INDOCTRINATING THE GULF COAST: THE FEDERAL RESPONSE TO HURRICANES KATRINA AND RITA AND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

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I. INTRODUCTION

Throughout history, virtually all societies have relied to some extent on the generosity of religious and faith-based organizations.[1] From operating soup kitchens and shelters to caring for children and the mentally ill, these religious organizations have often filled vital areas of societal need when the government fails to do so.[2] The United States is no exception to this rule. Throughout the last half century, the federal government has increasingly looked to religious and faith-based organizations for assistance in meeting its societal obligations.[3] This reliance has grown to unprecedented levels during the last decade, particularly due to public support for partnering programs like Charitable Choice and the White House Office of Faith-Based and Community Initiatives.[4]

The fall of 2005 saw this partnership put to a monumental test, however, when Hurricanes Katrina and Rita thrashed their way through the Gulf Coast region. In the wake of the most devastating

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[1] *See, e.g.*, STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 8 (1996) (discussing the historical role of religiously motivated groups in public service).

[2] *See id.*; *see also* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 5 (2005) (discussing the "deep roots" of partnerships between government and religiously affiliated entities in circumstances such as state-financed health insurance and a variety of other social services).

[3] *See* David K. Ryden & Jeffrey Polet, *Introduction: Faith-Based Initiatives in the Limelight*, *in* SANCTIONING RELIGION? POLITICS, LAW, AND FAITH-BASED PUBLIC SERVICES 1, 1–2 (David K. Ryden & Jeffrey Polet eds., 2005) (citing a "long and substantial history of government collaboration with religious nonprofits in social service provision").

[4] A 2001 Pew Research Center Poll shows that seventy-five percent of the Americans polled support government funding of faith-based organizations. *See* THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND (2001), http://people-press.org/reports/print.php3?ReportID=15. Furthermore, seventy-five percent say that churches, synagogues, and other houses of worship assist in solving societal problems. *Id.* at § 1.

hurricanes in American history,[5] the Federal Emergency Management Agency (FEMA) was forced to rely on religious and faith-based organizations to house and feed more than 500,000 people displaced by the storms.[6] In return for this assistance, the agency announced that it would use public funds to reimburse these groups for expenses associated with providing shelter, food, and supplies.[7] The federal government also acknowledged that this decision was an unprecedented step and marked the first time the government had directly compensated religious groups for their help in disaster relief.[8] Nevertheless, FEMA's plan was met with considerable approval by many citizens as being an appropriate response to the massive devastation.[9]

There were also many opponents to the plan, however, who claimed it was merely an effort by the President and FEMA to restore their blemished reputations by "playing to religious conservatives."[10] These critics also argued that regardless of the underlying reasoning for the plan, the funding violated the Establishment Clause of the First Amendment[11] because the federal money allegedly supported preaching, proselytizing, and prayer.[12]

Although many of these claims were false exaggerations, to this date there has been no official determination whether the funding program did in fact cross the line of constitutional permissibility.

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[5] *See* Federal Emergency Management Agency, 2005 Hurricane Season, http://www.fema.gov/hazard/hurricane/hu_recovery.shtm (last visited Oct. 15, 2006).

[6] *See* Alan Cooperman & Elizabeth Williamson, *FEMA Plans to Reimburse Faith Groups for Aid*, WASH. POST, Sept. 27, 2005, at A1.

[7] *Id.*

[8] *See id.* Instead of making direct payments to the religious groups themselves, the government usually contracted with religiously affiliated organizations that have religious identities and provide secularized professional service but do not engage in practices of worship. *See* Lupu & Tuttle, *supra* note 2, at 5–6 (discussing how the government has extended Medicaid and Medicare to religiously affiliated hospitals and how it has contracted for social services from Catholic charities and Jewish Family Services).

[9] For example, Joe Becker, Senior Vice President for Preparedness and Response with the Red Cross, remarked, "I believe it's appropriate for the federal government to assist the faith community because of the scale and scope of the effort and how long it's lasting." Cooperman & Williamson, *supra* note 6.

[10] *Id.*

[11] The First Amendment of the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[12] *See* Press Release, Americans United for Separation of Church and State, Americans United Criticizes Lack of Accountability in FEMA Funding of Religious Groups (Sept. 27, 2005), *available at* http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7579&security=1002&news_iv_ctrl=1842 [hereinafter Americans United] (criticizing FEMA's plan for its failure to separate "evangelism from relief work"); Press Release, Freedom from Religion Foundation, FEMA Church Give-Away Sets Egregious Precedent—As Usual, Churches Get Credit, Taxpayers Get the Bill (Sept. 28, 2005), *available at* http://www.ffrf.org/news/2005/faithbasedFEMAII.php [hereinafter Freedom from Religion Foundation] (criticizing reimbursement, in part, because it applies retroactively without a contractual agreement).

Moreover, because U.S. citizens have the legal right to challenge this type of congressional spending,[13] the current environment remains ripe for a lawsuit.

Fortunately for the federal government, however, this Comment will show why the hurricane funding should ultimately survive a constitutional challenge. Moreover, even if the funding does violate the Constitution, this Comment will also show why the political environment makes it unlikely that the program will be challenged. In arriving at these conclusions, this Comment examines both the historical development of the Establishment Clause as well as the questionable actions taken by the government in response to the hurricanes. Specifically, Part II explains the combined role of the federal government and religious organizations in providing disaster relief. Part III then considers the development of the Establishment Clause throughout its history. Part IV suggests the potential legal challenges following FEMA's relief efforts. Finally, Part V explains why it is unlikely that a lawsuit will ever be pursued.

II. THE FEDERAL GOVERNMENT'S PARTNERSHIP WITH RELIGIOUS ORGANIZATIONS IN DISASTER RELIEF EFFORTS

Coordinated disaster relief has a long history in the United States stretching almost as far back as the country's founding.[14] In the early 1800s, though, relief provided by the federal government was limited to various ad hoc legislative acts passed in response to natural disasters.[15] It was only during the twentieth century that the government adopted a proactive approach to providing relief and created agencies like the Federal Disaster Assistance Administration within the Department of Housing and Urban Development.[16] In the meantime, religious and faith-based organizations often led the way in meeting societal needs.[17] The country's dependence on these religious groups led to an environment in which the dividing line between public and private disaster relief was often quite blurred.[18]

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[13] "[F]ederal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution." Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (citing Flast v. Cohen, 392 U.S. 83 (1968)).

[14] *See* Federal Emergency Management Administration, FEMA History, *available at* http://fema.gov/about/history.shtm (last visited Oct. 15, 2006) (tracing FEMA's origins to the Congressional Act of 1803, an early example of disaster legislation).

[15] *See id.*

[16] *See id.*

[17] *See* MONSMA, *supra* note 1, at 8.

[18] *See id.* at 5 ("Without government funds, many private, nonprofit associations would collapse or have to cut back their programs drastically; without private, nonprofit associations, government would have to expand dramatically to meet public needs in such areas as health,

This division began to sharpen in 1979—around the same time that President Jimmy Carter established FEMA.[19] In creating the agency, Carter's goal was to centralize the various federal emergency functions and to streamline the government's response in providing aid.[20] To Carter's credit, the advent of FEMA was quite successful in meeting these goals.[21] Nevertheless, the agency's creation failed to provide any clarity about the remaining role of religious organizations in providing disaster relief. Rather, the federal courts ultimately created some clarity through a "separationist" movement.[22]

During this movement, many scholars advocated for a stricter separation between government and religion. As a result, many groups that had traditionally sought government support in providing disaster relief attempted to avoid legal challenge by creating affiliates in which they substantially downplayed their religious identity.[23] These groups also responded to the movement by calling the separationist movement's beliefs discriminatory and urged the view that accepting federal funds would "compromise the very essence of their religious mission and identity."[24] As an unfortunate result, many religious groups abandoned the practice of providing disaster relief altogether.[25]

Congress attempted to reverse this trend, however, when it enacted the Charitable Choice provision in 1996 as part of a broad legislative effort for welfare reform.[26] The official purpose of Charitable Choice was to "level the playing field[]" for groups receiving government funds,[27] and to enable religious organizations to "accept government funds without the pressure to sideline their religious charac-

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education, social services, and overseas relief. In the end . . . 'Mutual dependence blurs the lines between public and private.'").

