Neutrality and the Establishment Clause: The Constitutional Status of Faith-Based and Community Initiatives after Agostini and Mitchell

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I. INTRODUCTION

Ten days into his presidency, George W. Bush unveiled a proposal to expand Charitable Choice:

The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty. The delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.¹

With this pronouncement on January 29, 2001, the President formed the White House Office of Faith-Based and Community Initiatives and took his first official step toward delivering on one of his principal campaign promises.² That promise was, of course, his pledge to further devolve the federal welfare system by partnering the government with private faith-based and community groups to provide social services to Americans in need. On July 19, 2001, the United States House of Representatives passed a version of Bush’s proposal.³

This Note shall discuss President Bush’s proposal for Faith-Based and Community Initiatives (FBCI), examining the debate
that exists regarding its constitutionality under the Establishment Clause of the First Amendment. In light of the Supreme Court’s recent decisions in *Agostini v. Felton*⁴ and *Mitchell v. Helms*,⁵ the proposal comports with the Establishment Clause and passes constitutional muster. This conclusion about the FBCI program’s constitutionality is not uncontroversial, and it will be necessary to examine carefully both the *Agostini* and *Mitchell* opinions as they apply to the FBCI proposal. In particular, it should prove helpful to evaluate how these opinions bear upon the two primary methods by which government aid is to be distributed in the FBCI program. The first method is when the government gives vouchers to needy individuals who can then redeem them for services at the provider of their choice.⁶ Under the second method, the government gives money directly to private service organizations either by grants or contracts.⁷ Some of these organizations receiving federal aid would be religiously affiliated.

Before undertaking any First Amendment analysis it will be helpful to set forth in some detail the pertinent elements of the FBCI program as proposed in the bill passed by the House in July 2001.

II. OUTLINE OF LEGISLATION TO EXPAND CHARITABLE CHOICE: FAITH-BASED AND COMMUNITY INITIATIVES

The legislation considered here is a portion of H.R. 7 known as the “Charitable Choice Act of 2001” (the Act).⁸

A. The Act’s Stated Purposes

The Act enumerates several purposes that it is designed to achieve. Foremost among these is the goal to improve the effectiveness and efficiency with which social providers assist needy individuals and families.⁹ One way in which the Act seeks to achieve these improvements is by expanding the network of social service providers by enlisting the help of “religious and other community organizations.”¹⁰ Further, the Act lifts a burden on religious social service providers by prohibiting governmental discrimination against them in the distribution of

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6. H.R. 7, § 201(h)(2).
7. Id. § 201(h)(1).
8. Id. § 201(a).
9. Id. § 201(b)(1).
10. Id. § 201(b)(2).
funding for service programs. Likewise, the Act maintains that religiously affiliated service providers should not be required to surrender their religious character or sacrifice their essential autonomy in order to participate in governmental programs. Finally, and very importantly, the Act seeks to protect against religious establishment by ensuring the religious freedom of individuals and families that receive services from publicly funded providers.

B. Treating Religious and Nonreligious Organizations Neutrally

1. Funds Available on Equal Basis for Achieving Secular Purposes

For all programs described in the Act and involving federal funds, the government must consider religious and nonreligious service providers equally. The government is prohibited from excluding any social service organization on the basis that it is religious. With neutrality in mind, the Act expressly states that money flowing from the government to religious organizations constitutes “aid to individuals and families in need,... not support for” any religious beliefs or practices. The Act also disavows any endorsement of religion through the distribution of funds for social services.

Accordingly, federal funds may flow to private organizations (whether religious or nonreligious) only if those organizations are delivering services that promote the secular goals of one of several pre-existing federal programs. Therefore, private organizations qualifying for federal funding must address at least one of the following areas: juvenile delinquency, crime prevention, assistance to crime victims and offenders’ families, housing, job skills training, domestic violence, hunger relief, commuter transportation, or alternative education.

2. Preserving Organizational Character and Autonomy

An infusion of federal funding is always accompanied by necessary federal oversight and control. However, recognizing that religious organizations have in the past been asked to

11. Id. § 201(b)(3).
12. Id. § 201(b)(4).
13. Id. § 201(b)(5).
14. Id. § 201(c)(1).
15. Id. § 201(c)(2).
16. Id. § 201(c)(3).
17. Id. § 201(c)(4).
18. See id. § 201(c)(4)(i)-(viii).
divorce their beliefs from their service in ways that secular organizations have not, the Act offers the following safeguards for religious liberty. Most fundamentally, religious groups retain their right to control their religious beliefs and practices. Therefore, federal, state, and local governments may not require a religious organization participating in a federally funded program to change its internal form of governance, nor to remove religious art, symbols, or scripture from its premises, nor to change its name because of its religious character.

Recognizing that a religious organization cannot maintain its character without employees who share a commitment to a common creed, the Act permits religious groups to make personnel decisions on the basis of religion. Notably, this provision does not extend new benefits to religious organizations, but simply preserves their rights expressly granted under the Civil Rights Act of 1964. Nothing in the Act, however, exempts participating religious organizations from federal civil rights laws that prohibit discrimination based on race, color, national origin, and, in specific contexts, sex, physical impairment, and age.

C. Protecting the Rights of Individuals and Families Receiving Assistance

1. Governmental Obligation to Provide Services to Which Beneficiaries Do Not Have Religious Objections

The Act respects the rights of individuals and families not to be forced to receive services in an objectionable religious environment. Therefore, it requires federal, state, and local governments to provide alternative services to beneficiaries who object to the religious character of the organization that provides, or would provide, their services.

