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SHOULD WE HAVE FAITH IN THE FAITH-BASED INITIATIVE?: A CONSTITUTIONAL ANALYSIS OF PRESIDENT BUSH'S CHARITABLE CHOICE PLAN

by ANDREA PALLIOS*

In recent decades, religion and politics have become linked more than ever before.[1] The Supreme Court has permitted programs providing federal funds to religious organizations that would have been struck down in the 1970s and early 1980s.[2] Religion's influence on politics was perhaps at its highest in the 2000 presidential campaign. Both former Vice President Al Gore and President George W. Bush supported a greater role for faith-based organizations in delivering social services.[3] In his Inaugural Address, President Bush announced: "Church and charity, synagogue and mosque, lend our communities their humanity and they will have an honored place in our plans and in our laws."[4] This goal of giving religion an "honored place in our . . . laws" has taken the form of President Bush's charitable choice initiative: federal funding of faith-based organizations that provide community services. Methods of

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1. Lewis D. Solomon & Matthew J. Vlissides, Jr., *Article: Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y 265, 265-66 (2001).

2. *Compare* Agostini v. Felton, 521 U.S. 203 (1997) (permitting New York City to send public school teachers to parochial schools to provide remedial education to underprivileged children) *with* Aguilar v. Felton, 473 U.S. 402 (1985) (barring New York City from sending public school teachers to parochial schools to provide remedial education to underprivileged children).

3. Soloman & Vlissides, *supra* note 1, at 277.

4. President George W. Bush, Inaugural Address (Jan. 20, 2001).

achieving this goal have taken the form of Executive Orders and congressional action.[5]

As benevolent as this federal program is—aiding those who aid others—it is not without drawbacks. Most importantly, the charitable choice initiative may violate the First Amendment's Establishment Clause. Before reaching this question, it is important to understand the background of charitable choice and the Establishment Clause constitutional framework. Only then can the constitutional rules be applied to the charitable choice legislation. Only then will it become clear that the program runs afoul of the First Amendment.

I. Background to the Charitable Choice Initiative

President Bush announced: "We must encourage and support the work of charities and faith-based and community groups that offer help and love one person at a time. (Applause) . . . Government should welcome these groups to apply for funds, not discriminate against them."[6] The history of charitable choice legislation pre-dates President Bush's inauguration. The model for charitable choice legislation first appeared in the 1996 Temporary Assistance for Needy Families (TANF) legislation.[7] The law allows states to administer TANF services through nongovernmental organizations or through vouchers or certificates redeemable by private organizations.[8] If a state chooses to implement the TANF program in this manner, it must allow religious organizations to participate, subject to the requirements of charitable choice.[9]

Since the enactment of TANF, Congress has enacted into law three other charitable choice measures.[10] In 1997, the welfare-to-work grant program was added to TANF.[11] In 1998, Congress reauthorized

5. For a discussion of Executive Orders 13,199 and 13,198, see Soloman and Vlissides, *supra* note 1, at 265. For a discussion of H.R. 7, the Community Solutions Act of 2001, see David M. Ackerman, *CRS Report for Congress, Public Aid and Faith-Based Organizations (Charitable Choice): Background and Selected Legal Issues*, CONGRESSIONAL RESEARCH 9-15 (updated Aug. 23, 2001) (on file with author). For a discussion of S.1924, see The Charity Aid, Recovery And Empowerment ("CARE") Act of 2002, (Feb. 7, 2002) *available at* http://lieberman.senate.gov/~lieberman/press/02/02/2002207716.html.

6. President George W. Bush, State of the Union Address (Feb. 27, 2001).

7. Ackerman, *supra* note 5, at 8.

8. *Id.*

9. *Id.*

10. *Id.* at 7.

11. *Id.*

the "Community Services Block Grant Program" and included selected charitable choice provisions in the legislation.[12] In 2000, Congress added charitable choice to the substance abuse treatment and prevention services provided under the grant provisions of Titles V and XIX of the Public Health Services Act.[13] In 2001, the House of Representatives adopted H.R. 7, the Community Solutions Act of 2001, by a 233-198 vote.[14] The Senate never voted on this bill.[15] On February 8, 2002, Senators Joseph I. Lieberman and Rick Santorum introduced in the Senate the Charity Aid, Recovery, and Empowerment Act of 2002.[16] This "compromise" legislation left out the controversial issues surrounding federally funded religion that were present in the House bill.[17] The Senate bill failed in the last days of the 107th Congress.[18] The CARE Act of 2003 was introduced in the Senate by Senators Grassley, Santorum and Leiberman, on January 30, 2003.[19] In the executive branch, President Bush issued an executive order which "directed federal agencies to treat religious and secular charities equally when awarding money" in December of 2002.[20] In his State of the Union Address in January of 2003, he again asked Congress to pass his faith-based initiative.[21]

The intent behind charitable choice legislation is to ensure that religious organizations can apply to participate in federally funded social programs.[22] Charitable choice allows them to provide social

12. *Id.*

13. Ackerman, *supra* note 5, at 8.

14. *Id.* at 13.

15. H.R. 7, 107th Cong. (2001), *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1:./temp/~bdLAc8:@@@L&summ2=m&l/bss/d107query.html.

16. S. 1924, 107th Cong. (2002), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01924:@@@L&summ2=m&.

17. *TIA: Lieberman-Santorum Faith-Based Initiative Bill Is 'Compromise'; Bill Still Has To Be Conferenced With Divisive HR 7*, (U.S. NEWSWIRE, Feb. 8, 2002).

18. CRS Report for Congress, Charitable Choice, Faith-Based Initiatives, and TANF, at 4 (updated Jan. 3, 2003) (on file with author).

19. S. 256, 108th Cong. (2003), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.256:. The CARE Act of 2003 is described as "[a] bill to provide incentives for charitable contributions by individuals and businesses, to improve the public disclosure of activities of exempt organizations, and to enhance the ability of low-income Americans to gain financial security by building assets, and for other purposes." *Id.*

20. Dana Milbank, *'Faith' Initiative Revived*, S.F. CHRON., Dec. 13, 2002, at A3.

21. President George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html (last visited Feb. 12, 2003).

22. Ackerman, *supra* note 5, at 3.

services without having to abandon their religious character.[23] There are three basic provisions of charitable choice legislation: (1) provisions protecting the religious character of organizations; (2) provisions protecting the religious freedom of program beneficiaries; and (3) provisions protecting the constitutionality of charitable choice.[24]

First, to protect the religious character of faith-based organizations that wish to participate in federally funded social programs, the government cannot discriminate against an applicant for funding because of religion.[25] Faith-based organizations that receive funding can remain independent of government control.[26] They retain control over aspects of their religion such as the definition, expression, and practice.[27] The government cannot require such organizations to change their internal governance or remove religious symbols from their property.[28] Finally, faith-based organizations that receive federal funding may discriminate on religious grounds in employment.[29] This preempts state and local discrimination laws.[30] This is the primary difference between the bill passed by the House of Representatives and the recent Charity Aid, Recovery, and Empowerment Act introduced in the Senate.[31]

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23. *Id.*

24. *Id.* at 3-4.

25. *Id.* at 3.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Bumiller, *supra* note 15. *See also* Common Questions About the CARE Act, (Feb. 7, 2002), *available at* http://lieberman.senate.gov/~lieberman/press/02/02/2002207720.html; *and* Statement of Senator Joe Lieberman on the Introduction of the Charity Aid, Recovery, and Empowerment (CARE) Act, (Feb. 7, 2002), *available at* http://liberman.senate.gov/~lieberman/press/02/02/2002207724.html. Senator Lieberman repeatedly has stated that the Senate legislation does not contain "charitable choice" provisions. The primary difference, however, between the two pieces of legislation is the ability or inability of religious organizations to discriminate in hiring. Despite that difference, the Lieberman bill does contain many similar provisions to H.R. 7. Senator Lieberman seems to define "charitable choice" more narrowly than others. *See* Ackerman, *supra* note 5, at 3. In pertinent part, S.1924 Sec. 301 provides:

GENERAL AUTHORITY – For any social program, a nongovernmental organization that is (or applying to be) involved in the delivery of social services for the program shall not be required –

(1) to alter or remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name are religious;

Second, to protect the religious freedom of beneficiaries of federally funded social programs, faith-based organizations cannot discriminate against a beneficiary based on religious belief or lack thereof.[32] For each federally funded program, there must be an alternate provider of services available to any beneficiary who objects to a religious organization providing those services.[33] The government must give notice of this right to beneficiaries.[34] Finally, if a faith-based organization receives direct public aid, participation in religious activities on the part of beneficiaries must be voluntary.[35] If aid is indirect, such as vouchers or tax exemptions, it is irrelevant whether participation is voluntary or involuntary.[36]

Third, provisions of the charitable choice initiative seek to protect its constitutionality.[37] Faith-based organizations are barred from using federal aid for sectarian worship, instruction, or proselytization.[38] Additionally, each federally funded social program is required to be implemented in a manner "consistent with" the Establishment Clause of the First Amendment.[39]

Some religiously affiliated organizations already receive federal funding for social programs.[40] Examples of such organizations are the Salvation Army, United Jewish Communities, Catholic Charities USA, etc.[41] Generally, these organizations are required to be secular in nature to receive funds.[42] They must remove religious symbols from the premises and worship, instruction, and proselytizing are forbidden.[43] The difference between these already existing programs and President Bush's charitable choice initiative is that charitable

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(2) to alter or remove provisions in its chartering documents because the provisions are religious . . . ;

(3) to alter or remove religious qualifications for membership on its governing boards.

S.1924 Sec. 301, *available at* http://thomas.loc.gov/cgi-bin/query/F?c107:1:./temp/~c107KeoDhr:e70762:.

32. Ackerman, *supra* note 5, at 3.

33. *Id.*

34. *Id.* at 4.

