Effective and Constitutional: Goals for a Hurricane Response Plan in the Aftermath of Hurricanes Katrina and Rita

NEAL MCHENRY*

INTRODUCTION

On August 29, 2005, Hurricane Katrina made landfall.[1] It devastated the Gulf Coast region more than any storm before it. To make matters worse, Hurricane Rita followed on September 18,[2] delaying response efforts and wreaking even more havoc on the Gulf Coast. In the aftermath of Hurricanes Katrina and Rita, local governments and national emergency response organizations like the Federal Emergency Management Agency (FEMA) were overwhelmed. Because of the scope of the hurricanes, the government could not adequately meet the needs of the victims; and private groups, including religious organizations, helped fill the void left by the government.

On September 25, 2005, FEMA announced that it would reimburse religious and secular groups that had contributed to the relief effort by sheltering and providing necessities to evacuees.[3] Many citizens approved of this measure because of the important role religious organizations played in providing relief after the massive devastation of the storms, but others argued that the plan was a violation of the Establishment Clause.[4] Those opponents claimed that the reimbursements were going to go to constitutionally impermissible activities that advanced religion.[5]

The purpose of this Note is to recommend a disaster response plan that is as effective as possible without violating Establishment Clause principles implicated when the government directly aids religious organizations. Keeping these principles in mind, Part I discusses the role of religious organizations in the response to the hurricanes and highlights the importance of incorporating religious organizations in any hurricane response structure to provide the most effective possible relief. Part II then uses relevant Supreme Court cases to outline Establishment Clause issues that

---

* J.D. Candidate, 2009, Indiana University Maurer School of Law — Bloomington. I would like to thank my friends, family, and Laura Howard for all their love and support. I would also like to thank all those who helped in creating this Note.

1. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT OF THE BIPARTISAN COMMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 7 (Comm. Print 2006), *available at* http://www.gpoaccess.gov/katrinareport/mainreport.pdf [hereinafter FAILURE OF INITIATIVE].

2. RICHARD D. KNABB, DANIEL P. BROWN & JAMIE R. RHOME, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE RITA 1 (2006), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf.

3. *See* Alan Cooperman & Elizabeth Williamson, *FEMA Plans to Reimburse Faith Groups for Aid*, WASH. POST, Sept. 27, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/26/AR2005092601799.html.

4. Brian C. Ryckman, Comment, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. PA. J. CONST. L. 929, 930 (2007).

5. *See* Cooperman & Williamson, *supra* note 3.

arise when religious organizations receive direct government funding. This Part goes on to discuss how the Supreme Court standard has been applied to other Establishment Clause challenges in lower courts. Part III evaluates the potential success of an Establishment Clause challenge to FEMA's current reimbursement plan. Part IV closes the analysis with a discussion of some alternatives to the reimbursement plan. This Note concludes with the proposition that the best plan for an effective and constitutional response is one that incorporates religious organizations into the relief framework while providing them with guidelines and supervision on how to constitutionally use government funds.

I. CRISIS AND RECOVERY: THE ROLE OF FAITH-BASED ORGANIZATIONS IN THE HURRICANE RELIEF EFFORTS AND THE NECESSITY OF UTILIZING THESE ORGANIZATIONS IN THE FUTURE

FEMA and the Red Cross (to a lesser extent) were subjected to heavy criticism in the wake of Hurricanes Katrina and Rita.[6] Their ability to allocate resources and coordinate relief efforts were not up to the challenge of the disaster before them.[7] However, national religious organizations like Catholic Charities and local faith-based organizations were largely praised for their role in the relief efforts.[8]

The Red Cross often fell short of expectations and many times it had to call on local charities to fill the void left by FEMA and Red Cross relief efforts. In Shreveport, Louisiana, the Red Cross asked local churches to take over a shelter that ended up having 6200 people pass through its doors.[9] Over 7000 hurricane victims were cared for and sometimes housed by local churches in Birmingham, Alabama.[10] The Red Cross had five shelters open in the Baton Rouge area, but there were also seventy non-Red Cross shelters, primarily run by faith-based organizations, opened in the area that were "hugely important" to the "community's capacity to absorb the volume of displaced people that it did."[11] When the Red Cross was incapable of providing the necessary assistance or when the Red Cross asked faith-based groups for help, community organizations and churches stepped in and did all they could to help hurricane victims.

Local faith-based charities were also crucial to relief efforts in areas in which the Red Cross and FEMA refused to operate because of concerns with high winds or

---

6. *See* Tony Pipa, *Weathering the Storm: The Role of Local Nonprofits in the Hurricane Katrina Relief Effort* 10 (Aspen Inst., Working Paper, 2006), *available at* http://www.nonprofitresearch.org/usr_doc/Nonprofits_and_Katrina.pdf.

7. FAILURE OF INITIATIVE, *supra* note 1, at 158, 343.

8. *See* Pipa, *supra* note 6, at 11.

9. *To Review the Response by Charities to Hurricane Katrina: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 109th Cong. 10 (2005) (statement of Rep. Jim McCrery), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4682 [hereinafter *Response by Charities*].

10. *Id.* at 25 (statement of Cynthia M. Fagnoni, Managing Director, Education, Workforce and Income Security, U.S. Government Accountability Office).

11. *Id.* at 41 (statement of John G. Davies, President and Chief Executive Officer, Baton Rouge Area Foundation).

flooding.[12] Red Cross policies kept the organization from operating in unsafe areas, but there were still victims who needed assistance in these places.[13] Charities, often local churches, provided much-needed relief services in these dangerous areas.[14] These local, faith-based charities proved invaluable in supplementing Red Cross services in areas inundated with hurricane victims and areas where the Red Cross feared to tread.

Local religious organizations were able to immediately and efficiently respond to the needs of the community with what little resources they had.[15] Unfortunately, FEMA and the Red Cross were unprepared to utilize these organizations properly.[16] As a result, local charities were frustrated by a lack of coordination or clear guidance from FEMA or the Red Cross.[17] The Red Cross was often unaware of what was happening at the local level among different charitable organizations.[18] Leaders of local charities felt there was "no significant awareness among local organizations of what the national organizations were doing, and vice versa."[19] Red Cross officials even acknowledged the shortcomings in communication with local charities and noted the importance of improving input mechanism from local charities.[20]

A pre-defined system of coordination would help local charities know and understand their expected role in disasters and would help FEMA and the Red Cross properly utilize these organizations.[21] The Red Cross and FEMA can take a lesson from the structure of Catholic Charities. Although it is a national organization, Catholic Charities works through local Catholic organizations to meet the needs of the community.[22] Since its primary organization is at the local level, Catholic Charities was more able to stay "responsive and flexible" to the needs of the community.[23] When a new problem arose in a particular area, the local chapter was able to refocus its efforts without disrupting other chapters' operations.[24]

---

12. *Id.* at 25 (statement of Cynthia M. Fagnoni, Managing Director, Education, Workforce and Income Security, U.S. Government Accountability Office).

13. *Id.* at 24.

14. *Id.*

15. *See* Pipa, *supra* note 6, at 8.

16. *See* FAILURE OF INITIATIVE, *supra* note 1, at 350 (quoting Louisiana Representative Jim McCrery's condemnation of the Red Cross's failure to offer adequate assistance to local independent shelters set up by churches); *see also* Pipa, *supra* note 6, at 11.

17. *See* Pipa, *supra* note 6, at 15.

18. *See, e.g.*, *Response by Charities*, *supra* note 9, at 11 (statement of Rep. Jim McCrery).

19. *Id.* at 40 (statement of John G. Davies, President and Chief Executive Officer, Baton Rouge Area Foundation).

20. *Id.* at 33 (statement of Joseph C. Becker, Senior Vice President, Preparedness and Response, American Red Cross).