These alternative services must not be religiously objectionable to the beneficiaries, and they must provide value at least equal to that of the services the beneficiaries would have received had they not raised a religious objection. To ensure the effectiveness of this safeguard against religious establishment, the Act directs the appropriate government entity to notify beneficiaries

19. Id. § 201(d)(1).
20. Id. § 201(d)(2).
21. Id. § 201(e).
23. Id. § 201(f).
24. Id. § 201(g)(1).
25. Id.
of this right to receive services to which they do not religiously object.\textsuperscript{26}

2. Religious Providers of Services May Not Discriminate
   Against Beneficiaries Based on Religion

Honoring the bedrock principle that government funds are
not to be used to benefit one particular religious group or sect, the Act requires participating religious organizations to provide
services to all beneficiaries without regard to their religion or
irreligion.\textsuperscript{27} The Act expressly states that service providers shall
not deny benefits to individuals "on the basis of religion, a religious belief, or a refusal to hold a religious belief."\textsuperscript{28}

D. Keeping Private Organizations Accountable for Their
   Use of Public Funds

Because the funding flowing from the government to religious organizations does not constitute aid to religion, participating religious organizations cannot use the funds for "sectarian instruction, worship, or proselytization."\textsuperscript{29} If religious organizations do provide such activities in addition to social services, these activities must be completely voluntary and offered separately from the programs receiving public funding.\textsuperscript{30} Private organizations that partner with the government to provide services under the Act shall be required to audit and give an account of their use of public funds.\textsuperscript{31}

At the same time, the Act addresses concerns about excessive governmental entanglement with religion by limiting this audit to funds received as direct aid from the government. Parishioner donations and indirect public aid such as vouchers can be segregated into separate accounts not subject to governmental oversight.\textsuperscript{32} Additionally, participating religious organizations shall conduct annual self-audits, checking for compliance with the Act's requirements such as religious neutrality toward beneficiaries, and appropriate use of funds.\textsuperscript{33} In this manner, governmental "entanglement" is minimized while public accountability is maintained.

\begin{itemize}
\item \textsuperscript{26} Id. § 201(g)(2).
\item \textsuperscript{27} Id. § 201(h).
\item \textsuperscript{28} Id. §§ 201(h)(1)–(2).
\item \textsuperscript{29} Id. § 201(j).
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. § 201(i).
\item \textsuperscript{32} Id. § 201(i)(2).
\item \textsuperscript{33} Id. § 201(i)(3).
\end{itemize}
E. Provision of Training and Technical Assistance to Small Private Organizations

One of the FBCI program’s primary objectives is to increase the government’s cooperation with smaller, local social service providers. To promote this goal, the Act provides for programs to train small and new private organizations (both religious and nonreligious) in procedures for navigating the federal bureaucracy in search of funds for social service providers. Under the Act, available assistance could include workshops and other training to help small, private groups form tax-exempt 501(c)(3) organizations, and to explain how to comply with federal accounting, tax, and nondiscrimination requirements. While such funds would be generally available to all private social service organizations, the Act expressly requires that smaller groups receive priority in the distribution.

III. GLEANING CONSTITUTIONAL PRINCIPLES

Having set forth the FBCI program’s main elements, this discussion can move to analysis of the Act’s constitutionality. As noted above, two recent Supreme Court opinions have redefined the boundaries of permissible cooperation between church and state. In its 1997 Agostini opinion, the Court held that a federally funded Title I program sending public school teachers into private religious schools to give secular instruction during school hours did not violate the Establishment Clause. Then in 2000, the Court decided Mitchell, another case involving federal aid to private religious schools. The Court held that the Establishment Clause permitted federal lending of educational materials to religious schools. Neither of these cases presented a federal program identical to the FBCI proposal, but their principles form the basis of the following analysis, beginning with Agostini.

35. H.R. 7, § 201(o).
36. Id. § 201(o)(2).
37. Id. § 201(o)(4).
38. For my understanding of Agostini, Mitchell, and the rest of the Court’s Establishment Clause jurisprudence, I am deeply indebted to Professor Richard Garnett and his excellent course on the First Amendment.
41. Id. at 835.
A. Agostini v. Felton: Refining the Lemon Test

*Agostini* involved federal Title I funds that were statutorily required to be available to all eligible children whether they attended public or private schools. The Title I funds flowed from the federal government to the states, then to local education agencies (LEAs). The LEAs would then distribute the funds for remedial education, guidance and job counseling for eligible students. Funds distributed to aid private school children were subject to stricter regulation than those that benefited children in public schools. For example, the funds for private schools could not be used in any school-wide programs, but had to be targeted specifically for eligible students. Furthermore, the LEA had to retain control over the funds rather than allowing private schools to manage them, Title I services had to be supplied by persons independent of the private schools, and the services themselves had to be “secular, neutral, and nonideological,” and be supplemental to the private schools’ pre-existing programs.

Prior to delivering Title I instruction at private schools, teachers were given instructions about the program’s secular purpose and how they should conduct themselves so as not to compromise that purpose. They were not to introduce religious materials or ideas into their instruction or to become involved with the religious activities of the school. Religious symbols were to be stripped from classrooms where Title I instruction occurred. Finally, public officials were to make unannounced monthly visits to these classrooms to see that these secular guidelines were being followed.

Writing for a five-justice majority, Justice O’Connor declared that the Title I program did not violate any of the three primary criteria the Court uses to determine if government aid has the impermissible effect of advancing religion. These three criteria are: 1) the government aid must not result in indoctrination, 2) it must not define its recipients by reference to religion, and 3) it must not create an excessive entanglement of government and religion.