35. *Id.*

36. *Id.*

37. *Id.*

38. Ackerman, *supra* note 5, at 4.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 5.

43. *Id.*

choice allows faith-based organizations to participate in federally funded social programs and retain their religious character.[44]

II. Constitutional Framework

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion."[45] There is virtually no caselaw that determines whether federal funding of social services violates the Establishment Clause. The Supreme Court has considered federal funding of social services provided by religious institutions only twice in this country's history and only once in the last century.[46] Neither of those two cases help determine whether charitable choice is unconstitutional.

In *Bradfield v. Roberts*, the Supreme Court held that the appropriation by Congress of money to fund two hospitals in the District of Columbia, one of which was managed by members of the Catholic Church, did not violate the Establishment Clause.[47] *Bradfield* does not provide much guidance in the question of charitable choice for two reasons. First, decided in 1899, the opinion was written long before modern Establishment Clause jurisprudence was developed. Second, the Court relied on the fact that Providence Hospital was a secular corporation that happened to be managed by people who adhered to the Catholic faith.[48] The Court stated: "there is nothing sectarian in the corporation."[49] Charitable choice is distinguishable from the appropriations bill in *Bradfield* because it does fund sectarian institutions.

In *Bowen v. Kendrick*, the Supreme Court held that the Adolescent Family Life Act ("AFLA") did not violate the Establishment Clause.[50] The AFLA provided grants to public or non-profit private organizations to care for pregnant adolescents and provide services to prevent adolescent sexual relations.[51] The Act

44. Ackerman, *supra* note 5, at 5.

45. U.S. CONST. amend. I.

46. Bowen v. Kendrick, 487 U.S. 589 (1988); Bradfield v. Roberts, 175 U.S. 291 (1899).

47. 175 U.S. at 295-97.

48. *Id.* at 298-99.

49. *Id.* at 299.

50. 487 U.S. 589, 618 (1988).

51. *Id.* at 593-94.

allowed grants to go to religious and charitable organizations.[52] The Court held that the AFLA did not violate the Establishment Clause because the law did not indicate that a "significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions."[53] Charitable choice is distinguishable from the AFLA because federal funds will be disbursed to "pervasively sectarian" institutions.[54] That is the goal of charitable choice: to allow sectarian organizations to provide social services without having to relinquish their religious characteristics.

A. Separation Theory v. Neutrality Theory

Because neither *Bradfield* nor *Bowen* provides much guidance in the charitable choice analysis, we must start from scratch. In recent history, there have been two dominant theories regarding the prohibitions of the Establishment Clause; the separation theory and the neutrality theory.[55] The separation theory is that of strict separation between government and religion.[56] Proponents of this theory adhere to the metaphor that a wall should separate church and state.[57] In *Everson v. Board of Education*, the Supreme Court stated: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[58] The rationale behind this theory is that strict separation is necessary to protect religious liberty.[59] When religion becomes a part of government, there is inevitable coercion to participate in that faith.[60] Nevertheless, under the separation theory, government can fund a religious organization as long as the secular and sectarian elements can be separated such that the government only funds the secular elements.[61]

The neutrality theory says that the government must be neutral toward religion.[62] It cannot favor religion over secularism.[63] In

52. *Id.* at 595.

53. *Id.* at 610.

54. Discussion *infra* Part III.B.d.

55. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 977 (Aspen Law & Business 1997).

56. *Id.*

57. *Id.*

58. 330 U.S. 1, 18 (1947).

59. CHEMERINSKY, *supra* note 55, at 978.

60. *Id.*

61. Solomon & Vlissides, *supra* note 1, at 283.

62. CHEMERINSKY, *supra* note 55, at 978.

Rosenberger v. Rector and Visitors of the University of Virginia, the Supreme Court stated: "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[64] This is based upon the theory that if public funding is distributed in a neutral way, then it is less likely to advance religion.[65] For the most part, the Supreme Court has invoked the neutrality theory in cases involving the private expression of religious views.[66] Most recently, the neutrality theory was invoked to uphold an Ohio school voucher program.[67]

Proponents of the neutrality theory advocate application of the "symbolic endorsement" test.[68] The government violates the Establishment Clause if it symbolically endorses a particular religion or if it generally endorses either religion or secularism.[69] "Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated."[70] The neutrality theory received the support of a majority of Supreme Court Justices for the first time in *Simmons-Harris*.[71]

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63. *Id.*

64. 515 U.S. 819, 839 (1995).

65. Jonathon Friedman, Student Research, *Charitable Choice and the Establishment Clause*, 5 GEO. J. FIGHTING POVERTY 103, 109 (1997) (citing Agostini v. Felton, 521 U.S. 203, 231 (1997)).

66. *Id.* The neutrality theory was invoked in the free speech context in *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a university could not exclude religious student groups from using school facilities); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (holding that a school district could not exclude an evangelical church from using a school auditorium to show religiously based films); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that the university could not withhold funding of a student publication because the publication was religious). According to Friedman, the neutrality theory was invoked outside of the free speech context in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (holding that public funding of a sign-language interpreter to accompany a deaf student to Catholic high school did not violate the Establishment Clause).

67. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

68. CHEMERINSKY, *supra* note 55, at 978.

69. Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

70. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in the judgment).

71. *Simmons-Harris*, 122 S. Ct. at 2467. *See also* CHEMERINSKY, *supra* note 55, at 984.

B. The Lemon-Agostini Test

The government violates the Establishment Clause if it discriminates among religious groups.[72] For example, granting tax exemptions to only Christian churches would violate the Establishment Clause. If a law is not discriminatory, it may still violate the Establishment Clause. Historically, to determine this, courts have applied the three-prong test from *Lemon v. Kurtzman*.[73] A law is unconstitutional if it fails any prong of the test.[74] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[75]

The *Lemon* test was modified by *Agostini v. Felton*.[76] The *Agostini* Court determined that excessive entanglement is an aspect of the second prong—the inquiry into the statute's primary effect.[77] This is because the factors considered to determine whether entanglement is "excessive" are similar to those used to determine whether the primary effect of a statute is to advance or inhibit religion.[78] The Court stated:

> to assess entanglement, we have looked to "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." Similarly, we have assessed a law's 'effect' by examining the character of the institutions benefited and the nature of the aid that the State provided.[79]

Due to the similarities in these assessments, the *Agostini* Court consolidated the second and third prongs of the *Lemon* test into one.[80] The criteria used by the *Agostini* Court in the "effects" inquiry were: whether the statute results in government indoctrination; whether it defines recipients by reference to religion; or whether it creates excessive entanglement.[81]

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72. Hernandez v. C.I.R., 490 U.S. 680, 695 (1989).
73. 403 U.S. 602 (1971).
74. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664 (1970)).
75. *Id.* at 613.
76. 521 U.S. 203, 222-23 (1997).
77. *Id.* at 232.
78. *Id.*
79. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).
80. Mitchell v. Helms, 530 U.S. 793, 807-08 (2000).
81. *Agostini*, 521 U.S. at 234.

The resulting *Lemon-Agostini* test addresses four questions: (1) whether the law has a secular purpose; (2) whether it results in government indoctrination; (3) whether it defines participants by reference to religion; and (4) whether it creates excessive entanglement.[82] The application of this revised test is not entirely clear. In *Mitchell v. Helms*, the Court explained that "in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools."[83] Thus, it is not clear that the Supreme Court would apply the modified *Lemon-Agostini* test if it were to consider the charitable choice legislation. Rather, the fact that the *Mitchell* Court specifically stated that the *Agostini* modification was for the purpose of schools might imply that the Supreme Court never intended for it to be applied to any other cases. If this is true, the *Lemon* test would be the proper test to apply to charitable choice.

Each of the four factors used in the *Lemon* and *Agostini* tests are tests in their own right. First, a statute must have a secular legislative purpose.[84] This is, generally, the easiest of the factors for a statute to meet.[85] Governmental assistance programs tend to survive this prong, even if they may not survive the other requirements of *Lemon* or *Agostini*.[86] *Mueller v. Allen* explains that this is because the Supreme Court is reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."[87] Nevertheless, this is still one of the requirements that a statute must meet in order to pass constitutional muster.

The second factor of the *Lemon-Agostini* test is whether the law results in government indoctrination.[88] The key to distinguishing between religious indoctrination by the state or indoctrination not by the state is neutrality.[89] Aid that is offered to a wide range of people without regard to religion is generally upheld.[90] "If the religious, irreligious, and areligious[sic] are all alike eligible for governmental

82. Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950, 966 (W.D. Wis. 2002).

83. *Mitchell*, 530 U.S. at 807.

84. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

85. *See* Mueller v. Allen, 463 U.S. 388, 394 (1983).

86. *Id.*

87. *Id.*

88. Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950, 966 (W.D. Wis. 2002).

89. Mitchell v. Helms, 530 U.S. 793, 809 (2000).

90. *Id.*

aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[91] To assure neutrality on the part of the government, the Supreme Court has considered whether aid that goes to a religious organization does so as a result of the independent and private choices made by individuals.[92] This has been a particularly important question when courts deal with aid to religious schools.[93]

Third, a statute must not define participants by reference to religion.[94] In ascertaining this factor, courts ask "whether the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination.'"[95] The *Agostini* Court said that this financial incentive is not present when aid is distributed based on "neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[96] The purpose behind questioning whether aid creates a financial incentive to subject oneself to indoctrination is to determine whether a private choice to participate in a program is truly independent.[97]

Finally, both the *Lemon* and *Agostini* tests question whether a statute leads to excessive entanglement between government and religion.[98] To determine whether entanglement is excessive, a court will examine the character of the institutions to be benefited, the nature of the aid provided by the state, and the resulting relationship between the government and the religious organization.[99] A law violates the Establishment Clause when it requires "comprehensive, discriminating, and continuing state surveillance."[100] Thus, if a federally funded social program provided by a religious organization requires continued monitoring by the government to ensure that the program is consistent with the Establishment Clause, there might be an excessive entanglement between government and religion. Apart

91. *Id.*

92. *Id.* at 810.

