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CHARITABLE CHOICE AND THE CRITICS

CARL H. ESBECK*

Charitable choice is now part of three federal social service programs. The provision first appeared in the Welfare Reform Act of 1996;¹ two years later it was incorporated into the Community Services Block Grant Act of 1998,² and most recently President Clinton made it part of the Children's Health Act of 2000³ on October 17, 2000. In each of these programs, government funds are placed directly into the hands of private social service providers via grants and purchase of service contracts.

Charitable choice interweaves three fundamental principles, and each of these receives prominence in the legislation. First, the statute prohibits the government from discriminating with regard to religion when determining whether providers are eligible to deliver social services under these programs.⁴ Rather than examining the nature of the service provider, charitable choice focuses on the nature of the services and the means by which they are provided. The relevant question concerning provider eligibility is not "Who are you?" but "What can you do?"

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1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act or PRWORA), 42 U.S.C. § 604a (Supp. II 1996). Section 604a applies to federal revenue streams: Temporary Assistance to Needy Families and Welfare to Work monies. See P.L. No. 104-193, § 103(a), 110 Stat. 2112-2114 (codified as amended at 42 U.S.C. § 601 et seq.). Welfare to Work funds were made subject to PRWORA in the 1997 Balanced Budget Act. Balanced Budget Act of 1997, P.L. No. 105-33, § 5001, 111 Stat. 577 (codified as amended at 42 U.S.C. § 403(a)).

2. Pub. L. No. 105-285, § 201, 112 Stat. 2702, 2749 (codified at 42 U.S.C. § 9920 (Supp. IV 1995-1999)).

3. Pub. L. No. 106-310, § 3305, 114 Stat. 1212, 1212-15 (to be codified at 42 U.S.C. § 300x-65) (concerning expenditures for substance abuse treatment and prevention). Somewhat redundantly, drug abuse and prevention expenditures were again made subject to a charitable choice provision in the Community Renewal Tax Relief Act of 2000, signed by President Clinton on December 21, 2000. This Act was incorporated by reference in the Consolidated Appropriation Act of 2001, Pub. L. No. 106-554, § 144, 114 Stat. 2763 (amending Title V of the Public Health Service Act (42 U.S.C. § 290aa); to be codified at 42 U.S.C. § 290kk). The confusion was no doubt the result of the hurried actions of a lame-duck 106th Congress.

4. 42 U.S.C. § 604a(b) and (c).

Second, the statute imposes on government the duty not to intrude into the religious autonomy of faith-based providers. Charitable choice extends a guarantee to each participating faith-based organization ("FBO") that the organization "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."⁵ A private right of action to sue a government that tries to renege on that duty gives real teeth to the guarantee.⁶ Additionally, there are prohibitions on specific types of governmental interference, such as demands to strip religious symbols from the walls of FBOs and bans on regulations requiring FBOs to adjust their governing boards to reflect some "ethnic or gender balance" thought more politically correct.⁷

Third, the statute imposes on both government and participating FBOs the duty not to abridge certain rights of the ultimate beneficiaries of these programs. Charitable choice not only protects the rights of religious conscience, but also seeks to expand the number of providers from which the beneficiaries can choose to receive services, including the choice of a religious provider. Each of these federal social service programs has a secular purpose, namely, helping the poor and needy. They seek to achieve this object by providing resources in the most effective and efficient means available. The purpose of the program is not, of course, to benefit the participating social service providers, whether secular or religious. Rather, the purpose of the program is to benefit the poor and needy. Hence, it is they who are the ultimate beneficiaries.

I will touch on these three principles below, and do so in reverse order.

I

In programs subject to charitable choice, when funding goes directly to the social service providers,⁸ the ultimate beneficiaries are empowered with a choice. Beneficiaries who want to receive services from an FBO may do so, provided that the FBO has other-

5. 42 U.S.C. § 604a(d)(1).

6. 42 U.S.C. § 604a(i).

7. 42 U.S.C. § 604a(d)(2).