First, as to the indoctrination issue, the Court reasoned that the mere presence of a public employee on parochial school

42. *Agostini*, 521 U.S. at 209.
43. Id. at 210.
44. Id. at 211.
45. Id. at 211–12.
46. Id. at 212.
47. Id. at 234.
48. Id.
grounds, without more, did not result in impermissible government-sponsored indoctrination.\textsuperscript{49} Neither did such presence constitute a "symbolic link" between the government and religion.\textsuperscript{50} \textit{Agostini} further rejected the notion that a federally funded program could result in religious indoctrination simply because it reached a large number of recipients affiliated with religious organizations.\textsuperscript{51}

The \textit{Agostini} Court relied on \textit{Zobrest v. Catalina Foothill School District} and \textit{Mueller v. Allen} to disavow this method of strict numerical analysis.\textsuperscript{52} It noted that the outcome in \textit{Zobrest} had not depended on the fact that James Zobrest was the only student using a state-funded sign-language interpreter in a parochial school.\textsuperscript{53} Further, the Court quoted the following language from \textit{Mueller} to support its decision: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."\textsuperscript{54}

Second, the \textit{Agostini} Court considered the criteria by which beneficiaries were selected. It noted that selection criteria were important because they might advance religion by creating incentives for religious participation.\textsuperscript{55} However, because the Title I program applied to all eligible students regardless of their religion or the religious or secular status of their schools, the Court concluded that the program neither favored nor hampered religion. Importantly, these religion-neutral selection criteria did not give students or parents any incentive to alter their religious beliefs or practices.\textsuperscript{56} Before announcing its conclusion on this issue, the Court recalled several other neutrally distributed aid programs that had complied with the Establishment Clause. These included, among others, reimbursement to parents for public and private school bussing,\textsuperscript{57} loans of secular text-

\textsuperscript{49} \textit{Id.} at 223 (citing \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1 (1993)). In \textit{Zobrest} the Court held that it was permissible for a state-employed sign language interpreter to sign for a deaf student at his Roman Catholic high school. \textit{Id.} at 13.

\textsuperscript{50} \textit{Agostini}, 521 U.S. at 224.

\textsuperscript{51} \textit{Id.} at 229.


\textsuperscript{53} \textit{Agostini}, 521 U.S. at 229 (discussing \textit{Zobrest}, 509 U.S. at 1).

\textsuperscript{54} \textit{Id.} at 230 (quoting \textit{Mueller}, 463 U.S. at 401).

\textsuperscript{55} \textit{Id.} at 230–31.

\textsuperscript{56} \textit{Id.} at 232.

\textsuperscript{57} \textit{Id.} at 231 (citing \textit{Everson v. Board of Ed. of Ewing}, 330 U.S. 1, 16–18 (1947)).
books to all students in public and private schools, and funding for vocational training for blind persons even when one aid recipient used those funds to train as a Christian minister.

Third, the Court resolved that the Title I program did not result in excessive entanglement between government and religion. In analyzing whether such entanglement existed, the Court looked to the following factors: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." It held that neither concerns about administrative cooperation between religious organizations and government, nor concerns about political divisiveness were sufficient to constitute excessive entanglement.

One entanglement concern the Court did consider was the need for governmental monitoring of religious organizations. However, it dismissed this as insufficient to cause excessive entanglement. In the wake of Zobrest, the Court reasoned, it would no longer presume public employees would inculcate religion whenever they stepped foot into a sectarian environment. Therefore, because publicly-funded employees can largely be trusted to refrain from religious indoctrination, the need for governmental monitoring of religious organizations is not pervasive but limited.

In summary, Agostini clarified the Court's modification of the Lemon test. It retained the first Lemon prong requiring the

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58. Id. (citing Bd. of Ed. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243-44 (1968)).
59. Id. (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986)).
60. Id. at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (internal quotation marks omitted)).
61. Id. at 233-34.
63. Agostini, 521 U.S. at 234.
64. Id.
65. Id.
66. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (setting forth the famous three-prong Lemon test for Establishment Clause compliance: Government action must 1) have a secular purpose, 2) not have a primary effect of either advancing or inhibiting religion, and 3) not create an excessive entanglement between government and religion). In Lemon, the Court considered two statutes enacted by the legislatures of Rhode Island and Pennsylvania. The Rhode Island statute required the state to supplement the salaries of teachers who taught only secular subjects in nonpublic elementary schools. Rhode Island would pay a supplement of up to fifteen percent of such teachers' salaries, provided that this supplement did not cause any recipient's salary to
government to act with a valid secular purpose. Agostini also preserved the second Lemon prong, the "effects" test. However, the Court revised the criteria it uses to make this "effects" inquiry. It set forth three elements to the analysis, the third of which incorporated the Lemon "entanglement" prong into the "effects" inquiry. This reduced the "entanglement" analysis to being just one factor contributing to a program's "effect" on advancing or inhibiting religion. The result was a two-prong test: 1) does the program have a valid secular purpose? and 2) does the program have the primary effect of advancing or inhibiting religion? The Court's three "effects" factors are reviewed in the following paragraphs.

First, government aid to religious organizations must not sponsor religious indoctrination. The mere presence of a public employee working in a sectarian environment does not cause such indoctrination, nor does it establish a "symbolic link" between government and religion. Nor does a publicly funded program result in indoctrination simply because a significant number of its beneficiaries are religious individuals or organizations.

Second, government aid can only flow to religious organizations if it does so as part of a religion-neutral distribution process. Distribution criteria must not benefit one religious group over another, or religion over irreligion because such criteria would create incentives for individuals to alter their religious practices or beliefs. The Court has many times upheld programs that happen to give aid to religious individuals or organizations as a result of religion-neutral distribution systems.

exceed the maximum salary of public school teachers. Under the Pennsylvania statute the state reimbursed nonpublic schools for teachers' salaries, textbooks, and other materials insofar as these were used for secular instruction. No state money could be used for materials used in classes with religious instruction or worship. The Court invalidated both the Rhode Island and Pennsylvania statutes on the ground that they resulted in an excessive entanglement between government and religion. See John T. Noonan, Jr., The Believer and the Powers That Are 378-85 (1987).

