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Perks for Prisoners who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units

Richard R.W. Fields


The opening of these two prisons continues a trend started in 1997 when InnerChange Freedom Initiative ("InnerChange"), an evangelical Christian organization, opened a privately run faith-based unit in a Texas prison. Government officials, desperate for a solution to years of high recidivism rates, subsequently gave InnerChange control over prison units in four states. This delegation of control raises constitutional questions under the Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion."
Courts use several tests to evaluate Establishment Clause challenges, and each test may assist a court in determining if a particular faith-based prison program is constitutional. This Comment argues that courts should, at a minimum, evaluate Establishment Clause challenges to faith-based prisons and prison units using a coercion test. While violation of a coercion test is not necessary to find that a program contravenes the Establishment Clause, it is sufficient. The coercion analysis should focus on the pressures the program puts on prisoners to engage in religious exercise, including benefits that attend participation in the program, to determine if the program impermissibly persuades prisoners to participate in religion.

To provide a frame of reference, Part I describes the Inner-Change program and also explains why prisoners want to reside in InnerChange prison units. Part II provides background on the various tests courts use to evaluate Establishment Clause claims. Subsection A analyzes prisoners' ability to challenge prison actions and policies as unconstitutional, and argues that the deferential standard established in *Turner v Safley* for evaluating prisoners' constitutional claims should not apply to Establishment Clause challenges to faith-based prison programs. Subsections B through D explain the Supreme Court's major Establishment Clause tests: *Agostini-Lemon*, endorsement, and coercion. Subsection E explains how these tests were modified by the Supreme Court's decision in *Zelman v Simmons-Harris*. Part III evaluates the constitutionality of faith-based prisons and prison units by applying the *Zelman*-modified coercion test, arguing that this test gets to the heart of the appropriate boundary between church and state in the context of faith-based prisons and prison units.

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8 See Part II.

9 Readers should be aware that all faith-based prisons and prison units are not the same; indeed, even InnerChange units in different states have slightly different policies, rules and methods. Additionally, state rules pertaining to corrections facilities sometimes require InnerChange to modify its program. See Email from Norm Cox, Vice President for Ministry Delivery, InnerChange Freedom Initiative (May 10, 2005) (on file with U Chi Legal F).


I. BACKGROUND ON INNERCHANGE FREEDOM INITIATIVE PRISON UNITS

A. Brief History of InnerChange Freedom Initiative

In 1997, with the support of then-Governor George W. Bush, InnerChange Freedom Initiative ("InnerChange"), a project of Prison Fellowship Ministries, opened a faith-based prison unit at Jester II, a minimum-security prison in Richmond, Texas. InnerChange is a "Christ-centered, Bible-based prison program supporting prison inmates through their spiritual and moral transformation beginning while incarcerated and continuing after release." InnerChange established a voluntary program where prisoners live in a separate, faith-based unit that immerses them in faith-based teaching, work and basic educational study for sixteen hours a day, seven days a week, for up to eighteen months. Participation in InnerChange does not end with the prisoner's release: participants receive a Christian mentor and church support for a minimum of six months following their release. There are 995 active participants in the InnerChange program and approximately 600 volunteers.

To be eligible to participate in the program, applicants must meet a variety of eligibility criteria. For example, in the Texas InnerChange unit, prisoners must have 18 to 24 months remaining on their sentences and must have no "disqualifying incidents" on their disciplinary record. In Texas, prisoners with certain convictions, including sex-offenses and capital murder, are not permitted to participate. The InnerChange program is decidedly Christian. Inmates must sign an agreement stating that they understand the pro-

12 Id.
14 Id.
15 See Email from Norm Cox (cited in note 9).
16 Id.
17 Daniel Brook, When God Goes to Prison, Legal Affairs 22, 25 (May/June 2003). See also Email from Norm Cox (cited in note 9).
18 Brook, When God Goes to Prison, Legal Affairs at 25 (cited in note 17). Norm Cox explains that states have different rules on what offenses will disqualify an inmate from participating in the InnerChange program: in Texas, the prison in which the InnerChange wing sits is a low-security prison, and thus prisoners with certain crimes are ineligible to reside in the prison itself. Id.
19 See InnerChange, About - IFI Program (cited in note 13) (noting that InnerChange is "[a]nchored in biblical teaching that stresses personal responsibility, the value of edu-
gram is based upon Christian values and principles. Inner-Change states that it does not discriminate on the basis of inmates' religious beliefs, but it does select participants on their sincere commitment to participate in a rigorous, Christian program. According to Norm Cox, Vice President for Ministry Delivery for InnerChange, inmates are not evaluated on their beliefs, but are evaluated on how their actions comply with "fruits of the Spirit": love, joy, peace, kindness, goodness, faithfulness, gentleness and self-control.

Once an inmate has been accepted into the program, he is immersed in biblically-based teaching. Inmates take classes on the basics of Christian faith, the impact of crime on victims and their families, self esteem, and other subjects. The program's volunteers are free to preach and teach as they see fit. In addition to religious teaching, InnerChange participants are able to take classes that assist them in finding a career when they are released, including GED classes and computer technician training classes, in conditions more favorable than non-InnerChange units.

B. Benefits of Residence in InnerChange Prison Units

Although some prisoners seek placement in InnerChange prison units for religious reasons, many do not. There are four major benefits that can be associated with residing in an Inner-Change prison unit: greater ability for inmates to practice religion, enhanced safety, augmented probability of parole, and other miscellaneous improvements to inmates' quality of life.

cation and work, care of persons and property and the reality of a new life in Christ") (emphasis added).

20 Email from Norm Cox (cited in note 9).

21 Id.

22 Id. But see First Amended Complaint, Americans United for Separation of Church and State v Prison Fellowship Ministries, No 4:03-cv-90074 (S D Iowa filed July 2004), ¶ 47, available at <http://www.au.org/site/DocServer/InnerChangeBrief.pdf?docID=163> (last visited July 27, 2005). In current litigation, Americans United for the Separation of Church and State allege that prisoners are evaluated for religious beliefs, including whether or not they demonstrate a belief in Jesus Christ, pray "in the spirit," and put God first in their lives. Id.

