LIBERTY UNIVERSITY

Liberty University Law Review

Volume 4 | Issue 2 Article 5

2010

Boundaries of Faith-Based Programs, Determine Who Controls Prisons, and Escape from the Shackles of Contemporary Establishment Clause Jurisprudence

Mark D. Tolles II

NOTE

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE V. PRISON FELLOWSHIP MINISTRIES: USING AGENCY LAW PRINCIPLES TO DEFINE THE CONSTITUTIONAL BOUNDARIES OF FAITH-BASED PROGRAMS, DETERMINE WHO CONTROLS PRISONS, AND ESCAPE FROM THE SHACKLES OF CONTEMPORARY ESTABLISHMENT CLAUSE JURISPRUDENCE

Mark D. Tolles, II[†]

ABSTRACT

In 2007, the Court of Appeals for the Eighth Circuit ruled in the case of *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, which involved an alleged Establishment Clause violation.[1] The court determined that the State of Iowa's governmental financial assistance to InnerChange Freedom Initiatives, an organization affiliated with Prison Fellowship Ministries, violated the Establishment Clause because the funding was considered by the court to be an endorsement of religion. Additionally, the court held that InnerChange had been acting as a state actor. This Note will examine the Eighth Circuit's decision and seek to determine whether it was premised upon sound Establishment Clause principles. Part II of this Note outlines a brief history of how the Establishment Clause has been interpreted since the founding of the United States. Part III reviews previous litigation brought against faith-based organizations under the Establishment Clause that is relevant to understanding *Americans United*. Part IV discusses several foundational principles of the laws of agency. Following a short explanation of key

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† Symposium Editor, Liberty University Law Review, Volume 4; J.D. Candidate, May 2010, Liberty University School of Law; B.A. in Political Science and International Studies, Case Western Reserve University, 2005. I am grateful for the love and encouragement of my family. In particular, I would like to thank my wife for her continuous support and my father who first introduced me to the law and whose example has developed my passion for utilizing the law to carry out its noble and good purposes. In addition, I would like to thank the Liberty University Law Review Editors and Staff for their thoughtful suggestions and meticulous review.

1. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007).

agency rules, Part IV acknowledges several examples where the courts have explicitly or implicitly framed their decisions in terms of agency principles. Then, it applies those same agency principles to the case at hand. Finally, Part V develops a proposed Establishment Clause test using agency principles and applies it to *Americans United* to show that the proposed test, while adding much-needed clarity to Establishment Clause jurisprudence, would not sacrifice any respect for religious liberty in America, nor would it permit the improper marriage of church and state that would lead into any sort of theocratic governing arrangement. Rather, the agency test would establish a clear bright line that would enable faith-based organizations and governments to cooperate without compromising the integrity of either set of institutions or coercing citizens to adhere to or support a belief system to which they do not personally hold.

I. INTRODUCTION

In recent years, claims involving the First Amendment's Establishment Clause[2] have come under more stringent inspection by federal and state judiciaries as legislatures and executive officers attempt to change, redefine, or simply clarify the permissible points in society where religious activities and governmental affairs are allowed to intersect and coexist. While some governmental agencies and states have attempted to develop clearer and simpler guidelines that in practice create *de facto* segregation between all governmental endeavors and all things religious, others have sought to expand the permissible boundaries of church-state collaboration and interaction.[3] The courts have been similarly divided in their rulings, as they struggle to determine the proper scope of the Establishment Clause. Courts disagree on how the Establishment Clause should be interpreted to address modern challenges and developments, especially in light of the increasingly expansive role that religious institutions and faith-based

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2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

3. For an example of the latter, see Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002), in which President George W. Bush stated that the purpose of this executive order was

> to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and community organizations, to further the national effort to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations so that they may better meet social needs in America's communities . . . .

organizations play in providing essential social services to communities throughout the nation.[4]

Due to the proliferation of faith-based activities in recent years, governmental funding of these sectarian organizations is one of many areas in which the courts have targeted potential issues relating to the Establishment Clause.[5] Yet faith-based organizations are not novel entities. They have been in existence for decades, often escaping media attention as they work at the grassroots level throughout communities and religious congregations. However, as the federal government and many states have turned to them for help due to the lack of resources, personnel, and facilities, faith-based organizations have become popular actors, since they have been able to augment governments' constrained roles in society.[6] It was for these very reasons that the State of Iowa offered grant opportunities to community organizations and institutions, including Prison Fellowship Ministries, Inc., that could offer prisoner rehabilitation programs to supplement the overcrowded and burdened state-run prisons.[7]

However, in *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, the Court of Appeals for the Eighth Circuit held that the State of Iowa's financial grants for the operational expenses of InnerChange Freedom Initiatives, which provided residential, value-based, prisoner rehabilitation programs, violated the Establishment Clause.[8] The Eighth Circuit rationalized its conclusion by determining that InnerChange, which was managed by Prison Fellowship Ministries, had

4. *Compare Ams. United*, 509 F.3d at 422 (holding that a faith-based program providing rehabilitation for prisoners violated the Establishment Clause), *with* Bowen v. Kendrick, 487 U.S. 589 (1988) (holding that a federal grant program for faith-based organizations to provide teenage sexuality counseling was constitutional despite the Adolescent Family Life Act not exempting funds for religious purposes).

5. THE WHITE HOUSE, THE QUIET REVOLUTION: THE PRESIDENT'S FAITH-BASED AND COMMUNITY INITIATIVE: A SEVEN-YEAR PROGRESS REPORT (Feb. 2008). For example, since President George W. Bush announced his Prisoner ReEntry Initiative (PRI) in 2004 (funding beginning in 2006), over 30 PRI grants have been awarded to programs in 20 different states. *Id.*

6. Anna Stolley Persky, *A Question of Faith: Cash-Strapped States Look Elsewhere for Inmate Rehab Programs*, 94 A.B.A. J., June 2008, at 20, 20 (specifically discussing the governmental needs of Iowa and why it decided to allow nonprofit organizations to seek grants to provide alternative rehabilitation services to inmates).

7. *Ams. United*, 509 F.3d at 416-17.

8. *Id.* at 422.

functioned as a state actor through its employees' abilities to "incarcerate, treat, and discipline inmates."[9]

Nevertheless, the court of appeals mistakenly affirmed the Southern District Court of Iowa's decision that classified InnerChange as a state actor—that is to say, as an organization or individual acting on behalf of or in conjunction with the government, pursuant to actual governmental authority or colorable power, in order to carry out governmental responsibilities or functions.[10] Essentially, the Eighth Circuit reasoned that Prison Fellowship Ministries had acted as a state actor through its InnerChange program because there was a connection, however nominal it may have been, between the state government's authority and the InnerChange program's actions.[11] The court based this connection on the Prison Fellowship Ministries' receipt of governmental grants that partially provided for InnerChange's non-sectarian operating expenses.[12]

Yet, there was no evidence presented that would substantiate the court's state actor finding. A faith-based organization is not an agent of the government merely because it receives, or has received in the past, governmental financial support for non-religious expenses that are incurred as it provides community services. Indeed, a faith-based organization can be considered a state agent only when it acts in concert with the government to such a degree that the government has primary control over the organization's activities. This requires a close relationship between the faith-based organization's activities and the government, such that the government dictates most, if not all, of the organization's activities through governmental control, oversight, and discretion. However, because the State of Iowa did not control InnerChange's activities or methodology, and because InnerChange was not excessively entangled in the affairs of the state, the Eighth Circuit was incorrect to hold that Iowa's support of InnerChange's program constituted an Establishment Clause violation.