8. Charitable choice contemplates both direct and indirect forms of aid. 42 U.S.C. § 604a(a)(1). Some statutory rights and duties pertain only to direct funding.

wise qualified for a grant or service contract.⁹ On the other hand, if a beneficiary objects on religious grounds to receiving services at an FBO, then the state is required to provide equivalent services at an alternative provider.¹⁰ This is the “choice” in charitable choice. Choosing to receive services at an FBO is as much an exercise of religious freedom as is the right not to be served at a provider objectionable for reasons of religious conscience. Civil libertarians express much concern for the latter choice, whereas they often overlook the former. Charitable choice regards these choices as equally important.

If a beneficiary selects an FBO that receives funding, the provider cannot discriminate against beneficiaries on account of their religion or their refusal to participate actively in a religious practice.¹¹ Protection of the ultimate beneficiaries was bolstered in the charitable choice provisions relating to substance abuse in the Children’s Health Act of 2000. Now beneficiaries not only have the right of choice and protection from discrimination, but also must receive actual notice of these rights.¹²

II

If the availability of government money should undermine the religious character of FBOs, then charitable choice will have failed. If the availability of government funding should cause FBOs to become dependent on government or should it silence their prophetic voice, then charitable choice will have failed. Accordingly, charitable choice acts to safeguard the “religious character” of faith-based organizations. FBOs’ institutional autonomy is protected to enable them to succeed at what they do so well, namely helping the poor and needy in a holistic way.¹³ Protecting autonomy is also required to persuade reluctant FBOs to participate in government

9. It may be that no FBOs successfully compete for a grant or service contract. Charitable choice is not a guarantee that aid will flow to FBOs. Charitable choice guarantees only that FBOs will not be discriminated against with regard to religion.

10. 42 U.S.C. § 604a(e)(1).

11. 42 U.S.C. § 604a(g).

12. See Children’s Health Act of 2000, Pub. L. No. 106-310, § 3305, 114 Stat. 1212, 1214 (to be codified at 42 U.S.C. § 300x-65(e)(2)). Of course, nothing in prior versions of charitable choice prevents states from giving actual notice of beneficiary rights. It would be prudent to provide notice of rights whether required by the legislation or not, but the absence of a requirement in older versions of the law hardly rises to the level of a constitutional concern.

13. See, e.g., Carl H. Esbeck, *Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 629-31 (1995); Rebecca G. Rees, “*If We Recant, Would We Qualify?*”: *Exclusion of Religious Providers*

programs, something FBOs are far less likely to do if they face invasive or compromising regulations.¹⁴

One of the most important of these guarantees of institutional autonomy is the ability to select staff on a religious basis. FBOs can hardly be expected to sustain their religious vision without the ability to employ individuals who share the tenets and practices of the faith. The guarantee is central to each organization's freedom to define its own mission according to the dictates of its conscience. Accordingly, in addition to the broad guarantee of "independence" from government, charitable choice specifically provides that FBOs need not alter their policies of "internal governance" formed as a matter of religious faith¹⁵ and that FBOs retain their exemption from federal employment discrimination laws.¹⁶ While it is essential that FBOs be permitted to make employment decisions based on religious considerations, FBOs are not exempted from federal civil rights laws prohibiting discrimination on the basis of race, color, national origin, gender, age, and disability; these laws apply to FBOs as they do to all other providers.¹⁷

As a general proposition, FBOs must comply with existing state and local employment nondiscrimination laws. These laws were enacted pursuant to each state's police power. Some states and municipalities also have nondiscrimination laws and procurement policies adopted pursuant to governmental spending power. When these spending power laws do not permit FBOs to select staff on the basis of faith commitments, the laws are not enforceable against FBOs acting pursuant to charitable choice revenue streams. This is because the federal statutory guarantees in charitable choice that

from *State Social Service Voucher Programs*, 56 WASH. & LEE L. REV. 1291, 1315 n.124 (1999).

14. See Esbeck, *supra* note 13; Megan Twoheg, *Charitable Choice Grows, but so Do Questions*, 32 THE NAT'L J. 3254; Jeffrey Rosen, *Why the Catholic Church Shouldn't Have To Hire Gays*, THE NEW REPUBLIC, Feb. 26, 2001, at 16.

15. 42 U.S.C. § 604a(d)(2)(A).

16. 42 U.S.C. § 604a(f) (preserving a recipient religious organization's exemption under 42 U.S.C. § 2000e-1).

17. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994) (prohibiting recipients of federal financial assistance from discriminating on the basis of race, color, or national origin); Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681-88 (prohibiting discrimination in educational institutions on the basis of sex or visual impairment); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (prohibiting programs or activities that receive federal financial assistance from discriminating against otherwise qualified disabled individuals); 42 U.S.C. §§ 6101-6107 (1994) (prohibiting federally assisted programs from discriminating on the basis of age).

promise to protect the “religious character” and “internal governance” of FBOs preempt contrary provisions in state and local laws.¹⁸

Occasionally the charge is made that charitable choice is “government-funded job discrimination.” This is untrue. The purpose of the funding is not to create jobs. Rather than “funding job discrimination,” the government’s object is funding social services for the poor and needy. Whether the social service provider is an FBO with employment policies rooted in its religion is probably unknown to the government, and that is the way it ought to be. The discrimination, if there is any, is not “state action” in the sense of that term in Fourteenth Amendment doctrine,¹⁹ because it is the FBO that is discriminating on the basis of religion in its staffing decisions, not the government. Moreover, the private act of discrimination by an FBO does not result from intolerance or malice. Rather, the FBO is acting positively—and understandably so—in accord with the dictates of its sincerely held religious convictions. If FBOs are not allowed to operate in accord with their own sense of mission, then they will not be able to sustain the impressive record they now have of successfully helping the poor and needy.

18. This is not unlike when claims of religious freedom override state laws that protect citizens from discrimination on the basis of sexual orientation or marital status. *See, e.g.,* *Altman v. Minn. Dep’t of Corr.*, 80 Fair Empl. Prac. Cas. (BNA) 1166, 1170-71 (D. Minn. 1999) (sexual orientation); *Madsen v. Erwin*, 481 N.E.2d 1160, 1161, 1164-66 (Mass. 1985) (sexual orientation); *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762, 764-65 (Cal. Super. Ct. 1980) (sexual orientation); *Attorney Gen. v. Desilets*, 636 N.E. 2d 233, 235, 238-41 (Mass. 1994) (reversing summary judgment in defendant landlord’s favor and remanding to the lower court to determine whether state had a compelling interest in enforcing its law prohibiting discrimination on the basis of marital status, where such law imposed a substantial burden on defendant’s religious practice); *Arriaga v. Loma Linda Univ.*, 13 Cal. Rptr. 2d 619, 620-22 (Cal. Ct. App. 1992) (affirming lower court’s dismissal of plaintiff’s suit against her employer, a non-profit religious corporation, because state’s fair employment statute did not apply to such corporations, so defendant’s dismissal of plaintiff for violating defendant’s religious tenets was not actionable); *Cooper v. French*, 460 N.W.2d 2, 4, 9-11 (Minn. 1990) (holding that state constitution permitted defendant to refuse to rent to unmarried couples in accordance with defendant’s religious beliefs, despite state statute prohibiting marital status discrimination).

19. *See* *Blum v. Yaretsky*, 457 U.S. 991, 1002-12 (1982) (holding that pervasive regulation and receipt of government funding at private nursing homes do not make nursing home decisions state action); *Rendell-Baker v. Kohn*, 457 U.S. 830, (1982) (holding that private school heavily funded by state is not state actor); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (stating that mere acquiescence by the law in private actions of warehouse does not convert the acts into those of the state).

A religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization favoring employees devoted to environmentalism, a feminist organization hiring only those devoted to the cause of expanded opportunities for women, or a teachers' union hiring only those opposed to school vouchers. To bar a religious organization from hiring on a religious basis is to assail the very cause for which the organization was formed in the first place.

Section 702 of Title VII of the Civil Rights Act of 1964²⁰ permits religious organizations to make employment decisions based on religion.²¹ Occasionally claims are made that the § 702 exemption is waived when an FBO becomes a provider of federally funded social services. The law is to the contrary. Indeed, charitable choice expressly states that the § 702 exemption is preserved.²² Having just promised FBOs that they will not be impaired in their religious character if they agree to provide social services, it would be wholly contradictory to deem FBOs to have impliedly waived valuable autonomy rights. Waiver of rights is always disfavored in the law, and, as would be expected, the credible case law holds that the § 702 exemption is not lost when an FBO becomes a provider of publicly funded services.²³

20. 42 U.S.C. § 2000e-1(a). Religious educational institutions are separately exempt under 42 U.S.C. § 2000e-2(e)(2).