23 As of publication, InnerChange only operates in male correctional facilities. See InnerChange, About IFI-Program (cited in note 13).

24 Brook, When God Goes to Prison, Legal Affairs at 25 (cited in note 17).

25 Id at 25–26. For example, one volunteer stated, "For those of you who are Muslim, Jesus is God . . . I'm sorry if I've offended you, but Jesus is God." Id.

26 Id at 27.

27 Id at 28 ("Many of the inmates I spoke with did seem to have joined InnerChange more out of dissatisfaction with the Texas prison system than out of faith.").
One obvious benefit to InnerChange participants is the ease with which they are able to practice their religion. Christian participants in InnerChange prison units are better able to practice and explore their faith than they would be in traditional prison units. Officials and volunteers in some InnerChange units are required to sign a "statement of faith," a statement that sets forth the organization's core Christian beliefs. Additionally inmates have access to these officials; other individuals' expertise in Christian teachings and belief; and Bibles, classes, speeches, concerts and church services unavailable to the general population. For Christians, participation in the InnerChange program provides access to religious instruction unparalleled in the prison system.

Non-Christian inmates sometimes enter InnerChange prison units out of a "general interest in religion" or a hope that they might be able to practice their religion in a more open environment than they would be able to in a traditional prison unit. Muslim inmates in an InnerChange prison in Texas are allowed to pray together five times a day while there could be different rules for general population prisoners. Although conditions in the InnerChange unit may not be perfect, these units are an improvement over the prisons from which these inmates transfer, prisons where prisoners' constitutional free exercise rights can

28 Email from Norm Cox (cited in note 9).
30 See Ben Paynter, Jesus is in the Big House: Putting Its Faith in a Prison Ministry, the Kansas Department of Corrections Saves Money If Not Souls, Pitch Weekly (Feb 12, 2004) (detailing the case of one inmate who recognized his decision to join the InnerChange program as easy given that he had "found God" earlier in life).
31 Brook, When God Goes to Prison, Legal Affairs at 27 (cited in note 17). Brook notes:

The Muslim inmates I spoke with in the Vance Unit told me that they applied to InnerChange out of a general interest in religion but have no intention of converting. Though there is clearly peer pressure to "find Jesus"—inmates demonstrate their progress by briefing classmates and staff on their "walk with Christ"—prisoners of all faiths are allowed to practice their religion in the unit. The twelve Muslim inmates now at the Vance Unit pray five times a day on their own and hold prayer meetings every Friday.

32 Id.
33 See O'Lone v Estate of Shabazz, 482 US 342 (1987) (upholding a New Jersey prison policy preventing Muslim inmates from attending Friday afternoon religious services on the ground that the policy was reasonably related to a legitimate penological interest).
be—and are—abridged if administrators have a legitimate penological interest.\textsuperscript{34}

Prisoners in InnerChange units also have greater access to certain material, non-religious benefits than do their counterparts in the general prison population. For example, prisoners in InnerChange units have better access to education than those in the general population.\textsuperscript{35} In addition to religious instruction, inmates are given the opportunity to get their GED, computer technician certificates, and other types of job training.\textsuperscript{36} Prisoners are also given access to substance-abuse classes, self-improvement programs, and parenting courses.\textsuperscript{37} InnerChange inmates eat better food, sometimes from outside vendors, and receive pizza-party orientation ceremonies.\textsuperscript{38} These inmates have access to musical instruments, computers, email, art supplies, and large screen televisions.\textsuperscript{39} In short, life is much better in the religious InnerChange wing of a prison than it is elsewhere in a particular facility.\textsuperscript{40}

\textsuperscript{34} Id (applying the \textit{Turner} test to uphold a prison policy restricting prisoners' free exercise rights).
\textsuperscript{35} See Shapiro, 28 Mother Jones at 58 (cited in note 29) (noting that in a time of "budgetary woes" for American prisons, InnerChange provides its inmates with free computer training, while members of the prison's general population must pay $150 for similar computer classes).
\textsuperscript{36} Brook, \textit{When God Goes to Prison}, Legal Affairs at 27 (cited in note 17).
\textsuperscript{37} \textit{Ark. Board OKs Faith-Based Virginia Program}, AP Alert - Va (Mar 1, 2005).
\textsuperscript{38} Paynter, \textit{Jesus is in the Big House} (cited in note 30) ("Unlike in regular housing units, the men of InnerChange have a Christmas banquet to which they can invite their families. After each new class orientation, directors throw a party for everyone, catered by Pizza Hut.").
\textsuperscript{39} Id. See also Brook, \textit{When God Goes to Prison}, Legal Affairs at 25–27 (citing the material benefits associated with InnerChange prison facilities); Paynter, \textit{Jesus is in the Big House}, Pitch Weekly (same).
\textsuperscript{40} In current litigation, Americans United for Separation of Church and State alleges that there are even more significant perks. The allegations include the following: First, that prisoners in InnerChange prison units are allowed more control over interpersonal contact, the ability to make free telephone calls to family members, attend religious services with family members, and see visitors more frequently and afforded a higher degree of privacy than prisoners in conventional prison units are. First Amended Complaint, \textit{Americans United for Separation of Church and State v Prison Fellowship Ministries} at ¶ 51 (cited in note 22). Second, prisoners in InnerChange's Iowa prison unit have access to private bathroom stalls, complete with partitions and locking doors, while prisoners in the other wings of the same prison can only use toilet stalls located in the middle of their cells. Id at ¶ 49. The Iowa InnerChange prison unit features air-conditioning and carpeting, luxuries found nowhere else in that prison. Id. Third, overcrowding is not a problem in the InnerChange wing: prisoners there are more likely to be housed two to a cell than those in other wings. Id at ¶ 50b. Finally, prisoners in the InnerChange wing are given keys to their cells, and are free to leave their cells at night while other prisoners are locked up. Id at ¶ 49.
The benefits of residence in an InnerChange unit are not limited to material benefits like food and recreation. These units might offer prisoners a safer environment than a secular prison facility. Prisoners and guards believe that InnerChange prison units are likely to be safer than the secular alternatives.\textsuperscript{41} In the InnerChange wing of a Texas prison, inmates note a huge difference between the different prison wings: the InnerChange wing lacks the strained race relations and gang-style prison turf-wars common to the rest of the prison.\textsuperscript{42} In Texas prisons, there are over 600 serious inmate-on-inmate assaults a year, but in the InnerChange wing of a Texas prison, there are fewer assaults.\textsuperscript{43}

