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CASENOTES

WIELDING THE AX OF NEUTRALITY: THE CONSTITUTIONAL STATUS OF CHARITABLE CHOICE IN THE WAKE OF *MITCHELL V. HELMS*

I. INTRODUCTION

During the past decade, the Supreme Court loosened restraints that it had previously imposed upon government aid to religious institutions. In 1996, Congress and the President seized upon this phenomenon and implemented a controversial provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996—also known as the Welfare Reform Act of 1996.[1] Included among the various revolutionary provisions of this legislation is something known as Charitable Choice. This program authorizes states to contract with religious institutions to provide social welfare services on behalf of the states.[2]

This, in and of itself, is not shocking. Many states already contract with private social service providers including religiously *affiliated* institutions such as Catholic Ministries USA.[3] These institutions, however, operate separately from the sectarian functions of the churches that sponsor them. They distribute so-

1. 42 U.S.C. § 604a (Supp. IV 1998).
2. *See id.*
3. *See* H.R. CONF. REP. NO. 104-725, at 316 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2704 (stating that the Child Care and Development Block Grant Act prohibits any contracts or grants to any institution to be used for "sectarian purpose or activity" or to any institution that discriminates on the basis of religion).

cial services in a secular manner without reference to religious beliefs or indoctrination. Charitable Choice is revolutionary, though, because it authorizes state governments to distribute direct federal monetary grants to religious institutions *themselves*.[4] Additionally, the Charitable Choice program specifically prohibits a state from denying aid to a religious institution if the administration of its social services involves religious exercises.[5]

In June 2000, the Supreme Court issued its decision in *Mitchell v. Helms*.[6] In *Mitchell*, the Court upheld the constitutionality of Chapter 2 of the Education Consolidation and Improvement Act of 1981,[7] which permits direct government aid to religious schools in the form of equipment loans.[8] A plurality of the Court upheld the program, reasoning that direct aid to a religious institution is constitutional so long as the distribution of aid results out of a neutral and secular standard driven by the private decisions of individuals.[9] A majority of the Court, however, refused to endorse the plurality's all-encompassing conception of private choice.[10]

Currently, it is not clear when and how direct government aid to religious institutions violates the Establishment Clause.[11] *Mitchell*, however, will have a major impact on the constitutional status of Charitable Choice. President Bush recently announced the formation of a White House Office of Faith-Based and Community Initiatives, which will distribute $24 billion in Charitable Choice aid to private religious organizations over the next ten years.[12] Numerous Charitable Choice programs already exist.[13] These controversial aid packages will have a major impact on the

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4. *See* 42 U.S.C. § 604a(a)(1) (Supp. IV 1998).
5. *See id.* § 604a(c).
6. 120 S. Ct. 2530 (2000) (plurality opinion).
7. 20 U.S.C. §§ 7301–7373 (1994 & Supp. IV 1998).
8. *Mitchell*, 120 S. Ct. at 2537; 20 U.S.C. § 7351(b)(2) (1994 & Supp. IV 1998).
9. *See Mitchell*, 120 S. Ct. at 2536–37.
10. *See* discussion *infra* Parts III.C–D.
11. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").
12. *See Social Aid Plan Proposed, Bush: U.S. Funds for Churches, Charities Can Boost Effectiveness*, RICH. TIMES-DISPATCH, Jan. 30, 2001, at A1; *All Things Considered: Faith-Based Initiatives* (NPR radio broadcast, Jan. 24, 2001), *available at* http://www.npr.org/ramfiles/atc/20010124.act.14.ram.
13. *See, e.g.*, Americans United for Separation of Church and State, *at* http://www.au.org/cc-leg.htm (last visited Mar. 16, 2001) (listing successful legislation containing Charitable Choice provisions, including The Youth, Drug and Mental Health Service Act of 1999).

manner in which our government provides social services. It is important, therefore, to delineate the contours of the *Mitchell* decision and how it will affect the constitutional status of Charitable Choice programs now and in the future.

Part II of this note will trace the evolution of the Supreme Court's aid to religion jurisprudence decided under the Establishment Clause. This review demonstrates the slow and rocky manipulation of the Court's original three-part Establishment Clause test found in *Lemon v. Kurtzman*,[14] up through the test's radical transformation in *Agostini v. Felton*[15] and *Mitchell*.

Part III focuses exclusively on an in-depth explanation of the decision in *Mitchell*. This section contrasts the plurality's opinion, authored by Justice Thomas, with the holdings in past cases, and compares Justice Thomas's opinion with Justice O'Connor's concurrence. Finally, this section examines and critiques Justice Souter's dissent. Hopefully, from the Court's cacophony, we will glean some conclusions as to the current rule of law and where the Court is headed in the future.

Part IV examines the mechanics of Charitable Choice by presenting and evaluating these mechanics under the guiding principles of the Court's current stance in *Mitchell*. Viewed in this manner, Charitable Choice violates the Establishment Clause because it does not have a secular purpose. Assuming that it does have such a secular purpose, Charitable Choice still violates the Establishment Clause because it authorizes direct cash payments to the coffers of pervasively sectarian institutions. A social service voucher program is the Charitable Choice program most likely to survive constitutional scrutiny.

Part V focuses on the policy behind the two competing theories of Establishment Clause interpretation—separationism and neutrality.[16] A significant portion of this section examines policy concerns that religious organizations should take into account before attempting to vie for government money.

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14. 403 U.S. 602 (1971).
15. 521 U.S. 203 (1997).
16. *See, e.g.*, ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT (3d ed. 1987); FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976).

II. THE EVOLUTION OF SUPREME COURT JURISPRUDENCE OF GOVERNMENT AID TO RELIGION

A. Everson v. Board of Education

In 1947, the Supreme Court ushered in its modern age of Establishment Clause jurisprudence with *Everson v. Board of Education.*[17] In *Everson*, a New Jersey statute authorized local school districts to provide transportation reimbursements to parents of children who attended private religiously oriented schools.[18] This was the first case to hold that the Establishment Clause, via the Fourteenth Amendment, applies to state action as well as federal government action.[19]

The Court upheld the New Jersey program.[20] It found that a general welfare program does not violate the Establishment Clause when it minimally aids religion in a neutral manner.[21] The regulation only incidentally aided religious practice by providing safety and welfare benefits to clearly secular functions of religious organizations.[22] Moreover, the aid flowed to the parents, not to the religious school.[23] While such regulations may passively aid religion, they do so without favoring religion.

B. Lemon v. Kurtzman

In the composite case of *Lemon v. Kurtzman*,[24] the Court reviewed the constitutionality of statutes in Rhode Island and Pennsylvania that provided state aid to religious elementary and secondary schools.[25] The Rhode Island statute authorized a salary supplement of up to fifteen percent for private school teachers of secular subjects.[26] The Pennsylvania act authorized a reimburse-

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17. 330 U.S. 1 (1947).
18. *See id.* at 3.
19. *See id.* at 8, 16.
20. *Id.* at 18.
21. *Id.* at 17–18.
22. *See id.* at 18 ("Of course, cutting off church schools from these services, so separate and so indisputably marked off from their religious function, would make it far more difficult for the schools to operate.").
23. *See id.* at 17.
24. 403 U.S. 602 (1971).
25. *Id.* at 606.
26. *See id.* at 607.

ment to nonpublic schools for teachers' salaries, textbooks, and instructional materials—all pertaining to secular subjects.[27]

Chief Justice Burger wrote the decision of the Court setting up a three-pronged analysis for determining when state aid to religion violates the Establishment Clause.[28] "First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[29] Applying the first criterion, the Court held that both statutes had secular purposes because they intended to enhance the quality of secular education in all schools—both public and religious.[30]

The Court did not decide whether the statutory schemes had the effect of advancing religion.[31] Instead, it held that government aid that funds religious exercise violates the Establishment Clause.[32] As for the Rhode Island program, the Court found that the religious nature of the schools was so substantial that it justified a presumption that even secular teachers in those schools, to some degree or another, will inculcate religious values.[33] The Court recognized that the state-installed procedural safeguards necessarily involved a "comprehensive, discriminating, and continuing state surveillance" of religion that violates the Establishment Clause.[34] The Court found that the Pennsylvania statute possessed similar defects. The fact that the Pennsylvania statute authorized direct cash grants to religious institutions, however, troubled the Court the most.[35] The Court overturned both statutes due to the fact that they involved excessive entanglement.[36]

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27. *See id.* at 609–10.
28. *See id.* at 612–13.
29. *Id.* (citations omitted).
30. *Id.* at 613.
31. *See id.* at 613–14.
32. *Id.* at 625 ("Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.").
33. *Id.* at 618 ("We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.").
34. *Id.* at 619.
35. *Id.* at 621. Particularly, the Court was concerned with the state's power to inspect a religious school's financial records in order to comply with the statute's mandate that religious funds and secular funds be kept separate. *See id.*
36. *Id.* at 603.

C. *The* Lemon *Test Applied*

Over the next twenty-five years, the Supreme Court pulled, twisted, molded, massacred, processed, decried, lambasted, and manipulated Chief Justice Burger's *Lemon* test.[37] This section will briefly trace the major aid-to-religion cases.

1. *Tilton v. Richardson*

In *Tilton v. Richardson*,[38] decided on the same day as *Lemon*, the Court overturned a portion of the Higher Education Facilities Act[39] that authorized federal grants and loans to sectarian institutions of higher learning.[40] While the Act contained a provision prohibiting the use of the funds to construct facilities for sectarian worship, the provision expired after twenty years.[41]

Applying the *Lemon* test, the Court held that Congress enacted the legislation with a secular purpose.[42] Under the second prong, however, the Court found that if, after expiration of the twenty-year prohibitory period, the benefited religious institutions used the facilities for sectarian worship, then the government's grant would result in religious advancement.[43]

Under its entanglement analysis, the Court drew a distinction between secondary schools and universities.[44] Unlike the elementary schools in *Lemon*, providing a secular education was the primary mission of the religiously affiliated universities receiving

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37. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

38. 403 U.S. 672 (1971).

39. 20 U.S.C. § 751(a)(2) (1964).

40. *Tilton*, 403 U.S. at 675, 689.

41. *See id.* at 675.

42. *Id.* at 676–77.

43. *See id.* at 683 ("If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.").