[19] FEMA History, *supra* note 14.

[20] *Id.*

[21] *See, e.g., id.* (describing how FEMA proved its efficiency during events like the Cuban refugee crisis, the nuclear accident at Three Mile Island, and Hurricane Andrew).

[22] Lupu & Tuttle, *supra* note 2, at 46.

[23] For example, groups such as Catholic Charities and Lutheran Social Services were only religiously affiliated groups that had ties to the church but delivered services through separate corporate entities. These separate corporate entities had nonreligious governing boards, had segregated financial accounts, and operated in such a manner that the religiousness of the organization had been removed. *See* Ryden & Polet, *supra* note 3, at 1–2.

[24] *Id.*

[25] *See id.*

[26] *See* Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 806 (2002) (describing the origins, legislative history, and effects of Charitable Choice as part of the massive reform of the federal welfare system).

[27] Ryden & Polet, *supra* note 3, at 2.

ter."[28] In reality, though, Charitable Choice served as a means for politicians, who believed a faith element was a large part of religious organizations' historical success, to bring religion back into relief efforts.[29]

To accomplish these goals, Charitable Choice implemented three major changes. First, the program required federal officials to give sectarian organizations the same consideration as secular nonprofits when awarding social service grants.[30] Second, it imposed a series of protective measures so the receipt of federal money by faith-based organizations would not force these groups to compromise their religious affiliation or mission.[31] Finally, Charitable Choice protected potential recipients by requiring all aid providers to respect the religious liberty of their clients and by banning groups from diverting federal funds to support "inherently religious practices such as worship or proselytization."[32]

These changes only achieved modest success, however, as Charitable Choice did not induce the significant partnership between religion and government for which many politicians had hoped.[33] Some commentators claimed the principal reason for the program's failure was its lack of publicity.[34] The program "barely caused a splash in the American media" and most faith-based organizations were simply not aware of the legislative changes at all.[35] Other critics alleged, however, that partisan politics were to blame because Charitable Choice was Republican-driven, and President Bill Clinton and the Democrats simply ignored its existence.[36] Regardless of the reason, the lack of attention paid to Charitable Choice led to little real change in how the government provided assistance.

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[28] Stanley W. Carlson-Thies, *Charitable Choice: Bringing Religion Back into American Welfare, in* RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA 269, 280 (Hugh Heclo & Wilfred M. McClay eds., 2003).

[29] *See* Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 187 (2002) ("Over time, politicians favoring faith-based initiatives grew increasingly committed to the proposition that faith-based entities are effective precisely because of their use of faith in service provision.").

[30] *See* Carlson-Thies, *supra* note 28, at 280.

[31] *See id.* at 280–81.

[32] *Id.* at 281.

[33] *See* Lin et al., *supra* note 29, at 188.

[34] *Id.*

[35] *Id.*

[36] *See* Ryden & Polet, *supra* note 3, at 3 ("Absent a determined effort on the part of the executive branch to educate and press state governments to implement charitable choice, most public officials remained in the dark about the requirements of charitable choice, or if they knew about it, had a seriously misguided understanding of it. Studies revealed that only a handful of states made any serious effort to pursue charitable choice. In sum, implementation at the state level was sporadic at best and nonexistent at worst.").

This all changed in 2001, however, when the presidential spotlight finally shifted to shine on Charitable Choice ideas.[37] In March of that year, President George W. Bush established the White House Office of Faith-Based and Community Initiatives (OFBCI).[38] According to the President, the purpose of this new office was to "enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."[39] To the benefit of many religious organizations that had traditionally provided disaster relief without the help of federal funds, the White House OFBCI was very successful in its first few years. By the end of 2003, the office had paid out over $1.1 billion in federal money to religious organizations, hundreds of which were first-time grantees.[40] This was a significant increase in the number of participating religious organizations, and it marked a new high in the total amount paid to such groups.[41] Furthermore, it served as evidence of the administration's efforts to reshape the American perception about the possibility of a partnership between religious organizations and the federal government.[42]

As many commentators have recently recognized, however, the ultimate test for the White House OFBCI is not whether the program receives support from the public.[43] Rather, the success of the office depends far more on the legal support it receives when its "vigilant faith-based opponents" inevitably challenge its existence in court.[44]

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[37] *See id.* (describing President Bush's focus on faith-based legislation).

[38] Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001). In accompanying executive orders, this program was expanded to include Centers for Faith-Based and Community Initiatives in ten federal agencies. Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (June 1, 2004); Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 16, 2002); Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

[39] Exec. Order No. 13,199, 66 Fed. Reg. at 8499.

[40] Ryden & Polet, *supra* note 3, at 4.

[41] *See id.*

[42] *Id.* at 5 ("Concerted efforts by the current administration indeed may have begun to reshape how bureaucratic cultures perceive faith-based organizations as potential partners . . . . If a central aim of the Bush plan was to increase the presence of religious groups in the delivery of government social services, the initiative must be judged a legitimate success.").

[43] *See id.* In fact, public support for the program, although slipping some in four years, has remained relatively steady. In a 2005 poll by The Pew Research Center, sixty-six percent of Americans still favored allowing churches and other houses of worship to apply for government funding to provide social services. THE PEW RESEARCH CENTER, PUBLIC DIVIDED ON ORIGINS OF LIFE: RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES, Aug. 30, 2005, http://peoplepress.org/reports/display.php3?PageID=988.

[44] Ryden & Polet, *supra* note 3, at 5 ("A legal landscape that previously was free of lawsuits pre-2000 is now speckled with potentially significant cases and developments. On one hand, advocacy groups and faith-based opponents have turned aggressively to litigation in an effort to stem the tide of greater church-state interaction. On the flip side, religious providers and conservative public interest law firms are litigating issues pertaining to organizational rights the faith-based organizations hope to retain as government contractees.").

FEMA's response to the hurricanes provides a significant opportunity for such a challenge, and its outcome will likely affect the future of the OFBCI and its policies. Accordingly, it is necessary to next examine exactly how such a legal challenge would take shape.

III. THE ESTABLISHMENT CLAUSE AND GOVERNMENT FUNDING OF RELIGIOUS AND FAITH-BASED ORGANIZATIONS

If FEMA's actions in response to the hurricanes were ever challenged in court, the most likely legal claim against the agency would be an alleged Establishment Clause violation.[45] The Establishment Clause appears in the First Amendment of the United States Constitution and states simply: "Congress shall make no law respecting an establishment of religion . . . ."[46] The boundaries of the Establishment Clause are greatly undefined, however, and uncertainty surrounds the extent to which the Supreme Court will permit interaction between government and religion. This determination has become increasingly important, as it will play a crucial role in determining the success of the White House OFBCI and other Charitable Choice programs. Therefore, to determine the constitutionality of FEMA's recent actions, it is necessary to analyze the uncertainty of the Establishment Clause by examining its historical development.

A. *Funding Religiously Affiliated Social Service Providers:* Bradfield v. Roberts *and* Bowen v. Kendrick

Throughout its history, although the federal government has granted money to a wide variety of religious organizations, surprisingly there have been only two Supreme Court disputes involving entities other than religious schools.[47] These cases, *Bradfield v. Roberts*[48] and *Bowen v. Kendrick*,[49] are especially relevant to the purposes here, for many of the issues facing FEMA will involve organizations other than schools.

In 1899, the Supreme Court first decided in *Bradfield v. Roberts* that the government's financial support of a religiously affiliated social service provider, a hospital run by the Roman Catholic Church, did not violate the Establishment Clause.[50] In coming to this deci-

[45] For scholarly writing about other potential challenges including free speech, antidiscrimination, and free exercise claims, see generally Lin et al., *supra* note 29, at 196, and Lupu & Tuttle, *supra* note 2, at 15.

