THE FAITH-BASED STANDARD: A REVIEW AND PROSPECTIVE ANALYSIS OF ESTABLISHMENT CLAUSE DEVELOPMENTS IN LIGHT OF *AMERICANS UNITED V. PRISON FELLOWSHIP MINISTRIES*

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SINCE the rise of the faith-based organizational movement in the mid-1990s, the ever expanding role of religious service providers has been a source of heated debate, dividing pundits,[1] the populace, and most recently, prisoners[2] down ideological lines over the propriety of church-state relations. On one hand, there are those who fear the message of government endorsement and official theology sent by the selection of certain religious service providers to the exclusion of others.[3] Such an entanglement is perceived as a threat to religious free will; identifying a chosen group as the religious archetype, and perhaps even providing an opportunity for faith-based service providers to coerce the more vulnerable individuals entrusted to their care.[4]

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1. *Compare* Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 34-35 (2005) (commenting on the historic social value of religious organizations and their "unique function [in] achieving [the] social goals" of the "modern … welfare state") *with* Sheila Suess Kennedy, *Redemption or Rehabilitation? Charitable Choice and Criminal Justice*, 14 CRIM. JUST. POL'Y REV. 214, 219 (2003) (noting the burden faith-based organizations impose on the state).

2. *See generally* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006) (involving an Establishment Clause challenge to an in-prison, faith-based, rehabilitation program).

3. *See* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1232 (2003) (noting the possibility that faith-based funding will create "perceptions of government endorsement of religion"). *Cf.* Charles McDaniel et al., *Charitable Choice and Prison Ministries: Constitutional and Institutional Challenges to Rehabilitating the American Penal System*, 16 CRIM. JUST. POL'Y REV. 164, 177 (2005) (suggesting the likelihood that Muslim charities will be disfavored by some government agencies).

4. *See* Rob Boston, *Iowa Inmate Indoctrination on Trial: Americans United Challenges Taxpayer-Funded Program That Immerses Inmates in Fundamentalism and Scorns Other Faiths, Gays, Women's Equality*, AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, Dec. 2005, http://www.au.org/site/News2?page=NewsArticle&id=7680&abbr=cs_(observing the choice "between getting a needed benefit … [or] maintaining … religious freedom rights" imposed on those left to rely on faith-based services).

At the same time, there seems to be a growing contingent of pragmatists in favor of an increased role for faith-based organizations[5] due to the benefits they provide in excess of their non-monetary risks. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*[6] serves as, perhaps, the most illustrative example of this perception in practice. The case involved a Christian rehabilitation program selected by the Iowa Department of Corrections—with the support of the state's electorate[7] and prison administration[8]—to provide in-prison training services within the state's Newton Correctional Facility.[9] In obtaining its initial contract and subsequent renewals, the Iowa Department of Corrections continually evaluated the program based on its track record and price, resulting in consistent determinations favoring Prison Fellowship's InnerChange program over both its nearest private competitor and the state acting independently.[10] As a result, InnerChange remained the primary source of correctional and vocational instruction within the Newton Correctional Facility[11] for the duration of its seven year relationship with the state.[12]

Many non-Christian inmates predictably took issue with the state's selection of the religiously motivated program.[13] This led to a legal challenge by Americans United that illuminated not only the disparate philosophies encompassing church-state relations, but also the utter confusion plaguing practitioners and courts alike regarding the discernment and application of the appropriate legal standard to modern Establishment Clause problems. The need for more explicit constitutional parameters regarding the Establishment Clause is

5. *See* Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y 265, 265-66 (2002) (observing the growing number of Americans acceptant of church-state relationships).

6. 432 F. Supp. 2d at 862.

7. The Iowa legislature began appropriating funds for InnerChange's operations at the Newton Correctional Facility in 2002 and continued to do so throughout 2003, 2004, and 2005. *Id.* at 885-86.

8. *Id.* at 881.

9. *Id.* at 881-82.

10. *Id.* at 880-83. For the first five contracts between the Iowa Department of Corrections and InnerChange, the program's only real contractual competitor was the State itself since no other private service providers responded to the state's request for proposal in 1998. However, in 2005, Emerald Correctional Management entered a bid in response to another request for proposal, which showed both the State of Iowa and Emerald to be significantly more expensive than InnerChange. *Id.* at 880-81, 886.

11. *Cf. id.* at 930 (noting the relative preeminence of InnerChange's programs "within the Iowa Depart[ment] of Corrections").

12. The InnerChange program was initially contracted by the Iowa Department of Corrections in 1999, and presumably continues to provide services at the Newton Correctional Facility pending appeal of the Southern District of Iowa's stayed injunction, which was issued in June of 2006. *Id.* at 884, 941.

13. *Id.* at 898-99. It is important to note that the InnerChange program is based on what has been referred to as a "transformational" model. *Id.* at 875. This model identifies criminality as a symptom of sin and stresses the necessity of a personal relationship with Jesus Christ to deliver the actor from recidivist behavior. *Id.* These beliefs, as well as the organization's de-emphasis on organized religious practices, such as Holy Communion, make InnerChange suspect in the eyes of some non-Evangelical Christians. *Id.* at 873-74.

clear from the sheer volume of the *Prison Fellowship* opinion,[14] and, more specifically, its tortuous analysis of outdated, irreconcilable precedent that seems to have been largely displaced by the Supreme Court's recent consideration of *Mitchell v. Helms*[15] and *Zelman v. Simmons-Harris*.[16] These two cases involved expansive holdings in favor of increased church-state corroboration, representing a jurisprudential epoch in faith-based organizational funding.

In the interest of constitutional integrity and the avoidance of Justice Thomas' concern that the "unintelligibility" of current Establishment Clause doctrine might cause "adjudication … [to] turn[] on judicial predilections,"[17] rather than consistent legal rationale, this article seeks a clearer delineation of the constitutional requirements applicable to modern faith-based organizational funding, attempting to gauge the current constitutional standard, and note developments related to the emerging Establishment Clause stance on church-state alliances. Additionally, this article briefly reexamines the *Prison Fellowship* decision, which ultimately found the InnerChange program unconstitutional,[18] speculating that regardless of the emerging Establishment Clause's greater faith-based funding latitude, the InnerChange program will continue to enjoy only mixed constitutionality.

Part I of this article examines the rise of the faith-based organizational movement, including relevant history and more recent political interventions. Part II examines constitutional developments in the faith-based organizational movement, beginning with a general background of the Establishment Clause, as well as an analysis of modern applications in the faith-based context, and finishing with a review of interpretational trends among members of the Supreme Court. Part III summarizes likely changes in the Establishment Clause standard and the impact that they will have on faith-based organizations like InnerChange.

14. 78 pages.

15. 530 U.S. 793 (2000). For example, the *Prison Fellowship* court placed great emphasis on the fact that secular aspects of the program could not be separated from sectarian aspects. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 921-23 (S.D. Iowa 2006). However, in *Mitchell*, both the plurality opinion and concurrence of Justices O'Connor and Breyer discounted the importance of ensuring that sectarian aspects of religious programming remain free from funding benefits. 530 U.S. at 816, 857.