44. *See id.* at 687 ("Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.").

funds in *Tilton*.[45] According to the Court, continued government surveillance to ensure compliance with restrictions on religious discourse is less of a concern in this context.[46] Additionally, the Court found that, while the teachers in *Lemon* might have had difficulties resisting indoctrination, the facilities at issue in *Tilton* were religiously neutral.[47]

In *Tilton*, the Supreme Court established the ideological nature of the institution receiving aid and the convertibility of that aid to further religion as entanglement concerns. The Court struck down the twenty-year limit, but remanded the case back to the district court with the remainder of the statute intact.[48]

2. *Committee for Public Education and Religious Liberty v. Nyquist*

Two years after *Lemon* and *Tilton*, the Court considered *Committee for Public Education and Religious Liberty v. Nyquist*,[49] involving a New York statute that authorized: (1) direct monetary grants for physical maintenance of all school facilities, including religious secondary and elementary schools; (2) tuition reimbursements to indigent parents of children attending private schools; and (3) certain state tax exemptions to parents who did not qualify for the tuition reimbursement.[50]

Applying *Lemon*, the Court held that the three statutory schemes had a secular legislative purpose—"preserving a healthy and safe educational environment for all of its schoolchildren."[51] The Court, however, found that all three statutory schemes had the effect of advancing religion because all three involved direct aid to religious institutions.[52] The Court distinguished the maintenance aid in *Nyquist* from the similar aid in *Everson* on the di-

45. *See id.*
46. *See id.*
47. *See id.* ("The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides.").
48. *Id.* at 689.
49. 413 U.S. 756 (1973).
50. *See id.* at 762–68.
51. *Id.* at 773.
52. *See id.* at 774–94.

rect aid point. Here, the direct aid would finance the maintenance of the building for both secular and sacred functions.[53]

3. *Meek v. Pittenger*

In *Meek v. Pittenger*,[54] the Court invalidated a pair of Pennsylvania statutes granting equipment loans and the use of public personnel for student counseling and remedial education services to religious primary and secondary schools.[55] The Court held that the equipment loans failed the second prong of the *Lemon* test because of "the predominately religious character of the schools benefiting from the Act."[56] Unlike the general public welfare services approved in *Everson*, the Court held that the equipment loans were "neither indirect nor incidental."[57] The Court was concerned that substantial amounts of direct aid to the school, although earmarked for secular purposes and not having any religious content per se, would inevitably aid religious functions.[58]

The Court noted that when "faced with the *substantial amounts of direct support* authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominately religious role performed by many of Pennsylvania's church-related elementary and secondary schools."[59] The Court went on to say that

> the very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.... *Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.*[60]

"For this reason," the Court concluded, "Act 195's direct aid... inescapably results in the direct and substantial advancement of

53. *See id.* at 774–80. "If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777.

54. 421 U.S. 349 (1975).

55. *Id.* at 366.

56. *Id.* at 363.

57. *Id.* at 365.

58. *See id.* at 365–66.

59. *Id.* at 365 (emphasis added).

60. *Id.* at 366 (emphasis added) (citations omitted).

religious activity . . . and thus constitutes an impermissible establishment of religion."[61]

The Court refused to decide whether the auxiliary services also constituted an impermissible advancement of religion.[62] Instead, the Court held that the prophylactic measures used to ensure that such personnel would not invoke religion amounted to excessive entanglement under the *Lemon* test.[63] "[A] state subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction . . . from his secular educational responsibilities."[64] In this respect, the Court failed to distinguish between the urges of instructors employed by religious institutions and those employed by the state.

The *Meek* decision established that potentially secular aid would almost always be used for religious purposes in institutions primarily dedicated to further sectarian ends. Substantial direct aid to such institutions, therefore, has the undeniable effect of advancing religion, even when the aid itself does not contain a religious message. According to the decision in *Meek*, the Court will examine both the nature of the institution to which the aid is provided and whether the aid is direct or indirect.[65] Direct aid is per se unconstitutional when it goes to institutions that so intertwine sectarian and secular functions as to make them indistinguishable.[66] Indirect aid to institutions that are not so permeated by religion, however, will be upheld.[67]

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61. *Id.* (citations omitted).

62. *Id.* at 369.

63. *See id.* at 370 ("[E]xcessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that . . . personnel do not advance the religious mission of the church-related schools in which they serve.").

64. *Id.* at 371.

65. *See id.* at 368–69.

66. *See id.* at 363.

67. *See id.* at 359. The Court reaffirmed this principle the following term in *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976). In *Roemer*, the Court upheld direct monetary aid to religious universities. *See id.* at 754–61. The Court specifically relied upon the holding in *Tilton* that the presumption of religious indoctrination applies with little force to religiously affiliated institutions whose primary purpose is to foster secular education. *See id.* Therefore, the direct aid was not going to a pervasively sectarian institution. *See id.*

4. *Larkin v. Grendel's Den*

In *Larkin v. Grendel's Den*,[68] an eight-to-one decision, the Court invalidated a Massachusetts statute granting churches the right to veto an application for a liquor license by any establishment located within a 500-foot radius.[69] The Court held that the statute violated all three prongs of the *Lemon* test.[70] Massachusetts argued that the statute served secular zoning purposes.[71] The Court held, however, that Massachusetts could have accomplished this goal through means that did not delegate the decision to religious authorities.[72] The Court, therefore, denied the validity of Massachusetts's proffered secular purpose. Such a delegation necessarily advances religion by allowing it to directly control the implementation of government policy. The statute also contained a clear example of religious entanglement in government by "vesting significant governmental authority in churches."[73]

According to the Court, this was a paradigmatic example of the fusion of government and religion that the Establishment Clause was designed to prevent.[74] "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[75] The overwhelming majority decision and the abrupt tone of the opinion indicated that the Court would not look kindly on such blatant attempts to vest government power in religious authorities.

D. *The Rise of Private Choice Principles in "Effects" Analysis*

1. *Mueller v. Allen*

In *Mueller v. Allen*,[76] the Court upheld a Minnesota statute that granted a state tax deduction to parents for their children's

68. 459 U.S. 116 (1982).
69. *Id.* at 117.
70. *See id.* at 127.
71. *Id.* at 120–21.
72. *See id.* at 122.
73. *Id.* at 126.
74. *Id.*
75. *Id.* at 127.
76. 463 U.S. 388 (1983).

educational expenses. The deduction applied to parents of both public and non-public school students.[77] It exempted a variety of expenses ranging from tuition to tutoring costs to physical education requirements.[78] Basically, any money spent on education-related activities by any parent was deductible for state tax purposes.[79] The statute prohibited the deduction for religious expenses.[80]

The Court wasted little time in concluding that Minnesota's goal served a secular purpose, as required under the first prong of the *Lemon* test.[81] As to the "effects" prong, the Court concluded that the benefits to religion more closely resemble those permitted under the Establishment Clause (*i.e.*, *Everson*) than those prohibited (*i.e.*, *Nyquist*).[82] For the first time in a government assistance-to-religion case, the Court relied upon principles of individual private choice to justify the conclusion that the state practice did not advance religion.[83] The statutory scheme benefited the individual, not religion. The individual's choice, not the government's decision to fund, put the aid to religious use.

> [B]y channeling whatever assistance it may provide to parochial schools through individual parents, . . . Minnesota's arrangement [of] public funds become[s] available *only as a result of numerous private choices of individual parents* of school-age children. . . . Where, as here, aid to parochial schools is available *only as a result of decisions of individual parents* no "imprimatur of state approval," . . . can be deemed on any particular religion or on religion in general.[84]

Finally, the Court concluded that the statute does not excessively entangle government with religion, even though the deduction did not apply to religious books or materials.[85] The state can determine whether certain expenses are secular without resorting to an invasive system of government surveillance.[86]

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77. *Id.* at 397.
78. *Id.* at 390 n.1.
79. *See id.* at 391–92 n.2.
80. *Id.* at 390 n.1.
81. *See id.* at 394–95.
82. *Id.* at 398.
83. *See id.* at 397–99.
84. *Id.* at 399 (emphasis added) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).
85. *Id.* at 403.
86. *See id.*

2. *Bowen v. Kendrick*

In *Bowen v. Kendrick*,[87] the Court denied a facial Establishment Clause-based challenge to certain provisions of the Adolescent Family Life Act of 1981 ("AFLA").[88] The challenged provisions authorized federal monetary grants to organizations implementing programs with the purpose of curbing teenage pregnancy.[89] A particular provision explicitly stated that grant implementation should involve a broad range of organizations, including religious institutions.[90] The AFLA imposes several limitations on the use of its grant funds, including: (1) a ban on the use of funds for family planning services; (2) a ban on grants to institutions who provide abortions, abortion counseling, or abortion referral; and (3) a ban on the use of funds for projects or programs advocating the use of abortion.[91]

The Court held that Congress's inclusion of religious organizations in its statutory scheme does not endorse a non-secular purpose.[92] Reducing teenage pregnancy is the goal of the AFLA.[93] Including religious organizations in the task simply represents a legitimate congressional "aim of increasing broadbased community involvement 'in helping adolescent boys and girls understand the implications of premarital sexual relations, pregnancy, and parenthood.'"[94]

The Court's decision explicitly recognized the connection between direct aid to pervasively sectarian institutions and the use of funds for religious purposes under the "effects" prong of the *Lemon* test.[95] While the AFLA does not contain limitations on the use of funds for religious purposes, there is nothing in the statute

87. 487 U.S. 589 (1988).

88. *Id.* at 593; 42 U.S.C. § 300z (1994). One of the goals of the AFLA is "to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations." 42 U.S.C. § 300z(a)(10)(C).

89. *Bowen*, 487 U.S. at 593; 42 U.S.C. § 300z-2.

90. *See Bowen*, 487 U.S. at 595–96; 42 U.S.C. § 300z(a)(8)(B).

91. *Bowen*, 487 U.S. at 596–97.

92. *Id.* at 602–04.

93. *See id.* at 604–05.

94. *Id.* at 603 (quoting S. REP. NO. 97-161 at 15–16 (1981)).

95. *Id.* at 610 ("Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions.").

to indicate that religious uses are permitted.[96] The Court, therefore, refused to hold that the statute specifically earmarked aid for pervasively sectarian institutions.[97]

The Court held that there was insufficient entanglement between government and religion to justify overturning the statute.[98] The school-funding cases make clear that aid to pervasively sectarian institutions requires a degree of oversight that violates the third prong of the *Lemon* test.[99] Without explanation, the Court concluded, however, that "there is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be."[100]

The *Bowen* decision left open the possibility that the statute, as applied, could violate the Establishment Clause. The Court remanded the case for a fact-specific determination as to whether the AFLA, in operation, gave direct aid to pervasively sectarian institutions.[101] The use of grants to produce "materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith" would impermissibly advance religion.[102] However, "evidence that the views espoused on questions such as premarital sex, abortion, and the like happen[ed] to coincide with the religious views of the AFLA grantee would not be sufficient to show that the grant funds [were] being used . . . to have a primary effect of advancing religion."[103]

The *Bowen* decision illustrates the Court's reluctance to strike down a statute on its face without factual evidence indicating an impermissible use of direct aid for religious purposes. Still, the Court has held that direct aid to pervasively sectarian institutions violates both the "effects" and "entanglement" prongs of the *Lemon* test.[104] Outside the context of parochial school aid, how-

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96. *Id.* at 614.

97. *See id.* at 610.

98. *See id.* at 616 ("There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees.").

99. *See* discussion *supra* Part II.C.

100. *Id.*

101. *Id.* at 620–22.

102. *Id.* at 621.