21. The Supreme Court held that the Title VII religious exemption did not violate the Establishment Clause in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

22. 42 U.S.C. § 604a(f) (Supp. II 1996).

23. *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623-25 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); *Siegel v. Truett-McConnell Coll.*, 13 F. Supp. 2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII, the parties could not waive the congressionally created exemption, and students' use of federal grants to pay for tuition did not constitute government advancement of religion); *Young v. Shawnee Mission Med. Ctr.*, No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248, at *4 -*5. (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received thousands of dollars in federal Medicare payments because such payments did not "transform [the hospital] into a federally funded institution"); *see Arriaga v. Loma Linda Univ.*, 13 Cal. Rptr. 2d at 621-22 (stating that religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding); *Saucier v. Employment Sec. Dept.*, 954 P.2d 285, 288-89 (Wash. Ct. App. 1998) (finding Salvation Army's religious exemption from state unemployment compensation tax does not violate Establishment Clause where government

Occasionally the suggestion is made that, as federal taxpayers, each of us has a personal right of conscience to not have our taxes paid to a religious organization via government programs such as charitable choice. The putative legal claim by such a taxpayer would be that he or she has a right not to be coerced or otherwise “religiously offended” when general federal revenues end up going to a religious organization. The idea has a certain superficial appeal, but the law is to the contrary and for good reason.

The U.S. Supreme Court has refused to recognize a federal taxpayer claim of coercion or other personal religious harm arising out of government spending. In *Tilton v. Richardson*,²⁴ plaintiffs claimed that they had been coerced into funding faith-based colleges and other institutions of higher education, in violation of their rights under the Free Exercise Clause, when a portion of the money that they had paid in federal taxes went to such institutions. Finding no plausible evidence of compulsion relating to matters of faith, the Court held that the plaintiff-taxpayers failed to state a claim under the Free Exercise Clause.²⁵ In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,²⁶ plaintiffs challenged as violative of the Establishment Clause the transfer of government surplus property to a religious college. The Supreme Court rebuffed all asserted bases for standing to sue because the plaintiffs lacked the requisite personal “injury in fact.” One of the rejected claims was that the plaintiffs had a “spiritual stake” in not having their government give away property to a religious organization or to otherwise act in a manner contrary to no-establishment values. The high court rejected plaintiffs’ characterization of “injury” and stated that where plaintiffs had not alleged any injury, their spiritual stake in having the government comply with the Establishment Clause did not confer standing.²⁷

As federal citizens our taxes support all manner of policies and programs with which we deeply disagree. Taxes pay the salaries of public officials whose policies we despise and oppose at every op-

grants funded plaintiff-employee’s job because the purpose of the funding was secular); *Seale v. Jasper Hosp. Dist.*, No. 09-95-231-CV, 1997 WL 606857, at *4-5 (Tex. App. Oct. 2, 1997) (finding Catholic hospital does not waive its rights to refuse to perform sterilizations and abortions merely because it had a lease with the government on its building). A rare case to the contrary is distinguished by the court in *Siegel*, 13 F. Supp. 2d at 1343-44 (discussing *Dodge v. Salvation Army*, 48 Empl. Prac. Dec. (CCH) ¶ 38619 (S.D. Miss. 1989)).

24. 403 U.S. 672 (1971).

25. *Id.* at 689.

26. 454 U.S. 464 (1982).

27. *Id.* at 486 & n.22.

portunity. None of these complaints give rise to constitutionally cognizable “injuries” to us as federal taxpayers. There is no reason that a federal taxpayer alleging “religious coercion” or being “religiously offended” should, on the merits of the claim, be treated any differently.

III

Charitable choice requires that social service providers be selected without regard to religion.²⁸ Because religion may not be taken into account in awarding a contract or grant, government need never face the problem of having to “pick-n-choose” among competing religious groups. Nor does the government need to determine which groups are “genuinely” religious; once again, religion is irrelevant in the competitive award process.