There are many possible explanations for such enhanced safety: the religious instruction could be more effective at making prisoners less violent;\textsuperscript{44} the InnerChange units could be safer because there are physical barriers that prevent entry of those most likely to commit acts of violence while behind bars;\textsuperscript{45} the units could be safer because prisoners with disciplinary records are not permitted to participate;\textsuperscript{46} or it might be that it is hard for prisoners to cause trouble in the InnerChange units because of their low guard-to-inmate ratios.\textsuperscript{47} Perhaps due to a combination of all of these factors, InnerChange prison units appear safer than their secular counterparts.

Participation in the InnerChange program could also materially alter a prisoner's chances of being paroled. For some parole boards, participation in an InnerChange program sends a clear signal that the inmate deserves parole. As one InnerChange

\textsuperscript{41} Ron Word, Christ Behind Bars; Nation's First Faith-Based Prisons Hoping to Reduce Recidivism, Telegraph Herald D1 (May 22, 2004) ("Inmates and corrections officers alike agree that the atmosphere at [Florida's faith-based prison] is safer for both sides."). See Paynter, Jesus in the Big House, Pitch Weekly (cited in note 20) (noting that a Kansas InnerChange prison wing is safer than where the general population is housed given that there is a higher prisoner-to-guard ration in the former and that "[i]n Texas, some inmates have told reporters that they have used the program merely to get away from the violence and racial tension in the general population"). See also Email from Norm Cox (cited in note 9) (When asked to explain the difference in safety between InnerChange prison units and regular prisons, Norm Cox called the InnerChange units "peaceful and safe.").

\textsuperscript{42} Brook, When God Goes to Prison, Legal Affairs at 28 (cited in note 17) (noting that unlike most Texas prison units, in an InnerChange unit it is "more common to find prisoners crying than fighting—not because of any physical or emotional distress, but because they have been moved by the religious programs").

\textsuperscript{43} Id.


\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Paynter, Jesus is in the Big House, Pitch Weekly (cited in note 30).
prison official stated, "We have a very positive relationship with the board. Sometimes they just give our inmates a green light." But even in situations where parole is not automatic, participation in the program has clear benefits. For example, in Kansas, InnerChange prescreens its candidates with the parole board to learn what each inmate needs to do in order to be released. The prescreening is successful: as of February 2005, no Kansas InnerChange inmate had been denied parole.

The increase in the likelihood of being granted parole may be due to several factors. Parole might be given more frequently because those in faith-based prisons are more likely to have been model prisoners behind bars: prisoners cannot get into many InnerChange units if they have had any disciplinary infractions or if they have committed certain heinous crimes. Parole might be granted because InnerChange programs allow inmates to complete treatment and educational programs more quickly than their counterparts in the general population. Parole might also be granted in a disparate manner because InnerChange prison programs are more effective at rehabilitating prisoners than other programs available to prisoners.

Although there are difficult factual questions as to the actual benefits attendant to participation in an InnerChange prison unit or any other religious prison unit, there is the pos-

48 Shapiro, 28 Mother Jones at 56 (cited in note 29).
49 Paynter, Jesus Is in the Big House, Pitch Weekly (cited in note 30).
50 Brook, When God Goes to Prison, Legal Affairs at 25 (cited in note 17).
52 This claim is hotly disputed. A study released by the University of Pennsylvania's Center for Research on Religion and Urban Civil Society ("CRRUCS") found that "graduates" of the Texas InnerChange program were 50% less likely to be rearrested and 60% less likely to be reincarcerated than the matched comparison group. Byron R. Johnson and David B. Larson, The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program 5 (CRRUCS 2003). For the purposes of the study, a "graduate" is an inmate who completed the in-prison portion of the InnerChange program and continues to fulfill certain InnerChange requirements, including meeting with a mentor, holding a steady job and becoming active in a local church. Id. Rearrest and reincarceration rates are much less promising for those who do not graduate: those who participate in the InnerChange program without graduating had slightly worse recidivism rates than the state average. Id. For a criticism of this study, see Mark A. R. Kleiman, Faith-Based Fudging: How a Bush-promoted Christian prison program fakes success by massaging data, Slate, Aug 5, 2003, available at <http://slate.msn.com/id/2086617/> (last visited July 29, 2005) (arguing that the CRRUCS study fails to minimize selection bias, rendering its conclusions highly suspect).
53 Notably, the litigation of Americans United for Separation of Church and State v Prison Fellowship Ministries, No 4:03-cv-90074 (S D Iowa July 2004), may provide an-
sibility that the differences between residence in a secular or sectarian facility will rise to the level of an Establishment Clause violation. This Comment now summarizes the tests used to evaluate such cases.

II. TESTS USED TO EVALUATE ESTABLISHMENT CLAUSE CLAIMS

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion." The Supreme Court has established many different tests for evaluating whether the state has effected an unconstitutional establishment of religion, and there are three tests that have garnered majority support in evaluating Establishment Clause claims: the Agostini-Lemon test, the endorsement test, and the coercion test. All three tests are used by courts today.

Before a court can evaluate faith-based prison units using these Establishment Clause tests, it must first determine if the same standards apply to prisoners' Establishment Clause challenges. Some argue that a more deferential test, the modified rational-basis test delineated in *Turner v Safley*, should be used to evaluate prisoners' Establishment Clause claims. But while prisoners do not enjoy the same level of constitutional protections as the unincarcerated, *Turner* should not be used to evaluate Establishment Clause challenges to faith-based prisons and prison units. Subsection A explains why *Turner* should not be used to evaluate challenges to faith-based prisons and prison units, Subsections B through D briefly summarize the tests used to evaluate Establishment Clause cases, and Subsection E explains how the Supreme Court's decision in *Zelman v Simmons-Harris* modified the three dominant modes of Establishment Clause analysis.

