1960s and 1970s were trying to help inner-city Catholic schools, which were struggling with reductions in revenue due to flight of middle-class Catholic families from urban areas to the suburbs. The first such case was *Board of Education v. Allen* (1968). It involved a New York state program that required local school boards to loan textbooks at no cost to all public and private schools (which might have also been religious). The Court held that the program did not violate the Establishment Clause. However, the majority opinions in *Everson* and *Allen* were used to outline a permissible means for the government to support religious schools. According to them, the government could provide aid to religious schools as long as the aid was 1) secular in content; 2) generally available to students in both public and private schools, 3) primarily directed toward students rather than toward schools.

[48] Although the Court found New Jersey bus subsidies legal as they mostly benefited the parents and the school children, not the religious schools.

[49] The Pew Forum on Religion and Public Life, 'Religion and the Courts…', p. 8.

The Lemon test (of secular purpose, effect and no "excessive entanglement") was constructed only three years later. The case *Lemon v. Kurzman* concerned Rhode Island and Pennsylvania programs which either paid part of the salaries of private school teachers who taught secular courses or reimbursed private schools for teaching secular courses. They were declared unconstitutional because although they met the first prong of the newly constructed test, it was not clear that they met the second one because the grant went to *pervasively sectarian* institutions. Additionally, it violated the third prong concerning "entanglement" because government would have to somehow control schools and that is excessive entanglement. The Lemon test was also used in *Aguilar v. Felton* (1985)[50]. In this case the Court invalidated a federal program that provided remedial instruction in New York City private schools, including religious ones, because there was no way to ensure that public school teachers did not provide religious instruction in religious schools without causing government entanglement in religious issues[51]. In *Aguilar* it became obvious that Lemon test was very difficult to apply. The two last prongs were most problematic and to some extent contradictory: there was no way to check the effect without an "excessive entanglement" between government and religion.

Because of these problems in *Bowen v. Kendrick* (1988) the Supreme Court did not use the Lemon test and referred to the *Tilton v. Richardson* (1971), which limited the reach of the Lemon case. The Court decided that since the *secular purpose* prong was the most important, the necessary thing to do was to secure it in the best possible way. The Court decided to do it by applying the *pervasively sectarian* standard. As a result, the Supreme Court upheld the program, which allowed religious groups to receive grants to provide instructions on teen sexuality, but it also introduced very important limitations. It stressed that the government may not directly fund *pervasively sectarian* organizations or specifically religious activities, therefore, the groups funded under this program were forbidden to incorporate religious references into their sex education programs, and to offer their programs in locations that provided space for religious worship or that featured religious symbols.

Another decision which shifted away from the Lemon test towards "neutrality" was *Agostini v. Felton* (1997). The Court concluded that the government may directly provide aid to religious schools as long as the aid itself is secular, and as long as the government provides safeguards to ensure that the school uses the aid for secular purposes. In fact, this decision was a re-evaluation of the *Aquilar* decision. The *Agostini* test retained Lemon's *secular purpose* prong while collapsing the other two prongs into an expanded "effects" prong under which a government program must satisfy three criteria: it may not "result in governmental indoctrination [of religion]; define its recipients by reference to religion; or create an excessive entanglement [between religion and government]"[52]. Although this test still mentions the excessive

[50] More in: ibid., p. 10.

[51] Ibid., p. 14.

[52] Agostini, 521 U.S. at 234, cited in: S.M. Michelman, 'Faith-Based Initiatives'.

entanglement, Justice O'Connor in the majority decision had argued that the majority in *Aguilar* had wrongly presumed that public school teachers sent to provide instruction in religious schools would incorporate religious content into their lessons. Instead courts should presume that teachers, as public servants, would teach only the secular content. With this presumption, O'Connor concluded, the government need not excessively monitor its teachers, and therefore the program does not violate the *entanglement* test.

