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GOVERNING FROM THE PULPIT: HOW THE FIRST CIRCUIT IN *ACLU OF MASSACHUSETTS V. U.S. CONFERENCE OF CATHOLIC BISHOPS* FAILED TO PREVENT A GOVERNMENT AGENCY FROM UNCONSTITUTIONALLY CONTRACTING ITS DUTIES TO A RELIGIOUS INSTITUTION

ANNA M. LASHLEY*

When the government delegates its discretionary power to religious institutions, it violates a fundamental right guaranteed by the First Amendment of the U.S. Constitution—the freedom from government entanglement with religion. The Establishment Clause of the First Amendment was written to protect religious freedom from intrusion by the government by preventing, to the extent possible, the imposition of either the church or the government into the confines of the other. This separation between church and state is essential to preserve the liberty of the American people and to ensure that the nation stays true to its Constitution.

In 2009, the U.S. Department of Health and Human Services (HHS) violated the Establishment Clause when it formed a master contract with the U.S. Conference of Catholic Bishops (USCCB). This contract authorized the USCCB to allocate federal funds to subcontractors pursuant to the Trafficking Victims Protection Act of 2000, a discretionary duty originally assigned to the HHS.

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This Comment demonstrates that such a delegation of discretionary power violates all three of the Supreme Court's Establishment Clause tests: the Lemon *test, the endorsement test, and the coercion test. The master contract between the HHS and the USCCB was a direct violation of Americans' First Amendment rights. Until courts take action to prevent such contracts from being formed in the future and limit the type of business interactions in which the government and religious institutions may engage, the American people are at risk of similar unconstitutional relationships being formed. Otherwise, this continued entanglement between the government and religious institutions will erode the religious liberty the nation has worked so hard to maintain and protect throughout its history.*

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INTRODUCTION

The Establishment Clause of the First Amendment specifies that "Congress shall make no law respecting an establishment of religion."[1] Throughout U.S. history, the Supreme Court and scholars have interpreted this clause to mean that there must be separation between religion and the government.[2] Although the First Amendment does not explicitly mention this separation, the Court has concluded that there is no question that the First Amendment established that church and state should be separated.[3] While Thomas Jefferson discussed the concept of a "wall of separation" between church and state,[4] the Supreme Court has acknowledged that "total separation is not possible" and that "[s]ome relationship between the government and religious organizations is inevitable."[5] However, the Court has determined that the Establishment Clause at least means that the "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, *may not delegate a governmental power to a religious institution*, and may not involve itself too deeply in such an institution's affairs."[6] In addition, any idea of a "wall" between church and state is "substantially breached" when the government puts discretionary governmental powers in the hands of religious bodies.[7]

While the Supreme Court has made it clear that giving governmental power to religious institutions is a violation of the Establishment Clause, the federal government frequently delegates such power. In 2001, for example, President George W. Bush created the Faith-Based and Community Initiatives (FBCI), which ensured that faith-based organizations could subcontract to receive federal

1. U.S. CONST. amend. I.

2. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–23, 126–27 (1982) (invoking Thomas Jefferson's concept of a "wall" of separation and discussing Supreme Court precedent analyzing the purposes of the Religion Clauses and the ability of religion and government to coexist); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (asserting that the separation of church and state "must be complete and unequivocal").

3. *Zorach*, 343 U.S. at 312.

4. *Larkin*, 459 U.S. at 122–23 (internal quotation marks omitted).

5. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (highlighting prior Supreme Court rulings that did not require total separation between church and state).

6. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 590–91 (1989) (emphasis added) (footnotes omitted).

7. *See, e.g.*, *Larkin*, 459 U.S. at 123, 127 (holding that a state statute that gave churches the right to determine whether applicants could obtain liquor licenses violated the Establishment Clause).

funding to provide public social services.[8] The Supreme Court has yet to rule on the constitutionality of such subcontracts;[9] however, allowing religious organizations to administer these services has become a common and accepted practice.[10]

A novel type of contract sparked debate in 2009, when the U.S. District Court for the District of Massachusetts decided *ACLU of Massachusetts v. Sebelius*.[11] The plaintiffs alleged an Establishment Clause violation after the U.S. Department of Health and Human Services (HHS) formed a "master contract" with the U.S. Conference of Catholic Bishops (USCCB).[12] This contract conferred to the USCCB the authority to perform the duties of the HHS in allocating federal funds to subcontractors pursuant to the Trafficking Victims Protection Act of 2000.[13] The contract also gave the USCCB the discretionary power to decide which organizations would receive a subcontract granting federal funds to provide services for trafficking victims.[14] Rather than addressing the larger constitutional issue of these types of master contracts generally, the parties formed their arguments around the specifics of the HHS-USCCB contract.[15] The district court therefore only analyzed this specific contract and found that both the contract itself, as well as the way in which the USCCB was performing under the contract, unconstitutional.[16] The court ruled this way because the USCCB awarded subcontracts only to organizations that agreed not to use the federal funds to provide victim services that conflicted with the USCCB's religious beliefs.[17]

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8. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001), *reprinted in* 3 U.S.C. § 21 app. at 13–14 (2012).

9. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 605 (2007) (plurality opinion) (refusing to rule on the constitutionality of the FBCI after finding that the respondent lacked standing); *see also infra* Part I.B.2.

10. *See* Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 186–88 (2002) (discussing the long history of allocation of federal funds to religious organizations that provide social services); *see also infra* Part I.B.3 (describing the prevalence of the FBCI).

11. 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated as moot sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

12. *Id.* at 477–78.

13. *Id.* at 476–77.

14. *Id.*

15. *Id.* at 488; *see, e.g.*, Complaint, *Sebelius*, 821 F. Supp. 2d 474 (No. 1:09-cv-10038), 2009 WL 8500122; Defendant's Answer, *Sebelius*, 821 F. Supp. 2d 474 (No. 1:09-cv-10038), 2010 WL 7940343.

16. *See Sebelius*, 821 F. Supp. 2d at 488 (finding a violation because the HHS delegated authority to a religious group "to impose religiously based restrictions in the expenditure of taxpayer funds, and thereby impliedly endorsed [their] religious beliefs").

17. *See id.* at 487–88 (specifying that subcontractors could not use the funds to provide victims contraceptives or abortion services).

The U.S. Court of Appeals for the First Circuit avoided analyzing the constitutionality of the formation of the contract when it reversed the district court's decision as moot.[18]

Although this case provided a potential opportunity for a court to determine the constitutionality of these master contracts between the government and religious institutions, the issue remains undecided, and there is nothing to prevent similar contracts in the future. While not officially deemed constitutional, subcontracts between government agencies and religious organizations have become an accepted practice.[19] Yet, more powerful and potentially detrimental master contracts have introduced new Establishment Clause issues.

This Comment argues that there is a constitutional limit on the extent to which faith-based organizations can administer or participate in federally funded social-service programs. It advances the notion that general master contracts between the government and a religious institution, which give the institution the authority to allocate federal funds to subcontractors pursuant to a legislative act, are a violation of the Establishment Clause of the First Amendment.

Part I of this Comment briefly discusses the background of the Establishment Clause and the different tests the Supreme Court has developed to determine whether the Clause has been violated. This Part also provides information about the creation, rules, and regulations of the FBCI. Finally, this Part takes a more in-depth look at the details surrounding *ACLU of Massachusetts v. Sebelius*.

Part II contends that any master contract between the government and a religious institution violates the First Amendment. It discusses the differences between these master contracts and the subcontracts that are formed under the FBCI in order to demonstrate why the master contracts are not valid under the FBCI. This Part also argues that the American Civil Liberties Union (ACLU) and the district court mistakenly focused its Establishment Clause analysis on the restriction the USCCB imposed because, under several Establishment Clause tests, these contracts are unconstitutional regardless of whether such restrictions exist.

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18. *See* ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 48, 53 (1st Cir. 2013) (declaring the case moot on several grounds, including that "there [was] literally no controversy left for the court to decide" because the contract had expired, and the obligations between the parties had therefore ended).

19. *See* Lin et al., *supra* note 10 (highlighting the reasoning behind federal funding for religious organizations); *see also infra* Part I.B (discussing the establishment of the FBCI program, the Court's refusal to rule on its constitutionality, and its prevalence today).

In conclusion, this Comment suggests that the role of religious institutions and organizations, when it comes to receiving federal funding, must be limited to providing services as a subcontractor pursuant to the FBCI. Any extension of authority beyond that of subcontractors, such as a general master contract, is constitutionally prohibited.

I. BACKGROUND

A. The Supreme Court's Interpretation of the Establishment Clause

In writing and signing the Constitution, the Framers sought to create laws of the nation to protect the people and preserve their liberty.[20] The government has always acknowledged the role of religion in American culture,[21] and the United States has a history and tradition of widespread religious diversity.[22] The language of the First Amendment reflects the desires of early Americans to abolish conditions and practices limiting religious freedom "in order to preserve liberty for themselves and for their posterity."[23] Fearing that a new government would impose the same religious dictatorship that they fled from in England, the American people realized that religious liberty could be best achieved if the government was prohibited from intruding on the religious beliefs of any individual.[24] Accordingly, the religion provisions in the First Amendment were intended to provide this protection.[25]

In the nineteenth century, the Supreme Court emphasized the success of these religion provisions: "The structure of our government has, for the preservation of civil liberty, rescued the temporal

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20. Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (recognizing that the First Amendment conveyed the Framers' objective to protect the people from "governmental intrusion on religious liberty").

21. Lynch v. Donnelly, 465 U.S. 668, 673–78 (1984) (highlighting Supreme Court precedent and the religious practices of the Framers of the Constitution to emphasize the longstanding presence of religion in American culture).

22. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 589 (1989) (noting the "[s]ectarian differences among various Christian denominations [that] were central to the origins of our Republic" and how people of various religious faiths have made the United States their home).

23. *Everson*, 330 U.S. at 8 (referring to the First Amendment language declaring that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (quoting U.S. CONST. amend. I)).

24. *See id.* at 8–13 (providing historical examples of religious oppression that led to the adoption of the First Amendment, such as penalizing absences from government-established churches).

25. *Id.* at 8.

institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[26]

The Supreme Court, in its decades-long analysis of the Establishment Clause, has looked to the country's history and the Framers' intent in order to determine the meaning of the Clause.[27] The Court has concluded that the Establishment Clause was intended to protect against three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[28] The purpose of the Clause is to prevent, to the extent possible, the intrusion of either the church or the government into the confines of the other.[29] According to the Court, the key principle in any judicial analysis of the Establishment Clause is that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[30]

A separation between church and state, although not explicitly mentioned in the First Amendment, is implied.[31] However, the Court has struggled to settle on the required degree of separation in light of its recognition that absolute separation is not possible.[32] The Supreme Court is tasked with the duty of drawing the requisite line of separation as issues arise.[33] The Court has explained that the line-drawing process is very difficult, and has described the guidance of the Establishment Clause as "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship" between the government and religion.[34] When

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26. Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871).

27. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–23, 126–27 (1982) (discussing the purpose of the Establishment Clause and how Thomas Jefferson's view of the separation of church and state should be applied); Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971) (analyzing the "opaque" language of the Free Exercise Clause to determine the Framers' intended meaning); Reynolds v. United States, 98 U.S. 145, 162–64 (1878) (utilizing Jefferson's own language to understand the concept of separateness).

28. *Lemon*, 403 U.S. at 612 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970)).

29. *See id.* at 614 (reiterating the Establishment Clause's goal of preventing the entanglement of church and state, but recognizing that total separation is impossible).

30. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (internal quotation marks omitted) (using precedent to explain the importance of religious neutrality to build tolerance and respect for any and all religions).

31. *See supra* notes 3–5 and accompanying text.

32. *See supra* notes 3–5 and accompanying text (noting that religious practices date back to the Framers of the Constitution, and realizing the historical importance of both church and state in American culture).

33. *See Lemon*, 403 U.S. at 612 (asserting that because the Establishment Clause's language "is at best opaque," it is the Court's task to determine the scope of the Clause).

34. *Id.* at 614.

analyzing Establishment Clause issues case-by-case, the Supreme Court has concluded that no single test or criterion can be applied to adequately analyze every Establishment Clause issue.[35] Instead, the Court has assessed issues in several ways, primarily employing three main tests: the *Lemon* test, the endorsement test, and the coercion test.[36]

1. The Lemon *test and its evolution*

One of the Establishment Clause tests courts employ is the three-part test first articulated in *Lemon v. Kurtzman*.[37] The case involved Pennsylvania and Rhode Island statutes that provided state aid to nonpublic schools, including church-affiliated elementary and secondary schools.[38] The Court acknowledged the history of the Religion Clauses of the First Amendment and enunciated that any Establishment Clause analysis must consider the cumulative criteria that have developed in the jurisprudence over the years.[39]

The Court concluded that the precedent garnered three primary questions, which in turn created three prongs that government action must meet in order to be constitutional: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[40] The Court emphasized that, when analyzing the third prong, courts "must examine the character and purposes of the institutions that are benefited [by the government action], the nature of the aid . . . provide[d], and the resulting relationship between the government and the religious authority" that results from the government action.[41] To pass the test, the government action at issue must satisfy all three prongs.[42]

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35. Lynch v. Donnelly, 465 U.S. 668, 678–79 (1984) ("In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.").

36. *See* Murray v. City of Austin, 947 F.2d 147, 154 (5th Cir. 1991) (identifying the different tools used in the Supreme Court's Establishment Clause jurisprudence and recognizing "that there is no one readily and easily applicable test").

37. 403 U.S. 602 (1971).

38. *Id.* at 606–07.

39. *Id.* at 612.

40. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)); *see also* Ashley M. Bell, Comment *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1281–90 (2001) (discussing the evolution of the three-prong standard).

41. *Lemon*, 403 U.S. at 615.

42. *See id.* at 612–13.

In applying the three-prong analysis to the Pennsylvania and Rhode Island statutes, the Court held that both state programs violated the Establishment Clause.[43] It was clear that the statutes had the secular purpose of enhancing the quality and standards of all schools;[44] however, problems arose with the question of entanglement.[45] The Court considered each statute separately and determined "that the cumulative impact of the entire relationship" resulting from both states' statutory programs of aid for nonpublic schools involved impermissible entanglement of church and state.[46] The Court reasoned that both statutes required continued state action and supervision, as well as annual appropriations, and therefore presented a risk of divisive political activity along religious lines.[47]

The Supreme Court and lower courts have applied the *Lemon* test to examine Establishment Clause questions for many years; however, the Court has since modified the original test.[48] The Court first transformed the *Lemon* test in 1997 in *Agostini v. Felton*[49] in order to consolidate previously disparate considerations.[50] Then, in 2000, the Supreme Court in *Mitchell v. Helms*[51] clarified the changes made in *Agostini* and fleshed out the test's second prong.[52] Both cases involved state programs that offered government aid to public and private schools, including private religious schools. *Agostini* addressed a New York City program implemented under Title I of the Elementary and Secondary Education Act of 1965 that made public school teachers available to provide remedial education to disadvantaged children in all public and private schools throughout

43. *See id.* at 613–14 (charging that the statutes involved excessive entanglement between government and religion because the statutes were not aimed at advancing religion at specific schools, but instead were administered "to enhance the quality of the secular education in all schools covered by compulsory attendance laws").
44. *Id.* at 613.
45. *See id.* at 614.
46. *Id.* at 614–22.
47. *Id.* at 622–23.
48. *See* Lin et al., *supra* note 10, at 200–04 (documenting the transformation of the *Lemon* test).
49. 521 U.S. 203 (1997).
50. *See id.* at 232–35 (modifying the *Lemon* test to analyze a New York City program that used federal funds to provide remedial education to disadvantaged children).
51. 530 U.S. 793 (2000).
52. *See id.* at 807–08 (plurality opinion) (illuminating the legal analysis the Court used in *Agostini* and applying it to an Establishment Clause claim against state and federal school aid programs that resulted in federal funding being given to religious schools in Louisiana); *see also* Lin et al., *supra* note 10, at 202–04 (explaining the *Mitchell* test and Justice O'Connor's view that the plurality focused too heavily on neutrality).

the city.[53] *Mitchell* focused on a Louisiana program implemented under Chapter 2 of the Education Consolidation and Improvement Act, which allowed federal funds to be used to provide educational materials and equipment to public and private schools.[54] In these cases, the *Lemon* test was reduced to the first two prongs; the third prong, "excessive entanglement," was combined with the second prong and became one of several factors[55] relevant to determining the "principal effect" of the government action.[56] The Court made this change after recognizing that many of the considerations evaluated under the entanglement prong were also contemplated when determining the principal effect of the government action.[57]

The amended *Lemon-Agostini-Mitchell* test analyzes many different factors. Similar to the original test, the first prong is whether there is a secular purpose.[58] While the Court retained the second prong from the original test—whether the primary effect of the action is advancing or hindering religion—it delineated three primary criteria to evaluate this question.[59]

The first criterion is whether the government action resulted in government indoctrination.[60] The result of this inquiry depends on whether any indoctrination that occurred could be reasonably credited to governmental action.[61] Courts often turn to the "principle of neutrality" to decide whether the government action resulted in any noticeable indoctrination.[62] Under this neutrality analysis, courts will sustain aid that was presented to a broad range of groups or persons without respect to their religion.[63] "If the religious, irreligious, and areligious are all alike eligible for governmental aid . . . [and] the government is offering assistance to recipients who provide . . . a broad range of indoctrination, the government itself is not thought responsible for any particular

53. *See Agostini*, 521 U.S. at 209–14.
54. *See Mitchell*, 530 U.S. at 801–02 (plurality opinion).
55. Other relevant factors courts employ to decipher the primary effect of the government action include whether it results in government indoctrination, whether aid recipients are defined by religion, and whether individuals have a genuine independent choice. *See id.* at 808–11.
56. *See Agostini*, 521 U.S. at 232–33 (determining that the entanglement inquiry of the *Lemon* test was instead a criterion to determine the primary effect of the government action).
57. *Mitchell*, 530 U.S. at 808 (plurality opinion).
58. *Agostini*, 521 U.S. at 233.
59. *Id.* at 233–34.
60. *Id.* at 234.
61. *Mitchell*, 530 U.S. at 809 (plurality opinion).
62. *Id.*
63. *Id.*

indoctrination."[64] In *Agostini* and *Mitchell*, the Court assessed whether any religious indoctrination that occurred in religious schools could be attributed to the government programs at issue.[65] The Court in both cases held that government aid directly assisting religious schools did not in itself generate government indoctrination.[66] Additionally, the particular aid programs did not result in indoctrination because the aid was offered on neutral terms to any schools that furthered a legitimate secular purpose.[67] The governments in both New York and Louisiana implemented new programs, improved existing platforms in the schools,[68] and allocated the aid based on neutral criteria.[69] Therefore, the Supreme Court concluded that neither program led to impermissible government indoctrination.[70]

The second relevant criterion to the primary effect analysis is whether the government action defines aid recipients with respect to religion.[71] Neutrality is also a factor under this criterion in determining the permissibility of the disbursed aid.[72] Specifically, the issue is whether the criteria for selecting or allocating the aid create a financial incentive for those seeking the aid or services to choose religion over a secular alternative.[73] If a court finds that aid was allocated based on neutral, secular factors that neither favored nor disfavored religion and that the aid was made available to multiple beneficiaries—both nonreligious and religious—on a

64. *Id.* at 809–10.
65. *Id.* at 809; *see Agostini*, 521 U.S. at 230–31.
66. *See Mitchell*, 530 U.S. at 809–11 (plurality opinion) (allowing governmental assistance for legitimate secular purposes); *Agostini*, 521 U.S. at 230 (determining that placing employees in parochial schools does not, as a matter of law, result in indoctrination).
67. *See Mitchell*, 530 U.S. at 809–10 (plurality opinion) (inspecting the Louisiana program); *Agostini*, 521 U.S. at 231, 234–35 (reviewing the New York City program).
68. *See Mitchell*, 530 U.S. at 831 (plurality opinion) (purporting that the Louisiana program in question channeled federal funds to public and private elementary and secondary schools to employ "secular, neutral, and nonideological programs"); *Agostini*, 521 U.S. at 234–35 (emphasizing that the program sent teachers to elementary and secondary schools to provide remedial education to disadvantaged children).
69. *See Mitchell*, 530 U.S. at 829 (plurality opinion) (elucidating that the amount of funds distributed to each participating school was determined by student enrollment); *Agostini*, 521 U.S. at 229 (clarifying that teachers are made available to all eligible children, regardless of where they choose to attend school).
70. *Mitchell*, 530 U.S. at 808 (plurality opinion); *Agostini*, 521 U.S. at 230.
71. *See Agostini*, 521 U.S. at 230–32, 234 (declaring that New York's Title I program does not advance religion, in part because it does not decide who receives aid through reference to religious beliefs).
72. *See id.* at 231.
73. *Id.*

nondiscriminatory basis, then no financial incentive was present.[74] Also relevant to this analysis is whether a genuinely independent choice is available to the individuals receiving services or benefiting from the aid.[75] If the individuals seeking services are offered a wide range of providers—both religious and secular—from which they can choose to receive services, then it is more likely that the aid was made available without regard to the recipients' religion.[76]

In *Agostini*, the Court noted that the New York City program made educational services available to all children who met the eligibility requirements—regardless of their religious beliefs.[77] Also essential in the Court's determination was that eligible children were able to pick where they wished to receive this education from a broad range of secular and religious options.[78] Eligible students received Title I services based on criteria which neither favored nor disfavored religion, regardless of individual religious beliefs.[79] With no financial incentive to modify religious beliefs, the Court held that the program did not distinguish aid recipients based on religion.[80]

Similarly, the Court in *Mitchell* considered government aid allocated to a religious institution a result of the private choice of the individuals who would benefit from or receive the aid.[81] The Court determined that any aid ultimately distributed to a private religious school through the Louisiana program was grounded solely on the independent and private choices of parents as to where their children would attend school.[82] Additionally, because the aid was generated based on the size of the school's enrollment—which was determined by the independent choice of parents—the program allocated aid on the basis of neutral, secular criteria, and made the aid available to religious and secular beneficiaries on a