21. *See* Pipa, *supra* note 6, at 20 (recommending the development of a "high-level coordinating capability [that is] seamlessly able to integrate a multiplicity of [charitable] organizations delivering a stratified response").

22. FAILURE OF INITIATIVE, *supra* note 1, at 353.

23. Jennifer Seidenberg, Cultural Competency in Disaster Recovery: Lessons Learned from the Hurricane Katrina Experience for Better Serving Marginalized Communities 21 (Spring 2006) (unpublished student paper, University of California—Berkeley), *available at* http://www.law.berkeley.edu/library/disasters/Seidenberg.pdf.

24. *See id.*

FEMA recognized that help from local volunteer agencies substantially augmented its relief efforts in the aftermath of Hurricanes Katrina and Rita.[25] Acknowledging this reality, FEMA needs to take the next step by instituting reforms to help coordinate these local organizations. If FEMA creates a coordinated superstructure that integrates local charities into an overall disaster response plan, it can avoid much of the needless death and suffering caused by inefficiency.[26] The need to incorporate religious institutions into disaster relief is clear; the question remaining is how to do this effectively without trampling Establishment Clause principles.

II. THE ESTABLISHMENT CLAUSE STANDARD FOR GOVERNMENT FUNDING OF RELIGIOUS ORGANIZATIONS

The standard used by the Supreme Court when dealing with direct government funding to religious organizations is controlled by Justice O'Connor's concurring opinion in *Mitchell v. Helms*.[27] O'Connor's standard focuses on actual prevention of diverting government aid to religious purposes, and this standard has been applied by lower courts.[28] When reviewing direct funding cases, the Supreme Court uses a modified version of the test set up in *Lemon v. Kurtzman*.[29] The three-part test in *Lemon* applied to challenges of government activities requires that, "[f]irst, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[30]

In *Agostini v. Felton*, the Court folded the excessive entanglement inquiry into the effect prong, so that now only the purpose and effect prongs of the *Lemon* test must be considered when dealing with direct government funding of religious organizations.[31] The purpose prong is not in question in any of the following cases, and most of the Court's analysis is focused on ensuring that the government aid does not have the effect of promoting religion.[32] Therefore, this Part will first discuss the current Supreme Court standard for considering the effect of direct government aid to religious organizations. Subpart B will discuss the possible impact of the new members of the Court on the current standard. Subpart C will then look at how lower courts have applied the standard to recent cases.

---

25. *See* Pipa, *supra* note 6, at 17 (quoting News Release, FEMA, Volunteer Agencies Essential to Hurricane Response: Help for Louisiana Communities Came from Across the Nation and World (Mar. 13, 2006), *available at* http://www.fema.gov/news/newsrelease.fema?id=24161).

26. *Cf.* FAILURE OF INITIATIVE, *supra* note 1, at 2.

27. 530 U.S. 793 (2000).

28. *Id.* at 836–67 (O'Connor, J., concurring).

29. 403 U.S. 602 (1971).

30. *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

31. 521 U.S. 203, 232–33 (1997).

32. *See Mitchell*, 530 U.S. 793; *Agostini*, 521 U.S. 203; Bowen v. Kendrick, 487 U.S. 589 (1988).

A. Direct Funding Establishment Clause Standard: The Effect Prong

The current Establishment Clause standard for direct government funding of religious organizations does not allow such funds to be diverted to religious purposes, to foster excessive entanglement between the government and a religious organization, or to end up in the coffers of pervasively sectarian institutions.[33] The current Supreme Court standard for the government directly funding religious organizations is controlled by Justice O'Connor's concurring opinion in *Mitchell v. Helms.*[34] However, there is a four-judge plurality adopting a different approach to direct funding questions.[35]

Mitchell arose as a challenge to a state and federal program that lent educational materials to public and private schools.[36] The challengers objected to the government giving materials directly to parochial schools on Establishment Clause grounds.[37] The four-judge plurality upheld the direct government grants partially because the materials were neutrally available to public and private, non-religious and religious schools alike.[38] The plurality also held that since the money was distributed based on enrollment, the government funds were disseminated based on the private choices of citizens,[39] and thus equated the program to one of true private choice.[40]

O'Connor's concurring opinion (joined by Justice Breyer) upholding the program gave the plurality the deciding votes, so her opinion is controlling on the issue.[41] She agreed with the outcome the majority reached, but felt that they placed too much emphasis on neutrality without worrying about how the government aid is used.[42] She also found the distinction between true private choice and the per capita aid program important for purposes of endorsement and treated the case as a direct aid case, subjecting the program to more scrutiny than if the aid were indirect.[43] Her main

---

33. *See Mitchell*, 530 U.S. at 836–67 (O'Connor, J., concurring).

34. *See id.*

35. *Id.* at 801–36 (plurality opinion).

36. *Id.* at 801.

37. *Id.* at 803–04.

38. *See id.* at 830 ("The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. We therefore have no difficulty concluding that [the challenged program] is neutral . . . .").

39. *See id.*

40. A true private choice program is one where money is distributed directly to private citizens, who then choose how to use it. *Id.* at 841 (O'Connor, J., concurring). An example would be the voucher program approved by the Court in *Zelman v. Simmons-Harris*. 536 U.S. 639 (2002). In that case, the government gave parents vouchers, which the parents could use to send their children to any school, including religious schools. *Id.* at 645. Classifying something as a true private choice is significant for Establishment Clause purposes because when the money is coming from private citizens the Court has not been nearly as concerned with government advancement or endorsement of religion, and thus such programs have a much easier time passing Supreme Court scrutiny than direct grant programs.

41. *Mitchell*, 530 U.S. at 836–67 (O'Connor, J., concurring).

42. *See id.* at 837.

43. *Id.* at 842.

emphasis was ensuring that no government grants be used to advance religious objectives.[44]

Both opinions in *Mitchell*, and other cases dealing with direct funding, can be distilled into a number of different considerations. In cases where the government directly funds religious organizations, the focus for the effect prong should be on four factors: (1) the divertability of the aid to religious purposes, (2) whether the aid was supplemental to the core function of the grantee, (3) whether the organization receiving the aid is pervasively sectarian, and (4) whether the aid fosters excessive entanglement between the government and the religious organization.[45]

1. Divertability of Government Aid to Religious Purposes

Under the current Supreme Court standard, government aid must be secular and cannot be diverted to religious uses. Diversion of government aid to religious use was one of the main points of contention between the plurality opinion and the concurring opinion in *Mitchell*.[46] While all Justices agreed that the content of the aid had to be secular,[47] the plurality was unconcerned with how the aid was used once it was granted to religious organizations.[48] The plurality even indicated that they would approve direct monetary grants to pervasively sectarian groups as long as the grants were neutrally available and met the plurality's required private choice principles.[49] This statement has important implications because money is fungible and therefore could be used to purchase anything, including religious materials or programs.

In contrast, the concurrence found it constitutionally troubling if religious organizations diverted secular aid to religious purposes.[50] O'Connor required that secular aid not be diverted to religious use, but placed the burden on plaintiff to prove that the aid was actually being "used for religious purposes."[51] As long as the government and the religious organizations had constitutionally sufficient safeguards and monitoring in place to guard against the danger of divertability, the program was presumed to be constitutional unless the plaintiff could prove otherwise.[52] However, the concurring opinion's emphasis on the safeguards indicates that the presumption of constitutionality would be lost if there were not adequate safeguards in place.[53] O'Connor scrutinized the program's safeguards to make sure they were constitutionally sufficient to ensure that aid was not being diverted to religious use.[54] Diversion was

---

44. *See id.* at 844.

45. *See, e.g.*, *id.*; Agostini v. Felton, 521 U.S. 203 (1997); Bowen v. Kendrick, 487 U.S. 589 (1988).