93. *Id.*

94. Freedom From Religion Found. v. McCallum, 179 F.Supp.2d 950, 966 (W.D. Wis 2002).

95. Mitchell v. Helms, 530 U.S. 793, 813 (2000) (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

96. Agostini v. Felton, 521 U.S. 203, 231 (1997).

97. *Mitchell*, 530 U.S. at 814.

98. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); *Agostini*, 521 U.S. at 234.

99. *Lemon*, 403 U.S. at 615.

100. *Id.* at 619.

from specific entanglements, government assistance to religious organizations violates the Establishment Clause if it carries with it the potential for continuing political strife over aid to religion.[101]

C. Other "Effects" Test Factors

In addition to the "effects" factors listed in *Agostini*, the Supreme Court has considered coercion and endorsement as elements of whether a program has the primary effect of advancing religion. In *Lee v. Weisman*, the Court first articulated coercion as part of the effects prong of the *Lemon* test.[102] The Court stated: "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'"[103] The Court reiterated this rule in *Santa Fe Independent School District v. Doe*.[104] This is significant because *Santa Fe* was decided in 2000, three years after *Agostini* modified the *Lemon* test. The Court in *Santa Fe* focused almost exclusively on the issue of coercion, but did briefly address the *Lemon* test.[105] The Court did not address the *Agostini* modification of the *Lemon* test. Thus, *Agostini* clearly did not overrule *Lemon*.

In *Lynch v. Donnelly*, Justice O'Connor interpreted the "effects" prong of the *Lemon* test to be a question of whether a program constitutes a government endorsement of religion.[106] There are two prongs to Justice O'Connor's endorsement test: 1) the purpose or intent of the policy or act, and 2) the effect of the action.[107] In her concurring opinion in *Capitol Square Review and Advisory Board v. Pinette*, Justice O'Connor explained that the question of governmental endorsement of religion should be judged from the point of view of "the hypothetical observer."[108] Would a reasonable

101. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 794 (1973).

102. Carmen M. Guerricagoitia, Feature, *Innovation Does Not Cure Constitutional Violation: Charitable Choice And The Establishment Clause*, 8 GEO. J. ON POVERTY L. & POL'Y 447, 465 (2001).

103. Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

104. 530 U.S. 290, 302 (2000) (quoting *Lee*, 505 U.S. at 587) (holding that a high school policy of having a student elected student council chaplain deliver a prayer before each home varsity football game violated the Establishment Clause).

105. *Id.* at 314.

106. 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

107. Guerricagoitia, *supra* note 102, at 468-69.

108. *Id.* at 470 (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753,

observer see a specific special treatment of religion as an endorsement of religion?[109] In *Books v. City of Elkart, Indiana*, the Seventh Circuit explained that in more recent cases, the Supreme Court has, on occasion, considered the first two prongs of the *Lemon* test as an "endorsement" test.[110] Similarly, in *Destefano v. Emergency Housing Group, Inc.*, the Second Circuit stated that the endorsement inquiry has been subsumed within the *Lemon-Agostini* test in recent Supreme Court cases.[111] The Second Circuit read those decisions as casting doubt upon the vitality of the endorsement test as a stand-alone measure of constitutionality.[112]

The final "effects" factor that the Supreme Court historically considered is the question of whether a religious institution is "pervasively sectarian." In *Bowen v. Kendrick*, the Court stated that a statute might have the effect of advancing religion if the aid goes to "pervasively sectarian" institutions.[113] A "pervasively sectarian" institution is one that cannot separate its sectarian activities from the secular.[114] However, in *Mitchell*, the Court stated that the "pervasively sectarian" factor was no longer relevant.[115]

Unfortunately for constitutional law scholars who seek a clear-cut approach to Establishment Clause cases, the Supreme Court made its jurisprudence even more confusing with its decision in *Zelman v. Simmons-Harris*.[116] There, the majority opinion invoked the neutrality theory to uphold a school voucher system which permitted the use of state-funded vouchers at private religious schools.[117] The Court stated that:

> where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the

765 (1995)).

109. *Id.*

110. 235 F.3d 292, 301-02 (7th Cir. 2000). The court cited *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), as examples.

111. 247 F.3d 397, 410-11 (2d Cir. 2001).

112. *Id.*

113. 487 U.S. 589, 610 (1988).

114. Friedman, *supra* note 65, at 115.

115. 530 U.S. 793, 826 (2000).

116. 536 U.S. 639 (2002).

117. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2467 (2002).

Establishment Clause.[118]

The majority opinion did not articulate that it was analyzing the voucher program under the *Lemon-Agostini* factors, making it difficult to determine whether that test is still applicable to Establishment Clause cases. However, the majority seemed to employ the *Agostini* test, without saying so. The Court stated that the voucher program was created with a valid secular purpose—improving the school system in Ohio.[119] Consequently, all that needed to be considered was whether the program had the effect of advancing religion.[120] Thus, it appears that the majority opinion uses neutrality as a factor in determining whether the program has the primary effect of advancing religion. Moreover, Justice O'Connor, in her concurring opinion, specifically stated that the Court's decision in *Simmons-Harris* was not a departure from precedent, indicating that the *Lemon-Agostini* test has not been overruled.[121] She explained that when addressing the primary effects prong in an indirect aid case, courts must consider two factors.[122] First, courts must consider whether the program is administered neutrally, "without differentiation based on the religious status of beneficiaries or providers of services."[123] Second, courts must determine whether beneficiaries of indirect aid have a genuine choice between religious and nonreligious providers.[124] If the answer to either of these questions is no, then the government program violates the Establishment Clause.[125]

Because the Supreme Court has not articulated a single, consistent test for all Establishment Clause cases, it is difficult to determine which factors are the most important when attempting to analyze the constitutionality of charitable choice. For the purposes of this Note, I will consider the constitutionality of charitable choice in light of all of these factors. I will analyze the charitable choice legislation under the two prongs of the *Lemon-Agostini* test: secular purpose and effects. Under the effects prong, I will consider the three *Agostini* criteria, as well as the coercion, endorsement, and neutrality

118. *Id.*
119. *Id.* at 2465.
120. *Id.*
121. *Id.* at 2473 (O'Connor, J., concurring).
122. *Simmons-Harris*, 122 S. Ct. at 2476 (O'Connor, J., concurring).
123. *Id.*
124. *Id.*
125. *Id.*

tests.

III. Analysis Under the Lemon-Agostini Test

A. Secular Purpose

The first prong of both the *Lemon*[126] and *Agostini*[127] tests is whether the law has a secular purpose. While courts generally give deference to legislatures, the duty of the courts is to "distinguish[] a sham secular purpose from a sincere one."[128] An act can have a religious purpose, as long as it is not the primary purpose, and a true secular purpose exists.[129] To determine whether a secular purpose does exist, the statute, legislative history and statements of the sponsor should be considered.[130]

Charitable choice legislation seems to have a legitimate secular purpose: providing social services to those in need. The very first purpose listed in the purposes section of H.R. 7 is "to provide assistance to individuals and families in need in the most effective and efficient manner."[131] The stated purpose of S. 1924 is "to tap into America's renewed spirit of unity, community and responsibility in the wake of September 11th to better respond to pressing social problems and ultimately help more people in need."[132] Because courts give much deference to legislatures, a court would most likely find that charitable choice has a legitimate secular purpose.

B. "Effects" Test

1. Agostini *criteria*

As discussed above, the *Agostini* Court consolidated the second and third prongs of the *Lemon* test into one because the factors used to determine whether a statute had the primary effect of advancing religion were similar to those used to determine if it created an

126. 403 U.S. 602, 613 (1971).

127. 521 U.S. 203, 222-23 (1997).

128. Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment).

129. Geurricagoitia, *supra* note 102, at 461.

130. *Id.*

131. Community Solutions Act of 2001, H.R. 7, 107th Cong. § 1994A(b) (2001).

132. The Charity Aid, Recovery And Empowerment ("CARE") Act of 2002 (Feb. 7, 2002), *available at* http://lierberman.senate.gov/~lieberman/press/02/02/2002207716.html.

excessive governmental entanglement with religion.[133] The resulting criteria used by the *Agostini* Court in the "effects" inquiry were: 1) whether the statute results in government indoctrination; 2) whether it defines recipients by reference to religion; or 3) whether it creates excessive entanglement.[134] If a law runs afoul of any of these criteria, then it has the primary effect of advancing religion.[135]

a. Does it result in government indoctrination?

Charitable choice programs must not result in government indoctrination.[136] There are two prongs of an inquiry into government indoctrination: whether the public funding constitutes or results in indoctrination and whether the indoctrination is attributable to the government.[137]

First, one might like to believe that religious organizations that receive federal funds to provide social services to those in need will refrain from preaching to the beneficiaries of the social programs. Certainly, many organizations will respect the notions of religious liberty and simply provide services. However, those organizations are already entitled to federal funding, without the help of charitable choice.[138] The charitable choice initiative will provide federal funding to those organizations that do not already receive it *because* they do not refrain from indoctrination. Thus, the extension of funding to more faith-based organizations will likely result in indoctrination.

Furthermore, there is evidence that some groups will use the opportunity to provide social services as an opportunity to indoctrinate. Two of the more outspoken opponents of President Bush's charitable choice initiative are leaders of the religious right, founder and former president of the Christian Coalition Pat Robertson and Reverend Jerry Falwell. They oppose federal funding of non-traditional religions.[139] Of course, the government cannot

133. Agostini v. Felton, 521 U.S. 203, 232 (1997).

134. *Id.* at 234.