The *Agostini* ruling led to *Mitchell v. Helms* (2000), which in fact removed the *pervasively sectarian* standard. The case involved a constitutional challenge to a federal program that provided all schools, both public and private, with instructional materials and equipment, including computers and film projectors. Six justices voted to uphold the program, but they disagreed on the reason for finding it was constitutional. Justice Clarence Thomas, joined by three other justices, claimed the program was constitutional because it provided secular benefits to schools without regard to whether they had a religious affiliation. Justices O'Connor and Stephen Breyer did not join this opinion because they thought it deviated too far from *Agostini* ruling. O'Connor reasoned that the *Agostini* ruling allowed the government to provide secular aid to any institution as long as the aid did not directly support religious activities. Therefore, although the government may direct funding also to a *pervasively sectarian* institution, it must take reasonable steps to ensure that recipients use the aid only for secular activities. According to her, the federal program in *Mitchell* satisfied this requirement because it had three features: it prohibited schools from using the aid for religious purposes, it limited the aid to supplemental materials, and it did not transfer ownership of the materials to the schools[53].

In the Supreme Court decisions with no majority opinion, the narrowest opinion supporting the result becomes the controlling law. In this case O'Connor's concurring opinion is narrower, thus it now governs when the government may directly support religious institutions. It is, therefore, important to evaluate G.W. Bush's policy according to this opinion.

The most important part of Justice O'Connor's decision is the evaluation of the "governmental indoctrination" question, which takes into consideration seven factors: 1) whether the aid to religious institutions is secular in content; 2) whether the aid supplants private funds; 3) whether the program includes adequate safeguards against religious indoctrination; 4) whether the aid is being diverted to religious purposes; 5) whether funding is available to religious and secular organizations on "neutral" basis; 6) whether the program fosters the perception of government endorsement of religion; and 7) whether government funds "reach the coffers" of religious institutions[54].

It is sure that funding of religious charities under Bush's law meets the first factor. It is controversial, however, whether it satisfies the rest of the factors enlisted by

[53] The Pew Forum on Religion and Public Life, 'Religion and the Courts…', p. 15.

[54] Justice O'Connor explicitly reserves the question of whether these seven factors amount to "constitutional requirements": more in: S.M. Michelman, 'Faith-Based Initiatives', p. 487.

Justice O'Connor. Most importantly, under Bush's law it is very difficult to examine it. In factor number three, O'Connor talks about "adequate safeguards". G.W. Bush's in fact include some safeguards, but, as noted before, according to some jurists, it is very difficult to prove whether they are "adequate". Many experts claim that the religious indoctrination or even coercion seems to still be quite possible under the bounds of Bush's safeguards. David Ackerman, a legislative attorney analyzing charitable choice for the Congressional Research Service, claims that the safeguards barring the funding of "sectarian worship, instruction or proselytization" cannot be implemented while the law at the same time protects the right of religious groups to fully practice and express their believes while providing social services. He underlines that for many evangelical organizations the sharing of faith (proselytization) is an essential component their religious practice[55]. Scott M. Michelman additionally underlines that with beneficiaries in the especially vulnerable positions (relying on providers for basic necessities such as food or housing), it is possible that "the participation of desperate people in religiously styled programs may cross the line into coercion"[56]. With so many different religions in the USA, it is especially dangerous that poor people might be forced to deny their religious tradition in order to receive service from the provider available in his area, if no alternative (neither religious nor secular) is provided.

For Scott M. Michelman, most of O'Connor's factors are likely to be violated under Bush's law. He explains that since key premise behind *charitable choice* and Bush's policy is the belief that the spiritual dimension of faith-based service providers contributes to their efficacy, the religious components of aid distribution are not merely a likely byproduct but a fundamental goal of faith-based initiatives[57]. Ackerman seems to agree with this view. Furthermore, he argues that the underlying spirit of charitable choice is at odds with the notion of non-establishment. Subsidizing religious groups in social welfare programs is based on a tacit acknowledgment of the transformative power of religion, and the presumption that it will be transmitted at some point in service delivery. The belief that religious groups have a special capacity to serve and address problems effectively[58] suggests that they need to be able to share the tenets of their particular belief[59]. Thus government dollars would be used to promote religion. Also George Washington University law professors: Ira Lupu and Robert Tuttle see constitutional problems with *faith-based initiatives* policy. According to

[55] D. Ackerman, *Charitable Choice: Constitutional Issues and Developments through the 106th Congress*, Report prepared for the Congressional Research Service of the U.S. Congress (Washington, D.C.) 2000, cited in: A.E. Black, D.L. Koopman, D.K. Ryden, *Of Little Faith…*, p. 238.