[46] U.S. CONST. amend. I.

[47] MONSMA, *supra* note 1, at 40.

[48] 175 U.S. 291 (1899).

[49] 487 U.S. 589 (1988).

[50] 175 U.S. at 300.

sion, the Court highlighted the limited, secular purpose of the hospital to care for the sick people of Washington, D.C.[51] The Court also emphasized that there were no allegations that the hospital confined its services to members of the Roman Catholic Church.[52] Under these circumstances, "[w]hether the individuals who composed the [hospital] . . . happen to be all Roman Catholics . . . or members of any other religious organization . . . [was] of not the slightest consequence" to the Court.[53] Rather, because the hospital was ultimately subject to the supervision of the government due to its incorporation pursuant to an act of Congress, it was irrelevant whether any church or religion had influence on the hospital's employees, and furnishing it with government funds did not violate the Establishment Clause.[54]

In 1988, the Court revisited the issue in more depth when it decided *Bowen v. Kendrick*.[55] *Bowen* involved a challenge to the Adolescent Family Life Act (AFLA), a program passed by Congress to mitigate the "severe adverse health, social, and economic consequences" of unmarried pregnancy and childbirth.[56] Under AFLA, the federal government provided grants to nonprofit organizations for their services and research in adolescent sexual relations, pregnancy care, and prevention.[57] A group of federal taxpayers challenged the program however, claiming AFLA violated the Establishment Clause both on its face and as applied because a number of the grantees were organizations with ties to religious denominations.[58]

To the benefit of the participating organizations, the Court determined that AFLA was not unconstitutional on its face.[59] In coming to this decision, much like in *Bradfield*, the Court again placed a great deal of importance on the program's secular purpose.[60] Because the Court found no evidence suggesting that Congress's actual purpose was one of endorsing religion, it concluded that AFLA was appropriately motivated "primarily, if not entirely, by [the] legitimate secular

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[51] *Id.* at 299–300.

[52] *Id.* at 298.

[53] *Id.*

[54] *Id.*

[55] 487 U.S. 589.

[56] *Id.* at 593. The Court noted that "Congress expressly recognized that legislative or governmental action alone would be insufficient: 'Such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.'" *Id.* at 595 (quoting 42 U.S.C. § 300z(a)(8)(B)).

[57] *Id.* at 594–95 n.2 (listing the services which grantees may provide).

[58] *Id.* at 597.

[59] *Id.* at 593.

[60] *Id.* at 603 (explaining that the statute is motivated by secular concerns—"problems of adolescent sexuality").

purpose" stated in the statute.[61] In addition, the Court also determined that AFLA was permissible because "a fairly wide spectrum of organizations [was] eligible to . . . receive funding" and nothing suggested that AFLA was "anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."[62]

As a warning, however, the Court also acknowledged that even under a facially neutral statute such as AFLA, there was still the possibility that sectarian organizations could use the federal funds improperly to advance their religious missions.[63] To the Court, though, the mere possibility that religious organizations could use the grants improperly was not sufficient to invalidate the entire program.[64] Rather, the protective measures included in AFLA were satisfactory safeguards,[65] and a better solution for the disposition of the case was to remand it for a determination of any particularly questionable grants.[66]

In its entirety, then, *Bowen* was as much a success for religious organizations as it was a warning. In one sense, the Court reaffirmed the principle that the Establishment Clause was not a blanket prohibition against religious organizations receiving federal funds for their involvement in publicly funded social welfare programs.[67] This was a significant victory for faith-based organizations because according to *Bowen*'s reasoning, a facial challenge of a secularly motivated and neutral welfare program would virtually never be successful.[68]

As a word of caution, however, the Court also held that lower courts should strictly scrutinize even neutral social welfare programs "as applied." Proper separation between the organizations' secular and sectarian missions remained essential for constitutionality, and the Court warned that it would continue to "[strike] down programs that entail an unacceptable risk that government funding would be

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[61] Specifically, the Court recognized that this secular purpose was the "elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood." *Id.* at 602.

[62] *Id.* at 608.

[63] *Id.* at 610.

[64] *Id.* at 611.

[65] *Id.* at 615 ("The application requirements of the Act . . . require potential grantees to disclose in detail exactly what services they intend to provide and how they will be provided. These provisions, taken together, create a mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes." (citations omitted)).

[66] *Id.*

[67] *See id.* at 609 (affirming that the Supreme Court "has never held religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs").

[68] *See* Lin et al., *supra* note 29, at 200 (discussing *Bowen's* precedent for Establishment Clause challenges).

used to 'advance the religious mission' of the religious institution receiving aid."[69]

Bowen's limited focus on AFLA, however, unfortunately provided little guidance about how to determine when there was an unacceptable risk of advancing religion. As a result, clarification of this issue requires examination of other, more developed strings of Establishment Clause cases as well.

B. Government Funding of Parochial Schools

One area in which the Supreme Court has given considerable attention to the Establishment Clause is the presence of public funding in religious schools. Similar to the doctrine applied to other social service providers, the Court has never mandated total separation between the government and parochial schools.[70] Rather, historically the Court has interpreted the Establishment Clause as a question of permissible degree.[71] To complete its construction of this sliding standard, however, the Court made a series of important decisions in a line of cases stretching back more than thirty years.

1. *The* Lemon *Benchmark*

The Court first articulated its standard for analyzing Establishment Clause violations in parochial schools in 1971 when it decided *Lemon v. Kurtzman*.[72] In *Lemon*, the Court determined the constitutionality of programs in Rhode Island and Pennsylvania that reimbursed religious schools for the cost of teachers' salaries and supplies in the instruction of secular subjects.[73] In coming to the conclusion that both of the programs violated the Constitution,[74] the Court outlined a three-part test to be used generally in analyzing potential Establishment Clause violations.[75] Under this standard, to pass constitutional muster, a statute or government program must: first, have a secular legislative purpose; second, as its principal or primary effect,

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[69] *Bowen*, 487 U.S. at 612.

[70] *See* Ryden & Polet, *supra* note 3, at 16–17 (discussing the neutrality movement and citing cases such as *Zorach v. Clauson*, in which the Court held that "there could be no absolute separation between church and state").

[71] *Id.* at 17 (reiterating the Court's concession that "there . . . be some allowable contact between church and state . . . ."). In fact, in *Lemon v. Kurtzman*, the Court went as far as to say that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. 602, 614 (1971).

[72] 403 U.S. 602 (1971).

[73] *Id.* at 606–11.

[74] *Id.* at 625.

[75] *Id.* at 612.

neither advance nor inhibit religion; and third, not foster an excessive entanglement between government and religion.[76]

The creation of this new test was beneficial to the Court because it consolidated the various criteria previously used to decide Establishment Clause violations.[77] In addition, it also protected against the "three main evils" that the Establishment Clause was intended to prohibit, particularly the government's "sponsorship, financial support, and active involvement" in religious activity.[78] Even with this new standard, however, the Court candidly acknowledged that the Establishment Clause still lacked "precisely stated . . . prohibitions" and the Justices could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[79] As a consequence, and to the frustration of many religious groups, the Court continued to remain unfortunately inconsistent and anomalous in many of its subsequent decisions.[80]

2. *Refining the* Lemon *Test:* Agostini v. Felton

To clarify these ambiguous results, in 1997 the Supreme Court modified the *Lemon* test with its decision in *Agostini v. Felton.*[81] In *Agostini,* a group of petitioners challenged a longstanding injunction of a federally funded education program.[82] Based on the Court's interpretation of the Establishment Clause in *Aguilar,* the government was forbidden from paying public school teachers to provide remedial instruction to disadvantaged children at parochial schools.[83] Claiming that subsequent decisions had severely undermined the original reasoning for the injunction, the petitioners argued for relief and insisted the original decision should be overruled.[84]

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[76] *Id.* at 612–13. In analyzing whether entanglement is excessive, the Court created a second three-part test which examined 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 the religious authority. *Id.* at 615.