When discussing the restraints of the Establishment Clause on generally available programs of aid, this principle of equal treatment or nondiscrimination is termed “neutrality theory.” The Supreme Court case that most recently addressed the neutrality principle is *Mitchell v. Helms*.²⁹ The four-justice plurality opinion, written by Justice Thomas and joined by the Chief Justice and Justices Scalia and Kennedy, embraced the neutrality principle.³⁰ In the sense of legal positivism, however, Justice O’Connor’s opinion concurring in the judgment is controlling in the lower courts.³¹

The plurality and concurrence opinions establish that: (1) neutral, indirect aid to a religious organization does not violate the Es-

28. See 42 U.S.C. § 604a(b) and (c).

29. 530 U.S.793, 120 S. Ct. 2530 (2000) (plurality opinion).

30. Before proceeding under the assumption that Justice O’Connor’s opinion is controlling, at least until the Supreme Court should again address this issue, it is well to extol the virtues of the plurality opinion. The plurality adopted the neutrality principle without any qualifications. See, e.g., 120 S. Ct. at 2541 (stating that “[i]f the religious, irreligious and areligious are 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”). Hence, the plurality is not only a bright-line rule of easy and sure application, but brings the constitutional theory of the Establishment Clause—heretofore in confusing disarray—in line with the Free Exercise Clause and the Free Speech Clauses. See Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285, 300-04 (1999). In the plurality opinion, Justice Thomas said that failing to adhere to the neutrality principle “would raise serious questions under the Free Exercise Clause.” *Mitchell*, 120 S. Ct. at 2555 n.19.

31. *Mitchell*, 120 S. Ct. at 2556 (O’Connor, J., concurring in the judgment). Justice Breyer joined Justice O’Connor’s opinion.

establishment Clause,³² and (2) neutral, direct aid to a religious organization does not, without more, violate the Establishment Clause.³³ Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that: (a) *Meek v. Pittenger*³⁴ and *Wolman v. Walter*³⁵ should be overruled; (b) the Court should do away with presumptions of unconstitutionality, thus rendering the "pervasively sectarian" test no longer relevant to the Court's analysis; (c) proof of actual diversion of government aid to religious indoctrination would demonstrate a violation of the Establishment Clause; and (d) while adequate safeguards to prevent diversion are called for, an intrusive and constant governmental monitoring of the organization is no longer required.

The issue in *Mitchell* concerned the scope of the Establishment Clause when evaluating a program of governmental assistance entailing direct aid to organizations, including religious organizations.³⁶ The federal program at issue in *Mitchell* entailed federal aid to kindergarten-through-twelfth-grade ("K-12") schools, public and private, secular and religious, allocated on a per-student basis. The same principles apply, presumably, to social service or health care programs, although the Court has applied closer scrutiny to direct

32. *Id.* at 2558-59.

33. *Id.* at 2557.

34. *Id.* at 2556, 2563-66. *Meek v. Pittenger*, 421 U.S. 349 (1975) (plurality in part), had struck down loans to religious schools of maps, photos, films, projectors, recorders, and lab equipment, and it disallowed services for counseling, remedial and accelerated teaching, psychological, speech, and hearing therapy. *Id.* at 353-55, 363, 372.

35. *Mitchell*, 120 S.Ct. at 2556, 2563-66. *Wolman v. Walter*, 433 U.S. 229 (1977) (plurality in part), upheld use of public funds to provide guidance, remedial and therapeutic speech and hearing services to pupils attending nonpublic schools, but struck down state aid for the purchase or loan of instructional materials to religious schools and transportation for field trips by religious school students. *Id.* at 244-55.

36. *Mitchell* does not speak—except in the most general way—to the scope of the Establishment Clause when it comes to other issues such as religious exemptions in regulatory or tax laws, issues of church autonomy, religious symbols on public property, or religious expression by government officials. In that regard, *Mitchell* continues the balkanization of doctrine, that is, different Establishment Clause tests for different contexts. This splintering of doctrine can be avoided because a comprehensive and integrated view of the Establishment Clause is possible. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

aid to K-12 schools than aid to social welfare and health care services.³⁷

In cases involving programs of direct aid to K-12 schools, Justice O'Connor started by announcing that she would follow the analysis used in *Agostini v. Felton*.³⁸ She began with the first two prongs of the three-prong *Lemon* test:³⁹ (1) is there a secular purpose and (2) is the primary effect to advance religion? As plaintiffs did not contend that the program lacked a secular purpose, she moved on to the second prong of *Lemon*.⁴⁰ Drawing on *Agostini*, Justice O'Connor noted that the primary-effect prong is guided by three criteria. The first two inquiries are whether the aid is diverted to government indoctrination of religion and whether the program of aid is neutral with respect to religion. The third criterion, once a separate prong of the *Lemon* test but now clearly just a factor under the primary-effect prong, is whether the program creates excessive administrative entanglement.⁴¹ An alternative analysis would evaluate the same evidence under the effect prong of *Lemon* pursuant to Justice O'Connor's no-endorsement test, which asks whether an "objective observer" would feel civic alienation upon examining the program of aid.⁴²

37. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1989) (upholding, on its face, religiously neutral funding of teenage sexuality counseling centers); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding use of federal funds for construction at religious hospital).

38. *Mitchell*, 120 S. Ct. at 2556, 2560. *Agostini v. Felton*, 521 U.S. 203 (1997), found constitutional a neutral program whereby public school teachers go into religious schools to deliver remedial educational services.

39. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that previous Supreme Court decisions had established three criteria for evaluating whether legislation violated the Establishment Clause).

40. *Mitchell*, 120 S. Ct. at 2560. Plaintiffs were wise not to argue that the program lacked a secular purpose. See Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 515-21 (1990) (discussing decisions which illustrate that the secular-purpose prong of *Lemon* is easily satisfied when dealing with neutral programs of aid to education, health care, or social welfare).

41. In *Mitchell*, plaintiffs did not contend that the program created excessive administrative entanglement. 120 S. Ct. at 2560. For a survey of cases where the Supreme Court sought to employ the excessive entanglement test, see Esbeck, *supra* note 30, at 304-07.

The Supreme Court has limited the applicability of the "political divisiveness" analysis as an aspect of entanglement analysis. See Esbeck, *supra* note 13, at 634-35 (collecting authorities).

42. See *Mitchell*, 120 S. Ct. at 2560. Endorsement is unlikely unless a facially neutral program, when applied, singles out religion for favoritism. In *Mitchell*, Justice O'Connor little utilized the alternative endorsement test. See *id.* at 2559. For criticism of the no-endorsement test because it focuses on individual harm rather

After reviewing the standard that the Court set forth in *Agostini*, Justice O'Connor analyzed the facts in *Mitchell* in light of the religious neutrality and diversion-to-indoctrination factors. Because the federal K-12 educational program was unquestionably neutral as to religion,⁴³ she devoted most of her analysis to the diversion-to-indoctrination factor. Justice O'Connor noted that the educational aid in question would supplement rather than supplant monies from private sources, that the nature of the aid was such that it could not reach the coffers of a religious school, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes.⁴⁴ Regarding the nature of the aid, she noted that the aid consisted of materials and equipment rather than cash, and that the materials were loaned to the religious schools with the government retaining title.⁴⁵

Justice O'Connor went on to reject a rule of unconstitutionality that distinguishes different forms of non-monetary aid according to whether a particular form can be diverted to religious indoctrination, hence overruling *Meeh* and *Wolman*.⁴⁶ In doing so, she rejected employing presumptions of unconstitutionality, as the Court did in *Agostini*, and stated that she would require proof that the government aid was actually diverted.⁴⁷ Because the "pervasively sectarian" test makes such a presumption, indeed, an irrebuttable presumption (i.e., any direct aid to a K-12 parochial school is assumed to advance sectarian or inherently religious objectives),⁴⁸

than on policing the line between church and state, see Esbeck, *supra* note 13, at 631. The endorsement test, if still used by courts facing claims under the Establishment Clause, is more suited to analyzing issues such as those that arise when government displays religious symbols on public property.

43. Religious neutrality, explained Justice O'Connor, ensures that an aid program does not provide a financial incentive for citizens who are intended to ultimately benefit from the aid "to undertake religious indoctrination." *Mitchell*, 120 S. Ct. at 2561 (quoting *Agostini*, 521 U.S. at 205).

44. *Id.* at 2562.

45. *Id.* On at least one occasion the Supreme Court upheld direct cash payments to religious K-12 schools. See *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646 (1980). The payments were in reimbursement for state-required testing. Rejecting a rule that cash was never permitted, the *Regan* Court explained, "[w]e decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash." *Id.* at 658. See also *Mitchell*, 120 S. Ct. at 2546 n.8 (noting that monetary assistance is not "*per se* bad").