135. *See id.*

136. *Id.*

137. DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397, 414 (2d Cir. 2001) (citing *Agostini,* 521 U.S. at 226).

138. *See* Ackerman, *supra* note 5, at 4.

139. *See, e.g.,* Kathy A. Gambrell, *Bush Gives $1B in Homeless Assistance*, UNITED PRESS INTERNATIONAL, Nov. 20, 2001 ("Conservative religious leaders such as Pat Robertson . . . expressed concern organizations such as Elijah Mohammed's Nation of Islam might apply for and receive federal monies."); David Jackson, *Taking Hits from the Left and the Right: It Isn't Easy Being Point Man on Faith-Based Initiatives*, DALLAS

discriminate against religions without violating the Establishment Clause.[140] More importantly, though, Robertson and Falwell oppose funding of non-traditional religions because they disagree with what they teach. For example, Robertson expressed concern that the Church of Scientology will use federal funding to expand its Narconon drug treatment plan.[141] He is also concerned about "plans by the Rev. Sun Myung Moon's Unification Church to promote its sexual abstinence programs in public schools with government funds."[142] Falwell stated on the website Beliefnet.com: "The Muslim faith teaches hate."[143]

The problem that Robertson and Falwell have with the charitable choice initiative is that other, "non-traditional", religions will be able to use federal funds to indoctrinate. This indicates that they either believe that indoctrination is permitted under the charitable choice initiative, or that it will not be regulated effectively. This suggests that the religious groups Robertson and Falwell represent will also practice indoctrination. After all, CNBC's Chris Matthews quoted Robertson's comments in the Wall Street Journal, saying:

> "If government provides funding to the thousands of faith-based institutions, but, under a tortured definition of separation of church and state, demands in return that those institutions give up their unique religious activities, then not only the effectiveness of those institutions but possibly their very" reason to be may . . . be lost.[144]

Thus, *their* religious organizations should not have to give up

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MORNING NEWS, May 12, 2001, at 1G ("Evangelists Pat Robertson and Jerry Falwell complained that groups such as the Hare Krishnas or the Church of Scientology would also be eligible for grants."); and Megan Twohey, *Limelight Scorching 'Charitable Choice'?*, NAT'L J., Apr. 28, 2001 ("[F]undamentalist evangelists Jerry Falwell and Pat Robertson, . . . have criticized the idea of government funding for religious groups outside the nation's Judeo-Christian mainstream.").

140. Hernandez v. C.I.R., 490 U.S. 680, 695 (1989).

141. Don Lattin, *Faith-Based Welfare Puzzles Televangelist*, S.F. CHRON., Feb. 22, 2001, at A1.

142. *Id.*

143. Don Lattin, *Bush Courts Right To Back Program*, S.F. CHRON., Mar. 8, 2001, at A4. *See also Hardball With Chris Matthews: President Bush's Office of Faith-Based Action* (CNBC television broadcast, Mar. 12, 2001) (transcript on file with CNBC News Transcripts) ("Islam should be out the door before they knock.").

144. *Hardball With Chris Matthews: President Bush's Office of Faith-Based Action* (CNBC television broadcast, Mar. 12, 2001) (transcript on file with CNBC News Transcripts).

their "unique religious activities,"[145] but non-traditional religions should. The fact that leaders of the religious right fear that other religions will use federal funds to indoctrinate indicates that their groups also plan to indoctrinate, because to refrain to do so would be to lose their "very reason to be."[146]

Governmental indoctrination requires "some nexus between the disputed government action and the resulting indoctrination, beyond the bare existence of a causal relationship between the two."[147] It is unlikely that the mere presence of a publicly paid social worker on the premises of a religious institution will raise a presumption of indoctrination.[148] Something else is required to establish the link between indoctrination and the government. The prevailing view of the Supreme Court is Justice O'Connor's concurring opinion in *Mitchell*.[149] She explained that although "neutrality is important," more central is the principle that "actual diversion of government aid to religious indoctrination" is constitutionally suspect.[150] Following Justice O'Connor's view, in *DeStefano v. Emergency Housing Group, Inc.*, the Second Circuit found that if public funds paid staff salaries and staff read religious texts and showed religious videos, then the indoctrination would be attributable to the government.[151] The court explained that if staff members just encouraged beneficiaries to go to Alcoholics Anonymous meetings (which have been found to be a religious activity),[152] there was no indoctrination.[153] However, if the staff was successful in encouraging clients to go to meetings, then there was indoctrination.[154]

Application of the *Mitchell* and *DeStefano* analyses indicates that the charitable choice initiative will result in government

145. *Id.*

146. *Id.*

147. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 416 (2d Cir. 2001).

148. *See* Helms v. Picard, 151 F.3d 347, 363 (5th Cir. 1998) (citing Agostini v. Felton, 521 U.S. 203 (1997) for the conclusion that the presence of a publicly paid teacher on a sectarian school premises will not raise a presumption of indoctrination).

149. *DeStefano*, 247 F.3d at 418.

150. Mitchell v. Helms, 530 U.S. 793, 837-40 (2000) (O'Connor, J., concurring). In *Mitchell*, Justice Thomas wrote that as long as aid is neutral, meaning it is "'offered to a broad range of groups . . . without regard to their religion," indoctrination is not attributable to the government. *Id.* at 809.

151. 247 F.3d at 419.

152. *Id.* at 406 (citing Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1997).

153. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 416 (2d Cir. 2001).

154. *Id.*

indoctrination. If federal funds are used to pay staff salaries and the staff uses spiritual approaches to provide social services, then there would be an "actual diversion of government aid to religious indoctrination." Moreover, if faith-based organizations are successful at what they do, then their indoctrination of beneficiaries will amount to governmental indoctrination. For the purposes of this note, I will assume that faith-based organizations will be successful, because if the government assumes that they will be unsuccessful, and therefore indoctrination will not be attributable to the government, then there is no point for the legislation anyway. Additionally, it is likely that faith-based organizations will be successful in encouraging recipients to participate in religious activities because recipients may be pressured to do so.[155] If a beneficiary is invited to participate by the person overseeing his or her benefits, it might be difficult to decline.[156] Steven K. Green, in *Charitable Choice and Neutrality Theory*, correctly points out that the government provides a captive audience to faith-based organizations.[157]

It is worth noting that if government aid takes the form of non-ideological aid, such as food, blankets, or medication, then it will be less likely to result in government indoctrination. In *Zobrest v. Catalina Foothills School District*, the Court distinguished employing a sign language interpreter from a teacher or guidance counselor.[158] Because the Court upheld the interpreter, the decision implies that a teacher or guidance counselor would be impermissible. In his dissenting opinion in *Bowen*, Justice Blackmun explained that the Court time and again has recognized the "difficulties inherent in asking even the best-intentioned individuals in such positions to make 'a total separation between secular teaching and religious doctrine.'"[159] He said that there is a difference between running a soup kitchen or hospital and counseling pregnant teenagers.[160] The risk of advancing religion is greater where the intent of the program is to change behavior than where it is to distribute medication, food, or

155. Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 45-46 (2000).

156. *Id.*

157. *Id.* at 46.

158. 509 U.S. 1, 13 (1993). *See also* Tilton v. Richardson, 403 U.S. 672, 687-88 (1971) (stating "teachers are not necessarily religiously neutral").

159. 487 U.S. 589, 638 (1988) (Blackmun, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

160. *Id.* at 641.

shelter.[161] Thus, if government aid pays the salaries of staff members of faith-based organizations, then there is a good chance the aid could result in government indoctrination. If the aid is provided as direct cash subsidies that could be used for any purpose, then it can result in government indoctrination.[162] However, if the government only provides such nonmonetary and verifiably secular aid as food, medication, blankets, etc., then the aid will not result in impermissible government indoctrination.[163]

b. Does it define participants by reference to religion?

Charitable choice must not define participants by reference to religion.[164] What this means is that the charitable choice initiative must not "create a financial incentive to undertake religious indoctrination."[165] The *Agostini* Court stated this rule as follows:

> This incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.[166]

In other words, a recipient must have a choice in whether he or she wants to receive benefits from a faith-based organization. That choice must be truly independent. If there is some sort of financial incentive to choose the religious organization over a secular one, then the choice is not truly independent and the program may have the effect of advancing religion.

In *Mitchell*, the Court concluded that the program at issue did not define participants by reference to religion.[167] The program was a school aid program known as Chapter 2.[168] The federal government distributed funds to state and local governmental agencies who then would lend educational materials to public and private schools.[169] The

161. *Id.*

162. *Id.* at 634.

163. *Id.*

164. Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 966 (W.D. Wis. 2002).

165. Agostini v. Felton, 521 U.S. 203, 231 (1997) (quoting Witters v. Washington Dep't. of Servs. For Blind, 474 U.S. 481, 488 (1986).

166. *Id.*

167. 530 U.S. 793, 829 (2000).

168. *Id.* at 801.

169. *Id.*

amount of aid was determined by the student enrollment at each participating school.[170] The Court concluded that the program did not define participants by reference to religion because aid was "allocated on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis."[171] The Court reasoned that because aid was distributed on a per capita basis and allocations to private schools had to be equal to allocations to public schools, the funding did not create an improper incentive.[172] This suggests that if President Bush's charitable choice initiative is implemented in such a way that federal funding of religious organizations is dependent on the number of beneficiaries they serve – rather than payment of a lump sum—and the funding of faith-based organizations and secular charities is equal, then the program would not be deemed to define recipients based on religion.

Similarly, in *Helms v. Picard*, the Fifth Circuit addressed the constitutionality of a Louisiana special education program that said that the state would provide free, publicly supported education to every exceptional child.[173] The court concluded that the program did not define recipients based on religion because the students would have received special education in the public schools.[174] This suggests that if beneficiaries receive the same benefits from a faith-based organization as they would from a secular organization, then the program will not have the primary effect of advancing religion.