This Note will begin in Part II by exploring the relevant historical background of the Establishment Clause and how early statesmen and Supreme Court justices interpreted its meaning. Part III will examine over one hundred years of case law pertaining to the permissible scope of governmental funding to faith-based organizations. Part IV will focus on the agency frameworks that have been implied in the case law concerning

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9. *Id.* at 423 (analyzing Prison Fellowship Ministries' role as a state actor primarily under 42 U.S.C. § 1983 and its relevant case law).

10. *Id.* at 423.

11. *See id.* at 422-23.

12. *Id.* at 416-19.

faith-based organizations. It will also define the fundamental agency relationships and how they relate to *Americans United*. Part V will propose an agency framework test for Establishment Clause issues and apply the proposed agency test to other aspects of Establishment Clause litigation, in order to illustrate how an agency framework would affirm many of the Supreme Court's past landmark decisions, while also providing a better bright-line test than those that are currently used inconsistently by the High Court and many lower courts. Part VI will then conclude.

II. A BRIEF HISTORY OF RELEVANT ESTABLISHMENT CLAUSE JURISPRUDENCE

While the words of the Establishment Clause of the First Amendment to the U.S. Constitution clearly declare that the Federal "Congress shall make no law respecting an establishment of religion,"[13] the specific meaning of those words is, at best, imprecise.[14] At worst, the federal government's evolving interpretation of the Establishment Clause injects instability, suppression, and fear into American communities and the manner in which citizens, churches, and organizations are able to practice and promote their religious beliefs.[15] Even though the Founders "appoint[ed] chaplains, open[ed] legislative sessions with prayer, and declar[ed] days of fasting and thanksgiving," Jon Meacham observes that "[i]n America a kind of 'wall' between church and state—albeit a low one—has always been there, or at least has been since the last state (Massachusetts) disestablished its church in 1833."[16] Yet, the degree of separation between the church's authority and the state's jurisdiction that existed at the founding of the United States is quite different from the strict separationist position advocated today in many Establishment Clause cases.

The Declaration of Independence, which portrayed the type of government that the American colonists felt the American people were naturally entitled to as human beings, strongly affirmed that religion and

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13. U.S. CONST. amend. I.

14. *See* PAUL I. WEIZER, THE OPINIONS OF JUSTICE ANTONIN SCALIA: THE CAUSTIC CONSERVATIVE 23-25 (2004) (explaining how the Supreme Court has had periods of consistency as well as inconsistency in how it interprets the religion clauses of the First Amendment).

15. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE FIRST AMENDMENT: THE ESTABLISHMENT OF RELIGION CLAUSE 136, 136-40 (Alan Brownstein ed., 2008).

16. JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 82 (2006).

religious beliefs were inseparable from the governance of nations, even when nations themselves were not theocracies.

> [T]he Founders were also making another declaration: that Americans respected the idea of God, understood the universe to be governed by moral and religious forces, and prayed for divine protection against the enemies of this world, but were not interested in establishing yet another earthly government with official ties to a state church.[17]

This is seen in the actions taken by General Washington following the American victory at the Battle of Saratoga. Washington declared that "[t]he chaplains of the army are to prepare short discourses suited to the joyful occasion to deliver to their several corps."[18] By no means did Washington wish to establish a national church, though he did recognize the spiritual, moral, and social value of cooperation between a secular government and a religious citizenry.[19] In fact, after the Anglican Church was disestablished as the state church of Virginia in 1779, Washington, joined by John Marshall (who later became Chief Justice of the Supreme Court), attempted to pass a proposal through the state legislature "to put all Christian churches on an equal footing by supporting all of them by taxation."[20]

John Adams had a similar view of how the government would be dependent upon the religious beliefs and values of the colonists. He stated that, "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[21] John Jay, the first Chief Justice of the Supreme Court, echoed this proposition. Jay stated:

> No human society has ever been able to maintain both order and freedom . . . apart from the moral precepts of the Christian

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17. *Id.* at 78.

18. *Id.* at 77 (internal quotation marks omitted).

19. *See id.* at 77-78.

20. WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 183 (1954). Although Washington and Marshall endorsed this proposal, other leaders, including Jefferson and Madison, vehemently opposed such financial support to churches. *Id.*; *see also* STEPHEN MANSFIELD, TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT'S HAPPENED SINCE app. 1, at 147 (2007) ("It would be strange indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations with it." (quoting Letter from John Marshall to Jasper Adams (May 9, 1833))).

21. Letter from John Adams to the Officers of the First Brigade of the 3rd Division of the Massachusetts Militia (Oct. 11, 1789), *in* 9 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 228, 229 (1854).

> Religion applied and accepted by all the classes. Should our Republic ever forget this fundamental precept of governance, . . . this great experiment will . . . be doomed.[22]

John Adams and John Jay recognized that religion would necessarily permeate American society, and that religion would inevitably affect the federal and state governments and leaders.

Sources from the writings and speeches of Thomas Jefferson and James Madison are often used to support the opposite ideal—that of a strict separation between church and state. Yet, a closer reading of their words reveals how they viewed that separation, which was largely in how the state and church possess authority over distinct jurisdictions. "The wall Jefferson referred to is designed to divide church from state, not religion from politics."[23] Jefferson embraced John Locke's idea "that neither civil penalties nor 'the right of the sword by the magistrate' had any place in religious instruction. . . . Jefferson resolved to prevent the church in America from ever having any civil power and law of its own."[24] Although James Madison, the author of the First Amendment, stated that "[t]he Constitution of the U.S. forbids everything like an establishment of a national religion,"[25] he also declared that "[r]eligion is the basis and Foundation of Government."[26] Madison conceived of a separation between the federal government and a nationally established church. However, Madison recognized that complete separation was not possible, necessary, or even desirable. In arguing that provisions for legislative chaplains would be unconstitutional under the strictest interpretation of the Establishment Clause, Madison noted that this *de minimis* violation of the First

22. MANSFIELD, *supra* note 20, app. 1, at 145-46.

23. MEACHAM, *supra* note 16, at 19. It should be noted that Jefferson did not want the church, a spiritual entity, to have civil authority, nor did he want the government, a civil entity, to be able to coerce people concerning their spiritual affairs; however, Jefferson did proclaim days of thanksgiving and make other religious acknowledgements as governor of Virginia, even though he refused to do so as president. For many of the Founders, there was a distinction between a public, federal-imposed religion and the private aspects of religion that were prevalent in the states and their communities *See generally id.* at 22.