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answers to some of these questions in the near future.

54 US Const Amend I.

55 "State" refers to either the federal government or any of the several states. The Supreme Court has used the Fourteenth Amendment to incorporate the Establishment Clause against the states. *Everson v Board of Education*, 330 US 1, 15–16 (1947). This incorporation is not without criticism: see, for example, Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv L Rev 1700 (1992).

56 *Newdow v United States Congress*, 292 F3d 597, 605 (9th Cir 2002).


58 See Branham, 37 U Mich J L Ref 291 (cited in note 44) (evaluating the constitutionality of faith-based prison units under *Turner*).
A. *Turner v Safley*

Prisoners do not enjoy the same constitutional rights as the unincarcerated. In *Turner*, the Supreme Court established a four-part modified rational basis test for evaluating claims that prison policies or practices violate prisoners' Constitutional rights. It is unclear whether or not the test enunciated in *Turner* applies to prisoners' Establishment Clause claims. But arguments in favor of using *Turner* to analyze prisoners' Establishment Clause challenges rely exclusively on the holding in that case and ignore the rationale behind it. In short, *Turner* should not apply to Establishment Clause challenges.

In *Turner*, prisoners in the Missouri Division of Corrections challenged two prison regulations: the first restricted correspondence between inmates and the second restricted an inmate's right to marry. A five-member majority held that the restriction on inmate correspondence was a constitutional limitation on the First Amendment and all nine justices agreed that the marriage restriction violated prisoners' Fourteenth Amendment rights. The Court upheld the policy that allowed inmate-to-inmate correspondence when the inmates were related to one another or when the correspondence was related to legal matters. Other correspondence was allowed only when it was in the "best interests of the parties involved," a rule that, in practice, forbade non-relative inmates from corresponding with each other. The Court's holding was buttressed by four prior cases that upheld prison policies restricting prisoners' individual rights where the accommodation of those rights threatened prison safety. Noting that inmate-to-inmate correspondence is often used in ways that threaten safety, namely to organize gangs and other criminal

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60 Id at 89.
63 Id.
64 Id at 82.
65 Id.
enterprises, the Court stressed the need to defer to prison administrators on issues of safety and other "intractable problems of prison administration."67

Synthesizing the holdings in prior prisoners'-rights cases, the Court established a four-part test to determine if prison regulations that restrict prisoners' constitutional rights are unconstitutional. First, a threshold requirement for constitutionality is that the policy must have a valid, rational connection to the legitimate government interest put forward to justify it.68 If this requirement is satisfied, then courts must balance three remaining factors: other ways for inmates to exercise the right in question; alternative means of achieving the legitimate penological objectives furthered by the restrictive prison policy; and how accommodating the inmates' rights will affect correctional officers, other inmates, and institutional resources.69

In a later case, the Court noted that it "made quite clear that the standard of review we adopted in Turner applies to all circumstances in which the needs of prison administration implicate Constitutional rights."70 The Turner test has been used to uphold prison regulations that restrict prisoners' free speech, marriage, association, free exercise of religion, due process, and court access rights.71 But while the Court has used broad strokes in defining its deference to prison officials on issues of prison administration, not all courts have used—or even mentioned—the Turner test when evaluating prisoners' Establishment Clause claims.72 Reliance on Turner for the proposition that pris-

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68 Id at 89.
69 Id at 89–91.
71 Branham, 37 U Mich J L Ref at 303 (cited in note 44) (citations omitted).
72 See Williams, 52 SW3d at 188 (declining to apply Turner to an Establishment Clause challenge); Kerr v Farrey, 95 F3d 472, 476–80 (7th Cir 1996) (analyzing an Establishment Clause claim without applying Turner); Muhammad v City of NY Dept of Corrections, 904 F Supp 161, 195–99 (S D NY 1995) (applying Turner to free-exercise and equal-protection claims but not to an Establishment Clause claim), appeal dismissed, 126 F3d 119 (2d Cir 1997); Scarpino v Grosshiem, 852 F Supp 798, 804 (D S D 1994) (explicitly stating that Turner does not apply to an Establishment Clause claim); Card v Dugger, 709 F Supp 1098, 1103–10 (M D Fla 1988) (applying Turner to a free-exercise claim but not to an Establishment Clause claim), aff'd, 871 F2d 1023 (11th Cir 1989). See also Derek Apanovitch, Note, Religion and Rehabilitation: The Requisition of God by the State, 47 Duke L J 785, 822–36 (1998) (arguing that applying Turner to Establishment Clause claims can have a devastating effect). But see Boyd, 914 F Supp at 832 (stating that courts should first evaluate prisoners' Establishment Clause claims on the basis of the Lemon test, and if the policy at issue violates Lemon, courts should then ask if the program is reasonably related to legitimate penological interests); Warburton v Underwood, 2 F Supp 2d 306, 316 (W D NY 1998) (finding that prisoners' Establishment Clause challenges are “tempered” by Turner, but applying Establishment Clause tests anyway);
oners' Establishment Clause claims should be reviewed under rational-basis style balancing is misplaced because the concerns underlying Turner are not necessarily implicated in the Establishment Clause context.

The Turner majority was worried that subjecting prison administrators' decisions to strict scrutiny would require courts to decide how best to deal with the difficult problems inherent in prison administration. While prisoners do not leave their constitutional rights at the gate of the prison, it would be extremely costly to guarantee individuals the same constitutional protections behind bars as they receive in front of them. Courts are justifiably reluctant to become "super legislatures," and the Turner Court recognized that courts are even more reluctant to become "super wardens" who determine whether particular prison administration decisions are acceptable. The majority noted, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."

The worry is that prison administrators and courts will be required to grant exemptions from many prison rules because of a conflict with a constitutional right, like the free speech claim argued in Turner, and the free exercise concern at issue in O'Lone v Estate of Shabbaz, a decision handed down the same day as Turner. The government would be greatly burdened by granting exemptions from prison policies to individual prisoners, particularly with respect to claims that prison policies violate free speech and free exercise rights. But this concern is not implicated by prisoners' claims that InnerChange prison units violate the Establishment Clause. Those who challenge such programs on Establishment Clause grounds do not generally seek review of "day-to-day judgments of prison officials"; they want a court to determine if a state's delegation of prison authority to a private, religious group impermis-

Branham, 37 U Mich J L Ref 291 (cited in note 44) (arguing that Turner or a Turner hybrid should be used to evaluate prisoners' Establishment Clause claims).