[77] *Id.* at 612 (giving effect to the "cumulative criteria developed by the Court over many years").

[78] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[79] *Id.*

[80] *See* Ryden & Polet, *supra* note 3, at 17 (discussing how the Court's excessive entanglement prong produced a variety of contrary results such as its decision in *Tilton v. Richardson,* wherein a law "providing secular aid to private colleges was upheld even though it was virtually the same law struck down in *Lemon*").

[81] 521 U.S. 203 (1997).

[82] The Court was revisiting its decision in *Aguilar v. Felton,* 473 U.S. 402 (1985).

[83] *See Agostini,* 521 U.S. at 209–10 (outlining Title I of the Elementary and Secondary Education Act of 1965, which sets forth the requirements for governmental aid).

[84] *Id.* at 215–16 (relying on subsequent decisions and the fact that a majority of current justices believed *Aguilar* should be overruled).

Agreeing with the petitioners and acknowledging that the legal landscape had changed since the original decision, the Court overturned the injunction.[85] In doing so, the opinion described how the Court's understanding of the *Lemon* test had transformed since its inception.[86] The Court explained that although the broad principles underlying its Establishment Clause decisions had stayed constant throughout the years, the criteria to assess whether government aid has an impermissible "'effect' of advancing . . . religion" had not.[87]

Therefore, to better tailor the standard, the Court altered the traditional *Lemon* test. Subsequently, when determining the second "effects" prong, the Court would examine whether the aid resulted in governmental indoctrination, whether it defined its recipients by reference to religion, and whether it created excessive entanglements.[88] These new criteria superseded both the second and third prongs of the original *Lemon* test, and they became, along with the surviving "purpose" prong,[89] the Court's new Establishment Clause standard.

In altering its interpretation, the Court also limited the traditional prohibitions of the Establishment Clause in multiple ways. First, the Court reiterated its belief that providing publicly funded services on a religious organization's property would inevitably result in state-sponsored indoctrination.[90] Rather, the Court adopted a presumption that even in such a sectarian environment, properly instructed employees would discharge their duties in a manner that did not promote religion.[91] Second, the Court rejected the belief that the government advanced religion if individuals made a decision to use federal funds to finance inherently religious activities.[92] To the contrary, the Court held that this type of indirect financing was not at-

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[85] *Id.* at 237.

[86] *Id.* at 232 (observing how *Lemon*'s entanglement prong inquired into the same factors as the effects prong).

[87] *Id.* at 223.

[88] *Id.* at 233–34.

[89] The first prong asks whether there is a valid secular legislative purpose for the federal aid, *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and remains unchanged by *Agostini v. Felton*, 521 U.S. at 223 ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged.").

[90] *Agostini*, 521 U.S. at 223 (citing *Zobrest* for the proposition that the Establishment Clause does not bar the placement of a public employee in a sectarian school). This decision also served to overrule, and thereby clarify the meaning of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

[91] *Agostini*, 521 U.S. at 234.

[92] The Court analogized the school grants to a state paying an employee with the knowledge that some or all of the check would be donated to a religious institution. Under such circumstances, "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals." *Id.* at 226 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

tributable to the decision making of the state.[93] Finally, the Court abandoned the idea that "pervasive monitoring" was indicative of excessive entanglement under the Establishment Clause.[94] In fact, quite the opposite, the Court held that even if administrative cooperation was required for the success of a program, this did not create impermissible entanglements that would invalidate the program altogether.[95]

3. *The Importance of Neutrality and True Private Choice:* Mitchell v. Helms *and* Zelman v. Simmons-Harris

The Court continued in its efforts to clarify the *Lemon* test early this decade when it decided *Mitchell v. Helms*.[96] *Mitchell* involved a school aid program in which the federal government distributed money to supply educational materials to both public and private schools.[97] Much like in *Agostini* and *Lemon*, the petitioners challenged the program because it provided funding to religiously affiliated schools.[98] Unlike the prior cases, however, *Mitchell* provided a more significant legal challenge as the government allocated the money directly to the religious schools rather than to its teachers. As a result, the program provided government funding to religious organizations that were "pervasively sectarian" in nature and historically precluded from this type of assistance.[99]

In determining that the program did not violate the Establishment Clause, however, the Court clarified two of the new factors from *Agostini*: whether aid results in governmental indoctrination and whether a program defines its recipients by reference to religion. With respect to both of these criteria, the Court explained that regardless of whether federal aid reaches a religious organization directly or not, no indoctrination or incentive to indoctrinate is attributable to the government if the funding was both religiously neutral in terms of its recipients[100] and based upon true private choice.[101] In

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[93] *Id.* at 226 (quoting Zobrest v. Catalina Foothills Sch. Dist., 501 U.S. 1, 10 (1993)).

[94] *Id.* at 234 (stating that pervasive monitoring only inferred entanglement under the now obsolete assumption that public employees would tend to inculcate religion if placed in secular schools).

[95] *Id.* at 233.

[96] 530 U.S. 793 (2000).

[97] *Id.* at 801.

[98] *Id.*

[99] The Court first recognized this in *Lemon* when it supported the District Court's conclusion that "the parochial school system was 'an integral part of the religious mission of the Catholic Church.'" Lemon v. Kurtzman, 403 U.S. 602, 609 (1971) (internal citations omitted).

[100] *See Mitchell*, 530 U.S. at 809 ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to

other words, the Court held that "[i]f aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[102] Accordingly, as the program in *Mitchell* neutrally allocated money based on the number of children enrolled in each school, a decision ultimately made by the parents, the funding satisfied both of these subelements.[103]

Equally as important to the development of the Establishment Clause, the Court in *Mitchell* also repudiated its longstanding belief that the Constitution forbade "pervasively sectarian" organizations from receiving federal funding altogether.[104] In making this decision, the opinion reasoned simply, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . ."[105] The Court also stated that the doctrine was "born of bigotry," and that it was high time to bury such a traditionally anti-Catholic policy.[106] Regardless of the reasoning, however, the religious character of a recipient organization was thereafter immaterial to the Court when making Establishment Clause decisions. This was a significant change in the Court's jurisprudence, and some scholars have gone so far as to denote it as *Mitchell*'s most important legacy.[107]

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their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

[101] *See id.* at 810 ("As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.' We have viewed as significant whether the 'private choices of individual parents,' as opposed to the 'unmediated' will of government determine what schools ultimately benefit from the governmental aid, and how much." (citations omitted)).

[102] *Id.* at 816 (citation and punctuation omitted).

[103] *Id.* at 813 (stating that the decisions of individual parents does not confer an "imprimatur of state approval" on any religion).

[104] *Id.* at 829 (citing Hunt v. McNair, 413 U.S. 734, 743 (1973)). In defense of the doctrine, however, the Court also recognized that "there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past." *Id.* at 826 (citations omitted).

[105] *Id.* at 829.

[106] *Id.*

[107] *See* Lupu & Tuttle, *supra* note 2, at 25 ("*Mitchell*'s unmistakable legacy . . . is the abandonment of organizational character as a conclusive determinant of eligibility for government support.").

It is important to note, however, that only a plurality decided *Mitchell*.[108] Rather than joining a majority, Justice O'Connor authored a concurring opinion disapproving of the other Justices' treatment of neutrality.[109] In particular, she claimed the other Justices in the plurality came "close to assigning [neutrality] singular importance in . . . Establishment Clause challenges," and this worried her because she believed that the "genuinely independent and private choice"[110] of aid recipients was more important.[111] As a consequence of this disagreement, the precedential value of the Court's decision is questionable, especially with respect to the relative importance of neutrality and true individual choice. Furthermore, the Court has failed to address this uncertainty in its subsequent decisions.