103. *Id.*

104. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 409 (1985); Hunt v. McNair, 413 U.S.

ever, the Court will likely require a factual record indicating the pervasively sectarian nature of institutions receiving direct government aid in order to justify fashioning an appropriate remedy.

3. *Zobrest v. Catalina Foothills School District*

In *Zobrest v. Catalina Foothills School District*,[105] the Court held that a public school district would not violate the Establishment Clause by providing a sign-language interpreter to a deaf student attending a parochial school.[106] The Catalina Foothills School District refused James Zobrest's request under the Individuals with Disabilities in Education Act ("IDEA")[107] on the ground that such action would violate the Establishment Clause.[108]

The Court, once again, invoked the principle of private choice, holding that this type of indirect aid to religion would not violate the Establishment Clause.[109] The government benefit was available, under the IDEA, to all hearing-impaired students regardless of whether they attended a public or religious school.[110] Zobrest's choice, not government action, dictated where the sign-language interpreter performed.[111] "In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking."[112]

The *Zobrest* decision is important for our purposes because it entrenched three points in the aid-to-religion cases. First, unlike previously invalidated programs in *Meek* and *School District of Grand Rapids v. Ball*,[113] the aid to Zobrest simply supplemented

734, 743 (1973).

105. 509 U.S. 1 (1993).

106. *Id.* at 14.

107. 20 U.S.C. §§ 1400–1489 (1994).

108. *Zobrest*, 509 U.S. at 3.

109. *See id.* at 10–11.

110. *Id.* at 10.

111. *Id.* at 10–11.

112. *Id.* at 10.

113. 473 U.S. 373 (1985) (invalidating a program employing public employees as teachers of secular subjects in parochial schools as having the effect of advancing religion based on three assumptions: (i) any public employee who works on the premises of a religious school will inculcate religious values; (ii) the presence of public employees on the campuses of religious schools creates a symbolic union between government and religion; and (iii) all

costs to the sectarian institution.[114] The statutory schemes in those cases specifically sought to supplant costs that the religious schools would have otherwise borne in fulfilling their state-mandated minimal education requirements.[115] Second, in *Zobrest,* the aid recipient was identified by his handicap, not by his religion.[116] Any deaf child may receive aid. The statutes in *Meek* and the education programs in *Ball* imposed benefits primarily upon religious institutions.[117] Third, the aid to Zobrest was indirect in that the handicapped child, not the religious school, received the aid.[118]

Additionally, publicly employed sign-language interpreters do not provoke the same danger of religious inculcation as teachers employed by parochial schools.[119] Sign-language interpreters simply translate word-for-word the speech of students and teachers.[120] "The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause."[121]

E. *The Reformulation of the* Lemon *Test:* Agostini v. Felton *and a New Age of Establishment Clause Jurisprudence*

Recognizing the crucial change that private choice principles inflicted upon Establishment Clause jurisprudence, the Court seized the opportunity to abandon previous decisions in *Ball* and its companion case *Aguilar v. Felton,*[122] in *Agostini v. Felton.*[123] *Agostini* was, in fact, an extension of *Aguilar.* In *Aguilar,* the Court invalidated a portion of Title I of the Elementary and Sec-

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direct public aid to religious schools invariably aids the sectarian functions of that school).

114. *See Zobrest,* 509 U.S. at 12.

115. *Id.*

116. *Id.*

117. *Ball,* 473 U.S. at 375; Meek v. Pittenger, 421 U.S. 349, 351 (1975).

118. *See Zobrest,* 509 U.S. at 10 ("[U]nder the IDEA, no funds traceable to the government ever find their way into the sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child's tuition.").

119. *See id.* at 13.

120. *See id.*

121. *Id.*

122. 473 U.S. 402 (1985).

123. 521 U.S. 203 (1997).

ondary Education Act of 1965,[124] which authorized public teachers to provide remedial instruction at parochial schools.[125] In accordance with that decision, the district court in *Agostini* issued a permanent injunction against operation of the statute.[126] In 1995, the petitioners filed motions under Federal Rule of Civil Procedure 60(b)(5) for relief from the permanent injunction.[127] They alleged that the decisional law had dramatically changed so as to invalidate the injunction.[128]

Justice O'Connor wrote a detailed opinion granting the motion to vacate.[129] According to Justice O'Connor, the student's decision to attend a religious school invalidated the presumption that direct aid to a religious school's educational mission is impermissible.[130] In particular, the Court relied upon *Zobrest* to explicitly reject the presumptions in *Meek* and *Ball* that the mere presence of public employees at religious schools will: (1) result in government indoctrination of religion; and (2) inevitably result in a symbolic union of church and state.[131] Using this analysis, the Court held that New York's Title I program "is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend."[132]

The *Agostini* decision explicitly recognizes that the criteria used to ascertain aid eligibility are important for two reasons. First, they determine whether any religious indoctrination is attributable to the State.[133] Second, they determine whether the aid creates an incentive to undergo religious indoctrination.[134] When eligibility for aid depends on secular conditions that neither favor nor disfavor religion, neither of these concerns is implicated.[135]

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124. 20 U.S.C. §§ 2701–2971 (repealed 1982).
125. *Aguilar*, 473 U.S. at 414.
126. *Agostini*, 521 U.S. at 212.
127. *Id.*
128. *Id.* at 208–15.
129. *Id.* at 240.
130. *See id.* at 226.
131. *See id.* at 225–27.
132. *Id.* at 228.
133. *Id.* at 230.
134. *Id.* at 231.
135. *Id.*

New York's Title I program allocated aid to schools based on an individual student's eligibility, determined by clearly secular standards.[136] The Court held that the aid neither resulted in government indoctrination of religion, nor created a financial incentive to undergo such a process.[137] The program, therefore, did not have the effect of advancing religion.[138]

Justice O'Connor restated the *Lemon* test as a two-prong inquiry with the issue of excessive entanglement as one of three relevant factors in determining whether the statute has the effect of advancing religion.[139] In making an "effects" analysis of government aid, the Court will determine whether: (1) the government action results in governmental indoctrination of religion; (2) the government aid defines its recipients by religion; and (3) the statutory scheme involves excessive entanglement between government and religion.[140] Administrative cooperation and political divisiveness are no longer sufficient, in and of themselves, to justify a finding of excessive entanglement.[141] The monitoring system used in *Agostini* to ensure that public teachers refrained from indoctrinating religion was not sufficient to deem it a system of continuous and pervasive surveillance of religion.[142]

III. *MITCHELL V. HELMS* AND ITS EFFECT ON DIRECT AID ANALYSIS

A. *Facts and Procedural History*

Chapter 2 of the Education Consolidation and Improvement Act of 1981[143] authorizes block grants of federal money to local educational agencies ("LEAs").[144] These agencies use the aid to purchase educational materials that are distributed to primary

136. *Id.* at 232.
137. *Id.*
138. *Id.*
139. *See id.* at 232–33.
140. *See id.* at 232.
141. *See id.* at 233–34.
142. *See id.*
143. 20 U.S.C. §§ 7301–7373 (1994).
144. *See id.* § 7312.

and secondary schools.[145] Chapter 2 provides that the LEAs must distribute the goods to both public and private schools based on the number of students attending individual schools.[146] Several restrictions apply to private school grants.[147] First, Chapter 2 aid can only be used to supplement, not support, any private school.[148] Second, LEAs must retain legal title to any equipment purchased with Chapter 2 funds.[149] Third, no private school may control Chapter 2 funds.[150] The LEA for Jefferson Parish, Louisiana, used its Chapter 2 allocations for library and media purchases, such as library books, computers, VCRs, TVs, and projection screens.[151]

In 1985, the respondents in *Mitchell* initiated an action in the Federal District Court for the Eastern District of Louisiana,[152] alleging that Chapter 2 aid to private religious schools in Jefferson Parish violated the Establishment Clause.[153] After several pretrial and posttrial motions, the district court granted judgment for the Jefferson Parish LEA.[154] On appeal, the Fifth Circuit reversed, holding that Chapter 2 aid to private schools in Jefferson Parish had the effect of advancing religion.[155] Thereafter, the Supreme Court granted certiorari.[156]

B. *Justice Thomas's Opinion*

Justice Thomas, writing for the plurality, began by acknowledging that *Agostini* significantly modified the *Lemon* test.[157] Because the respondent challengers failed to dispute Chapter 2's secular purpose before the Fifth Circuit, the Court refused to ad-

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145. *See id.* § 7351 (1994 & Supp. IV 1998).
146. *See id.* § 7312(a)–(b) (1994).
147. *See id.* § 7372.
148. *See id.* § 7372(a)(1).
149. *See id.* § 7372(c)(1).
150. *Id.*
151. *See* Mitchell v. Helms, 120 S. Ct. 2530, 2537–38 (2000) (plurality opinion).
152. *Id.* at 2538.
153. *Id.*
154. *Id.*
155. *Id.* at 2539–40.
156. 527 U.S. 1002 (1999).
157. *See Mitchell*, 120 S. Ct. at 2532. Justice Thomas's plurality opinion was joined by Chief Justice Rehnquist, along with Justices Scalia and Kennedy.

dress that argument.[158] Instead, Justice Thomas dedicated his opinion to applying the new post-*Agostini* "effects" test.[159] He concluded that Chapter 2 aid to private schools in Jefferson Parish did not have the effect of advancing religion.[160]

1. Government Indoctrination of Religion

Relying upon the holdings in *Witters v. Washington Department of Services for the Blind*,[161] *Mueller v. Allen*,[162] and *Zobrest*,[163] Justice Thomas combined the secular criteria discussion from *Agostini* with the Court's private choice principles and concluded that no religious indoctrination which occurs at private schools in Jefferson Parish can be attributed to the government aid under Chapter 2.[164] According to Justice Thomas:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the *principle of neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious were all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. . . .
>
> As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of genuinely independent and private choices of individuals."[165]

The amount of aid distributed under Chapter 2 is determined on the basis of how many students attend the school.[166] The state does not participate in a student's decision to attend a religious school.[167] If the aid is distributed according to this decision, then any indoctrination of religion that occurs, results from the stu-

158. *Id.* at 2540.
159. *See id.* at 2541.
160. *Id.* at 2552.
161. 474 U.S. 481 (1986).
162. 463 U.S. 388 (1983).
163. *See supra* Part II.D.3.
164. *Mitchell*, 120 S. Ct. at 2552.
165. *Id.* at 2541 (emphasis added) (quoting *Agostini*, 521 U.S. at 226).
166. *See* 20 U.S.C. § 7312(a)–(b) (1994).
167. *Mitchell*, 120 S. Ct. at 2542.

dent's decision instead of the state's aid.[168] Like the sign-language interpreter in *Zobrest*, or the tax exemption in *Mueller*, any aid to the religious mission, like the corresponding aid to the nonreligious schools, is attributable to the private choices of the individuals and not to state action.[169]

2. Chapter 2 Does Not Define its Recipients by Religion

Justice Thomas invoked formal neutrality theory to support his finding that Chapter 2 does not define its recipients by religion.[170] According to the plurality, if aid is distributed equally to both religious and public schools, the student will receive the same benefit no matter where he/she attends school.[171] "For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'"[172] Thus, Chapter 2 does not define its beneficiaries by religion.[173]

The plurality went so far as to say that even if Chapter 2 lowers the cost of obtaining a religious education, this still does not create a financial incentive sufficient to justify a finding that Chapter 2 recipients are identified by their religion.[174] Yet, the plurality failed to explain how this is not a financial incentive or how it would not frustrate the independent nature of the neutral distribution mechanism.