16. 536 U.S. 639 (2002). The *Prison Fellowship* court also emphasized the non-financial incentives for inmates to join the InnerChange program, such as the privacy afforded in InnerChange bathrooms. 432 F. Supp. 2d at 925-31. However, in *Zelman* the Supreme Court upheld the voucher program at issue because of the lack of financial incentives for choosing the religious program, despite the non-financial benefits of private religious schools over their public counterparts. 536 U.S. at 653. *See also infra*, part II B (discussing the reasoning of *Zelman*).

17. Van Orden v. Perry, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

18. *See infra* part II C.

I. THE FAITH-BASED ORGANIZATIONAL MOVEMENT

A. Background

The faith-based organizational movement was borne of several broad trends in American social policy that were drawn together and encapsulated in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Act").[19] The first trend, and one bearing most directly on the passage of the Act was society's growing discontent over the state of the nation's welfare system.[20]

Welfare was originally envisioned as a system of temporary assistance, under which the nation was able to meet its "moral obligation" to keep the less fortunate afloat during times of economic upheaval.[21] However, by and through Great Society revisions, which stressed the societal abandonment of the economic underclass,[22] welfare turned into a system of legal "entitlement … supplying the material needs of … recipients … [and] permit[ting] dependency."[23] Americans grew increasingly discontent with this arrangement, coming to the realization that welfare was defying the ethic to work rather than mending torn societal fabric.[24] As a result, the nation took its dissatisfaction to the voting booth, electing a Congress willing to make broad revisions.[25]

The second trend, however, arose from a model already incorporated within the delivery portion of the social service system itself, namely, privatization. Since the 1960s, federal, state and local governmental bodies have increasingly relied on private contractors for all manners of social service, from the provision of specific services, such as medical care,[26] to welfare system administration.[27]

Traditionally, this movement toward the greater inclusion of private contractors was justified on efficiency grounds, as private organizations were

19. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

20. *See* Solomon & Vlissides, *supra* note 5, at 269-74 (discussing public discontent over welfare programming). The welfare system and the privatization of government services are given only passing treatment in this article as a way to introduce the faith-based organizational movement. For a more detailed discussion, see generally *id.*

21. *Id.* at 269.

22. *See* JOHN PERRY, GOD BEHIND BARS: THE INSPIRING STORY OF PRISON FELLOWSHIP 47 (2006) (noting the view of "Great Society welfare programs … that members of the social underclass were 'victims of society' [caught in a trap of self-perpetuating poverty by] an uncaring system that denied them what they needed to succeed").

23. *See* Solomon & Vlissides, *supra* note 5, at 269-70.

24. Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1753 (2002).

25. Solomon & Vlissides, *supra* note 5, at 273.

26. Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 813 (2002).

27. Diller, *supra* note 24, at 1740.

viewed as being particularly adept at reducing cost and increasing productivity;[28] however, with the movement toward welfare revision, private contractors seem to have been chosen for the potential impact they could have on the lives of those they served, rather than mere financial concerns.[29] For this reason, religious organizations were viewed by many as ideal for reaching the ultimate goal of the Act, which was to revitalize the welfare system by achieving real change in the perspectives of those who were dependant upon it.[30] This particular emphasis and motivation led to the inclusion of the Act's infamous "Charitable Choice"[31] provision, which made limited allowances for faith-based contracting.

B. Charitable Choice

Charitable Choice refers to a set of rules "intended to ensure that faith-based organizations participate more fully in federally funded social service programs and offer services without abandoning their religious character or infringing on the religious freedom of applicants/recipients."[32] Essentially, Charitable Choice allows private religious entities—ranging from 501(c)(3) corporations all the way down to the local church level[33]—to provide specified state services for compensation.

1. *Federal Expansion of Charitable Choice*

Initially, the Charitable Choice provision was limited to the scope of the Act, restricting it to services provided under the Temporary Assistance for Needy Families program created therein.[34] However, as time went on, Charitable Choice provisions were included in the Community Services Block Grant Program[35] as well as certain drug treatment[36] and children's health programs.[37]

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28. Gilman, *supra* note 26, at 812.

29. *See* Solomon & Vlissides, *supra* note 5, at 267 (observing that "it is doubtful that the trend toward 'faith-based' solutions is a product of greater religiosity … [but rather] a general belief that they work," as compared to traditional government interventions).

30. *See* Gilman, *supra* note 26, at 813 (noting that "contracting out social services puts services closer to the people served … allow[ing] private providers to act as mediating forces").

31. Charitable Choice was later codified at 42 U.S.C. § 604a (2000).

32. Joe Richardson, *Charitable Choice Rules and Faith-Based Organizations*, CONG. RES. SERVICE, Mar. 24, 2005, at 2 (on file with author).

33. Sheila Suess Kennedy & Leda McIntyre Hall, *What Separation of Church and State? Constitutional Competence and the Bush Faith-Based Initiative*, 5 J.L. SOC'Y 389, 394 (2004).

34. Andrea Pallios, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HASTINGS CONST. L.Q. 131, 132 (2002).

35. 42 U.S.C. § 603 (2000). *See also* Kennedy & Hall, *supra* note 33, at 392. The Community Services Block Grant Program provides grants for "Federal and State-recognized Indian Tribes and tribal organizations." Office of Community Services, Community Services Block Grant Program Overview, http://www.acf.hhs.gov/programs/ocs/csbg/documents/mission.html (last visited Sept. 5, 2007).

36. 42 U.S.C. § 201 (2000). *See also* Kennedy & Hall, *supra* note 33, at 392 (noting that the drug treatment programs arose through the "Substance Abuse and Mental Health Services Administration").

Hence, Charitable Choice's expansion to cover "child care, substance abuse treatment, homeless services, English courses, parenting classes, mentoring, job training, mental health counseling, life skills training, affordable housing, domestic violence shelters, transportation to job sites and fatherhood programs."[38] Following these incorporations of the provision, however, further attempts at legislative extension proved unsuccessful.[39]

Nevertheless, Charitable Choice has been expanded through executive orders to encompass seven executive departments: Health and Human Services, Labor, Housing and Urban Development, Education, Justice,[40] Agriculture, and the Agency for International Development,[41] all of which are required to contract with faith-based organizations on "the same terms as private non-religious institutions."[42]

2. *The State Response*

Following the enactment of Charitable Choice, a number of state governments have embraced the same tolerance for faith-based contracting in non-federally funded programs as the provision mandates in the federal-funding context; in effect expanding the influence of Charitable Choice to the states themselves.[43] The most obvious example of this is provided by the InnerChange program, which currently has operations in the state prison systems of Iowa, Texas, Minnesota, Kansas, Tennessee, Arkansas, and Missouri,[44] under varying direct and indirect state funding arrangements.[45]

C. Concerns

There are a number of policy and constitutional concerns raised by outsourcing human services under Charitable Choice and the pseudo-Charitable Choice actions of state governments contracting with programs like InnerChange,

37. 42 U.S.C. § 629 (2000). *See also* Kennedy & Hall, *supra* note 33, at 392 (noting that the children's programs arose under the "Children's Health Act").

38. Gilman, *supra* note 26, at 802.

39. Ira C. Lupu & Robert W. Tuttle, The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Religious Organizations 3 (2003), http://www.religionandsocialpolicy.org/docs/legal/reports/12-2-2003_state_of_the_law.pdf.

40. Steven K. Green, *"A Legacy of Discrimination"? The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 84 OR. L. REV. 725, 735 (2005). *See also* Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001).