74. *Id.*
75. *Mitchell*, 530 U.S. at 810 (plurality opinion) (emphasizing that the Court has, on multiple occasions, considered whether government aid to religious institutions was the result of an individual's genuinely independent and private choice).
76. *See Agostini*, 521 U.S. at 225–26 (noting that federal funding went to the religious schools only as a result of the genuinely independent choice of those students deciding between religious and secular schools); *see also* Lin et al., *supra* note 10, at 202–03 (discussing, in depth, the *Mitchell* plurality's interpretation of the *Agostini* modifications to the *Lemon* test, and explaining that if the distribution of aid is determined by the private choice of individuals, then that aid would be considered neutral).
77. *Agostini*, 521 U.S. at 232.
78. *Id.*
79. *Id.*
80. *Id.*
81. Mitchell v. Helms, 530 U.S. 793, 810 (2000) (plurality opinion).
82. *Id.* at 830.

nondiscriminatory basis.[83] Thus, there was no incentive for aid recipients to choose religious over nonreligious schools.[84]

Finally, the last criterion used to evaluate the primary effect of the government action is whether it creates excessive government entanglement.[85] While entanglement is important to consider, not all entanglements have the effect of advancing or inhibiting religion: in order to constitute an Establishment Clause violation, the government entanglement must be "excessive."[86] A court's entanglement analysis relies on multiple factors; however, one commonly cited example of excessive entanglement is when constant government monitoring and surveillance is needed to ensure that religion is not given preference.[87] In contrast to the Supreme Court's reasoning in *Lemon*, where it found excessive entanglement because the statute required constant government surveillance in order to guarantee that states were properly administering programs,[88] the Court in *Agostini* found that monthly visits by public supervisors to observe the Title I teachers were sufficient to ensure that only secular material was taught, yet did not reach the level of "excessive" entanglement.[89]

2. The endorsement test

While the *Lemon-Agostini-Mitchell* test is a popular Establishment Clause interpretive tool, it is not the only one used to determine whether government action has violated the Religion Clauses of the First Amendment. The Supreme Court has declined to utilize only a singular test when assessing whether an Establishment Clause violation has occurred, and in some instances, the *Lemon-Agostini-Mitchell* test cannot adequately answer the question at hand or fully address the issues.[90] In these situations, courts look to alternative

83. *Id.* at 829.
84. *Id.* at 830.
85. *Agostini*, 521 U.S. at 232–34.
86. *Id.* at 233 (clarifying that some entanglement, or interaction between church and state, is inevitable and tolerable).
87. *See id. Compare, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 616–17 (1988) (holding that some instances of minimal monitoring do not rise to the level of excessive entanglement, such as government review of educational materials and inspection of centers where programs are carried out), *with* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (identifying a state program as excessively entangled because it required constant state surveillance to ensure that subsidized teachers complied with the Establishment Clause when choosing their teaching texts and materials).
88. *Lemon*, 403 U.S. at 622–23.
89. *Agostini*, 521 U.S. at 234–35.
90. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (articulating the Supreme Court's inability to apply one test or look at only certain criteria when assessing an alleged Establishment Clause violation); Marsh v. Chambers, 463 U.S. 783, 786

methods of analysis. One recurring Establishment Clause question that the Supreme Court began to pay particularly close attention to, and that the *Lemon* test was not particularly useful for assessing, was whether government action had the purpose of endorsing religion.[91]

In her concurring opinion in *Lynch v. Donnelly*,[92] Justice O'Connor established what is now known as the "endorsement test."[93] The case involved a Christmas display that the City of Pawtucket, Rhode Island constructed at a park in the heart of the city's shopping district.[94] The park was owned by a nonprofit organization.[95] Within the Christmas display was a Santa Clause house, a "SEASONS GREETINGS" banner, a Christmas tree, and a nativity scene.[96] The plaintiffs sued the Mayor of Pawtucket, alleging that the nativity scene violated the Establishment Clause.[97] The majority of the Court briefly applied the *Lemon* test and concluded that the inclusion of the nativity scene satisfied all three prongs of the test, and therefore found that there was no Establishment Clause violation.[98]

The majority opinion's analysis in *Lynch* did not provide guidance for subsequent cases assessing the constitutionality of the government's display of objects with religious significance.[99] However, in evaluating the legality of the government display, Justice O'Connor's concurrence articulated a "sound analytical framework" for the use of religious objects that focused on the notion of endorsement rather than the *Lemon* test.[100] Justice O'Connor

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(1983) (declining to apply the *Lemon* test in analyzing whether state legislative prayer violates the Establishment Clause); Larson v. Valente, 456 U.S. 228, 230, 252 (1982) (concluding that the *Lemon* test was not relevant or necessary to assess the constitutionality of a statute requiring religious organizations that receive less than fifty percent of funding from members to register and report to the state).

91. *See* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) (submitting that endorsement was a new area of focus and that the majority opinion in *Lynch* was not useful in scrutinizing endorsement in situations in which the government displayed objects with religious implications).

92. 465 U.S. 668 (1984).

93. *See id.* at 688–89 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . . ."). The endorsement test is now seen to be the controlling standard for Establishment Clause cases. *See Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2005 n.50 (2010).

94. *Lynch*, 465 U.S. at 671.

95. *Id.*

96. *Id.* at 670–71.

97. *Id.* at 671.

98. *See id.* at 684–85 (approving the display's secular purpose, lack of religious advancement, and lack of excessive entanglement).

99. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) (pointing out that the majority opinion in *Lynch* was "none too clear" and not useful in delineating constitutional and unconstitutional endorsements).

100. *Id.* at 595.

explained that she wrote her concurrence "to suggest a clarification of our Establishment Clause doctrine" and particularly how the *Lemon* test related to the principles preserved in the Establishment Clause.[101] The endorsement test was necessary, according to Justice O'Connor, because focusing on endorsement elucidated the analysis of the *Lemon* test and made the Establishment Clause doctrine more clear-cut.[102]

The primary question in this endorsement analysis is whether the government action is perceived to endorse a particular religion.[103] As a result, courts must look at what viewers would fairly understand to be the purpose of the government action.[104] The test is whether a reasonable adherent of a particular religion would feel as though her or his religion was being privileged as an insider or as "favored members of the political community," or whether a reasonable nonadherent of the religion would feel as though she or he was an outsider and another religion was being imposed or endorsed by the government action.[105]

Part of the endorsement analysis is assessing whether the government has conveyed or attempted to convey a message that religion—or a particular religious belief—is favored or preferred.[106] The Court has consistently determined that government endorsement is unconstitutional when government action favors religious belief over disbelief or shows preference for particular religious beliefs.[107]

Justice O'Connor applied her test in *Lynch* and concluded that because the nativity scene is seen as a traditional symbol of Christmas, and not just of Christianity, and because it was combined with several purely secular symbols in the display, a reasonable person would not

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101. *Lynch*, 465 U.S. at 687–89.

102. *See id.* at 689 (illustrating how political divisiveness can evince government endorsement, but insisting that the inquiry should focus not on the divisiveness but on the character of the activity causing the divisiveness).

103. *Id.* at 690.

104. *Id.* at 692.

105. *Id.* at 688.

106. *Id.* at 690 (explaining that the test involves both objective and subjective measures of the government's intended and perceived message).

107. *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 601 (1989) (concluding that an indoor nativity display had the effect of endorsing a patently Christian message and therefore violated the Establishment Clause); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (finding that a Texas sales tax exemption for religious periodicals violated the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (holding that the primary purpose of a Louisiana act was to advance a particular religious belief, and therefore the act endorsed religion and violated the Establishment Clause).

perceive the display as an endorsement of Christian beliefs.[108] While four Justices in *Lynch* dissented with the outcome of the majority and concurring opinions, the dissent did mention that Justice O'Connor was correct that the controlling question in the case was whether the State had endorsed religion and that her opinion provided a helpful analytical tool for considering this issue.[109]

The endorsement test has been central in striking down multiple government actions for violating the Establishment Clause. For example, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,[110] the Supreme Court resisted the notion that the *Lynch* holding led to the inference that all nativity displays were constitutional and instead applied Justice O'Connor's endorsement analysis.[111] The case concerned two holiday displays in downtown Pittsburgh.[112] One was a Christian nativity scene placed on the grand staircase of the Allegheny County Courthouse and contained a banner proclaiming, in Latin, "Glory to God in the highest."[113] The second display was an eighteen-foot menorah placed outside the City-County Building next to the city's forty-five-foot Christmas tree and a sign that saluted liberty.[114] The *Allegheny* Court distinguished *Lynch*, noting that in *Lynch* there was no Establishment Clause violation because the nativity scene was a traditional symbol of Christmas displayed with other purely secular symbols, but the nativity scene in *Allegheny* stood alone.[115] The Court found that the government, in placing this display in the main part of the courthouse, was sending "an unmistakable message that it supports and promotes the Christian praise to God that is the [display's] religious message."[116] Additionally, including a sign naming the Roman Catholic organization that donated the nativity scene only made this endorsement seem more likely.[117] On the other hand, a plurality found that displaying the menorah was not an Establishment Clause violation because it was placed next to a Christmas tree, and a reasonable adherent of the Christian or Jewish faiths would not view

108. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (analogizing between the display and a museum exhibit by stating that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content").
109. *Id.* at 697 n.3 (Brennan, J., dissenting).
110. 492 U.S. 573 (1989).
111. *Id.* at 595 (plurality opinion).
112. *Id.* at 578.
113. *Id.* at 580 & n.5.
114. *Id.* at 582, 587.
115. *Id.* at 598 (majority opinion).
116. *Id.* at 600.
117. *Id.*

the display as an endorsement of either religion.[118] Instead, this display would likely be seen as a recognition of the winter-holiday season.[119] In her concurring opinion in *Allegheny*, Justice O'Connor emphasized that an essential principle of the Establishment Clause is that it, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[120]

Similarly, the Court invalidated a school policy that, among other things, permitted student-led and initiated prayer at school football games in *Santa Fe Independent School District v. Doe*.[121] The Court utilized the endorsement test—as well as the *Lemon* and the coercion tests—to determine that the policy violated the Establishment Clause.[122] In its endorsement analysis, the Court rejected the Santa Fe School District's claim that the school was not involved and that the students, not the schools, chose to have, and actually delivered, the prayer.[123] Instead, the Court found that the policy resulted in both perceived and actual endorsement of religion because the prayer was delivered on school grounds, at a school activity, and with school resources.[124] The pregame prayer was found to "bear the imprint of the State,"[125] and the Court asserted that based on the context in which the prayer was delivered, "an objective Santa Fe High School student [would] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[126] Based on the criteria set forth in the concurrence in *Lynch*,[127] the Court held that such a policy was an impermissible endorsement because it sent the message to those members of the audience who were adherents of a particular religion that they were insiders and favored members of the school community, while sending the

