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THE CONSTITUTIONALITY OF FAITH-BASED PRISON PROGRAMS: A REAL WORLD ANALYSIS BASED IN NEW MEXICO

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I. INTRODUCTION

The recidivism rate in this country is staggering. In 2002, the Department of Justice released a recidivism study indicating that, of the inmates tracked, 67.5 percent were re-arrested, 46.9 percent were re-convicted, and 25.4 percent were re-sentenced within three years of their release.[1] The desire to reduce these figures has led the federal and state governments to look to new and alternative ways to prevent inmates from making return trips to prison.[2]

Of the solutions proffered, one rests on the principle that prisoners who practice religion are less likely to become repeat offenders: faith-based prison programming.[3] Faith-based prison programming incorporates religion into an inmate's rehabilitation plans and attempts to instill her with the morals needed to avoid returning to jail post-release.[4] The faith-based units generally involve a separate living facility for participants and separate rehabilitation-oriented programs. Such units, however, have brought about a flurry of challenges claiming that allowing government facilities to fund religious programs violates the Establishment Clause.[5]

Some of these lawsuits were brought by taxpayers who relied on the U.S. Supreme Court's decision in *Flast v. Cohen*,[6] which allowed citizens to bring an Establishment Clause claim based solely on their status as taxpayers.[7]

However, on June 25, 2007, the U.S. Supreme Court handed down a ruling that may substantially diminish the number of Establishment Clause cases brought before the courts. In *Hein v. Freedom from Religion Foundation, Inc.*,[8] a plurality of the Court determined that taxpayer standing would no longer be sufficient to

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1. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf. The study was published in 2002 and followed 272,111 prisoners from fifteen states who were released in 1994. *Id.* About two-thirds of the recidivist crimes occurred within the first year of the three-year period of the study. *Id.*

2. One scholar has suggested that education is the answer. Bernard LoPinto, *How Schools "Down Back" Help Inmates and Society*, http://adulted.about.com/cs/prisoneducation/a/prison_ed.htm (last visited June 24, 2007). Another, albeit unconventional, approach to assist in the reduction of recidivism was implemented by the sheriff of Mason County, Texas. Dan Glaister, *Pink Prison Makes Texan Inmates Blush*, GUARDIAN, Oct. 11, 2006, *available at* http://www.guardian.co.uk/usa/story/0,,1892555,00.html#article_continue. There, the inmates were forced to wear all pink clothes and sleep in pink sheets and the walls and bars of the jail were painted pink. *Id.*

3. *See, e.g.*, Colin J. Baier & Bradley R.E. Wright, *"If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime*, 38 J. RES. CRIME & DELINQ. 3, 3 (2001).

4. *See id.* at 16–17.

5. *See, e.g.*, Claire Hughes, *Potential for Widespread Fallout in Ruling Against Iowa Faith-Based Prison Program*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, June 6, 2006, *available at* http://www.socialpolicyandreligion.org/news/article_print.cfm?id=4384; Freedom from Religion Foundation, *FFRF Sues Federal Bureau of Prisons over Faith-Based Prison Programs* (May 5, 2006), http://ffrf.org/news/2006/FedPrisonsued.php.

6. 392 U.S. 83 (1968).

7. *See infra* Part IV.C.

8. 127 S. Ct. 2553 (2007).

bring Establishment Clause claims except in certain, limited situations.[9] The decision limits the reach of the *Flast* exception to actions brought about by a specific act of Congress.[10]

After this ruling was handed down, a case that had been pending in New Mexico regarding the constitutionality of a faith-based unit at the New Mexico Women's Correctional Facility (NMWCF) in Grants, New Mexico was dismissed due to the plaintiffs' lack of standing.[11] In that case, a separation of church and state watchdog group, the Freedom From Religion Foundation, Inc. (FFRF), joined with New Mexico taxpayers to challenge the faith-based prison unit located at the Grants facility.[12] In their complaint, the plaintiffs named the following persons and entities as defendants: New Mexico Governor Bill Richardson, New Mexico Corrections Department Secretary Joe Williams, Coordinator of Faith-Based Programs for the New Mexico Corrections Department Homer Gonzales, Warden of the NMWCF Bill Snodgrass, and Corrections Corporation of America, Inc.[13] The plaintiffs claimed that the faith-based unit in Grants violated the Establishment Clause because the State of New Mexico allowed government funds to be used to promote a religious cause.[14]

The Grants facility, which is operated on behalf of the State of New Mexico by Corrections Corporation of America, Inc. (CCA),[15] receives its funding from the permanent land fund and from the New Mexico General Fund, which includes taxpayer monies.[16] In 2001, CCA opened a separate living unit for inmates participating in a six-month faith-based program called the Life Principles Community/Crossings Program.[17] This unit, dubbed the "God Pod," provides participant inmates with a quieter living environment and requires them to participate in a total of 732 hours of programming over the six-month term.[18]

Part II of this Comment presents the new *Hein* ruling; Part III discusses the U.S. Supreme Court's jurisprudence regarding the Establishment Clause.[19] The Court has formulated several tests and standards by which lower courts can judge the constitutionality of state or federal funding in light of the Establishment Clause's prohibitions. Part IV discusses how lower courts have applied the U.S. Supreme Court's formulations to prison programs faced with Establishment Clause challenges.[20] Part V outlines the facts of the recently dismissed New Mexico case,[21] and Part VI specifically examines the constitutionality of faith-based programming

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9. *Id.*
10. *Id.* at 2568.
11. Freedom from Religion Found., Inc. v. Richardson, No. CIV-05-1168-RLP/KBM (D.N.M. Nov. 7, 2005).
12. *See infra* Part V.A.3.
13. Complaint at 3–4, *Freedom from Religion Found., Inc.*, No. CIV-05-1168-RLP/KBM (D.N.M. Nov. 7, 2005).
14. *Id.* at 11; *see infra* Part V.A.3.
15. *See infra* Part V.A.1.
16. Answer to Civil Rights Complaint at 8, *Freedom from Religion Found., Inc.*, No. CIV-05-1168-RLP/KBM (D.N.M. Jan. 13, 2006).
17. *See infra* Part V.A.2.
18. *See infra* Part V.A.2.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part V.

at correctional facilities like the New Mexico Women's Correctional Facility in light of current federal jurisprudence.[22]

This Comment argues that faith-based programming, such as that at the Grants facility, violates the Establishment Clause. This Comment focuses on the fact that the outcome of a constitutional challenge against such programs will depend upon which of the U.S. Supreme Court's proffered tests the trial court uses in its analysis. Although a ruling for either party could be supported by the available jurisprudence, only a ruling against the constitutionality of faith-based programs like the one at the NMWCF will help to ensure that private prisons are held to constitutional standards in maintaining the separation of church and state. A judgment to the contrary would set a dangerous precedent that would allow private corporations that run prison facilities under contracts with the state to commit constitutional violations without any possible redress for those adversely affected.

II. *HEIN*: THE CURRENT STATUS OF TAXPAYER STANDING IN ESTABLISHMENT CLAUSE CASES

The concept of standing is related to the Article III restriction of judicial power to hear only "cases" and "controversies."[23] Standing addresses the question of "whether the litigant is entitled to have the court decide the merits of the dispute or of the particular issues."[24] The U.S. Supreme Court said that the "core component" of standing is that the plaintiff alleges "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[25]

Historically, an individual's status as a federal taxpayer was insufficient to confer the standing necessary to bring a claim based on an act of the federal government because there was no "personal injury," only a general injury.[26] In *Flast v. Cohen*, the Supreme Court created an exception to this rule and held that "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."[27] The Court in *Flast* applied this new exception to the Establishment Clause of the First Amendment because it "specifically limit[s] the taxing and spending power conferred by Art. I, § 8."[28]

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22. *See infra* Part VI.

23. U.S. CONST. art. III, § 2, cl. 1; *see also* Allen v. Wright, 468 U.S. 737, 750 (1984).

24. Warth v. Seldin, 422 U.S. 490, 498 (1975).

25. *Allen*, 468 U.S. at 751 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

26. *See generally Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam) (stating that "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public"); Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (indicating that a plaintiff must allege a personal injury, "not merely that he suffers in some indefinite way in common with people generally").

27. 392 U.S. 83, 105–06 (1998). The challenged expenditures in *Flast* dealt with disbursements made under the Elementary and Secondary Education Act of 1965. *Id.* at 85.

28. *Id.* at 105. Specifically, the *Flast* Court created a two-part test for determining whether taxpayer standing will apply:

The Supreme Court recently reviewed the *Flast* exception in *Hein v. Freedom from Religion Foundation, Inc.*[29] *Hein* involved a complaint brought by several federal taxpayers who claimed that certain conferences organized by the Executive Branch singled out faith-based organizations "as being particularly worthy of federal funding."[30] This, the plaintiffs argued, was in violation of the Establishment Clause because faith-based organizations were "insiders and favored members of the political community," while nonbelievers were given the message that they were "outsiders."[31] The plaintiffs' asserted basis for the standing of the individual respondents was that they were "federal taxpayers who [were] opposed to the use of Congressional taxpayer appropriations to advance and promote religion."[32]

In analyzing the applicability of *Flast* to the facts before it, the *Hein* Court rejected a broad reading of *Flast* that would allow taxpayer standing to be sufficient to challenge any "expenditure of government funds in violation of the Establishment Clause."[33] Rather, the Court determined that *Flast* should only apply to expenditures that are expressly authorized or mandated by specific congressional action.[34] This meant that the facts of *Hein* did not support taxpayer standing because the requisite link between constitutional violation and congressional action was not present. As the Court stated, "the expenditures at issue" in the case "were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities."[35] These general appropriations, the Court continued, were thus the result of "executive discretion, not congressional action."[36]

One of the first pending Establishment Clause cases to fall victim to *Hein*'s ruling involved faith-based programming implemented at the Grants Women's Facility in Grants, New Mexico.[37] The case, brought by individuals who were members of the Freedom from Religion Foundation, as well as New Mexico taxpayers, was dismissed on July 6, 2007 after the district court judge filed a Notice of Proposed Withdrawal of Memorandum Opinions and Orders based on the issue of taxpayer

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> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute....Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102–03.

29. 127 S. Ct. 2553 (2007).

30. *Id.* at 2560 (citation omitted) (internal quotation marks omitted).

31. *Id.* at 2560–61 (citation omitted) (internal quotation marks omitted).

32. *Id.* at 2561 (citation omitted) (internal quotation marks omitted).

33. *Id.* at 2565 (citation omitted) (internal quotation marks omitted).

34. *Id.* at 2566.

35. *Id.*

36. *Id.*

37. Freedom from Religion Found., Inc. v. Richardson, No. CIV-05-1168-RLP/KBM (D.N.M. Nov. 7, 2005).

standing.[38] The specifics of that case and the implications of the *Hein* ruling on it are discussed in Parts V and VI. As discussed *infra*, the New Mexico case could nevertheless be maintained if a prisoner was willing to bring the claim and thus fulfill the requisite "personal injury" component of the standing doctrine.[39]

III. THE DEVELOPMENT OF THE ESTABLISHMENT CLAUSE TESTS IN THE U.S. SUPREME COURT

The Free Exercise and the Establishment Clauses of the First Amendment—commonly referred to as the Religion Clauses—seek to strike a balance between government interference (or abstention from interference) in religious practice and government allowance of freedom of religious practice.[40] The Establishment Clause aims to accomplish the former by mandating that the federal government "shall make no law respecting an establishment of religion."[41] As with most constitutional provisions,[42] the U.S. Supreme Court has interpreted the Establishment Clause both broadly and narrowly throughout the years.[43]

In its broadest interpretation, the Establishment Clause prohibits the federal government from enacting laws that "aid one religion, aid all religions, or prefer one religion over another."[44] This "no aid" view of Establishment Clause jurisprudence opposes the use of taxpayer money to support any religious group.[45] The theory behind this "no aid" view is that allowing the government to distribute taxpayer funds to religious organizations impermissibly permits the government to support one or a few religions over others.[46]

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38. Notice of Proposed Withdrawal of Memorandum Opinions and Orders [Docket No. 92 & 93], *Freedom from Religion Found., Inc.*, No. CIV-05-1168-RLP/KBM (D.N.M. June 26, 2007).

39. *See infra* Part V.

40. Wallace v. Jaffree, 472 U.S. 38, 49 (1985) (stating that "the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience").

41. U.S. CONST. amend. I. The Free Exercise Clause accomplishes the latter by stating that "Congress shall make no law...prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The prohibitions against the federal government establishing religion as set forth in the First Amendment have been extended to the states. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

42. The U.S. Supreme Court articulated the following in *Lemon v. Kurtzman*:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

403 U.S. 602, 612 (1971).

43. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 150–51 (2d rev. ed. 1994).

44. *Everson*, 330 U.S. at 15.

45. THOMAS C. BERG, THE STATE AND RELIGION IN A NUTSHELL 210 (2d ed. 2004); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1192 (3d ed. 2006) (indicating that a theory of "strict separation" means that "government should be, as much as possible, secular; religion should be entirely in the private realm of society").

46. BERG, *supra* note 45, at 210.

At the other end of the spectrum is the "equal aid" view of Establishment Clause analysis.[47] An "equal aid" approach requires that religious organizations be entitled to receive the same funding as their secular counterparts.[48] The rationale behind this position is that individuals and groups should not be punished with an inability to receive government funding just because they choose to exercise their First Amendment right to practice religion.[49] The U.S. Supreme Court relied on this neutral view in a series of cases in which it held that distributing government funds for secular purposes without reference to religion did not violate the Establishment Clause simply because a portion of the funds was given to religious organizations.[50]

Over the years, the Court has attempted to streamline Establishment Clause jurisprudence, which has proven difficult in light of the varying opinions held by the Justices regarding the correct interpretation and application of the constitutional language.[51] The quest for a streamlined Establishment Clause analysis has resulted in a muddled and confusing amalgamation of tests and standards.[52] In the sections below, the possible application of strict scrutiny, under *Larson v. Valente*,[53] to Establishment Clause Claims is discussed.[54] Next, the various tests that the U.S. Supreme Court has formulated are introduced. These include the *Lemon* test,[55] the coercion test,[56] the endorsement test,[57] and the principle of private choice.[58] This variety of formulations of analysis provides fertile ground for arguments regarding the broad and narrow interpretations of the Establishment Clause.

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47. *Id.*

48. *Id.*

49. *Id.* at 210–11. Proponents of this view cite the fact that the government supplies both secular and religious organizations with other government benefits (i.e., protection by fire departments or police agencies) to support neutral funding in other realms. *Id.* The U.S. Supreme Court supported the "equal aid" view in *Everson v. Board of Education*. 330 U.S. 1. In *Everson*, a New Jersey taxpayer alleged that a local school board's plan to reimburse parents of parochial school students for the cost of transporting their children to and from school violated the Establishment Clause. *Id.* at 3. The Court, while acknowledging that a state is barred by the Establishment Clause from contributing tax funds to support religious institutions, ruled in favor of the school board. *Id.* at 16. The Court noted that the key to a First Amendment analysis in scenarios involving the funding of religious organizations should be neutrality. *Id.* at 18. The Court stated that because public school children are given the benefits of safety and convenience that are provided by state-sponsored transportation, children attending parochial schools should as well. *Id.* at 17. It was by the choice of the parents, not the school board, that the children happened to attend parochial school. *See id.* at 18.

50. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); Bowen v. Kendrick, 487 U.S. 589, 609 (1988) ("[T]his Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."); Mueller v. Allen, 463 U.S. 388, 398–99 (1983) ("[A] program...that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

51. PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 30 (2005).

52. *See id.*

53. 456 U.S. 228 (1982).

54. *See infra* Part II.A.

55. *See infra* Part III.B–C.

56. *See infra* Part III.E.

57. *See infra* Part III.D.

58. *See infra* Part III.F.

A. *The Standard of Review for Establishment Clause Claims*

The first inquiry in any lawsuit involving a constitutional claim involves the appropriate level of scrutiny by which the court will analyze the government's actions. The U.S. Supreme Court has formulated three levels of scrutiny under which courts can analyze constitutional claims: rational basis,[59] mid-tier scrutiny,[60] and strict scrutiny.[61] Strict scrutiny requires courts faced with statutes that classify individuals based on a suspect classification to determine (1) if that classification is supported by a compelling government interest and (2) if the means used are narrowly tailored.[62] Strict scrutiny is reserved for classifications that are based on "discrete and insular minorities"[63] or that implicate a fundamental right.[64] The Court has never made an affirmative decision regarding which level of scrutiny applies to Establishment Clause claims.

The question of whether strict scrutiny should apply in Establishment Clause cases depends on the circumstances under which the claims arise.[65] In *Larson v. Valente*, the Court outlined the appropriate standard of review for Establishment Clause claims dealing with unequal treatment between religions.[66] The Court stated that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[67]

In *Larson*, the Court applied strict scrutiny analysis to invalidate a Minnesota statute that imposed registration and reporting requirements only upon religious organizations that received more than half of their funds from individuals who were not members of the church.[68] The Court found that the fifty percent provision of the statute was not narrowly tailored to further a compelling government interest.[69] In its analysis, the Court refused to apply the *Lemon v. Kurtzman* test[70] to the Establishment Clause claim, stating that the *Lemon* test was "intended to apply to

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59. Under this level of scrutiny, a statute will be valid if the classification of individuals made is rationally related to a legitimate state interest. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

60. To survive mid-tier scrutiny, a statute's classification must be "substantially related to a sufficiently important governmental interest." *Id.* at 441. The Court applies this standard to classifications based on criteria such as gender and illegitimacy. *Id.*

61. *Id.* at 440.

62. *Id.*

63. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching juridical inquiry.").

64. *E.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (concluding that marriage is a fundamental right).

65. *See* Russell W. Galloway, *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 846–47 (1989) (discussing the various rules to be applied to Establishment Clause claims based on the nature of the aid given).

66. 456 U.S. 228, 246 (1982). The statute at issue in *Larson* indicated that any religious organization that received over fifty percent of its funds from nonmembers was required to register with the State and file extensive yearly reports indicating its total receipts and income. *Id.* at 231–32.

67. *Id.* at 246.

68. *Id.* at 230, 246.

69. *Id.* at 255. The State's proffered compelling interest was that the statutory provision was necessary to protect its citizens from abusive practices involved in a charity's solicitation of funds. *Id.* at 248. The Court recognized this to be a true "compelling" government interest but found that the fifty-percent rule was not closely fitted to meet this purpose. *Id.*

70. *See infra* Part III.B.

laws affording a uniform benefit to *all* religions, and not to provisions...that discriminate *among* religions."[71]

In *Hernandez v. Commissioner of Internal Revenue*, the Court outlined the placement of *Larson*'s strict scrutiny standard in the landscape of the Court's Establishment Clause jurisprudence.[72] The *Hernandez* Court stated, "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*."[73]

B. The Lemon *Test*

The Court began its effort to formulate a single test for determining the scope of the Establishment Clause in 1971 in *Lemon v. Kurtzman*.[74] The three-part test that emerged in *Lemon* focused on the nature of the organization receiving government funding, the government's reason for providing the funding, and how involved the government became with the organization due to the funding.[75]

Lemon involved challenges to Pennsylvania and Rhode Island statutes that provided state funding to elementary and secondary schools with religious affiliation.[76] The statutes allowed the payment of government funds to non-public schools, including religious schools, for various secular expenses.[77] In addition, both statutes contained provisions requiring the State to practice continued oversight of the recipient schools in order to ensure that the funding was only used for the prescribed secular purposes.[78]

In *Lemon* the Court drew on previous Establishment Clause cases to articulate a test that would address "the three main evils against which the Establishment Clause was intended to afford protection."[79] The three evils were the "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[80] The resulting test included a prong to address each of these evils: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster

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71. *Larson*, 456 U.S. at 252 (footnote omitted). The Court indicated that, even though *Lemon* was not applicable to the inquiry before it, *Lemon* did "reflect the same concerns that warranted the application of strict scrutiny." *Id.*

72. 490 U.S. 680, 695 (1989).

73. *Id.*

74. 403 U.S. 602 (1971).

75. *Id.* at 619–20.

76. *Id.* at 606.

77. *Id.* at 607–10. The purpose of the Rhode Island statute was to supplement the salaries of teachers who taught courses identical to those offered in public schools to children in non-public schools, some of which were parochial. *Id.* at 607–08. The Pennsylvania statute allowed the state to directly reimburse non-public schools for materials and teachers' salaries for those schools that taught secular courses. *Id.* 609–10.

78. *Id.* at 608–10. The Rhode Island statute called for the submission of financial data from the non-public schools in order for the State to determine what percentage of expenses was used for secular as opposed to religious activities. *Id.* at 608. Similarly, the Pennsylvania legislation called for State auditing of the non-public schools in order to ensure that the funds were being used solely for the prescribed secular purposes. *Id.* at 610.

79. *Id.* at 612.

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

'an excessive government entanglement with religion.'"[81] In applying this three-part analysis to the facts of the case, the Court determined that both statutes were constitutionally deficient under the third prong of the test.[82] Specifically, the Court ruled that ongoing oversight of the religiously affiliated schools would be necessary to ensure that the secular stipulations in the statutes were being followed and that the oversight itself would create excessive government entanglement with religion.[83]

Thus, the Court set down a uniform three-part test that could potentially serve to guide other courts regarding Establishment Clause challenges. The three *Lemon* factors were interpreted and expounded upon by the U.S. Supreme Court in the years following the decision. Discussed below is how the Court has interpreted the meaning and the language of the *Lemon* test's three prongs.

1. The First Prong—Secular Legislative Purpose

In *Mueller v. Allen*, the Court clarified the requirements needed to satisfy the "secular, legislative purpose" prong of the *Lemon* test.[84] The Court stated that if a plausible secular purpose could be found for a state's enactment of certain legislation, then the legislation would most likely be valid under this part of the test.[85]

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court further clarified that the first prong of the *Lemon* test does *not* require that a law's purpose be completely unrelated to religion.[86] Rather, the "purpose" prong is meant to "prevent[] the relevant governmental decisionmaker

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81. *Id.* at 612–13 (citation omitted) (quoting *Walz*, 397 U.S. at 674).

82. *Id.* at 614.

83. *Id.* at 619–20. The Court also concluded that the Pennsylvania statute was unconstitutional under the third prong because it directly funded church-related schools. *Id.* at 621. The Court explained as follows: "'Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards....'" *Id.* (alteration in original) (quoting *Walz*, 397 U.S. at 675).

84. 463 U.S. 388, 394–95 (1983). *Mueller* involved a challenge brought by Minnesota taxpayers against a Minnesota statute that allowed parents to take a tax deduction for certain costs of their children's education. *Id.* at 391–92. The plaintiffs alleged that the statute violated the Establishment Clause because it provided financial assistance to religious institutions. *Id.* at 392. The Court, applying *Lemon*, found no violation of the Establishment Clause. *Id.* at 394. The Court found that the statute had the secular legislative purpose of defraying educational costs for parents. *Id.* at 395. The Court also concluded that the second *Lemon* prong was not violated because the deduction was available to all parents regardless of the type of school that their children attended. *Id.* at 397. The Court relied on the principal of private choice in its analysis of *Lemon*'s second prong. *Id.* at 399–400; *see also infra* Part III.F. Finally, the Court concluded that the statute did not offend the third *Lemon* inquiry because the state officials were only involved in determining whether certain books would apply for the deduction. *Mueller*, 463 U.S. at 403. The Court found this act to be insufficient to qualify as excessive entanglement. *Id.*

85. *Mueller*, 465 U.S. at 394–95.

86. 483 U.S. 327, 335 (1987). *Amos* involved a claim of religious discrimination brought by individuals who were fired from a church-run facility due to their lack of membership with the church. *Id.* at 330. The formerly employed individuals claimed that the exemption for religious organizations provided in the Civil Rights Act's prohibition against employment discrimination based on religious affiliation violated the Establishment Clause. *Id.* at 329–30. The U.S. Supreme Court upheld the exemption under a *Lemon* analysis. *Id.* at 335. The Court held that the exemption did not violate the first prong of the *Lemon* test because it was a "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* The Court also determined that the exemption passed muster under the second *Lemon* prong because "there is ample room for accommodation of religion under the Establishment Clause." *Id.* at 338.

...from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[87]

In *Wallace v. Jaffree*, however, the Court clarified this issue by stating that, when analyzing the first *Lemon* prong, "it is appropriate to ask 'whether government's *actual* purpose is to endorse or disapprove of religion.'"[88] Justice O'Connor's concurrence in this opinion indicated that it is the duty of the courts to distinguish "a sham secular purpose from a sincere one."[89] Thus, while *Lemon*'s first prong has been construed as fairly easy to satisfy, courts must be careful not to dismiss its applicability too quickly.[90]

2. The Second Prong—Primary or Principal Effect

The second prong of the *Lemon* test has also received attention, and attempts have been made to clarify it in post-*Lemon* Establishment Clause cases. In *Hunt v. McNair*, the Court explained that government aid to religious organizations may satisfy the primary effect prong of the *Lemon* test if it "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[91] In *Roemer v. Board of Public Works*, the Court further elaborated by reducing the *Hunt* principle into a two-part analysis requiring "(1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded."[92]

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87. *Id.* at 335.

88. 472 U.S. 38, 56 (1985) (emphasis added) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). *Wallace* involved an Establishment Clause claim asserted against an Alabama statute that authorized public schools to have a daily "period of silence for meditation or voluntary prayer." *Id.* at 40 (internal quotation marks omitted). A statement in the statute's legislative history indicated "that the legislation was an effort to return voluntary prayer to the public schools." *Id.* at 57 (internal quotation marks omitted). The Court used this statement, as well as the state's inability to show any secular purpose, to determine that the true purpose of the statute was to "express[] the State's endorsement of prayer activities." *Id.* at 60. The Court concluded that the enactment of the statute had absolutely no secular purpose and was in violation of both *Lemon*'s first prong and, ultimately, the Establishment Clause. *Id.* at 56, 61.

89. *Id.* at 75 (O'Connor, J., concurring).

90. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 860–64 (2005) (discussing the need to continue using the *Lemon* purpose test in order to ensure that courts use the facts presented to identify the government's actual objective).

91. 413 U.S. 734, 743 (1973). *Hunt* concerned a South Carolina statutory scheme under which revenue bonds were issued to institutions of higher learning to help fund their construction projects. *Id.* at 736. The statute precluded the issuance of aid for the construction of facilities that would be used for religious worship or religious instruction or that were connected in part to a program of a school of divinity. *Id.* at 736–37. The Court found the scheme to be constitutional using the *Lemon* test. *Id.* at 749. The Court concluded that the primary effect of the funding was not to advance or inhibit religion because the college was not "oriented significantly towards sectarian rather than secular education." *Id.* at 744. Furthermore, no excessive entanglement existed because the State would only have to become involved in overseeing the use of the funds if the college failed to make its rental payments. *Id.* at 748.

92. 426 U.S. 736, 755 (1976). *Roemer* involved an Establishment Clause challenge against a Maryland statute that gave public aid in the form of grants to any private college, including religious ones, if they met the criteria laid out in the statute. *Id.* at 739–40. Using the two-part *Hunt* inquiry, the *Roemer* Court upheld the statute, finding that the activities of the religious institutions in question satisfied the *Lemon* test. *Id.* at 758–61. Particularly important in the Court's analysis were the council's two-step screening process, which required eligible institutions to refrain from "awarding primarily theological or seminary degrees," and that any funds received could not be used for sectarian purposes. *Id.* at 741–42 (internal quotation marks omitted). The Court indicated that the screening process ensured that the secular activities alone would not be funded. *Id.*

While *Hunt* clarified this prong through the creation of the two-part test, *Amos* placed a limitation on its broad application.[93] In *Amos*, the Court stated that a violation of the second *Lemon* prong does not occur simply if the government allows religious organizations to advance religion.[94] Rather, for the "effects" prong of the *Lemon* test to be violated, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[95]

3. The Third Prong—Excessive Entanglement

The determination of whether a state's action violates *Lemon*'s third prong was outlined in *Lemon* itself.[96] There, the Court stated that one had to look to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[97] The Court in *Lemon* found both statutes in question to be excessively entangled because both required the State to maintain a continuing relationship with the religiously affiliated schools in order to ensure that the schools were using the funds for purely secular purposes.[98] This, however, is not the only context in which excessive entanglement can be found.