41. Lupu & Tuttle, *supra* note 39, at 2.

42. *Id.*

43. *Cf.* Green, *supra* note 40, at 747 (noting that Oregon had some state Charitable Choice-like programs in place prior to the passage of the Personal Responsibility and Work Opportunity Reconciliation Act and that such state programming remains in place).

44. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 871 (S.D. Iowa 2006).

45. *See* McDaniel et al., *supra* note 3, at 171 (contrasting the direct financial support of InnerChange in Iowa and Kansas with the more indirect funding schemes of Texas and Minnesota).

mainly due to the concessions they allow faith-based contractors. These concessions differ substantially from the limited funding arrangements available to religious social service providers in previous generations.

1. *Traditional v. Modern Religious Provisions*

American social services have a rather extensive history of religious involvement with "Catholic Charities, Lutheran Social Services and even the Salvation Army"[46] sharing a common contractual tradition with government agencies. In fact, these relationships seem to have generated a substantial amount of revenue for all of the religious charities involved.[47] However, in these cases, the providers were generally separate corporate affiliates acting in a secular capacity to provide contracted services, whereas the organizations invited into government arrangements under Charitable Choice and pseudo-Charitable Choice state initiatives are of a completely different character.[48]

2. *Issues Raised*

General concerns over faith-based service provider arrangements include the potential threat of government regulations on the "religious autonomy" of faith-based organizations;[49] the "dilution of religious mission"[50] through the imposition of government objectives; and "increased social divisiveness,"[51] as competition for government contracts creates denominational winners and losers. Far beyond these basic policy considerations, however, is the realization of the social libertarian fear that non-adherents of a given faith-based organization's tenets will be forced to compromise their views due to a lack of secular alternatives.

For example, in *Prison Fellowship*, the court found that the comparable services provided by the Iowa Department of Corrections failed to offer the range of programming options provided by InnerChange, leaving inmates of other faiths with no real non-Christian alternatives for some recommended classes.[52] Similarly, the living unit that InnerChange occupied was found to have the

46. Kennedy & Hall, *supra* note 33, at 397.

47. *See* Gilman, *supra* note 26, at 811 (noting that "government funding accounts for 39% of the budget of Lutheran Services, 62% of Catholic Charities, and 18% of the Salvation Army").

48. *See* Kennedy & Hall, *supra* note 33, at 389 (observing that "[r]eligious organizations no longer need to 'spin off' 501(c)(3) affiliates," but rather "congregations may contract directly with the government").

49. David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1365 (2003).

50. *Id.* at 1367.

51. *Id.* at 1371.

52. *Prison Fellowship*, 432 F. Supp. 2d at 930-32. It is also important to note that though the InnerChange program does not discriminate against individuals of other faiths, the court found its Christian nature and mission to be a disincentive for non-Christian inmates, in effect, leaving them with no means of receiving instruction that was not provided by the Iowa Department of Corrections. *Id.* at 930-31.

unique distinction of being the only cell block within the Newton Correctional Facility to have its toilets and sinks located outside of the cells.[53] The Court found these features to present the type of incentives that would prevent a free choice on the part of an inmate over whether to join the program,[54] leading to the invalidation of one of InnerChange's state contracts on Establishment Clause grounds.[55]

Whether one agrees with the specific findings of the *Prison Fellowship* court, or the legal basis on which it relied,[56] the case does highlight some of the policy concerns surrounding the increased frequency of church-state corroboration. It also serves as a reminder that the funding of organizations like InnerChange raises significant Establishment Clause issues that, as the next section illustrates, lack a definitive standard of review.

II. CONSTITUTION

A. Background

The Establishment Clause of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion."[57] This provision was interpreted in *Everson v. Board of Education of Ewing Township*[58] as the embodiment of a "'wall of separation between church and state,'"[59] launching the "modern Establishment Clause"[60] doctrine and the separationist understanding of it that dominated the Court for a generation.[61]

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53. *Id.* at 893.

54. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 927 (S.D. Iowa 2006). Specifically, the court found that "[w]hat appears insignificant to those accustomed to a wide range of normal freedoms outside of prison can be of great value and import to someone whose every minute is managed by others." *Id.*

55. *Id.* at 931. This contract, as well as the InnerChange's previous contract with the Iowa Department of Corrections, is explored further in part II C.

56. *See, e.g.*, *supra* note 16.

57. U.S. CONST. amend. I.

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

59. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

60. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284 (2001). The authors refer to *Everson* as the beginning of the "modern Establishment Clause," because, as they observe, prior to *Everson*, "the Supreme Court decided only two cases under that provision, and neither cast a long shadow." *Id.* The first of these cases was *Bradfield v. Roberts*, 175 U.S. 291, 292 (1899), which involved a challenge to state funding of a Catholic Hospital. However, though this funding was challenged under the Establishment Clause, the Court found the allegations waged against the institution insufficient to declare public funding unconstitutional due to the secular nature of the hospital function and its divisibility from the personal beliefs of staffers. *Id.* at 298-99. The second case was *Quick Bear v. Leupp*, 210 U.S. 50, 52-53 (1908), which involved "treaty and trust money" utilized in the provision of educating Native American children in Catholic Schools. The Court felt this use of the money was within the tribal prerogative and, thus, inline with Establishment Clause requirements. *Id.* at 82.

61. *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233 (1993) (observing the dominance of separationism from 1947-1980).

1. Everson v. Board of Education of Ewing Township

The *Everson* case involved a state statute permitting local school districts to arrange for the transportation of constituent students, including those attending parochial schools. Under this statute, the Board of Education of Ewing Township provided for the reimbursement of money spent by parents sending their children to school via the public transportation system, which resulted in some amount of state funds reaching the parents of children enrolled in Catholic schools.[62] The practice was challenged as a state support of religion;[63] but, the Court ultimately sided with the Board of Education, noting that the program "contribute[d] no money to the schools [directly and as such] … provide[d] only a general program to help parents get their children … to and from … schools."[64]

Though the Court ultimately upheld the challenged practice, the case's importance derived from the analysis leading to that result, which included an official acknowledgement that the Establishment Clause "applied to the states through the Fourteenth Amendment under the Court's doctrine of incorporation,"[65] and an articulation of the historical account upon which that assertion was based. Under this account, the Court interpreted statements made by Thomas Jefferson and James Madison, in opposition to a Virginia establishment tax, as authoritative insights into their intentions as leaders in the adoption of the First Amendment,[66] inspiring the famous and subsequently influential dicta:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against

62. *Everson*, 330 U.S. at 3.

63. *Id.* at 7.

64. *Id.* at 18.

65. Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. CITY L. REV. 53, 59 (2005). *See also Everson*, 330 U.S. at 8. *Everson*'s outright acknowledgement that the Establishment Clause applied to the states through incorporation verified what had been suspected following the Court's broad announcement in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108 (1943), that the "Fourteenth [Amendment made the First Amendment] applicable to the states."

66. *Everson*, 330 U.S. at 13 (citing *Reynolds*, 98 U.S. at 164).