118. *Id.* at 617–20 (plurality opinion).
119. *Id.*
120. *Id.* at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).
121. 530 U.S. 290, 294, 317 (2000).
122. *See id.* at 305, 314, 316–17.
123. *Id.* at 305.
124. *Id.* at 307–08.
125. *Id.* at 305 (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992)) (internal quotation marks omitted).
126. *Id.* at 308.
127. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (articulating that an essential part of the endorsement analysis is whether a reasonable adherent would feel as though he was an insider or a favored member of the political community, or whether a reasonable nonadherent would feel as though he were an outsider or a disfavored member of the political community).

accompanying message to nonadherents that they were outsiders and were not full members of the school community.[128]

3. The coercion test

The final Establishment Clause test that the Supreme Court has used is known as the "coercion test." The coercion test was first crafted in *Lee v. Weisman*.[129] Daniel Weisman, on behalf of himself and his daughter Deborah, brought an Establishment Clause claim against the principal of Nathan Bishop Middle School in Providence, Rhode Island.[130] He alleged that the school's policy of allowing principals to invite members of the clergy to deliver prayers as part of graduation ceremonies violated his daughter's First Amendment rights.[131] In analyzing whether prayer during school graduation ceremonies was consistent with the Religion Clauses of the First Amendment, the Supreme Court declared that the *Lemon* test was not the appropriate analysis for the situation at hand.[132] Instead, the pervasive degree of government involvement with religious activity was sufficient in and of itself to determine the constitutionality of allowing a nonsectarian prayer at a school graduation.[133] The Court focused its reasoning on the concept of coercion, holding that the Establishment Clause precludes the government from coercing citizens into giving up their constitutionally guaranteed rights and benefits in order to resist conformance to government-sponsored religious practice.[134] The coercion test stems from the undisputed belief that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[135]

The legal test is whether the government action coerces a religious belief or practice by putting pressure on or forcing an individual who does not subscribe to a particular religion to follow or partake in the

128. *Santa Fe*, 530 U.S. at 309–10.
129. 505 U.S. 577, 595–96 (1992).
130. *Id.* at 581.
131. *Id.* at 580–81.
132. *See id.* at 586–87, 599 (circumventing the "invitation" to reconsider *Lemon* and instead finding that "[n]o holding of this Court suggests that a school can persuade or compel a student to participate in a religious exercise").
133. *Id.* at 587.
134. *Id.* at 587, 596. For example, in *Lee*, the Court found that the school was violating many students' right to freedom of religion by forcing them to acknowledge the religious prayer being voiced at the graduation ceremony, and therefore compelling them to forego their constitutional right. *See id.* at 596.
135. *Id.* at 587 (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

observation of that religion.[136] While coercion may be direct[137] or indirect,[138] direct coercion is not required to violate the Establishment Clause.[139] Unconstitutional coercion may instead take the form of "subtle coercive pressure" that obstructs a person's true choice about whether to participate in the religious activity at issue.[140] Courts have also found that certain government action can functionally coerce participation if individuals are forced to at least acknowledge the religious activity.[141]

The Supreme Court in *Lee* found that including clergy members who offer prayers as part of an official public school convocation ceremony was unconstitutional government coercion.[142] The Court reasoned that although the school did not mandate attendance at graduation or require students to stand during the prayer, there was significant coercive pressure to attend and to stand and respect the prayer at the ceremonies.[143] Students who did not desire to participate in the prayer were still required to be silent, and the Court found that this silence amounted to functional coercion because it could be perceived as functionally identical to partaking in the prayer.[144]

The U.S. Court of Appeals for the Seventh Circuit expanded the coercion analysis in *Kerr v. Farrey*.[145] There, an inmate brought a case against the state prison alleging that the prison's threat of penalties compelled him to attend religious-themed Narcotics Anonymous meetings with no alternative secular program.[146] In determining

136. *See id.* at 593–95 (holding that the school district's control of the graduation ceremony puts pressure on attendees to participate in prayer); Kerr v. Farrey, 95 F.3d 472, 477 (7th Cir. 1996) (discussing the types of cases in which courts have applied the coercion test).

137. *See, e.g.*, *Kerr*, 95 F.3d at 479–80 (insisting that an inmate was forced to participate in the religious-based meetings because he was significantly penalized for refusing to attend and was given no other option).

138. *See, e.g.*, *Lee*, 505 U.S. at 593 (maintaining that although the students were not forced to participate in the prayer, they were obliged to recognize that the prayer was being given and to be silent during it).

139. *See id.* at 592 (specifically mentioning the issue of indirect coercion rather than direct coercion).

140. Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 12 (1st Cir. 2010); *see Lee*, 505 U.S. at 588, 593 (finding that there was coercive pressure for students to attend the graduation ceremony and to stand and respect the prayer and contending that this pressure "can be as real as any overt compulsion").

141. *See, e.g.*, *Hanover*, 626 F.3d at 12–14 (contrasting a student's silence during group prayer in *Lee* as perceived participation in religious activity with the less overt silence of a student choosing not to participate in the Pledge of Allegiance).

142. *Lee*, 505 U.S. at 592, 597.

143. *Id.* at 593–98.

144. *Id.* at 593.

145. 95 F.3d 472 (7th Cir. 1996).

146. *Id.* at 473–74.

whether the government action requiring the inmate to attend the religious-based narcotics meeting was unconstitutional, the Seventh Circuit laid out three factors for examining a potentially coercive religious practice: (1) was there government action, (2) did the government action amount to coercion, and (3) was the object of the coercion in question religious or secular in nature?[147] Focusing on these three factors, the Seventh Circuit deduced that requiring the inmate to attend the religious-based narcotics meetings was coercion, that the coercion was religious in nature, and that the coercion resulted in the state favoring religion over nonreligion.[148] The court determined that the government action coerced the inmate to observe religion in violation of the Establishment Clause because the inmate had no option but to participate in the religious-sponsored practice.[149]

The coercion test rounds out the three main tests that courts use in order to analyze whether government action has violated the Establishment Clause of the First Amendment. Courts have utilized these three tests to assess a variety of government actions people believe are unconstitutional.[150]

B. President Bush's Faith-Based and Community Initiatives

In 2001, President George W. Bush, by executive order and without legislative authorization or support, created the White House Office of Faith-Based and Community Initiatives.[151] The FBCI is a federal program that ensures faith-based community groups and organizations are as equally eligible as secular groups to compete for federal funding to provide social services to the public.[152] President

147. *Id.* at 479.
148. *Id.* at 479–80.
149. *Id.* (dismissing as insufficient the State's claim that the Narcotics Anonymous program's religious aspects could include the nonreligious idea of will power).
150. *See* Lance E. Shurtleff, Case Note, *Confusing Game Plan: The Court Has To Use Every Play in the Book To Keep Prayer Out of High School Football*—Santa Fe Independent School District v. Jane Doe*, 120 S. Ct. 2266 (2000)*, 1 WYO. L. REV. 723, 730–34 (2001) (explaining the evolution and application of the *Lemon*, endorsement, and coercion tests). *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 599–600 (1989) (demonstrating how the placement of a crèche on the stairs of the county building functions as an endorsement of Christianity by county officials)
151. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001), *reprinted in* 3 U.S.C. § 21 app. at 13–14 (2012) (establishing the White House Office of Faith-Based and Community Initiatives and directing it to lead the Administration's effort to expand the role of faith-based and other private community organizations in delivering social services to the public and to strengthen their ability to meet the needs of communities); *see also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593–94 (2007) (plurality opinion) (clarifying how religious groups may compete for federal financial support without weakening their independence).
152. *Hein*, 551 U.S. at 593–94.

Bush also issued separate executive orders to establish FBCI Executive Department Centers in various federal agencies and departments.[153] All of these centers are funded through Executive Branch appropriations, meaning that Congress has not acted to fund these entities' activities.[154]

1. The rules and regulations

Under the FBCI, religious organizations have the same opportunity to apply for federal funding as secular organizations and community groups, so long as they seek to "achieve valid public purposes," and follow the "bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality."[155] To adhere to these requirements, religious organizations or institutions seeking to apply for grants or federal funding pursuant to the FBCI must adhere to specified rules and regulations.[156]

Religious organizations are not to use any direct federal financial assistance to support "inherently religious activities," including worship, religious instruction, or proselytization.[157] Federal funds may only be used for social services, and any organization wishing to engage in inherently religious activities in connection with delivering social services must segregate the religious activities from the social services and pay for them with private funds only.[158] While federal funds may not be used to fund religious activities, individuals receiving services from faith-based organizations may choose to participate in the organization's religious activities, but organizations are barred from requiring such participation.[159] Religious organizations should reassure program participants that the organizations can still receive aid even if a participant does not join

153. *Id.* at 594 & n.1 (citing Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 29, 2001), *reprinted in* 5 U.S.C. § 601 app. at 96; Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 12, 2002), *reprinted in* 5 U.S.C. § 601 app. at 99–100; Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (June 1, 2004), *reprinted in* 5 U.S.C. § 601 app. at 99–100; Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 7, 2006), *reprinted in* 5 U.S.C. § 601 app. at 101–02) (explaining that the President charged these centers with ensuring that faith-based community groups would maintain eligibility to compete for federal financial support without jeopardizing their independence or autonomy).

154. *Id.* at 595.

155. Exec. Order No. 13,199, 66 Fed. Reg. 8,499.

156. *See Partnering with the Federal Government: Some Do's and Don'ts for Faith-Based Organizations*, WHITE HOUSE ARCHIVES, http://georgewbush-whitehouse.archives.gov/government/fbci/guidance/partnering.html (last visited Nov. 20, 2013) [hereinafter *Do's and Don'ts for Faith-Based Organizations*] (outlining the rules faith-based organizations must follow in order to properly act under the FBCI).

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

158. *Id.*

159. *Id.*

in religious conduct and that participation, or lack thereof, will have no effect on the services received.[160] Finally, if an organization receives federal money, it cannot choose to provide services to some people while denying it to individuals who are otherwise eligible to receive the service.[161] Officials designating the subcontracts must offer a secular alternative when a beneficiary does not wish to be served by a faith-based provider.[162] An organization that takes federal funds and violates any of the specified requirements may be subject to legal action.[163]

2. The Court's refusal to analyze the FBCI

Although many scholars and lower courts have questioned the constitutionality of the FBCI,[164] the Supreme Court has yet to take a stance on the issue. In 2007, the Court had an opportunity to rule on whether the use of federal money to fund the FBCI violated the Establishment Clause in *Hein v. Freedom from Religion Foundation, Inc.*[165] The Freedom from Religion Foundation brought suit, alleging that the directors of the White House Office and various executive department centers violated the Establishment Clause by promoting religious organizations as more worthy of federal financing than secular organizations during conferences held as part of the FBCI program.[166] However, the Court refused to rule on the merits of the case.[167] Because the defendants were acting on behalf of the President, not Congress, the Court found that the plaintiffs were not challenging any congressional action and thus, that they lacked taxpayer standing to bring suit in federal court.[168]

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160. *Id.*
161. *Id.*
162. Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, 32 HARV. J.L. & PUB. POL'Y 931, 936 (2009).
163. *Do's and Don'ts for Faith-Based Organizations*, *supra* note 156 (providing that potential punishment includes loss of grant funds, repayment of the funds received, payment of any damages awarded by court action, and even criminal prosecution).
164. *See generally* Kyle Forsyth, *Neutrality and the Establishment Clause: The Constitutional Status of "Faith-Based and Community Initiatives" After* Agostini *and* Mitchell, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 593 (2003) (discussing the constitutionality of the FBCI in lieu of Supreme Court precedent); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005) (detailing what the FBCI are, and determining that the FBCI will push the limits of the Constitution).
165. 551 U.S. 587 (2007) (plurality opinion).
166. *Id.* at 592, 594–95.
167. *See id.* at 593 (ruling on the issue of standing).
168. *Id.* at 593, 605 (refusing to adopt a broad reading of an otherwise narrow exception to the general bar on taxpayer standing to accommodate the plaintiffs' claim). The plaintiffs attempted to establish standing by asserting that members of the organization were federal taxpayers and that the Executive Branch's use of taxpayer dollars to fund the conferences violated their rights under the

3. The FBCI in effect today

In February 2009, President Barack Obama formed the White House Office of Faith-Based and Neighborhood Partnerships in an effort to continue and expand upon President Bush's initiatives.[169] This expansion reflects the notion that religious organizations that have received aid provide many social services to the public across the country.[170] Some of these services include HIV/AIDS prevention and treatment programs, prisoner re-entry programs, drug treatment programs, food banks, and expanding affordable housing.[171]

Until the Supreme Court addresses the constitutionality of the FBCI and similar programs, the practice of allowing religious groups and organizations to subcontract for federal funds and provide social services to the public is likely to continue as an accepted practice as long as certain rules and procedures are followed.[172] This Comment does not address the constitutionality of the FBCI, but simply acknowledges the fact that the practice of allowing faith-based organizations to use federal aid to provide valid public services is currently allowed but is also potentially constitutionally problematic.