In *Larkin v. Grendel's Den, Inc.*, the Court indicated that excessive entanglement also exists when a legislative body delegates governmental authority to a religious entity.[99] In *Larkin*, the Court emphasized that the Establishment Clause requires the government "to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government.*"[100] Twelve years later, the Court expanded this idea to include a proscription of delegation of civic functions to a particular religious group rather than religious groups generally.[101]

Thus, under the *Lemon* test, courts are first instructed to look to the government's purpose behind providing the funding.[102] Although the inquiry into legislative purpose is generally deferential to the government's decisions, courts must still be

93. 483 U.S. 327 (1987).
94. *Id.* at 337.
95. *Id.*
96. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).
97. *Id.*
98. *Id.* at 619, 621–22.
99. 459 U.S. 116, 126 (1982). In *Larkin*, the Court addressed Establishment Clause concerns that arose in reaction to a Massachusetts statute allowing churches and schools to veto liquor license applications for establishments located within five-hundred feet of them. *Id.* at 117. The Court found that the statute violated the third prong of the *Lemon* test because it "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards." *Id.* at 127. The Court also found the statute violative of the second *Lemon* prong because it provided no check on the ability of the churches to use their veto power to advance religious goals. *Id.* at 125.
100. *Id.* at 126 (quoting *Lemon*, 403 U.S. at 625).
101. Bd. of Educ. v. Grumet, 512 U.S. 687, 710 (1994). *Grumet* involved an Establishment Clause challenge to an act of the New York legislature allowing a group of practitioners of Satmar Hasidim to create a separate school district for their members. *Id.* at 690. The Court determined that the civic authority to create school districts belonged to the State and that allowing the religious sect to perform this duty was a delegation of that civic power. *Id.* at 698. The Court relied on its earlier finding in *Larkin* to hold that the act was a violation of the Establishment Clause because it allowed "an allocation of political power on a religious criterion and neither presuppose[d] nor require[d] governmental impartiality toward religion." *Id.* at 690.
102. *See supra* Part III.B.1.

watchful for potential "sham" proffered purposes.[103] Next, Courts should focus on the primary effect of the government funding.[104] The funding cannot flow to an institution that is "pervasively sectarian" if doing so means that the government is effectively advancing religion.[105] Finally, the funding cannot place the government in a position of being "excessively entangled" with religion.[106] Excessive entanglement may occur when the government maintains a high degree of oversight of a religious organization or when the legislative body delegates governmental authority to a religious organization.[107]

Over the years, the *Lemon* test lost some of its influence as various Justices, including those who originally supported it, showed wavering loyalty to the standard and, at times, attempted to undermine its validity.[108] Justice O'Connor articulated her frustration with the *Lemon* test in her concurrence in *Board of Education v. Grumet*.[109] There, Justice O'Connor opined that, given the wide range of diverse Establishment Clause claims presented to the Court, it is unwise and necessarily difficult to attempt to create one test to govern them all.[110] Despite harsh criticisms of the *Lemon* test, however, it has never been abandoned; rather, it has only been modified.[111] The most successful overhaul of the *Lemon* test occurred in 1997 in *Agostini v. Felton*.[112]

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103. *See supra* notes 88–90 and accompanying text.

104. *See supra* Part III.B.2.

105. *See supra* Part III.B.2.

106. *See supra* notes 96–101 and accompanying text.

107. *See supra* notes 96–101 and accompanying text.

108. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart..., and a sixth has joined an opinion doing so." (citation omitted)); Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting) ("The Court's extended treatment of the 'test' of *Lemon v. Kurtzman* suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts.'" (citation omitted)); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) ("The threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes." (quoting Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 822 (1973) (White, J., dissenting))).

109. 512 U.S. 687, 720 (1994) (O'Connor, J., concurring).

110. *Id.*

111. Justice Scalia's concurring opinion in *Lamb's Chapel* continued:

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in some somnolent state; one never knows when one might need him.

508 U.S. at 399 (Scalia, J., concurring) (citations omitted) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

112. 521 U.S. 203 (1997).

C. Lemon *Refined*

In *Agostini*, the Court concluded that when applying the *Lemon* test, "the factors...use[d] to assess whether an entanglement is 'excessive' are similar to the factors...use[d] to examine 'effect.'"[113] The Court thus combined the second and third *Lemon* factors into a single inquiry, reducing the Establishment Clause analysis from a three-pronged to a two-pronged analysis.[114]

The *Agostini* Court also articulated three main criteria that should be used to evaluate the newly consolidated "effect" and "entanglement" prong.[115] These criteria mandate that the government aid may not (1) result in governmental indoctrination, (2) define the recipients by reference to religion, or (3) create excessive entanglement between the government and the religious organization.[116] Thus, entanglement became just one factor that lower courts are required to consider when analyzing the effect of government aid in the newly formulated *Lemon-Agostini* inquiry.[117]

D. *The Endorsement Test—Another Twist on* Lemon

The endorsement test, another proposed modification to *Lemon*, was offered by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly* in 1984.[118] Her analysis delved into the requirements necessary to satisfy the purpose and effect prongs of the *Lemon* inquiry.[119] In her concurrence, Justice O'Connor indicated that the focus of the purpose prong of the *Lemon* test should be on "whether the government intends to convey a message of endorsement or disapproval of religion."[120] In reference to the effects prong, she posited that courts should analyze whether a government action has the actual effect of communicating a message of religious endorsement or religious disapproval.[121]

In assessing these criteria, Justice O'Connor's endorsement analysis centers on whether a reasonable person would believe that a government's action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[122] To prevent such a schism in society, Justice O'Connor stated that governments are precluded from "conveying

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113. *Id.* at 232.
114. *See id.*
115. *Id.* at 234.
116. *Id.*
117. Mitchell v. Helms, 530 U.S. 793, 807–08 (2000).
118. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). *Lynch* turned on the question of whether the City of Pawtucket, Rhode Island violated the Establishment Clause by erecting a crèche in a park. *Id.* at 671 (majority opinion). While Justice O'Connor presented her use of the Endorsement Test in this case in concurrence, the four dissenters in the case agreed with her that the central question should involve governmental endorsement. *See id.* at 698 (Brennan, J., dissenting). The dissenters, however, did not agree with Justice O'Connor's analysis of *how* the endorsement test weighed in the facts of that case. *See id.* at 701.
119. *Id.* at 690 (O'Connor, J., concurring). Justice O'Connor stated in her 1985 concurring opinion in *Wallace v. Jaffree* that "[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect." 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).
120. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).
121. *Id.* at 692.
122. *Id.* at 688.

or attempting to convey a message that religion or a particular religious belief is favored or preferred."[123]

The endorsement test set forth in *Lynch* was adopted by a majority of the Court in *Santa Fe Independent School District v. Doe*.[124] In that case, the Court used the endorsement test to find that a school district's policy of allowing student-led and student-initiated prayer at school football games violated the Establishment Clause.[125] The school district argued that the student-initiated speech was private speech and, therefore, not attributable to the government.[126] The Court disagreed, however, and held that the speech was not private because it took "place on government property at government-sponsored school-related events."[127] Furthermore, the Court indicated that the actual or perceived governmental endorsement of the students' religious message was apparent from the circumstances under which it was delivered.[128] Because the message was delivered through the school's PA system and conducted on school property, the listening audience was given the perception that the message represented "the views of the majority of the student body delivered with the approval of the school administration."[129] The Court concluded that these circumstances created the appearance of school sponsorship of the religious message and were impermissible because they had the potential to give non-adherents the message that they were outsiders and not favored members of the political community.[130]

Not all members of the legal community are sold on the merits of the endorsement test.[131] Justice Kennedy has complained that "the endorsement test is flawed in its fundamentals and unworkable in practice."[132] Still, this form of analysis for Establishment Clause cases has been relied upon and given credence in other U.S. Supreme Court cases.[133]

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123. *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

124. 530 U.S. 290 (2000).

125. *Id.* at 301.

126. *Id.* at 302.

127. *Id.*

128. *Id.* at 307.

129. *Id.* at 308. The Court also pointed to the fact that the school's name was likely written on banners, flags, and uniforms within the stadium as further support of the likelihood that an outsider's perception would have been that the message was endorsed by the school itself. *Id.*

130. *Id.* at 309–10 (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

131. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986).

132. *County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part).

133. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (concluding that the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act was unconstitutional because it impermissibly endorsed religion through the promotion of the belief that a supernatural being created humankind); Wallace v. Jaffree, 472 U.S. 38 (1985) (finding that an Alabama statute that allowed moments of silence in school for prayer or meditation had the unconstitutional effect of having the government affirmatively endorse religious prayer).

E. The Coercion Test

The direction of the judicial Establishment Clause analysis took yet another turn with the introduction of the coercion test in *Lee v. Weisman*.[134] In *Lee*, the Court stated that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[135] Expanding on the rationale behind this idea, the Court continued by stating that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[136]

In *Lee*, a concerned public school parent challenged the school's invitation of clergy to deliver an invocation and benediction prayer during graduation ceremonies by claiming a violation of the Establishment Clause.[137] The Court held that the inclusion of the prayers was unconstitutional and that the resulting government involvement with a religious activity was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[138] Relying on its newly formulated coercion principles, the Court concluded that the school's actions were unconstitutional due to the coercive nature of including prayer in graduation ceremonies.[139] While the Court recognized that the graduation events were voluntary, it found that, given the importance of graduation ceremonies in our society, the school was "in effect requir[ing] participation in a religious exercise."[140] The Court iterated that "subtle coercive pressures exist...where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[141]

Although the coercion test has never been supported by a majority of the Court,[142] the basic principle set out in *Lee* has been included in the analysis of the Court's subsequent cases.[143] Despite the coercion test's introduction into Establishment Clause jurisprudence, Justices and scholars alike have criticized the test because it "guts" the purpose of the Establishment Clause.[144] Justice O'Connor attacked the coercion test because it only proscribes certain forms of government proselytizing and "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others."[145] Relying on constitutional grounds, one scholar posited that the coercion

134. 505 U.S. 577 (1992).
135. *Id.* at 587 (alteration in original) (quoting *Lynch*, 465 U.S. at 678).
136. *Id.* at 591–92.
137. *Id.* at 580.
138. *Id.* at 587.
139. *Id.*
140. *Id.* at 594.
141. *Id.* at 588.
142. BERG, *supra* note 45, at 34–35.
143. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (using the principles outlined in *Lee* to find that a school policy of allowing student-initiated prayer before school football games coerced students to participate in school-sponsored religion).
144. *See* BERG, *supra* note 45, at 175–76.
145. County of Allegheny v. ACLU, 492 U.S. 573, 627–28 (O'Connor, J., concurring).

test made the Establishment Clause "superfluous or repetitious, because the free-exercise clause protects against coercion that is based on religion."[146]

F. Private Choice

One final factor that the Court has added to its Establishment Clause jurisprudence is the concept of private choice.[147] Private choice relies on the distinction that the Court has made between government funding provided directly to a religious institution and funding that reaches an institution only through the choice of individual recipients of the funds.[148] The latter type of religious funding is not generally attributable to the government and can break any possible improper connection between government and religion.[149]

The Court first introduced this concept in *Mueller v. Allen*, where it determined that money given to a parochial school through the private choice of an individual was constitutional.[150] The *Mueller* Court reasoned that "[t]he historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[151] More recently, in *Zelman v. Simmons-Harris*, the Court described the impact of individual determinations of the recipient of public funds as causing "the circuit between government and religion [to be] broken."[152] In *Zelman*, the Court found true private choice where there were many options from which to choose, including between public school and private school as well as between secular and religious schools.[153]

In order to have private choice act as the "circuit breaker" that creates constitutionally sound funding of religious programs, the choice presented must be a "genuine choice."[154] In the case of tuition aid for schools, Justice O'Connor's concurring opinion described a "genuine choice" for parents as one involving non-religious schools that "need not be superior to religious schools in every respect.

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146. LEVY, *supra* note 43, at 159.

147. JAY ALAN SEKULOW, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS 296 (2006).

148. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

149. *Id.* at 652–53.

150. 463 U.S. 388, 400 (1983).

151. *Id.* The Court described these historic purposes as "'preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'" *Id.* at 399–400 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796 (1973)).

152. 536 U.S. 639, 652 (2002). *Zelman* involved an Establishment Clause challenge to the Ohio Pilot Project Scholarship Program. *Id.* at 644. The program provided two kinds of assistance to parents of children in the school district involved: (1) the program would provide tuition aid to parents who decided to send their children to private school and (2) the program offered the alternative of tutorial aid for students whose parents decided to keep them in the public school system. *Id.* at 645. Ninety-six percent of the students who participated in the tuition aid portion of the program enrolled in religiously affiliated schools. *Id.* at 647. The *Zelman* Court found the funding of the religious schools to be the result of true private choice and, thus, the funding could not be attributed to the State. *Id.* at 653.

153. *Id.* at 662.

154. *Id.* at 669 (O'Connor, J., concurring).

They need only be adequate substitutes for religious schools in the eyes of the parents."[155]

The U.S. Supreme Court gave the principle of private choice further credence in a series of cases that upheld the private choices of citizens to use neutrally distributed state funds to support religious ends.[156] Moreover, the Court clarified 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.'"[157]

Private choice is a powerful doctrine capable of making action that might otherwise be found unconstitutional under the other tests constitutional by acting as a circuit-breaker between the religious organization and the government.[158] It plays an important role in the Court's modern Establishment Clause analysis.

G. The Current State of Establishment Clause Jurisprudence

Currently the U.S. Supreme Court's Establishment Clause jurisprudence is best described as being in a state of "hopeless disarray."[159] Even within the Court there is dissention about which test should be used to analyze Establishment Clause cases, evidenced by both the affection and hatred shown for the long standing *Lemon* inquiry.[160] The Court's cases show that when government funding is involved, it can be classified as either supplied directly to the religious organization from the government or through an individual intermediary's choice with different constitutional outcomes for each. It is in this mess of tests and standards that this Comment seeks to better understand the potential issues involved in Establishment Clause claims regarding faith-based prison programs.

IV. THE ESTABLISHMENT CLAUSE IN THE PRISON CONTEXT

Although the U.S. Supreme Court has never dealt directly with the question of faith-based programs in prisons, various lower courts have taken on the issue with mixed results. The constitutionality of the programs under the lower courts' analyses tends to depend on which of the Supreme Court's tests is applied.

A. Alcoholics Anonymous and Narcotics Anonymous Programs

Most cases involving claims of Establishment Clause violations in correctional facilities stem from a prison's use of Alcoholics Anonymous (AA) or Narcotics

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155. *Id.* at 670. In *Zelman*, this genuine option was shown to exist for parents using the Ohio voucher program where many had selected non-religious private schools over the religious alternatives. *See id.*

156. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (concluding that the private choice of the parents of a deaf student to have him attend a parochial school did not mean that allowing a state-employed sign language interpreter to accompany him was impermissible government support of religion); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (finding that a student's use of neutrally available state funds to pay tuition for a religious education was based on the student's decision to support religion, not the State's).

157. Mitchell v. Helms, 530 U.S. 793, 816 (2000) (quoting *Witters*, 474 U.S. at 489).

158. *See Zelman*, 536 U.S. at 653–54.

159. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

160. *See supra* Part III.C.