24. CHARLES B. SANFORD, THE RELIGIOUS LIFE OF THOMAS JEFFERSON 30 (1984).

25. MEACHAM, *supra* note 16, at 228 (internal quotation marks omitted).

26. MANSFIELD, *supra* note 20, app. 1, at 146. This further shows how the Founders viewed the Establishment Clause as a restriction only upon the federal government, not all levels of government.

Amendment was not worth contending against where such religious traditions had a substantial history.[27]

The influential Supreme Court jurist Joseph Story proclaimed that

> at the time of the adoption of the Constitution, . . . the general . . . sentiment in America was, that Christianity ought to receive encouragement from the State, so far as such encouragement was not incompatible with the private rights of conscience, and the freedom of religious worship.[28]

As the meaning of the Establishment Clause has morphed from James Madison's simple prohibition restraining Congress from establishing a national religion into the complex, modern framework for evaluating any utterance of religion by any governmental entity,[29] it is evident that the purpose and scope of application of the Establishment Clause has become significantly restrictive towards religion in general.[30] Much has been done to perpetuate the building of a high and mythical "wall of separation," which has created divergent jurisprudential interpretations of the Establishment and Free Exercise Clauses.[31]

In most areas of constitutional law, the scope of issues becomes greatly narrowed over time as federal and state legislatures enact statutes to refine constitutional limitations as unique situations arise. The courts tend to slow constitutional litigation in particular areas as they resolve interpretive disputes that establish guidelines for future jurisprudence. However,

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27. MEACHAM, *supra* note 16, at 228. During the debate over the appointment of congressional chaplains, Madison noted that the provision of such chaplains violated a strict interpretation of the Constitution; yet, he exclaimed that "as the precedent is not likely to be rescinded, the best that can now be done may be to apply to the Constitution the maxim of the law, de minimis non curat [lex]," which means that "the law does not concern itself with trifles." *Id.* (internal quotation marks omitted). At any rate, Madison recognized that the wall of separation between church and state was lower in some areas than in others. *Id.*

28. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 316 (Regnery Gateway 1986) (1859), *as quoted in* GARY DEMAR, AMERICA'S CHRISTIAN HISTORY: THE UNTOLD STORY 82 (2d ed. 1995). This shows that the Establishment Clause was intended to protect people and states from being deprived of their religious beliefs and orders by the federal government.

29. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

30. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (holding that a school district's "policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause" (internal quotation marks omitted)). The Supreme Court has stated that the First Amendment is applicable to the states through the Fourteenth Amendment.

31. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 55-70 (2002).

judicial review of Establishment Clause claims has multiplied in recent years due to the limited capacity of governments to attain their governmental interests and services, as well as due to emerging issues related to the expanding role of the religious community beyond the walls of its churches. As faith-based programs have become more prevalent and accessible, the federal government and many states have turned to them not only to meet important social needs, but also to also fulfill traditional governmental or pseudo-governmental functions.[32] In recent years, faith-based organizations have expanded their services to include programs for prisoner rehabilitation, substance abuse and addictions, character education, career development, health care, and sustenance.

In 1970, the United States Supreme Court recognized that to those "who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[33] While such a statement is facially true, it masks the reality of what American colonists and early jurists and statesmen truly feared: a nationally established system of religion that utilized governmental compulsion to gain adherents and to destroy previously recognized state religions or denominations.[34]

III. THE ORIGINS OF LITIGATION AGAINST FAITH-BASED ORGANIZATIONS

Despite the recent surge in litigation involving faith-based activities, faith-based organizations are not new to the United States or its prison systems. In fact, records indicate that as early as 1787, religious organizations were influential in developing alternatives to the crowded prison systems that were then in existence.[35]

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32. *See* Persky, *supra* note 6, at 20.

33. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

34. *See* REPORTS OF COMMITTEES OF THE HOUSE OF REPRESENTATIVES MADE DURING THE FIRST SESSION OF THE THIRTY-THIRD CONGRESS 1, 6, 8-9 (1854), *and* THE REPORTS OF COMMITTEES OF THE SENATE OF THE UNITED STATES FOR THE SECOND SESSION OF THE THIRTY-SECOND CONGRESS, 1852-53, 1-4 (1853) (showing that the American public and leaders, even through the Civil War era, believed that an "establishment of religion" meant that the government was declaring a particular religion to be the only religion in its territory and that all citizens would be compelled to participate in that established religion), *reprinted in* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 30-31 (2000).

35. Free Library of Philadelphia, Birch's Views of Philadelphia in 1800, http://www.ushistory.org/birch/plates/plate24.htm. In 1787, the Philadelphia Society for Alleviating the Miseries of Public Prisons, which spear-headed many reforms in the prison systems during the United States' early development, was organized. The Society was heavily influenced by religious beliefs. Those who developed the "penitentiary" at Walnut

> The influence of religion as a treatment alternative in the correctional setting is as old as the history of prisons. The early Christian church, beginning in the days of Constantine, granted asylum to criminals who would otherwise have been mutilated or killed. . . . [I]mprisonment under church jurisdiction became a substitute . . . .[36]

In the United States, religious entities took a similar role in providing useful social services, even in the prison context, from the beginning of the founding of the republic. From the Washington administration through the Madison administration, the federal government actively supported the missions and activities of churches in several social realms, including the evangelization of Native Americans.

> Federal executive policy toward Native Americans provoked remarkably little religious political friction. . . . With Elias Boudinot and Jedidiah Morse standing beside Jefferson and Madison, the church participated eagerly, with no complaint from the state, in what today would be called "faith-based initiatives," administered by the churches and funded by the Indian Affairs office, which was lodged in the War Department.[37]

Under President James Monroe, the executive office expanded its support for religious entities. "Until Monroe's Civilization Fund was established in 1819, upping the government ante, religious bodies received modest federal aid to help underwrite missions created to 'civilize' (Jefferson's hope) and 'Christianize' (Morse's and Boudinot's aim) the natives."[38] Congress had apportioned $10,000 for the Civilization Fund.[39] These types of efforts to support religious entities in order to foster the religious development of the country continued throughout the nineteenth century.

Prior to the Civil War, many charitable organizations established schools for juvenile delinquents and orphanages that were based upon non-

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Street Jail in Philadelphia thought of it as a means of providing prisoners with the necessary confinement needed to encourage prisoners to repent of their wrongdoings and seek spiritual guidance and growth. *Id.*

36. Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, *in* RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS 35, 35 (Thomas P. O'Connor & Nathaniel J. Pallone eds., 2002).

37. FORREST CHURCH, SO HELP ME GOD: THE FOUNDING FATHERS AND THE FIRST GREAT BATTLE OVER CHURCH AND STATE 395-96 (2007).

38. *Id.* at 396.