67. Agostini, 521 U.S. at 222-23 ("we continue to ask whether the government acted with the purpose of advancing or inhibiting religion").
68. Id. at 234.
69. See id. at 222-23, 234.
70. Id. at 223.
71. Id. at 224.
72. Id. at 229-30.
73. Id. at 231.
74. Id.
75. Id. (citing numerous cases).
Third, government aid to religious organizations must not result in excessive entanglement between government and religion.\textsuperscript{76} It is not altogether clear what would in the Court's view constitute such entanglement. But the \textit{Agostini} decision states at least that monthly visits to religious school classrooms by public officials do not rise to this level.\textsuperscript{77} Moreover, public employees working in sectarian environments can generally be trusted to conduct their duties without inculcating religion. The effect of this presumption is that pervasive governmental monitoring is not required.\textsuperscript{78} Finally, neither administrative cooperation between religious and government officials, nor political divisiveness constitutes excessive entanglement.\textsuperscript{79}

Three years after \textit{Agostini}, the Court in \textit{Mitchell}\textsuperscript{80} again upheld a program giving government aid to religious schools. Analysis of \textit{Mitchell} follows below.

\section*{B. Mitchell v. Helms: Neutral Aid Programs Are Not Endorsement}

\textit{Mitchell} involved a federal education program known as Chapter 2.\textsuperscript{81} Through Chapter 2 the federal government granted money to state and local government agencies which distributed the funds to all public and nonprofit private schools.\textsuperscript{82} This distribution was based entirely on the number of students attending a school, with each school receiving the same amount per student.\textsuperscript{83} Aid flowed to public and private schools in the form of instructional and educational materials.

As was true in \textit{Agostini}, the government placed several restrictions on the federal aid to private schools. Chapter 2 funds could only be used to supplement a private school's normal budget and could not supplant funds from non-federal sources.\textsuperscript{84} The nature of the aid was of particular concern. Under Chapter 2, aid to private schools had to be "secular, neutral, and nonideological."\textsuperscript{85} Additionally, local educational agencies (LEAs) retained title to all loaned materials, and controlled all funding received through Chapter 2. Approximately thirty

\begin{itemize}
  \item \textsuperscript{76} \textit{Id.} at 232.
  \item \textsuperscript{77} \textit{Id.} at 234.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{Id.} at 233-34.
  \item \textsuperscript{80} Mitchell v. Helms, 530 U.S. 793 (2000).
  \item \textsuperscript{81} \textit{Id.} at 801.
  \item \textsuperscript{82} \textit{Id.} at 802. These agencies are local educational agencies (LEAs) just as in \textit{Agostini}.
  \item \textsuperscript{83} \textit{Id.} (citing 20 U.S.C. §§ 7301-73).
  \item \textsuperscript{84} \textit{Id.} at 802.
  \item \textsuperscript{85} \textit{Id.} (citing 20 U.S.C. § 7372(a)(1)).
\end{itemize}
percent of the funds distributed by the local LEA went to forty-six private schools. Of these, forty-one were religiously affiliated.86

With its Mitchell opinion, the Supreme Court determined Chapter 2's constitutional status under the Establishment Clause. Six justices held that Chapter 2 was not a law respecting an establishment of religion and voted to uphold the program. Justice Thomas wrote for a four-justice plurality. Justice O'Connor wrote for herself and Justice Breyer, concurring in the judgment.87 Although Justice Thomas' plurality opinion garnered more votes than any other on the Court, it was Justice O'Connor's less sweeping opinion that established the boundaries of the Court's Establishment Clause jurisprudence.88 For this reason, after framing the issues presented to the Court, this Note will sketch the plurality opinion only briefly before examining more fully Justice O'Connor's concurrence in the judgment.89

Both opinions made repeated references to Agostini. The parties agreed that Chapter 2 had a valid, secular purpose. Because in Agostini the Court had reduced the Lemon test from three prongs to two, this left the Court only to decide whether the Chapter 2 program had the effect of advancing or inhibiting religion. Proceeding to this "effects" analysis, the Court could further pare its inquiry because the parties did not claim any excessive entanglement between government and religion. Therefore, it had only two "effects" factors to consider: 1) whether Chapter 2 resulted in governmental religious indoctrination, and 2) whether the government distributed the aid on a religion-neutral basis.

1. The Mitchell Plurality

The four members of the plurality began this two-part inquiry by checking for governmental religious indoctrination. Their test for impermissible religious indoctrination was whether any indoctrination that occurred "could reasonably be attributed to governmental action."90 They made this "attribution" determination, in turn, by deciding whether the federal aid was dis-

86. Id. at 803.
87. Id. at 801, 836.
88. See Marks v. United States, 430 U.S. 188, 193 (1977) (recognizing that when the Supreme Court does not issue a majority opinion, the opinion concurring in the judgment on the narrowest grounds establishes controlling precedent).
89. For a helpful, and extremely brief, summary of the plurality's opinion, see Mitchell, 550 U.S. at 837 (O'Connor, J., concurring in the judgment).
90. Id. at 809 (citing Agostini v. Felton, 521 U.S. 203, 226 (1997)).
tributed in a religion-neutral manner.\footnote{Id. at 809.} The plurality contended that if all organizations—whether religious, irreligious, or areligious—were eligible for aid no one could reasonably have concluded the government had supported any indoctrination.\footnote{Id.} It then made the following statement about the importance of religion-neutral distribution criteria:

\begin{quote}
[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.\footnote{Id. at 810 (citation omitted).}
\end{quote}

From these premises, the plurality proceeded to form an elegant rule for determining whether government aid advances religion: such aid does not advance religion if the aid itself is not religious in content,\footnote{Id. at 822.} and the aid is made available to all recipients based on religion-neutral criteria.\footnote{Id. at 813.} The plurality considered it unimportant if content-neutral government aid was diverted by a private entity for religious uses.\footnote{Id. at 820. For example, neutral aid would be diverted to religious use if an overhead projector were used to teach a sectarian theology class.} Finally, the plurality greatly diminished the importance of the distinction between direct and indirect aid.\footnote{Id. at 817-19 (dismissing the direct/indirect distinction as an exaltation of form over substance, but reserving the possibility that it might play a role in some "special" cases) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995)).}

2. The \textit{Mitchell} Concurrence in the Judgment

Like the justices in the plurality, Justices O'Connor and Breyer decided that the Chapter 2 program provided content-neutral aid, and distributed that aid in a religion-neutral manner. This was not enough, however, for them to conclude that Chapter 2 did not have the effect of advancing or inhibiting religion. First, the concurring justices rejected, or at least refused to join, the plurality's position that neutral content plus neutral distribution equaled no advancement of religion.\footnote{Id. at 837.} Second, their concurrence asked if the aid had been diverted to
religious uses. Because the concurring justices found on the facts that no indoctrination had occurred, and that any diversion of aid for religious purposes had been _de minimis_, they concurred in the judgment to uphold Chapter 2.