For example, the Court declined to clarify the relative importance of the two factors during its next significant Establishment Clause challenge in *Zelman v. Simmons-Harris*.[112] In *Zelman*, the Court determined that an Ohio education program that provided tuition grants for students attending public or private schools of their parents' choice was constitutional.[113] The grants were distributed strictly according to the financial need of the students, and if the parents selected a private school, the checks were made payable to the parents who then endorsed them over to the chosen school.[114]

In upholding the program, instead of basing its decision on one factor or the other, the Court examined the "effects" prong using both neutrality and true private choice principles.[115] The Court held:

> [W]here 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 Establishment Clause.[116]

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[108] Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Thomas's plurality opinion. Justice O'Connor filed a concurring opinion in which Justice Breyer joined. Justices Souter, Stevens, and Ginsburg dissented.

[109] Mitchell v. Helms, 530 U.S. at 836 (O'Connor, J., concurring).

[110] *Id.* at 837, 841 (quoting Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

[111] Justice O'Connor argued that the Court had "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid" and neutrality was merely "one of several factors" the Court had traditionally used in determining the constitutionality of government-aid programs. *Id.* at 839.

[112] 536 U.S. 639 (2002).

[113] *Id.* at 653.

[114] *Id.* at 646.

[115] *Id.* at 652. The Court also examined the aid program to determine whether it had a valid secular purpose to fulfill the first prong of its Establishment Clause analysis. *Id.* at 649. Conspicuously missing, however, was any mention of the "entanglement" prong, thereby signifying again its likely obsolescence within Establishment Clause jurisprudence.

[116] *Id.* at 652.

Therefore, because the grant program conferred educational assistance neutrally to a broad class of individuals who directed it to the individual schools, the program met both of these criteria.[117] In upholding the program on these grounds, however, the Court did little to address the uncertainty in its jurisprudence.

The Court left many other troubling issues for another day as well. Most importantly, the Court failed to answer whether true private choice requires government money to actually pass through the hands of a beneficiary.[118] The Court also failed to explain whether duress or limited capacity affect an individual's ability to make a true private choice.[119] The cases argued since *Zelman* unfortunately have yet to involve facts necessary to address these uncertainties. As a result, as long as these questions remain unanswered, Justice O'Connor's concurring opinion from *Mitchell* will continue to have relevance in evaluating Establishment Clause violations.

C. The Modern Establishment Clause Standard

Viewing this long string of cases in its entirety, the current framework for the Supreme Court's Establishment Clause standard becomes somewhat clear. Although the Court's traditional *Bowen* analysis for evaluating religious social service providers remains good law, the Court is unlikely to apply it due to the extensive developments made in Establishment Clause jurisprudence through cases involving parochial schools. Instead, the Court will likely use the refined *Lemon* test from *Agostini* rather than *Bowen*, regardless of whether a case involves religious schools or not. As a consequence, when the Court evaluates the constitutionality of a program funding religious organizations, it will ask three principal questions in making its decision: (1) whether there is a valid secular purpose; (2) whether the aid results in government indoctrination; and (3) whether there are financial incentives that would favor religious organizations.

In answering the second two of these questions, the Court will likely use both neutrality and true private choice as dispositive factors. The extent to which the Court will require true private choice, however, remains unsettled. Undoubtedly, the Justices are more likely to approve of a funding program that provides vouchers or money directly to beneficiaries rather than to religious organizations. Never-

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[117] In effect, the program is one of "true private choice," which the Court had "never found . . . to offend the Establishment Clause." *Id.* at 653.

[118] *See* Lupu & Tuttle, *supra* note 2, at 27 (framing the unanswered question as whether *Zelman* would allow programs that make payments directly to providers).

[119] *See id.* at 28.

theless, the Court has never made this an explicit requirement for its Establishment Clause standard.

IV. POTENTIAL ESTABLISHMENT CLAUSE CHALLENGES IN THE WAKE OF HURRICANES KATRINA AND RITA

Turning now from the state of the law to the circumstances currently facing the government: in August 2005, FEMA took unprecedented action when it announced its plan to reimburse churches and other religious organizations for providing shelter and aid to the victims of the hurricanes.[120] Many opponents of the plan quickly criticized the agency's decision, claiming it was merely the government's attempt to "restore its battered reputation by playing to religious conservatives."[121] Civil liberties groups also criticized the decision alleging it was a blatant violation of the Establishment Clause.[122]

In support of the government's actions, however, several academics rebutted these attacks and stated simply that there was "nothing . . . constitutionally troubling" about FEMA's reimbursement program.[123] And true enough, there have yet to be any legal challenges to the relief program to date.[124] Accordingly, the rest of this part. will analyze the Establishment Clause challenges that may indeed exist and the probability of their success.

A. Directing Generosity: FEMA's Prominent Feature of "Operation Blessing" and Other Religious Charities

To take advantage of the generosity of the American public following the hurricanes, FEMA quickly compiled and disseminated a list of reputable charities to which citizens could direct their monetary donations.[125] Near the top of this list, FEMA prominently featured Operation Blessing, a sixty-six million dollars-a-year humanitar-

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[120] *See* Cooperman & Williamson, *supra* note 6.

[121] *Id.*

[122] *See id.* (stating that civil liberties groups called the decision a "violation of the traditional boundary between church and state"); *see also* Americans United, *supra* note 12 (claiming that the FEMA efforts are "too open-ended and could leave storm victims vulnerable to aggressive proselytism").

[123] Adelle Banks, *FEMA's Plan to Reimburse Churches Draws Criticism*, CHRISTIAN CENTURY, Oct. 18, 2005, at 13, *available at* 2005 WLNR 17458401 (quoting Robert Turtle, a law professor at the George Washington University Law School and analyst for the Roundtable on Religion and Social Welfare Policy).

[124] This Comment was completed, and therefore up-to-date, in September 2006.

[125] *See* Press Release, Federal Emergency Management Agency, Cash Sought To Help Hurricane Victims, Volunteers Should Not Self-Dispatch (Aug. 29, 2005) *available at* http://www.fema.gov/news/newsrelease.fema?id=18473 [hereinafter Federal Emergency Management Agency].

ian group headed by religious mogul Pat Robertson.[126] To accompany Operation Blessing and various other religious groups also mentioned on the list, however, FEMA included only two nonreligious organizations.[127] As a result, when media outlets duly reprinted and disseminated the list, critics claimed various news agencies like the *New York Times* and the Associated Press became unwitting agents in an effort to solicit cash for Robertson and the other religious groups.[128] This solicitation was no small matter either, as experts suspected the prominent featuring by FEMA yielded millions of dollars for these religious groups.[129] The issue that remains to be determined, then, is whether this type of prominent and preferential featuring constitutes a violation of the Establishment Clause.[130]

Looking at the issue first under the Supreme Court's traditional analysis from *Bowen*, the answer seems rather clear. In *Bowen*, the Court held that a social welfare program did not violate the Establishment Clause if it had a legitimate secular purpose,[131] and was neutral with respect to the participating beneficiaries' sectarian or secular status.[132] Here, FEMA met both of these requirements. Petitioning for money to fund hurricane relief clearly constitutes a valid secular purpose, and there is nothing to suggest that the government did not give a wide spectrum of qualified organizations the same opportunity to be included on the list. The fact that FEMA featured a secular organization—the American Red Cross—as the first charity on the list only reinforces this conclusion.[133]

If the Court also chose to analyze the issue under the standard it developed in its parochial school cases, the most likely conclusion is that it is still constitutional. Under the refined *Lemon* test from

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[126] *See, e.g.*, Max Blumenthal, *Pat Robertson's Katrina Cash*, THE NATION, Sept. 7, 2005, *available at* http://www.thenation.com/doc/20050919/blumenthal (noting that FEMA's relief efforts brought about a monetary windfall to Pat Robertson and his charitable organization, Operation Blessing). Operation Blessing was second only to the American Red Cross on the list of charities accepting donations. Brian Ross, *Some Question Robertson's Katrina Charity*, ABC NEWS, Sept. 9, 2005, *available at* http://abcnews.go.com/WNT/print?id=1112518.