73 482 US at 89.
74 Id.
75 Id.
76 482 US 342 (1987) (upholding, in the face of a free exercise challenge, a New Jersey prison regulation that prevented Muslim inmates from attending Jumu'ah, a weekly Muslim congregational service).
77 See Apanovitch, 47 Duke L J at 832–33 ("If the government has to consider individuals' religious beliefs before acting, the potential reach of the Establishment Clause would paralyze government's ability to function.") (cited in note 72).
sibly establishes religion. There is no claim that the government needs to accommodate a particular individual and his beliefs; it is a question of whether or not a broad policy granting power to a private, religious organization contravenes the Establishment Clause. For this reason, most courts have rightly held that the Turner test is inapplicable to Establishment Clause challenges and other challenges that do not involve individual accommodations.78

Further, applying the Turner test to prisoners' Establishment Clause challenges could lead to results "discomfiting and at odds with the overarching purpose of both religion clauses."79 If Turner is taken at face value, it could authorize government pressure on inmates to accept placement in a religious unit, up to and including compelled placement in such a unit.80 This raises a host of constitutional problems and, in particular, could create massive tension between the Free Exercise and Establishment Clauses. For this reason, courts should be wary of applying the Turner test to Establishment Clause challenges.

Finally, the Supreme Court no longer applies Turner without exception to prisoners' constitutional challenges. In Johnson v California,81 the Court recently abandoned the Turner test in cases related to the constitutional prohibition against racial discrimination, apparently discarding the belief that it is "quite clear that the standard of review we adopted in Turner applies to all circumstances in which the needs of prison administration implicate Constitutional rights."82 In Johnson, the Supreme Court struck down an unwritten California policy that segregated inmates on the basis of race immediately following place-

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78 See Scarpino, 852 F Supp 798, 804–05 (holding that Establishment Clause claims do not concern accommodation, and thus Turner is inapplicable). See also Williams, 52 SW3d at 188–89 (generally applicable Establishment Clause jurisprudence should govern prisoners' Establishment Clause claims). Consider Jordan v Gardner, 986 F2d 1521, 1530 (9th Cir 1993) (holding that the Turner test should not be used to evaluate Eighth Amendment claims because such claims do not necessarily concern an accommodation of an individual prisoner). Notably, several courts have analyzed prisoners' Establishment Clause challenges without even mentioning Turner. See Korr, 95 F3d at 476–80 (analyzing prisoner's Establishment Clause challenge to Narcotics Anonymous program without mentioning four-part Turner test); Muhammad, 904 F Supp at 195–99 (applying Turner to free-exercise and equal-protection claims, but not to Establishment Clause claims).


80 This pressure is most likely to increase when there is some evidence that such units reduce recidivism or otherwise help the government achieve a legitimate penological objective. See id at 321–22 (discussing the likelihood of the government forcing prisoners to live in faith-based units given the ostensible relationship between units and the furthering of legitimate government interests, such as a reduction in recidivism rates).

81 125 S Ct 1141 (2005).

ment or transfer to a new prison facility, even though prison administrators justified this rule on the basis of promoting prison safety.\(^{83}\) The majority held that *Turner* only applied when evaluating claims for rights that are "inconsistent with proper incarceration," without defining the contours of this new term of art. In dissent, Justice Thomas noted that the Court had "eviscerated" the *Turner* test.\(^{84}\)

In conclusion, the rationale that undergirds *Turner* is inapplicable to prisoners' Establishment Clause challenges. Using the *Turner* test would lead to results discomforting to most: the allowance, under some circumstances, of the forced religious indoctrination of prisoners, so long as such indoctrination was reasonably related to a legitimate penological goal. It is clear that the Supreme Court is not as attached to the *Turner* standard as it once was, as the Court has shown a willingness to second-guess the decisions of prison officials, even when those decisions are designed to promote safety. As such, courts should not use the *Turner* test in evaluating prisoners' challenges to faith-based prisons and prison units. The question then is which of the generally applicable Establishment Clause tests should be used to evaluate prisoners' claims.

B. The *Agostini-Lemon* Test

The *Agostini-Lemon* test is a modification of the *Lemon* test, a three-pronged test established in *Lemon v Kurtzman.*\(^{85}\) The *Lemon* test has been called the "test applied most frequently" in evaluating Establishment Clause disputes,\(^{86}\) the "dominant mode of Establishment Clause analysis,"\(^{87}\) and the "primary organizing principle of Establishment Clause decisions."\(^{88}\) In short, nearly all Establishment Clause analysis begins with *Lemon.*\(^{89}\)

\(^{83}\) In *Johnson*, the Court noted that the prison rationalized its practice on the ground "that it is necessary to prevent violence caused by racial gangs." 125 S Ct at 1144–45. ("An associate warden testified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard .... Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated.") (citations omitted).

\(^{84}\) Id at 1167–78 (Thomas and Scalia, dissenting).

\(^{85}\) 403 US 602 (1971).

\(^{86}\) Branham, 37 U Mich J L Ref at 301 (cited in note 44).


\(^{89}\) Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 Hastings Const L Q
In *Lemon*, the Supreme Court found Rhode Island and Pennsylvania statutes that provided state aid to parochial elementary schools unconstitutional. The Court stated that it had previously used three tests to determine if a state action violates the Establishment Clause: (1) does the state action have a secular legislative purpose, (2) is the state action's principal or primary effect one that neither advances nor inhibits religion, and (3) does the state action not foster an excessive government entanglement with religion. Each of these past tests constitutes a separate prong of the *Lemon* test. A state action is only constitutional if the court answers each of the respective prongs in the affirmative.

The Court modified this test in *Agostini v Felton*. The Court formally noted the overlap between the second and third prongs of the *Lemon* test, and tried to fix problems in *Lemon*'s operation. The primary problem was that the *Lemon* test could require extensive monitoring of a program to ensure there was no impermissible religious inculcation, but that such monitoring rendered many programs unconstitutional because it constituted excessive entanglement. The Court noted that the central hold-

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90 403 US at 603.