39. *Id.*

denominational Protestantism and Catholicism; some of these establishments were partially funded by grants from state and local governments.[40] "The key fact about the full range of charitable institutions in this period, though, is that almost none were state-run, but nearly all . . . received significant government assistance."[41] Governmental assistance for these undertakings, which were spearheaded by faith-based organizations, was prevalent because prior to "the rise of the welfare state, government dealt with the problems of poverty largely by relying on private institutions and supplementing their financial needs when it became obvious that it was in the public interest to do so."[42] By no means was this governmental financial assistance trivial. For example, between 1869 and 1871 the New York City government contributed $1.55 million to faith-based institutions that were operated by Catholic and Protestant churches as well as Jewish synagogues.[43] Several more decades would pass before the activities of faith-based organizations would be scrutinized as potential violations of the Establishment Clause.

In 1899, the United States Supreme Court heard the case of *Bradfield v. Roberts*, which concerned the constitutionality of the District of Columbia, pursuant to congressional authorization, providing Providence Hospital with governmental funds despite the sectarian nature of the hospital and its monastic employees.[44] The Court held that the appropriation to the hospital, which funded the hospital's treatment services to the community, was not in violation of the Establishment Clause.[45] The Court stated that its holding would remain true even if the hospital's employees were members of a monastic order, if the hospital was operated under the auspices of the Roman Catholic Church, or if the hospital's property had been titled to the Church.[46] Thus, the Court reasoned that the public service of medical care and treatment was more important than the religious benefit that would be gained by the hospital employees who adhered to a particular religious belief system.[47] This was the only Establishment Clause case that was heard by the Supreme Court until the late 1940s.

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40. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 92-93 (2005).

41. *Id.* at 94 (explaining how religious organizations had the flexible capacity to provide these pseudo-governmental activities as the needs arose in urban areas of the United States).

42. *Id.*

43. *Id.* at 94-95.

44. Bradfield v. Roberts, 175 U.S. 291, 295 (1899).

45. *Id.* at 299.

46. *Id.* at 296-99.

47. *Id.* at 298-99.

In 1947, the landmark case of *Everson v. Board of Education* was decided by the Supreme Court.[48] In *Everson*, the Court determined that it was permissible for the State of New Jersey to provide financial support to transport children to private, often religious, schools.[49] While the Court stated that New Jersey would not be able to contribute money directly to the private schools to support their religious mission or religious curriculum, it noted that the state was able to provide a "general program" that enabled parents to ensure that their children would be transported to the private schools, since the education of youth is an important state interest.[50] Thus, the Court recognized that religious institutions could receive incidental benefits when a state provides for important societal activities and achieves the purpose of such activities by employing religious institutions that are able to serve the state's communities in such a manner.[51]

In *Walz v. Tax Commission*, the Court went beyond *Everson* to recognize that religious institutions could even receive economic or financial benefits without violating the Establishment Clause.[52] The *Walz* Court held that it was constitutional for states and municipalities to grant tax exemptions to churches because such exemptions, though they provide an economic benefit to the church and require governmental involvement in religious affairs, were not an excessive entanglement with, or sponsorship of, religion.[53] Chief Justice Burger pointed out that "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[54]

Largely building upon its precedent in *Everson* and *Walz*, the Court adopted a three-prong test in *Lemon v. Kurtzman* to determine whether statutes and legislative determinations violate the Establishment Clause.[55] The *Lemon* test, which continues to be utilized (although not consistently) as well as criticized by members of the Court, requires a statute to: (1) have a *secular legislative purpose*; (2) neither advance nor inhibit religion as its

48. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

49. *Id.* at 18.

50. *Id.*

51. *Id.* at 6-7.

52. Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970).

53. *Id.* at 674-75.

54. *Id.* at 669 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)) (holding that released-time religious programs are constitutional as long as they do not violate certain criteria).

55. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

principal or primary effect; and (3) not *excessively entangle government with religion*.[56]

Since deciding *Lemon*, the Supreme Court has reviewed only one case that has been primarily concerned with the funding of faith-based organizations by governmental entities.[57] In *Bowen v. Kendrick*, the Court upheld the federal Adolescent Family Life Act, which provided financial grant assistance to faith-based and community organizations that offered counseling to teens on sexuality issues.[58] Though the Act had been challenged because it implicitly allowed funds to be used for religious purposes, the Court stated that it was immaterial whether the funds were utilized for religious purposes, since the faith-based organizations were achieving important governmental interests.[59] Because an important governmental interest was properly being served, the religious character of the service provider was irrelevant.

These Supreme Court cases have largely shaped Establishment Clause jurisprudence, and they will be insightful as this Note examines the *Americans United* case and analyzes the agency relationships between states and non-state actors that the Court has explicitly and implicitly recognized throughout its jurisprudence.

IV. CONSIDERATIONS FOR FAITH-BASED ORGANIZATIONS USING PRINCIPLES OF AGENCY LAW

The First Amendment applies only to federal, state, and municipal governments as well as their subordinate governmental agencies and departments.[60] Consequently, private persons and organizations cannot violate the Establishment Clause, because it is inapplicable to their private affairs. The essence of the Establishment Clause is to prohibit a government from instituting a state-sponsored religion, which either expressly or by effect gives tremendous preference to a particular religion or religious denomination to the exclusion of all other religions or denominations.[61] Absent a *coup d'état*, a private organization is incapable of establishing a

56. *Id.* at 612-13 (emphasis added).

57. Bowen v. Kendrick, 487 U.S. 589 (1988).

58. *Id.* at 593.

59. *Id.* at 602-05 (analyzing the case under the three prongs of the *Lemon* test).

60. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 422 (8th Cir. 2007) (stating that "the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how wrongful'" (citing Blum v. Yaretsky, 457 U.S. 991, 1002 (1982); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999))).

61. *See generally* STEVEN G. GEY, RELIGION AND THE STATE 1-49 (2001).

state religion within a particular jurisdiction, despite its ability to promote a particular religion or engage citizens in certain religious activities.

Yet, it is common knowledge that allegations have been brought against private organizations in the past for suspected violations of the Establishment Clause. Furthermore, many courts have declared that private organizations have acted in ways that contravene the Establishment Clause and its purpose.[62] Many of the decisions finding Establishment Clause violations by private organizations are explainable because the circumstances that transpired fall into one of the following categories: (1) the government acted under the pretext of providing resources or funding to an organization in order to intentionally further specific religious activities, which the government could not do itself; or (2) the government (not under a pretext) provided resources or financial support to an organization, which utilized the governmental support to conduct activities that are purely religious in nature (regardless of whether the government knew that the support would be used for such activities).[63] Aside from these examples of where governments or organizations have improvidently acted to further a particular religion or use public funds for clearly religious activities, a private entity can violate the Establishment Clause only if there is an agency relationship between the organization and the government. Consequently, an agency relationship will only exist where the private organization is working on behalf of the government to such a degree that it essentially becomes a governmental actor. Where this situation arises, both the government, acting indirectly as the principal of the organization, and the private organization, acting directly as the agent of the government that unlawfully acted, should be considered to have violated the Establishment Clause.