Establishment Clause. *Id.* at 592–93. In rejecting this argument, the Supreme Court noted that paying taxes has long been held insufficient to establish standing. *Id.* at 593. Furthermore, a narrow exception to this general rule did not apply because Congress did not specifically authorize funding for the conferences; rather, the conferences were paid for through general appropriations to the Executive Branch. *Id.*

169. *Obama Announces White House Office of Faith-Based and Neighborhood Partnerships*, WHITE HOUSE (Feb. 5, 2009), http://www.whitehouse.gov/the_press_office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships (announcing the creation of the new office and listing its key priorities, which include integrating community groups into the nation's economic recovery efforts, addressing issues affecting women and children, supporting fathers and encouraging responsible fatherhood, and working with the National Security Council to "foster interfaith dialogue" worldwide); *see also* Carlson-Thies, *supra* note 162, at 932 (explaining how Barack Obama, as a presidential candidate, announced that he would "expand and improve" on President Bush's FBCI program as President—a promise he later kept by establishing the new office).

170. *See* Carlson-Thies, *supra* note 162, at 935, 937–38 (describing some of the key roles faith-based organizations play in providing social services and noting that the nation's congregations make up "a major part of our social safety net").

171. *Id.* at 937–38; *see also* John J. Dilulio Jr., *Amen (Again) to Faith-Based Initiatives*, WASH. POST, (Jan. 28, 2013, 4:18 PM), http://www.washingtonpost.com/blogs/guest-voices/post/amen-again-to-faith-based-initiatives/2013/01/28/acfb709a-66b6-11e2-85f5-a8a9228e55e7_blog.html (illustrating the importance of faith-based groups in providing necessary services across the country).

172. *See supra* Part I.B.2 (referring to the Supreme Court's refusal to rule on whether federal funding of the FBCI violates the Establishment Clause); *see also supra* Part I.B.1 (describing the establishment of the FBCI and the regulations governing faith-based organizations that accept federal funding).

C. Taking the FBCI a Step Further: ACLU of Massachusetts v. Sebelius

1. The underlying statute: The Trafficking Victims Protection Act

In response to the major issue of human trafficking in the United States and worldwide, Congress passed the Trafficking Victims Protection Act of 2000[173] (TVPA or "the Act").[174] The three major goals of the TVPA were to prevent human trafficking, protect and provide support for trafficking victims as they rebuilt their lives, and prosecute traffickers with more severe penalties.[175] Part of the protection aspect of the TVPA provides a wide range of benefits and services—including cash, medical assistance, and social aid—to trafficking victims under federal and state funded programs.[176] These benefits and services are available to U.S. citizens to the same extent as refugees.[177] Although not explicitly mentioned in the TVPA, refugees receive medical care in the form of contraceptive material and abortion services in certain situations[178] through the Refugee Act of 1980.[179] Trafficking victims often require similar services.[180]

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173. Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–112 (2012); *see also Trafficking Victims Protection Act of 2000 Fact Sheet*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, http://archive.acf.hhs.gov/trafficking/about/TVPA_2000.pdf (last visited Nov. 20, 2013) [hereinafter *TVPA Fact Sheet*] (outlining the history, purpose, and details of the TVPA).

174. *See* 22 U.S.C. § 7101(b) (documenting Congressional findings regarding the existence of slavery and human trafficking throughout the world); *TVPA Fact Sheet*, *supra* note 173 (naming trafficking as the "fastest growing source" of money for organized crime groups and enterprises across the world).

175. *TVPA Fact Sheet*, *supra* note 173.

176. *Id.*

177. *Id.*

178. *See* ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 477 n.5 (D. Mass. 2012) (citing to both the ACLU's and the USCCB's statement of facts, which explained that "Medicaid and Refugee Medical Assistance pay for contraception and abortions in the case of rape, incest, and when the woman's life is in danger"), *vacated as moot sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

179. 8 U.S.C. §§ 1521–1524. The Refugee Act of 1980 created the Office of Refugee Resettlement to help refugees become economically self-sufficient as fast as possible after arriving in the United States. *Id.* §§ 1521(a), 1522(a)(1)(A). The Refugee Act placed the HHS in charge of allocating the appropriated funds to organizations that would provide medical, employment, and social services to refugees pursuant to the Act. *Id.* §§ 1521(a), 1522(c).

180. *See* Carol Rose, *First Circuit Court Should Defend Victims of Human Trafficking*, AM. CIV. LIBERTIES UNION (Dec. 6, 2012, 4:30 PM), http://www.aclu.org/blog/religion-belief-human-rights/first-circuit-court-should-defend-victims-human-trafficking (explaining how many trafficked women and children have been subjected to regular incidents of forced sexual activity and may need a variety of medical services, including abortion and contraceptive services and HIV and STD testing).

2. The formation of the contract between the HHS and the USCCB

Within the TVPA, Congress included a provision that put the HHS in charge of using federal funds appropriated by Congress to implement the victim services required under the Act.[181] The HHS was responsible for issuing grants and contracts to organizations and institutions to provide medical services to victims of trafficking.[182] For five years, the HHS subcontracted with organizations that provided the requisite services to the trafficked persons through competitively selected grants.[183] However, inefficiency and a lack of effectiveness compelled the HHS to reexamine its approach.[184] In 2005, the HHS published a request for proposals to find a general contractor to take over the HHS's job of administering federal funds to the different organizations pursuant to the TVPA.[185]

The USCCB was one of two applicants that responded to the HHS's request for proposals.[186] During the application process, the USCCB informed the HHS that if it were to win the contract it would not allow any potential subcontractors to use federal funds for any victim services that conflicted with the USCCB's religious beliefs.[187] Specifically, the USCCB stated that no subcontractors would be permitted to provide or refer abortion services or contraceptive materials with the funds that the USCCB allocated under the TVPA.[188] Despite this condition, in 2006, after what the HHS claimed was a neutral selection process,[189] the Agency awarded the USCCB the master contract for managing the federal funds under the TVPA.[190] The HHS-USCCB master contract lasted for five years until its

181. *Sebelius*, 821 F. Supp. 2d at 476 (citing 22 U.S.C. § 7105(b)(1)(B)).
182. *See* 22 U.S.C. § 7105(b)(1)(B) (directing the HHS to "expand benefits and services to victims of severe forms of trafficking in persons in the United States"). Congress appropriated $5 million for such uses in Fiscal Year 2001 and as much as $10 million for each subsequent year. *Sebelius*, 821 F. Supp. 2d at 476.
183. *See U.S. Conference of Catholic Bishops*, 705 F.3d at 49; Rose, *supra* note 180.
184. *U.S. Conference of Catholic Bishops*, 705 F.3d at 49.
185. *Sebelius*, 821 F. Supp. 2d at 476.
186. *Id.*
187. *Id.* at 476–77 (noting that, due to the Catholic nature of the organization, the USCCB would "need to ensure that [its] victim services are not used to refer or fund activities that would be contrary to [its] moral convictions and religious beliefs" and would have to provide a disclaimer to potential subcontractors notifying them of this requirement).
188. *Id.* at 477.
189. *Id.* at 487–88 (asserting that while the selection process may have been neutral at the outset, the HHS's decision to allow the USCCB to bar funds from being used for abortions and contraceptives "was neither customary nor neutral").
190. *Id.* at 477.

expiration in 2011, and during that period the government awarding the USCCB $15.9 million.[191]

3. The lawsuit

The ACLU of Massachusetts brought suit against HHS officials on January 12, 2009, alleging that the HHS contract with the USCCB, which allowed the organization "to impose a religiously based restriction on the use of taxpayer funds" violated the Establishment Clause of the First Amendment.[192] On March 23, 2012, the Massachusetts District Court granted summary judgment in favor of the ACLU.[193] The court applied both the endorsement and *Lemon* tests and found that delegating authority to a religious institution, which imposed restrictions on the use of taxpayer money based on religion, endorsed religion and failed the *Lemon* test.[194] According to the court, the then-expired HHS-USCCB contract violated the First Amendment because it "impliedly endorsed the religious beliefs of the USCCB."[195]

The defendant-intervenor, USCCB, appealed the decision, and on January 15, 2013, the First Circuit in *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*[196] dismissed the case as moot because the contract between the HHS and the USCCB had expired.[197] The court vacated the district court's decision and remanded the case with instructions to dismiss.[198]

II. A MASTER CONTRACT BETWEEN THE GOVERNMENT AND A RELIGIOUS INSTITUTION FAILS ALL ESTABLISHMENT CLAUSE TESTS AND VIOLATES THE FIRST AMENDMENT

The First Circuit's "decision leaves unanswered the legal question of religious accommodation in the delivery of services under a federal

191. *See id.* at 478 & n.7 (stating that the original contract term lasted one year with options for four yearly renewals, all of which the HHS exercised).
192. *Id.* at 478.
193. *Id.* at 474, 488.
194. *See id.* at 483–88 (rejecting the USCCB's argument that the government's recognition of its restrictions was simply an accommodation of religious belief and holding that the restrictions were instead an endorsement because they "provide[d] a significant symbolic benefit to religion" and were not "truly voluntary" (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982))).
195. *Id.* at 488.
196. 705 F.3d 44 (1st Cir. 2013).
197. *Id.* at 51, 58.
198. *Id.* at 48; *see also* Dennis Sadowski, *Federal Court Panel Dismisses ACLU Challenge of USCCB Trafficking Grant*, NAT'L CATH. REP. (Jan. 17, 2013), http://ncronline.org/news/politics/federal-court-panel-dismisses-aclu-challenge-usccb-trafficking-grant (explaining the decision's impact on the USCCB and the individuals it serves).