Because this *Agostini* criterion stresses whether private choices to participate in a program are truly independent,[175] whether aid is direct or indirect is relevant. Direct aid is either money or materials given by the government directly to the faith-based organization. In contrast, indirect aid is aid that is given to the beneficiary and then indirectly reaches the faith-based organization. Examples of indirect aid are tax benefits and vouchers.[176] Constitutional rules for indirect aid to religious organizations are more lenient than rules for direct

170. *Id.*

171. *Id.* at 829 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

172. *Id.* at 829-30.

173. 151 F.3d 347, 350 (5th Cir. 1998).

174. *Id.* at 366.

175. Mitchell v. Helms, 530 U.S. 793, 814 (2000).

176. David M. Ackerman, *CRS Report for Congress, Public Aid and Faith-Based Organizations (Charitable Choice): Background Selected Legal Issues*, CONGRESSIONAL RESEARCH SERVICE 26 (updated Aug. 23, 2001) (on file with author).

aid, because the funding reaches the religious organization only through the private choices of individuals. For example, while direct aid is limited to secular uses, indirect aid can be used for all functions, not just secular functions.[177] Furthermore, all of the Justices in *Mitchell* seemed to doubt that direct monetary aid can pass constitutional muster.[178] The rationale behind the different treatment of the two kinds of aid is that if aid goes to religious organizations because of the choices of individuals, then the government is not advancing religion.

If charitable choice provides direct aid to religious organizations, it is much more likely that there will be a financial incentive for beneficiaries to subject themselves to religious indoctrination. Although the government cannot force individuals to receive social services from religious institutions, the choices of individuals might not be truly voluntary. This is true of both direct and indirect funding. Virtually all of the case law addressing this issue deals with federal funding of sectarian schools. In those cases, choices made by individual parents and students are voluntary. If parents want their children to be taught in a religious environment, then they may choose to send their children to sectarian schools. This is not necessarily true of social services. The beneficiaries of charitable choice are all in need of some kind of social service, whether it be shelter, food, alcohol and drug abuse treatment, etc. Because of this social state, they may not be truly "free" to choose between social services.

In addition, beneficiaries might not know of their right to choose. Charitable choice does not require that a voucher recipient have a choice of providers initially.[179] Rather, it requires that beneficiaries affirmatively request that they be provided with services from some other organization.[180] Charitable choice puts them in a position that they might reasonably see as "obligatory."[181] As Senator Simon stated, when discussing the charitable choice provisions in TANF: "a hungry person should not have to be subjected to a religious lecture from a Lutheran, a Catholic, a Jew, or a Muslim before they get

177. *Id.* at 26. The Supreme Court has upheld indirect funding of sectarian institutions in *Simmons-Harris*, *Mueller*, *Witter*, and *Zobrest*.

178. *See Mitchell*, 530 U.S. at 818-19. *See also* Ackerman, *supra* note 5 at 28.

179. Ackerman, *supra* note 5, at 28.

180. Guerricagoitia, *supra* note 102, at 466.

181. *Id.*

assistance."[182] Yet, that hungry person may have to make the choice between receiving food and religious indoctrination, or going hungry and avoiding religious indoctrination. To a hungry person, this is no choice at all. Thus, there is a financial incentive to subject oneself to indoctrination and the choice is not truly voluntary. As a result, charitable choice does define participants by reference to religion.

c. Does it create excessive government entanglement with religion?

The final *Agostini* criterion, and the third prong of the *Lemon* test, is whether the charitable choice legislation will lead to an excessive entanglement between government and religion.[183] The *Lemon* Court explained that courts should examine the character of the institutions to be benefited, the nature of the aid provided by the state, and the resulting relationship between the government and the religious organization.[184] First, the institutions to be benefited by charitable choice legislation are faith-based organizations. Secular organizations and religious groups that provide entirely secular services are already eligible for federal funding. Thus, charitable choice benefits those faith-based organizations which are not already eligible for federal funding because they indoctrinate, worship, proselytize, show religious symbols, etc.

Second, the nature of the aid provided by the charitable choice program is relevant.[185] In *Tilton v. Richardson*, the Court found that a one-time single purpose construction grant did not constitute excessive entanglement.[186] This was because there were "no continuing financial relationships... no annual audits and no government analysis of... expenditures" to determine whether they were secular or religious.[187] Neither the House bill nor the Senate "compromise" bill specify the kinds of aid that will be provided to faith-based organizations. Because the bills do not restrict the aid, it may range from one-time grants to continuous financial relationships between religious groups and the federal government.

Finally, the resulting relationship between government and religion will depend upon both the nature and the uses of the aid.

182. *Id.* (quoting 142 CONG. REC. 8501, 8529 (1996)).

183. Agostini v. Felton, 521 U.S. 203, 232-34 (1997); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

184. *Lemon*, 403 U.S. at 615.

185. *Id.*

186. 403 U.S. 672, 688 (1971).

187. *Id.*

Neither bill restricts the uses of governmental aid. Federal funding may be used to purchase supplies, construct buildings, pay salaries, and so on. The resulting relationship between government and religious organizations will depend on the uses of the aid. As Justice Blackmun stated in *Bowen*:

> Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.[188] ... Since teachers and counselors, unlike buildings, "are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction."[189]

Thus, if the federal funding is paying the salaries of staff members that counsel beneficiaries, or whose jobs are non-secular, then there will be greater government entanglement with religion than if the funding pays for food, because of the need for greater surveillance.

This surveillance may take a number of different forms. *Agostini* held that unannounced monthly visits by public supervisors did not constitute excessive government entanglement.[190] With regard to auditing, if faith-based organizations segregate federal funds from non-federal funds, then there will be no entanglement because the government can only audit federal funds.[191] However, if the funds are commingled, then the government can audit all of an organization's funds.[192]

The extent of government entanglement is also dependent on the beneficiaries of the programs. In *Tilton*, the Court found that college students are less impressionable and susceptible to religious indoctrination than younger students, so the program giving federal aid to church-related colleges and universities did not create an excessive government entanglement with religion.[193] This finding suggests that, at the very least, faith-based social programs provided by faith-based organizations that are directed toward children, will require a high level of surveillance, because children are

188. Bowen v. Kendrick, 487 U.S. 589, 650 (1988) (Blackmun, J., dissenting) (quoting *Lemon*, 403 U.S. at 619).

189. *Id.* at 651 (Blackmun, J., dissenting) (quoting *Tilton*, 403 U.S. at 687-88).

190. Agostini v. Felton, 521 U.S. 203, 234 (1997).

191. Friedman, *supra* note 65, at 117.

192. *Id.*

193. Tilton v. Richardson, 403 U.S. 672, 686-87 (1971).

impressionable. However, the majority of beneficiaries of social programs are impressionable because they are at a point in their lives where they need assistance. Although adult beneficiaries may not be as impressionable as children, the rationale behind counseling programs is that the beneficiaries are impressionable enough for the programs to change their behavior.

Regardless of the nature and use of the aid, the government will have to monitor faith-based organizations to ensure that they do not violate the law. H.R. 7 requires that each federally funded social program be implemented in a manner "consistent with" the Establishment Clause.[194] Of course, even if there was no such provision in the legislation, charitable choice must be enacted in a manner consistent with the Establishment Clause. "[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."[195] Thus, either the government agencies implementing charitable choice, or a newly-created government agency, will have to monitor each individual program to assure that federal funds are not being used for religious indoctrination, and is consistent with the Establishment Clause.

It is clear that monitoring will be necessary, given the fact that charitable choice gives federal funding to religious organizations that currently indoctrinate too much to be eligible for existing federal funding. Additionally, the monitoring scheme for charitable choice will have to be larger and more complex than anything the Supreme Court has seen before. The vast majority of Establishment Clause cases involve federal aid to parochial schools. Most address statutes or programs implemented by a local school board, local government, or state government. President Bush's charitable choice initiative involves federal funding of religious organizations on a much grander scale. It gives federal funding to secular and faith-based organizations that provide a wide variety of social services. The program stretches across the country and will involve every federal, state, and local government agency that provides funding for social services. Not only will monitoring such a program be a bureaucratic nightmare, but it will require a much greater level of government entanglement than do smaller, local programs.

In *Bowen*, the Supreme Court found that the AFLA, which provided counseling to unmarried, pregnant teens, did not create an

194. Ackerman, *supra* note 5, at 4.

195. Levitt v. Comm. for Pub. Educ. and Religious Liberty, 413 U.S. 472, 480 (1973).

excessive government entanglement with religion.[196] The Court said there was no reason to assume that grants would go to organizations that were "pervasively sectarian."[197] Thus, all that the government would have to do to monitor the program would be: to review the programs set up by grantees, review the educational materials used, and occasionally visit clinics.[198] The Court concluded: "in our view, this type of grant monitoring does not amount to 'excessive entanglement,' at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily 'pervasively sectarian.'"[199] Charitable choice is distinguishable from *Bowen* because it does authorize grants to "pervasively sectarian" organizations.[200] There is nothing in the language of either bill that restricts funding of "pervasively sectarian" organizations. Thus, more monitoring is required than was necessary in *Bowen*, and the heightened monitoring will create an excessive entanglement.