Two aspects of the concurrence merit closer attention. These are its discussion about the diversion of funds to religious uses and the distinction between direct and indirect aid to religious organizations. Unlike the plurality, the concurrence conditioned its approval of Chapter 2 on the fact that federal funds were not diverted except for possible _de minimis_ exceptions. However, the concurrence made no presumption that government aid—though capable of being diverted to religious uses—was in fact employed for religious purposes. The concurrence recalled that in _Agostini_ the Court emphasized the impropriety of presuming government aid would be used to advance religion. Instead, the plaintiff raising an Establishment Clause claim bears the burden of proving that the aid was used to promote religious indoctrination.

According to the concurrence, diversion in _Mitchell_ could only be found if one were to “presume bad faith on the part of the religious school officials.” However, no such diversion could be found because it was “entirely proper to presume that these school officials [would] act in good faith.” An important corollary of presuming good faith compliance with secular use guidelines is that the government need not pervasively monitor religious recipients of aid. This reduces the likelihood of excessive entanglement between government and religion.

One final note on the diversion of funds fits neatly into the following discussion of direct versus indirect aid. Specifically, according to the concurrence, diversion of public funds to religious uses is not problematic if it occurs as the result of “genuinely independent and private choices of aid recipients.”

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99. _Id._ at 837–38, 857.
100. _Id._ at 867. Justice O'Connor also identified other factors that contributed to the decision to uphold the program: 1) the aid supplemented rather than supplanted non-federal funds, 2) the aid never “reached the coffers” of religious schools, and 3) the program included “adequate safeguards” against governmental advancement of religion. Significantly, she indicated that while this combination of factors was “surely sufficient” to uphold the program, they might not all be “constitutional requirements.” _Id._
101. _Id._ at 840, 867.
102. _Id._ at 857–58.
103. _Id._ at 863.
104. _Id._ at 863–64.
105. _Id._ at 841 (quoting _Witters v. Wash. Dept. of Servs. for the Blind_, 474 U.S. 481, 487 (1986)).
tinction between direct and indirect aid is extremely important in cases where government aid ultimately supports religious activities. In fact, the concurrence indicates that this direct/indirect distinction is determinative. Direct aid is that aid that flows straight from the government to a religious organization without first passing through the hands of private individuals. Naturally enough, indirect aid is aid that the government distributes to individuals who then make a private, independent choice about where to put that aid to use. A familiar example of indirect aid is a voucher that can be used by recipients to attend schools of their choosing.

Applying these categories in Mitchell, the concurrence found Chapter 2's per-capita aid program to constitute direct aid. The justices concurring in the judgment offered three reasons supporting this determination. First, they noted that the per-capita distribution flowed directly to the schools without ever being controlled by the children’s families. However, the money earmarked for each student went to a given school based solely on the student’s decision to attend. Nevertheless, the concurrence still deemed this direct aid because the student, apart from choosing a religious or secular school, did not have control over whether the government aid would be used to benefit a religious institution.

Second, the concurrence argued that the distinction between an indirect voucher system and a “direct” per-capita distribution system affected public perceptions about government

106. See id. at 841.
107. Id.
108. In June, 2002, the Supreme Court upheld the Cleveland City School District’s vouchers program in Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002). Vouchers providing tuition assistance were distributed directly to the parents of school children who then applied the vouchers to schools of their choosing. If parents chose to send their children to private schools, checks were made payable to the parents who then endorsed the checks over to the chosen school. Thus, “Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child.” Id. at 2464. The Court’s opinion focused heavily on the indirect nature of the Cleveland voucher program’s aid to religion. Therefore, the Zelman analysis does not apply as directly to the FBCL proposal as do Agostini and Mitchell, and further discussion of Zelman is unmerited in the context of this Note.
110. Id.
111. Id. at 843. Apparently Justice O’Connor envisioned parents who would choose to send their children to religious schools, but because of their refined view of the Establishment Clause would desire to refund the aid back to the government rather than have it benefit their children’s education.
endorsement of religion.\textsuperscript{112} If the aid flowed directly to religious schools on a per-capita basis, and if that aid were then used to inculcate religion, the public would likely perceive a governmental endorsement of religion. However, if private individuals served as independent intermediaries between the government and religious schools, a different situation would exist. There, any religious use of the aid would be far enough removed from the government's decisions that no reasonable observer would likely conclude any governmental endorsement of religion had occurred.\textsuperscript{113}

Third, and finally, the concurrence asserted that the difference between direct and indirect aid programs is particularly important when the aid consists of monetary subsidies.\textsuperscript{114} Aid flowing to religious organizations in the form of cash payments was an activity the Court had previously identified as one raising "special Establishment Clause dangers."\textsuperscript{115} The concurrence did not explain why these "special dangers" exist, but one rationale could be that cash is fungible and may be more easily diverted to religious uses than other forms of aid.