46. *See Mitchell*, 530 U.S. at 840.

47. *See id.* at 822 (plurality opinion) (noting both the plurality's and concurrence's requirement that aid be secular); *id.* at 867 (O'Connor, J., concurring) (same).

48. *See id.* at 822 (plurality opinion).

49. *See id.* at 819 n.8 ("[I]t is hard to see the basis for deciding . . . differently simply if the State had sent the tuition check directly to whichever school [the student] chose to attend.").

50. *Id.* at 857 (O'Connor, J., concurring).

51. *Id.*

52. *See id.* at 861.

53. *See id.*

54. *See id.* at 861–66.

O'Connor's main point of emphasis in *Mitchell*, but other factors are generally considered under the effect prong when examining a direct aid program.[55]

2. Aid Must Be Supplemental

The Supreme Court has considered it important that the government aid is supplemental when approving direct aid programs. By supplemental, the Court means that the aid does not supplant the costs the religious groups otherwise would have borne.[56] The idea behind requiring that the aid be supplemental is to ensure that the government is not helping the school achieve a religious objective. Because the aid provided in *Agostini* and *Mitchell* was supplemental to the regular curricula of the religious schools, the Court did not find the aid constitutionally troubling.[57] In both cases, the Court also found that the aid could be easily separated from the religious functions of the school.[58] The requirement that government aid not be used to supplant costs that religious organizations otherwise would have borne goes hand-in-hand with the diversion requirement. Both are aimed at preventing government money from directly funding religious activities or instruction.

3. Religiously Affiliated Versus Pervasively Sectarian

Because O'Connor's controlling opinion in *Mitchell* is relatively silent on the issue of pervasively sectarian organizations receiving direct money grants, the constitutional standard is somewhat murky. However, *Agostini*, and even the plurality opinion in *Mitchell*, make clear that this is still a special situation that will receive additional scrutiny because of the relative ease that money can be diverted to religious purposes.[59] Pervasively sectarian institutions, as opposed to religiously affiliated institutions, are thought to have environments "in which religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission . . . ."[60] Religiously affiliated organizations are groups like colleges, charities, or hospitals with religious ties,[61] while parochial schools and churches are examples of pervasively sectarian groups. In *Bowen*, the Court considered whether a group was pervasively sectarian, a relevant factor in determining the constitutionality of a direct aid program.[62] The presumption was that if direct government aid went to pervasively sectarian institutions, "there is a risk that direct government funding, even if designated for

---

55. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 228, 233–34 (1997).

56. *Id.* at 228.

57. *See Mitchell*, 530 U.S. at 860; *Agostini*, 521 U.S. at 228.

58. In *Agostini*, the aid was remedial instruction provided by public school teachers on parochial school grounds. *Agostini*, 521 U.S. at 211. In *Mitchell*, the aid was secular instructional materials that the government lent to parochial schools. *Mitchell*, 530 U.S. at 848.

59. *See Mitchell,* 530 U.S. at 818–19; *Agostini*, 521 U.S. at 228.

60. Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

61. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 207 (2d ed. 2009).

62. *Bowen*, 487 U.S. at 610.

specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'"[63]

However, in *Agostini*, the Court did away with the presumption that because a teacher taught in a parochial school, the pervasively sectarian nature of her surroundings would influence the teacher to promote religion.[64] Instead, the Court assumed that a public school teacher would be able to execute her secular teachings properly unless there was evidence to the contrary.[65] The one context in which pervasively sectarian schools might still be treated differently than religiously affiliated institutions is when the Court considers direct monetary grants.[66] The Court has permitted direct money grants to religiously affiliated institutions as long as the money is restricted to secular use,[67] but the Court has yet to allow direct money grants to pervasively sectarian groups.

In *Agostini*, the Court found it important to note that no government funds ever "reach[ed] the coffers of religious schools."[68] The plurality in *Mitchell* also acknowledged special dangers when money was given directly to pervasively sectarian organizations, although it indicated that the per capita assignment of money might be enough to protect against those dangers.[69] O'Connor did not deal with the issue of monetary grants in her opinion, possibly because the grant in *Mitchell* was of educational materials, or perhaps because she was not as concerned with that portion of the plurality's opinion. Her opinion sheds little light on the issue, but it is safe to assume that a case involving direct grants to pervasively sectarian institutions would receive special scrutiny from the Court since money is so easily diverted to religious use.

4. Excessive Entanglement Between the Government and Religious Organizations

The Supreme Court will not find excessive entanglement between the government and religious organizations unless there is a pervasive monitoring or administrative system in place, such that the government will interfere with the day-to-day functions of the religious organization. Excessive entanglement, based upon the Supreme Court's most recent cases dealing with direct aid, "is confined to extreme institutional entanglement."[70] "Routine administrative cooperation and governmental monitoring are no longer regarded as problematic" when dealing with excessive entanglement inquiries.[71]

In *Bowen*, the Court pointed out that to claim that monitoring and administering a government grant program to religious organizations creates excessive entanglement between church and state forces the government into a Catch-22.[72] If the government

63. *Id.* (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985)).
64. *Agostini*, 521 U.S. at 223.
65. *Id.* at 224.
66. CONKLE, *supra* note 61, at 207.
67. *Id.*
68. *Agostini*, 521 U.S. at 228.
69. *See* Mitchell v. Helms, 530 U.S. 793, 818–19 n.8 (2000) (plurality opinion).
70. CONKLE, *supra* note 61, at 205.
71. *Id.*
72. Bowen v. Kendrick, 487 U.S. 589, 615 (1988).

does not monitor the grants, it fails Establishment Clause scrutiny in its duty to ensure the aid is not diverted to religious purposes, but if the government does monitor the grants, it fails the excessive entanglement prong.[73] Because of this Catch-22 and because the monitoring in *Bowen* did not interfere with the day-to-day operation of the religious organization, the Court held that the monitoring program at issue in *Bowen* did not amount to excessive entanglement.[74] Similarly, the Court in *Agostini* found that there was no excessive entanglement violation if the religious organization and the government had some administrative cooperation and the government had some level of monitoring over the application of the grant, as long as it was not pervasive.[75]

B. The New Court and the Future of Mitchell

With O'Connor's retirement and the appointment of two new Justices, many are questioning how long O'Connor's opinion will remain controlling. However, a recent Establishment Clause case, *Hein v. Freedom From Religion Foundation, Inc.*,[76] indicates that the new conservative Justices may not be as willing as Scalia and Thomas to overrule Establishment Clause precedent. O'Connor's recent retirement and President Bush's conservative appointments leave the security of the *Mitchell* opinion in doubt. Since O'Connor was a swing vote in the *Mitchell* case, if both of the new Justices agree with the *Mitchell* plurality, this outcome could have a considerable impact on the standard for direct funding.

Alito and Roberts have not weighed in on the specific issue of direct funding of religious organizations, but Alito's Supreme Court confirmation hearings brought attention to some of his conservative viewpoints on issues such as abortion[77] and affirmative action.[78] Roberts is similarly expected to side with conservative Justices on many issues.[79] However, there is no way to tell the impact of the new appointees on the *Mitchell* precedent until the new Court rules on an Establishment Clause case dealing with direct government funding of religious organizations.

In 2007, *Hein v. Freedom From Religion Foundation, Inc.*, provided a first opportunity for the new Court to deal with an Establishment Clause case.[80] The plaintiffs challenged Congress's allocation of funds to the executive branch, which were then used to fund conferences promoting President Bush's Faith-Based and

---

73. *See id.*

74. *Id.* at 616–17.

75. Agostini v. Felton, 521 U.S. 203, 233–34 (1997).

76. 127 S. Ct. 2553 (2007).