Admittedly, the excessive entanglement analysis creates a "Catch-22."[201] The Court has recognized that "the very supervision of the aid to assure that it does not further religion renders the statute invalid."[202] However, monitoring is still necessary. The fact that charitable choice grants federal funds to faith-based organizations, that otherwise would not receive funding because they cannot separate their secular from sectarian activities, indicates that monitoring is necessary. Additionally, evidence that religious leaders such as Robertson and Reverend Falwell believe that religious groups will use federal funds to indoctrinate, indicates the need for monitoring. Enforcement will require government monitoring of organizations' internal practices.[203] Such monitoring would require the "comprehensive, discriminating, and continuing state surveillance" that *Lemon* proscribed.[204]

In addition to these administrative entanglements, *Agostini* stated that excessive entanglement exists where "the program might

196. 487 U.S. 589, 617 (1988).
197. *Id.* at 616.
198. *Id.* at 616-17.
199. *Id.* at 617.
200. *See* discussion *infra* Part III.B.d.
201. *Bowen*, 487 U.S. at 615.
202. *Id.*
203. Friedman, *supra* note 65, at 117.
204. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

increase the dangers of 'political divisiveness.'"[205] This is because "competition among religious sects for political and religious supremacy has occasioned considerable civil strife, 'generated in large part' by competing efforts to gain or maintain the support of government."[206] In *Lemon*, the Court found that the programs at issue had potential for political strife because there was a "need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."[207] As the Court in *Nyquist* pointed out: "we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases."[208]

It seems very likely that providing federal funds to faith-based organizations has the potential of causing great political strife. This is evident from the political debates over religion in public schools and federal funding of parochial schools.[209] Government agencies will have to determine which faith-based organizations are eligible for federal funding under the charitable choice program. If only certain religions can meet the criteria established by the government, then there will not be a neutral distribution of funds to all religions. The same will be true if some religious groups refuse to comply with the Establishment Clause, requiring that funding will have to be withheld from them. If either of these two scenarios occur, there will be political strife between those religious groups that receive funding and those that do not. Finally, the fact that Robertson and Reverend Falwell, both religious and political leaders, are outspoken opponents of charitable choice indicates that different religious groups will likely compete for support in the government. The resulting political strife,

205. Agostini v. Felton, 521 U.S. 203, 233 (1997) (citing Aguilar v. Felton, 473 U.S. 402, 413-14 (1985)).

206. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 796 (1973) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947)).

207. *Lemon*, 403 U.S. at 623.

208. *Nyquist*, 413 U.S. at 797.

209. *See, e.g.*, David Kravets, *Appeals Court Declares Pledge of Allegiance Unconstitutional*, S.F. CHRON., June 26, 2002, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2002/06/26/state1513EDT0109.DTL; Proposition 38. School Vouchers. State-Funded Private and Religious Education. Public School Funding, *available at* http://vote2000.ss.ca.gov/VoterGuide/text/text_title_summ_38.htm (last visited March 24, 2003); and Julian Guthrie, *Voters Dump Vouchers, Lower Bond Hurdles; Results Show An Abiding Commitment to Public Schools*, S.F. EXAMINER Nov. 8, 2000, at B1.

coupled with the administrative entanglements required to monitor the charitable choice program, will create an excessive entanglement between government and religion.

2. Coercion

The government may not coerce anyone to participate in a religion or religious activity.[210] Charitable choice arguably does coerce beneficiaries to participate in religious activities. To violate the Establishment Clause, coercion "need not involve either the forced subjection of a person to religious practices or the conditioning of relief from punishment on attendance [to] church services."[211] "Coercion is also impermissible when it takes the form of 'subtle coercive pressure' that interferes with an individual's 'real choice' about whether to participate in worship or prayer."[212] Proponents of charitable choice would argue that there is no governmental coercion because beneficiaries have the choice between faith-based organizations and secular organizations.

In *DeStefano*, the Second Circuit questioned whether participation in religious practices is really a matter of free choice when a person chooses to seek treatment at a private alcoholic treatment facility that uses Alcoholics Anonymous in its program.[213] This doubt was supported by Supreme Court decisions holding that clergy or student-led prayers at public high school graduations or football games are impermissibly coercive.[214] The *Lee* and *Santa Fe* Courts stated that students are not free to avoid high school graduation and football games because to do so would require "'forfeiture of those intangible benefits' that accompany one's high school experience."[215] Similarly, the Second Circuit stated:

> The "choice" between forgoing . . . alcohol treatment provided by the State and coping with one's alcoholism without professional assistance or with assistance at substantial personal expense or inconvenience, on the other hand, and availing oneself of that treatment and thereby "facing a personally offensive religious ritual," on the other, may be no choice at

210. Lee v. Weisman, 505 U.S. 577, 587 (1992).

211. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 412 (2d Cir. 2001).

212. *Id.* (quoting *Lee*, 505 U.S. at 592).

213. *Id.*

214. *Id.* at 413 (referring to Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Indep. Sch. Dist., 530 U.S. 290 (2000)).

215. *Id.* (quoting *Lee*, 505 U.S. at 595).

all.[216]

Like the program in *DeStefano*, charitable choice will certainly amount to government coercion. Individuals in need of social services do not really have a choice. H.R. 7 says that if beneficiaries object to receiving services from a faith-based organization, then the government must provide them with a secular alternative and give them notice of this right.[217] Realistically, however, beneficiaries may exercise this right as often as a high school student avoids graduation because of religious activities. Although participation is not required in either case, both the beneficiaries of social services and high school students are in a position where making the choice may require relinquishing "intangible benefits." Moreover, if aid is indirect, then participation in religious activities does not have to be voluntary.[218] Thus, charitable choice amounts to government coercion because the need for social services creates a 'subtle coercive pressure' that interferes with a beneficiary's 'real choice' about whether to participate in a religious activity.

3. Endorsement

Justice O'Connor interprets the "effects" prong of the *Lemon* test to be a question of whether a program constitutes a government endorsement of religion.[219] Under that analysis, the charitable choice initiative definitely constitutes a government endorsement of religion. Justice O'Connor addresses endorsement as a two-part test: 1) the purpose or intent in the act, and 2) the effect of the action.[220] She explains that courts must conduct this inquiry from the point of view of "the hypothetical observer."[221] The question is whether a reasonable observer would see charitable choice as a government endorsement of religion. A reasonable observer would, in fact, see charitable choice as an endorsement of religion.

The stated purpose for charitable choice is to end discrimination against faith-based organizations that would like to provide social services to the needy using federal funding. The truth is, however, charitable choice is unnecessary to get religious groups to participate

216. *Id.* (quoting *Santa Fe*, 530 U.S. at 312).

217. Ackerman, *supra* note 5 at 3-4.

218. *Id.* at 4.

219. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

220. Guerricagoitia, *supra* note 102, at 468-69.

221. *Id.* at 469 (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995)).

in providing social services. Religious groups have been active in the social welfare system for years and have long received public funding.[222] Prominent Catholic, Jewish, and Protestant groups receive large portions of their revenue from government sources: 65% for Catholic charities, 75% for the Jewish Board of Family Children's Services, and 95% for the Lutheran Social Ministries.[223] However, prior to welfare reform in 1996, these groups had to be secular in order to receive public support, even if motivated by a religious purpose or mission.[224] Proponents of charitable choice argue that these old rules discriminate against evangelical churches.[225]

The foregoing suggests that charitable choice endorses religion. "Evangelical churches are no more sectarian than the Catholic Church, yet the Catholic Church has found a way to work effectively within the system without losing its sense of mission."[226] The reason why evangelical churches do not receive current federal funding is because they cannot find a way to provide social services in a secular way, not because of discrimination. Therefore, charitable choice's goal is to encourage evangelical involvement, not just broad religious involvement.[227]

Charitable choice does not treat faith-based organizations and secular charities neutrally. Religious organizations are exempt from regulations that are inconsistent with their religious beliefs.[228] The government allows faith-based organizations to give their religious message and the House legislation allows them to discriminate in hiring, which assures that only those who adhere to the same religious beliefs are employed.[229] This gives religious organizations an advantage because only they are free to communicate their message to beneficiaries.[230] As an example, consider the program in *Bowen* that provided federal funding for the counseling of pregnant teenagers. The government has the authority to restrict counselors from encouraging teens to either get an abortion, or refrain from

222. Green, *supra* note 155, at 35.

223. Stephen Macedo, *II. The Constitution of Civil Society B. Religion and Civic Education Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, And Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 443 (2000).

224. Green, *supra* note 155, at 35.

225. *Id.* at 37-38.

226. *Id.*

227. *Id.* at 43.

228. *Id.* at 41.

229. *Id.* at 43.

230. Green, *supra* note 155, at 43.

getting an abortion. However, faith-based organizations would be exempt from this rule if the regulation would intrude on their religious character. In this way, charitable choice favors faith-based organizations.

Finally, charitable choice endorses religion because it implies that religious groups are the proper organizations to provide community services. It is based on the premise that a faith-based approach is superior to a secular approach.[231] It is also based on the premise that the current system of providing social services is ineffective. Because there is no evidence that allowing faith-based organizations to indoctrinate beneficiaries while providing services would be more effective than the current system, the choice to fund such organizations is an endorsement of religion. A reasonable observer can view the charitable choice program and conclude that the government believes that it is the business of churches to care for the needy and that perhaps the reason why so many people are needy is because they are not getting enough church. Given that the goal of charitable choice is to encourage evangelical involvement, it does not treat religion and non-religion neutrally. Thus, charitable choice implies that faith-based organizations are superior to secular charities, and President Bush's charitable choice initiative is a government endorsement of religion.