For *Americans United*, this means that there must be an agency relationship between InnerChange and the State of Iowa, such that Iowa would have been prohibited from doing what InnerChange did and InnerChange would have been prohibited from accepting public funding for its operational expenses.[64] Although courts do not explicitly analyze

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62. *See, e.g.*, *Ams. United*, 509 F.3d at 424-25 (stating that the State of Iowa had aided in InnerChange's religious indoctrination in ways that far exceeded the permissible scope of governmental involvement or accommodation of religion that the Establishment Clause allows).

63. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 209-11 (1948) (striking down a program that utilized public funding to conduct release-time religious educational programs on a school campus with school personnel teaching much of the content).

64. *Ams. United*, 509 F.3d at 416-17 (reimbursement funds from Iowa were being billed and used only for non-religious operating expenses, not for religious expenses).

Establishment Clause violations today in terms of agency relationships, court decisions dating back to the 1800s have recognized that agency relationships may exist between faith-based organizations and governments.[65] In those cases, a closer examination of the courts' rationales reveals that where an Establishment Clause violation was found, there was an agency relationship between the government and the religious organization, whereas no agency relationship existed when the courts decided that there was no Establishment Clause violation.

For these reasons, a brief discussion of basic agency law principles will be helpful in re-examining the constitutionality of Iowa's and InnerChange's actions in *Americans United*.

A. Understanding the Fundamental Laws of Agency

At the most basic level, an agency relationship is "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents . . . to act [in such a manner]."[66] There are two specific types of agency relationships that are applicable to faith-based organizations that act on behalf of governments: the master-servant relationship and the independent contractor relationship. Depending upon which relationship exists, the level of agency will be different and its consequences will change accordingly.

1. Master-Servant Relationship

In the master-servant context, a master (principal) employs a servant (agent) to perform services on his behalf.[67] The modern employer-employee relationship is an example of the master-servant relationship. In this relationship, the master retains a right to control the servant's physical conduct,[68] and the servant is authorized to do only "what it is reasonable for

65. Bradfield v. Roberts, 175 U.S. 291, 293 (1899) (stating that the appropriation of funds to religious societies would result in a "legal agency . . . which would, if once established, speedily obliterate the essential distinction between civil and religious functions").

66. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *see also* RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) (Cum. Supp. 2008).

67. RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2) (1958).

68. *Id.*

him to infer that the [master] desires him to do."[69] Thus, the servant's authority can be utilized only to "act for the benefit of the [master]" at all times during his employment.[70]

Since the servant's authority is derived from the master and in furtherance of a benefit for the master, the master may assume liability to third parties who are injured or harmed by the servant's acts.[71] However, the master will not automatically be held liable for each and every act that the servant commits.[72] Rather, the master will be held liable only when the servant does something that results in harm or injury and that the servant had either actual authority[73] or apparent authority[74] from the master to do.[75] In the context of faith-based organizations, the government could be held liable for an organization's acts if the government had given the organization authority to act, even when the organization may have acted with an improper motive or made misrepresentations to third parties.[76]

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69. *Id.* § 33 (1958); *see also id.* § 35 (stating that the "authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it").

70. *Id.* §§ 39, 387 (1958).

71. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY (1839). Justice Story refers to such servants as "public agents," and he states:

> [A]n agent, contracting in behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. . . . [T]he natural presumption in such cases is, that the contract was made upon the credit and responsibility of the government itself . . . .

Id. at 392-93.

72. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (describing when a master will or will not be held liable for torts committed by its servant).

73. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) (defining actual authority as when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act").

74. *Id.* § 2.03 (defining apparent authority as "the power held by an agent . . . to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations").

75. RESTATEMENT (SECOND) OF AGENCY § 140 (1958) (which primarily means that a master will be held liable for servant's acts if they are performed within the scope of the servant's employment); *id.* § 228 (discussing what acts might fall within the scope of employment); RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (same); *see also id.* § 7.03 (describing the principal's liability to third parties as well as what elements related to authority and conduct are necessary to establish such liability).

76. RESTATEMENT (SECOND) OF AGENCY § 161A(a)(ii), (iv) (1958) (explaining how a principal can be held liable to third person when a special relationship exists between them); RESTATEMENT (THIRD) OF AGENCY § 7.05(2) (2006) (same). In the prison context, if there is

2. Independent Contractor Relationship

On the other hand, an independent contractor is one (potential agent) who contracts to do something for another person (potential principal).[77] An independent contractor may or may not be an agent of the one for whom he is working. The distinction between an agent-type and a non-agent independent contractor is that in the former relationship, an agent is "one who has agreed to act on behalf of another, the principal, but not subject to the principal's control over how the result [the terms of the contract] is accomplished," while in the latter non-agency relationship, the independent contractor "operates independently and simply enters into arm's length transactions with others."[78] Thus, the difference depends on how involved the "principal" is in the day-to-day work and operations of the independent contractor. Where such involvement by the principal permeates the independent contractor's daily business, and the principal appears to control or heavily influence all or most of the contractor's decisions, a strong agency relationship will likely be found by the courts.

3. Distinguishing Between Servants and Independent Contractors

Often it may not be readily apparent from contractual language or the factual circumstances whether a faith-based organization is acting as a servant of the government or as a non-agent independent contractor. However, the Restatement (Second) of Agency lists many factors that are helpful in determining what relationship exists.[79] These factors include: (1) the extent of control that the master exercises over the details of the work performed by the other; (2) whether the one employed is in a distinct occupation or business; (3) whether in that kind of occupation it is customary in that locality to perform the work under direct supervision; (4) the level of skill required for the employed person's occupation; (5) whether the employed person supplies the instruments and tools or the location for the work to be performed; (6) the duration of the employment; (7) the method of payment (i.e., by time, work job, or project); (8) whether the work being performed is part of the regular business that the employer

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a master-servant relationship between the government and a faith-based organization, presumably the government would be held to a duty to protect the prisoners from acts committed by the faith-based organization.

77. RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958).

78. WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS 47 (6th ed. 2006).

79. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (listing ten factors that may illustrate whether a master-servant or independent contractor relationship exists).

conducts; (9) how the parties interpret their relationship;[80] and (10) whether the principal is in business. Although no single factor is determinative, these factors can be analyzed in order to see which relationship is more indicative of the situation presented.

B. Agency Relationships Recognized by Courts

Although courts have not explicitly employed frameworks for determining violations of the Establishment Clause based upon whether master-servant or independent contractor relationships exist, many courts have discussed, in general terms, the presence of agency relationships in order to enhance or justify their holdings that there were or were not Establishment Clause violations. Several of the cases previously mentioned due to their significant impact on Establishment Clause jurisprudence have used agency terminology in order to explain the involved relationships and assess liability.