77. *See* Memorandum from Samuel A. Alito to the Solicitor Gen. of the U.S. (May 30, 1985), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-216/Thornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf.

78. *See* NAACP LEGAL DEF. & EDUC. FUND, INC., REPORT ON THE NOMINATION OF JUDGE SAMUEL A. ALITO, JR. TO THE SUPREME COURT OF THE UNITED STATES 14 (2005), *available at* http://www.naacpldf.org/content/pdf/alito/Report_on_the_Nomination_of_Judge_Samuel_A._Alito,_Jr._to_the_Supreme_Court_of_the_United_States.pdf.

79. *See* Michiko Kakutani, *Books of the Times; Court No Longer Divided: Conservatives in Triumph*, N.Y. TIMES, Jan. 23, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0CE7DA1F30F930A15752C0A9619C8B63.

80. *See* Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007).

Community Initiative program.[81] The plaintiffs believed that any expenditure of government funds in violation of the Establishment Clause could be challenged using taxpayer standing.[82] However, the plurality of the Court held that because this money was a general grant from Congress to the executive branch for day-to-day activities, the case was distinguishable from the facts of *Flast v. Cohen*.[83] While *Flast* dealt with a direct grant of money from Congress that was partly used to support religious schools,[84] the grant in *Hein* was from Congress to the executive branch, with no particular mandate.[85] The executive branch then chose to use the funds to put on conferences to promote President Bush's Faith-Based and Community Initiative.[86] The plurality found the distinction between funds granted directly by Congress and funds used at the discretion of the executive branch important, and based on that distinction, declined to extend *Flast* taxpayer standing to the latter situation.

While *Hein* is not terribly relevant to the *Mitchell* line of cases, the opinion shed some light on where the new members of the Court might fall within the ideological spectrum of the Court.[87] Unlike what many expected, Chief Justice Roberts and Justice Alito did not join with Justices Scalia and Thomas to form a sturdy conservative bloc. In fact, Scalia, in a blistering concurrence, chastised the plurality (Alito, Roberts, and Kennedy) for making meaningless distinctions between the facts at hand and *Flast* instead of overruling *Flast* altogether.[88] The case showed that Roberts and Alito might be less inclined than Scalia and Thomas to overturn Establishment Clause precedents and that the ideologies of the new justices may not be as neatly in line with Scalia and Thomas as some conservatives hoped.[89]

C. Lower Court Challenges to Programs Under the Faith-Based Initiative

In lower court decisions made since *Mitchell*, the courts have indicated that they will follow the reasoning in O'Connor's concurrence and have used the same factors as O'Connor to examine whether particular government aid violates the Establishment

---

81. *Id.* at 2560.

82. *Id.* at 2565. The idea of taxpayer standing comes from *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast*, the Court held that taxpayers could challenge a congressional expenditure that was disbursed to schools, including parochial schools, and was expressly mandated by Congress. *Id.* at 105–06. The Court allowed a very limited exception that allowed taxpayers to challenge laws when Congress was using its taxing and spending power in violation of the Establishment Clause. *Id.* at 105. The reason behind this is that when a citizen's money is being used by Congress to support the establishment of a religion or religions, the citizen is entitled to protest this unconstitutional use of his tax money.

83. *Hein*, 127 S. Ct. at 2566.

84. *See Flast*, 392 U.S. at 85–86.

85. *See Hein*, 127 S. Ct. at 2566.

86. *See id.* at 2555.

87. Justices Scalia and Thomas fall at the conservative end of the Court's ideological spectrum, with Kennedy occupying the moderate position, and Justices Breyer, Ginsburg, Stevens, and Souter at the more liberal end.

88. *See Hein*, 127 S. Ct. at 2573–74.

89. Robert Marus, *Analysis: Courts Only Slightly Less Open to Church-State Suits After* Hein *Case*, ASSOCIATED BAPTIST PRESS NEWS, June 28, 2007, http://www.abpnews.com/index.php?option=com_content&task=view&id=2731&Itemid=120.

Clause. Lower federal courts have decided a number of cases dealing with government funding of religious organizations since the *Mitchell* decision. These cases make it clear that O'Connor's opinion is considered the controlling standard for government funding of religious institutions.[90] In both *Freedom From Religion Foundation, Inc. v. McCallum*[91] and *DeStefano v. Emergency Housing Group, Inc.*, the courts explicitly announced their intention to use the constitutional standard in Justice O'Connor's *Mitchell* concurrence.[92]

The lower court cases also examine the same factors used in the *Mitchell* concurrence when considering whether the primary effect of a statute or regulation is to advance religion. We will therefore examine how the lower courts deal with the four considerations from *Mitchell*: (1) the divertability of the aid to religious purposes, (2) whether the aid is supplemental to the core function of the grantee, (3) whether the organization receiving the aid is pervasively sectarian, and (4) whether the aid fosters excessive entanglement between the government and the religious organization.[93]

1. Divertability of Government Aid to Religious Purposes

Like O'Connor's *Mitchell* concurrence, lower courts have emphasized preventing actual diversion of government aid to religious use when considering the constitutionality of a funding program. In *McCallum*, the court discussed extensively the possibility of diversion of money.[94] Recall that, in *Mitchell*, O'Connor gave the government a presumption that money was not being diverted to religious use as long as the government and the religious organization instituted proper safeguards to ensure that the government grant was not being used for religious purposes.[95] *Mitchell* also dealt with educational materials,[96] while *McCallum* dealt with direct monetary grants.[97]

Because *McCallum* dealt with money, which is easier to divert to religious purposes, and because the government did not institute enough safeguards to ensure the money was only spent in secular pursuits, the court struck down the grant.[98] The court found it particularly troubling that the government grants and private donations were deposited into the same account with no method of separating the government money for secular purposes.[99] The court did not accept the religious organization's argument

---

90. *E.g.*, DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 419 (2d Cir. 2001).

91. Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 967 (W.D. Wis. 2002).

92. *See DeStefano*, 247 F.3d at 419; *McCallum*, 179 F. Supp. 2d at 967. The court in *McCallum* actually announced that they would use the test "as prescribed by a majority" of the *Mitchell* Court. *McCallum*, 179 F. Supp. 2d at 967. The court in *McCallum* is not entirely clear on what it means by "majority," but the inference can be drawn that it was referring to O'Connor's opinion combined with the dissent since the court goes on to use the same factors (divertability, supplemental/supplanting, and excessive entanglement) that the O'Connor opinion uses in coming to its decision in *Mitchell*. *See id.* at 967–77.

93. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 836–67 (2000).

94. *See McCallum*, 179 F. Supp. 2d at 973–74.

95. *See supra* Part II.A.1.

96. *See Mitchell*, 530 U.S. at 802 (plurality opinion).

97. *See McCallum*, 179 F. Supp. 2d at 974.

98. *See id.* at 974–75, 982.

99. *See id.* at 974.

that because they had enough private money to cover its religious programs, the government money was only being used for secular purposes.[100] Instead the court held that without monitoring or separation of the funds, there was no way to tell what the government money was being spent on.[101] This case shows that, like O'Connor, lower courts are concerned with diversion of funds to religious use. It also shows that if the government neglects to institute proper safeguards to prevent diversion, a court will presume that funds are being diverted to religious purposes even if the religious organization can show that it had enough private funding to cover their religious costs.