> establishment of religion by law was intended to erect "a wall of separation between Church and State."[67]

Following *Everson*, the Court was wary of direct government involvement with religion, leading to the invalidation of religious exercises[68] and programs[69] on state property,[70] as well as the validation of tax exemptions for private places of worship.[71] During this same period, however, a number of programs involving low levels of state involvement were actually upheld,[72] suggesting that there were permissible boundaries to church-state relations, but providing no real indication of the precise parameters applicable until the Court decided *Lemon v. Kurtzman*.[73]

2. Lemon v. Kurtzman

In *Lemon*, the Court faced simultaneous challenges to similar statutory provisions arising under Rhode Island and Pennsylvania law.[74] The Rhode Island statute included a provision for the supplementation of school teachers' salaries in nonpublic schools spending proportionately less on secular education than their average public school counterparts.[75] Similarly, the Pennsylvania statute provided for the reimbursement of nonpublic schools for the salaries of their teachers, as well as instructional materials.[76]

To analyze these statutes, the Court articulated a three part rule, subsequently known as the "*Lemon* test." This rule requires: (1) that "the statute … have a secular legislative purpose"; (2) that "its principal or primary effect … be one that neither advances nor inhibits religion"[77]; and (3) that "the statute …

67. *Id.* at 15-16 (quoting *Reynolds*, 98 U.S. at 164).

68. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (invalidating the practice of Bible reading and prayer during the school day).

69. *See, e.g.*, McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (holding the practice of allowing students to attend religious classes on school premises unconstitutional).

70. *Compare id.*, *with* Zorach v. Clauson, 343 U.S. 306, 315 (1952) (upholding a program allowing the release of students, from public school, to attend religious classes in an offsite location). The difference between *McCollum* and *Zorach* seems to be the fact that *McCollum* allowed religious classes to take place on public school property, as opposed to *Zorach*'s offsite location. The contrast in these two decisions emphasizes the Court's concern over the actual place or property where indoctrination takes place.

71. *See* Walz v. Tax Comm'n, 397 U.S. 664, 679-80 (1970) (upholding the tax exempt status of churches). *See also* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (explaining that the exemption in *Walz* "tended to confine rather than enlarge the area of permissible state involvement with religious institutions … prevent[ing], as far as possible, the intrusion of either [church or state] into the precincts of the other").

72. *See, e.g.*, Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968) (allowing the state to lend text books to religious school students).

73. 403 U.S. 602.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 612 (quoting *Allen*, 392 U.S. at 243).

not foster 'an excessive government entanglement with religion.'"[78] Under this analysis, the Court found that the purpose prong was satisfied by each state's statutory intent "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws;"[79] however, the excessive entanglement prong was not so easily met.

Regarding the excessive entanglement portion, the Court noted the inevitability of "[s]ome relationship between government and religious organizations … [such as f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws."[80] The Court found these types of encounters "necessary and permissible … [fitting within the] blurred, indistinct, and variable barrier"[81] of "the line of separation."[82] However, after noting the "comprehensive, discriminating, and continuing state surveillance … required to ensure that [the teacher's refrained from indoctrinating students] and [that] the First Amendment [was] otherwise respected,"[83] the Court concluded that "the resulting relationship between the government and the religious authority" was impermissibly close.[84]

Though the effects prong was not reached in *Lemon*, due to the finding of excessive entanglement, subsequent cases elaborated the intention and application of that portion of the test. Initially the effects portion was construed as preventing state actions from "subsidiz[ing] and advanc[ing] the religious mission of sectarian" organizations[85] through funding either: (1) "institution[s] in which religion is so pervasive that … substantial portion[s] of [their] functions are subsumed in the religious mission"; or (2) "fund[ing] … specifically religious activit[ies] in … otherwise substantially secular setting[s]."[86] As years went by, this portion of the test underwent many changes and became paramount in addressing the funding of religious institutions. Resultantly, much of the funding discussion below dwells on its revisions and applications.

i. Lemon *in perspective*

The articulation of the *Lemon* test was seen "as an essential step in the maintenance of separationism, … erect[ing] a general doctrinal framework for

78. *Id.* at 613 (quoting *Walz*, 397 U.S. at 674). The *Lemon* test requires all three prongs of its analysis to be satisfied before the church-state relationship will be found constitutional. *Id.*

79. *Id.* at 613.

80. *Id.* at 614.

81. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

82. *Id.* By characterizing the church-state boundary as a "line of separation," rather than a "wall," the Court was acknowledging the untenable nature of the strict separation philosophy and offering a prelude to its progressive decline in the 1980s. *See generally* Lupu, *supra* note 61 (examining the decline of separationism).

83. *Lemon*, 403 U.S. at 619.

84. *Id.* at 615.

85. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779 (1973).

86. Hunt v. McNair, 413 U.S. 734, 743 (1973).

implementing the separationist vision,"[87] shared, almost exclusively, by Court members until the 1980s.[88] Under the *Lemon* test, the Court invalidated prayer,[89] symbolism,[90] and funding cases,[91] reaching many decisions in opposition to its prior Establishment Clause holdings. For example, in the pre-*Lemon* case of *Board of Education of Central School District No. 1 v. Allen*,[92] a New York statute allowing textbooks to be loaned to public and private school students was challenged because some of the students benefited by the statute attended religious schools.[93] The Court found that because the books covered only secular topics and remained in the ownership of the state,[94] the statute was constitutional.[95] However, less than ten years later, a similar scheme under which nonpublic school students were loaned instructional materials[96] was held to violate the Establishment Clause under *Lemon*.[97]

ii. Seeds of change

These jurisprudential contradictions and the general un-workability of the *Lemon* test, due to the "Catch-22" resulting from the interaction of its effects and entanglement prongs, led to much criticism from academics and jurists alike, creating an environment that became increasingly open to alternative analyses.[98]

The first major departure from the *Lemon* standard came in the context of legislative prayer in 1983.[99] The case was *Marsh v. Chambers*,[100] wherein a state legislature's practice of beginning each day with a prayer led by a state funded chaplain was challenged. Rather than applying the *Lemon* test's three-prong approach, the Court examined the practice's tradition and historical acceptance,

87. Lupu, *supra* note 61, at 236.

88. *Id.* at 233-34.

89. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating a school prayer and meditation statute under the first prong of *Lemon* because of its lack of a secular purpose).

90. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42-43 (1980) (invalidating a state statute requiring the posting of the Ten Commandments in public school classrooms because of its lack of a secular purpose).

91. *See, e.g.*, *Nyquist*, 413 U.S. at 783 (invalidating a program that made aid available only to nonpublic school parents).

92. 392 U.S. 236 (1968).

93. *Id.* at 238.

94. *Id.* at 243, 244-45.

95. *Id.* at 238.

96. Wolman v. Walter, 433 U.S. 229, 248-49 (1977).

97. *Id.* at 251.

98. Lupu, *supra* note 61, at 242. The critiques alluded to seem to have centered on the fact that "monitor[ing] … aid to ensure that no … subsidy occurred" would result in excessive entanglement and a lack of supervision would result in the impermissible effect of conveying a "subsidy." *Id.*

99. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1568 (15th ed. 2004).