46. 120 S. Ct. at 2562-68.

47. *Id.* at 2567.

48. See *id.* at 2561 (noting that *Agostini* rejected a presumption drawn from *Meeh* and later *Aguilar v. Felton*, 473 U.S. 402 (1985)); *id.* at 2563-64 (quoting *Meeh*:

Justice O'Connor is best understood to have rendered the "pervasively sectarian" test no longer relevant.⁴⁹ Justice O'Connor's opinion seems to require that religious organizations monitor or "compartmentalize" program aid.⁵⁰ If the aid is used for secular educational functions, then there is no problem. If the aid flows into the entirety of an educational activity and some "religious indoctrination [is] taking place therein," then that indoctrination "would be directly attributable to the government."⁵¹

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in *Mitchell* reassured her that the program, as applied, did not violate the Establishment Clause. A program of aid need not be failsafe, nor does every program require pervasive monitoring.⁵² The statute limited aid to "secular, neutral, and nonideological" assistance, re-

regarding the "pervasively sectarian" rationale and noting it created an irrebuttable presumption which Justice O'Connor later rejects); *id.* at 2558, 2566-67 (reading out of *Bowen v. Kendrick* dependence on the "pervasively sectarian" test); *id.* at 2567 (requiring proof of actual diversion, thus rendering "pervasively sectarian" test irrelevant); *id.* at 2568 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be used only for secular purposes); *id.* at 2570 (rejecting presumption of bad faith on the part of religious school officials).

49. While Justice O'Connor did not join in the plurality's denunciation of the "pervasively sectarian" doctrine as bigoted, her opinion made plain that the doctrine has now lost all relevance. Justice O'Connor did not, for example, take issue with the plurality's condemnation of the doctrine as anti-Catholic, and in fact explicitly joined in overruling the specific portions of *Meek* and *Hunt* that set forth the operative core of the "pervasively sectarian" concept. 120 S. Ct. at 2563-65. Being a "pervasively sectarian" organization never totally disqualified a school from receiving direct state aid. For example, the Court repeatedly permitted school busing and loan of secular textbooks. *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (holding constitutional law which required public school authorities to lend textbooks free of charge to all schools, including parochial schools); *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975); *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding constitutional use of public funds to reimburse bus fare expenses for transport of students to religious schools). Other aid as well was occasionally upheld such as reimbursement for mandatory testing, but the line between permitted and prohibited forms of aid was unclear. *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 660-61 (1980) (upholding reimbursement of private schools for mandatory testing). Indeed, permitting textbooks but not wall maps, permitting bussing from home but not on field trips, let the Court in for considerable ridicule. *See, e.g., Mitchell*, 120 S. Ct. at 2564. This line drawing was unprincipled, and dispensing with the need for it is yet another reason to welcome discarding of the "pervasively sectarian" test.

50. 120 S. Ct. at 2568.

51. *Id.* (explaining why her position in *Mitchell* is consistent with her position in *Sch. Dist. v. Ball*, 473 U.S. 373, 398-400 (1985)).

52. *Id.* at 2569.

quired that the aid supplement rather than supplant private-source funds, and expressly prohibited use of the aid for “religious worship or instruction.”⁵³ State educational authorities required religious schools to sign assurances of compliance with the above-quoted statutory spending prohibition as a term of the contract.⁵⁴ The state conducted monitoring visits, albeit infrequently, and randomly reviewed government-purchased library books for their religious content.⁵⁵ Also, local public school districts monitored religious schools. In doing so, the school districts reviewed the required project proposals that the religious schools submitted, and conducted annual program-review visits to each recipient school.⁵⁶ The districts did catch instances of actual diversion, though not a substantial number, and Justice O’Connor was encouraged by the fact that when problems were detected they were corrected.⁵⁷

The diversion-prevention factors outlined above are not talismanic. Justice O’Connor expressly declined to elevate them to the level of constitutional requirements.⁵⁸ Rather, the factors are to be weighed according to the nature of the government’s program of aid.⁵⁹ In most programs, for example, the supplement/supplant factor makes little sense.⁶⁰

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 2569-70.

57. *Id.* at 2571-72.