contract."[199] Once again, a court failed to address the constitutionality of allowing religious institutions to receive taxpayer funds to provide social services.[200] Although the contract between the HHS and the USCCB has expired, there is no law in place to prohibit similar contracts from being created in the future. In fact, the USCCB stated that it would continue to seek opportunities to collaborate with the government to provide these services.[201] The director of media relations for the USCCB, Mary Ann Walsh, considered the First Circuit's decision to vacate the district court's decision a limited victory for faith-based organizations, and admitted that a ruling on the merits would have negatively affected future contracts between the government and faith-based organizations seeking to "exercis[e] their conscience rights."[202]

Master contracts such as the HHS-USCCB contract will occur again, and the real question, beyond standing and mootness, is whether the mere formation of such contracts violates the First Amendment of the U.S. Constitution. The ACLU, in basing its constitutionality argument only on the fact that there was a religiously motivated prohibition on services missed an opportunity to have a court look at the larger issue of government agencies delegating their duties to religious institutions.[203] As a result of the limited argument, the Massachusetts District Court granted summary judgment on narrow grounds, and declared the HHS-USCCB contract unconstitutional solely on the restriction the USCCB put in place.[204] Rather than focusing on the specifics of the master contract, the ACLU should have focused more broadly. Arguing that allowing a government agency to contract with a religious institution in order to allow that institution to implement provisions of a legislative act is unconstitutional would have brought attention to this larger issue. Had the ACLU argued that the government violated the First

199. Sadowski, *supra* note 198. Henry Dinger, the attorney who represented the USCCB, admitted that the decision "doesn't resolve anything on the merits (of the ACLU's claim)." *Id.*

200. *See supra* Part I.B.2 (discussing the Supreme Court's decision not to determine whether the FBCI violates the Establishment Clause).

201. ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 481 (D. Mass. 2012), *vacated as moot sub nom.*, *U.S. Conference of Catholic Bishops*, 705 F.3d 44.

202. Sadowski, *supra* note 198.

203. *See* Complaint, *supra* note 15, ¶¶ 3–5 (arguing only that allowing the USCCB to dictate which services trafficking victims receive with federal funds violates the Establishment Clause).

204. *Sebelius*, 821 F. Supp. 2d at 488 (holding that the HHS violated the Establishment Clause by granting authority to a faith-based organization, specifically the USCCB, to enforce a religiously motivated restriction on the expenditure of taxpayer dollars).

Amendment when it formed a contract with the USCCB to put the power of the HHS into the hands of the Catholic organization, the case might have turned out very differently. If the court had looked at contracts generally, instead of the details of this one contract, the legal analysis might have resulted in an opinion that would have prevented future master contracts between the government and religious organizations. Regardless of whether the religious institution in charge of the master contract invokes religious restrictions, the mere existence of a master contract between a government agency and a religious institution is, in itself, an Establishment Clause violation.

The following section explains how a master contract is different from a subcontract that may be permitted under the FBCI. It also suggests and illustrates a framework that courts should use when examining master contracts using the three Establishment Clause tests. Finally, it applies this framework to analyze the expired HHS-USCCB contract as a whole rather than just analyzing the religious restriction.

A. Master Contracts Are Not Comparable to the Subcontracts Permitted Under the FBCI Because They Delegate More Power and Are Not Restricted by Rules and Regulations

President Bush created the FBCI to provide faith-based organizations with the same opportunities as secular organizations when applying for federal grants to provide social services.[205] Even if the general public is prepared to accept the FBCI as constitutional—or at least as a necessary means of providing important social services—the master contracts create relationships that are completely different from the subcontracted religious organizations acting under the FBCI. Additionally, the master contracts break many of the rules set forth by the FBCI.

To minimize the link between church and state and thus circumvent the constitutionality issue, the FBCI included many rules and regulations that control the subcontracts awarded to faith-based organizations.[206] Alternatively, the general master contract between the HHS and the USCCB was wholly different from these

205. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593–94 (2007) (plurality opinion).

206. *See supra* Part I.B.1; *see also* Carlson-Thies, *supra* note 162, at 936 (stating that grant officials may not be biased in favor of or against faith-based applicants, that applicants may not provide services on a religiously selective basis, and that "inherently religious activities" must remain distinct from services funded by federal monetary aid).

subcontracts, not only due to the amount of authority delegated to the religious organization, but also due to the fact that the master contract broke the rules and regulations that determine what is permitted under the FBCI.

Rather than applying to be one of multiple service providers, the USCCB was awarded the master contract to be the body that selects service providers.[207] Because the contract delegated this federal agency function to the USCCB, the process directly conflicted with the requirement that the federal agencies distributing subcontracts must ensure that beneficiaries have an option to interact with nonreligious service providers.[208] The individuals seeking services and the organizations applying for federal funding have no alternative, such as working directly with a federal agency, to working with the religious institution in charge of the master contract.[209] Under the FBCI, the role of faith-based organizations is limited to providing social services, and beneficiaries cannot be selected based on religious preferences or beliefs.[210] In contrast, the role of the USCCB in the master contract was not limited to providing social services; instead its role was vastly expanded to oversee all organizations that provided such services.[211] Even more worrisome, the government has yet to implement any restrictions to prevent religious institutions with such power from selecting subcontract beneficiaries based on religion.[212] Additionally, in order for a faith-based organization to act properly under the FBCI, it must ensure that it separates religious activities from government-funded services offered and that it does not use taxpayer money to fund any religious

207. *See Sebelius*, 821 F. Supp. 2d at 476–77.

208. Carlson-Thies, *supra* note 162, at 936 (clarifying that, under the Charitable Choice provisions initially implemented by President Bill Clinton in 1996, faith-based organization officials must guarantee that beneficiaries have an option to interact with nonreligious service providers if they so choose).

209. *See generally Sebelius*, 821 F. Supp. 2d at 476–77 (explaining how the HHS, the original entity with the authority to make grants to nonprofit organizations, handed off this responsibility to one private, faith-based organization: the USCCB).

210. *See Do's and Don'ts for Faith-Based Organizations*, *supra* note 156 (outlining the rules faith-based organizations must follow in order to properly act under the FBCI).

211. *See Sebelius*, 821 F. Supp. 2d at 477 (explaining that, pursuant to being awarded the master contract, the USCCB subcontracted with service providers).

212. *See* ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 48 (1st. Cir. 2013) (avoiding ruling on whether selecting subcontractors based on religious belief is permitted by finding that the contract at issue was moot). In fact, under the HHS-USCCB contract, subcontractors were specifically selected only if they would agree not to provide services or refer patients for services that were against the beliefs of the Catholic religion. *Sebelius*, 821 F. Supp. 2d at 477–78.

activities.[213] With subcontracts, the government requires financial status reports, strict record-keeping, and audits to guarantee that the religious organization is separating its religion and religious activities from any services funded by the government.[214] However, no such safeguards are found regarding master contracts. Furthermore, there was nothing to certify that the USCCB or a similarly situated religious institution would separate its religion from its use of government funds.[215]

The master contracts grant more power and authority than the subcontracts,[216] allow for discretion with government funds rather than strictly designating a particular use for the funds,[217] do not have safeguards in place to prevent religious beliefs from influencing the organization's policies,[218] and fail to offer the secular alternative that is required under the FBCI.[219] As such, the master contracts are entirely separate from any FBCI subcontracts granted to faith-based organizations.

B. Master Contracts Fail All Three Establishment Clause Tests

These master contracts are so different from the subcontracts permitted under the FBCI that a rigorous Establishment Clause

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213. *See supra* Part I.B.1 (delineating the requirements for acting correctly under the FBCI); *see also Do's and Don'ts for Faith-Based Organizations*, *supra* note 156 (same).

214. *See* WHITE HOUSE OFFICE OF FAITH-BASED & CMTY. INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT 6–7, *available at* http://www.ojp.usdoj.gov/fbnp/pdfs/GuidanceDocument.pdf (last visited Nov. 20, 2013) (listing the legal obligations that accompany a federal grant).

215. *See Sebelius*, 821 F. Supp. 2d at 482, 485 (providing no mention of precautions taken to ensure that the USCCB separated its religion from its duties and describing how, in fact, the USCCB explicitly did not separate the two by invoking the religion-based restriction).

216. *See supra* notes 210–211 and accompanying text (highlighting that while subcontractors simply provide social services to eligible beneficiaries, the master contractor oversees all of the subcontractors providing these services); *see also supra* note 207 and accompanying text (stating that the organization awarded the master contract is granted the expanded responsibility of selecting subcontractors).

217. *See supra* notes 214–215 and accompanying text (asserting that no measures exist to ensure that the USCCB or another master contractor would be required to use federal funding solely for nonreligious activities).

218. *See supra* note 212 and accompanying text (noting that the government allows faith-based organizations awarded the master contract to impose religiously motivated restrictions on subcontractors' use of federal funds); *supra* notes 214–215 and accompanying text (describing how the safeguards put in place to ensure that faith-based subcontractors do not use government funds for religious activities do not apply to master contractors).

219. *See supra* notes 207–209 and accompanying text (concluding that, because a faith-based organization was awarded the master contract and given the sole authority to award subcontracts, organizations have no alternative but to use the federal funding they receive in a manner that adheres to religiously motivated rules).

analysis is required to determine whether they are constitutional. As discussed in Part I, there are several Establishment Clause tests; any master contract formed between the government and a faith-based institution is likely unconstitutional regardless of the test applied.

1. Applying the Lemon-Agostini-Mitchell *test*

The district court's opinion in *Sebelius* discussed the *Lemon-Agostini-Mitchell* test but only in reference to the government's delegation of authority to the USCCB to impose restrictions on the types of services available under the TVPA.[220] When the government action at issue is the making of the master contract, however, additional lines of inquiry are relevant to a court's analysis.

In addressing the first question of the *Lemon-Agostini-Mitchell* test—whether the government action has a secular purpose[221]—a master contract awarded to a religious organization likely satisfies this prong. Similar to the government actions in *Lemon*, *Agostini*, and *Mitchell*, in which the government alleged that the actions had the secular purpose of providing educational services to students,[222] the HHS-USCCB contract had the secular and primary purpose of providing money to give services to trafficking victims pursuant to the TVPA.[223] Because these contracts all involved using money to implement provisions of legislative acts, they almost certainly contained a secular purpose to pass the first prong of the test.[224]

The master contract becomes problematic when analyzed under the second prong—whether the primary effect of the government action either advances or hinders religion—and the three criteria

220. *See Sebelius*, 821 F. Supp. 2d at 486–87.

221. *See* Agostini v. Felton, 521 U.S. 203, 233 (1997) (stating that the first prong did not change from the original *Lemon* test); *see also supra* note 58 and accompanying text.

222. *See* Mitchell v. Helms, 530 U.S. 793, 829–30 (2000) (plurality opinion) (acknowledging that "[t]he program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof"); *Agostini*, 521 U.S. at 234–35 (holding that a program providing supplemental remedial education, granted to recipients on a neutral basis, does not run afoul of the Establishment Clause where the instruction is distributed by public employees on the campus of sectarian schools); Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (invalidating programs in Rhode Island and Pennsylvania providing direct aid to parochial schools for supposedly nonreligious educational purposes).