100. 463 U.S. 783, 784-85 (1983).

noting that legislative prayer "has become part of the fabric of our society" and as such, cannot offend the Establishment Clause.[101]

Though *Marsh* involved a liturgical practice long ingrained in all levels of governmental administration,[102] the Court's departure from *Lemon* nevertheless seems to have typified the beginnings of an era of Establishment Clause redefinition, receptive to further *Lemon* modification and preemption. In the area of "religious symbolism,"[103] this led to the adoption of Justice O'Connor's endorsement test,[104] while at the same time, the funding case genre began gradually shifting to a more inclusionary view.[105]

B. Shifting Standard: The Emergence of Funding Neutrality

In *Mueller v. Allen*,[106] the Court was faced with a Minnesota tax deduction for the benefit of parents who had incurred educational expenses on behalf of their children.[107] Under *Lemon*, the Court first found the statute to have a secular purpose, noting that "[a] state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."[108]

The Court then went on to emphasize the impact of neutrality on the effects prong of the *Lemon* test, drawing from the actual holding in *Everson*, rather than its separationist dicta. Specifically, the Court cited the most important consideration in upholding the statute under the effects prong as: "the deduction['s] availab[ility] for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."[109] This inclusion of "all" parents was the distinguishing point between Minnesota's scheme and those involved in previous cases invalidated under the Establishment Clause.[110] Furthermore, the Court found that any aid flowing to religious schools, as the result of the deduction, would be entirely due to the decisions of "individual parents [removing any] 'imprimatur of State approval' … [from being] conferred on any particular religion, or on religion generally."[111]

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101. *Id.* at 792.

102. *Id.* at 786-88 (noting the history of legislative prayer).

103. SULLIVAN & GUNTHER, *supra* note 99, at 1568-69.

104. *Id.* at 1572. The endorsement test asks whether the 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." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

105. *See generally* SULLIVAN & GUNTHER, *supra* note 99, at 1590.

106. 463 U.S. 388 (1983).

107. *Id.* at 391-92.

108. *Id.* at 395.

109. *Id.* at 397.

110. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) (invalidating a program that made aid available only to nonpublic school parents).

111. *Mueller*, 463 U.S at 399.

Following *Mueller*, a string of further cases emphasized the Court's increasing reliance on neutrality in considering enactments allowing beneficial conveyances upon religious institutions, with cases fitting into two general categories: those neutral due to the state's absence from the funding equation, i.e., cases involving the state subsidizing or reimbursing individuals freely choosing religious services, and those neutral due to the absence of religious exclusions in public funding arrangements.

1. *Neutrality through Individual Choice*

Under the free choice category, the Court reviewed a number of cases involving statutory schemes that provided funding based on individual preference, ultimately leading to the open acceptance of voucher programs in *Zelman*. Typical of this gradual progression are the foundational cases of *Witters v. Washington Department of Services for the Blind*[112] and *Zobrest v. Catalina Foothills School District*,[113] each of which generated significant controversy and dissent among the Court.

In *Witters*, the petitioner suffered from an eye condition that qualified him for educational assistance under a Washington statute designed to benefit the visually impaired.[114] Pursuant to the provision, the petitioner applied for funding to attend a Christian college where he was already studying to enter the ministry. Upon review, his application was denied pursuant to an internal policy of the Washington Commission for the Blind that disfavored subsidizing religious instruction.[115] The Commission's decision was challenged and ultimately upheld by the State Supreme Court on Federal Establishment Clause grounds.[116]

The U.S. Supreme Court then analyzed the case under the effects prong of *Lemon*. The Court noted the prong is "not violated every time money previously in the possession of a State is conveyed to a religious institution" but rather where the money transferred acts as an impermissible "'direct subsidy.'"[117] The Court ultimately concluded that the statutory provision did not violate the Establishment Clause[118] since the program transferred assistance to religious institutions only "as a result of the genuinely independent and private choices of aid recipients … [confronted with] … a huge variety of possible careers, of which only a small handful [were] sectarian."[119]

Similarly in *Zobrest*, which involved a deaf child seeking a statutorily provided sign language interpreter to supplement his "Roman Catholic high

112. 474 U.S. 481 (1986).

113. 509 U.S. 1 (1993).

114. *Witters*, 474 U.S. at 483.

115. *Id.*

116. *Id.* at 484.

117. *Id.* at 486-87 (quoting Sch. Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985)).

118. Although the case was remanded for Washington to consider the unreached question of whether the program violated its state constitution. *Id.* at 489-90.

119. *Id.* at 487-88.

school" classes,[120] the Court applied the reasoning inherent in both *Mueller* and *Witters*, to hold that provision of the interpreter would not violate the Establishment Clause. Specifically, the Court noted: "[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."[121]

In the wake of *Witters* and *Zobrest*, several questions regarding the individual choice standard emerged, centering specifically on the number of options required to make a choice "genuinely independent" and the exact degree of benefit allowed to flow to religious providers under a given statutory scheme. These questions were ultimately addressed in *Zelman*, which was the first case to allow the funding of religious schools without any government restrictions on how the money was to be spent.[122]

Zelman involved an Ohio voucher program intended to improve the quality of inner city education in Cleveland by providing grants for students in failing public school districts to attend either a different public school or an area private school at their parents' discretion.[123] Ultimately, adjacent public schools declined to participate in the program and eighty-two percent of the private schools utilized were characterized by some religious affiliation,[124] prompting allegations that the program had an impermissible effect.[125] Nevertheless, the Court found the program to be one of "true private choice,"[126] regardless of the predominance of religious participants and the fact that ninety-six percent of the students chose to attend religiously oriented schools.[127] This result contradicted the Court's previous holding in *Nyquist*[128]—where indirect aid provided to parents sending their children to religious schools had been found to have the primary effect of advancing religion—and led to much speculation on the ultimate direction of Establishment Clause jurisprudence in the voucher program area.

The Court's trend away from strict separationism in connection with indirect aid was not uncharacteristic of developments taking place simultaneously in direct funding cases. In fact, direct funding's precedential "shift"[129] has led to even greater mysticism surrounding its current standard than that imparted to indirect funding by the *Zelman* decision. This effect is due largely to the rather

120. *Zobrest*, 509 U.S. at 3.

121. *Id.* at 8.

122. Ira C. Lupu, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919 (2003).

123. Zelman v. Simmons-Harris, 536 U.S. 639, 645-46 (2002).

124. *Id.* at 647.

125. *Id.* at 648.

126. *Id.* at 662.

127. *Id.* at 647.

128. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780, 783 (1973).

129. Mitchell v. Helms, 530 U.S. 793, 804 (2000).

expansive holding and dicta of *Mitchell v. Helms*, which suggested an almost total reversal of the direct funding requirements developed in prior cases.

2. *Neutrality in the Selection Process*

i. Direct funding developments under Lemon

In *Tilton v. Richardson*,[130] the Supreme Court upheld federal construction grants flowing to religious colleges for the purpose of building facilities devoted to secular teaching. Specifically, the Court found that the purpose behind the grants, which was to assist colleges and universities in accommodating the "rapidly growing numbers of youth who aspire to a higher education,"[131] was secular in nature. The Court also found that the primary effect did not advance religion, since the subsidies were required to be devoted to purely secular buildings.[132] Finally, the "skepticism" of college students, in addition to the fact that the grants were "one-time" allocations, limiting the amount of government contact necessary to supervise the use of the money, was held to satisfy the excessive entanglement prong.[133]

A reading of *Tilton* suggests the lump-sum nature of the payments involved to be a significant consideration in the Court's holding. However, shortly thereafter, in *Roemer v. Board of Public Works of Maryland*,[134] the Court permitted annual subsidies flowing to Christian colleges, provided that they benefited only distinctly secular educational aims.[135]

While *Tilton* and *Roemer* both evidence the maintenance of a fair amount of church-state relational caution, they also provide incites into the Court's early acceptance of religious organizational funding. Gradually, this early tolerance increased, leading to the liberalization of the *Lemon* standard and ultimately permitting, at least in part, a statutory scheme similar to Charitable Choice in *Bowen v. Kendrick*.[136]

At issue in *Bowen* was a statute intended to incorporate nonprofit agencies into the government provision of premarital sexual relations counseling, which specifically mentioned "religious and charitable organizations" in its list of prospective grantees.[137] Accordingly, many of the organizations employed under

130. 403 U.S. 672 (1971).