Anonymous (NA) as substance abuse treatment plans.[161] AA and NA are treatment programs that several courts have determined to be "religion" for the purpose of Establishment Clause challenges.[162] The challenges involving AA and NA tend to succeed when participation is mandatory as a condition of probation or if the AA or NA program is the only drug or alcohol rehabilitation option presented to the prisoner because (1) the programs are considered religion and (2) required participation in them is considered coercive.[163]

The coercion test from *Lee v. Weisman*[164] was given a more concrete form in the three-part test introduced in *Kerr v. Farrey*.[165] In *Kerr*, the Seventh Circuit analyzed an Establishment Clause claim involving NA at a Wisconsin prison.[166] In addressing the Establishment Clause question, the *Kerr* court rejected the lower court's analysis of the facts under the *Lemon* test and instead used its own three-part test, which it believed to be a summary of the U.S. Supreme Court's coercion test jurisprudence.[167] *Kerr*'s three-part analysis asked (1) if there was state action, (2) if the state action amounted to coercion, and (3) if the coercion involved a religious or secular object.[168]

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161. AA is described as a worldwide "fellowship of men and women" who help each other to stay sober. ALCOHOLICS ANONYMOUS, A BRIEF GUIDE TO ALCOHOLICS ANONYMOUS 6 (1972), *available at* http://www.alcoholics-anonymous.org/en_pdfs/p-42_abriefguidetoaa.pdf. The central ideology of the AA recovery program is the "Twelve Steps," which describe the experience of previous AA members. *Id.* at 7. The Twelve Steps state:

> 1. We admitted we were powerless over alcohol— that our lives had become unmanageable.
> 2. Came to believe that a Power greater than ourselves could restore us to sanity.
> 3. Made a decision to turn our will and our lives over to the care of God as *we understood Him.*
> 4. Made a searching and fearless moral inventory of ourselves.
> 5. Admitted to God, to ourselves and to another human being the exact nature of our wrongs.
> 6. Were entirely ready to have God remove all these defects of character.
> 7. Humbly asked Him to remove our shortcomings.
> 8. Made a list of all persons we had harmed, and became willing to make amends to them all.
> 9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
> 10. Continued to take personal inventory and when we were wrong promptly admitted it.
> 11. Sought through prayer and meditation to improve our conscious contact with God, *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.
> 12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

Id. at 13.

NA is an offshoot of the AA program that is designed for those suffering from drug addiction. NARCOTICS ANONYMOUS, INFORMATION ABOUT NA 1 (2007), *available at* http://www.na.org/pdf/info_about_NA_2007.pdf. NA relies on the same Twelve Steps used in AA programs but substitutes the word "addiction" for "alcohol" in the First Step. *Id.*

162. *See, e.g.*, Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1075 (2d Cir. 1997) (finding that an AA program had a "substantial religious component" because "[p]articipants were told to pray to God for help in overcoming their affliction"); Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) ("A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being.").

163. *See, e.g.*, *Warner*, 115 F.3d at 1075; *Kerr*, 95 F.3d at 480.

164. 505 U.S. 577 (1992).

165. 95 F.3d 472.

166. *Id.* at 473–74.

167. *Id.* at 479.

168. *Id.*

The issue before the court in *Kerr* was whether a prison could require an inmate to attend NA when the consequences of failure to attend included being rated a higher security risk and having diminished parole eligibility.[169] Because NA was the only substance abuse rehabilitation program available to the inmates at the facility in question,[170] the court determined that sufficient coercion existed to raise an Establishment Clause question.[171] In finding that the prison's NA requirement met all three parts of its newly enunciated test,[172] the court ruled that the program violated the Establishment Clause.[173]

The Seventh Circuit's formulation of the coercion test in *Kerr* was followed by the Second Circuit in *Warner v. Orange County Department of Probation* one year later.[174] In *Warner*, the court was asked to determine if an Establishment Clause violation existed where probationers were sentenced to AA "without suggesting that the probationer might have any option to select another therapy program, free of religious content."[175] Furthermore, the probationers were subject to imprisonment for violation of probation if they did not attend the AA meetings.[176] In determining that the mandatory AA attendance was coercive, the court rejected the county's argument that the probationer was a mature adult and as such was less susceptible to religious pressures.[177] In its reasoning, the court relied on the fact that the probationers were required to participate in the long-term AA program, which "repeatedly turned to religion as the basis of motivation."[178]

Other jurisdictions have followed the lead of *Kerr* and *Warner* by applying the coercion test when dealing with similar prison guidelines involving AA or NA. In one case, the U.S. District Court for the Eastern District of Wisconsin found

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169. *Id.* at 474. The lawsuit was brought by inmate Kerr, who indicated in an affidavit that he "objected to dragging God's name into 'this messy business of addictions.'" *Id.* Kerr further indicated that he believed in free will and that NA's deterministic view of God was in conflict with those beliefs. *Id.* The prison's warden indicated that the prisoners were required to "'observe'" the NA meetings, but they were not forced to "'participate.'" *Id.*

170. *Id.*

171. *Id.* at 479. The court analyzed the available U.S. Supreme Court Establishment Clause precedent and classified the cases as either "outsider" or "insider" cases. *Id.* at 477. The court described the "outsider" cases as those that involve a complaint that the government is "somehow forcing a person who does not subscribe to the religious tenets at issue to support them or to participate in observing them." *Id.* The "insider" cases were described as those in which the complaint centered on the government conferring a benefit upon a religious group or where a religious group sought a benefit from the government. *Id.* The court indicated that "outsider" cases have generally been accepted by the U.S. Supreme Court as falling squarely within the scope of the Establishment Clause. *Id.* at 478.

172. The court determined that the prison's program failed the first requirement because the prison officials were acting on behalf of the State. *Id.* at 479. The court also found that the program failed the second requirement of the coercion test because Kerr was subject to "significant" penalties if he failed to attend the NA meetings. *Id.* The court lastly determined that the NA program was indeed religious in nature given that (1) "[a] straightforward reading of the twelve steps show[ed] clearly that the steps [were] based on the monotheistic idea of a single God or Supreme Being" and (2) the meetings were "permeated with explicit religious content." *Id.* at 480.

173. *Id.*

174. 115 F.3d 1068 (2d Cir. 1997).

175. *Id.* at 1075.

176. *Id.*

177. *Id.* at 1075–76. The defendants attempted to distinguish their case from the facts of *Lee v. Weisman*, 505 U.S. 577 (1992), where the U.S. Supreme Court found coercion involving middle school students. *Warner*, 115 F.3d at 1076. For a discussion of *Lee*, see *supra* notes 137–141 and accompanying text.

178. *Warner*, 115 F.3d at 1076. The *Warner* court distinguished the case at bar from *Lee* by indicating that in *Lee* the exposure experienced by the middle school students was only "a brief two minutes of prayer on a single occasion." *Id.*

coercion when a prison offered participation in a program based on AA as the only alternative to parole revocation.[179] In that case, the court pointed to the U.S. Supreme Court's observation in *Morrissey v. Brewer* that the revocation of parole is considered a "'grievous loss'" for the parolee and thus is evidence of coercion.[180]

Contrastingly, another court determined that when AA is only one of a variety of programs available, there may not be an Establishment Clause violation.[181] In *O'Connor v. California*, the U.S. District Court for the Central District of California found the fact that an individual had a choice of several programs in which to enroll to be significant.[182] In reaching its conclusion, the court applied the three-prong *Lemon* test and the endorsement test rather than the *Lee* coercion inquiry.[183]

The outcome of similar cases will depend on the test applied. When the courts apply the *Lee* coercion test, they generally find mandatory participation in AA or NA violative of the Establishment Clause; whereas, courts that apply the *Lemon* test generally find mandatory participation constitutional.[184]

B. Long-Term Drug and Alcohol Treatment—Halfway Houses

The AA and NA cases previously discussed dealt with offender participation in programs that contained religious material in their meetings. Programs that require inmates to be completely immersed in religious programming may also violate the Establishment Clause. One such example involves halfway houses and the differences associated with secular and sectarian programs. In *Freedom from Religion Foundation, Inc. v. McCallum*, the Seventh Circuit addressed the constitutionality of the state funding of prisoners' participation in a faith-based, long-term drug and alcohol treatment halfway house under the Establishment Clause.[185] In its analysis, the court relied on the principles of private choice and coercion to determine that the scheme did not violate the Establishment Clause.[186]

The faith-based halfway house at issue in *McCallum*, Faith Works, incorporated Christianity into its rehabilitation programming.[187] In addition to Faith Works, the Wisconsin Department of Corrections also contracted with several non-faith-based halfway houses.[188] Unlike Faith Works, which ran from nine to twelve months, the non-faith-based programs were between thirty and ninety days in duration.[189] This difference was significant given that the Wisconsin Department of Corrections found that having a longer treatment period in a completely supervised setting

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179. Bausch v. Sumiec, 139 F. Supp. 2d 1029, 1034 (E.D. Wis. 2001).
180. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).
181. *See, e.g.*, O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994).
182. *Id.* at 305.
183. *Id.* at 307.
184. *Bausch*, 139 F. Supp. 2d at 1035 n.6; *see also* Rachel F. Calabro, Comment, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 582 (1998); Dess Aldredge Grangetto, Comment, *Reducing Recidivism by Substance Abusers Who Commit Drug and Alcohol Related Crimes*, 10 J. CONTEMP. LEGAL ISSUES 383, 404–06 (1999).
185. 324 F.3d 880, 884 (7th Cir. 2003).
186. *Id.* at 882–84.
187. *Id.* at 881.
188. *Id.*
189. Freedom from Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905, 909 (W.D. Wis. 2002).

created the highest chance of success in treatment for participants who had drug or alcohol addictions.[190]

Before enrolling an eligible offender in the program, the probation and parole agents were instructed to inform the potential enrollee that Faith Works was a religiously affiliated program and to ask if the offender had any objections.[191] Agents were allowed to refer eligible offenders to the Faith Works program as long as a secular alternative was also offered.[192] The parole agents could order an offender to attend a specific secular program or could suggest the faith-based program while also offering the option of a particular secular program.[193]

The question presented in *McCallum* was whether the state funding received by Faith Works, through its contract with the Wisconsin Department of Corrections, was solely attributed to the private choice of the inmates participating in the program or if it could be attributed to the state.[194] The plaintiffs argued that the government was providing support to religion because the parole officers steered some of the offenders to the Faith Works program.[195] The plaintiffs also argued that, because Faith Works was a better program, the offenders did not have a real choice when enrolling in a halfway house.[196] The court rejected both of those arguments and found that the Faith Works program did not violate the Establishment Clause.[197]

In rejecting the plaintiffs' contention that by recommending a faith-based program the parole officers were supporting religion, the court firmly stated that "[s]uggestion is not a synonym for coercion."[198] To emphasize this point, it analogized the situation to a public school guidance counselor recommending that a student apply to a Catholic college.[199] The court stated that finding the situation to be unconstitutional would "be to adopt a doctrinaire interpretation of the establishment clause remote from its underlying purpose and historical understanding."[200]

The court also rejected the argument that true private choice was lacking when there was inequality between the choices presented.[201] The plaintiffs argued that Faith Works was the best program available and that the dissimilarity in quality of the halfway houses available to offenders prevented the exercise of true private choice.[202] The Seventh Circuit rebuffed this argument by stating that "quality cannot be coercion."[203] It further indicated that Faith Works should not be punished for

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190. *Id.*

191. *Id.* at 910.

192. *Id.* To be eligible for the Faith Works program, an offender must have had dependent children. *Id.*

193. *Id.* at 912. This policy was set forth in the Administrative Directive 01-10 issued by the Division of Community Corrections. *Id.* The directive also allowed agents to offer an offender a list of acceptable programs from which to choose, but the secular and faith-based programs had to be clearly identified. *Id.*

194. *Id.* at 914.

195. Freedom from Religion Found., Inc. v. McCallum, 324 F.3d. 880, 883 (7th Cir. 2003).

196. *Id.* at 884.

197. *Id.* at 883–84.

198. *Id.* at 883.

199. *Id.*

200. *Id.*

201. Freedom from Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905, 916 (W.D. Wis. 2002). In contrast with others, the Faith Works program was longer in duration, incorporated a more holistic approach involving family integration and employment services, and was based on religious principles. *Id.*

202. *McCallum*, 324 F.3d at 884.

203. *Id.*

investing its resources in providing a higher quality program to offenders.[204] The court continued by indicating that "[i]t is a misunderstanding of freedom...to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him."[205] Thus, the court was not convinced that the unique features of the Faith Works program were such that they would divest offenders of the ability to exercise true private choice.[206]

The *McCallum* court relied on private choice to invalidate any potential unconstitutional activity of the defendant even when the programs were unequal in quality. Another court, however, came to the opposite conclusion in the context of residential treatment programs.

C. Unit-Based Residential Treatment Programs—The Iowa Case

A different situation, although similar in some respects to the halfway house scenario, arises when the faith-based program in which an offender participates is actually located within the prison facility. Recently, in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*,[207] the U.S. District Court for the Southern District of Iowa invalidated a faith-based program implemented in an Iowa prison on Establishment Clause grounds.[208] The court found that the program violated the second prong of the *Lemon-Agostini* analysis and that no genuine private choice existed to sever the unconstitutional relationship between the State and prison.[209]

In 1999, the Iowa Department of Corrections contracted with a group called InnerChange Freedom Initiative (InnerChange).[210] Through this contract, InnerChange provided a faith-based prisoner rehabilitation program[211] that was developed by Prison Fellowships, a non-profit charitable organization.[212] The stated mission of the program was "to create and maintain a prison environment that fosters respect for God's law and rights of others, and to encourage the spiritual and moral regeneration of prisoners. Therefore, they may develop responsible and productive relationships with their Creator, families and communities."[213] The InnerChange program operated in the Iowa prison at a cost to the state of roughly $1.5 million dollars over a period of several years.[214] The money was appropriated from both the Iowa Department of Corrections' Telephone Fund and from the

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204. *Id.* The court found that penalizing Faith Works because the secular halfway houses were of less quality would actually produce a "race to the bottom." *Id.*

205. *Id.* The court utilized another analogy to emphasize its point by indicating that supposing that the chooser had no actual choice when the options were not equally attractive "would mean that a person was not exercising his free will when in response to the question whether he preferred vanilla or chocolate ice cream he said vanilla, because it was the only honest answer that he could have given and therefore 'he had no choice.'" *Id.*

206. *Id.*

207. 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006).

208. *Id.*

209. *See id.* at 925–32.

210. *Id.* at 884.

211. *Id.*

212. *Id.* at 871.

213. *Id.* at 875.

214. *See id.* at 884–87.

Healthy Iowans Tobacco Trust.[215] InnerChange billed the state for programs that it deemed to be "non-sectarian," although a clear definition of this meaning was never discussed.[216]

The InnerChange program implemented what it called a "transformational model," as opposed to the more traditional "therapeutic model," for inmate rehabilitation.[217] The transformational model has a strong Christian basis, whereas the therapeutic model seeks to accomplish rehabilitation in a religion-neutral manner.[218] The guide given to participating inmates at the InnerChange program orientation session stated that the program was "an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God's love."[219] InnerChange operated under the notion that a prisoner's criminal tendencies can only be overcome by "rewiring" that prisoner's fundamental mental and emotional characteristics through an intensive religion-based program.[220]

The daily schedule for InnerChange participants included four hours of biblically based instruction, secular courses, community meetings, and devotionals.[221] In addition to these requirements, prisoners enrolled in the InnerChange program received many benefits for which other inmates were ineligible, such as being allowed (1) more books, (2) a less restrictive security environment, (3) more telephone calls, and (4) the option to wear the non-regulation InnerChange logo tee-shirt.[222] In addition, the InnerChange inmates were allowed to participate in planned social events on Friday evenings, during which they were able to receive visitors outside of the usual prison visiting schedule.[223] Upon completion of the InnerChange program, inmates participated in a graduation ceremony in which outside food, paid for by the State, was brought in for the celebration.[224] Inmates in non-InnerChange programs who wanted outside food were required to pay for it themselves.[225] The

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215. *Id.*

216. *Id.* at 888. The InnerChange program defined "sectarian funds" as those funds pertaining to the religious aspect of the program and "nonsectarian funds" as those funds not specifically pertaining to religion or a religious organization, but the two categories were sometimes mixed. *Id.* For example, the first 40,000 copies that the InnerChange program made on state copy machines were billed as "non-sectarian," and anything over that was billed as "sectarian." *Id.* at 888–89. This meant that the religiously themed pamphlets that InnerChange copied were paid for as "non-sectarian" expenses by the State. *Id.*

217. *Id.* at 877.