[127] *See* Blumenthal, *supra* note 126.

[128] *See id.*

[129] *See* Ross, *supra* note 126.

[130] *See* Freedom from Religion Foundation, *supra* note 12 (arguing that the decision to prominently feature Operation Blessing along with many other religious charities was "constitutionally a river of no return").

[131] *See* Bowen v. Kendrick, 487 U.S. 589, 602–03 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . . .").

[132] *See id.* at 608 (examining whether eligibility for funding depends on the grantee's status as a secular or sectarian organization).

[133] Federal Emergency Management Agency, *supra* note 125. There are also other nonreligious organizations now included such as the Corporation for National and Community Service Disaster Relief Fund, Feed the Children, America's Second Harvest, and the Humane Society of the United States. *See id.*

Agostini, the Court will require that in addition to having a valid secular purpose, the government action in question must not result in indoctrination nor create financial incentives favoring religious groups.[134] In evaluating these questions, neutrality and true private choice are both essential factors.[135] With the inclusion of both secular and sectarian groups based on their skills and qualifications, however, the list seems to have been compiled according to neutral criteria. In addition, because the donations are a private decision made by individual donors, there is also no claim that true private choice is absent. As a result, because the list meets both of these criteria, it is unlikely that a court would deem FEMA's action to be a violation.

As one last possible challenge based on the featuring of religious groups, critics could argue that FEMA's inclusion of considerably more religious groups on the list than nonreligious ones demonstrates a preference for religion in violation of the Establishment Clause. Under a recent case argued before the D.C. Circuit, however, this contention does not seem to be a sustainable challenge. In *American Jewish Congress v. Corp. for National and Community Service*, the court held that "[a] program may be one of 'true private choice' even when more religious than non-religious choices are available."[136] For this holding to apply, however, the court was clear that there must be sufficient evidence that (1) there were numerous religious and secular choices and (2) no participant was "impermissibly channeled" to a religious group against his or her wishes.[137]

In the circumstances here, with the American Red Cross serving as one of the secular relief organizations originally included in the list, there was not an absence of reputable nonreligious choices. Furthermore, there have been no reports alleging that any donations to secular organizations on FEMA's list were diverted to a religious group. Therefore, because both of these additional criteria are satisfied, the ratio between religious and nonreligious charities on the list is likely irrelevant for Establishment Clause purposes.

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[134] *See generally* Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002) (discussing a government educational program that did not create financial incentives favoring religious groups); Mitchell v. Helms, 530 U.S. 793, 812 (2000).

[135] *See Zelman*, 536 U.S. at 652 (using both neutrality and true private choice as criteria in the Court's analysis of Establishment Clause violation).

[136] *See* Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351, 358 (D.C. Cir. 2005) (discussing circumstances in *Zelman* where eighty-two percent of the eligible private schools participating in the voucher program were religious schools but nevertheless the program was deemed neutral and based on true private choice).

[137] *Id.* (asking only whether aid went to a religious organization as a result of "genuine and private choice").

B. *Proselytizing Providers: Unconstitutionally Mixing Religious Activities with Relief Efforts*

A second and far more likely challenge to the federal response to the hurricanes concerns FEMA's program to reimburse religious organizations for providing services during the relief effort. Not long after the reimbursement program's initiation, the government's decision to fund these sectarian organizations came under attack by civil liberties groups.[138] Representing the views of many of these watchdog organizations, Reverend Berry Lynn, the director of Americans United for Separation of Church and State, condemned the reimbursement program, arguing it was both far "too open-ended" and left storm victims "vulnerable to aggressive proselytism."[139] In addition, he also claimed that numerous religious organizations were "openly using the hurricane relief efforts to win new converts."[140]

Although some of these and other similar claims are likely false exaggerations, there is still a strong possibility that one of the civil liberties groups might nevertheless eventually challenge the reimbursement program, arguing that it violates the Establishment Clause. The outcome of this lawsuit would have a large impact on many religious groups, as an injunction barring any further reimbursement might have devastating effects on their financial security. To determine whether a lawsuit of this kind would be successful, however, one must first take a closer look at the program itself and the various ways the federal money was or could be spent.

1. *The Current Reimbursement Program*

Under the current reimbursement program, religious and faith-based organizations can seek reimbursement from FEMA for expenses associated with providing aid to those affected by the hurricanes.[141] Among these covered costs, the reimbursement program will repay religious groups for supplying a variety of necessities such as food, water, shelter, and medical supplies.[142] While providing these

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[138] Americans United, *supra* note 12 (criticizing FEMA "for its plan to fund hurricane relief by churches without adequate accountability and safeguards to protect the evacuees" from proselytism).

[139] *Id.*

[140] *Id.*

[141] *See* Memorandum from Nancy Ward, Director, Recovery Area Command (FEMA), to Federal Coordinating Officers (Sept. 9, 2005), *available at* http://www.religionandsocialpolicy.org/docs/policy/FEMA_reimbursement_memo_Sept%209-2005.pdf (discussing how the President made "[f]ederal assistance immediately available to State and local governments [and certain private non-profits] for 100% of eligible costs they incur to provide shelter and care to Katrina's victims").

[142] *Id.* at 2.

types of services would not usually invoke concerns about violating the Establishment Clause, critics of the program claim religious groups went about these activities in such a way as to violate the constitutional rights of the beneficiaries.[143]

For example, one commonly reported problem during the relief effort was the practice of some sectarian organizations to proselytize and distribute Bibles and other religious items while providing food and water to victims and relief workers.[144] Also raising concern was the dual roles that many churches, synagogues, and mosques played, serving as both sanctuaries for religious worship as well as housing for an estimated 500,000 displaced victims.[145] Fearful that practices like these compromised the constitutional rights of the victims, one civil liberties group advocated the view that "if [religious organizations] can't separate their evangelism from their relief work, they should not be eligible for public funding."[146]

In this limited respect, the critics of the reimbursement program are indeed correct. As the Court stated in *Lemon*, "the Establishment Clause was intended to afford protection [from] 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[147] Therefore, even if the religious groups have a legitimate secular purpose underlying the relief activities, the government cannot directly fund them if the groups inescapably intertwine the aid with proselytizing.

As a result, the federal government must require sufficient safeguards in the reimbursement program to ensure proper separation between the relief efforts and religious activities.[148] Fortunately for FEMA, however, because the organizations that provided aid will have incurred nearly all of the claimed expenses by the time they seek re-

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[143] *See* IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2005: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS 22–23 (2005), *available at* http://www.religionandsocialpolicy.org/homepage/State_of_the_Law_2005.pdf (noting that faith-based organizations must have in place "adequate safeguards to prevent the diversion of public funds into religious activities" and scrutinizing the constitutionality of FEMA's reimbursement program).

[144] *See* Cooperman & Williamson, *supra* note 6 (discussing one religious group's practice of bundling Bibles and tracts in packages of food or clothing distributed to the hurricane victims); Americans United, *supra* note 12 (citing instances where religious organizations were proselytizing while distributing food and water, distributing gift bags with evangelistic tracts and a stuffed lamb that plays "Jesus Loves Me" to displaced children, and placing tracts on the pillows of relief workers at their shelters each night).

[145] Cooperman & Williamson, *supra* note 6.

[146] Americans United, *supra* note 12.

[147] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[148] *See* LUPU & TUTTLE, *supra* note 143, at 23 (discussing the constitutional issues regarding the segregation of religious activities from FEMA relief).

payment, minimal safeguards are necessary on a prospective basis.[149] These religious organizations will submit receipts and a description of the work they did, and then government officials can determine whether the claimed expenses meet separation requirements.[150] Accordingly, it should be readily apparent from the reimbursement documentation whether claimants used federal funds for blatant Establishment Clause violations such as purchasing and distributing Bibles or other religious texts.