4. Neutrality Test

Charitable choice should be considered under the more lenient neutrality test. The neutrality theory states that the government must be neutral toward religion.[232] For the most part, the neutrality theory has only been applied to cases that involve both the Free Speech and Establishment Clauses of the First Amendment.[233] Nevertheless, it was the test applied in the Supreme Court's most recent Establishment Clause case where Free Speech was not an issue.[234] According to the majority opinion in *Simmons-Harris*, a government program that provides aid to religious institutions will not violate the Establishment Clause if the program is neutral with respect to religion and provides assistance directly to a broad class of citizens

231. *Id.*

232. CHEMERINSKY, *supra* note 55, at 978.

233. *See* Friedman, *supra* note 65. Two exceptions to this are *Zelman v. Simmons-Harris* and *Zobrest v. Catalina Foothills School District.*

234. *See Simmons-Harris*, 122 S. Ct. 2460.

who freely choose to direct that aid to religious organizations.[235]

There were several factors which the *Simmons-Harris* Court considered before concluding that Ohio's school voucher program is constitutionally permissible.First, the Court found that the voucher program gives assistance to a broad class of citizens without reference to religion[236] and that there were no financial incentives which "skewed" the program toward religious institutions.[237] In *Simmons-Harris*, these were considered as two factors. However, in *Agostini*, the Court defined the former as meaning the latter.[238] Financial incentives which skew an individual's choice toward religious organizations are not present if the government aid is allocated based on neutral, secular criteria which do not favor nor disfavor religion and the aid is available to both religious and secular beneficiaries.[239] In *Simmons-Harris*, the Court held that there was not such a financial interest because under the Ohio voucher program, parents who choose to participate in the program must co-pay a portion of their child's tuition if their child is enrolled in either a religious or non-religious private school.[240] Thus, parents have a financial incentive against participating in the voucher program.[241]

Similarly, in *Rosenberger*, the Court addressed the issue of whether the program at issue provided government assistance without reference to religion.[242] There, the Court considered whether the University of Virginia's refusal to fund a religious student publication was constitutional.[243] The university authorized payment of outside contractors for the printing costs of student publications.[244] It withheld payments for those publications that were religious.[245] The Court held that withholding payments violated the Free Speech Clause and that the Establishment Clause did not require the university to exclude religious student publications.[246] The Court

235. *Id.* at 2467.
236. *Id.* at 2468.
237. *Id.*
238. 521 U.S. 203, 231 (1997).
239. *Simmons-Harris*, 122 S. Ct. at 2468.
240. *Id.*
241. *Id.*
242. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995).
243. *Id.* at 822.
244. *Id.*
245. *Id.*
246. *Id.* at 846.

explained that the guarantee that government be neutral toward religion is satisfied when the government extends benefits, following neutral criteria, to recipients whose views are broad and diverse.[247] In other words, the University of Virginia created a public forum for student publications. As long as the requirements to allow student groups to participate in that forum were neutral, allowing religious speech would not violate the Establishment Clause.[248]

If enacted, the charitable choice initiative certainly will provide assistance to beneficiaries regardless of their religious beliefs. Otherwise, the program would surely violate the Establishment Clause, not to mention the Equal Protection Clause of the 14th Amendment. Nevertheless, charitable choice might still define participants by reference to religion.[249] As discussed earlier, if the charitable choice initiative is implemented such that federal funding is based on the number of beneficiaries served by each faith-based organization, and the funding to religious and secular charities is equal, then the program will provide assistance without reference to religion.[250] Furthermore, if the beneficiaries of social services receive the same benefits from religious charities as they would from secular charities, then the charitable choice program would not be deemed to define recipients based on religion.[251] It is difficult to determine whether the charitable choice program will provide assistance without reference to religion, since it has yet to be enacted or implemented. Nevertheless, the program may create a financial incentive for a beneficiary to subject himself to religious indoctrination if he is in need of social services and is not in a social state in which he can make a truly voluntary choice.

The *Simmons-Harris* Court considered the fact that the Ohio voucher program provided assistance to all schools as the second important factor.[252] This issue was previously addressed in *Zobrest v. Catalina Foothills School District*, where the Court considered whether a hearing-impaired student could have a publicly paid sign-

247. *Id.* at 839.

248. *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), *and* Widmar v. Vincent, 454 U.S. 263 (1981).

249. *See* discussion *supra* Part III.B.a.ii.

250. This conclusion is based on the Supreme Court's analysis in *Mitchell*. *See* discussion *supra* Part III.B.a.ii.

251. *See* Helms v. Picard, 151 F.3d 347, 350 (5th Cir. 1998). *See also* discussion *supra* Part III.B.a.ii.

252. 122 S. Ct. at 2468.

language interpreter accompany him to Catholic high school.[253] The Court held that the program was constitutionally permissible.[254] It stressed that the program was neutral because benefits were provided neutrally to all handicapped children, without regard to the kind of school the student attended.[255] The Court stated: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause."[256]

Unlike the program at issue in *Zobrest*, the charitable choice initiative cannot possibly give governmental assistance to all those faith-based organizations which desire it. The designated government agency implementing charitable choice will have to establish requirements to insure that all faith-based organizations provide social services if they receive federal funding. Thus, it is entirely possible that once implemented, the charitable choice program could end up favoring some religions and not others, or not favoring religious organizations at all if they do not meet the requirements. Thus, it will be impossible for the charitable choice program to provide assistance to all interested faith-based organizations, as did the voucher program in *Simmons-Harris* and the funding program for handicapped students in *Zobrest*.

Third, the *Simmons-Harris* Court rejected the argument that the voucher program created a public perception that the government endorsed religion.[257] The Court explained that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[258] To determine whether a government program creates the perception of government endorsement of religion, courts look to what a reasonable observer would believe.[259] In *Simmons-Harris*, the Court concluded that "no reasonable

253. 509 U.S. 1, 3 (1993).

254. *Id.* at 13-14.

255. *Id.* at 10.

256. *Id.* (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986)).

257. *Simmons-Harris*, 122 S. Ct. at 2468.

258. *Id.* at 2467.

259. *Id.* at 2469. This was Justice O'Connor's approach in *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). *See* discussion *supra* Part III.B.3.

observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."[260]

There are several reasons why the charitable choice initiative, unlike Ohio's school voucher system, creates a perception of government endorsed religion.[261] First, the charitable choice program is unnecessary to encourage religious groups to participate in providing social services. Many religious organizations already receive federal funding to provide social services. Rather, the charitable choice program endorses the evangelical organizations that are currently ineligible for government aid because they refuse to provide services in a secular manner. Second, charitable choice does not treat faith-based organizations neutrally because they are exempt from regulations which are inconsistent with their religious beliefs, while secular charities must abide by all government regulations. Third, enactment of the charitable choice initiative implies that religious groups are the proper groups to provide social services, not the government.

Additionally, the Court in *Simmons-Harris* suggested that the hypothetical reasonable observer consider the history and context of the school voucher program.[262] After doing so, he would be reasonable to conclude that the program was enacted as a response to the failing school system in Cincinnati, rather than an endorsement of religious education.[263] In contrast, the charitable choice initiative does not have such a history. The stated purpose of charitable choice is to end discrimination against religious charities applying for federal funding. However, in reality, there is no such discrimination against religious charities. Religious groups have long received public funding to provide social services.[264] It is only those religious organizations which cannot find a way to provide social services in a secular way that are denied federal funding. Thus, the charitable choice initiative addresses a discrimination problem which is almost entirely non-existent.

Furthermore, one must consider the context in which the charitable choice initiative was introduced. The program was

260. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2468 (2002).

261. *See* discussion *supra* Part III.B.3.

262. *Simmons-Harris*, 122 S. Ct. at 2469.

263. *Id.*

264. Green, *supra* note 155, at 35.

introduced by President Bush at his Inauguration following eight years of Democratic leadership in the White House. President Bush is opposed to big government. Thus, a reasonable observer might suspect that President Bush will cut government-provided social services if given the opportunity. The charitable choice initiative could provide such an opportunity. For example, in a recent hearing before the House Ways and Means Committee, Health and Human Services Secretary Tommy Thompson discussed the Bush Administration's prescription drug plan.[265] In his testimony, Secretary Thompson could not guarantee that Medicare would continue to provide prescription drug benefits to seniors who remain in the original fee-for-service Medicare program.[266] Democrats oppose the Administration's plan because it will give faith-based organizations funds to provide drug treatment, while only providing prescription drug benefits to elderly people who opt out of the traditional Medicare program.[267] In response to this plan, Representative Pete Stark stated:

> This is a president who has cut back on the safety net for the poorest and most vulnerable people in our country. Then he's saying: "let's take money and give it to the churches." Why should we throw money at them while we're taking money away from people who need it.[268]

The hypothetical reasonable observer could reach the same conclusion as Representative Starks, that the President's plan is "fanaticism to force (Bush's) right wing Christian religion on the rest of the country."[269] For this reason, along with the above mentioned reasons, the charitable choice program will create a public perception that the government is endorsing religion.

The final factor which influenced the *Simmons-Harris* Court was the majority's conclusion that there was no evidence that the voucher program denied parents the opportunity to choose secular educational options for their children.[270] The Court stated that it did not need to consider the fact that ninety-six percent of scholarship

265. *See* Robert Pear, *Bush Medicare Proposal Vague on Drug Coverage*, S.F. CHRON., Feb. 7, 2003, at A3; and Marc Sandalow, *Rep. Stark Takes Swipe at Bush Over His Past Alcohol Use*, S.F. CHRON., Feb. 7, 2003, at A3.

266. Pear, *supra* note 265.

267. Sandalow, *supra* note 265.

268. *Id.*

269. *Id.*

270. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2469 (2002).

recipients chose to enroll in religious schools.[271] This argument was rejected in *Mueller*, where ninety-six percent of parents taking tax deductions for tuition expenses paid tuition at religious schools.[272] The Court explained that "[t]he constitutionality of a neutral educational program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[273] This argument served as a point of contention in Justice Souter's dissenting opinion. Justice Souter stated:

> There is . . . no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students.[274]

Because the charitable choice initiative has yet to be enacted, it is too early for evidence regarding choice to exist. Nevertheless, there is reason for concern that once enacted, recipients will not have a genuine choice between religious and secular social service providers. First, beneficiaries might not be in a position to make a truly voluntary choice because of their social state. For example, if the Bush Administration failed to provide prescription drug benefits to seniors, the elderly would not truly have a choice between religious and secular providers of drug treatment. Most likely, a senior in need of prescription drugs will choose the provider which offers his or her medications at the lowest costs and which requires the least amount of effort on the part of the senior. Because this individual will be in need of a vital service, the choice is not likely to be truly voluntary.[275]

Second, recipients might not have a genuinely voluntary choice between service providers because they may not know of their right to choose. As discussed above, the charitable choice initiative does not initially require a choice of providers for a recipient.[276] Rather, the program requires that a beneficiary affirmatively request that they be offered services from another social service provider.[277] The average recipient of government-provided social services might

271. *Id.* at 2470.