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168. *See id.* at 2543 ("We explained that 'where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally.'") (quoting *Mueller*, 463 U.S. at 397).

169. *See id.*

170. *See id.* at 2541.

171. *See id.*

172. *Id.* at 2543 (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486 (1986)).

173. *Id.*

174. *See id.* at 2543–44.

> We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini's* second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some effect.

Id.

3. The Revolution: Direct, Non-incidental Aid Does Not Violate the Establishment Clause if Distributed Neutrally

Justice Thomas explicitly rejected the respondents' contention that any direct, non-incidental aid to religion, such as Chapter 2, violates the Establishment Clause.[175] These programs are permissible so long as the government distributes aid in a neutral manner, in accordance with the private choices of individuals.[176]

> If aid to schools, even "direct aid," is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion." Although the presence of private choice is easier to see when aid literally passes through the hands of individuals—which is why we mentioned directness in the same breath with private choice . . . there is no reason why the Establishment Clause requires such a form.[177]

Direct aid situations, therefore, do not raise heightened concern where the distribution of aid is determined based upon criteria that are religiously neutral and reflect private choices.[178] *Agostini* marked the death of the direct/indirect aid distinction when it voided *Ball's* rule "that all government aid that directly assists the educational function of religious schools is invalid."[179] Direct monetary grants will still raise important Establishment Clause concerns.[180] The *Mitchell* case, however, involved direct equipment loans, not monetary grants to religious institutions.[181]

Justice Thomas dismissed any rule that would inquire as to the divertibility of direct aid to religious schools.[182] No aid, whether direct or indirect, may take the form of religious materials.[183] If there is no religious content, and the aid is distributed neutrally, "any use of that aid to indoctrinate cannot be attributed to the

175. *Id.* at 2547.
176. *Id.*
177. *Id.* at 2544–45 (citations omitted).
178. *See id.*
179. *Id.* at 2545 (quoting Agostini v. Felton, 521 U.S. 203, 225 (1997)).
180. *See id.* at 2546.
181. *See id.* at 2545–46.
182. *Id.* at 2547.
183. *See id.*

government and is thus not of constitutional concern."[184] Nor can the use of that aid create an impermissible incentive.[185] There is a distinct difference between the use of government aid to indoctrinate religion and religious indoctrination *by* the government or incentives created by government aid.[186]

For the plurality, the issue was not divertibility of aid, but rather impermissible content.[187] If the content of the aid is permissible in the context of a public school, then it automatically qualifies in the parochial school context.[188] Like a sign-language interpreter, there is no content in the aid provided under Chapter 2.[189] A computer screen or overhead projector has no ability to inculcate a religious message, unless the operator uses it for such purposes.[190] Under those circumstances, the aid only *conveys* the religious message.[191] The religious school accomplishes the indoctrination, not the aid.[192] A divertibility rule would be unworkable "because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an 'establishment of religion.'"[193]

Finally, Justice Thomas abandoned years of established precedent in boldly announcing that aid to pervasively sectarian institutions raises no special Establishment Clause concerns.[194] He proffered four reasons for this conclusion. First, recent precedent proves that an institution's sectarian nature is no longer relevant.[195] Second, if the recipient furthers a secular purpose, then the sectarian nature of that institution is not relevant in a constitutional analysis.[196] Third, the Court should refuse to examine

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184. *Id.*

185. *Id.*

186. *See id.* ("[W]e did not, as respondents do, think that the *use* of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government or that such use of aid created any improper incentives.").

187. *Id.*

188. *Id.* at 2548.

189. *See id.*

190. *See id.*

191. *Id.*

192. *See id.* at 2548–49.

193. *Id.* at 2549.

194. *See id.* at 2552. "The dissent is correct that there was a period when this factor mattered.... But that period is one that the Court should regret, and it is thankfully long past." *Id.* at 2550 (citations omitted).

195. *Id.*

196. *Id.* at 2551.

matters of conscience, such as the nature of an individual or institution's beliefs.[197] Finally, the pervasively sectarian standard demonstrates open hostility to religion, most particularly to the Catholic religion.[198]

4. Applying the New Standard to Chapter 2

Justice Thomas concluded that because Chapter 2 determines eligibility of government aid neutrally, based on the private choices of parents, it does not define its recipients by religion and does not have any impermissible content.[199] There is evidence that the equipment has, or could possibly be, put to use as a tool of religious indoctrination.[200] That, however, has no relevance to an effects analysis.[201] The procedural safeguards in Chapter 2—requiring that the equipment remain the legal property of the state and that it be used for secular and nonideological purposes—mitigate any concerns that the aid might be used for sectarian purposes.[202] The Court did not address the issue of excessive entanglement because neither party challenged the Fifth Circuit's holding that Chapter 2 does not involve excessive entanglement.[203]

The plurality concluded that Chapter 2 aid to religious schools in Jefferson Parish "does not have the effect of advancing religion."[204] The plurality overruled *Meek* and its presumptions as to direct aid to pervasively sectarian institutions.[205]

C. *Justice O'Connor's Concurring Opinion*

1. Rejecting Blind Deference to Neutrality

Justice O'Connor, joined by Justice Breyer, agreed with the

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197. *Id.*
198. *See id.*
199. *See id.* at 2552.
200. *See id.* at 2553.
201. *See id.* at 2554.
202. *See id.* at 2553–54.
203. *See id.* at 2540.
204. *Id.* at 2555.
205. *See id.* at 2555–56.

plurality that Chapter 2, in practice, does not violate the Establishment Clause because it does not have the effect of advancing religion.[206] Justice O'Connor, however, vehemently disagreed with the mode of analysis that the plurality used to come to this conclusion.[207]

> I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.[208]

The concurring faction objected specifically to the plurality's blind deference to the principle of formal neutrality[209] and its lack of concern over actual diversion of government aid for religious indoctrination.[210] Justice O'Connor did not dispute the recognition of neutrality as an important consideration in deciding Establishment Clause aid cases.[211] She did, however, find it disturbing that the plurality intended to elevate that principle from one of many concerns to the decisive factor.[212] "[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[213]

As to actual diversion, Justice O'Connor flatly stated that the plurality was wrong in analogizing *Zobrest* and *Witters* to Chap-

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206. *See id.* at 2556 (O'Connor, J., concurring).
207. *See id.*
208. *Id.*
209. *See id.*
210. *See id.* at 2558

> First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.

Id. at 2556
211. *See id.* at 2557.
212. *See id.*
213. *Id.*

ter 2.[214] In those cases, the statutory schemes provided aid *directly* to the student who, in turn, directed its usage according to his or her own private choices.[215] Under Chapter 2, the student makes the choice and then the aid is provided *to the school* based on a per capita student formula.[216] The reasons for tolerating divertibility when the student controls the aid are absent under a per capita distribution system.[217] First, in *Witters* and *Zobrest*, the aid was wholly dependent on the student's choice.[218] Second, a reasonable observer could perceive a per capita distribution system as a government endorsement of religious education when the aid is diverted to religious purposes.[219]

The distinction between a true private choice situation and a per capita distribution system takes on special importance in the context of direct aid cases.[220] Any government aid that is distributed to religion would be upheld under the plurality's analysis so long as it has a public sector counterpart.[221] "And, because actual diversion is permissible . . . the participating religious organizations (including churches) could use that aid to support religious indoctrination."[222]

2. Resurrecting Neutrality: Applying *Agostini* to Chapter 2

Justice O'Connor went on to apply *Agostini* to Chapter 2.[223] She concluded that because Chapter 2 provides aid in a neutral manner, it does not define its recipients by religion.[224] By distributing aid neutrally, Chapter 2 does not create a financial incentive to undertake religious indoctrination.[225]

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214. *See id.* at 2558.

215. *See id.* Justice O'Connor stated that "[t]hose decisions, however, rested on a significant factual premise missing from this case . . . . Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Id.*

216. *See id.* at 2559.

217. *See id.*

218. *See id.*

219. *Id.*

220. *Id.*

221. *See id.* at 2552–53.

222. *Id.* at 2560.

223. *See id.*

224. *See id.* at 2561.

225. *See id.*

Agostini required the Court to determine whether the government aid in question results in religious indoctrination.[226] Justice O'Connor recognized that *Agostini* effectively denied the validity of the presumptions in *Meek* that: (1) government aid to parochial schools inevitably results in the impermissible effect of a symbolic union between government and religion;[227] and (2) direct aid to the educational functions of religious schools necessarily aids the religious mission of those schools.[228] While direct monetary aid to religious institutions still raises suspicion, there is no reason to apply the same cynicism to clearly secular aid.[229] "To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." [230]

There are numerous factors that drove Justice O'Connor to conclude that the aid from Chapter 2 does not result in government indoctrination. First, aid is distributed neutrally, based on secular standards.[231] Second, the funds may only supplement the educational mission of the religious schools.[232] Third, no Chapter 2 funds are ever deposited with the religious schools.[233] Fourth, the statute requires that all Chapter 2 materials distributed to religious schools must be secular and nonideological.[234] Finally, any diversion of aid to religious purposes is, at best, de minimis.[235] Justice O'Connor concluded that there was insufficient factual evidence in the record to prove actual diversion of Chapter 2 aid for religious purposes.[236] The program's safeguards are constitutionally sufficient to ensure compliance with the Establishment Clause.[237] Inadvertent and infrequent violations of the statutory limitations of Chapter 2 aid are insufficient to warrant an invalidation of the entire statutory scheme as applied to private religious schools.[238]

226. *Id.*
227. *Id.*
228. *See id.* at 2561–62.
229. *See id.* at 2566.
230. *Id.* at 2567.
231. *See id.* at 2562.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 2569.
238. *Id.*

D. *Justice Souter's Dissenting Opinion*

1. The Protections and Foundations of the Establishment Clause

Justice Souter, joined by Justices Stevens and Ginsburg, concluded that Chapter 2 has the effect of advancing religion.[239] He, therefore, dissented from the Court's judgment to the contrary.[240] For the dissenters, deciding Establishment Clause cases based on neutrality frustrates the original purposes behind that constitutional mandate.[241]

The Establishment Clause protects against several encroachments by the government. It protects the right of the individual's freedom of conscience in matters of ultimate concern against manipulation by the government.[242] It also protects the integrity and purity of religious institutions from the same danger.[243] Finally, the Establishment Clause protects our society at large from the divisive and exclusionary "antagonism of controversy over public support for religious causes."[244]