223. *See Sebelius*, 821 F. Supp. 2d at 476 (explaining that the HHS sought to find a general contractor to administer the funds to organizations working with trafficking victims).

224. It would be difficult for these contracts to fail this prong, as the government is not required to promulgate programs based solely upon a secular purpose, and even an action partly motivated by a religious purpose may still satisfy this prong. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (acknowledging that a law may be invalidated only if it seeks to advance religion without any secular purpose).

that are used in this inquiry.[225] A key aspect of whether the contract results in government indoctrination[226] is whether the formation of the contract gives rise to the distribution of federal aid based on religious beliefs or whether it is offered to a variety of groups without regard to religion.[227] Clearly the HHS-USCCB contract resulted in allocation of federal aid to subcontractors based on whether the services offered were against certain religious beliefs.[228] However, this result may not have been as evident without USCCB's articulated restriction. While it may be possible for a religious organization to select subcontractors in a neutral manner, some may find it challenging to ignore core beliefs and ideals[229]—or to ignore the beliefs of potential subcontractors—when deciding whether to award aid.[230]

The question of neutrality also arises when looking at whether an aid recipient—the subcontractors in this case—is defined with respect to religion,[231] and specifically whether there exists a financial incentive for aid recipients to choose religion over a secular alternative.[232] Put another way, the inquiry must be whether the HHS-USCCB contract gave federal fund recipients any incentive to

225. *See Lemon*, 403 U.S. at 612–13 (creating the famous three-pronged *Lemon* test which, in part, provides that a law's "principal or primary effect must be one that neither advances nor inhibits religion"); *see also supra* text accompanying notes 60, 71, 85 (defining the three criteria of the second prong as (1) whether the government action resulted in government indoctrination, (2) whether the government action defines aid recipients with respect to religion, and (3) whether it creates excessive government entanglement).

226. *See Agostini*, 521 U.S. at 233 (asserting that all three criteria must be examined in scope and that "the last two considerations are insufficient by themselves" to determine whether the government action results in government indoctrination).

227. *Mitchell*, 530 U.S. at 827–28 (plurality opinion) (asserting that, if a program offers to aid both religious and nonreligious recipients, it is unclear what type of constitutional violation a program would engender without more specified analysis into the secular or religious purposes of the governing law).

228. *Sebelius*, 821 F. Supp. 2d at 476–77 (discussing the USCCB's position that it cannot be associated with entities that perform abortions or offer contraceptives to clients).

229. *See generally* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982) (recognizing that a faith-based organization may abuse its power to benefit religion but that, even assuming that a faith-based group may act in good faith in exercising power governed to it by statute, "the mere appearance of a joint exercise of legislative authority by Church and State" may instill in some people the notion that the faith-based group may use its power to benefit religion and those that practice it).

230. *See generally USCCB Mission*, U.S. CONF. OF CATH. BISHOPS, http://www.usccb.org/about/usccb-mission.cfm (last visited Nov. 20, 2013) (explaining that "[t]he Gospel of Christ and the teachings of his Church guide the work of the USCCB").

231. *See Agostini*, 521 U.S. at 233 (providing this as the second criterion to take into account in establishing the primary effect of the action).

232. *See id.* at 231 (including these incentives for choosing religion as an aspect of the second criterion).

modify their religious beliefs in order to be selected as a subcontractor.[233] Unlike in *Agostini* and *Mitchell*, where the Supreme Court found that no financial incentive existed because aid was awarded to eligible students regardless of their religious beliefs,[234] the USCCB selected which organizations were to receive aid based on whether the organizations would tailor their spending to comply with the USCCB's religious beliefs.[235] The USCCB allocation was not comparable to a program that provides aid to all disadvantaged students or schools that meet the requirements; with the master contract at issue, organizations that were otherwise eligible may have been denied a subcontract at the USCCB's discretion. The USCCB's restrictions on abortion and contraceptive services made accepting the group's religious practices a prerequisite to receiving funds.[236] Even without the restrictions in place, organizations that knew they were applying to the USCCB may have felt as though there was a better chance of being awarded a subcontract from the Catholic organization if they adopted or accepted such religious beliefs.[237]

Additionally, the inquiry into whether aid recipients are determined with respect to religion should include an assessment of whether individuals seeking service providers have a choice between a

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233. *See id.* at 232 (holding that the New York City Title I program at issue did not give aid recipients any incentive to change their religious practices or beliefs in order to obtain such aid).

234. *See* Mitchell v. Helms, 530 U.S. 793, 829–30 (2000) (plurality opinion) (acknowledging aid distribution according to enrollment size without any consideration of religious affiliation); *Agostini*, 521 U.S. at 232 (finding that all children who met the Act's eligibility requirements were awarded services, no matter what religious beliefs they possessed).

235. *See* ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 476–78 (D. Mass. 2012) (providing the backstory on how HHS awarded the general contract to the USCCB and further explaining that the USCCB provided over 100 grants to different institutions, many of which were not Catholic institutions, for the purposes of assisting victims of trafficking), *vacated as moot sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

236. *See id.* at 477 (describing how the USCCB entered into subcontracts with over 100 organizations providing services and that the subcontractors were required to agree to adhere to the abortion/contraception restriction).

237. *See supra* note 229 and accompanying text (discussing the Court's assertion in *Larkin v. Grendel's Den, Inc.* that the appearance of a "joint exercise" of power by church and state may lead some to conclude that the faith-based group will use its power to advance religious views). To satisfy restrictions against incentivizing religious practices, aid must be allocated based on criteria that do not factor religion, and must make funds available to both religious and secular beneficiaries on a completely nondiscriminatory basis. *See Agostini*, 521 U.S. at 231 (distinguishing acceptable criteria in governmental aid distribution schemes); *e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002) (holding that no financial incentives existed because a program offering educational scholarships to parents were awarded with no reference to religion and no benefit to using the scholarship for a religious school over a secular school).

wide range of religious organizations and secular organizations.[238] A master contract with a religious organization removes alternatives for organizations seeking to subcontract and for individuals seeking services. Neither party has any alternative but to interact with the religious institution charged with distributing the federal funds.[239] This lack of alternatives contradicts the Supreme Court's conclusion in *Mitchell* that government aid to religious institutions is permitted only when it is the result of the beneficiary's genuine, independent choice to receive the aid from a secular or religious provider.[240] Independent choice, after a master contract is awarded to a religious organization, hinges entirely upon whether the religious organization provides funds neutrally to religious and nonreligious institutions.[241] If genuinely independent choices are not available for organizations and individuals, the master contract fails the second criterion of the indoctrination question, and in turn fails the *Lemon-Agostini-Mitchell* test.[242]

The contract between HHS and USCCB also fails to meet the third criterion of the second prong in the *Lemon-Agostini-Mitchell* test—whether the formation of the master contract results in excessive entanglements between the government and religion.[243] Specifically, the contract between the HHS and the USCCB resulted in a direct

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238. *See Agostini*, 521 at 225–26 (emphasizing that federal aid was given to the religious schools solely as a result of the genuinely independent choice of those students deciding between religious and secular schools); *see also Mitchell*, 530 U.S. at 809 (plurality opinion) (articulating that the Supreme Court has, on multiple occasions, considered whether government aid to religious institutions was the result of an individual's genuinely independent and private choice); Lin et al., *supra* note 10, at 202–03 (discussing the *Mitchell* Court's interpretation of the *Agostini* modifications to the *Lemon* test, and explaining that if aid is distributed to religious schools based on the private choice of individuals, then that aid is neutral).

239. *See U.S. Conference of Catholic Bishops*, 705 F.3d at 49 (stating that the HHS sought a general contractor responsible for selecting grant recipients to offer services to trafficking victims).

240. *See Mitchell*, 530 U.S. at 810 (plurality opinion) (asserting that any government aid provided to religious schools pursuant to the genuine independent choice of parents is permissible).

241. *See id.* at 810–11 (explaining the relationship between the principles of neutrality and private choice and that the possibility of genuinely independent choice is a way of assuring neutrality).

242. *See id.* at 810 (finding that "if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot . . . grant special favors that might lead to a religious establishment"); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986) (holding that the program in question satisfied this prong because "[a]ny aid provided . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").

243. *Agostini*, 521 U.S. at 234 (providing the third criterion, that laws creating an excessive entanglement between government and religion are violative of the Constitution).

entanglement by placing discretionary governmental power to control federal funds into the hands of a Catholic organization.[244] The master contract fails this prong of the test due to excessive entanglement for the same reasons as the state programs in *Lemon*.[245] The Court's opinion in *Lemon* recognized the perpetual government supervision required to safeguard citizens from constitutional violations of excessive entanglement between state governments and religion.[246] Similarly, to ensure that religious beliefs were not taken into account when the USCCB awarded subcontracts, the government would have needed to constantly monitor the selection process. Unlike in *Agostini* where the monitoring efforts were considered minimal,[247] the requisite efforts to oversee the distribution of subcontracts would result in a level of entanglement that the Supreme Court has previously deemed "excessive."[248] Requiring continuing government surveillance to guarantee that the USCCB—or another religious institution—did not favor religious organizations for subcontracts, or did not impose religious restrictions, results in unconstitutional entanglement.[249]

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244. *See* ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 487 (D. Mass. 2010) (asserting that the HHS gave USCCB discretionary authority), *vacated as moot sub nom.*, *U.S. Conference of Catholic Bishops*, 705 F.3d 44; *see also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982) (concluding in the Court's entanglement evaluation that discretionary governmental powers were not meant to be delegated to—or shared with—religious institutions).

245. Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) (acknowledging that a Rhode Island program required extensive state auditing to ensure funds went to primarily secular activities and that the measure was "fraught with the sort of entanglement that the Constitution forbids"); *see also id.* at 620–21 (holding that a Pennsylvania program also at issue required "the very [same] restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role giv[ing] rise to entanglements between church and state").

246. See *id.* at 614, 622–23 (concluding that the programs excessively entangle the government in religion, and recounting the intentions of the Framers to prevent future political divisiveness caused by such excessive entanglement).

247. *See Agostini*, 521 U.S. at 234–35 (holding that program supervisors' unannounced monthly audits to ensure that government-sponsored remedial supplemental education provided by state employees embedded at parochial schools was "[]sufficient to prevent or detect inculcation of religion by public employees").

248. *See id.* at 233 (mentioning that whether pervasive monitoring by the public authorities is required as one of the grounds excessive entanglement rests on); Bowen v. Kendrick, 487 U.S. 589, 616–17 (1988) (holding that while government monitoring may result in excessive entanglement in certain situations, the disputed and minimal review of grant applications, coupled with government employee site visits, did not amount to excessive entanglement).