218. *See id.* As an illustration of the differences between the two models, the transformational model sees criminal behavior as a "'manifestation of an alienation between the self and God.'" *Id.* (quoting Plaintiffs' Exhibit 35 at 5, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03 CV 90074)). Contrastingly, the therapeutic model attributes criminal behavior to an "'alienation of self from society.'" *Id.* (quoting Plaintiffs' Exhibit 35 at 5, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03 CV 90074)). The transformational model also views transformation as occurring "'through an instantaneous miracle; it then builds the prisoner up with familiarity of the Bible.'" *Id.* (quoting Plaintiffs' Exhibit 35 at 6, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03 CV 90074)). The therapeutic model, on the other hand, "'seeks gradual change of self as one interacts with one's environment.'" *Id.* (quoting Plaintiffs' Exhibit 35 at 6, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03 CV 90074)).

219. *Id.* at 876.

220. *Id.* at 878.

221. *Id.* at 901–02.

222. *Id.* at 901.

223. *Id.* at 902.

224. *Id.* at 911.

225. *Id.*

court determined that the InnerChange inmates also received other tangible benefits.[226]

Against this backdrop of facts, the plaintiffs—Iowa taxpayers,[227] Americans United for Separation of Church and State, and state prison inmates—sought an injunction prohibiting the InnerChange program from operating within the Iowa prison system.[228] The plaintiffs claimed an Establishment Clause violation due to the State's use of government funds to pay a religiously affiliated organization to "rehabilitate" inmates.[229]

To determine if the program passed constitutional muster under the Establishment Clause, the trial court began its analysis by applying the *Lemon-Agostini* factors and the principle of private choice.[230] Under the first *Lemon-Agostini* prong, which requires any government funded program to have a secular purpose, the court determined that the State's purpose was indeed secular: the reduction of recidivism.[231] The court indicated that some of the corrections officials wanted to implement the faith-based program as opposed to other programs because it had a supportive communal environment and an extensive post-release care program.[232] In light of these facts, the court determined that the InnerChange program satisfied the first *Lemon-Agostini* prong.[233]

In considering the primary effect prong of the *Lemon-Agostini* test, the court looked to the two factors set out in *Roemer v. Board of Public Works*,[234] which required an inquiry as to whether the InnerChange program was pervasively sectarian in nature and whether it was possible to separate the sectarian and secular aspects of the program.[235] In addressing the "pervasively sectarian" question, the *Prison Fellowship Ministries* court considered whether, in reality, the InnerChange program was one in which the "'[a]id...flow[ed] to an institution in which religion [wa]s so pervasive that a substantial portion of its functions [we]re subsumed in the religious mission or when [the program] fund[ed] a specifically religious activity in an otherwise substantially secular setting.'"[236] Applying this to InnerChange, the trial court determined that the program was pervasively sectarian because it required attendance at worship services, held daily religious activities, required inmates to

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226. *Id.* at 905. There were certain treatment courses recommended by the Iowa Department of Corrections that, if completed, could increase an inmate's chance of parole. *Id.* The department did not offer these courses every year. *Id.* The InnerChange program, however, allowed participating inmates to complete the necessary courses in a single period and earlier in their prison term than would be possible for non-participating inmates, who had to wait for the courses to be offered through the department. *Id.* at 904. Early completion of the courses was significant because the parole board looked favorably upon any inmate who took the initiative to complete the necessary courses early. *Id.* Other factors were also taken into account by the parole board on a case-by-case basis in determining parole. *Id.*

227. This case occurred prior to *Hein v. Freedom from Religion Found., Inc.* and relied on the U.S. Supreme Court's decision in *Flast v. Cohen* to support the standing of taxpayers to bring suit alleging violations of the Establishment Clause. *See supra* Part II.

228. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 865.

229. *Id.* at 864–65.

230. *Id.* at 915.

231. *Id.* at 917.

232. *Id.*

233. *Id.*

234. 426 U.S. 736, 755 (1976); *see also supra* note 92 and accompanying text.

235. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 914.

236. *Id.* at 917–18 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

lead prayers, and demanded obedience to InnerChange's dogmas and doctrines.[237] Additionally, the court found that the religious nature of essentially every course offered through InnerChange illustrated the program's devotion to inculcating religion.[238]

Next, the court considered the second *Roemer* factor, which looks to whether it is possible to separate the sectarian and non-sectarian aspects of the program.[239] On this point, the court concluded that the nature of the transformational model utilized by InnerChange made such separation impossible.[240] The court emphasized that all of the InnerChange activities were "designed to transform an individual spiritually," and, in addition to their roles as mentors and educators, the InnerChange teachers and staff also had the power to punish inmates according to the code of prison conduct.[241] The court considered this relationship between the inmates and the InnerChange employees as an example of the inseparable nature of the religious and non-religious InnerChange program.[242]

The court also found that it could not separate the secular and sectarian aspects of the program because of the nature of the State's funding.[243] In particular, the court determined that it was impossible to determine what percentage of the InnerChange employees' salaries was charged to the State for non-sectarian purposes and what percentage was sectarian and not funded by the State.[244] Furthermore, given InnerChange's religious nature, the substantial "in-kind" aid that the program received from the State in the form of classroom furniture, transportation of InnerChange inmates, and building use could not be considered neutral state funding.[245] All of these factors led the court to conclude that "there is no way to guarantee that public funds are used only for secular portions of the InnerChange program."[246]

Finally, the court concluded that the arrangement between the Iowa Department of Corrections and InnerChange failed the *Lemon-Agostini* restriction against excessive entanglement.[247] As the court indicated, it was as if the department established an Evangelical Christian congregation in the prison facility.[248] The court found that the entanglement was further emphasized by a lack of sufficient safeguards in place to ensure that the state funds were not spent on the religious

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237. *Id.* at 920.

238. *Id.* For example, an InnerChange course offered on the secular subject of financial management used a religion-based text that defines wealth as "'what God entrusts to us.'" *Id.* at 906 (quoting LARRY BURKETT, HOW TO MANAGE YOUR MONEY: AN IN-DEPTH BIBLE STUDY ON PERSONAL FINANCES 11 (1975)).

239. *Id.* at 921.

240. *Id.*

241. *Id.* at 922–23.

242. *Id.*

243. *Id.* at 923.

244. *Id.* at 923–24.

245. *Id.* at 924. "In-kind" aid is the receipt of "goods or services rather than money." BLACK'S LAW DICTIONARY 802 (8th ed. 2004). The court further explained that while in-kind aid would be allowed if provided to a therapeutic penal rehabilitation program, "when used in the service of indoctrinating religious belief, in-kind giving is no longer considered neutral state funding under the Establishment Clause." *Prison Fellowship Ministries*, 432 F. Supp. 2d at 924.

246. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 924.

247. *Id.* at 933.

248. *Id.*

aspects of the program.[249] In fact, the court concluded that InnerChange's utilization of the transformation model precluded any possibility of separation of the religious and non-religious aspects of the program, meaning that inevitably some of the state funding went to the religious aspects.[250] Thus, the court found that, through its funding, the State "hope[d] to cure recidivism through state-sponsored prayer and devotion," which meant that the entanglement had the impermissible effect of promoting religion.[251]

In addition to finding a violation using the *Lemon/Agostini* test, the court also rejected the defendants' argument that the funding did not violate the Establishment Clause because it was indirect due to the private choice of the inmates.[252] The court used the U.S. Supreme Court's formulation of private choice in *Zelman v. Simmons-Harris*[253] to find that the prison inmates did not exercise private choice due to the lack of availability of similar secular program alternatives.[254] This lack of alternatives meant that there was no real choice for the inmates to exercise in determining how the State's money would be spent and thus was no true private choice.[255] The court explained that participation in the InnerChange program itself was limited to those individual inmates who were "willing to engage in a spiritual transformation guided by Evangelical Christian counselors and programming,"[256] and the strong ties between InnerChange and the Evangelical Christian faith created a disincentive for inmates of other religions to participate.[257]

D. The Status of the Establishment Clause in Prisons

The outcome of Establishment Clause cases arising in the prison context is mainly contingent on which test is applied and the facts involved in the particular case. Courts tend to analyze whether participation in a faith-based program is mandatory, whether it is the only comparable option available, and whether the programming is "pervasively sectarian." These various factors would similarly play a part in the outcome of any litigation involving the faith-based programming at the New Mexico Women's Correctional Facility in Grants, New Mexico or in any other correctional facility nationwide.

V. THE NEW MEXICO LAWSUIT

New Mexico nearly became yet another state facing an Establishment Clause challenge after the implementation of faith-based programming at a state prison. The

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249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 925.
253. 536 U.S. 639 (2002); *see supra* text accompanying notes 152–155.
254. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 929–30 (citing *Zelman*, 536 U.S. at 655, 699). The court determined that no other programs contained a comparable range of treatment modules and post-release benefits. *Id.*
255. *Id.* The trial court distinguished the facts at hand from those of *Zelman*, where parents had a wide range of choices regarding where to spend state money on their children's education. *Id.* at 930 (citing *Zelman*, 536 U.S. at 655).
256. *Id.*
257. *Id.* at 931.

case concerned the constitutionality of two programs, the Life Principles Community/Crossings Program and the more recently implemented programming of the Institute of Basic Life Principles, which were introduced into the New Mexico Women's Correctional Facility (NMWCF). The programs were being challenged by a church and state watchdog group along with several New Mexico taxpayers who were also members of the group. The defendants in the lawsuit, which was dismissed on July 6, 2007,[258] were state officials and the private organization that runs the facility. The defendants maintained that they had not used state funds to promote religion. In the Notice of Proposed Withdrawal filed by the court, the Magistrate Judge indicated that the case was being dismissed based on the insufficiency of taxpayer status to satisfy the constitutional requirement of standing for Establishment Clause claims as held by the U.S. Supreme Court in *Hein v. Freedom from Religion Foundation, Inc.*[259] Although the case became a "*Hein* Fatality,"[260] the plaintiff Freedom From Religion Foundation intends to continue to observe CCA's programming at the NMWCF and look for an inmate who can claim direct personal injury to bring the case in the future.[261]

Despite the fact that the New Mexico lawsuit was dismissed on the issue of standing, an analysis of the facts of the case under the current U.S. Supreme Court Establishment Clause jurisprudence is instructive as to how similar cases brought by individuals having standing would be judged.

A. The New Mexico Women's Correctional Facility

The NMWCF in Grants, New Mexico has been owned and operated by the Corrections Corporation of America (CCA) since 1989.[262] The facility is the only women's prison in New Mexico and houses 596 female offenders.[263] Beginning in 2001, the prison began offering a residential unit to participants involved in a faith-based rehabilitation program known as the Life Principles Community/Crossings Program.[264] The facility is also one of eight prisons run by CCA to pilot a religiously oriented program based on the collaboration of CCA with an Evangelical Christian organization called the Institute of Basic Life Principles (IBLP) within the Life

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258. Stipulated Order Dismissing All Claims, Freedom from Religion Found., Inc. v. Richardson, No. CIV-05-1168-RLP/KBM (D.N.M. July 6, 2007).

259. Notice of Proposed Withdrawal of Memorandum Opinions and Orders [Docket No. 92 & 93], *supra* note 38.

260. Claire Hughes, *Lawsuit Targeting Faith-Based Prison Program Becomes "*Hein *Fatality"*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 10, 2007, *available at* http://www.religionandsocialpolicy.org/news/article.cfm?id=6740.

261. *Id.* ("While the *Hein* decision limits the right of taxpayers to sue the government, it does not affect the rights of parties like prisoners who may suffer a direct personal injury from a violation of the Establishment Clause, such as religious discrimination.").

262. Corrections Corporation of America, Facility List, http://www.correctionscorp.com/facilitylist.cfm# (follow "New Mexico Women's Correctional Facility" hyperlink) (last visited July 7, 2007) [hereinafter Corrections Corporation of America, NMWCF]. CCA is the fifth largest corrections services provider in the country after only the federal government and three states. Corrections Corporation of America, About CCA, http://www.correctionscorp.com/aboutcca.html (last visited July 7, 2007) [hereinafter Corrections Corporation of America, About CCA].

263. Corrections Corporation of America, NMWCF, *supra* note 262.

264. Silja J.A. Talvi, *Beyond the God Pod*, SANTA FE REP., Mar. 9, 2005, *available at* http://sfreporter.com/articles/publish/printer_9.php.

Principles Community/Crossings Program.[265] In addition to offering inmates faith-based programs, the NMWCF also offers various educational, vocational, and "life skills" programs to inmates.[266]

1. CCA and the IBLP

CCA is a private corporation that currently operates sixty-five prison facilities under contract in nineteen states and Washington D.C.[267] It is the fifth largest corrections system in the nation behind only the federal government and three states.[268] CCA, which has partnered with several Evangelical Christian groups in the past, began introducing the IBLP programs into its inmate programming selection in 2004.[269] By 2006, CCA had extended its IBLP programming to twenty-eight of its prison facilities.[270] CCA representatives indicate that they hope to eventually implement IBLP programming into all of CCA's facilities across the country.[271] John Lanz, CCA's national director of Industry and Special Programs, stated that the partnership with the IBLP would help to create a "'franchise-like approach'" to faith-based prison programming.[272] Lanz asserted that this approach would help to guarantee the "integrity" of such programs.[273] CCA stresses that participation in the religious programming that it offers is wholly voluntary.[274] In addition, it maintains that all inmates are welcome to join the program regardless of their religious orientation and religious conversion is not required.[275]

IBLP was founded by Bill Gothard for the official purpose of "introducing people to the Lord Jesus Christ."[276] The program works to attain this goal by providing "training on how to find success by following God's principles found in Scripture."[277] The prison programming implemented by IBLP consists of various seminars, including the "Basic" and "Advanced" seminars as well as specialized

265. *Id.* CCA denies, however, that it is in such a partnership with the IBLP. Corrections Corporation of America, Inc. and Bill Snodgrass' Answer to Complaint and Jury Demand at 5, Freedom from Religion Found., Inc. v. Richardson, No. CIV-05-1168-RLP/KBM (D.N.M. Jan. 13, 2006).