58. *Id.* at 2572 (“[r]egardless of whether these factors are constitutional requirements . . .”).

59. Cash payments, for example, are merely one factor to consider under *Mitchell*. This makes sense given Justice O’Connor’s concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly “sensitive” area of teenage sexual behavior, as long as there is no “use of public funds to promote religious doctrines.” *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O’Connor, J., concurring). *See also* Comm. for Pub. Educ. v. *Regan*, 444 U.S. 646, discussed *supra* note 45.

60. In *Committee for Public Education v. Regan*, 444 U.S. 646, 660-62 (1980), the Supreme Court upheld aid that “supplanted” expenses otherwise borne by religious schools for state-required testing. Even the dissent in *Mitchell* concedes that reconciliation between *Regan* and an absolute prohibition on aid that supplants rather than supplements “is not easily explained.” 120 S. Ct. at 2588 n.17 (Souter, J., dissenting). *Regan* suggests that no “blanket rule” exists. *Id.* at 2544 n.7 (plurality). It would make no sense to elevate the supplement/supplant distinction to a principle of law. The Supreme Court’s past practice is to trace the government funds to the point of expenditure, rejecting any analysis whereby government funds must not be provided so as to “free up” private money which then might be diverted to religious indoctrination. Carl H. Esbeck, *A Constitutional Case For Governmental Cooperation With Faith-Based Social Service Providers*, 46 EMORY L. J. 1, 17 (1997) (listing cases).

CONCLUSION

Charitable choice is clearly responsive to many aspects of Justice O'Connor's opinion in *Mitchell*. First, the legislation authorizing the program of aid expressly prohibits diversion of the aid to "sectarian worship, instruction, or proselytization."⁶¹ Second, government-source funds may be kept in accounts separate from an FBO's private-source funds, and the government may audit the accounts with government funds.⁶² Third, the government requires regular audits by a certified public accountant. The results are to be submitted to the government, along with a plan of correction if any noncompliance is uncovered.⁶³ Finally, FBOs may self-monitor and, if need be, segment aspects of their program to ensure that the government-provided aid is spent only on program activities involving no religious indoctrination.⁶⁴

Moreover, nothing in charitable choice prevents officials from implementing additional procurement regulations such as requiring all providers to sign an Assurance of Compliance promising attention to essential statutory duties. It would be a material breach of the contract if a provider's conduct did not measure up to the assurances. It is also common for procurement regulations to require self-audits. Any discrepancies uncovered by a self-audit must

To get a fuller sense of what is important to Justice O'Connor, one should also consider her multi-factor analyses in her separate opinions in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 849-51 (1995), *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 776-83 (1995), and *Bowen v. Kendrick*, 487 U.S. 589, 622-24 (1989). Justice O'Connor is prone to have a list of factors to examine in light of the totality of the circumstances. However, as her separate opinions demonstrate, the factors she deems relevant are heavily wedded to the particular program, policy, or practice under review. The factors Justice O'Connor lists in *Mitchell* therefore are not elevated to the level of constitutional requirements.

61. 42 U.S.C. § 604a(j) (Supp. II 1996).

62. 42 U.S.C. § 604a(h). Under the Children's Health Act of 2000, the segregation of accounts is required. Pub. L. No. 106-310, § 3305, 114 Stat. 1212, 1214 (to be codified at 42 U.S.C. § 300x-65(g)(2)). This improves accountability with little loss of organizational autonomy.

63. All federal programs involving financial assistance to nonprofit institutions require annual audits by a certified public accountant whenever the nonprofit receives \$300,000 or more in a year in total federal awards. Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35,278, 35,289-35,302 (June 30, 1997). The independent audit is not just of financial expenditures, but includes a review for program compliance.

64. Justice O'Connor nowhere defined what she meant by "religious indoctrination." The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical creation story taught as science are all inherently religious. See Esbeck, *supra* note 30, at 307-08 (collecting cases).

be promptly reported to the government along with a plan to correct the deficiency. These procurement policies would, of course, have to be equally applicable to secular providers, and none of the details of the procurement requirements could intrude on the “religious character” of FBOs. Charitable choice facially satisfies the parameters of Justice O’Connor’s *Mitchell* opinion, and for most FBOs it can be applied in accord with her requirements as well.