In *Bradfield v. Roberts*, the Court viewed a religiously-affiliated hospital as a non-state actor.[81] The Court stated that the religious nature of the hospital and its employees, and the fact that it was operated by the Roman Catholic Church and that its property was held by the Church, did not influence the government's ability to provide funds for the hospital or create an Establishment Clause violation.[82] Thus, under the master-servant and independent contractor distinction described above, the hospital in *Bradfield* would have fallen into the independent contractor category. This hospital, though religiously-affiliated, was open to all members of society who sought care at its facility.[83]

In *Everson*, the Court held that governmental funding for the transportation of parochial students to and from parochial schools did not violate the Establishment Clause.[84] Here, again, the Court found that the service being provided was a legitimate secular service that benefitted all of

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80. This refers to any written agreements between the parties. However, just because an agreement asserts that one of the relationships exists does not mean that the other relationship might not be more appropriate for classifying the relationship between the parties. *See* RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006).

81. Bradfield v. Roberts, 175 U.S. 291, 297-99 (1899).

82. *Id.* at 298-99.

83. *Cf.* Collins v. Kephart, 117 A. 432, 440 (R.I. 1922) (holding that a Jewish hospital that limited its services to only Jewish members of society was unable to receive governmental funds). Thus, it may be said that if the hospital received funds, it would have been using them only to further its doctrinal mission rather than to provide larger social needs. *See id.*

84. Everson v. Bd. of Educ., 330 U.S. 1, 17-18 (1947).

society, even though the transportation was being provided to further other sectarian affairs. But the transportation, in itself, was not a sectarian activity.[85] Rather the government was ensuring that students would be provided with the necessary means to further their educational needs and goals: a non-sectarian purpose.

In *Lemon*, the Court created its three-prong test and held that governmental funding of teaching salaries in a parochial school for secular subjects was unconstitutional.[86] Here, there would have been a close master-servant relationship, as the government would have been funding teachers directly.[87]

In *Bowen*, the Court determined that the Adolescent Family Life Act, which provided grants for religious and nonreligious organizations to offer teen sexuality counseling, was not facially unconstitutional.[88] Here, the religious providers could be considered as non-agent independent contractors because they were provided funds only to serve a particular social need. However, the methodology used to fulfill that need was not prescribed by the government.[89] Thus, the government did not dictate how the religious organization was supposed to act, nor did the government's Act have the effect of promoting religion, because the religious and nonreligious organizations could act in a variety of ways that neither furthered nor inhibited religion.[90]

Several scholars have listed the parameters of permissible governmental financial assistance in ways that allude to principles of the laws of agency. Carl Esbeck has described five parameters that can be vital to formulating an agency framework. These factors include: (1) the intended objects of the governmental regulation or action (i.e., the type of service being rendered by the faith-based organization); (2) the degree of connection between the faith-based organization and any central religious authority or institution; (3) the format of the governmental assistance (e.g., direct payments for an earmarked purpose, project grants, loans, in-kind donations of goods, free use of governmental property, free assistance by governmental staff or professionals, financial vouchers for beneficiaries, and tax credits or deductions); (4) whether the government gives the funding directly to the faith-based organization or whether individuals direct payments to the faith-based organizations; and (5) how many levels of government are involved

85. *Id.*
86. Lemon v. Kurtzman, 403 U.S. 602, 606-07, 612-13 (1971).
87. *See generally id.* at 615-22.
88. Bowen v. Kendrick, 487 U.S. 589 (1988).
89. *See generally id.* at 604-10.
90. *Id.* at 609-10.

in monitoring or administering the faith-based organization's program.[91] Esbeck concludes that, "The pronouncements of the Supreme Court declare that an entity is not a state actor simply because it is licensed or pervasively regulated by a state, nor is there 'state action' merely because the operating and capital costs of the private entity are heavily subsidized by governmental social programs."[92]

C. Examining Potential Agency Relationships Between Iowa and InnerChange

The procedural history of *Americans United* illustrates that Establishment Clause cases are not always clear-cut. The district court, using the *Lemon* test, viewed the Iowa Department of Corrections' (DOC) purpose in contracting with InnerChange as a purely secular purpose.[93] The Eighth Circuit, however, viewed the DOC's purpose as a sectarian one, not because the government acted intentionally to advance religion, but rather because the effects of the funding and contracts were to advance a particular religion.[94] Yet, even in this instance the Court of Appeals employed a two-part analysis, one part of which examines whether the party depriving another of a constitutional right "may fairly be said to be a state actor."[95]

1. Factual Background

The InnerChange program was a nonprofit 501(c)(3) corporation affiliated with Prison Fellowship Ministries.[96] From September 1999 to June 2007, InnerChange received partial funding through the State of Iowa for its residential inmate program at the Newton prison facility.[97] The InnerChange program was "an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation . . . through the miraculous power of God's love."[98] Inmates are not required to join or participate in InnerChange activities, and they are clearly told

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91. Carl H. Esbeck, *Regulation of Religious Organizations via Governmental Financial Assistance*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 349, 354-56 (James A. Serritella et al. eds., 2006).

92. *Id.* at 385.

93. Ams. United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406, 423-24 (8th Cir. 2007).

94. *Id.* at 424.

95. *Id.* at 422 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

96. *Id.* at 413.

97. *Id.*

98. *Id.*

before they enroll that InnerChange is a faith-based alternative.[99] Furthermore, prisoners are told that enrollment in, and completion of, the InnerChange program will not affect their parole eligibility; they sign statements of understanding to this effect.[100] In addition, inmates are informed that they may voluntarily withdraw from the program at any time and without any penalty.[101]

Inmates who are interested in InnerChange become eligible for enrollment after completion of a brief introductory program, which illustrates civic values through stories in the Bible.[102] Following the introductory program, inmates participate in a four-week orientation.[103] After completion of orientation, inmates must sign the InnerChange Accountability Covenant in order to continue to Phase I of the program.[104] This agreement states that inmates agree to apply the teachings and principles from *Matthew* 18:12-35 to their life (at least while participating in InnerChange), which relate to restoration, personal responsibility, mediation, conflict resolution, and forgiveness of others.[105]

Phase I lasts twelve months. Inmates participate in required classes throughout the day, including times for devotional readings, group prayer, and singing.[106] While some classes have religiously-based content, others concern topics such as substance abuse, anger management, financial management, and issues related to marriage, parenting, and family needs.[107] On Friday evenings, revival services are held, and there are church services on Sunday mornings. Inmates are required to attend these services.[108]

In Phase II, which lasts six months, inmate participants sign a Continued Stay Agreement indicating their promise to continue to partake in the activities of Phase I.[109] Phase II participants are also assigned mentors, who are InnerChange volunteers.[110] In Phases I and II, inmate participants are evaluated quarterly based upon the civic virtues that they have incorporated into and applied to their lives.[111] Inmates are able to enter Phase III of

99. *Id.* at 414.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 415.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 414-15.
109. *Id.* at 415.
110. *Id.*
111. *Id.* at 416.