131. *Id.* at 678.

132. *Id.* at 679-80.

133. *Id.* at 686-88. Note also, that the Court in *Tilton* placed some emphasis on the "potential for divisive religious fragmentation in the political arena." *Id.* at 688. Though this factor has been mentioned in some recent cases, such as *Lee v. Weisman*, 505 U.S. 577, 587-88 (1992), it has not been applied in the modern funding context.

134. 426 U.S. 736 (1976).

135. *Id.* at 762. The Court found that the ability to separate secular from sectarian removed excessive entanglement concerns by reducing the need for supervision. *Id.* at 764. Similarly, the ability to attribute the funding to distinctly secular aspects of the program prevented an impermissible effect. *Id.* at 746.

136. 487 U.S. 589 (1988).

137. *Id.* at 594-96.

the statute possessed some religious affiliation,[138] leading to an Establishment Clause challenge due to the direct federal benefits these organizations received.[139]

The Court analyzed the case under the traditional *Lemon* framework, finding first that the statute had a legitimate secular purpose—"the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood."[140] Then, moving to the more central effects prong issue, the Court prefaced its discussion by reviewing the history of government corroboration with religious organizations,[141] suggesting that these organizations "'need not be quarantined from public benefits … neutrally available to all,'"[142] provided that the "direct government funding … is designated for specific secular purposes."[143]

Aid to "pervasively sectarian" institutions, however, was explicitly precluded due to the impermissible religious advancement resulting from aid to institutions where a "'substantial portion of [their] functions are subsumed in the religious mission.'"[144] With this last "pervasively sectarian" consideration in mind, the Court upheld the statute "on its face,"[145] but remanded the matter to the District Court for consideration of whether the aid was actually benefiting "pervasively sectarian" institutions.[146]

In retrospect, *Bowen* seems to stand for the proposition that neutral statutory selection criteria, providing for the inclusion of religious social services, pass Establishment Clause muster as long as the activity funded can be adequately separated from the organization's religious mission. However, this exclusion of "pervasively sectarian" providers has undergone a significant redefinition under the Court's most recent *Lemon* revisions.

ii. The Lemon-Agostini *test*

In *Agostini v. Felton*,[147] the Court altered the effects prong of the *Lemon* analysis to include three primary criteria for gauging whether or not the government aid has the effect of advancing religion.[148] The first criterion looks to whether the program "result[s] in governmental indoctrination."[149] The second criterion establishes whether it "define[s] its recipients by reference to

138. *Id.* at 597.
139. *Id.* at 606.
140. *Id.* at 602.
141. *Id.* at 609.
142. *Id.* at 608 (quoting *Roemer*, 426 U.S. at 746).
143. *Id.* at 610.
144. *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
145. Bowen v. Kendrick, 487 U.S. 589, 618 (1988).
146. *Id.* at 621.
147. 521 U.S. 203 (1997).
148. *Id.* at 206.
149. *Id.*

religion."[150] Finally, the third criterion determines whether it "create[s] an excessive entanglement."[151] As is intuitively obvious, the altered *Lemon-Agostini* test absorbs the traditional entanglement prong into the effects portion of the test, obviating the need for a separate entanglement analysis and reducing the likelihood that a case will pass the effects portion only to be overturned on the separate entanglement inquiry. Following the introduction of this altered Establishment Clause approach, it was less than apparent how the *Lemon-Agostini* test would apply in practice, precipitating its "first major test" in *Mitchell v. Helms*.[152]

In *Mitchell*, the Court dealt with a school aid program in which educational equipment and materials were lent to both public and private schools based on the number of students in attendance, resulting in the direct benefit of a number of private, religious schools.[153] The Supreme Court relied on its revised *Lemon-Agostini* analysis, under which it characterized the issue arising from the program as "whether any religious indoctrination that occur[ed] in those schools could reasonably be attributed to governmental action."[154] Due to the "private choices"[155] involved in selecting the schools, the Court concluded that there could not be governmental attribution; but, it went on to make a determination far more significant to the broader direct funding issue. Specifically, the Court observed 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, [then] the government has not provided any 'support of religion.'"[156] Thus suggesting that the state is free to subsidize even "pervasively sectarian" institutions.[157]

Following *Mitchell*, the actual Establishment Clause standard for directly subsidized religious organizations remained ambiguous. Previous holdings had moved progressively further towards increased direct funding latitude, but a long string of cases including *Tilton*, *Roemer* and *Bowen* had shown an unmistakable constitutional animus towards "pervasively sectarian" institutions. This seems to have led to ambivalence in lower court application.

C. Modern Application

In light of the foregoing history, it is understandable why the actual Establishment Clause standard for faith-based organizations has remained rather speculative. Consequently, it is easy to appreciate how Charitable Choice provisions have survived to this point, with *Bowen*'s refusal to find the Act at

150. *Id.*
151. *Id.*
152. SULLIVAN & GUNTHER, *supra* note 99, at 1597.
153. Mitchell v. Helms, 530 U.S. 793, 801 (2000).
154. *Id.* at 809.
155. *Id.* at 810.
156. *Id.* at 816.
157. *Id.* at 829.

issue invalid "on its face" and the otherwise "fact-based, program-specific inquiry [the Court] utilizes in evaluating state aid programs."[158] What is apparent is that in the post-*Lemon-Agostini* analysis, attribution of indoctrination seems to be the most important consideration.

As to how to prevent governmental attribution, *Zelman* suggested true choice as a preventative measure, and *Mitchell* went as far as to hint that neutrality in disbursement could accomplish the same disconnection, despite the direct or indirect character of the funding involved. *Prison Fellowship*, among other recent funding cases, suggests that the direct versus indirect distinction endures with all the traditional trappings of each inquiry.

1. *Recent Indirect Funding Treatment*

In *Prison Fellowship*, InnerChange received reimbursement under its final contract with the Iowa Department of Corrections based on a daily per participant rate[159] similar to the voucher program in *Zelman*. However, as previously indicated, because the secular alternative did not include all of the rehabilitative classes that InnerChange offered and because InnerChange participants were given bigger cells along with more bathroom privacy,[160] the court found that inmates were precluded from making the type of true private choice required to uphold an indirectly funded program.[161]

This portion of the opinion sheds some light on the current standard applicable to indirect religious funding; however, it is far from definitive. In *Freedom From Religion Foundation, Inc. v. McCallum*,[162] the Seventh Circuit reached a contrary result on a similar fact pattern, casting some doubt on the incentives that *Prison Fellowship* relied on as barriers to true private choice.