249. *See, e.g.*, *Lemon*, 403 U.S. at 616 (discussing how the Rhode Island program at issue involved excessive entanglement between the state and religion because the state must provide surveillance to ensure that the statutory restrictions were being obeyed in implementing the program); *see also Bowen*, 487 U.S. at 615 (mentioning the "Catch-22" issue that "the very supervision of the aid to assure that it does not further religion renders the [government action] invalid" because it leads to excessive entanglement, and finding that although some supervision of the

The HHS-USCCB contract had a secular component and would thus prevail on an inquiry under the first prong of the *Lemon-Agostini-Mitchell* test.[250] However, there is potential for government indoctrination from the likely appearance of financial incentives to modify religious practices, an absence of any choice for subcontractors to interact with a different religious or secular institution, a potential lack of a genuine private choice, and excessive entanglement from constant monitoring. For these reasons, the HHS-USCCB master contract had the primary effect of advancing religion and would fail the second prong of the test.[251] Failing the prong, and therefore the test, leads to the conclusion that the creation of the master contract was a violation of the Establishment Clause, and was accordingly unconstitutional under the First Amendment.

2. Applying the endorsement test

As discussed in Part I, the endorsement test looks at what the public would fairly understand to be the purpose of the government action.[252] This inquiry includes an assessment of how a reasonable adherent or nonadherent to the religion involved would look at the government action.[253]

The Massachusetts District Court looked briefly at the endorsement test in its analysis of the HHS-USCCB contract and determined that the government impliedly endorsed the religious beliefs of the USCCB in allowing the "religious organization to impose religiously based restrictions on the expenditure of taxpayer funds."[254] The district court applied the endorsement test narrowly, looking solely at the restriction on reproductive services, to determine that

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government action was required, it was less intensive monitoring and therefore did not amount to the level necessary to find the entanglement excessive).

250. The reasoning behind the creation of the master contract was to select a general contractor for administering funds under the TVPA. ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 476 (D. Mass. 2012), *vacated as moot sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

251. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982) (holding that a statute providing churches with the authority to unilaterally block liquor license applications enmeshed religion in the exercise of substantial governmental powers—resulting in excessive entanglement that violates the Establishment Clause); *Sebelius*, 821 F. Supp. 2d at 476–78 (summarizing the HHS's decision to award the contract to USCCB despite the group's requirement that subcontractors not provide abortion or contraceptive services to clients).

252. *See supra* Part I.A.2 and accompanying text.

253. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (noting that excessive entanglement may have an effect of creating political divisions between religious followers and nonadherents).

254. *Sebelius*, 821 F. Supp. 2d at 488.

permitting the USCCB to enact such a restriction would cause an objective observer to believe that the government was endorsing Catholic beliefs.[255]

In fact, if the endorsement test were applied to the master contract generally, rather than just to the restriction, the government action of forming the master contract would similarly fail the test. By placing the discretionary powers of a federal agency into the hands of the USCCB, the federal government—via the HHS—gave its authority to the Catholic Church.[256] Similar to the Supreme Court's determination regarding the nativity scene in *County of Allegheny*, the government, in forming this contract, sent an "unmistakable message that it supports and promotes" the Catholic religion and that it endorses the religious message of the USCCB.[257] Unlike in *Lynch*, where the government action of putting up the nativity scene was not found to endorse religion because it was combined with several purely secular symbols, the government action in forming the master contract vested high authority in one religious institution while failing to grant any secular organization with comparable authority.[258]

The HHS-USCCB contract created a problem similar to that found in the policy allowing student prayer at school football games in *Santa Fe*.[259] The contract is analogous to the school district policy in that the public would perceive the religious message of the USCCB, like the prayer in *Santa Fe*, to bear the seal of approval of the government, regardless of the government's efforts to distance itself from the religious nature of the USCCB.[260] The appearance that the government sponsored the religious beliefs of the USCCB sent a secondary message, similar to that in *Santa Fe*.[261] The message was that Catholics were insiders and favored members of the

255. *See id.* at 485 (rejecting arguments that the government made an accommodation to the USCCB when it awarded the general contractor bid to the religious conference and instead narrowly focused on the religious motivations behind the USCCB's restrictions).

256. *See generally id.* at 476 (quoting the USCCB as stating that it is a "*Catholic organization*" (emphasis added)); *USCCB Mission*, *supra* note 230 (maintaining that the USCCB is a Catholic organization guided by the word of Christ).

257. *See* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 600 (1989) (declaring that the nativity display on its own can be construed as the government's endorsement of Christian beliefs).

258. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasizing the combination of secular and religious symbols in the display as the reasoning for concluding that the display was not an endorsement of religion).

259. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

260. *See id.* at 308 (conveying the notion that members of the audience at the football games will view any religious prayer as being approved by the school even though the students chose to deliver a prayer and made all requisite efforts to do so).

261. *Id.* at 309.

political community, especially for selection as subcontractors, while non-Catholics were outsiders and disfavored members of the political community.[262]

The master contract sent the message that the government promoted the Catholic beliefs of the USCCB, and in turn failed the primary question of the endorsement test: whether a reasonable adherent would identify the government action as supporting his religion. Therefore, the contract between the HHS and the USCCB fails the endorsement test and violates the Establishment Clause of the First Amendment.

3. Applying the coercion analysis

The final Establishment Clause analysis to consider is whether the formation and existence of the master contract between the HHS and the USCCB resulted in unconstitutional, coercive pressure. If such coercion existed and interfered with a person's or organization's choice about whether to participate in a religious activity or religious belief, or required that person or organization to give up rights in order to avoid participation, then the government action was unconstitutionally coercive.[263]

To determine whether the HHS-USCCB master contract coerced religious beliefs or practices it is relevant to look at the three crucial points that the Seventh Circuit articulated in *Kerr v. Farrey*.[264] First, the HHS clearly engaged in government action[265] by seeking out general contractors, and, through a selection process, entering into a contract with the USCCB.[266] The next question is whether the action of forming the contract resulted in coercion.[267] In *Kerr*, the Seventh Circuit grappled with an inmate's need for narcotics rehabilitation through group counseling and the religious affiliations of the only

262. *See id.* (asserting that school sponsorship of a religious message sends the ancillary message to members of the audience who are adherents that they are insiders, and the accompanying message to nonadherents that they are outsiders).

263. *See* Lee v. Weisman, 505 U.S. 577, 593–96 (1992) (applying the coercion test to conclude that a student may exercise the option to abstain from participation in a graduation ceremony containing a religious invocation and group prayer, and that such abstention is predicated upon a desire to avoid the schools impermissible and indirectly coercive effect of exacting religious conformity amongst students).

264. Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996).

265. *See generally id.* (describing the three main points in the coercion analysis).

266. *See* ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474, 476–78 (D. Mass. 2012) (describing the process of forming the contract), *vacated as moot sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

267. *Kerr*, 95 F.3d at 479 (listing the three crucial points in the coercion analysis, the second of which prescribes an inquiry into whether the actions of the government amount to coercion).

program available to provide such counseling.[268] Regarding the HHS-USCCB master contract, organizations risked forgoing federal aid to assist in providing social services to trafficked victims if they did not apply for subcontracts to obtain money under the TVPA, and their only path for doing so was through a religious institution.[269] Therefore, the pressure to do a certain activity—apply for a subcontract—and the consequences of not doing the activity—foregoing federal funding—as well as the fact that the only means to do such an activity was to go through a religious institution, resulted in coercion.[270] Finally, the remaining question is whether the coercion was religious in nature.[271] The clearly religious nature of the twelve-step Narcotics Anonymous program, which was "based on the monotheistic idea of a single God or Supreme Being," was sufficient for the court in *Kerr* to find that the coercion was religious.[272] Similarly, the religious nature of the USCCB, as a Catholic organization whose mission is to do work guided by "[t]he Gospel of Christ and the teachings of his Church,"[273] is enough to lead to the same conclusion—the coercion was religious.

Rather than being directly coercive, the master contract may have entailed "subtle coercive pressure,"[274] or may even have been functionally coercive.[275] The existence of the HHS-USCCB contract required every potential subcontractor, as well as every trafficked victim seeking services promised by the TVPA, to interact with a Catholic institution. The Court in *Lee* utilized a three-part syllogistic analysis to conclude that silence during convocation prayers functionally coerced students into religious expression.[276] That silence was the equivalent of participating in the prayer, and the Court concluded that the students were being functionally coerced

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268. *See id.* (restating the inmate's allegations that prison authorities were coercing him into religious activities because the prison only offered him a religiously based Narcotics Anonymous program).

269. *See Sebelius*, 821 F. Supp. 2d at 477–78 (reviewing the USCCB's power to select subcontractors).

270. *Cf. Kerr*, 95 F.3d at 479–80 (holding that the pressure put on the inmate to attend narcotics rehabilitation at risk of serious consequences, and the lack of a secular option for him to adhere to such pressure, gave rise to coercion).

271. *Id.* at 479.

272. *Id.* at 480.

273. *USCCB Mission*, *supra* note 230.

274. *See* Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 12 (1st Cir. 2010) (quoting Lee v. Weisman, 505 U.S. 577, 592 (1992)) (making the distinction between direct coercion, and subtle coercive pressure that interferes with the "real choice" whether to participate in the activity at issue).

275. *Cf. Lee*, 505 U.S. at 593 (explaining how student silence during religious prayer functionally coerced participation in religious activity—where such silence is, as adopted by worshippers, a form of religious expression).

276. *Id.*

into partaking in the prayer.[277] Operating under this analysis, organizations and individuals were coerced into interacting with the USCCB: the USCCB is a Catholic organization, and organizations or individuals looking to provide or receive services pursuant to the TVPA were functionally coerced into interacting with or supporting the Catholic Church.[278]

Similar to the government action of including organized prayer within graduation ceremonies and the government action of requiring an inmate to attend a religiously based narcotics program, the master contract between the HHS and the USCCB fails the coercion test and therefore is a violation of the Establishment Clause of the First Amendment.

CONCLUSION

The Establishment Clause of the First Amendment was intended to protect religious liberty by creating a separation between the government and religion. The Supreme Court has specifically stated that putting discretionary governmental powers in the hands of religious bodies is a substantial breach of the separation between church and state.

The issue of master contracts between government agencies and religious institutions, such as the one between the HHS and the USCCB, is one that the country will face again. The USCCB has admitted its interest in forming similar contracts in the future, and additionally, the Massachusetts District Court emphasized that there can be no assurance that the type of contract challenged in *ACLU of Massachusetts v. Sebelius* will not be repeated. Courts must address the Establishment Clause issue created by such contracts and they must articulate the constitutional problem with entering into them.

The role of religious organizations, with regard to federal tax-dollars, must be limited to that of subcontractors who provide social services pursuant to the rules and regulations of the FBCI. Granting any authority to a religious institution beyond that of a subcontractor has the primary effect of advancing religion, endorsing religion, and coercing religion. The master contracts,

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277. *See Hanover*, 626 F.3d at 13 (restating the three-step analysis in *Lee*, 505 U.S. 593, and noting the Supreme Court's holding that "silence was, in the eyes of the community, functionally identical to participation" in religious worship).

278. *Cf. id.* (pointing out that the Supreme Court in *Lee* used the two premises—that students were being coerced into silence during the reciting of the prayer and that silence was equivalent to participating in the prayer—to come to the conclusion that students were therefore being functionally coerced into participating in the prayer).

such as the one created between the HHS and the USCCB, violate all three primary Establishment Clause tests used by the Supreme Court and cannot be allowed.