92 Id.


As long as a public employee placed on parochial school grounds is presumed to inculcate religion or the school itself is presumed to use the government funds to advance religion, the program must include an extensive and intrusive system whereby the government is able to monitor the employee or the school's activity. However, because such a pervasive monitoring program would inevitably result in an excessive entanglement between church and state, an insurmountable roadblock to this type of government aid existed. This "Catch-22" was explicitly criticized by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor in their respective *Aguilar* dissents.

Id (citations omitted). For an example of how the "Catch-22" operated, see Robert L. Kil-
ing of Lemon was that no program should “further or inhibit” religion, and that using the “excessive entanglement” prong to strike down all religious programs was unnecessary.\textsuperscript{96} The Court added standards to assist courts in defining “furthering” and “inhibiting” as to prevent other courts from reading the modified Lemon test as broadly as Lemon itself.\textsuperscript{97} Although the Court was not very explicit in Agostini that it was significantly altering the Lemon test, Justice O’Connor later stated that Agostini “folded the entanglement inquiry into the primary effect inquiry.”\textsuperscript{98}

C. The Endorsement Test

A second major mechanism for analyzing Establishment Clause claims is the endorsement test, first enunciated by Justice O’Connor in a concurring opinion in Lynch v Donnelly.\textsuperscript{99} The endorsement test is used to evaluate Establishment Clause challenges to private group action that could be construed as government action supporting religion.\textsuperscript{100} In Lynch, the Court held that a city-owned and operated holiday display including a decorative Santa, reindeer, teddy bears, and a nativity crèche did not violate the Establishment Clause.\textsuperscript{101} The Court, emphasizing its “unwillingness to be confined to any single test or criterion in this sensitive area,”\textsuperscript{102} found that the holiday display did not violate the Constitution because it was no more objectionable than other situations the Court had previously upheld against Establishment Clause challenges.\textsuperscript{103}

Justice O’Connor attempted to clarify this area of the law by replacing the Lemon test with two separate tests that she felt

\textsuperscript{96} Bunnaw, 1998 Wis L Rev at 1174–75 (cited in note 95).
\textsuperscript{97} Id.
\textsuperscript{100} Elizabeth D. Kaiser, Jesus Heard the Word of God, but Mohammed had Convulsions: How Religion Clause Principles should be Applied to Religion in the Public School Social Studies Curriculum, 34 J L & Educ 321, 331 (2003).
\textsuperscript{102} Id at 679.
\textsuperscript{103} Id at 682, citing Board of Education v Allen, 392 US 236 (1968) (upholding the expenditure of large sums of public money for textbooks given to students at church-sponsored schools); McGowan v Maryland, 366 US 420 (1961) (upholding Sunday Closing Laws); Marsh v Chambers, 463 US 783 (1983) (upholding legislative prayers).
better addressed *Lemon*'s purpose.\textsuperscript{104} In O'Connor's view, the two ways that the government could run afoul of the Establishment Clause were to become too entangled with religious institutions or to endorse or disapprove of religion.\textsuperscript{105} O'Connor noted that endorsement:

[S]ends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.\textsuperscript{106}

The Court employed the endorsement test when it revisited the issue of holiday displays in *Allegheny County v ACLU*.\textsuperscript{107} At issue in this case were two holiday displays, one of which the Court found violated the Establishment Clause.\textsuperscript{108} Noting that the Court's Establishment Clause jurisprudence had evolved since *Lemon*, a majority of the Court analyzed the issue by paying "particularly close attention to whether the challenged practice has the purpose or effect of endorsing religion."\textsuperscript{109} The majority cited O'Connor's *Lynch* concurrence for the proposition that government action cannot make adherence to religion relevant to a person's standing in the political community and held this to be a minimum requirement of the Establishment Clause.\textsuperscript{110}

In evaluating the two holiday displays at issue, the splintered Court used several different tests, from *Lemon* to endorsement to coercion, and interpreted the tests differently. However, *Allegheny County* stands for the vitality of the endorsement test because a majority of the Court held that it was useful in evaluating Establishment Clause disputes.\textsuperscript{111} In fact, every member of the current court has accepted the use of the endorsement test.\textsuperscript{112}

While there have been disagreements about how to interpret the

\textsuperscript{104} *Lynch*, 465 US at 687 (O'Connor concurring).
\textsuperscript{105} Id at 687—88.
\textsuperscript{106} Id.
\textsuperscript{107} 492 US 573 (1989).
\textsuperscript{108} Id at 592.
\textsuperscript{109} *Allegheny County*, 492 US at 593.
endorsement test and when it should be used, a number of Justices have used some version of the endorsement test to analyze Establishment Clause claims.

D. The Coercion Test

Courts employing the coercion test analyze state action to determine whether it subtly or directly coerces individuals to participate in religious activity. If it does, through psychological or other means, the state action violates the Establishment Clause. The coercion test is most commonly used when evaluating situations in which children might be pressured to engage in a religious exercise, but the test is not strictly confined to those situations. The modern coercion test is rooted in Justice Kennedy's dissent in Allegheny County. However, it was not applied in a majority opinion until Lee v Weisman.

In Lee, invocation and benediction prayers at public elementary and secondary school graduation exercises were held to be an unconstitutional establishment of religion. Even though attendance at graduation was nominally voluntary, the Court found that there were incredible pressures on students to attend and to act respectfully during the prayers. The Court found

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113 See, for example, Capitol Square Review and Advisory Board v Pinette, 515 US 753 (1995) (finding that the state cannot bar the Ku Klux Klan from erecting a Latin cross in a plaza next to the state capital because “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms”). In Pinette, the four Justices felt that the endorsement test should only be applied to government actions, while three Justices, including Justice O'Connor, believed that the crux of the issue did not rest on whether the government initiated the action in question, but whether the reasonable observer would think the government endorsed religion.

114 See, for example, Santa Fe Independent School District v Doe, 530 US 290 (2000) (citing the endorsement test when striking down a school policy facilitating the election of a student-led pre-game football prayer).