Justice Souter concluded that there are three philosophical foundations for the Establishment Clause.[245] First, government aid of religion violates an individual's freedom of conscience by compelling him or her to support religious views with which he or she disagrees.[246] "Second, government aid corrupts religion."[247] Third, government aid of sectarian institutions unavoidably results in conflict.[248]

2. The Principles of Establishment Clause Jurisprudence

The dissent concluded that the basic principles underlying the Court's Establishment Clause jurisprudence make it clear that,

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239. *Id.* at 2595 (Souter, J., dissenting).
240. *See id.* at 2597.
241. *Id.* at 2573.
242. *See id.* at 2572.
243. *Id.*
244. *Id.*
245. *Id.* at 2574.
246. *See id.*
247. *Id.*
248. *See id.* at 2575.

at the very least, tax revenue may not be used to support a religious school or religious teaching.[249] The government, however, does not violate this principle when it provides universally available welfare benefits to religious institutions.[250] The line between government aid and universally available welfare is not precise.[251] There is, however, no rule that constitutionalizes any benefit bestowed upon religious students simply because their public school counterparts are privy to an identical endowment.[252] Instead, Establishment Clause neutrality dictates that the government may not aid or inhibit religion.[253] This form of neutrality does not mean that even distribution of benefits between religious and nonreligious institutions equates to constitutionally valid aid to religion.[254]

According to Justice Souter, neutrality, as the plurality conceived of it, is flawed as a guiding principle for judging government aid cases. The plurality transformed the definition of neutrality from a principle of "equipoise between government as an ally and government as adversary," to a standard of "evenhandedness."[255] The plurality's version of "neutrality" is flawed because it fails to address three areas of primary concern: (1) the characteristics of the aid recipient; (2) the aid distribution method; and (3) the characteristics of the aid itself.[256]

Formal neutrality fails to acknowledge the unique characteristics of the institutions receiving aid. Government donations to pervasively sectarian institutions, like primary and secondary religious schools, raise special concerns.[257] Direct subsidies to these institutions are prohibited because they will inevitably support religious indoctrination, even when the content of the aid is religiously neutral.[258]

Blind deference to neutrality fails to address the method of dis-

249. *See id.* at 2575–76.
250. *See id.* at 2577.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 2580.
256. *See id.* at 2582.
257. *See id.* at 2583.
258. *See id.* at 2582–83.

tribution.[259] The plurality explicitly rejected the relevance of the direct/indirect aid distinction. "Direct aid obviously raises greater risks, although recent cases have discounted this risk factor, looking to other features of the distribution mechanism."[260] The Court has distinguished between aid that flows only indirectly and incidentally to religious schools and "aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves."[261]

Other very important concerns apply in government aid to religion cases, even when neither the recipient, nor the manner of distribution is defective. The Establishment Clause prohibits the aid from possessing a religious content.[262] That is, aid may not take the form of, for example, religious materials or textbooks for inculcating religious thought. For the same reasons, aid is also invalid if there is a substantial risk that it will be diverted to religious uses.[263] Direct monetary grants to a religious organization's treasury raise special divertibility concerns. "Divertibility is not, of course, a characteristic of cash alone, and when examining provisions for ostensibly secular supplies we have considered their susceptibility to the service of religious ends."[264] Aid that supplants a large portion of the religious institution's budget is constitutionally invalid. This type of aid frees up large portions of the religious institution's budget permitting rededication of resources toward religious indoctrination.[265]

Raising evenhandedness of distribution to the pinnacle of Establishment Clause analysis, as the plurality does, frustrates all of the aforementioned concerns. The plurality's analysis eviscerates the principles developed throughout the evolution of the *Lemon/Agostini* "effects" analysis. Neutrality, as an end-all be-all factor, permits any aid to religion so long as there is a corresponding privilege to the religious institution's public sector counterpart. The plurality assumes, without justification, that equal

259. *See id.* at 2584.

260. *Id.* at 2583.

261. *Id.* at 2584.

262. *See id.* ("[W]e have barred aid with actual religious content, which would obviously run afoul of the ban on the government's participation in religion.").

263. *See id.* at 2585 ("[W]e have long held government aid invalid when circumstances would allow its diversion to religious education.").

264. *Id.* at 2586.

265. *See id.* at 2589.

distribution will have an equal effect on public perception and incentives that aid religion.[266] This conception of neutrality elevates a per capita distribution rule to the same status afforded to systems that involve legitimate individual private choice principles.[267] According to Justice Souter, Chapter 2 aid to religious schools in Jefferson Parish violated the Establishment Clause under both *Lemon* and *Agostini*.[268] The system of direct distribution of government aid in Jefferson Parish resulted in the actual diversion of aid to religious indoctrination.[269] "The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. While little is known about its use, owing to the anemic enforcement system in the parish, even the thin record before us reveals that actual diversion occurred."[270] The program, therefore, had the effect of advancing religion and thus violated the Establishment Clause.[271]

IV. CHARITABLE CHOICE

In 1996, former Republican Senator, and current United States Attorney General, John Ashcroft of Missouri, introduced an interesting amendment to the Welfare Reform Act.[272] His idea, known now as Charitable Choice, permits state governments receiving federal welfare grants to contract directly with religious institutions providing social services in a religious setting.[273]

The following is a summary of the statute's relevant portions. First, state governments may contract with religious institutions to provide social services.[274] Second, state governments may set up a redeemable voucher system for social services provided at religious institutions.[275] Third, no federal or state welfare pro-

266. *See id.* at 2590–91.
267. *Id.*
268. *See id.* at 2591–96.
269. *See id.* at 2595 ("But the record here goes beyond risk, to instances of actual diversion.").
270. *Id.* at 2591.
271. *See id.* at 2596.
272. 42 U.S.C. §§ 601–1397jj (Supp. IV 1994).
273. *See* Chris Collins, *State Officials Will Soon Find Themselves Center in Legal Debate Over Roles of Church, State,* GANNETT NEWS SERVICE, Dec. 24, 1997, *available at* 1997 WL 8843762.
274. 42 U.S.C. § 604a(a)(1)(A) (Supp. IV 1998).
275. *Id.* § 604a(a)(1)(B).

gram is permitted to exclude religious organizations from participating in the these programs.[276] Fourth, religious organizations are not required to alter their sectarian nature in order to receive a social services contract.[277] Fifth, religious organizations are still exempt from federal anti-discrimination laws, even if they participate in the provision of federally funded welfare programs.[278] Sixth, religious providers of social services are subject to the same auditing requirements as their nonreligious counterparts.[279] Finally, no religious provider of social services will expend contract funds to engage in "sectarian worship, instruction, or proselytization."[280]

Ashcroft included a similar provision in the Health and Human Services Reauthorization Act of 1998.[281] There are at least five major legislative schemes currently before Congress that include direct government-aid-to-religion provisions similar to the original Charitable Choice.[282] Many states are looking to implement similar schemes.[283] Charitable Choice has obvious political appeal. Resolving the constitutionality of this type of direct aid program, therefore, is of utmost relevance, for we will see more of these programs proposed in the future.

A. *Charitable Choice Does Not Have a Secular Purpose*

When Ashcroft introduced the precursor bill that ended up becoming Charitable Choice, he indicated that the federal government needed to involve religious organizations in providing welfare services.[284] According to Ashcroft, a religious movement around the turn of the century provided the impetus for imple-

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276. *Id.* § 604a(c).

277. *Id.* § 604a(d)(1).

278. *Id.* § 604a(f).

279. *Id.* § 604a(h)(1).

280. *Id.* § 604a(j).

281. *See* Americans United for Separation of Church and State, *Legislative Issues Online: Charitable Choice*, *at* http://www.au.org/leg-issu.htm (last visited Apr. 21, 2001).

282. *See id.*

283. *See* Americans United for Separation of Church and State, *Chart of Church/State Legislation Passed by the States 1999 Legislative Session*, *at* http://www.au.org/st-chart.htm (last visited Apr. 21, 2001); *see also Talking Points on "Charitable Choice,"* Americans United for Separation of Church and State, *at* http://www.au.org/ashcroft.htm (last visited Mar. 26, 2001).

284. 141 CONG. REC. S7238 (daily ed. May 23, 1995) (statement of Sen. Ashcroft).

menting government-subsidized welfare.[285] That movement came to view poverty as the root of immorality.[286] The federal government responded by enacting sweeping welfare provisions.[287] By doing so, however, the government monopolized the field.[288] More importantly, the government robbed the movement of its spiritual element.[289] During the course of the government's failed experiment in welfare, small religious organizations have continued on a small-scale to provide services independently of the government.[290] These small-scale enterprises succeed where the government has failed, primarily because of their spiritual nature.[291] As Ashcroft stated:

> We have all heard the stories of small organizations that are hugely successful in helping America's poor. Unfortunately, many of these programs have been constrained from receiving Federal funds because all too often those Federal funds would require radical changes in their beliefs, their structure, their facilities, their program, or their organization—changes that would rob these programs of the very characteristics and attitudes that make them successful.[292]

Ashcroft's statement demonstrates a belief that injecting a spiritual element into social welfare services equates to successful assistance. This is a clear government endorsement of religious practice. Judging by the logic of these statements, the purpose of the statutory scheme is not only to involve religious organizations, but also to integrate the religious character of those organizations. One could argue that the religious character adds to the effectiveness of such programs. This justification, however, still includes religion in providing governmental services *because* of its spiritual qualities. It is not presumptuous to infer that the government specifically endorses what is being said under such a scenario.

The Court, however, has generally rejected the type of argument that involves analyzing isolated comments by individual

285. *Id.* at S7237.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at S7238.
291. *Id.*
292. *Id.*; *see also* Stephen V. Monsma, *The "Pervasively Sectarian" Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322–24 (1999).

legislators. Instead, the Court will examine the face of the statutory language to evaluate the statute's purpose. In *Bowen v. Kendrick*,[293] for example, the Court held that the AFLA did not have an improper purpose even though the AFLA specifically called for the involvement of religious organizations in the implementation of services to prevent teenage pregnancy.[294] The Court concluded that the AFLA had a legitimate secular purpose because it also called for the involvement of various other nonreligious groups.[295]

Charitable Choice mirrors the AFLA in this sense. It authorizes states to "provide services . . . through contracts with charitable, religious, or private organizations."[296] This tiny sentence, amidst an entire statute detailing the involvement of religious organizations in providing social welfare services, however, should not be enough to insulate Congress's actual purpose from examination. To do so, clearly elevates form over substance to a perverse degree.

Even if we allow for this, Charitable Choice's purpose still suffers from other defects that are noticeable upon facial examination. One of the main purposes of the act is to allow religious institutions to receive public aid without having to diminish the religious content of their charitable programs.[297] In other words, Congress wants to give churches money to engage in religious exercises while administering social services. This purpose is clearly observable from the statute's syntax: "The purpose of this section is to allow States to contract with religious organizations, . . . on the same basis as any other nongovernmental provider *without impairing the religious character of such organizations.*"[298]

Another subsection specifically prohibits state governments from excluding religious organizations from contracts based solely on their sectarian character.[299] Congress is clearly going out of its way to include these religious institutions *because* of their religious message.