[56] S.M. Michelman, 'Faith-Based Initiatives', p. 488.

[57] Ibid. Michelman agrees in this view with Martha Minow. More about it in: M. Minow, *Choice or Commonality. Welfare and Schooling after the End of Welfare as We Knew It*, Duke (L.J.) 1999.

[58] There has been no research confirming the claims that religious organizations are more effective than secular ones. More about it: R. Wuthnow, *Saving America? Faith-Based Services and the Future of Civil Society*, Princeton (NJ) 2004.

[59] David Ackerman cited in: A.E. Black, D.L. Koopman, D.K. Ryden, *Of Little Faith…*, p. 239.

their analysis it becomes obvious that the requirements of O'Connor's factors cannot be satisfied. The problem is that the religious organizations' programs addressing substance abuse, juvenile delinquency, and adult criminal recidivism are "transformative in the deepest sense" seeking to "change the fundamental beliefs and practices of participants (…)". And in the view of both of the professors, the "project of awakening and or deepening faith is beyond the competence of state" that is presumed in these programs is simply beyond the competence of the state[60].

According to Michelman, Bush's policy violates even the neutrality (factor 5) principle, so strongly propagated by his supporters. He claims that during the process of granting federal money under *faith-based initiatives* policy, secular and religious providers are not treated equally. Faith-based social service providers actually have at least three advantages over non-religious private providers: they are exempt from certain employment discrimination laws, they are subject to a more limited audit, and they are specifically protected against discrimination by the government in the allocation of grants[61]. His arguments concerning unequal treatment might be supported by information provided by David Kuo, who used to work for G.W. Bush, in his book: *Tempting Faith. An Inside Story of Political Seduction*. According to him, preferential treatment has been given mostly to conservatively Protestant evangelical organizations[62].

Michelman also expressed his concerns about the implementation of the seventh factor in O'Connors reasoning. He claimed that the direct funding of religious institutions might easily "reach their own coffers". To support his view, he referred to the view expressed by some of the Justices (both concurrence and dissent) in *Mitchell*, who agreed that direct funding of religious institutions increases the risk of an Establishment Clause violation[63]. While direct aid under Bush's policy seemed to him constitutionally suspect, he considered the indirect aid provision as standing on much firmer constitutional ground[64]. In 2007, however, the Court decided that direct funding under certain conditions was constitutional.

Nevertheless, the analysis of *Mitchell* requirements shows that Bush's policy included many elements which can be considered as constitutionally dubious. *Mitchell* eliminated the *pervasively sectarian* standard, but it introduced a multi-factor analysis. The process of granting federal funds to religious organizations under rules introduced in Bush's executive orders is difficult to control and it is almost impossible to clearly decide whether it implements the requirements of *Mitchell* test. Therefore,

---

60 I.C. Lupu, R.W. Tuttle, *Government Partnership with Faith-Based Service Providers. The State of Law* Washington D.C. 2002, cited in: A.E. Black, D.L. Koopman, D.K. Ryden, *Of Little Faith…*, p. 239.

61 S.M. Michelman, 'Faith-Based Initiatives', p. 490.

62 D. Kuo, *Tempting Faith. An Inside Story of Political Seduction*, New York 2006.

63 S.M. Michelman, 'Faith-Based Initiatives'. p. 491.

64 According to Justice O'Connor, indirect aid allows the individual beneficiary to "retain control over whether the secular government aid will be applied" to religious organizations. More in: Mitchell 530 U.S. at 842, cited in: S.M. Michelman, 'Faith-Based Initiatives', p. 491.

since 2001 there have already been two Supreme Court cases concerning faith-based initiatives. In 2007 in a *Hein v. Freedom from Religion Foundation*, a church-state watchdog group that wanted to challenge *faith-based initiatives* policy. The group alleged that various federal executive agencies had violated the Establishment Clause by using tax dollars to promote the faith-based initiatives. The Court, however, turned the allegation down arguing that tax-payers standing applies only when the *legislative* branch specifically authorizes the use of tax dollars for religious institutions or purposes, not when the executive branch uses discretionary dollars without that legislative authority[65]. The use of President's executive orders, due to the fact that the Bush Administration did not managed to pass the bill in Congress, turned out to be the best way to introduce and keep faith-based initiatives solutions.