2. Aid Must Be Supplemental

In line with O'Connor's reasoning in *Mitchell*, lower courts have not allowed government funding to supplant costs of religious organizations, while government aid that supplements religious organizations' existing resources is permitted within the limits of the Establishment Clause. The key, like in *Mitchell*, is that the government funds not relieve the religious organization of costs it otherwise would have borne.[102] In *McCallum*, the court found that government money was crucial to support the primary functions of the religious organization and that the government money relieved the religious organization of costs it otherwise would have borne.[103] The court found that using government money to supplant costs that should be borne by the religious organization violates the Establishment Clause.[104]

3. Religiously Affiliated Versus Pervasively Sectarian

O'Connor's concurrence in *Mitchell* did not leave the question about pervasively sectarian organizations receiving direct government aid particularly clear, but at least one lower court has indicated that the government may not give direct government money grants to pervasively sectarian organizations.[105] In *American Civil Liberties Union v. Foster*, the district court went back to *Bowen* for guidance on how to deal with direct monetary grants to pervasively sectarian groups.[106] The court indicated that when government money flows to a pervasively sectarian institution, there is a substantial risk that some of that money will be used to further religious objectives.[107] While the court also looked at the actual diversion of government funds to religious

---

100. *See id.*

101. *See id.*

102. *See McCallum*, 179 F. Supp. 2d at 975.

103. *See id.*

104. *See id.*

105. *See* ACLU v. Foster, No. 02-1440, 2002 U.S. Dist. LEXIS 13778, at *9 (E.D. La. July 24, 2002) (explaining that direct monetary grants are one indication that the governmental program has the primary effect of advancing religion). For an explanation of the distinction between pervasively sectarian institutions and religiously affiliated institutions, see Part II.A.3.

106. *See id.*

107. *See id.* (stating that pervasively sectarian institutions should not receive public funding because "aid . . . would, knowingly or unknowingly, result in religious indoctrination") (quoting Bowen v. Kendrick, 487 U.S. 589, 612 (1988)).

uses,[108] it placed a great deal of weight on the fact that government money was being directly given to a pervasively sectarian institution.[109] This case indicates that at least one lower court believes that the Supreme Court standard for direct funding still bars direct monetary grants to pervasively sectarian groups.

4. Excessive Entanglement Between the Government and Religious Organizations

Similar to Justice O'Connor's analysis in *Mitchell*, lower courts have examined government grants to religious organizations for excessive entanglement but found no entanglement problems. In *McCallum*, the court pointed out that when the government gives religious organizations money, it has a duty to ensure that the grant is not used to support religion, so the government must engage in some monitoring.[110] And, as the court held, "[s]uch monitoring does not necessarily amount to excessive entanglement."[111] Similarly, the court in *DeStefano* found that the amount of monitoring needed to ensure that government funds were not used for religious purposes would not result in excessive entanglement.[112] The lower court opinions thus make it clear that some amount of monitoring of government grants is not only constitutionally permissible, but expected.

III. WILL FEMA'S REIMBURSEMENT PLAN SURVIVE AN ESTABLISHMENT CLAUSE CHALLENGE?

Under the current Supreme Court standard for direct aid to religious organizations, FEMA's reimbursement plan is likely to fail constitutional scrutiny because of the lack of safeguards in place to prevent diversion of government funds to religious use. Many civil libertarian organizations have been highly critical of FEMA's plan to reimburse religious organizations for their role in hurricane relief.[113] At this point, it is unclear whether the criticism will translate into an actual constitutional challenge. However, ignoring strategic[114] or political reasons[115] to refrain from attacking the reimbursements, the plan creates some realistic opportunities for constitutional challenges.

It is therefore worthwhile to consider the potential success of such a challenge. It will be helpful to first outline FEMA's reimbursement plan for private organizations that aided in hurricane relief and then consider whether such a plan is constitutional

---

108. *See id.* at *10–*12.

109. *See id.* at *9.

110. Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 967 (W.D. Wis. 2002).

111. *Id.*

112. *See* DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 414 (2d Cir. 2001).

113. *See* Cooperman & Williamson, *supra* note 3.

114. Civil libertarian groups may be fearful that the makeup of the new Supreme Court makes it likely that the new Court will abandon the reasoning of O'Connor's concurrence in *Mitchell* and side with the plurality. This would make these groups hesitant to create such an opportunity for the Court by bringing an Establishment Clause challenge.

115. It would be a politically unpopular move to challenge reimbursements to religious organizations that performed so admirably in the wake of the hurricanes.

under the relevant precedents. This Part will first outline FEMA's reimbursement plan and then move on to examine whether the plan will survive constitutional scrutiny under the current Supreme Court doctrine.

A. An Outline of FEMA's Reimbursement Plan

The reimbursement plan created by FEMA notably lacks any real guidance or limitations on how the government funds can be used aside from ensuring the items reimbursed are secular, and will therefore run into problems with the actual diversion part of O'Connor's test from *Mitchell*.[116] Congress granted the funds for the reimbursement to the executive branch in a series of appropriations designed to deal with hurricane relief.[117] The appropriations contained no relevant Establishment Clause limitations on how the executive branch could spend the funds,[118] so it is not very helpful in elaborating on guidelines for reimbursements. FEMA then decided to use some of this grant money to reimburse private organizations, including religious institutions that helped with relief efforts.[119] Applicants for reimbursements are required to document their costs and submit reimbursement requests to local and state emergency agencies, which will then seek funds from FEMA.[120] In looking at the FEMA plan, this Subpart will break the plan down into (1) the guidelines given by FEMA to local administrators and religious organizations and (2) the monitoring system FEMA has in place to ensure these guidelines are followed.

1. Guidelines

FEMA did outline which costs would be reimbursed in an internal memorandum entitled "Eligible Costs for Emergency Sheltering Declarations."[121] Eligible costs included essential assistance like housing, medical care, food, water, and other necessities.[122] In deciding whether the documented costs are to be reimbursed, FEMA officials are supposed to follow guidelines outlined in the Stafford Act.[123]

---

116. *See supra* Part II.A.1.

117. *E.g.*, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2745 (2005).

118. For example, the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006 contained no such Establishment Clause limitation. *See id.*

119. *See* Cooperman & Williamson, *supra* note 3. FEMA initially indicated that only groups that were asked by the government to aid would be reimbursed. *Id.* It has since backed away from this position and will grant reimbursements to organizations even if they were not asked to aid. Anne Farris & Claire Hughes, *FEMA Official Clarifies Federal Hurricane Aid to Faith-Based Groups*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, Oct. 4, 2005, http://www.religionandsocialpolicy.org/news/article_print.cfm?id=3305.

120. *See* Memorandum from Nancy Ward, Dir. of FEMA Recovery Area Command, to FEMA Pub. Assistance Staff (Sept. 9, 2005), *available at* http://www.religionandsocialpolicy.org/docs/policy/FEMA_reimbursement_memo_Sept%209-2005.pdf [hereinafter Ward Memorandum].

121. Cooperman & Williamson, *supra* note 3.

122. Ward Memorandum, *supra* note 120, at 2.

123. *See id.*

The Stafford Act is a statute dealing with disaster response, and it has a general prohibition against discrimination as a prerequisite to receiving government aid.[124] The general discrimination prohibition is not terribly helpful, but the statute goes on to say that organizations receiving government aid must comply with all "regulations relating to nondiscrimination promulgated by the President."[125] This is potentially more helpful because President Bush announced in an executive order some actual substantive Establishment Clause guidelines for private organizations receiving government funds.[126] Bush's order explained that organizations that receive federal financial aid must not make aid contingent on participation in religious practices and must offer inherently religious activities separately from federally-funded activities.[127] If adopted into FEMA's guidelines to its administrators, the Stafford Act and Bush's executive order could help avoid some Establishment Clause problems.

FEMA's memoranda, however, provide no detail about any Establishment Clause guidelines for state and local officials responsible for making and monitoring payments to private non-profit organizations.[128] The current guidelines only explain what types of costs are reimbursable.[129] They leave open the possibility that organizations will be reimbursed for secular materials diverted to religious purposes, religious counseling services, and even repairs and improvements on facilities used for religious purposes.[130]

---

124. 42 U.S.C. § 5151(a) (2000) ("[R]elief . . . activities [funded by the government] shall be accomplished . . . without discrimination on the grounds of . . . religion . . . .").