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293. 487 U.S. 589 (1988).
294. *Id.* at 602.
295. *See id.*
296. 42 U.S.C. § 604a(a)(1)(A) (Supp. IV 1998).
297. *See id.* § 604a(b).
298. *Id.* § 604a(b) (emphasis added).
299. *Id.* § 604a(c).

Additionally, Charitable Choice fails the first prong of the *Lemon/Agostini* test because, like the prohibited action in *Larkin v. Grendel's Den*,[300] it allows for "important, discretionary governmental powers . . . [to be] delegated to or shared with religious institutions."[301] Welfare surely qualifies as an important government function, at least to those receiving aid. By providing such a program and then delegating its implementation to religious authorities, Congress violated the bold and broad command of the *Larkin* case.

After reviewing the words of the bill's sponsor and the language of the statute itself, one must conclude that Congress intended to involve religious organizations in providing social services. At best, Congress judged that the use of a religious message is a more effective manner of administering a governmental task. At worst, Congress wanted to fund religious exercises. Either way, no secular purpose is legitimately discernable.

B. *Charitable Choice Has the Effect of Advancing Religion*

1. Charitable Choice May Result in Government Indoctrination of Religion

In deciding whether government aid results in religious indoctrination, the Court analyzes three factors. First, whether the aid is neutrally distributed to beneficiaries without regard to their religious nature. Second, whether aid is directed by the private choice of individuals. Third, whether the aid actually subsidizes religion.

Charitable Choice allows states to contract with religious organizations to provide social services "on the same basis as any other nongovernmental provider."[302] It prevents discrimination against religious organizations in the distribution of social service aid, but does not require that states contract with religious organizations, exclusively or otherwise.[303] The purpose of Charitable Choice is to make government aid for social service available

300. 459 U.S. 116 (1982).
301. *Id.* at 127.
302. 42 U.S.C. § 604a(b) (Supp. IV 1998).
303. *See id.* § 604a(a), (c).

without regard to the religious nature of an institution.[304] As to this point, Charitable Choice simply codifies the constitutional standard.

The determination as to whether aid is directed by the private choices of individuals will depend upon the type of program a state implements. Under Charitable Choice, a state may contract directly with a religious institution or it may establish a voucher program that beneficiaries use to redeem services provided by government contractors, religious or otherwise.[305] A voucher system assures that benefits are directed in accordance with a beneficiary's choices. The Court has repeatedly upheld this type of private choice situation in cases like *Witters*[306] and *Zobrest*.[307] In the *Mitchell* case, a majority of the Court voiced its approval of this type of private choice system.[308] Justice O'Connor's concurrence, joined by Justice Breyer, concluded that when the distribution of aid is directly steered by the beneficiary, then no objective message of government endorsement of religion occurs.[309]

A direct contract system presents more difficult problems. If, for example, State *A*, decides to simply contract with Church *Z* to provide State *A*'s social services, then there is no reason to believe that the aid is distributed according to private choices. Church *Z* is authorized under Charitable Choice to engage in religious activities.[310] The state's decision to fund, therefore, supports any religious indoctrination that occurs. This situation would not survive constitutional scrutiny.

The more difficult case involves a per capita distribution system that determines grant amounts to religious institutions based upon how many welfare beneficiaries a religious institution

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304. *See id.* § 604a(b).

305. *See id.* § 604a(a).

306. Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986).

307. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1995).

308. Mitchell v. Helms, 120 S. Ct. 2530, 2544–45 (2000) (plurality opinion). In his plurality opinion, Justice Thomas stated, "If aid . . . is neutrally available and . . . passes through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.' . . . [T]he presence of private choice is easier to see when aid literally passes through the hands of individuals." *Id.*

309. *See id.* at 2559–60 (O'Connor, J., concurring).

310. *See* 42 U.S.C. § 604a(d) (Supp. IV 1998) (prohibiting both the federal government and the states from requiring that religious organizations receiving funds under Charitable Choice alter their religious character).

serves. A five-member majority of the Court has rejected a per capita system as a definitively true method of private choice.[311] Despite her rhetoric to the contrary, Justice O'Connor approved of the use of Chapter 2 funds in *Mitchell*.[312] Justice O'Connor found the fact that no Chapter 2 funds ever reached the coffers of the religious institution dispositive on the issue of whether the aid was directed by private choices.[313]

Unlike the equipment loans at issue in *Mitchell*, a per capita distribution of aid under Charitable Choice involves direct cash payments to religious institutions.[314] This could be the crucial difference that invalidates a per capita distribution system under Charitable Choice. Although, like Justice Souter, Justice O'Connor understands the danger of diverting cash to religious functions,[315] in that she still requires a plaintiff prove the religious use of aid.[316] Charitable Choice encourages religious institutions receiving federal grants to involve "spiritual" elements in the provision of social services.[317] It is not unthinkable, therefore, that a plaintiff could demonstrate that a Charitable Choice grantee diverted federal funds for religious exercises.

A majority of the Court still recognizes that if government aid subsidizes religious institutions, then that aid results in government indoctrination of religion.[318] The Court will look to see if the governmental aid to religious organizations relieves that institution of expenses that it would have otherwise incurred under

311. *Mitchell*, 120 S. Ct. at 2530. "[T]he distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies." *Id.* at 2559 (O'Connor, J., concurring). "Not the least of the significant differences between per capita aid and aid individually determined and directed is the right and genuine opportunity of the recipient to choose not to give the aid." *Id.* at 2591 (Souter, J., dissenting).

312. *See id.* at 2572 (O'Connor, J., concurring).

313. *See id.*

314. *See* 42 U.S.C. § 604a(b) (Supp. IV 1998).

315. *Compare Mitchell*, 120 S. Ct. at 2559 (O'Connor, J., concurring) ("[T]he distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies."), *with id.* at 2585 (Souter, J., dissenting) ("[W]e have long held government aid invalid when circumstances would allow its diversion to religious education.").

316. *See id.* at 2567 (O'Connor, J., concurring) ("To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.").

317. *See* 42 U.S.C. § 604a(d) (Supp. IV 1998).

318. *See Mitchell*, 120 S. Ct. at 2541; *id.* at 2568 (O'Connor, J., concurring); *id.* at 2583 (Souter, J., dissenting).

law.[319] It is doubtful, however, that a voucher program could ever rise to this level. Further, it is just as unlikely that a per capita distribution Charitable Choice system would result in government subsidization of religious institutions.

2. Charitable Choice May Define its Recipients by Religion

The validity of this rule was not at issue in *Mitchell*.[320] The Court seems to be in agreement that if a government program creates a financial incentive to undergo religious indoctrination, then the government aid defines its recipients by religion.[321] The plurality would only require that aid be neutral in content in order to pass this test.[322]

For the remainder of the Court, however, other considerations still apply, such as the nature of the institution, the form of the aid, and the method of distribution.[323] Direct cash grants to pervasively sectarian institutions raise the highest level of scrutiny.[324] Even the plurality went so far as to recognize this.[325] "Of course, we have seen 'special Establishment Clause dangers' . . . when *money* is given to religious schools or entities directly, rather than . . . indirectly."[326] Charitable Choice authorizes direct cash payments to pervasively sectarian institutions,[327] thus raising the highest level of divertibility concern.

Also, if a house of worship is the only provider of social services in a particular jurisdiction, then a genuine incentive to undergo religious indoctrination exists. Whether that incentive is financial or otherwise seems immaterial. If a person seeks drug counseling or job training, and a house of worship that incorporates religious themes implements the sole program in that jurisdiction, then there is an incentive to undergo religious indoctrination. If the

319. *See id.* at 2562 (O'Connor, J., concurring); *id.* at 2588–89 (Souter, J., dissenting).
320. *See id.* at 2552; *id.* at 2561 (O'Connor, J., concurring).
321. *See id.* at 2543; *id.* at 2561 (O'Connor, J., concurring).
322. *See id.* at 2543–44.
323. *See id.* at 2557, 2562 (O'Connor, J., concurring); *id.* at 2582 (Souter, J., dissenting).
324. *See id.* at 2559 (O'Connor, J., concurring); *id.* at 2583 (Souter, J., dissenting).
325. *See id.* at 2546.
326. *Id.* (citations omitted).
327. *See* 42 U.S.C. § 604a(b) (Supp. IV 1998).

person is eligible for these programs through government designation, then the government has created the incentive. Any religious indoctrination takes place at the behest of the government. In this scenario, there is no true private choice. Does it make logical sense to invalidate such a program only if it creates a direct financial incentive? Such a distinction is not consistent with the spirit of the Establishment Clause.

3. Charitable Choice, in Any Form, Involves Excessive Entanglement of Government and Religion

Charitable Choice seeks to, at least symbolically, benefit institutions whose entire purpose and character are religious in nature.[328] It involves those institutions in providing governmental services, while purposefully protecting their ability to convey religious messages.[329] The program provides aid to religious organizations and institutions in the form of direct money payments.[330] A majority of the Court has disregarded presumptions of divertibility of aid.[331] The entire Court, however, still recognizes that direct cash payments to religious institutions raise special concerns that the aid will be employed to indoctrinate religion.[332]

Implementing Charitable Choice in accordance with its statutory mandate would necessarily involve an excessive and continuing system of government surveillance of religion. For example, 42 U.S.C. § 604a(g) requires that no religious institution receiving funds under Charitable Choice discriminate against an individual seeking assistance on the basis of religion.[333] An institution receiving federal funds may not deny services to beneficiaries who refuse to actively participate in a religious practice.[334] While subsection (d) guarantees that institutions are not required

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328. *See id.*

329. *See* Americans United for Separation of Church and State, *Charitable Choice: Churches, Welfare and Your Tax Dollars, at* http://www.au.org/welfare.htm (last visited Apr. 21, 2001). "Although 'charitable choice' technically states that public funds cannot be used for religious worship, instruction or proselytization, there is *not* an overall prohibition on coerced religious practices." *Id.*

330. *See* 42 U.S.C. § 604a(a) (Supp. IV 1998).

331. *See Mitchell*, 120 S. Ct. at 2547–49; *id.* at 2565–67 (O'Connor, J., concurring).

332. *See id.* at 2546; *id.* at 2559 (O'Connor, J., concurring); *id.* at 2583 (Souter, J., dissenting).

333. 42 U.S.C. § 604a(g) (Supp. IV 1998).

334. *See id.* § 604a(e)(1).

to alter their religious character in order to receive funds,[335] subsection (j) prohibits the use of funds for "proselytization."[336]

How will the government ensure compliance with these contradictory statutory mandates? Any plausibly effective solution will transcend mere administrative cooperation. If this language is more than lip service, to be successful, its implementation will necessitate non-stop government oversight of the manner in which these institutions provide services to the needy. This not only raises serious Establishment Clause concerns, it also frustrates the proffered secular purpose of the legislation—streamlining welfare benefits by avoiding bureaucratic obstacles.