266. Other programs offered to inmates include the following: educational programs (GED testing, college courses for associate of arts or other degrees through New Mexico State University, and art history classes), vocational programs (a carpentry training course, creative arts, which includes cake decoration, nutrition, and needlework), life skills programs (corrective thinking, Project POWER, which is a "3-year development program providing extensive educational opportunities, vocational training, parenting classes, behavioral courses, etc."). Corrections Corporation of America, NMWCF, *supra* note 262.

267. Corrections Corporation of America, About CCA, *supra* note 262.

268. *Id.*

269. Institute in Basic Life Principles, Prisoners Learn Life-Changing Principles, Nov. 2006, http://iblp.org/iblp/news/2006/11/001/.

270. *Id.*

271. Institute in Basic Life Principles, How Prisoners Are Finding Freedom, Apr. 2004, http://iblp.org/iblp/news/2004/04/001/.

272. Talvi, *supra* note 264 (quoting Interview with John Lanz, Nat'l Dir. of Indus. & Special Programs, Inst. of Basic Life Principles).

273. *Id.* (quoting Interview with John Lanz, *supra* note 272).

274. *Id.*

275. Paul Logan, *Program Helps Prisoners Avoid Return Trip*, ALBUQUERQUE J., Feb. 10, 2005.

276. Institute in Basic Life Principles, What We Do, http://iblp.org/iblp/about/whatwedo/ (last visited July 7, 2007).

277. Talvi, *supra* note 264 (internal quotation marks omitted).

seminars such as "Anger Resolution."[278] The proffered goal of the Basic Seminar is to "help [one] learn to see life from God's perspective."[279] The Advanced Seminars discuss the principles outlined in the Basic Seminar in further detail.[280]

IBLP's website explains that its programs help prisoners to "grow[] in their walk with God and receive[] practical instruction on living the Christian life."[281] The workbooks provided through the IBLP program contain Bible excerpts[282] and also break down what are called "basic life principles" into categories such as "Moral Purity, Yielding Rights and Proper Submission."[283] In addition, IBLP programming instructs that rock music, even Christian rock music, is considered inappropriate because it will lead to a music addiction.[284] An IBLP workbook iterates that a person who is addicted to rock music "will sacrifice God-given relationships with his parents and will neglect fellowship with Godly Christians in his compulsion to listen to his music."[285] The workbook continues by explaining that "[o]nly God can free a rock addict from the bondage of Satan's strongholds."[286]

2. The NMWCF's Faith-Based Programming

The NMWCF's faith-based programming is funded out of New Mexico's general fund as well as from money raised through sales of items to inmates.[287] Defendant CCA maintained that the funding for the faith-based programming at NMWCF was not derived from state funds and that the prison does not receive any extra money from the State for the faith-based living unit.[288] The program is described as a "non-denominational effort[] for inmates to enhance their personal sense of spirituality and to promote positive growth for productive lifestyles."[289] It remains true, however, that the program is premised on Christian-based education and principles.[290]

The requirements of the program itself are quite demanding. Each participant must engage in 732 hours of activities over the six-month period of the program.[291] The activities are aimed at helping inmates succeed in life outside prison.[292] The

278. Institute in Basic Life Principles, *supra* note 271.

279. Institute in Basic Life Principles, Basic Seminar, http://iblp.org/iblp/seminars/basic/goal/ (last visited July 7, 2007).

280. Institute in Basic Life Principles, Advanced Seminar, http://iblp.org/iblp/seminars/advanced/ (last visited July 7, 2007).

281. Institute in Basic Life Principles, *supra* note 269.

282. Talvi, *supra* note 264. For example, one section reads as follows: "Wives, submit yourselves unto your own husbands, as it is fit in the Lord." *Id.* (internal quotation marks omitted). The IBLP workbook materials also emphasize the importance of women obeying their husbands as well as the need of Christians to obey the church and government. *Id.* The materials also answer "Yes" to the question, "[m]ust we continue to respect an evil ruler as a minister of God?" *Id.* (internal quotation marks omitted).

283. *Id.* (internal quotation marks omitted).

284. *Id.*

285. *Id.* (internal quotation marks omitted).

286. *Id.* (internal quotation marks omitted).

287. *Id.*

288. Pretrial Order at 6–7, Freedom from Religion Foundation, Inc. v. Richardson, No. CIV-05-1168-RLP/KBM (D.N.M. June 6, 2007).

289. Corrections Corporation of America, NMWCF, *supra* note 262.

290. *See supra* Part V.A.2.

291. Talvi, *supra* note 264.

292. *Id.*

women must participate in religious meetings, prayer walks, meditation, and memorization of the New Testament.[293] There are also opportunities for the women to sing and dance to devotional music.[294]

The program involves separate living quarters for participating women, which CCA opened in 2001, and there are both benefits and restrictions for those living in the unit.[295] Some prisoners refer to the segregated living unit as the "God Pod."[296] This "Pod" contains fewer residents than the others in the prison facility.[297] Given the smaller number of residents, the "God Pod" is quieter and less hectic compared to other living quarters,[298] and NMWCF Warden Bill Snodgrass indicated that life in the "Pod" allows the participant inmates to live in a less stressful environment.[299] NMWCF maintains that the faith-based programming offered reduces recidivism among their inmates.[300]

In addition, Scripture-based movies and books are available to the participating inmates.[301] However, regular television programming is not available to the inmates, and they are not allowed to listen to rock music.[302] Furthermore, the program mandates that the women stay involved with a "faith community" upon release from prison.[303]

3. The Former New Mexico Lawsuit

In the recently dismissed lawsuit, Freedom From Religion Foundation, Inc. joined six New Mexico taxpayers to bring suit against the NMWCF.[304] The complaint, filed November 7, 2005 in the U.S. District Court for the District of New Mexico, identified the following as defendants: New Mexico Governor Bill Richardson, New Mexico Corrections Department Secretary Joe Williams, Coordinator of Faith-Based Programs for the New Mexico Corrections Department Homer Gonzales, Warden of the NMWCF Bill Snodgrass, and CCA.[305] Defendants Richardson, Williams, and Gonzales were sued in their official capacities and the plaintiffs claimed that they were "responsible for disbursing and spending New Mexico state taxpayer appropriations."[306] Defendant CCA was sued based on its contract with the State of

293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* The "God Pod" is the residence of thirty women. *Id.* Another thirty-five women are on the waiting list for entrance into the "Pod." *Id.*
298. *Id.* John Lanz of CCA has indicated that the faith-based living units in prisons around the country "'are turning out to be the cleanest and best pods in our facilities.'" *Id.* (quoting Interview with John Lanz, *supra* note 272).
299. Logan, *supra* note 275.
300. *Id.*
301. *Id.*
302. *Id.* Rock music is not allowed in accordance with IBLP instructions. *Id.*; *see supra* text accompanying notes 284–286.
303. Talvi, *supra* note 264.
304. David Miles, *Group Sues over Prison's "God Pod"*, SANTA FE NEW MEXICAN, Nov. 9, 2005, at C1. The six New Mexico taxpayers were members of the Freedom From Religion Foundation. *Id.*
305. Complaint, *supra* note 13, at 3–4.
306. *Id.* at 4.

New Mexico, through which the plaintiffs claimed that it exercised "powers traditionally exclusively reserved to the state" and thus worked as state actors.[307]

In their complaint, the plaintiffs averred that the involvement of the named defendants in the implementation of the faith-based programming at the NMWCF gave the appearance of government endorsement of religion.[308] The plaintiffs claimed that the defendants showed such government endorsement by using state taxpayer funds to implement the faith-based programming.[309] In addition, the plaintiffs asserted that, in offering the faith-based programs, the defendants "convey[ed] a message that religion is favored, preferred and promoted, in contrast to non-belief," meaning that the activities were "clothed in traditional indicia of government endorsement."[310] The plaintiffs further claimed that the faith-based programming at the NMWCF was configured in such a way that the secular and sectarian aspects of the programs could not be separated.[311] The complaint stated that the programming utilized taxpayer monies to fund activities "whose mission is to integrate religious indoctrination as an indivisible component of the programming provided to prison inmates."[312] With these allegations, the plaintiffs hoped (1) to show a violation of the Establishment Clause as a result of the relationship that the government had with the faith-based programming at NMWCF through its funding and (2) to obtain an injunction against the defendants' further implementation of the program.

Defendants Snodgrass and CCA filed an answer to the complaint separately from the other defendants.[313] Snodgrass and CCA contended that they were not state actors and that their actions, if they occurred at all, did not constitute state action.[314] Their answer indicated that they believed that the faith-based programming would help achieve rehabilitative penological goals[315] and that the programming was provided as just one of a variety of rehabilitative programs offered at the NMWCF.[316] Snodgrass and CCA admitted that they utilized materials from the IBLP[317] but denied that they were in "partnership" with that organization.[318] Given that they felt that their actions did not violate the Establishment Clause, Snodgrass and CCA asked the court to dismiss the plaintiffs' complaint.[319]

Similarly, the answer of defendants Richardson, Williams, and Gonzales asked the court to dismiss the plaintiffs' claims.[320] These defendants admitted that they

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307. *Id.*
308. *Id.* at 12.
309. *Id.* at 11.
310. *Id.* at 12.
311. *Id.* at 11.
312. *Id.* The plaintiffs claim that "[r]eligious indoctrination is an integral component of the faith-based programs provided by the New Mexico Corrections Department." *Id.*
313. Corrections Corporation of America, Inc. and Bill Snodgrass' Answer, *supra* note 265.
314. *Id.* at 9.
315. *Id.* at 5.
316. *Id.* at 7.
317. *Id.* at 4.
318. *Id.*
319. *Id.* at 10.
320. Answer to Civil Rights Complaint, *supra* note 16.

were responsible for spending money from the New Mexico General Fund[321] and that the New Mexico Department of Corrections authorized the NMWCF's faith-based programming.[322] Defendants Richardson, Williams, and Gonzales denied, however, that a goal of the implementation of the faith-based programming was to ensure that the inmates learned and modeled a Christian lifestyle.[323] They also asserted that they had not used state funds to "promote, advance and/or endorse the establishment of religion."[324]

If the lawsuit had not been dismissed, the District Court for the District of New Mexico would have had to sift through these allegations and denials and apply the principles set forth by the U.S. Supreme Court regarding the Establishment Clause to determine the validity of the issues raised in this case. In the section that follows, an analysis of the facts presented by the New Mexico case are analyzed.

VI. ANALYSIS

An analysis of the Life Principles Community/Crossings Program and similar programs throughout the nation's prisons in light of the U.S. Supreme Court's Establishment Clause jurisprudence and existing case law shows that judicial determination of the constitutionality of such programs will depend on which test or standard the court hearing the case chooses to utilize. The discussion below analyzes the circumstances surrounding the faith-based programming at the NMWCF under the potentially applicable strict scrutiny standard of review,[325] the *Lemon-Agostini* test,[326] the coercion test,[327] the endorsement test,[328] and the principle of private choice.[329] The presence of state action, a prerequisite for constitutional claims, is discussed first.[330]

A. The Presence of State Action

The Fourteenth Amendment expanded the reach of the Establishment Clause from solely prohibiting the federal government from establishing a national religion to include a similar prohibition on the states.[331] Thus, in order for the plaintiffs to have had a legitimate Establishment Clause claim, the allegedly unconstitutional actions must have been committed either by New Mexico government employees or a private corporation operating as a state actor. Defendants Richardson, Williams, and Gonzales are all New Mexico government employees and, as such, would fulfill the state action requirement.[332] There should not have been an issue of state action

321. *Id.* at 8.
322. *Id.*
323. *Id.* at 5.
324. *Id.* at 10.
325. *See infra* Part VI.B.
326. *See infra* Part VI.C.
327. *See infra* Part VI.E.
328. *See infra* Part VI.D.
329. *See infra* Part VI.F.
330. *See infra* Part VI.A.
331. CHEMERINSKY, *supra* note 45, at 503.
332. *See id.* at 515.

on the part of these defendants. The status of CCA as a state actor, on the other hand, requires a more in-depth analysis.[333]

The U.S. Supreme Court has developed several standards for determining state action by private actors. The two general areas of analysis can be categorized as (1) public function and (2) government entanglement.[334] As discussed below, CCA would have been found to be a state actor under public function, but its status under government entanglement is more difficult to predict.

1. Public Function

The public function requirements for finding state action create the strongest argument for finding CCA to be a state actor. This analysis is premised on the policy that the government should not be able to avoid its constitutional limitations by having private entities perform its duties.[335] In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court explained that there is state action "in the exercise by a private entity of powers traditionally exclusively reserved to the State."[336] The Court used this doctrine to find state action when private actors managed private property that was essentially a township[337] and when private parties usurped the election process.[338] The Court, however, refused to find state action in cases involving private schooling for special education and utility service because it found neither to be the *exclusive* prerogative of the State.[339]

Although the area of prison operation has been contracted to private entities for many decades,[340] incarceration is solely the prerogative of the government.[341] A state cannot relieve itself of its constitutional obligations toward prisoners merely by contracting them out to a private entity.[342] The U.S. Supreme Court emphasized this fact in *West v. Atkins* when it found that a physician with whom a state had contracted acted "under color of state law" when providing medical services to inmates.[343] The Court found that when a state contracts out aspects of prison operation to private entities, those entities act under the auspices of the State.[344]

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333. In the mid-1980s, the American Bar Association selected Ira P. Robbins, a prominent legal scholar in the area of corrections, to analyze the potential legal implications of privatization of prisons. Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 537 (1989). Robbins concluded that "in the privatization situation in which the operation of an entire institution is contracted out to private hands, there is no doubt that state action is present." *Id.* at 578.

334. *See* CHEMERINSKY, *supra* note 45, at 518; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 576 (2000).

335. CHEMERINSKY, *supra* note 45, at 519.

336. 419 U.S. 345, 352 (1974).

337. Marsh v. Alabama, 326 U.S. 501 (1946).

338. Terry v. Adams, 345 U.S. 461 (1953).

339. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); *Jackson*, 419 U.S. 345.

340. As Justice Breyer has indicated, "correctional functions have never been exclusively public. Private individuals operated local jails in the 18th century, and private contractors were heavily involved in prison management during the 19th century." Richardson v. McKnight, 521 U.S. 399, 405 (1997) (citations omitted).

341. Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2231 (1998) ("[T]he responsibility of incarcerating convicts falls squarely on the shoulders of the government.").

342. *See* West v. Atkins, 487 U.S. 42, 56 (1988).

343. *Id.* at 57. In *West*, the plaintiff claimed that inadequate medical treatment violated his Eighth Amendment rights. *Id.* at 48.

344. Robbins, *supra* note 333, at 604.

Given that private prison operators such as CCA perform a role traditionally reserved exclusively for the government, their actions can be attributed to the State under the public function analysis. In contrast, a private prison operator's status as a state actor could go either way under government entanglement analysis.