125. *Id.* § 5151(b).

126. *See* Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

> All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

Id. In addition,

> [O]rganizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance, and participation in any such inherently religious activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance

Id.

127. *See id.*

128. *See* IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2005–LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS 23 (2005), http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2005.pdf.

129. *See* Ward Memorandum, *supra* note 120, at 2–6.

130. *See* LUPU & TUTTLE, *supra* note 128, at 22–24.

2. Monitoring

Aside from the lack of guidelines, the nature of retrospective grants makes it impossible to tell exactly how the money was spent.[131] FEMA does require organizations to "provide a written assurance of their intent to comply with regulations relating to nondiscrimination" before they receive government funds.[132] Aside from the written assurance, officials trying to decide which aid can be reimbursed can only look at the documented costs to monitor how the money was spent.[133] Therefore, the monitoring system can ensure only that religious organizations promise that the reimbursements were not used for religious purposes and that the reimbursements go to cover expenditures of a secular character. Essentially, FEMA's only monitoring system of the reimbursements is to check receipts to make sure that the costs reimbursed are on the list of reimbursable costs. There is no plan beyond that to ensure that religious organizations are not using the reimbursement checks to fund religious activities or rebuild religious structures.

B. A Constitutional Challenge

The current FEMA reimbursement plan would likely not survive an Establishment Clause challenge under the Supreme Court's current standard for direct government grants to religious organizations because it lacks the proper safeguards to ensure that government funds are not diverted to religious use and because the Supreme Court has yet to allow monetary grants to be given directly to pervasively sectarian organizations. Brian C. Ryckman has previously addressed the issue of the constitutionality of the reimbursement plan,[134] but this Part will explain why this Note comes to a different conclusion about whether FEMA's plan will pass constitutional scrutiny. While Ryckman is probably correct that the political environment surrounding hurricane relief makes a constitutional challenge unlikely, this Part will explain the flaws in his analysis and subsequent conclusion that the program does not violate the Establishment Clause.

It is important to evaluate the constitutionality of the program even if a challenge is unlikely. FEMA should strive to create a disaster relief strategy that complies with the Establishment Clause because, as a government agency, it has a duty to uphold the Constitution. Furthermore, Hurricane Katrina is not the last disaster that FEMA will face. Unfortunately, there will be more disasters in the future and more opportunities for constitutional challenges if FEMA continues to promulgate a program that violates the Establishment Clause.

Because O'Connor's concurring opinion in *Mitchell* remains controlling, FEMA's current reimbursement plan would not survive a constitutional challenge. Using the framework given by the Supreme Court in *Mitchell* and used by lower courts in examining direct government aid programs, it is clear that the reimbursement plan is

---

131. *See id.* at 26.

132. 44 C.F.R. § 206.11(c) (2007).

133. *See* Ward Memorandum, *supra* note 120, at 2 (listing the categories of eligible expenses).

134. *See* Ryckman, *supra* note 4, at 948–50 (discussing how FEMA's reimbursement program will withstand constitutional challenges on Establishment Clause grounds).

constitutionally flawed. It will be helpful to systematically examine the plan using the *Mitchell* framework: (1) the divertability of the aid to religious purposes, (2) whether the aid was supplemental to the core function of the grantee, (3) whether the organization receiving the aid is pervasively sectarian, and (4) whether the aid fosters excessive entanglement between the government and the religious organization.[135]

1. Divertability of Government Aid to Religious Purposes

The FEMA reimbursement plan has few safeguards and almost no monitoring to ensure that money is not diverted for religious purposes and would therefore fail an Establishment Clause challenge. O'Connor's concurring opinion in *Mitchell* places the burden on plaintiffs to show that government aid was used for religious purposes.[136] However, O'Connor also scrutinized the safeguards in place to prevent divertability and ensure that there were not extensive Establishment Clause violations.[137] Like O'Connor, courts will scrutinize the safeguards implemented by FEMA to avoid diversion, and, unlike the program in *Mitchell*, the reimbursement safeguards are constitutionally insufficient.

The only clear safeguard contained in FEMA's guidelines is the requirement that certain costs like debris removal and long term housing cannot be reimbursed.[138] The memo also outlines some costs that may be reimbursed, but does not limit reimbursement to those listed costs.[139] The guidelines also refer to Section 502 of the Stafford Act, which could provide more guidance as explained above.[140] The Stafford Act has a broad prohibition against discrimination, but mentions nothing about conditioning aid on participation in religious services[141] or proselytizing while aid is disbursed. However, this is a fairly complex and obscure reference, and it would be a far better safeguard against misuse of government funds if the guidelines distributed by FEMA were more explicit about the prohibited uses of government funds. Currently, there is no safeguard against the possibility that reimbursable aid was distributed in a manner completely inconsistent with the *Mitchell* rule that direct government aid not be diverted to religious use. For example, some religious groups proselytized or handed out Bibles when they were distributing aid.[142] Under the FEMA guidelines, this would not be problematic, but under the *Mitchell* precedent, this would be unconstitutional.

In addition to the lack of safeguards for FEMA reimbursements, the FEMA plan has no system of monitoring to ensure that religious organizations did not violate the Establishment Clause when distributing aid. The monitoring problem is not limited to the FEMA plan. Any time the government makes retrospective payments to religious organizations, it loses the ability to monitor how that money is spent.[143] It is a fairly obvious point that the government has no means of monitoring the distribution of

135. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 836–67 (2000).
136. *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring).
137. *See id.* at 861–62 (reviewing the safeguards in place to prevent actual diversion).
138. *See* Ward Memorandum, *supra* note 120, at 6.
139. *See id.* at 2–5.
140. *See supra* Part III.A.1.
141. *See* LUPU & TUTTLE, *supra* note 128, at 23.
142. *See* Cooperman & Williamson, *supra* note 3.
143. *See* LUPU & TUTTLE, *supra* note 128, at 26.

money that has already been spent. Because of this, the government has no way to know whether secular aid was distributed in a manner that is inconsistent with the Establishment Clause.[144] Even if FEMA asked for a guarantee that money was not spent in violation (which it does not under the guidelines),[145] any religious organization could lie about how they spent the money and it would be very difficult to refute, because the events are all in the past. While O'Connor presumed good faith of religious organizations in *Mitchell*, she also thoroughly reviewed the safeguards to determine their adequacy.[146] A good faith presumption will not save a program that has no substantial safeguards in place. This problem of monitoring, along with the inadequate safeguards promulgated by FEMA, would doom the reimbursement plan if there were a constitutional challenge based on *Mitchell*.

2. Aid Must Be Supplemental

The FEMA reimbursement plan does a better job of ensuring that reimbursements will not supplant costs of the religious organizations, but there are a few problem areas like reimbursements for religious organizations' employee salaries or repairs to religious structures. The FEMA plan largely limits reimbursements to items that are unquestionably supplemental like essential aid supplies, medical care, and transportation of evacuees.[147] However, the plan also allows for some labor costs to be reimbursed,[148] and some of those employees might have a dual religious and secular purpose, thereby creating an Establishment Clause issue. A specific issue would be reimbursement of counseling expenses,[149] because some of the counseling might contain elements of religious proselytizing. *McCallum*, a district court case, explicitly ruled that using government funds on counseling that combined religious and secular messages violated the Establishment Clause.[150]

There also might be a problem with allowing facility expenses to be reimbursed. When a facility has dual religious and secular purposes, it is hard to separate which expenses the reimbursement is going towards.[151] There is also a danger that facility funds will be used to make improvements to religious facilities as opposed to just restoring the facility to its pre-disaster state, as required by the FEMA guidelines. While these concerns with the supplemental aid plan are present and should not be overlooked, overall the FEMA plan directs reimbursements toward supplemental aid services and not costs that would supplant normal operating expenses of religious organizations.