The Charitable Choice legislation also requires that participating institutions account for federally granted monies under generally accepted auditing principles.[337] Indeed, if an organization does not establish a separate account for federal funds, then the government has the right to audit the entire church treasury.[338] By participating in Charitable Choice, a religious organization abdicates protections afforded to it under the Establishment Clause.

Charitable Choice implicates all of the entanglement dangers that the Court has recognized under the Establishment Clause. It involves direct monetary grants to pervasively sectarian institutions. It implicates a symbolic union between Church and State. In order to comply with its statutory and constitutional requirements, Charitable Choice will require a comprehensive and continuous governmental surveillance of religious activities and finances.

C. *Charitable Choice Violates the Establishment Clause*

Charitable Choice has the impermissibly sectarian purpose of relinquishing governmental responsibilities to religion. Charita-

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335. *See id.* § 604a(d)(1) ("A religious organization with a contract . . . shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.").

336. *Id.* § 604a(j) ("No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization.").

337. *See id.* § 604a(h)(1).

338. *See id.* § 604a(h)(2) (providing that if the religious organization segregates funds, the government will only examine the separate account).

ble Choice has the effect of advancing religion. This statutory scheme authorizes direct monetary grants to pervasively sectarian institutions.[339] Aid might be distributed neutrally depending upon the type of distribution mechanism each state decides to employ.[340] Aid may also only supplement these religious institutions.[341] Nonetheless, by creating incentives to undergo religious indoctrination, the government is responsible for any religious indoctrination that occurs. Finally, Charitable Choice results in excessive entanglement between government and religion due to the invasive and constant monitoring that will be necessary to ensure compliance with the statutory safeguards.

V. A CRITIQUE OF NEUTRALITY POLICY

Neutrality theory, as equal treatment of religion or evenhandedness, found its origins in scholarly debate.[342] The basic tenet of neutrality theory advocates Establishment Clause jurisprudence that is more accommodating of religion.[343] It has many advocates in legislative bodies throughout the country,[344] and it clearly influenced Justice Thomas's plurality opinion in *Mitchell*.[345] Its popularity has resulted in direct government aid to religious programs like Charitable Choice and its progeny. This section will discuss some of the major philosophical fallacies that lie at the heart of the arguments in favor of neutrality theory.

First, neutrality assumes that the rise of the administrative and regulatory state has preempted religious discourse and is hostile toward religious belief. Second, neutrality assumes that its application would result in an equal playing field for religion. Third, neutrality assumes that allowing religious organizations to receive government aid on the same basis as nonreligious organizations would cause a rebirth of widespread religious belief throughout our country.

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339. *See id.* § 604a(b).

340. *See supra* Part IV.B.1.

341. *See supra* Part IV.B.1.

342. *See, e.g.*, Carl H. Esbeck, *Myths, Miscues and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999).

343. *See id.* ("In neutrality theory the recipients of vouchers, grants, and purchase-of-service contracts are eligible to participate as providers in government service programs without regard to their religious character.").

344. *See, e.g., id.* at 285–86.

345. *See Mitchell*, 120 S. Ct. at 2541–44.

A. *Neutrality Assumes That the Rise of the Administrative State Is Hostile to Religion*

Many scholars advocating a neutrality or "equal treatment" standard contend that the rise of the pervasive regulatory and administrative state makes impossible the use of a strict separation model of Establishment Clause analysis.[346] The rise of big government has resulted in secularized religious institutions and the diminished role of religion in American society in general.[347]

> [W]ith the arrival of the New Deal and explosive growth in the regulatory/welfare state, enforcing strict separation confined religious education and charitable ministries to ever smaller and smaller enclaves. If the two were not to mix, religion had to recede as the state grew larger. Thus, if social-service ministries and schools were to participate in government's largess, the theory demanded that religious social services and schools must first become secular. . . . To increasing numbers of Americans, strict separationism presents a cruel choice between suffering funding discrimination or forced secularization.[348]

These scholars view the secularization of these functions as hostile to religious belief in spirit and in practice.[349] As an alternative, equal treatment or neutrality recognizes the importance of religion and forbids discrimination against it.[350] "The purpose at work is the minimization of the government's influence over religious belief and practice. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or equal treatment in benefit programs, the integrating principle is to reduce the impact of governmental action on religious choices."[351]

This logic is difficult to grasp. According to these scholars, government has marginalized religion, thus driving people away from religion.[352] Therefore, they seek to minimize the ability of

346. *See* Carl H. Esbeck, *Equal Treatment: Its Constitutional Status*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 13 (Steven V. Monsma & J. Christopher Soper eds., 1998).

347. *See id.*

348. *Id.*

349. *See* Michael W. McConnell, *Equal Treatment and Religious Discrimination*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 30 (Steven V. Monsma & J. Christopher Soper eds., 1998).

350. *See id.*

351. Esbeck, *supra* note 346, at 17.

352. *See id.* at 13–14; McConnell, *supra* note 349, at 31.

government to control religious choices.[353] Their solution for this problem is to increase governmental financial support for religious beliefs.[354] The logical inconsistency is so deep that it sheds doubt on its sincerity.

This contention—that the rise of big government has resulted in an exemption of religion from the lives of Americans—borders on the absurd. The facts indicate quite the opposite. In a 1994 Gallup poll, ninety-six percent of all Americans stated that they believe in God.[355] That same poll indicated that religion plays a significant role in the lives of eighty-eight percent of all Americans.[356] Between 1970 and 1995, the Southern Baptist Convention grew by over five million members in the United States, and many other traditional religious groups—like the National Baptist Convention and the Roman Catholic Church—experienced similar popularity explosions during this period that supposedly marked the ultimate emasculation of religion in our society.[357] Pro-religious lobbying groups have also gained enormous financial power during this period. "[T]he Christian Coalition and the fast-rising Promise Keepers movement boast large budgets of $25 million and $115 million, respectively."[358]

These statistics point to an obvious conclusion: the rise of the administrative state has not led to the marginalization of religion, or religious belief in our society at all. In fact, the data suggests an increased religious fervor in our country. Religion in the United States is as healthy as it ever has been.

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353. *See* Esbeck, *supra* note 346, at 17; McConnell, *supra* note 349, at 32.

354. *See* McConnell, *supra* note 349, at 32.

355. Rogers M. Smith, *"Equal" Treatment? A Liberal Separationist View*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 187 (Steven V. Monsma & J. Christopher Soper eds., 1998) (citing GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1995 (1996)).

356. *See id.*

357. *Id.* at 187–88 (citing GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1995 (1996)) (reflecting that the Southern Baptist Convention grew from 11.3 to 15.4 million members, the National Baptist Convention grew from 5.5 to 8.2 million members, and the Roman Catholic Church grew from 47.9 to 59 million members).

358. *Id.* at 188 (citing Joe Conason et al., *The Promise Keepers are Coming: The Third Wave of the Religious Right*, THE NATION, Oct. 7, 1996, at 11).

B. *Neutrality Theory Falsely Assumes That Equal Treatment Will Affect All Religions Equally*

Neutrality theory argues that if the government offers a benefit to a secular entity, it should offer an identical benefit to religious bodies.[359] That way, government action will neither disfavor religion nor place it in a preferential position.[360] This argument undermines the type of "neutrality" that the Establishment Clause preserves. That is, neutrality theory, in practice, would ignore neutrality between religions.

The experiences of our nation's Founding Fathers, in both Europe and Colonial America, suggest that the Establishment Clause had as its primary purpose the prevention of intersectarian conflict and government persecution of minority religious views.[361] Religiously inspired warfare and sectarian persecution plagued both continental Europe and Great Britain throughout the sixteenth and seventeenth centuries.[362] Roger Williams, Rhode Island's founder and influential colonial theologian, linked the bloody religious conflicts of Europe to the blending of civil and ecclesiastical functions.[363]

In 1785, the General Assembly of Virginia considered a bill for the allocation of state money to employ teachers of Christianity.[364] In response to that bill, James Madison, author of the Establishment Clause, composed his famous *Memorial and Remonstrance against Religious Assessments*.[365] In this work, Madison argues

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359. *See* McConnell, *supra* note 349, at 32–33.

360. *See id.*

361. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–11 (1947).

362. *See id.*

363. *See* Roger Williams, *The Bloody Tenent, of Persecution for Cause of Conscience, in* 5 THE FOUNDERS' CONSTITUTION 48 (Phillip B. Kurland & Ralph Lerner eds., 1987).

> God requireth not an uniformity of religion to be enacted and enforced in any civil state; which enforced uniformity, sooner or later, is the greatest occasion of civil war, ravishing consciences, persecution of Christ Jesus in His servants, and of hypocrisy and destruction of millions of souls. . . . An enforced uniformity of religion throughout a nation or civil state confounds the civil and religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the flesh.

Id.

364. *See* A Bill Establishing a Provision for Teachers of the Christian Religion, *reprinted in Everson*, 330 U.S. at 72 (supplemental appendix).

365. James Madison, *Memorial and Remonstrance against Religious Assessments*, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 363, at 82.

that governmental aid of religion usually enables a tyrannical ruler to employ religion as a suppressive device over minority viewpoints.[366]

> What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen as upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people.[367]

Indeed, the pre-*Everson* period of American history was marred by a prevalent government endorsement of Protestantism.[368] This period also, not coincidentally, corresponded to an intolerance of fringe minority religious views, such as those of the Mormons and the Native Americans.[369]

There is no reason to believe that the use of criteria neutral toward religion in distributing aid will result in a return to this type of religious persecution. However, the fact of the matter is that America is still a nation of primarily Christian believers. While the twentieth century saw an explosion in religious diversity in this country, Protestants and Catholics still make up ninety-one percent of all churchgoers in America.[370] Under neutrality-based aid programs, these groups are able to employ significant financial resources to effectively monopolize government benefits.

> Since there are now approximately two thousand identifiable religions and sects in this nation, it would be impossible to distribute government monies fairly and equitably among them all. Instead, governments at all levels would be forced to make hard choices about which faith groups would receive public money, which would necessarily result in weighing the utility of certain religious programs. Inevitably, those with the most financial resources and political clout would get the largest share of the pie; smaller, less popular faith-

366. *See id.*

367. *Id.* at 83.

368. *See* Smith, *supra* note 355, at 186.

369. *See id.*; *see also* McConnell, *supra* note 349, at 31 (noting that "[i]n the decades preceding World War II, the dominant Protestant majority in this country not infrequently ran roughshod over the rights of others: Catholics, Jews, and non-Christians generally").