To summarize, the effect of the concurrence's view on the direct/indirect distinction is that direct aid cannot be used for religious purposes, but indirect aid can possibly be put to such religious uses.\textsuperscript{116} It is important to recognize that this does not place a ban on direct aid to religious organizations; it merely restricts the application of such aid to secular uses only.\textsuperscript{117}

3. The Establishment Clause: Lessons From \textit{Mitchell}

Justice O'Connor's concurrence in the judgment is more constrained than the plurality opinion of Justice Thomas. Thus, the rules emerging from \textit{Mitchell} are derived from the concurrence.\textsuperscript{118} Pared to its essentials, \textit{Mitchell} stands for the following four propositions:

1. The three-prong \textit{Lemon} test has now become a two-prong test. Federal aid programs must have a secular purpose and must not have the primary effect of advanc-

\textsuperscript{112} \textit{Id.} at 843.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} (quoting Rosenberger v. Rector, 515 U.S. at 842).
\textsuperscript{116} \textit{Id.} at 841.
\textsuperscript{117} The concurrence did, after all, characterize the per-capita aid program as direct aid, yet held that it lay well within the bounds of the Establishment Clause. \textit{See id.} at 841, 867.
\textsuperscript{118} \textit{See supra} note 88.
ing or inhibiting religion. The third *Lemon* prong—the restriction on excessive entanglement—is subsumed into the "primary effects" analysis. The three subtests for primary effects require that a) the government aid does not result in governmental religious indoctrination, b) the aid is distributed according to religion-neutral criteria, and c) the aid does not result in excessive entanglement between government and religion.

2. Indirect government aid that flows to religious organizations only by the independent choices of private individuals does not violate the Establishment Clause even when such aid is applied to religious uses. "[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." The role of the private decision-maker is central to the analysis because it diffuses claims that the government has engaged in religious endorsement.

3. The Establishment Clause permits direct government aid to flow to religious organizations without first passing through the hands of private individuals, but only if such aid is not applied to religious uses. The Court's approval of direct aid programs relies in part on the fact that the aid is not "used to advance the religious missions" of the recipient organizations.

4. Finally, there is to be no presumption that content-neutral aid that flows from government to religious organizations will be diverted for impermissible (religious) uses. Indeed it is "entirely proper to presume that [aid recipients] will act in good faith." According to the Court's opinion in *Agostini* this presumption of good faith compliance removes the need for pervasive governmental monitoring of aid recipients. This naturally

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120. Id. (citing *Agostini*, 521 U.S. at 234).
121. *Id.* at 841.
122. *Id.* at 842 (quoting *Witters* v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 493 (1986)).
123. *Id.* at 840.
124. *Id.* (citing *Agostini*, 521 U.S. at 226–27).
125. *Id.* at 863–64.
126. *Id.*
reduces the risks of excessive entanglement between government and religion.\textsuperscript{128}

It now remains only to apply the principles of \textit{Agostini} and \textit{Mitchell} to H.R. 7, the bill that would expand Charitable Choice and implement President Bush’s proposals for partnering the federal government with faith-based and community organizations.\textsuperscript{129}

IV. APPLYING CONSTITUTIONAL PRINCIPLES

Under \textit{Agostini} and \textit{Mitchell}, the FBCI program is consistent with the constraints of the Establishment Clause. While the First Amendment’s prohibition of laws “respecting an establishment of religion” is a vital guarantor of Americans’ sacred liberty, defining “establishment” requires critical thought.\textsuperscript{130} The Court’s opinions demonstrate that there is not an absolute ban on government money flowing to religious organizations.

The government effectively puts money into the pockets of religious groups in a number of ways. These include: property tax exemptions for religious organizations; personal income tax deductions for donations to non-profit organizations (both religious and nonreligious); federally subsidized financial aid that students can spend at either religious or secular colleges or universities; and welfare recipients tithing part of their (government subsidized) income to their local religious congregation.\textsuperscript{131} These examples include both direct and indirect flow of aid to religious organizations. Most constitute indirect aid that flows to religious organizations only due to the choices of private individuals, but property tax exemptions benefit religious groups solely at the behest of government.

It should be clear by now that the government may, in particular instances, enact policies and aid programs that benefit religious groups. Of course the Establishment Clause places necessary limitations on how the government can do this, but it does not completely ban aid that happens to benefit religion. The following analysis applies the limitations established by \textit{Mitchell} and (to a lesser extent) \textit{Agostini} to the FBCI program as proposed in the Charitable Choice Act of 2001.\textsuperscript{132}

\textsuperscript{128} Id.
\textsuperscript{129} H.R. 7, 107th Cong. § 201 (2001).
\textsuperscript{130} U.S. CONST. amend. 1.
\textsuperscript{132} H.R. 7, § 201.
A. Does the FBCI Program Have a Valid Secular Purpose?

The Act enumerates five purposes at the beginning of its text. Listed first is the primary purpose of increasing the effectiveness and efficiency with which social assistance is administered to needy individuals and families.133 Providing food for the hungry, shelter for the homeless, and treatment for the addicted are surely valid secular purposes of the government. Thus, it should be permissible for the government to enact legislation with the purpose of improving its ability to achieve those important social welfare goals. After all, this purpose does not even mention religion.

The second, third, and fourth purposes of the Act do mention religious organizations. However, they make mention of religion only to demand that all private charitable groups be treated equally, in a manner that does not discriminate based on religious or nonreligious affiliation.134 The equal treatment is designed to expand the government’s network of partners delivering social services, and thus to advance the goal of providing for the needy more effectively and efficiently.

The Act specifically bans discrimination against religious groups because these groups have historically been excluded from government programs.135 With this ban on discrimination, the Act lifts a burden from religious organizations and places them on even footing with private nonreligious charities. Quite simply, the Act does not set religion apart for special treatment; it merely prevents the government from discriminating against religion.

The Act’s fifth stated purpose is to protect the religious freedom of needy individuals and families that receive social services provided by the government or its private partners.136 If anything, this interjection of religion into the Act’s purposes cuts against establishment of religion. This “religious freedom” purpose safeguards against any recipient of government-sponsored services being coerced into religious participation. All of the Act’s stated goals, therefore, point toward a valid secular purpose: increasing the government’s ability to provide social services for its citizens in a way that honors these citizens’ fundamental rights.