2. Government Entanglement

Government entanglement as a prerequisite for a finding of state action by a private actor delves into the degree to which the government is involved in the private actor's conduct.[345] Generally, the government funding and regulation of a private entity alone are not enough to find state action under this analysis.[346] For example, when a state provided over ninety percent of the funding for a private high school for troubled teens, the U.S. Supreme Court would not attribute the acts of the school to the State.[347] The Court has found certain government funding to lead to state action, but this generally occurred only when the government acted with the purpose of creating a violation of constitutional rights.[348] Similarly, the Court has rejected the notion that a private utility could be judged as a state actor simply because it was regulated by the State.[349] The Court has found state action based on regulation, but this generally only occurs when there is also evidence of government encouragement of the unconstitutional conduct.[350]

Government entanglement may also exist based on the nature, rather than degree, of the relationship between government and a private entity.[351] In *Lugar v. Edmondson Oil Co.*, the U.S. Supreme Court articulated a two-part inquiry for finding state action that summarized its prior state action jurisprudence:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible....Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.[352]

In *Edmondson v. Leesville Concrete Co.*, the Court applied the two-part *Lugar* inquiry to invalidate racially based peremptory challenges by private litigants.[353] The Court found that the first prong of the *Lugar* inquiry was satisfied because the peremptory challenges were allowed under state law.[354] The Court found that the

345. CHEMERINSKY, *supra* note 45, at 527.

346. *Id.* at 408, 410.

347. Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (finding that the school's firing of a teacher due to her speech activities could not be attributed to the State because there was no state action).

348. CHEMERINSKY, *supra* note 45, at 536.

349. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

350. CHEMERINSKY, *supra* note 45, at 532.

351. *See* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 612–13 (6th ed. 2005).

352. 457 U.S. 922, 937 (1982). To meet the second factor, the Court continued by indicating that "[t]his may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

353. Edmondson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

354. *Id.* at 622.

facts also satisfied the second prong because it was the judge, a government official, who oversaw the use of the peremptory challenges.[355]

An analysis of the facts surrounding the former New Mexico case under the government entanglement doctrine shows that the actions of CCA or other private prison operators may or may not have been attributed to the state. Without a showing that either (1) the State acted with the purpose of bringing about the violation or (2) that the State encouraged the private prison operator to pursue the unconstitutional conduct, state action would probably not have been attributed to the private prison operator by looking to the degree of entanglement. However, if a court presented with facts similar to the former New Mexico case looks to the nature of the entanglement and follows *Lugar*, it would likely find state action.

First, in the New Mexico case, the privatization of prisons is allowed under New Mexico state law.[356] Moreover, the New Mexico Corrections Department has policies in place that allow the faith-based living units to operate within prison systems,[357] which satisfies the first requirement of the *Lugar* inquiry. CCA's operation depended on its contract with the State and is only able to operate because the State allows it to do so. Second, as was the case with the judge in *Leesville Concrete*, state officials (specifically defendant Homer Gonzales, who is the Coordinator of the Faith-Based Programs for the New Mexico Corrections Department)[358] are responsible for overseeing the faith-based programs in the New Mexico correctional system.[359]

If, however, a trial court were to find that the private prison operator's actions could not be attributed to the State, it would set a dangerous precedent that would allow private corporations holding individuals prisoner to avoid liability for constitutional violations committed by the prison. Additionally, a finding that private prison operators were not state actors would allow the states to shirk their constitutional duties regarding the incarceration of the persons sentenced to jail. The government should ultimately be responsible for the day-to-day operations of prison facilities.

Moreover, the rights of prisoners are already highly regulated and limited by the very fact of their incarceration. Allowing a private prison operator to violate their constitutional rights without redress would infringe on those rights that the prisoners retain. This would not only affect inmates in regard to the Establishment Clause, but also in regard to their First and Fourteenth Amendment rights. Courts should not allow private prison operators to commit constitutional violations that the states could not.

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355. *Id.* at 623.

356. NMSA 1978, § 33-1-17(A) (1995) ("The corrections department may contract for the operation of any adult female facility or for housing adult female inmates in a private facility with a person or entity in the business of providing correctional or jail services to government entities.").

357. N.M. Corr. Dep't, Faith-Based Living Units, CD-100900 (2007), *available at* http://corrections.state.nm.us/policies/CD-100900.pdf ("The New Mexico Corrections Department may provide an ethics- and faith-based alternative program, as available, under the day-to-day supervision of the institution chaplains or warden's designee, which allows inmates to live in a community within the institution, blending aspects of group and individual socio-education into a daily living program.").

358. Answer to Civil Rights Complaint, *supra* note 16, at 5.

359. *Id.*

B. Standard of Review Analysis

1. The Applicability of *Larson*'s Strict Scrutiny Standard

In *Larson v. Valente*, the U.S. Supreme Court determined that, "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[360] In *Hernandez v. Commissioner of Internal Revenue*, the Court further clarified that *Larson*'s strict scrutiny applied to Establishment Clause claims involving a denominational preference but that the *Lemon* test is the standard when no facial preference exists.[361] If a plaintiff bringing an Establishment Clause claim against a correctional facility could show that the facility gave preference to a certain denomination's programming, then *Larson* may apply and the court would judge the facility's actions under the strict scrutiny standard.

Thus, in order to trigger *Larson*'s standard, the plaintiffs would have to show that the prison operators contracted with the religious organization to provide faith-based programming in its prisons to the exclusion of other religious groups. For example, in the former New Mexico case, CCA utilized materials from IBLP, which is a Christian-based organization that strives to "introduc[e] people to the Lord Jesus Christ."[362] Prior to contracting with IBLP, CCA contracted with other Evangelical Christian groups for prison programming.[363] A court could have inferred from this pattern of preferential contracting between CCA and Christian organizations that CCA chose those groups because of their Christian affiliation. CCA could be seen, therefore, as discriminating among religions and preferring one over all others.

If a court found that a prison operator gave preferential treatment to one religious group and applied *Larson*'s mandated strict scrutiny, the faith-based programming would likely be found to be unconstitutional under the Establishment Clause. Strict scrutiny requires that the government be motivated by a compelling government interest and that the means implemented are closely tailored to that compelling interest.[364] Even if the court found the reduction of recidivism to be a compelling government interest, this level of scrutiny would be difficult for any faith-based prison programming to overcome given the lack of a proven connection between faith-based programs and a reduction in recidivism.

Without direct evidence of a prison having specifically chosen a certain denomination's faith-based programs at the expense of other religious groups, however, it is unlikely that *Larson* and its strict scrutiny requirement would be applicable. If *Larson* does not apply, a court would either follow the *Hernandez* ruling and apply the *Lemon* test or look to the other U.S. Supreme Court Establishment Clause tests and standards.

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360. 456 U.S. 228, 246 (1982); *see supra* Part III.A.
361. 490 U.S. 680, 695 (1989); *see supra* text accompanying notes 72–73.
362. Institute in Basic Life Principles, *supra* note 276.
363. *See supra* Part VI.A.1.
364. *See supra* Part III.A.

C. *The* Lemon-Agostini *Analysis*

In *Lemon v. Kurtzman*, the U.S. Supreme Court set forth a three-prong test that was later refined in *Agostini v. Felton* to a two-prong inquiry.[365] The combined *Lemon-Agostini* test asks first if there is a secular purpose for providing funding to a religious organization and second whether the primary effect of the funding is one that either enhances or inhibits religion.[366] Through *Agostini*, the original third *Lemon* prong of excessive entanglement became a single factor that courts look to when determining primary effect.[367] Although programming like the Life Principles Community/Crossing Program could survive scrutiny under the first *Lemon-Agostini* prong, it would likely fail under the second, rendering it violative of the Establishment Clause.

1. The First Prong—Secular Legislative Purpose

The first prong of the *Lemon-Agostini* analysis, the requirement of a secular purpose, might be met by the defendants in cases similar to the dismissed New Mexico case if the defendant's stated reasons for introducing the faith-based program were objectively secular. In the former New Mexico case, for example, CCA stated that they believed that the NMWCF's faith-based programming would "assist in preventing criminal recidivism and...help with rehabilitative penological goals, as well as provide psychological and spiritual support to inmates while incarcerated."[368] Former defendant Snodgrass, the warden of the NMWCF, also articulated his belief in the ability of the Life Principles Community/Crossing Program to decrease recidivism by stating that it "'will reduce [an inmate's] ability to come back into [the NMWCF] by about 90 percent to 95 percent.'"[369]

Defendants in such cases may rely on the U.S. District Court for the Southern District of Iowa's decision in *Americans United for Separation of Church & State v. Prison Fellowship Ministries* to prove a secular purpose.[370] In *Prison Fellowship Ministries*, the court determined that reduction of recidivism was a legitimate secular purpose because there was evidence that some officials wanted the faith-based program to be implemented because it involved a supportive communal environment and had an extensive post-release program.[371] If a court determined that, like the prison officials in *Prison Fellowship Ministries*, the correction facility defendants chose to introduce the programming based on its favorable non-religious attributes, then the first prong would be satisfied.

The analysis could go the other way, however, if a court were to follow Justice O'Connor's instruction regarding this first prong and were on the lookout for "sham" government purposes.[372] It is possible to see a less constitutional purpose for

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365. *See supra* Part III.C.
366. *See supra* Part III.C.
367. *See supra* Part III.C.
368. Corrections Corporation of America, Inc. and Bill Snodgrass' Answer, *supra* note 265, at 3.
369. *See* Logan, *supra* note 275 (quoting Interview with Bill Snodgrass, Warden, N.M. Women's Corr. Facility).
370. *See generally* 432 F. Supp. 2d 862 (S.D. Iowa 2006); *see also supra* Part IV.C.
371. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 917.
372. *See supra* notes 89–90 and accompanying text.

a prison operator to partner with a religious organization to provide programming in its prison. For example, looking at the facts of the former New Mexico case, IBLP was a fundamental Christian organization.[373] There, CCA's partnership with IBLP could have been seen as an effort to proselytize prison inmates through in-house programming, especially in light of CCA's previous contracting practices.[374] If the court were to find that the religious nature of the Life Principles Community/ Crossing Program or other prison programs was the primary reason that the prison introduced the faith-based programming, the program would violate this first *Lemon-Agostini* prong.

In analyzing a fact pattern similar to the dismissed New Mexico case, a court would have to make a number of inferences to arrive at the conclusion that a prison operator had a non-legitimate government interest and, thus, it is more likely that the court would only look to the prison's stated legitimate purpose, which would mean that no violation of this prong would likely be found. The second prong of the *Lemon-Agostini* analysis, however, would prove to be more problematic for the prison operator.

2. The Second Prong—Primary Effect/Entanglement

The combined "effect" and "entanglement" inquiry of the *Lemon-Agostini* test is analyzed according to the three factors set out in *Agostini*.[375] These factors mandate that government aid may not (1) result in governmental indoctrination, (2) define the recipients by reference to religion, or (3) create excessive entanglement between the government and the religious organization.[376] The application of these factors to faith-based prison programs like the Life Principles Community/Crossings Program would likely illustrate a violation of this prong.

The implementation of faith-based prison programs by government employees or private prison operators working as state actors could be found to result in government indoctrination. Proselytization is bound to occur when a religious organization leads inmates in a quest for self-forgiveness through the use of faith-based tenets.[377] As to the second factor, however, faith-based programs similar to the Life Principles Community/Crossings Program do not necessarily define their recipients with reference to religion. CCA and IBLP adamantly adhere to the assertion that persons of any faith are welcome to join in the NMWCF faith-based unit and that religious conversion is not required.[378] The question of excessive entanglement, however, shows that the faith-based programming such as that at NMWCF violates the Establishment Clause.

It is likely that the Life Principles Community/Crossings Program and similar faith-based programming at other correctional facilities would be found to be excessively entangled with the state government under the analyses of both *Roemer*

373. *See supra* Part V.A.1.
374. *See supra* Part V.A.1.
375. *See supra* Part II.C.
376. *See supra* Part II.C.
377. Lynn S. Branham, *"Go and Sin No More": The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 341 (2004).
378. *See supra* note 275 and accompanying text.

v. Board of Public Works[379] and *Lemon*.[380] *Roemer* indicated that no state aid may go to organizations that are so "pervasively sectarian" that the secular activities are inseparable from the religiously centered ones.[381] *Roemer* also instructed that, if the secular activities can be separated out, they alone may be funded.[382] *Lemon* found that excessive entanglement may also exist when there is an ongoing relationship of government oversight.[383]

As was the case with the InnerChange program in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*,[384] other faith-based programs' religious activities are a large component of the daily routine set for participant inmates. In *Prison Fellowship Ministries*, the court found the program to be "pervasively sectarian" because the inmates participated in four hours of biblically based instruction and attended at least one hour of "community meetings and devotionals" per day.[385] Other faith-based programs with the same degree of religious component may also be seen as "pervasively sectarian." For example, the inmates in the NMWCF's "God Pod" participate in religious meetings, prayer walks, and even memorize the New Testament.[386] Additionally, "God Pod" residents may participate in song and dance accompanying devotional music.[387] In total, the Life Principles Community/Crossings participants spend 732 hours completing the program.[388] Given that the program lasts for six months,[389] the inmates are exposed to a little over four hours of programming per day. If a court were to follow the decision in *Prison Fellowship Ministries*, it might conclude that faith-based programs with content similar to the Life Principles Community/Crossing Program are pervasively sectarian. If it were found that the secular and sectarian aspects of the pervasively sectarian program were separable, however, the secular activities alone could be funded with state money.

Even if a court determined that the secular and sectarian aspects of a program could be separated, it might still find excessive entanglement because of the degree of state oversight needed to ensure that the funding provided was used solely for secular purposes. In *Lemon*, excessive entanglement was found where the State would have to maintain a relationship with the religious organization to ensure that government funds were only being used for secular purposes.[390] Similarly, excessive entanglement could exist with prison programs like the Life Principles Community/Crossing program because the State would have to have constant and continuing oversight of the program in order to ensure that state funds were being used solely for the program's secular aspects. This continuing oversight is exactly

379. 426 U.S. 736 (1976); *see supra* note 92 and accompanying text.
380. 403 U.S. 602 (1971); *see supra* Part II.B.
381. *See supra* note 92 and accompanying text.
382. *See supra* note 92 and accompanying text.
383. *See supra* Part III.B.3.
384. 432 F. Supp. 2d 862 (S.D. Iowa 2006).
385. *Id.* at 901, 917–21.
386. *See supra* text accompanying note 293.
387. *See supra* text accompanying note 294.
388. *See supra* text accompanying note 291.
389. Corrections Corporation of America, Inc. and Bill Snodgrass's Answer, *supra* note 265, at 4.
390. *See supra* Part III.B.3.

the type of relationship that the *Lemon* test is supposed to ferret out as unconstitutional.

Thus, faith-based programs similar to the Life Principles Community/Crossing Program would likely fail the *Lemon-Agostini* inquiry. Even though the program might survive the first prong because of its objectively secular purpose, it would fail under the second prong. Under the second prong, such programs are "pervasively sectarian" and a court might find that the secular and sectarian aspects are so intertwined that it is impossible to separate the two. Even if the funds were separable, however, there would be excessive entanglement due to the fact that continuing oversight would be necessary to ensure that the funds were used only for secular purposes.