370. Smith, *supra* note 355, at 187 (citing GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1995 (1996)).

groups would be forced to the periphery in the new climate of destructive competition among American communities of faith.[371]

This may explain why many Jewish organizations, representing members of the largest religious minority in the United States, passionately oppose any blurring of bright-line separationism.[372] According to Gregg Ivers, a prominent Jewish legal scholar, despite their widespread success in this country, the overwhelming majority of American Jews insist more adamantly than ever on a complete separation of Church and State.[373] For Jews, history has repeatedly and painfully reinforced that government support of religion leads to, or at least facilitates, anti-Semitic regimes.[374] Separationism, at the very least, prohibits government endorsement of majoritarian theology.[375] At most, it prevents government persecution of minority religions.[376] Jews feel that they have flourished in America, as in no other country, because the Establishment Clause restrains government support for the political objectives of majoritarian religious viewpoints.[377]

Neutrality theory is misnomered and misguided. While it advocates neutrality between secular and sacred institutions, it ignores the plight of religious minorities.[378] Thus, neutrality theory does not address the primary concern of the Establishment Clause: the protection of religious minorities from government sponsored disfavor or even persecution. Instead, "it demonstrates little concern for the counter-majoritarian check on the power of religious majorities to curry government favor."[379]

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371. Derek H. Davis, *A Christian Separationist Perspective*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 136, 147 (Steven V. Monsma & J. Christopher Soper eds., 1998).

372. *See* Gregg Ivers, *American Jews and the Equal Treatment Principle*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY, *supra* note 371, at 158, 174.

373. *See id.*

374. *See id.* ("Jews, a religious minority, have never faired well in the theologies of Christian religions. Christian theology . . . has cast Jews as thieves, liars, predators, murderers, and above all, those responsible for the crucifixion of Jesus Christ.").

375. *See id.*

376. *See id.*

377. *See id.*

378. *See id.*

379. *Id.* at 177.

C. *Neutrality Theory Assumes That Separationism Is Hostile Toward Religious Belief*

Contrary to the rhetoric of the neutrality scholars, a strong Establishment Clause is not hostile toward religion. It does not equate to, as a prominent scholar (and attorney for Jefferson Parish in the *Mitchell* case) suggested, "a one-sided freedom *from* religion."[380] In fact, "the church-state divide is a benefit because it protects the sacred from the secular—not the other way around."[381] Government programs of aid to religious institutions, like Charitable Choice, infuse capital into church-related charities at the expense of institutional autonomy. They subject those institutions to government oversight and financial auditing.[382]

Charitable Choice, for example, is a confusing statutory scheme. How can one expect the religious organizations themselves to differentiate between prohibited functions (proselytization) and permitted functions (engaging in religious exercises)? Certainly, the line dividing the permissible from the impermissible is not precise. If these institutions cross that line, wherever it lies, the government will have free reign to meddle and tweak the inner workings of religious organizations so as to prevent further violations. If the government can not remedy the situation, then its safeguards are either constitutionally insufficient or a pretext for government sponsorship of majoritarian religious activities.

Neutrality theory, not separationism, truly demeans religious belief. By definition, neutrality places religion on an equal footing with the secular. Since religion enjoys a preferred status under our Constitution, this is a demotion of religion, not a promotion.

> If equal treatment prevails, . . . one's religious faith would be on a par with every other worldview and life belief. . . . At the same time, as religious speech and practice are reduced to the level of secular speech and practice, American churches lose their protection from governmental encroachment. The situation will worsen if equal treatment is broadened to allow funding of religious activities and institutions.[383]

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380. McConnell, *supra* note 349, at 31.

381. Henry G. Brinton, *It's Tempting, But My Church Says No Thanks*, WASH. POST, Sept. 10, 2000, at B1.

382. *See supra* Part IV.B.3.

383. Davis, *supra* note 371, at 154–55.

Government subsidization of religious activities has an even more corrosive effect upon the religious mission of churches beyond these invasive procedures.[384] First, direct government aid to religious organizations dilutes the volunteer spirit that drives those institutions. In Germany, where the government financially supports religion, weekly church attendance is a dismal five percent.[385] Here in the United States, we have a robust forty-four percent attendance rate.[386] Additionally, government sponsorship risks turning these volunteer-driven operations of genuine compassion into mere social service bureaucracies. Pastor Henry Brinton of the Calvary Presbyterian Church in Alexandria, Virginia sums it up well:

> I worry about the damage that government can do to religion when the wall between church and state is breached. And I wonder whether communities of faith can remain vibrant volunteer organizations, with strong patterns of private giving, once they have grown accustomed to federal funding.... The vitality of our churches depends on the community's spirit of giving and participating, and it has long been my belief that people are most committed to activities that they choose to support with their disposable income—including Church.[387]

Neutrality operates from the assumption that government aid to religion empowers religion. Yet, nothing could be further from the truth. Government aid to religious programs requires invasive government oversight and weakens the voluntary spirit of those institutions. What is so wrong with a strict separationist system that requires religious institutions to survive solely on voluntary contributions? Benjamin Franklin eloquently summarized this idea:

> When a Religion is good I conceive that it will support itself; and when it cannot support itself, and God does not care to support it, so that its Professors are obliged to call for the help of the Civil Power, 'tis a sign, I apprehend, of its being a bad one![388]

384. *See* Stanley W. Carlson-Thies, *"Don't Look to Us": The Negative Response of the Churches to Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 667 (1997).

385. *See* Brinton, *supra* note 381.

386. *See id.*

387. *Id.*

388. Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *reprinted in* 8 THE WORKS OF BENJAMIN FRANKLIN 506 (Jared Sparks ed., Boston, Hillard, Gray and Co., 1882).

D. *Policy Conclusion*

Neutrality theory—as articulated by the plurality in *Mitchell*, legislative proposals of direct government aid like Charitable Choice, and legal scholarship—does not further the interests of religion. Neutrality theory suggests that the increased size of government and the application of strict separationism has resulted in the marginalization of religion in American society.[389] Yet, the factual evidence contradicts this assertion so violently that it calls into question the purity of the intentions of those who insist that they simply want to see religion treated equally.[390] Neutrality theory is not neutral as between various religious beliefs.[391] In fact, neutrality theory fails to address the protection of minority religious views, the primary purpose of the Establishment Clause.[392] Even if we were to take the protestations of neutrality advocates at face value, there is no reason to conclude that treating religion equally is anything but undesirable. This would demote religion from its constitutionally protected status, resulting in a marginalization of true religious beliefs. Government funding of religion endangers the spirit of volunteerism that drives successful churches.

VI. CONCLUSION

From the dawn of the Supreme Court's modern Establishment Clause jurisprudence, the Court's stance has swung from opposite ends of the intellectual spectrum. Since *Mueller v. Allen*,[393] the Court has emphasized that the private choices of individuals are extremely important in determining whether government aid to religion has the effect of advancing religion. Private choices allow the Court to attribute religious indoctrination to the individual's decision, rather than the government's decision to fund. The Court has also consistently examined the nature of the institution receiving aid. Greater scrutiny applies when aid goes to institutions that so intertwine secular and sacred functions as to make

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389. *See supra* Part V.A.
390. *See supra* Part V.A.
391. *See supra* Part V.B.
392. *See supra* Part V.B.
393. 463 U.S. 388 (1983).

the two indistinguishable. Finally, the Court's decisions indicate that the type of aid and the manner in which it is distributed will influence the constitutionality of government aid to religion. Cash grants paid directly to religious institutions raise the highest level of concern.

Government aid to religion cases are complex and dense. The *Mitchell* decision, however, illustrates the Court's three distinct stances on the issue. First, the plurality's decision rejects all of the previously mentioned principles of the Court's modern Establishment Clause jurisprudence.[394] Instead, the plurality finds that formal neutrality ensures sanctuary from Establishment Clause invalidation.[395] Where aid is distributed based upon non-religious criteria, and the aid itself is not religious in nature, the government has not violated the Establishment Clause.[396] It is not concerned when aid is converted to religious purposes because no indoctrination that occurs is coerced by the government.[397] The plurality emasculates the principle of private choice to the point that ad hoc per capita aid distribution functions as a system of private choice.

Like the plurality, Justice O'Connor's concurrence rejects many of the presumptions that the Court previously erected pertaining to the divertibility of government aid to religion. Unlike the plurality, however, she feels that the actual diversion of government aid for religious purposes still violates the Establishment Clause.[398] The principles of private choice and neutral-aid criteria are only factors in making an Establishment Clause judgment.[399] Direct aid to pervasively sectarian institutions will raise the level of scrutiny.[400] In the end, the concurring justices tend to rely upon factual data, indicating a nexus between government aid and religious indoctrination.[401]

Finally, the separationist wing of the Court, led by Justice Souter, continues to advocate the presumptions of cases like *Meek*

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394. *See supra* Part III.B.3.
395. *See supra* Part III.B.4.
396. *See supra* Part III.B.3.
397. *See supra* Part III.B.3.
398. *See supra* Part III.C.1.
399. *See supra* Part III.C.1.
400. *See supra* Part III.C.2.
401. *See supra* Part III.C.2.

and *Lemon* concerning the divertibility of aid for religious purposes.[402] This wing of the Court will oppose any type of government aid to religion because it violates the purposes behind the Establishment Clause—the separation of the functions of government and religion.[403]

When analyzing the constitutional status of Charitable Choice, it is readily apparent that there can be no definitive answer at this time, due to the fact that most states have yet to implement Charitable Choice programs. More significantly, the splintered nature of the plurality in *Mitchell* fails to give proper guidance on the issue of direct aid to religious institutions. If the factions hold true to form, Justices O'Connor and Breyer will determine the outcome. While they concurred in *Mitchell*, there are several factors that may influence them to swing the opposite direction under Charitable Choice. First, the secular purpose of Charitable Choice is dubious, at best. Second, Charitable Choice permits direct cash payments to religious institutions. Third, Charitable Choice encourages religious use of federal grants. Fourth, the Charitable Choice statute necessitates severe and oppressive governmental interference with religion.

While much of the Court's jurisprudence is unclear, what is clear is that aid to religious programs, like Charitable Choice, are more politically popular than they have ever been. Jurists, legal scholars, and, most of all, legislators have openly embraced a return to the direct government interference in religious matters. More can be expected in the future.

This is disturbing on many levels. First, it operates from the false presumption that the rise of the administrative state has weakened religion. Not only does this speak solely to the soundness of the expansive regulatory state, it also ignores reality. Religion in America abounds. Government aid to religious programs may seem to advance the cause of religious beliefs that inspire humanity and humility. Yet, this is simply not the case. Government aid to religion allows the state to employ religion as an arm of its policy, making religion subject to the whims of the masses. This creates inter-sectarian conflict whereby stronger religions employ their vast resources and connections to the state to sup-

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402. *See supra* Part III.D.2.
403. *See supra* Part III.D.2.

press unpopular minority religious views. Most importantly, government aid to religion dilutes the power and beauty of true religious belief by discouraging volunteerism and converting churches into bureaucracies. The Establishment Clause wisely sought to eliminate such concerns by removing religious matters from political discourse. The Supreme Court would be wise to follow this mandate.

David J. Freedman

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