272. *Id.*

273. *Id.*

274. *Id.* at 2496 (Souter, J., dissenting).

275. *See also* discussion *supra* Part III.B.a.ii.

276. Ackerman, *supra* note 5, at 27.

277. Guerricagoitia, *supra* note 102, at 466.

reasonably believe that he or she is obligated to receive those services from whichever organization the government suggests, even if it is a faith-based organization.[278] Thus, it is reasonable to conclude that if enacted, evidence will emerge that beneficiaries of the charitable choice program are not making genuinely voluntary choices.[279]

Finally, the enactment and implementation of the charitable choice initiative might produce evidence to prove lack of choice because the program itself might amount to government coercion. As discussed above, government coercion can take the form of "'subtle coercive pressure' that interferes with an individual's 'real choice.'"[280] As in *Lee v. Weisman*, *Santa Fe Independent School District v. Doe*, and *DeStefano v. Emergency Hous. Group, Inc.*, beneficiaries of charitable choice will be in a position where making the choice against receiving services from faith-based organizations requires relinquishing "intangible benefits."[281] Thus, the charitable choice initiative will produce evidence to prove lack of choice because the program will amount to government coercion.

After reviewing all of the factors deemed important by the *Simmons-Harris* Court, it is clear that the charitable choice program is not constitutionally permissible because it does not treat faith-based organizations neutrally. The program provides financial incentives for beneficiaries to subject themselves to religious indoctrination. Charitable choice cannot possibly give assistance to all faith-based organizations that are interested in the program, as does the Ohio voucher program. Finally, the program will create a public perception of government endorsement of religion and it is reasonable to conclude that it will produce evidence to prove lack of choice. Aside from the factors considered by the Supreme Court in *Simmons-Harris*, other factors weigh in favor of concluding that the charitable choice program is not neutral towards religion.

Charitable choice does not pass constitutional muster under the neutrality theory because it does not treat religious and secular groups neutrally, as the programs did in *Rosenberger* and *Zobrest*. In *Rosenberger*, all student publications, regardless of viewpoint, were provided with school funding. In *Zobrest*, all handicapped children received benefits, regardless of what school they attended. Under

278. *Id.*

279. *See also* discussion *supra* Part III.B.a.ii.

280. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 412 (2d Cir. 2001) (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

281. *See* discussion *supra* Part III.B.b.

charitable choice, faith-based organizations are not treated the same as secular charities. Faith-based organizations are exempt from certain regulations, if abiding by them would require the organization to relinquish some of its religious characteristics.

For example, H.R. 7 exempts faith-based organizations from state and local discrimination laws.[282] Faith-based organizations may discriminate in hiring on religious grounds.[283] Secular charities receiving federal funds are not exempt from these civil rights laws. While the "compromise" Senate legislation does not include this exemption, even without it, faith-based organizations are favored because they are not forced to comply with regulations that are inconsistent with their religious beliefs. For example, Pat Robertson is concerned about "plans by the Rev. Sun Myung Moon's Unification Church to promote its sexual abstinence programs in public schools with government funds."[284] Under charitable choice, the federal government could decide to provide federal funding to counsel teenagers regarding pregnancy, but forbid organizations from promoting one option, such as abstinence or birth control, over any other option. The Unification Church would be exempt from such a prohibition if discussing anything but abstinence is inconsistent with its religious beliefs. Yet, secular organizations would be bound by the prohibition. Thus, the government does not treat faith-based organizations and secular organizations neutrally under charitable choice because faith-based organizations are given special advantages.

Furthermore, in *Rosenberger*, the Court found safeguards that ensured the student publication did not violate the Establishment Clause. No such safeguards are present in the charitable choice legislation. First, the Supreme Court pointed out that school funding of student publications came from student activity fees, rather than a tax.[285] The fees were not a general tax to raise revenue for the school.[286] The Court considered this fact as an important distinction because our Founding Fathers were concerned with levying taxes "for

282. Ackerman, *supra* note 5, at 3.

283. *Id.*

284. Lattin, *supra* note 141.

285. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840-41 (1995). *See also* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

286. *Rosenberger*, 515 U.S. at 840-41.

the direct support of a church or group of churches."[287] It appears that this safeguard is no longer as important to the Supreme Court as it was in 1995, when *Rosenberger* was decided. After all, the Ohio school voucher program is supported by tax funds and the Court held the program to be constitutional.[288] However, Justice Souter, in his dissenting opinion, pointed out that the Court has never repudiated or overruled *Everson v. Board of Education of Ewing*, which held that no tax can support any religious activities or institutions.[289] In the case of charitable choice, welfare programs *are* paid for by tax dollars. Thus, this first safeguard from *Rosenberger* does not save charitable choice.

Second, the *Rosenberger* Court found that the fact that disbursements from the University of Virginia went to the printer, and not directly to the student groups, was an effective safeguard.[290] Presumably then, if federal funding for the care of the mentally ill, for example, went directly to pharmaceutical companies that provide faith-based organizations with necessary medication, rather than directly to the faith-based organizations, then charitable choice might be constitutionally permissible under the neutrality theory. However, there are no such safeguards in either of the charitable choice bills. Finally, the *Rosenberger* Court found that "'government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University."[291] Charitable choice does create a mistaken impression that faith-based organizations speak for the government.[292] It endorses religion by encouraging evangelical involvement in social services, treating faith-based organizations differently than secular organizations, and implying that religious groups are the proper providers of community services.[293] Thus, none of the safeguards present in the University of Virginia program exist in charitable choice.

Charitable choice does not withstand the more lenient neutrality approach to Establishment Clause jurisprudence. It simply does not

287. *Id.*

288. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2485 (2002) (Souter, J., dissenting).

289. *Id.* at 2486. The *Rosenberger* Court relied heavily on this rule from *Everson*. *Rosenberger*, 515 U.S. at 840-41.

290. *Rosenberger*, 515 U.S. at 841.

291. *Id.* (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995)).

292. *See* discussion *supra* Part III.B.c.

293. *See* discussion *supra* Part III.B.c.

treat faith-based organizations and secular organizations in a neutral manner. Furthermore, the safeguards present in *Simmons-Harris* and *Rosenberger*, are not present in the charitable choice legislation to cure its unconstitutionality. Thus, even if the majority of the Supreme Court continues to adhere to the neutrality theory, charitable choice is unconstitutional. When charitable choice is applied to the *Lemon-Agostini* constitutional framework, it becomes clear that charitable choice does not pass constitutional muster. There is a secular legislative purpose behind the program. However, even if charitable choice survives the first prong of the *Lemon-Agostini* test, it cannot survive the second prong. Charitable choice has the primary effect of advancing religion. It will result in government indoctrination because it provides federal funding to those faith-based organizations that are currently ineligible for funding on the basis that they indoctrinate. It defines participants by reference to religion because it creates a financial incentive to subject oneself to religious activities. Individuals in need of social services are not entirely "free" to choose between religious and secular organizations. Charitable choice will create an excessive entanglement between government and religion because the government will have to monitor faith-based organizations to ensure that the program is being implemented consistent with the Establishment Clause and the program is likely to cause political strife. Other than the *Agostini* criteria for determining "effects," charitable choice will have the primary effect of advancing religion because it constitutes both government coercion and government endorsement of religion. Because charitable choice cannot survive either the "effects" prong of the *Lemon-Agostini* test or the *Simmons-Harris* neutrality test, it is unconstitutional.

IV. Conclusion

There is certainly a need for social services in America. Charitable choice is an innovative answer to this need. However, as novel as it is, charitable choice is not an appropriate way for the government to provide social services because it violates the First Amendment to the United States Constitution. Courts and the public should be skeptical over whether there really is a legitimate secular purpose for laws that benefit religion. While it is difficult to prove that politicians have a sham secular purpose, there is historical evidence that politicians hide their true feelings regarding other religious groups. For example, in a taped conversation, former-

President Richard Nixon discussed trying to reduce the Jewish influence in government because Jews are "untrustworthy."[294] He told former Treasury Secretary John Connally that he wanted "no more than 2 percent of the government's political appointees to be Jewish."[295] These statements were made in 1972, meaning that President Nixon's true feelings regarding Jews were kept secret for thirty years. Because it is virtually impossible to know a politician's true purpose behind any piece of legislation, and because politicians are only human and are bound to hold beliefs that should be kept secret, courts and the public should be skeptical of the purpose of programs like charitable choice. This skeptical view of human nature is why the Establishment Clause exists in the first place.

Despite the lack of evidence indicating a sham secular purpose, charitable choice still violates the Establishment Clause. Regardless of whether the Supreme Court is comprised of separationists or proponents of the neutrality theory, charitable choice does not pass constitutional muster. It cannot survive the *Lemon-Agostini* test because it has the primary effect of advancing religion. Nor can it satisfy the requirements of the neutrality theory because charitable choice is not neutral towards faith-based and secular organizations. As a result, with respect to charitable choice, the wall between church and state must remain strong and impenetrable.

294. George Lardner, Jr., *Nixon Defended Envoy's Groping; 1972 Tapes Also Reveal Talk of a Justice Dept. 'Full of Jews'*, WASH. POST, Mar. 1, 2002, at A2.

295. *Id.*