InnerChange's program only if they are placed in a work release center by the DOC.[112] Participation in Phase IV is available only to inmates who are released from confinement by the DOC.[113]

In 1997, due to budgetary limitations, increased prison overcrowding concerns, and the lack of effective programs for inmates to participate in that reduce recidivism, Iowa examined a similar InnerChange program that had been highly effective in Texas.[114] Although Iowa officials determined that the InnerChange program would work, the DOC issued a public request for proposals for pre-release, values-based programs at the Newton facility.[115] InnerChange submitted the only proposal, and it was subsequently accepted by DOC.[116]

In March 1999, the DOC and InnerChange signed a contract for InnerChange to provide program services from September 1999 until June 2002.[117] DOC agreed to reimburse InnerChange for non-religious costs and expenses.[118] InnerChange received nearly $230,000 for the first year of its program.[119] In the second year, it received almost $192,000, while its operating expenses exceeded $500,000. Meanwhile, in the third year of the program, InnerChange received the same amount as it had in the previous year, although its operating costs exceeded $575,000.[120]

Near the end of this contract, Iowa again issued a public request for proposals; InnerChange was the only organization that decided to submit a proposal.[121] Thus, the DOC and InnerChange signed a second contract that covered services from July 2002 until June 2005.[122] Similar to the condition under the previous contract, the DOC paid InnerChange for its non-religious operating expenses, giving InnerChange between $175,000 and $200,000 each year.[123] However, InnerChange's expenses continued to increase, exceeding $600,000, as the Newton program expanded.[124] The warden of the Newton facility recognized that InnerChange gave the state exponentially more in return for its non-religious programs than what the

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 417.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 417-18.
124. *Id.* at 417.

state actually reimbursed InnerChange for (only about thirty to forty percent of its operating expenses).[125]

This Note will now examine different aspects of the InnerChange program that support either a master-servant relationship or a non-agent independent contractor relationship between InnerChange and the DOC.

2. Evidence Leaning Towards a Master-Servant Agency Relationship

The following facts seem to favor the establishment of a master-servant relationship, which would hold the State of Iowa liable for any unconstitutional acts committed by InnerChange or its personnel. Several of the factors used in determining whether a master-servant relationship exists reflect upon the servant's use of the master's resources. Here, the InnerChange program was located in the state's Newton prison facility's Unit E and Building M.[126] Furthermore, InnerChange personnel were paid according to their respective positions rather than the amount of time that they spent conducting or organizing non-religious programs.[127] In addition, DOC paid for gifts for InnerChange volunteers and graduating inmates, which were often religious in content, as well as a "church copyright license" for InnerChange's use of religious worship music.[128]

Another critical factor examines the level of control that the master has over the servant and its daily operations. There are some indications that the DOC exerted substantial control over InnerChange's affairs. The DOC required InnerChange to provide regular disciplinary reports for inmates, while higher levels of discipline had to be conducted by DOC personnel.[129] It was on this basis that the court of appeals determined that InnerChange qualified as a "state actor" for the purposes of the § 1983 claim that plaintiffs brought against InnerChange.[130]

A third factor of importance concerns the method of payment that the servant receives. Here, InnerChange was reimbursed on an annual basis.[131] But it is important to point out that in order for the aid money to be available for use by InnerChange, inmates had to be willing to participate in its faith-based program. Thus, there were not any alternative programs to which the inmates could direct the monies.[132] However, the inmates did

125. *Id.* at 418.
126. *Id.* at 414.
127. *Id.* at 418.
128. *Id.*
129. *Id.* at 423.
130. *Id.*
131. *Id.* at 416-18.
132. *Id.* at 425.

have the choice to remain in a traditional prison program or to be placed in the InnerChange program.[133]

3. Evidence Indicative of a Non-Agent Independent Contractor Relationship

The Eighth Circuit noted that it did not matter if InnerChange's views were pervasively sectarian.[134] As such, it is important to think of InnerChange like any other recipient of state funding, regardless of its religious or secular characteristics.

Control is perhaps the most important characteristic that distinguishes a master-servant relationship from an independent contractor relationship.[135] A non-agent independent contractor is generally free to make all of the small decisions as long as the project for which the employer has hired him is completed in a satisfactory manner.[136] Thus, the independent contractor can determine how its work will be completed.

Here, the DOC did not have any control over the selection of the InnerChange curriculum, nor did it partake in the teaching of the curriculum or the hiring of teachers for the program.[137] The only thing that the DOC's proposal request required was submission of proposals for values-based programs, which could also have been secular in nature. In addition, the inmates were supervised by InnerChange staff without assistance from DOC personnel.[138] InnerChange effectively had complete power 24 hours per day to "incarcerate, treat, and discipline inmates."[139] Although there was some administrative cooperation between the DOC and InnerChange, the DOC did not pervasively monitor InnerChange's affairs.[140] This independence of the InnerChange program is also evident in how the inmate participants were affected by the program's administration. The InnerChange participants were not treated like typical inmates in the state penitentiaries. They were granted greater privacy and access to computers,

133. *Id.* at 414-15.

134. *Id.* at 414 n.2, 424 n.4.

135. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (1958). Compare the use and emphasis of "control" in sub-sections (1) and (2) (dealing with master-servant relationships) with the explicit notion in sub-section (3) that independent contractors are not inherently controlled by the people with whom they contract to do business. *Id.*

136. *Id.* cmt. b.

137. *Ams. United*, 509 F.3d at 414.

138. *Id.* at 416.

139. *Id.* at 423.

140. *Id.* at 425.

and they were afforded more opportunities to receive visits from family members.[141]

All of these facts strongly favor labeling the InnerChange program as a non-agent independent contractor of the State of Iowa. Although InnerChange was performing a vital state function, it had free reign to run its residential rehabilitation program as it saw fit.

V. PROPOSED AGENCY FRAMEWORK

Although the *Lemon* test is the most prominent test used in resolving Establishment Clause issues, several others have been employed, including Justice O'Connor's "endorsement test." However, none of these tests have been consistently applied by the Court, and individual justices frequently apply tests inconsistently themselves.

An agency framework would serve as a better test for constantly determining the legitimate scope of permissible acts under the Establishment Clause. First, an agency framework could practically restore the Establishment Clause to its original meaning and allow constitutional questions to be resolved based upon the text and meaning of the Constitution rather than the subjective pronouncements of jurists. Whereas the *Lemon* test and the endorsement test have failed to provide judges with sufficient flexibility to apply them consistently to all Establishment Clause issues, a test based upon objective agency principles could be employed consistently across the board without reaching divergent results. Most Establishment Clause cases hinge upon an analysis of whether a certain action had the effect of establishing religion. A proper analysis of that effect, and of its constitutional implications, needs to consider whether the action that caused the effect was sanctioned by the government. An agency framework provides the best alternative for considering this question because it does not result in overly broad prohibitions against religious effects that are caused by private, non-governmental entities; it acknowledges that private organizations can work to establish their religious beliefs in society, while civil government is prevented from establishing such a religion.[142] Impliedly, it recognizes that the jurisdictions of government and religion are distinct; where the government fails, religious institutions may be able to operate effectively.