Ensuring that the groups provided their services free from more subtle religious activities, however, will be much more difficult. As commentators have pointed out, it is unlikely that the reimbursement documentation will be able to prove whether religious organizations provided food and shelter separate from proselytizing or whether they conditioned the receipt of such things on a victim's participation in religious activities.[151] Fraud is always a possibility with retroactive reimbursement programs, and though religious groups must affirm in their documentation that they kept any proselytizing strictly separate from activities funded by the government, there is a strong likelihood that infringing groups would seek funding anyway. To address these concerns, FEMA has given little guidance. Rather, the agency decided to entrust local administrators with the responsibility of monitoring the funding, and it is nearly impossible to determine whether specific challenges to their decisions would be successful.

2. *An Alternative Method: Disaster Relief Vouchers*

Looking to improve its delivery of disaster relief in the future, though, FEMA should avoid these problems altogether by implementing a voucher program to replace its reimbursement strategy. If structured properly, this type of voucher program would provide a far more effective method of providing disaster aid without infringing on the constitutional rights of the recipients. Theoretically, this is because displaced victims could redeem the vouchers with a variety of eligible providers, religious or otherwise.[152] A voucher program, then,

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[149] *Id.* at 25.

[150] *Id.* The rules dictating the reimbursement policy are based on the Stafford Act, 42 U.S.C. § 5151 (2000), which authorizes and controls federal disaster relief programs. Regulations implementing the Stafford Act require all grantees to "provide a written assurance of their intent to comply with regulations relating to nondiscrimination." 44 C.F.R. § 206.11(c) (2005).

[151] *See* LUPU & TUTTLE, *supra* note 143, at 26 ("Receipts and other documentation . . . cannot show whether the services were intermingled with religious activity, or whether beneficiaries were required to participate in religious activities in order to receive the services.").

[152] *Id.* at 26 n.54 (indicating that a voucher program may avoid constitutional issues as long as there is a range of eligible providers, and public funds reach these providers through the "genuine and independent choice" of beneficiaries).

would provide disaster victims with the option to avoid unwanted religious pressure or proselytizing by sectarian groups.[153]

A voucher program could also withstand a wider variety of legal challenges. As demonstrated in *Zelman* and other "private choice" cases, the Supreme Court has consistently held that vouchers and other forms of indirect aid are permissible forms of funding under the Establishment Clause.[154] This applies despite how religious or nonreligious the providing organization may be,[155] and regardless of whether the majority—or even entirety—of the federal funds ultimately end up in the coffers of sectarian organizations.[156] Under a voucher program, "[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."[157] For that reason, as long as the federal funds reach religious groups only through the "genuine and independent choices" of the program's recipients, FEMA would not be "constitutionally responsible" under the Establishment Clause for any financial support of religion.[158]

To accompany these benefits, however, FEMA's formation of a voucher program would generate its own set of difficulties. For example, for this type of program to be initially successful, there must be a sufficient stockpile of vouchers for FEMA to distribute at the time of the next natural disaster. A list of qualified and eligible relief agencies must also be developed, and the federal government must construct policies and procedures to regulate both the distribution and redemption of the vouchers in order to safeguard against potential fraud.

Furthermore, even if these administrative hurdles have been satisfied, opponents could also challenge a voucher program by focusing on the ambiguous meaning of "true private choice." When only a

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[153] In fact, the program in *Zelman* provided incentives for participants to avoid redeeming vouchers at religious schools. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 654 (2002) ("[T]he program [providing tuition vouchers] . . . creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools.").

[154] *See, e.g., id.* (upholding a tuition voucher program for participating schools in Cleveland, OH); *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding a program providing sign-language interpreters to assist deaf children enrolled in religious schools when the parents had the freedom to select a school of their choice for their child to attend); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a scholarship program through which recipients could direct state money to religious institutions); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a voluntary Minnesota program granting tax deductions for educational expenses including parochial school tuition).

[155] LUPU & TUTTLE, *supra* note 143, at 26 n.54.

[156] *See Zelman*, 536 U.S. at 658–59.

[157] *Id.* at 652.

[158] LUPU & TUTTLE, *supra* note 143, at 26 n.54.

limited number of organizations have the resources and capabilities to provide disaster relief, there is substantial uncertainty whether victims have any choice whatsoever, let alone the Supreme Court's definition of "true private choice," in deciding where to eat, sleep, or receive medical care.[159] Without at least one, if not several, secular alternatives for beneficiaries to choose between, a court would likely find an absence of this criterion.[160] Therefore, because it remains unsettled whether such an absence is legally fatal, this sort of irresolution leaves even voucher programs susceptible to constitutional challenge. As a result, FEMA must unfortunately structure any improvements without the judicial guidance necessary to ensure the program's lasting success.

C. Rebuilding Education: Displaced Students and Their Destroyed Schools

One final potential challenge to the government's response to the hurricanes concerns its effort to rebuild the education system of the Gulf Coast region. This process first began in October 2005 when FEMA announced that parochial schools and other private, nonprofit organizations providing "government-type" services would be eligible for federal grants to rebuild their facilities.[161] Shortly thereafter, Congress added its support as well when it proposed a series of bills to authorize millions of dollars to subsidize religious schools that had accepted displaced students following the storms.[162]

Over a month later, however, Congress had yet to reach a consensus concerning the details of its funding plan.[163] As a result, various religious organizations began complaining that the government was giving them the "runaround" with respect to what sort of financial

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[159] *See* Lupu & Tuttle, *supra* note 2, at 27–28 (asking whether parity between secular and religious organizations must exist).

[160] *See also* Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351, 358 (D.C. Cir. 2005) (requiring "enough" secular alternatives to satisfy "genuine and independent private choice" criteria).

[161] *See* Associated Press, *White House: Religious Schools Can Get Aid*, Oct. 18, 2005, *available at* http://www.firstamendmentcenter.org/news.aspx?id=15944 (highlighting the White House's comment that "[the President] believes that hurricanes, floods and earthquakes don't discriminate on the basis of religion and that government's response to them should not either").

[162] The bill proposed in the U.S. Senate authorized $2.4 billion for an education recovery plan to aid evacuee students displaced by Hurricane Katrina and would pay up to $6,000 for tuition and other costs for students who attended religious schools. Press Release, Americans United for Separation of Church and State, Americans United Opposes Senate Plan to Give Voucher Aid to Religious Schools (Oct. 20, 2005), *available at* http://www.au.org/site/News2?JServSessionIdr006=i2utqm4512.app7b&abbr=pr&page=NewsArticle&*id*=7611&security=1002&news_iv_ctrl=1843.

[163] *See* Julia Duin, *Bishops Renew Vow Against Executions But Won't Hold Politicians to It*, WASH. TIMES, Nov. 16, 2005, at A05 (indicating that FEMA's indecision regarding support in rebuilding Catholic schools amounts to a "runaround").

help its broad policy would permit.[164] In addition, opponents began to attack the constitutionality of the proposals, claiming they violated the Establishment Clause.[165] In support of these claims, the critics alleged the funding proposals included no effective oversight to ensure that religious organizations could not use the federal money impermissibly to support religious indoctrination.[166]

Assuming that the government properly structures its education aid programs, however, it is unlikely that any such Establishment Clause challenges will be successful. This is especially true with respect to tuition reimbursements for which all schools that accepted displaced children are eligible. In fact, this type of program would be nearly identical to the tuition reimbursement program affirmed by the Supreme Court in *Zelman*.[167] There, the government distributed vouchers neutrally according to a family's financial need, and both parochial and public schools were eligible based on the private choice of the children's parents.[168] Similarly, in the proposed program here, as long as the government distributes the tuition vouchers according to the students' needs and the vouchers are redeemable at both public and parochial schools, the program should be equally as constitutional. This remains true no matter how fiscally robust the grants may become and regardless of what percentage of the money ultimately ends up in religious schools by private choice.[169]

The question of whether the government can use federal funds to actually rebuild parochial schools, however, is much more complex. Rather than relying on legal precedent, the federal government based this part of its education relief program on a memorandum authored by the Department of Justice ("DOJ") in 2005. In that memorandum, the DOJ overturned a long-held position by the federal government that prohibited public money from being used to repair structures owned by religious entities.[170] In doing so, the DOJ argued

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[164] *Id.*

[165] *E.g.*, Ralph G. Neas, *Don't Subsidize Religion*, USA TODAY, Oct. 27, 2005, *available at* http://www.usatoday.com/news/opinion/editorials/2005-10-26-oppose_x.htm (labeling the congressional bill a violation of the First Amendment's separation of church and state).