---

144. *See id.*
145. *See* Ward Memorandum, *supra* note 120.
146. *See* Mitchell v. Helms, 530 U.S. 793, 861–62 (2000) (O'Connor, J., concurring).
147. *See* Ward Memorandum, *supra* note 120, at 2–3.
148. *See id.* at 2.
149. *See id.* at 3.
150. *See* Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 969–970 (W.D. Wis. 2002).
151. *See* LUPU & TUTTLE, *supra* note 128, at 24.

3. Religiously Affiliated Versus Pervasively Sectarian

Another issue that may be problematic for the FEMA reimbursement plan is that it gives direct cash grants to pervasively sectarian organizations, which appears to violate Establishment Clause precedent even though O'Connor was relatively silent about the issue in her *Mitchell* concurrence. By a FEMA official's own admission, the reimbursements will be available to pervasively sectarian organizations like churches.[152] Even though *Agostini* did not deal with direct *cash* grants to pervasively sectarian groups, the Court did say that it was important that no government money ended up in the coffers of a pervasively sectarian organization.[153] O'Connor was silent on the issue in *Mitchell*, but even the plurality acknowledged that there were "'special Establishment Clause dangers' when *money* is given to [pervasively sectarian organizations] directly."[154]

More on point though, is the district court case of *ACLU v. Foster*, which held that direct monetary aid could not flow from the government to pervasively sectarian institutions.[155] This case is more on point because it deals with money as opposed to educational materials or remedial education teachers, as in *Mitchell* and *Agostini*. It is also an important case in the context of Hurricane Katrina because New Orleans is in the jurisdiction of the Eastern District of Louisiana,[156] so many, if not all, Katrina cases go through that court. That court held that when money is given directly to pervasively sectarian organizations, the risk is too great that the money will be diverted to religious purposes.[157] While Supreme Court precedent is not entirely clear on this issue, the Supreme Court has yet to approve direct cash grants to pervasively sectarian groups, and the practice is clearly still disfavored in lower courts. This is another pitfall of the FEMA reimbursement plan that should be addressed.

4. Excessive Entanglement Between the Government and Religious Organizations

The FEMA reimbursement plan will not have any problems with excessive entanglement because the plan crafted by FEMA has even less monitoring and administration in place than other plans approved in *Mitchell*, *Agostini*, and *Bowen*. Routine administration and monitoring of a government aid program is not only constitutionally permissible but is a key element of ensuring that government aid is not diverted to religious use.[158] The monitoring plans approved in *Agostini* and *Bowen*[159]

---

152. *See* Farris & Hughes, *supra* note 119.

153. *See* Agostini v. Felton, 521 U.S. 203, 228 (1997).

154. Mitchell v. Helms, 530 U.S. 793, 818–19 (2000) (plurality opinion) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)) (emphasis in original).

155. ACLU v. Foster, No. 02-1440, 2002 U.S. Dist. LEXIS 13778, at *22 (E.D. La. July 24, 2002).

156. United States Court Locator, http://216.152.235.70/webdir.fwx (choose "district court" under number 1 and "city and state" under number 2; then type in New Orleans and select the state of Louisiana; then click "search").

157. *See Foster*, 2002 U.S. Dist. LEXIS 13778, at *9 (quoting Bowen v. Kendrick, 487 U.S. 589, 612 (1988)).

158. *See supra* Part II.A.4.

were both much more comprehensive than the relatively limited monitoring in the FEMA plan. The FEMA monitoring plan, as discussed above,[160] appears to only require that government officials check the receipts of religious organizations to make sure that they are asking for properly reimbursable costs.[161] Beyond that, there is really no monitoring system in place to ensure that money is not being diverted to religious purposes.[162] While this causes problems in other areas of Establishment Clause inquiry,[163] it makes the excessive entanglement inquiry easier by creating a very low level of government involvement in the operations of the religious organizations.

IV. RECOMMENDATIONS FOR PROVIDING THE MOST EFFECTIVE DISASTER RESPONSE PLAN WHILE FOLLOWING THE ESTABLISHMENT CLAUSE PRINCIPLES

FEMA's reimbursement plan is constitutionally problematic and an ineffective way to coordinate the relief effort, so FEMA should work to create an emergency grant system that allocates funds to private groups in times of emergency, but also places enough safeguards to ensure that the money is used only for secular purposes. FEMA's two primary concerns in providing disaster relief should be (1) effectiveness and (2) constitutionality. The reimbursement system is clearly not the best way to deal with either concern. As outlined above, asking religious organizations to help with the relief effort without any funding or supplies inhibits these organizations' ability to provide the optimal hurricane relief.[164] Also, the lack of an ability to monitor whether aid was diverted to religious purposes makes the reimbursement plan constitutionally unappealing.[165] It is therefore worthwhile to consider some possible alternatives to the reimbursement plan.

Two of the best options are instituting a voucher system and giving government grants that include constitutional safeguards. The voucher system would ensure that federal money passes through individual citizens to religious organizations and other disaster response groups in exchange for emergency relief. This plan is appealing because indirect grants create far fewer constitutional problems, but it is inefficient and ineffective for dealing with immediate emergency situations. Another option is to give prospective grants that have more guidelines and monitoring in place to avoid Establishment Clause problems. This plan is appealing because it allows the organizations receiving the funding to be more effective, but it requires more energy and resources to ensure that there are no constitutional abuses.

---

159. *See* Agostini v. Felton, 521 U.S. 203, 234 (1997) (finding that because there was no longer a presumption that school teachers would be unable to faithfully execute their constitutional duties in a pervasively sectarian setting, there was no need for pervasive monitoring of the teachers and, therefore, that the level of monitoring needed was acceptable under excessive entanglement inquiry); Bowen v. Kendrick, 487 U.S. 589, 616–17 (1988) (approving a monitoring system where government officials would review the programs set up by religious organizations and visit the organizations to make sure the programs were being carried out according to constitutional requirements).

160. *See supra* Part III.B.1.

161. *See* Ward Memorandum, *supra* note 120, at 2.

162. *Id.*

163. *See supra* Part III.B.1.

164. *See supra* Part I.

165. *See supra* Part III.A.2.

A. Instituting a Voucher System

In his comment on FEMA's reimbursement plan, Brian C. Ryckman suggests that FEMA institute a voucher program for future disasters.[166] Ryckman does little to elaborate on the proposal, but it appears that he wants essential services like housing, medical aid, food, water, and clothing to be provided for through vouchers.[167] In proposing the voucher program, Ryckman focuses on preventing future Establishment Clause challenges,[168] but fails to properly estimate the practicality of such a solution in disaster scenarios.

Constitutionally speaking, vouchers are indeed an appealing way to deal with Establishment Clause issues. Under the *Mitchell* precedent, a majority of the Court would allow government money to be used to support even religious activities as long as the money was neutrally available to religious and secular organizations alike,[169] and it was given to the individual citizen first, who then made a true private choice to receive aid from a religious organization.[170] FEMA would then not have to worry about how the religious organization used the money from the voucher.

Where Ryckman's proposal runs into problems, however, is in considering the effectiveness of such a plan. The Red Cross and FEMA distributed vouchers in the wake of the Hurricanes Katrina and Rita for everything from meals[171] to permanent housing.[172] However, voucher dispersal stations were overwhelmed by crowds and had to call in the National Guard.[173] The Red Cross even admitted that the voucher system is not always viable for larger disasters since there is so much paperwork involved.[174] Vouchers might be useful for long-term relief efforts,[175] once the situation has stabilized. However, in short-term relief situations, they are an ineffective and burdensome way to distribute aid.