116 The phrase “coercion test” as used in this subsection refers to coercion as defined by the majority in Lee v Weisman, 505 US 577 (1992).

117 492 US at 659 (Kennedy concurring) (citation omitted). Justice Kennedy argued:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”


119 Id at 586–87.

120 Id at 594–96.
these coercive pressures forced students to participate or appear to participate in a religious exercise in contravention of the Establishment Clause. 121

Two separate concurrences, written or joined by the other four members of the Lee majority, stressed that coercion was sufficient for an Establishment Clause violation, but not necessary. 122 The concurrences asserted that a government practice coercing participation in religious activity constitutes an Establishment Clause violation, but a finding of no coercion does not end the inquiry. 123 Instead, once a court has determined a particular practice is non-coercive, the court should merely continue to analyze the case using the Lemon and endorsement tests. 124

E. Zelman v Simmons-Harris and the Modification of the Establishment Clause Tests

In Zelman v Simmons-Harris, 125 the Supreme Court upheld a scholarship program that provided school vouchers to the parents of children in the Cleveland City School District. In so holding, the Court modified, explicitly and implicitly, the three major modes of Establishment Clause analysis.

In Zelman, the Court evaluated an Ohio scholarship program that provided school vouchers to parents of children in an extremely distraught school system. The vouchers could be used at any participating school, public or private, secular or sectarian. 126 Most participating schools were religious—in the 1999-2000 school year, 82% of participating schools were sectarian—and over 96% of the 3,700 participating students used the vouchers to enroll in religiously affiliated schools. 127

In analyzing this program, the Court used, in various forms, the three tests discussed above: the Agostini-Lemon test, the endorsement test, and the coercion test. Although it did not rely on one test exclusively, it used the same rationale to support its conclusion that the Cleveland program did not violate the Establishment Clause: namely, that any benefit to religion was a result of the "true private choice" of parents and, as such, the bene-

121 Id at 593.
122 Id at 604 (Blackmun concurring), 618 (Souter concurring).
123 Lee, 505 US at 604 (Blackmun concurring).
124 Id at 618 (Souter concurring).
126 Id at 645-47.
127 Id at 647.
fit was a result of individual, not state, action. In so doing, the Zelman court redefined each of the Supreme Court's Establishment Clause tests. In effect, the Court stated that a program satisfies all three tests if any benefit to a religious organization is the result of "true private choice."

The major alteration of the coercion test was in the definition of impermissible coercion. Courts using the Lee coercion test analyze state actions and policies to determine whether the government subtly or directly coerces individuals to participate in religious activity. The majority in Lee concluded, "It is beyond dispute that, at a minimum, the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise." This was not challenged by the dissent: all nine Justices agreed that the Establishment Clause bars coercion to engage in religious activity. The dispute among the Justices was about the definition of coercion.

The plurality in Zelman refused to use a pure psychological analysis of coercion, and while it declined to discard the test entirely, it significantly diluted it. The Court determined that the presence or absence of coercion must be analyzed by looking at all options available to the relevant actors. If the choice exercised by the relevant actors was true and private, then there was no impermissible coercion.

However, Justice O'Connor's concurrence refused to let the majority pull all of the coercion test's teeth. Her concurrence defines "true and private choice" more carefully than other members of the Court. Justice O'Connor stated that true and private choices can only be made when there are genuine options. A genuine option exists when there is an "adequate substitute" for the religious option in the eyes of the relevant actor.

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128 Id at 648–58.
130 Id.
131 Lee, 505 US at 588.
132 Id at 587.
133 Id at 640 (Scalia dissenting); Griffin v Coughlin, 673 NE2d 98, 106 n 6 (NY Ct App 1996).
134 Feldman, 6 U Pa J Const L at 263 (cited in note 135).
135 Zelman, 536 US at 655–56. See also Child Evangelism Fellowship of Md, Inc v Montgomery County Public Schools, 373 F3d 589, 598 (noting explicitly that Zelman modified the coercion test).
137 Id at 870 (O'Connor concurring).
138 Id. But see Freedom from Religion Foundation, Inc v McCallum, 324 F3d 880, 884
there is no requirement for objective measures of similar quality, actors must feel like they have a real choice.

III. APPLICATION OF THE ZELMAN-MODIFIED COERCION TEST

Each faith-based prison program raises many independent constitutional questions, and can be held violative of the Establishment Clause under different tests for a variety of reasons. Courts should carefully evaluate each challenge to faith-based prison programs using multiple tests; among them is the coercion test.

There are several ways one can define the coercion test, but courts should analyze Establishment Clause challenges to faith-based prisons and prison units using the coercion test as implicitly refined by Justice O’Connor’s opinion in Zelman. This test helps assure that the government does not give any person a great incentive to participate in religious activity.

There are three ways in which faith-based prisons or prison units may unconstitutionally coerce inmates to participate in religious exercise: (1) offering inmates a safer environment; (2) offering participants a better possibility of parole; and (3) offering inmates a much higher quality of life than the available alternatives provide. If inmates lack “genuine choice” among relatively adequate substitutes, courts should hold that the faith-based prison or prison unit violates the Establishment Clause.

A. The Problem of Increased Safety

Faith-based prisons and prison units appear to be safer than their secular alternatives. This has massive constitutional significance. In a case decided under the extremely deferential Turner test, the Supreme Court rejected a prisoner’s claim that participation in a sexual offender treatment program forced him to violate his Fifth Amendment privilege against self-incrimination. Participation in the sexual offender treatment

(7th Cir 2003) (holding that the quality of the religious choice, compared to other options, should not be considered when applying the Zelman-modified coercion test: “It is a misunderstanding of freedom . . . to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him.”).


140 See discussion accompanying notes 41–47.

program provided inmates with a variety of significant benefits, but participation required inmates to confess to all crimes, even those for which the offender had not been convicted, without any guarantee of immunity. The Supreme Court denied the prisoner's claim. A four-Justice plurality believed that the loss of benefits attendant to not admitting all past crimes did not rise to the level of a Fifth Amendment violation. Justice O'Connor agreed with the majority's rationale with one caveat: if the prisoner's safety was at risk when he chose to incriminate himself, his Fifth Amendment right against self incrimination might be violated. But because the lower court did not enter any specific findings on this issue, O'Connor determined that the record required the rejection of the prisoner's claim.

