

The eroding faith-state divide

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IF THERE is one issue you would expect the Republican majority in Congress to agree on easily, it's President Bush's initiative to funnel government funds to faith-based organizations for a range of social services.

Just the opposite. Congress is stalled on enacting legislation to make the administration's central domestic policy initiative a permanent part of federal law.

In the Senate, a bipartisan effort by Sens. Rick Santorum, R-Pa., and Joseph Lieberman, D-Conn., to craft faith-based legislation failed, in large part because of a White House refusal to compromise on difficult constitutional issues. In the House, a little known subcommittee of the Committee on Government Reform and Oversight has held 11 hearings on the subject without making progress.

The most recent hearing was in June when the subcommittee considered HR1054, sponsored by Rep. Mark Green, R-Wis. But the legislation, which includes some creative elements designed to win over wavering lawmakers, is stuck still in the subcommittee, and is unlikely to pass any time soon, if at all.

The reason? The president's faith-based initiative may have the unintended consequence of breaking down the fragile barriers between church and state embodied in the First Amendment of the U.S. Constitution.

A principal concern on both sides of the political aisle is that by accepting government contracts, churches may open themselves up to all sorts of scrutiny from federal agencies that they have not been subjected to up until now. "The more there is a steady flow of government money, the more likely it is there will be more regulation," says Douglas Laycock, a professor of constitutional law at the University of Texas at Austin School of Law, a leading scholar on religious liberty.

So, instead of relying on Congress to act, President Bush issued a series of executive orders to institutionalize his faith-based initiatives. Last year alone, the executive orders allowed more than \$1 billion to flow to religious organizations. But a future president could revoke those orders at any time, which is why supporters of the initiative prefer that it be codified in federal law.

One advantage of going the executive-order route is that the president has so far been able to skirt a thicket of difficult constitutional issues. One is whether churches receiving federal funds should be required to meet federal anti-discrimination laws. Bush's executive orders exempt faith-based organizations from a previous order that prohibits discrimination in hiring based on an applicant's religion. His executive orders also allow religious organizations to participate in federal grant programs "without impairing their independence, autonomy, expression or religious character."

Most religious organizations have so far avoided legal and constitutional confrontations by

setting up separate nonprofit organizations. That way they can keep their religious activities separate from the social services they provide — and avoid dealing with tricky issues such as what constitutes proselytizing, where exactly prayers can be conducted and what religious symbols can be displayed, and where.

“We open up a Pandora’s box that would end an extraordinary period of religious autonomy and freedom in our country,” says Rabbi David Saperstein, director of the Religious Action Center of Reform Judaism. So, for example, a Catholic organization that receives government funds might find itself being sued for not ordaining openly gay men. An Orthodox Jewish seminary might be sued for not ordaining women.

These are legal complications churches shouldn’t have to endure. For that reason, religious organizations, which for decades have successfully run social programs without inviting constitutional confrontations, are almost certainly better off without formal faith-based programs. “The notion that we can’t do our work because we don’t have government support belies the reality of the extraordinary work religious organizations provide every day,” says Saperstein.

In his zeal to funnel government funds to religious organizations, President Bush’s faith-based initiative threatens a fundamental constitutional principle: the separation of church and state. It is a key reason why Congress must continue to resist entrenching it in federal law.

Page B - 8

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