By looking beyond the text of the bill, to secondary documents touting the merits of the FBCI proposal, one discovers yet

133. Id. § 201(b)(1).
134. Id. § 201(b)(2)-(4).
135. UNLEVEL PLAYING FIELD, supra note 34, at 2.
136. H.R. 7, § 201(b)(5).
more evidence for the program’s secular purpose. For example, President Bush’s executive order establishing the White House FBCI office declares that the plan seeks to help faith-based and other community groups “strengthen their capacity to better meet social needs in America’s communities.”\textsuperscript{137} The order goes on to state that the program’s “paramount goal is compassionate results . . . such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty.”\textsuperscript{138} The federal departments of Justice, Labor, Housing and Urban Development, Education, and Health and Human Services combat these issues every day. These are indeed valid secular purposes.

B. \textit{Does the FBCI Program Have the Primary Effect of Advancing Religion?}

As Agostini and Mitchell instruct, there are three phases to this inquiry into “primary effects.” First, does the aid result in governmental indoctrination? Second, is the aid distributed based on religion-neutral criteria? And third, does the aid program cause excessive entanglement of government and religion?\textsuperscript{139}

1. \textbf{Does the FBCI Program Result in Governmental Religious Indoctrination?}

When determining if government aid results in religious indoctrination, the threshold inquiry is whether the aid is religious in content. Even the plurality in Mitchell seems to require that aid be religion-neutral and suitable for secular uses.\textsuperscript{140} The aid in Agostini was the secular instructional services of publicly employed teachers.\textsuperscript{141} In Mitchell the aid was educational materials such as library books, computers, software, and audio/visual equipment.\textsuperscript{142} The valid educational purpose of such aid is self-evident.

Although the Act offers only a general description of the aid it would provide, it does clearly indicate the secular purposes for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Exec. Order No. 13,198 (2001).
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Mitchell v. Helms, 530 U.S. 793, 808 (2000) (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)).
\item \textsuperscript{140} Id. at 825 (“The issue is . . . whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.”).
\item \textsuperscript{141} Agostini, 521 U.S. at 209–10.
\item \textsuperscript{142} Mitchell, 530 U.S. at 802.
\end{enumerate}
\end{footnotesize}
which it is to be used. The aid from the FBCI program is to be used to promote the work of several federal initiatives aimed at addressing public problems like crime, homelessness, lack of health care, and lack of education. The Act's further stipulation that it constitutes neither aid to nor endorsement of religion provides additional assurance that "funds and other assistance" will be suitably content-neutral. Finally, the Act expressly prohibits its aid from being applied to religious activities including "sectarian instruction, worship, or proselytization." All of this guidance regarding the aid's intended use should adequately ensure that its content will be neutral.

Because the aid offered by the Act is content-neutral, the next step is to determine whether such aid will nonetheless be diverted to religious uses. At this point it is helpful to recall that the Court does not presume aid will be improperly diverted. In fact it makes the opposite presumption, treating its partner organizations as good faith trustees. Proof of actual diversion, not mere divertibility, is required to support a claim of an Establishment Clause violation.

Moreover, the Mitchell concurrence indicates that this diversion inquiry needs only be made when the aid involved flows directly to a religious organization. This, of course, raises the direct/indirect aid distinction. The Act would provide both direct and indirect aid to private religious and secular charities. Therefore it is necessary to determine if the Act impermissibly allows direct aid to be diverted to religious uses.

As noted above in the discussion about content neutrality, the Act contains several provisions that give instructions on proper use of direct aid. The aid is to be used to promote federal social welfare programs in furtherance of secular objectives. Furthermore, the Act prohibits government aid from being applied to religious activities like "sectarian instruction,

143. H.R. 7, 107th Cong. § 201(c)(2)(3) (2001) (describing "funds or other assistance").
144. See id. § 201(c)(4).
145. Id. § 201(c)(2)(3).
146. Id. § 201(j).
147. Mitchell, 530 U.S. at 857.
148. See id. at 863-64.
149. Id. at 858.
150. Id. at 841 (noting that in Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986), and Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), the aid facilitated religious instruction, but these uses were permitted because they occurred due to the independent choices of private individuals).
151. See H.R. 7, § 201(h)(1)(2).
152. See id. § 201(c)(4).
worship, or proselytization." 153 Private organizations receiving direct aid under the FBCI program should not be confused by the Act's plain language. They will know that the government aid is to be used to further secular purposes. Because of the Act's clear secular use guidelines, and because of the Court's presumption of compliance with them, the FBCI program passes what might be called the "no actual diversion" test.

2. Does the FBCI Proposal Distribute Aid on a Religion-Neutral Basis?

A second way in which government aid programs can cause religious indoctrination is if these programs identify aid recipients on the basis of religion. 154 There are two reasons for this principle. First, if the government distributes aid to recipients based on their religious affiliation (or lack thereof) it sends a strong message of endorsement and any indoctrination that results from the aid can be easily attributed to the government. 155 Second, religiously biased distribution criteria might create financial incentives for individuals or organizations to alter their religious beliefs or practices. 156

The Act is carefully drafted to prevent any religious bias from entering into its distribution calculus. Its overriding purpose is to improve the government's ability to deliver social services to needy individuals and families. It recognizes that one way to accomplish this is to expand the government's network of private charitable partners. Logically enough, the Act contends that an efficient way to expand this network is for government to cooperate with all effective charitable organizations regardless of their religious or nonreligious affiliations. 157 It defies reason to argue that an act that expressly rejects discrimination based on religion (which the FBCI proposal does) could result in religion-based distribution.

But even though the Act prescribes a facially neutral set of distribution criteria, it still must guard against creating incentives for aid recipients to alter their religious beliefs or practices. The Act does this by prohibiting the flow of aid to any private program that discriminates against the individuals and families it serves on the basis of religion. Specifically, the Act declares that service providers receiving federal FBCI funds shall not discrimi-

153. Id. § 201(j).
155. Id. at 230.
156. Id. at 231.
157. See H.R. 7, § 201 (b)(1)–(5).
nate against those seeking assistance on the basis of "religion, a religious belief, or a refusal to hold a religious belief." In practice, this means that if a soup kitchen run by a Christian church accepts federal FBCI aid, it must feed not only fellow Christians, but also people who profess other faiths, or no faith at all.