D. Endorsement Test

The endorsement test asks whether government action has the effect of communicating a message of religious approval or disapproval to observers.[391] The test forbids government action that makes individuals feel like "outsiders" rather than welcome members of the community.[392] Faith-based programs similar to the Life Principles Community/Crossings Program would fail this test because persons who practice a religion other than Christianity or who practice no religion at all may feel as if they are outsiders and are unwelcome to join the program due to actual or perceived government endorsement.[393]

Given that an objective observer would attribute the religious activities of programs like the Life Principles Community/Crossings Program to the State, it is likely that one could be under the impression that the State endorses the program's methodology and message. In *Santa Fe Independent School District v. Doe*, the U.S. Supreme Court found that student-initiated speeches were not private speech because they took place on government property at a government-sponsored event.[394] Due to the government's role in providing a medium for the prayers, the Court determined that an individual listening to the message would be given the impression that the religious views expressed were delivered with the approval of the school administration.[395]

As in *Santa Fe Independent School District*, the religious message of a faith-based program such as the Life Principles Community/Crossings Program may be attributed to the State and may make non-participants feel like outsiders. The program takes place on government property and is government-sponsored. If, as is the case at the NMWCF, the program is based on a certain denomination's religious principles, its religious undertones may be unwelcoming to persons of different religions, even if the program's officials indicate that all persons are

391. *See supra* Part III.D.

392. *See supra* text accompanying note 122.

393. This is not always the case, however. For example, a Buddhist inmate at the Carol Vance unit outside Houston indicated that he was comfortable with the Christian principles presented in the faith-based unit in which he participated. David, Crary, *Despite Concerns, Faith-Based Prison Programs Grow*, DAILY HERALD (Chicago), Oct. 10, 2007, *available at* http://www.dailyherald.com/story/?id=61463.

394. 530 U.S. 290 (2000); *see supra* text accompanying notes 124–130.

395. *See supra* text accompanying notes 128–130.

welcome to join.[396] If the majority of participants are of one religion, an inmate participant who is of a different religion may feel as though the state sponsors and approves of a religion different than her own. Furthermore, the less hectic environment and separate "pod" given to the inmates who participate in a faith-based program may make non-participants feel excluded. In this way, the government may be seen as endorsing religion as opposed to no religion, which the U.S. Supreme Court has specifically rejected as unconstitutional in several cases.[397]

Thus, programs similar to the Life Principles Community/Crossing Program would likely fail under the Endorsement test. Given that such programs are approved by the State and take place on state property, an objective observer would likely assume that the State endorses its religious-based message. These circumstances lead to impermissible government promotion of religion in violation of the Establishment Clause.

E. Coercion Test

The coercion test was outlined by the U.S. Supreme Court in *Lee v. Weisman* and finds a violation of the Establishment Clause when coercive factors require an individual to participate in a religious activity.[398] In *Kerr v. Farrey*, the Seventh Circuit summarized the U.S. Supreme Court's jurisprudence regarding the coercion test in its own three-part inquiry.[399] The *Kerr* test asked (1) if there was state action, (2) if the state action amounted to coercion, and (3) if the coercion involved a religious or secular object.[400] If a lawsuit similar to the one dismissed in New Mexico were analyzed under the *Kerr* inquiry, the court would likely find an Establishment Clause violation because the faith-based programming is coercive and runs afoul of all three parts of the *Kerr* analysis. The facts of the former New Mexico case are used to illustrate application of this test.

1. State Action

In the New Mexico case, defendants Richardson, Williams, and Gonzales would be considered state actors due to their status as government employees.[401] The answer of these three defendants acknowledged that they were responsible for spending appropriations of money from the New Mexico General Fund.[402] Some of this funding went to the NMWCF and ultimately to the facility's faith-based

396. *See supra* note 275 and accompanying text.

397. *E.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government...can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (footnote omitted)).

398. 505 U.S. 577 (1992); *see supra* text accompanying notes 134–141.

399. 95 F.3d 472 (7th Cir. 1996); *see supra* notes 165–173 and accompanying text.

400. *See supra* text accompanying note 168.

401. *See supra* Part VI.A.

402. Answer to Civil Rights Complaint, *supra* note 16, at 4.

programming. Furthermore, defendant Gonzales was in charge of coordinating faith-based programming for the New Mexico Department of Corrections.[403]

Similarly, corporate defendants Snodgrass and CCA would be state actors under U.S. Supreme Court state action jurisprudence because they perform a public function in running the prison facility.[404] CCA was responsible for opening the NMWCF's "God Pod" and for contracting with IBLP.[405] Thus, CCA acted to implement the prison's faith-based programming and acted under the color of state law in doing so.

2. CCA's Coercive Actions

Second, CCA's actions amounted to coercion. According to the definition of coercion supplied by Justice Kennedy in *Lee*, even "subtle coercive pressures" can constitute coercion.[406] In *Lee*, the Court found that students were coerced into listening to prayers during a graduation ceremony because society places pressure on people to attend graduation events.[407] Similarly, society places a stigma on people who are incarcerated, and offenders are motivated to try to stay out of prison. Defendant Snodgrass touted that ninety to ninety-five percent of inmates who complete the NMWCF's faith-based program will not return to jail.[408] As one inmate described, the Life Principles Community/Crossing Program ensures that "'I'm not one of those who comes back.'"[409] Perhaps the inmates, like the students in *Lee*, experience societal pressure to attend the program that is advertised as most likely to keep them out of prison and were thus coerced into listening to the religious content of the Life Principles Community/Crossings Program.

Furthermore, inmates at the NMWCF who participated in the Life Principles Community/Crossings Program had the advantage of living in a quieter and less stressful environment with fewer cellmates.[410] Although this may not seem like coercive conditions to a person outside the prison system, it may seem quite important to prisoners who have few amenities and comforts in their lives. The promise of a quieter environment may be enough to convince a religiously disinclined individual to join the Life Principles Community/Crossings Program and be subject to personally offensive religious teachings.

The benefits associated with life in the "God Pod" might not be considered coercive, however, if the court were to follow the Seventh Circuit's ruling in *Freedom from Religion Foundation, Inc. v. McCallum*.[411] In *McCallum*, the court stated that the quality of a program cannot be equated with coercion.[412] The results

403. *Id.* at 5.
404. *See supra* Part VI.A.1–2.
405. *See supra* Part V.A.2.
406. Lee v. Weisman, 505 U.S. 577, 588 (1992).
407. *Id.* at 594–95.
408. *See* Logan, *supra* note 275 (quoting Interview with Bill Snodgrass, Warden, N.M. Women's Corr. Facility).
409. *Id.*
410. *See supra* text accompanying notes 298–299.
411. 324 F.3d 880 (7th Cir. 2003).
412. *Id.* at 884.

of applying this principle to a program like the Life Principles Community/Crossing Program are discussed in the context of private choice below.[413]

Additionally, the submersion of inmates into the Life Principles Community/ Crossings Program and its teachings may be found to be coercive because the exposure is long term. In *Warner v. Orange County Department of Probation*, the Second Circuit found an AA program to be coercive because it was long term and because the basis for participants' motivation was religious.[414] As in *Warner*, the Life Principles Community/Crossings Program is based on religious notions designed to motivate. *Warner* may be distinguished, however, because in that case the prisoner had to attend the AA meeting or he would have faced imprisonment for violation of parole.[415] The inmates of the NMWCF were not required to enroll in the Life Principles Community/Crossing Program and were not threatened with penalties for not joining.

3. CCA's Coercion Involved as Religious Object

Finally, the object of the coercion, the Life Principles Community/Crossings Program, would be found to be religious in nature. The stated purpose of the IBLP program is to help prisoners "grow[] in their walk with God and receive[] practical instruction on living the Christian life."[416] The truth of this statement can be seen in the workbook materials provided to inmates and in their daily schedules.[417] Many courts have found that AA and NA programs are considered "religious" because the twelve step programs are permeated with references to the monotheistic notion of a single God or Supreme Being.[418] This is also true of the Life Principles Community/Crossings Program since the women enrolled in the program were involved in prayer walks and religious meetings and were asked to memorize the New Testament.[419]

Thus, coercion likely exists for inmates in prisons with faith-based programs similar to the Life Principles Community/Crossings program given that the benefits associated with the program are coercive, even if the coercion is only of the "subtle psychological" variety. Such programs are religious in nature and exist as a result of state action.

F. Private Choice

Within its Establishment Clause jurisprudence, the U.S. Supreme Court determined that private choice on behalf of recipients of government funds may sever any unconstitutional connection between the government and a religious organization receiving those funds.[420] Private choice exists when a "genuine choice"

413. *See infra* Part VI.F.
414. 115 F.3d 1068 (2d Cir. 1996); *see supra* text accompanying notes 174–178.
415. *Warner*, 115 F.3d at 1075.
416. Institute in Basic Life Principles, *supra* note 269.
417. *See supra* text accompanying notes 282–286.
418. *See supra* note 162 and accompanying text.
419. *See supra* Part V.A.2.
420. *See supra* Part III.F.

between a secular and religious program is offered.[421] Under this analysis, it is likely that the inmates participating in programs similar to the Life Principles Community/Crossings Program would be found to exercise private choice regarding the program because the program is only one of a number available to the inmates. The inmates' private choice may sever the potential coercive nature or state endorsement of faith-based programs and allow them to pass muster under the Establishment Clause.

The court in *Freedom from Religion Foundation, Inc. v. McCallum* found that inequalities between religious and non-religious programs offered in a prison did not diminish the inmates' true private choice.[422] There, the court found that a secular program with a much shorter treatment length that did not incorporate family and employment education was a reasonable alternative to a religious program that had those features.[423] As the *McCallum* court succinctly phrased it, "quality cannot be coercion."[424]

The NMWCF, for example, offers inmates a variety of non-religious educational, vocational, and "life skills" programs.[425] If a court analyzing the facts of the former New Mexico case agreed with the Seventh Circuit's statement in *McCallum* that "quality cannot be coercion,"[426] then any difference between the secular and sectarian programs offered to the inmates would not be considered coercive. If that were the case, a court could find that the inmates are given a true choice that acts as a circuit breaker to remove any unconstitutional connection between the government and the religious nature of the faith-based programming.

Furthermore, as the U.S. Supreme Court indicated in *Mitchell v. Helms*, it does not matter for the purposes of a private choice analysis that the money does not actually pass through the hands of the inmates to reach the religious organization associated with the faith-based programming.[427] In the former New Mexico case, for example, if the money from state funds was directed to the religious program according to the inmates' decisions, then the choice of the inmate would sever any impermissible connection between church and state. If the State provided the money to the prison for the faith-based programming regardless of the choices of the inmates, however, no prison choice would exist to act as a circuit-breaker between the government and religion. Thus, if a court decided to utilize the private choice analysis, faith-based programs that are only one of a wide array of programs offered to inmates may be found to be acceptable under the Establishment Clause if an inmate's choice as to which type of programming to enroll in determines where state funds are spent.

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421. *See supra* note 155 and accompanying text.
422. 324 F.3d 880, 884 (7th Cir. 2003).
423. *Id.*
424. *Id.*
425. *See supra* text accompanying note 266.
426. *McCallum*, 324 F.3d at 884.
427. 530 U.S. 793, 815–16 (2000).

VII. CONCLUSION

The introduction of the *Hein v. Freedom from Religion Foundation, Inc.*[428] framework into the U.S. Supreme Court's taxpayer standing jurisprudence will make it difficult for church and state watchdog groups to bring Establishment Clause claims because, without an individual claiming a "direct injury" to represent the case, the groups will lack standing. The full extent of the *Hein* decision will not be known, however, until the lower courts begin to adjudicate claims involving its limitations.

For those Establishment Clause claims that fall into the limited *Hein* exception or that are brought by an individual with standing, the question of whether a faith-based program similar to the Life Principles Community/Crossings program fails or survives constitutional scrutiny under the Establishment Clause will depend on several factors but will hinge mainly on which test the trial court chooses to apply. If the New Mexico court or any other court faced with a similar fact pattern followed the lead of the trial court in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*[429] and relied on the *Lemon-Agostini* test,[430] the faith-based programming would likely be found unconstitutional because (1) the program is "pervasively sectarian"[431] and (2) the funding scheme between the State and the program would cause excessive entanglement.

Furthermore, an analysis under the endorsement and coercion tests shows that faith-based programming like that at the NMWCF violates the Establishment Clause. The fact that such programs are operated under the approval of government employees gives an objective observer the impression that the State is endorsing a religious message. Furthermore, the programs' religious content may make non-religious persons feel like outsiders. Programs such as the Life Principles Community/Crossing Program also fail the coercion test because coercion can exist where there are "subtle psychological pressures," which presumably include the benefit of getting to live in a quieter and less hectic environment. Similarly, the programming would be unconstitutional under the analysis in *Kerr* because the object of the coercion is a program based on religious tenets.[432]

However, if a court deciding such a case relied on the principle of private choice[433] and followed the lead of the court in *McCallum*,[434] it might find that the choice the inmates have in rehabilitation programming is sufficient to sever any impermissible connection between the State and the religious content of the faith-based programming. This would lead to the conclusion that the program did not violate the Establishment Clause even if coercion and state endorsement were present.

Courts faced with similar Establishment Clause claims against faith-based prison programs should find that the programs violate the Constitution. Even though it may

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428. 127 S. Ct. 2553 (2007).
429. 432 F. Supp. 2d 862 (S.D. Iowa 2006).
430. *See supra* Part III.C.
431. *See supra* Part VI.C.2.
432. *See supra* notes 165–173 and accompanying text.
433. *See supra* Part VI.F.
434. *See supra* Part IV.B.

be consistent with the U.S. Supreme Court's jurisprudence, a ruling that such programs do not violate the Establishment Clause would allow state actors to cross the precarious line between church and state into the territory of state establishment of religion. A finding that faith-based programming similar to that at the NMWCF violates the Establishment Clause, however, would also be consistent with the U.S. Supreme Court's jurisprudence. In addition, such a finding would allow government and taxpayer monies to remain separate from the religious program's affiliation and remove any question of government endorsement of religion.

To maintain a society as diverse as currently exists in the United States, we must adhere to the constitutional restriction that separates church and state. If prison operators throughout the country were allowed to introduce programs that essentially proselytize inmates within the confines of the prison, it would, as the court in *Americans United for Separation of Church & State v. Prison Fellowship Ministries* indicated, be as though the prisons were allowed to set up religious congregations.[435] The idea of rehabilitating prisoners through faith-based programs is certainly a potential means of reducing recidivism and should be explored. We must ensure, however, that implementation of such programs respects the principles underlying the Establishment Clause.

435. *See* 432 F. Supp. 2d 862, 924 (S.D. Iowa 2006).