However, despite *Hein* decision, taxpayers still have standing in federal courts to challenge government funding of religion if the legislature has specifically authorized grants to religious entities[66]. In *Americans United for Separation of Church and State v. Prison Fellowship Ministries* (2007), the 8th U.S. Circuit Court of Appeals ruled that a church-state watchdog group had standing to challenge a faith-based organization's provision of rehabilitative services because the state legislature specifically appropriated tax dollars to fund these services. Moreover, the court also held that the Prison Fellowship Ministries' use of religious instruction and worship in providing these services violated the Establishment Clause. The Court explained that while the *Mitchell* ruling permitted direct government funding of a religious organization's secular activities, the ruling still prohibited direct public funding of religious activities.

The *Mitchell* turned out to be very difficult to apply to individual controversies. It is, for example, still unclear whether a group that offers both secular social welfare service and religious instruction can get government funding for such expenses as renting an office or photocopier. It is also unclear whether the government may pay a counselor who uses both secular and religious message to help people suffering from substance abuse. The answers to these questions will depend on the particular facts of the case.

It is possible that the Supreme Court will hear cases concerning these questions quite soon because it turned out that under the newly-elected President Obama, the policy of faith-based initiatives will be continued. It has come as a surprise to many because during the presidential campaign Obama claimed that, although in general he supports religious involvement in social services provisions, he thinks that better safeguards are necessary. He also made statements suggesting he might change the policy, especially to prohibit all recipients of federal aid from hiring on the basis of faith. However, not only did he retreat from this stance and said that his administration would instead take on the faith-based hiring issue on a case-by-case basis, but also established a new White House Office of Faith-Based and Neighborhood Partnerships, which in fact is similar to its predecessor in many ways.

[65] The Pew Forum on Religion and Public Life, 'Religion and the Courts…', p. 16.

[66] Ibid.

As the case of *faith-based initiatives* policy illustrates, although the USA has a long tradition of the separation of church and state, changes in presidents and political parties may change the character of church-state partnership. Depending on what approach to the interpretation of the religious clauses of the First Amendment they prefer, they might try to introduce laws favoring their attitude to religion. The effects of these changes should be limited because the executive and legislative branches are obligated to respect the appropriate constitutional limitations, which are determined by courts. However, the Justices appointed to the Supreme Court also often disagree on the interpretation of the idea of the church-state separation. The appointments of conservative Justices made by President Bush might cause another shift in the Court's interpretation of the constitutional church-state boundaries. Both Chief Justice John Roberts appointed in 2005, and Justice Samuel Alito appointed in 2006, voted with the conservative majority in the 2007 *Hein* case, which is considered to have made more difficult for people to bring suits concerning Establishment Clause in cases connected with faith-based initiatives[67]. It remains to be seen whether the Supreme Court will move further toward *positive neutrality* approach. For now, however, according to law, cases concerning the *faith-based initiatives* policy still have to turn on whether there is some assurance that the recipient of federal funding has actually segregated that funding from the group's religious programs.

[67] Ibid., p. 17.

Mgr Paulina NAPIERAŁA, doktorantka w Instytucie Amerykanistyki i Studiów Polonijnych Uniwersytetu Jagiellońskiego; absolwentka stosunków międzynarodowych (Instytut Nauk Politycznych i Stosunków Międzynarodowych UJ) oraz stosunków etnicznych i migracji międzynarodowych (Instytut Amerykanistyki i Studiów Polonijnych UJ); stypendystka Polsko-Amerykańskiej Komisji Fulbrighta, Biblioteki Instytutu J.F. Kennedy'ego (FU) oraz Instytutu Nauk o Człowieku w Wiedniu (stypendium im. Ks. J. Tischnera). Zainteresowania naukowe: relacje państwo–Kościół, rola religii w polityce, działalność amerykańskiej prawicy religijnej, specyfika religijności w Stanach Zjednoczonych, amerykańska polityka społeczna.