[166] *Id.*

[167] 536 U.S. 639, 644–46 (2002).

[168] *Id.*

[169] *See id.* at 658 ("[W]e have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools.").

[170] Memorandum Opinion from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Federal Emergency Management Agency, Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy (Sept. 25, 2002), *available at* http://www.usdoj.gov/olc/FEMAAssistance.htm [hereinafter Authority of FEMA to Provide Disaster Assistance]. The memo analyzes the Stafford Act to determine whether it permits federal disaster assistance for a Jewish parochial school after it sustained considerable damage during an earthquake in 2001. The opinion concludes "[w]e do not think that providing FEMA grants to religious institutions that qualify for disaster relief on the basis of wholly neutral crite-

that changes in the Supreme Court's interpretation of the Establishment Clause made this type of restriction unnecessary, especially when the federal government dispensed money neutrally to a variety of entities.[171] The DOJ reasoned that when the government granted disaster relief to a broad class of beneficiaries providing "essential services of governmental nature," this served as evidence that the money was generally intended to support the "rehabilitation of a community that has suffered great loss from a natural disaster."[172] Any indirect support of religious education was not attributable to the government, and the funds did not advance government-sponsored indoctrination.[173]

When applied to the circumstances here, however, the DOJ's conclusion seems somewhat problematic. This is particularly due to the inherent differences between schools and other government-like service providers such as utility companies, libraries, and police stations. Unlike providing money to these other service providers, the government's direct funding to rebuild religious schools would carry a significantly higher risk that the money would be impermissibly diverted to support religion. The Supreme Court has long recognized that "the parochial school system [is] 'an integral part of the religious mission of the Catholic Church,'" and as such, it would be nearly certain that participating parochial schools would use the money to advance their inherently religious agenda and to indoctrinate their students.[174] The DOJ even recognized this fundamental problem when it conceded in its memorandum that "providing FEMA disaster relief to repair a school used for religious instruction [could] run afoul of Supreme Court precedent restricting the use of 'direct' aid that can be put to specifically religious uses."[175]

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ria—a wide array of nonprofit organizations may receive aid for buildings that have suffered structural damage from a natural disaster—lacks a secular purpose or effect." *Id.*

[171] *Id.* These groups include "educational, utility, irrigation, emergency, medical . . . [and] other private nonprofit facilities which provide essential services of a governmental nature to the general public." *Id.* (quoting 44 C.F.R. § 206.221(e) (2001)).

[172] *Id.*

[173] In fact, there are also arguments that "excluding [such] religious organizations from disaster assistance made available to similarly situated secular institutions would violate the Free Exercise Clause." *Id.*

[174] Lemon v. Kurtzman, 403 U.S. 602, 609 (1971).

[175] Authority of FEMA to Provide Disaster Assistance, *supra* note 170. The memo cites three cases in response to the argument: *Tilton v. Richardson*, 403 U.S. 672 (1971), in which the Court held that federal construction grants for university facilities must be restricted indefinitely for secular purposes; *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), in which the Court invalidated a provision in state maintenance and repair grants excluding religious schools on the basis that such aid could not be restricted to secular purposes; and *Hunt v. McNair*, 413 U.S. 734, 744 (1973), in which the Court sustained state financing of construction for a religious college under a program that barred financing of "buildings or facilities used for religious purposes."

Fortunately for FEMA and the damaged religious schools, however, this potential vulnerability may not invalidate the school rebuilding program altogether. A changed Supreme Court would eventually determine the program's constitutionality under the Establishment Clause, and with the additions of Chief Justice John Roberts and Associate Justice Samuel Alito, the Court is far more conservative and religion-friendly than when it decided *Mitchell* or *Zelman*.[176] This shift in ideology is important because it aligns the Court far more squarely with the views of the plurality from *Mitchell*.[177] As a result, the Court's new majority might only consider a valid secular purpose and neutrality as the necessary prerequisites to withstand challenge under the Establishment Clause.[178] True private choice became a relevant criterion only through Justice O'Connor's concurrence in *Mitchell*, and with her recent retirement, its place as a dispositive factor in the Court's Establishment Clause standard is far less certain. If the Court did revert to the reasoning of *Mitchell*'s plurality, this decision would not only clarify the remaining ambiguity in the Court's Establishment Clause jurisprudence, it would also signify a considerable expansion of potentially permissible relief programs. Top among these new permissible programs, FEMA's education rebuilding policy would likely pass muster as well.

V. CONCLUSION: REBUILDING WITHOUT RESOLUTION

In sum, when examining the various efforts taken by FEMA to rehabilitate the Gulf Coast, it appears that many—if not all—of the government's actions have not and will not violate the Establishment Clause. Paramount to this conclusion is the fact that each of the government's programs has the same legitimate secular purpose: to aid in rebuilding this devastated area of the United States. Equally as important, each program also appears to be entirely neutral in its applicability to potential providers and beneficiaries. No federal action or program singled out religion for better or for worse, and eligibility

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[176] For an example of Chief Justice Roberts's support of religious groups, see generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Lee v. Weisman*, 505 U.S. 577 (May 24, 1991) (No. 90-1014), 1990 U.S. Briefs 1014, 1991 U.S. S. Ct. Briefs LEXIS 308. Similarly, for Justice Alito, see generally *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004), in which he concludes that a religious group's equal access to fora provided by a school district to the broad spectrum of other community groups would not result in an impermissible endorsement of religion, and *ACLU of New Jersey v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001), in which he struck down the legal challenge of a religious holiday display.

[177] See *supra* notes 96–110 and accompanying text.

[178] This new majority would presumably consist of the remaining justices from Mitchell's plurality, Justices Thomas, Scalia, and Kennedy, and the new additions to the Court, Chief Justice Roberts and Justice Alito.

depends on nonreligious factors such as an aid provider's level of expertise or a victim-beneficiary's need of assistance.

The only remaining Establishment Clause issue requiring determination, then, is whether true private choice survives as a necessary factor according to the newly minted Supreme Court. If so, this may have a large and adverse effect on many of FEMA's proposed programs. However, regardless of this possible complexity, other legal, political and humanitarian considerations remain in FEMA's favor. In the American legal system, until a plaintiff actually brings a legal challenge in court, the government is free to continue pursuing even blatantly unconstitutional policies. Consequently, to prevent the government from employing any programs that would violate the Establishment Clause, an opponent would have to bring a lawsuit to enjoin FEMA from providing further disaster aid.

In the current political environment, this type of legal challenge is very unlikely. To do so would force the plaintiff to declare his or her constitutional rights as more valuable than ensuring the livelihood of thousands of American citizens. Moreover, a lawsuit would slow down the already hindered rebuilding process and thereby cause even more harm to the devastated region. To this date, no critic or civil liberties group has been willing to take such action, and with increasing public support for government funding of religious organizations,[179] such legal challenge may never occur. In the end, though, whatever the reason for the lack of legal challenge, the absence can only help the Gulf Coast region in its long struggle to become the beautiful and welcoming place it once was.

[179] THE PEW RESEARCH CENTER, PUBLIC DIVIDED ON ORIGINS OF LIFE: RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES (Aug. 30, 2005), *available at* http://peoplepress.org/reports/display.php3?PageID=988 (showing that sixty-six percent still support faith-based initiative programs in 2005).