The Act offers still another important protection against religious coercion. If any person eligible for social services under the FBCI program objects to the religious nature of a service provider, the government entity overseeing the project must provide alternative services to which the individual has no religious objection. To ensure that this provision is an effective safeguard, the supervising governmental body must provide notice of this right to all those receiving assistance.

Still, there may be some concern that individuals adhering to less common religions will encounter much more difficulty obtaining services from a provider that shares their faith. But the Act helps to address this issue. It provides for training and technical assistance programs with a mandatory priority on training small organizations to obtain funding and comply with federal regulations. This emphasis on assisting smaller organizations reflects the Act's overall commitment to neutrality, inclusion, and nondiscrimination. Training of this type will help level the charitable playing field. Smaller groups such as Buddhists, Jehovah's Witnesses, and Muslims will be able to serve alongside larger, better-connected organizations like the Southern Baptist Convention and Roman Catholic Church. Under these guidelines it is difficult to imagine a scenario where a person would be subjected to unwanted religious influence.

3. Does the FBCI Program Result in Excessive Entanglement of Government and Religion?

The principle that guides this inquiry is that the Court will presume good faith compliance by religious organizations that participate in neutral aid programs. As a result of this good faith presumption, there is no need for the government to engage in intrusive monitoring of its religiously affiliated partners. The monitoring mechanisms prescribed by the Act for FBCI participants help to ensure compliance while avoiding

158. Id. § 201(h)(1)(2).
159. Id. § 201(g)(1).
160. Id. § 201(g)(2).
161. Id. § 201(o)(1)-(4).
163. Id.
excessive entanglement. Religious organizations receiving funds under the FBCI program must account for their use of those funds using the same methods that participating secular groups must use. In this way, religious groups are not singled out for extra rigorous investigation that could lead to entanglement.

Furthermore, religious groups are required to conduct annual self-audits checking for compliance with the Act’s regulations. At first glance this may appear to be a case of the fox guarding the henhouse, but the Act addresses this concern by requiring religious groups directly receiving federal funds to permit the government to conduct a full audit of how these funds have been spent. In summary, the Act’s provisions for governmental oversight comport with the Court’s decisions by requiring compliance without causing excessive entanglement between religion and government.

V. Conclusion

Applying tests established by Agostini and Mitchell, the FBCI program complies with the restrictions of the Establishment Clause. As with any federal program, there may be isolated cases where participants fail to comply fully with the regulations. But these can be dealt with on a case-by-case basis, and the possibility of occasional deviations presents no more reason to discard the FBCI program than any other federal venture.

The Court’s recent Establishment Clause jurisprudence is not without its critics. Commonly, their criticisms are directed at the Court’s adoption of a neutrality analysis and its willingness to distinguish between direct and indirect aid to religion. The critics contend that distribution of public aid based on religion-neutral criteria does not sufficiently guard against government support of religion. The Establishment Clause was meant to protect individuals from having their tax dollars spent to support religion. Such government spending would “cause profound divisiveness and offense,” or so the argument goes.

164. H.R. 7, § 201(i)(1).
165. Id. § 201(i)(2).
166. For examples of this neutrality analysis see Mitchell v. Helms, 530 U.S. 793 (1999); Agostini, 521 U.S. at 203; and Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).
169. Id. at 209–10.
Kathleen Sullivan has compared government expenditures that reach religious organizations with the compulsory payment of union dues that the Court restricted in *Abood v. Detroit Board of Education*. In *Abood*, the Court held that public employees could be compelled to contribute money to their union for collective bargaining activities, but not to pay for the union's other forms of political and ideological speech. Sullivan concludes that the Establishment Clause confers upon every taxpayer "a kind of non-disclaimable Abood right . . . against government expenditures in support of religion."

This conclusion, however, is inconsistent with Sullivan's own analogy to the *Abood* case. In *Abood*, the Court limited the scope of activity for which the union could compel financial support from its publicly employed members. By establishing these limitations, the Court set collective bargaining activities apart from other union functions. This distinction was based at least in part on the Court's understanding of what the proper role of the employees' union was. Essentially, the Court decided that negotiating contracts on behalf of union employees was at the heart of the union's reason for existing. Therefore, contract negotiations could be properly funded with compulsory employee union dues.

Sullivan's reference to *Abood* exposes the error of her analysis. She says the *Abood* model does not apply to the religion context, and she articulates a strict separationist view of religion and government. This view fails to recognize that government can and does achieve valid secular purposes while partnering with various private organizations, including religious groups. The Court has upheld programs in which religious groups receive incidental benefits while the overall character of the program addresses a public purpose and does not give any special preference to religion over non-religion.

*Mitchell* and *Agostini* upheld programs where the government offered educational aid to students in both public and pri-
vate schools according to religiously neutral criteria. Although private religious schools, or at least some students who attended those schools, benefited from the government funding, the Court correctly recognized that the neutral aid programs were aimed at achieving a valid public purpose: promotion of education in secular subjects. Just as union members in *Abood* could be compelled to contribute to collective bargaining efforts, so too can taxpayers be compelled to fund government programs addressing secular purposes in a religiously-neutral manner. The FBCI proposal aids the homeless, the hungry and the unemployed. It does so without discriminating based on the religious affiliations of aid recipients or providers. It would be bad policy and worse law to allow erroneous notions of strict separationism to prevent the FBCI program from achieving these valid purposes.

The Charitable Choice Act of 2001 embodies the essential principles of the Establishment Clause and of the First Amendment as a whole. It honors the notion that all persons should be free to choose their own religious beliefs, even if that means rejecting religion altogether. The Act also reaffirms a commitment to true government neutrality toward the sacred and secular. Under the FBCI program, all charitable groups would be evaluated not on their religiosity, but on their abilities to provide vital services for their neighbors in need. It is time to leave behind strict separationism and its legacy of antireligious discrimination, and to embrace the better understanding of the Establishment Clause to which *Agostini* and *Mitchell* so wisely point.