Freedom From Religion Foundation, Inc. involved a religiously affiliated treatment facility receiving state funds based on the number of participants enrolled.[163] The program was much longer than comparable secular alternatives, leading to the allegation that its superior quality prevented true private choice.[164] The court ruled that strict parity between religious programs and their secular alternatives is not required as a precondition to true private choice, but rather the presence of secular alternatives that are able to meet the same ultimate objectives is constitutionally sufficient.[165]

It is difficult to see how the emphasis on program quality in *Prison Fellowship* can be completely reconciled with *Freedom From Religion Foundation, Inc*. However, the fact that the Iowa Department of Corrections

158. Gilman, *supra* note 26, at 871.

159. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 886 (S.D. Iowa 2006).

160. *Id.* at 893.

161. *Id.* at 931.

162. 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003).

163. *Id.* at 917.

164. *Id.* at 916.

165. *Id.*

failed to offer a secular alternative with the same range of programming as InnerChange suggests the lack of a temporal option capable of the same rehabilitative objectives as InnerChange. In this sense, the two opinions indicate that in order for a faith-based organization to meet indirect funding requirements, a secular alternative must be available that offers, at least, the same substantive training options.

2. *Recent Direct Funding Treatment*

Prison Fellowship also involved a direct funding challenge to prior contractual practices. Under this challenge, the court found the nature of the InnerChange program, namely, its "pervasively sectarian" character,[166] an Establishment Clause block to direct funding, due to the "impossib[ility of] distinguish[ing] between the secular and sectarian aspects of its rehabilitation programming."[167] This led to the court's conclusion that the InnerChange setup was such that "no set of enforceable safeguards or standards [could] be erected that would enable funding of only the secular aspects involved."[168]

Resultantly, the court concluded that the direct funding of InnerChange would facilitate state attribution of the program's message.[169] Similarly, the overtly religious nature of Faithworks in *Freedom From Religion Foundation, Inc.*[170] caused the invalidation of its direct funding stream due to governmental attribution concerns.[171]

Each of these cases lead to the conclusion that if a truly faith-based, or "pervasively sectarian," organization is going to accept direct government subsidies, it must be able to separate out secular aspects of its programming to justify the government's funding. Otherwise, the faith-based character will hamper the organization's ability to participate in Charitable Choice provisions under the current Establishment Clause standard.

D. Prospective Changes

The current treatment of faith-based organizations was illustrated through the examples of *Prison Fellowship* and *Freedom From Religion Foundation, Inc.*, which each highlighted the continued reluctance of lower courts to allow the funding of faith-based organizations—especially in the direct funding context. Much of this animus towards faith-based organizations finds its roots in the Supreme Court's traditional "pervasively sectarian" doctrine, which, as evidenced by *Mitchell*, has fallen into increasing disfavor among members of the Court.

166. *Prison Fellowship*, 432 F. Supp. 2d at 919-20.

167. *Id.* at 921.

168. *Id.* at 925.

169. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 925 (S.D. Iowa 2006).

170. 179 F. Supp. 2d 950 (W.D. Wis. 2002).

171. *Id.* at 969-71, 978.

In *Mitchell*, Justice Thomas' plurality opinion observed the "shameful pedigree"[172] of the Court's historical aversion to "pervasively sectarian" institutions, noting that the term "sectarian" was traditional "code for 'Catholic,'" which facilitated the coining of the "pervasively sectarian" standard to seclude Catholic schools from state funding.[173] This realization led to the plurality's conclusion that the prohibition of "pervasively sectarian" funding was a "doctrine, born of bigotry, [that] should be buried."[174]

Following the opinion, there has been some speculation that the *Mitchell* concurrence of Justices O'Connor and Breyer implicitly supported the four member plurality's admonition against the doctrine, resulting in its abatement. But, as the decisions in *Prison Fellowship* and *Freedom From Religion Foundation, Inc.* suggest, the prevailing opinion among interpreting courts is that the plurality's position lacked majority support. Despite the doctrine's continued vitality, there are several developments that suggest potential revisions in the Establishment Clause standards for faith-based organizations, with the first arising from the recent appointments of Chief Justice Roberts and Justice Alito as replacements for Chief Justice Rehnquist and Justice O'Connor.

1. *Establishment Clause Perspectives*

There are two main Establishment Clause theories currently embraced by members of the Supreme Court.[175] The first is known as "neutrality," which differs from the neutral funding principals previously explored in that it interprets the Establishment Clause as a constitutional mandate for public secularism, proscribing even the most tenuous linkages of the state with religion.[176]

For example, *Van Orden v. Perry*[177] involved a monument on the Texas State Capital grounds inscribed with an eagle, an American flag, a pyramid and two tablets appearing above the Ten Commandments.[178] Justices adhering to neutrality found the mere presence of the Commandments on the display equivalent to the message: "This State endorses the divine code of the 'Judeo-Christian' God"[179]; whereas other members of the Court interpreted the display as an incidental and "irreligious" reference to the "proper standards of social conduct."[180]

172. Mitchell v. Helms, 530 U.S. 793, 801, 828 (2000).

173. *Id.* at 828-29.

174. *Id.* at 829.

175. Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of* Van Orden v. Perry *and* McCreary County v. ACLU, 71 MO. L. REV. 317, 323 (2006).

176. *Id.*

177. 545 U.S. 677 (2005).

178. *Id.* at 681.

179. *Id.* at 707 (Stevens & Ginsburg, JJ., dissenting).

180. *Id.* at 701.

Justices Stevens, Ginsburg, Souter, Breyer and former Justice O'Connor have each been identified as subscribers to neutrality,[181] though some more ardent than others,[182] which has facilitated the position's majority status in recent years.[183]

On the other end of the interpretational spectrum is the "accommodational" view, which "insist[s] that government policies that recognize, accommodate, and even honor the central role that religion plays in society are consistent with historical traditions, national expectations, and most importantly, the Establishment Clause."[184] Justices Kennedy, Scalia, Thomas, and former Chief Justice Rehnquist have been identified as subscribers to this approach.[185]

Clearly, interpretational perspective bears heavily on a Justice's reading of the law and the Establishment Clause is no exception. Historically, the predominant view among Court members has shared a strong correlation with church-state outcomes, assigning the neutrality position almost singular importance in decisional prediction;[186] however, times have changed. The appointments of Chief Justice Roberts and Justice Alito have likely reapportioned the Court's dominant view in favor of accommodation.[187]

In the case of Chief Justice Roberts, this assertion finds support in the expansive Establishment Clause interpretation he advocated as Deputy Solicitor General, which encouraged the narrow view that the Establishment Clause prohibits only "the establishment of an official religion [or coercion to] participat[e] in religious activities."[188] Similarly, Justice Alito has expressed disapproval of the decidedly separationist opinions of the Warren Court and "'questioned whether the Establishment Clause precludes the government from conveying a message that it endorses or encourages religion … or especially acknowledges or accommodates the broad Judeo-Christian heritage of our civil and social order.'"[189]

Though neither Chief Justice Roberts nor Justice Alito has issued a judicial opinion definitively suggesting an accomodational perspective, the uncontradicted musings of each[190] suggest a great tendency towards that

181. Harwood, *supra* note 175, at 343, 345.

182. *See, e.g.*, *Van Orden*, 545 U.S. at 700-04 (Breyer, J., concurring) (noting that the monument presented a "borderline" case, but nevertheless, failed to violate the Establishment Clause due to its context). *See also* Mitchell v. Helms, 530 U.S. 793, 838-39 (2000) (O'Connor & Breyer, JJ., concurring) (concurring in the decision to uphold religious school aid, though expressing disagreement with the plurality's willingness to "take evenhand[ed] neutrality and … promote it to a single and sufficient test for the establishment constitutionality of school aid").