In this sense, an agency approach may best integrate the Establishment and Free Exercise Clauses, as it denies government the authority to directly

141. *Id.* at 424.

142. WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 206 (2009).

impose religious beliefs on the citizenry, while at the same time providing the most opportunities for citizens to participate in surrounding religious activities.[143] Simply put, what the government may not be able to do itself, private organizations may be able to do; however, government may not force private organizations to do things that it could not do on its own. This is particularly true in the prison context, where prisoners are unable to engage in many religious practices unless opportunities and resources are made available to them.[144]

Second, an agency framework would bring reasonableness to the church-state debate. It would emphasize our nation's commitment to religious liberty and diversity, while simultaneously recognizing that religion has a vital role to play in the public square, including participation in community development and a voice in governmental discussions related to political, social, and moral concerns.[145] Separatists routinely claim that all religious activities and ideas need to be quarantined from the public arena. However, such a view neglects to realize that all activities—whether religious or secular—are based upon particular beliefs that aim to answer the ultimate questions of life when taken to their logical conclusions. As a result, every form of political and religious speech inevitably creates a class of outsiders who are excluded by the supporters of a particular viewpoint. Secular organizations inherently treat religious adherents as outsiders, at least to the same degree that non-religious citizens feel alienated by the work of faith-based organizations. This is especially true considering that the vast amount of evidence indicates that most faith-based organizations de-emphasize their particular religious beliefs when providing services to those in need; they do not engage in overt religious advocacy, proselytization, or discrimination based upon religious criteria.[146]

An agency framework would bring a breath of fresh air to the many contemporary debates over the proper role and policies of governments, because "[t]o suggest that such assertions [that provide religious solutions to social problems] are by virtue of their religious nature inappropriate is to foist on political discourse an artificial straightjacket that has no place in American history or law."[147] At the same time, an agency-based test would

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143. *Id.* at 206.

144. *Id.* at 206-07.

145. David Saperstein, *Appropriate and Inappropriate Use of Religion*, *in* SACRED PLACES, CIVIC PURPOSES: SHOULD GOVERNMENT HELP FAITH-BASED CHARITY? 297, 304 (E.J. Dionne, Jr. & Ming Hsu Chen eds., 2001).

146. ROBERT WUTHNOW, SAVING AMERICA?: FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY 142-45 (2004).

147. Saperstein, *supra* note 145, at 298.

caution anyone who might advocate for a more theocratic approach to civil society by reaffirming our nation's long-time prohibition against the use of religious tests to determine who can and cannot legitimately serve society.

Third, the implementation of an agency framework would eliminate discrimination that results from First Amendment tests that are based merely upon the simplistic distinctions between things that are "religious" and "non-religious" or organizations that are "faith-based" and "non-faith-based."[148] It would foster a healthier relationship between governments and societal institutions, such as faith-based organizations, by "nourish[ing] and sustain[ing] the integrity and identity of a wide array of nongovernment institutions and [ending] discrimination against institutions that currently are discriminated against."[149] In this respect, an agency framework would also minimize the "chilling effect [that other Establishment Clause tests might have] on the willingness of faith-based organizations to contribute to the solution of social problems."[150]

The proposed agency framework consists of three primary steps. The first step is determining the governmental interest(s) involved and the appropriate level of scrutiny required by the courts. In *Americans United*, the governmental interests involved were the preservation of effective prison management and the reduction of recidivism in criminal activity. Since a fundamental right is involved in this case, i.e., thwarting the religious exercise of inmates, the proper standard of review could arguably be strict scrutiny.[151]

The second step in the agency framework is determining whether the asserted governmental interest is legitimate or whether it is only a pretext for funding faith-based organizations. At this step, a look at the accounting of the faith-based organization may serve as a superior indicator of whether it is using funds properly or whether it is receiving funds only as a "payoff" or "special favor" from some legislator. In *Americans United*, there was no indication that there was any fraudulent activity related to the funding by either InnerChange and Prison Fellowship Ministries or the State of Iowa and its Department of Corrections. This is especially evident from the fact that InnerChange's operating expenses were almost double what it received from the DOC in grants.

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148. Kenneth Pavlischek, *Fighting Crime: Overcoming the Arguments of Church-State Separationists*, *in* SACRED PLACES, CIVIC PURPOSES, *supra* note 145, at 102, 103.

149. *Id.* at 102.

150. SULLIVAN, *supra* note 142, at 210.

151. *See* McKune v. Lile, 536 U.S. 24 (2002) (holding that legitimate governmental interests can even trump the fundamental rights of prisoners).

The third step is determining whether the faith-based organization is acting as an agent (servant) of the state (principal) or whether it is merely acting as a non-agent independent contractor. There are three subparts to this prong of the test. First, the principal must be identified. In *Americans United*, the plaintiffs implied that the State of Iowa was the principal. Second, the presumed agent must be identified. Here, the plaintiffs alleged that Prison Fellowship Ministries, through its InnerChange program, was acting as an agent of the State of Iowa. The final subpart is to analyze the agency relationship between the identified principal and presumed agent, and to analyze how the funding is being utilized. As previously described in Part IV.C above, due to the lack of control that Iowa had over the daily affairs and operations of the InnerChange program, and the fact that the governmental funding was used only for operational expenses, rather than for sectarian purposes, the agency relationship can best be categorized as an independent contractor relationship. Since the resulting relationship is one of an independent contractor, there cannot be an Establishment Clause violation. However, if there had been a master-servant relationship, then there might have been an Establishment Clause violation, if the actions did not pass constitutional muster under the proper standard of review.

VI. CONCLUSIONS

In *Americans United for the Separation of Church and State v. Prison Fellowship Ministries*, the Court of Appeals for the Eighth Circuit determined that there was an Establishment Clause violation when the State of Iowa provided funding to InnerChange's value-based, rehabilitative inmate program. However, the court's basis for finding that Prison Fellowship Ministries, and hence InnerChange, was a state actor was not founded upon stable constitutional principles. Even the *Lemon* test would not reach such a definition for state action. Yet, when the principles of agency are applied to *Americans United* and other Establishment Clause cases, courts can properly determine whether there is an agency relationship that potentially violates the Establishment Clause, or whether the religious nature of the faith-based organization is irrelevant. Under the proposed agency framework, this Note contends that the Eighth Circuit's holding that the InnerChange program was unconstitutional is erroneous. The court should not have found any Establishment Clause violation, because InnerChange was simply a non-agent independent contractor of the Iowa Department of Corrections.