---

166. *See* Ryckman, *supra* note 4, at 950.

167. *See id.* This is inferred from his proposal that vouchers "replace" reimbursements. Since these are the types of things religious organizations can be reimbursed for, it is reasonable to suspect that Ryckman wants the vouchers to be for the same types of goods.

168. *Id.* at 951.

169. Mitchell v. Helms, 530 U.S. 793, 838 (2000) (O'Connor, J., concurring).

170. *Id.* at 841–42.

171. COMMC'N & MKTG. DEP'T, AM. RED CROSS, WE CAN'T DO IT WITHOUT YOU: 2005 ANNUAL REPORT 3 (2005), http://www.redcross.org/www-files/Documents/pdf/corppubs/Annual_Report.PDF (discussing a family who was set up in a motel room with new clothes and meal vouchers after the hurricane).

172. *See* FAILURE OF INITIATIVE, *supra* note 1, at 315.

173. *Id.* at 348.

174. AM. RED CROSS, FROM CHALLENGE TO ACTION: AMERICAN RED CROSS ACTIONS TO IMPROVE AND ENHANCE ITS DISASTER RESPONSE AND RELATED CAPABILITIES FOR THE 2006 HURRICANE SEASON AND BEYOND 10 (2006), http://www.redcross.org/www-files/Documents/pdf/corppubs/file_cont5448_lang0_2006.pdf.

175. *See* FAILURE OF INITIATIVE, *supra* note 1, at 315 (explaining why vouchers were an effective means of providing permanent housing assistance to disaster victims).

B. Grants with Clear Guidelines and Monitoring

Once incorporated into the disaster response structure, religious organizations will need guidelines about proper spending. With the precedent of *Mitchell* in mind, FEMA should craft standards that will help grants avoid and survive constitutional challenges. Guidelines like the ones articulated in the Section on reimbursements[176] would help religious organizations understand how government funds could be used without violating the Establishment Clause.

Admittedly, it would be difficult to define permissible and impermissible activities. Would religious organizations be allowed to say a prayer when serving government-funded food? The question raises the specter of Establishment Clause problems running into Free Exercise issues. However, as long as FEMA makes it clear what kind of strings are attached to the government aid, it is free to articulate guidelines, as long as it does not violate the constitutional rights of those groups being excluded.[177] Excluding sectarian groups may create other problems with the Establishment Clause because groups could argue that FEMA is favoring non-sectarian groups178 over sectarian groups, so FEMA should be cautious in excluding any groups from the funding program unless the group refuses to comply with the guidelines promulgated by FEMA.

Once guidelines are in place, it is important that government officials monitor religious organizations for compliance. Although resources may limit the ability of government agencies to monitor charities for compliance,[179] these agencies should conduct site visits as often as possible to ensure that compliance standards are met. Monitoring of this sort has not been considered an "excessive entanglement" problem by Supreme Court decisions.[180] Violators should be warned of Establishment Clause deficiencies, and monitored more closely. If they continue the violations, government funding should be revoked.

A recent study conducted by the Government Accountability Office (GAO) shows the importance of monitoring and having clear guidelines when the government grants money to religious organizations. In reviewing other government grants to religious groups through the White House Office of Faith-Based and Community Initiatives (WHOFBCI), the GAO found that monitoring systems were inadequate to ensure that religious organizations were using grant money properly.[181] Even with guidelines in

---

176. *See supra* Part III.B.

177. Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

178. Nonsectarian is defined as "not restricted to or dominated by a particular religious group." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1538 (Phillip Babcock Grove ed., 1981).

179. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-616, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 36–37 (2006), *available at* http://www.gao.gov/new.items/d06616.pdf [hereinafter FAITH-BASED AND COMMUNITY INITIATIVE].

180. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 234 (1997) (finding unannounced monthly visits by public supervisors to fall far short of excessive entanglement).

181. *See* FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 179, at 36–39.

place, some local administrators and religious organizations receiving the money did not have a clear understanding of the applicable constitutional law.[182] When guidelines left room for misinterpretation, and monitoring was weak or non-existent, the GAO often found that religious organizations receiving government grants operated under mistaken assumptions about constitutional law.[183]

The GAO report indicates that clear and complete guidelines, in tandem with serious monitoring procedures, are the best way to ensure that religious organizations fully understand the constitutional requirements attached to government funding. Although resources may limit the ability of government agencies to monitor charities for compliance,[184] these agencies should aim to communicate openly with religious organizations to ensure they are aware of restrictions on grant money expenditures and conduct site visits as often as necessary to ensure that compliance standards are met. Religious organizations that are involved in activities that create a high potential for Establishment Clause violations or who resist guidelines should be monitored more closely. Violators should be punished with sanctions or, if necessary, revocation of grants.

There are some admitted problems with a monitoring system. It takes more administrative work and money to monitor aid than vouchers, which require no post-grant monitoring. Also, in the immediate aftermath of a disaster, monitoring may take a back seat to relief efforts. However, as the situation normalizes, monitoring should increase to ensure that organizations are complying with Establishment Clause standards. Monitoring for Establishment Clause violations is important, but when an area is in a state of emergency, an exception can be made until rule of law is reestablished.[185]

While there are more Establishment Clause issues to deal with in a grant program (as opposed to a voucher program), the grant program far outstrips the voucher program in effectiveness. FEMA can avoid constitutional violations in grant programs with proper guidelines and monitoring. Also, with a grant program, religious organizations that have agreed to be part of a hurricane relief infrastructure could create a hurricane relief account, separate from their private funding, strictly for government aid.[186] FEMA could then direct funds to the organizations as soon as the disaster hits. Unlike vouchers,[187] this would allow local religious organizations, with their first-hand knowledge of the needs of the community, to quickly try to meet those needs. FEMA could also supply these organizations with relief materials as requested by the organizations. Either system gets aid to religious organizations that know the needs of the community more quickly than a voucher system.

---

182. *See id.* at 39.

183. *Id.*

184. *See id.* at 36–37.

185. A state of emergency exception to the Establishment Clause is worth considering for its practical value in disaster response scenarios, however, space limitations do not allow for a full discussion of such an exception.

186. This would probably satisfy a constitutional challenge because Justice O'Connor's fear is diversion and separation of government aid from religious activities. *See* Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring).

187. Vouchers merely place another logistical step in the way of people who need aid. They first have to obtain a voucher, then go to receive actual aid.

There will be critics who point out that the assumption that religious organizations need to be incorporated into disaster response is flawed. There are groups that believe that there should be a wall between church and state no matter the circumstances. Setting up a system where the government funds and works together with religious groups will be highly unsatisfactory to such strict separationists. However, the Supreme Court has shown a willingness to allow interaction between the government and religious organizations as long as it does not appear that the government is promoting religion. Disaster response presents a scenario in which the government needs to utilize all available resources to deal with a massive and immediate problem. Requiring religious groups and the government to work separately and inefficiently just to maintain a solid wall of separation between church and state would be misguided. In an attempt to protect citizens' constitutional rights, strict separationists would prevent necessary aid from reaching those ravaged communities and citizens.

CONCLUSION

With the primary goal of saving and repairing lives in the wake of a disaster, the government needs to find a way to provide the best relief effort possible while respecting Establishment Clause principles. There are a number of different options to consider in attaining this goal. FEMA's current reimbursement program is fraught with constitutional problems and is not the best way to provide relief in a time of disaster. While constitutional principles are important, human life is more valuable, and so FEMA should set up the best possible hurricane response network. This network should include religious organizations because they are an integral part of the hurricane response and will function more effectively if they are coordinated with government agencies. A coordinated system incorporating local non-profits (including religious organizations) ensures the most effective response, and government grants to local groups with guidelines and monitoring in place to ensure compliance is the best means of achieving this end.