183. Harwood, *supra* note 175, at 348.

184. *Id.* at 323.

185. *Id.* at 348.

186. *Id.*

187. *Id.*

188. *Id.* at 349 (quoting Brief of the United States as Amicus Curiae Supporting Petitioners at 12-13, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014)).

189. *Id.* at 349 (footnotes omitted).

190. *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 749 n.106 (2006) (noting that "nothing in the later judicial opinions, nor

persuasion. It is therefore likely that these two Justices will view the "pervasively sectarian" doctrine, as well as the other issues raised by *Mitchell*—such as the breadth of direct funding latitude—similar to the case's plurality, which will provide majority support for the greater inclusion of faith-based organizations.

The second movement afoot among members of the Court involves a total rethinking of the Establishment Clause's application to the states, through a critical examination of the historical underpinnings of the provision.

2. *The Case for Unincorporation*

As previously addressed, the Court in *Everson* discerned the Establishment Clause's foundational intent through a review of the statements of Thomas Jefferson and James Madison in relation to a Virginia establishment tax, essentially transposing their outcry against that state establishment matter upon subsequent federal first amendment work. This has raised some amount of contention, both on[191] and off[192] the Court, about the actual scope of the Clause, or more specifically, whether it actually was intended to apply to the states, or was simply a "federalism provision intended to prevent Congress from interfering with state establishments."[193]

The federalism argument seems to find support in the "'fact' that six or seven states maintained religious establishments at the time of the ratification of the Constitution and drafting of the First Amendment,"[194] suggesting that the "Framers … [did not] intend[] the Establishment Clause to be applied to the states."[195] In line with this assertion, pertinent portions of the congressional debate evidence the voicing of concerns on the part of the pro-establishment electorate, over the specific language embodied within the First Amendment.[196] Through the presentment and revision of several proposals, the federal authority over state establishments was resultantly circumscribed, leading to the adoption of the First Amendment in its present form.[197] Additionally, beyond the wording

statements made at their confirmation hearings, indicate that either Chief Justice Roberts or Justice Alito have changed their … views of the protections offered by the Establishment Clause").

191. Justice Thomas has been identified as "the Court's leading proponent of the [un]incorporation thesis." *Id.* at 756. Justice Scalia, however, has also made statements consistent with unincorporation. *See Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (observing that "[t]he Establishment Clause was adopted to prohibit [the] establishment of religion at the federal level (and to protect state establishments of religion from federal interference)").

192. *See generally* Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) (stating the original purpose of the Establishment Clause makes it a "uniquely poor candidate for incorporation against the states").

193. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

194. Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 774 (2005).

195. Nina S. Schultz, *Davey's Deviant Discretion: An Incorporated Establishment Clause Should Require the State to Maintain Funding Neutrality*, 81 IND. L.J. 785, 789 (2006).

196. Green, *supra* note 194, at 769.

197. *Id.* at 770.

chosen for the First Amendment, contemporaneous statements of several prominent congressmen suggest the prevailing perception of a lack of federal authority over state religious matters.[198]

Contrarily, incorporationists argue that the incompleteness of the historical record,[199] as well as divergence in the traditional understanding of the term "establishment," make it disingenuous to speculate on foundational intent using the modern vernacular.[200] But, notwithstanding such criticism, the fact that shortly after the adoption of the Fourteenth Amendment, Congress entertained "an explicit application of the federal Establishment Clause to the states,"[201] known as the Blaine Amendment,[202] seems to offer strong support that regardless of the First Amendment's historical roots, the Fourteenth Amendment was never intended to serve as a mechanism for Establishment Clause incorporation.[203]

III. THE FUTURE FOR FAITH-BASED ORGANIZATIONS

Despite the support for unincorporation provided by the First Amendment's history, as well as Congress' subsequent entertainment of the Blaine Amendment, it seems unlikely that it will garner majority support in the foreseeable future as Justices Thomas and Scalia have been the only two to openly embrace the view.[204] However, as previously suggested, the appointments of Chief Justice Roberts and Justice Alito, will, in all probability, result in faith-based funding refinements favoring religious service providers. Specifically foreseeable changes include the abolition of the "pervasively sectarian" doctrine and the loss of the direct/indirect funding distinction advocated in *Mitchell*. These changes will favor organizations like Faithworks and InnerChange, which provide services that incorporate religious teaching in nearly all areas of instruction, leading to a greater likelihood that the funding of such organizations will not have the effect of advancing religion.

As the direct and indirect distinctions in faith-based funding diminish, a greater emphasis will likely be placed on the true choice of individuals selecting religious service providers. This emphasis on true choice will allow the government to escape attribution of the organization's religious message even in

198. For example, James Madison was quoted as saying: "There is not a shadow of right in the federal government to intermeddle with religion. Its least interference [with religion] could be a most flagrant usurpation." *Id.* at 771 (footnote and internal quotation omitted).

199. *Id.* at 795.

200. *See id.* at 782 (noting that the term "establishment" was often identified with "the Constitution's proposed ban on religious tests for federal office holding").

201. Schultz, *supra* note 195.

202. The Blaine Amendment was an anti-establishment provision that failed to make it through Congress despite being voted on "nineteen times between 1875 and 1930." Green, *supra* note 194, at 789-90.

203. *Id.*

204. *See supra* note 191.

the case of direct subsidies.[205] Resultantly, organizations like InnerChange, which operate with no real alternatives, will remain an Establishment Clause taboo.

IV. CONCLUSION

The part played by faith-based organizations in American social service has been on the rise since the passage of the Personal Responsibility and Work Opportunity Reconciliation Act. This has led to the inclusion of faith-based service providers in almost all areas of social welfare programming, and in the case of *Prison Fellowship*, even prisoner rehabilitation. But despite the support and economics of such programs, the Establishment Clause presents a highly convoluted barrier to modern church-state corroboration because its constitutional standard remains less than apparent.

What is clear is that courts currently discerning the Establishment Clause continue to differentiate funding sources based on the traditional direct and indirect funding categories, requiring that direct funding not benefit pervasively sectarian institutions and that indirect funding result from true, individual choice. There are, however, several indications of further Establishment Clause revision, which, following the appointments of Chief Justice Roberts and Justice Alito, will likely result in the abolition of the pervasively sectarian doctrine and a less differentiated approach to direct and indirect funding streams.

Under this emerging standard, inherently religious programs like InnerChange will benefit from greater constitutional acceptance, as the specific nature of a given organization becomes less constitutionally significant. At the same time, the emphasis on true private choice will likely increase in significance, leaving organizations like InnerChange at a disadvantage because of the lack of alternative providers.

205. *See* Mitchell v. Helms, 530 U.S. 793, 809 (2000) (noting the importance of aid being available to a "broad range of groups or persons without regard to their religion" to escape government attribution).