O'Connor's opinion is important because it recognized that prisoners' safety is an important factor when evaluating the constitutionality of prison regulations. If enhanced safety in a religious alternative could constitute Fifth Amendment compulsion, even under the highly-deferential *Turner* standard, such a program would be unconstitutionally coercive in the Establishment Clause context. In *Zelman*, O'Connor stated that coercion could exist if there are no genuine options for the person choosing between a religious program and a non-religious one, defining genuine option as an "adequate substitute" for the religious option in the eyes of the relevant actor. It is hard to imagine that a prisoner would find an unsafe prison an "adequate substitute" for a safe, religious one.

O'Connor's analysis in *McKune* and *Zelman* gets to the heart of the appropriate relationship between the Establishment Clause and faith-based prisons. If the faith-based option is substantially better than the secular alternative, prisoners are implicitly encouraged to participate in religious activities to enjoy greater benefits or privileges. While encouragement is both acceptable and desirable in some contexts, such as giving well-behaved prisoners certain rewards, it runs afoul of the Establishment Clause when prisoners receive benefits for religious attitudes or actions. It will not always be easy to determine what types of benefits are so minimal as to lose significance in an Establishment Clause analysis; all things being equal, a faith-based

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142 Id at 30–34.
143 Id at 37–38 (O'Connor concurring).
144 Id at 51.
145 *McKune*, 536 US at 51 (O'Connor concurring).
146 *Zelman*, 536 US at 670 (O'Connor concurring).
program that allows inmates a little more time with family members or residence in a newer prison wing probably does not eliminate a true and private choice. But it is not difficult to reason that offering prisoners a substantially better chance of avoiding assault, rape, or murder while behind bars gives them virtually no such choice. While there may not be a constitutionally significant difference in giving an inmate a choice between vanilla and chocolate ice cream, there is such a difference in offering an inmate the choice between ice cream and antifreeze.

As Fred Becker, Warden of the InnerChange wing of a Texas prison stated, "If a person is not particularly in favor of religion—is not in favor of doing anything for a criminal offender—but they're in favor of their own safety, this program is the best insurance policy society has had for the 200-plus-year history of this nation." While Warden Becker was likely speaking about how society would be safer if prisons could reduce inmate recidivism, he easily could have been speaking directly to prisoners. If faith-based prisons or prison units are significantly safer than their secular counterparts, such programs are the best, and perhaps only, insurance policy these prisoners can get. As such, prisoners are coerced into engaging in religious exercises in violation of the Establishment Clause.

B. The Problem of Earlier Parole

If prisoners receive parole benefits for participating in a faith-based prison or prison unit, there is a serious constitutional issue. As Professor Lynn Branham notes:

[If] prisoners faced the prospect of either a shortened or lengthened term of confinement if housed in the faith-based unit, the discrepant treatment of prisoners would be an overt indicator of governmental non-neutrality be-

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147 This argument is strong even though courts have generally refused to hold that a "choice between enhanced safety . . . and more expansive freedom and privileges" is not unconstitutional. Branham, 37 U Mich J L Ref at 334 (cited in note 44). The choice between more freedom and more safety offers inmates a true choice. Inmates have no more freedom from religious establishment if they chose not to enter the faith-based prison or prison unit: the religious establishment exists either way.


149 See Brook, When God Goes to Prison, Legal Affairs at 28 (cited in note 17) (noting that InnerChange units seem to be less violent than traditional prison units).
tween religion and irreligion. Thus, offering prisoners in faith-based units more or fewer good-time credits or earlier or later parole release than their counterparts in non-faith-based units would clearly contravene the Establishment Clause.\textsuperscript{150}

As previously noted, there is some evidence that inmates in faith-based prison units are getting paroled more quickly than their counterparts in secular prisons.\textsuperscript{151} But the real difficulty is determining why: is it because the inmates are generally better able to be reintegrated into society, or because they had opportunities in the faith-based unit unavailable to those in other units, or because the parole board is using religious affiliation to determine the likelihood the inmate will reoffend?

Ultimately, determining what difference in likelihood of parole is acceptable depends on why prisoners in faith-based units get paroled earlier than those in traditional prison units. Courts should determine if the program provides opportunities that substantially increase the likelihood of parole. For example, if prison regulations require completion of a certain type or number of education or treatment classes, and it is much easier to fulfill those requirements while in a faith-based prison or prison unit, the program runs afoul of the Establishment Clause. The important question is what type of choice is available to the inmate. If participating in a faith-based prison program provides inmates with an easier way to fulfill the requirements for parole, either a substantially less burdensome way to complete the requirements or a significantly shorter time-frame in which the requirements could be completed, then the non-faith-based unit is not an adequate substitute for the faith-based one.

To minimize complicated questions about the motives and prejudices of members of local parole boards, the Establishment Clause analysis should be limited to two questions: first, is there clear evidence that the parole board is making decisions on the basis of a denomination or sect preference; and second, if not, does the religious program provide a greater likelihood that inmates will complete programs or engage in certain activities that

\textsuperscript{150} Branham, 37 U Mich J L Ref at 337–38 (cited in note 44). Although Professor Branham was referring to explicit, guaranteed differences in the length of confinement and chances of parole between prisoners in secular and sectarian prisons, the argument should be carried forward to a situation where there are, as a matter of practice and probability, significant differences in a prisoners chance of parole based on that prisoner's participation in a faith-based program.

\textsuperscript{151} See text accompanying notes 48–52.
make it more likely that they will be paroled or paroled more quickly than other inmates.

It is doubtlessly true that some parole board members have religious biases and are more or less willing to parole adherents of particular faiths. But courts will be understandably wary of encouraging Establishment Clause challenges to the parole system and the thought-processes of parole board members. In some circumstances, it might be obvious that a parole board is making decisions for impermissible religious reasons. If not, courts should limit their analysis to evaluate what factors parole boards are explicitly authorized or required to consider, such as the completion of certain classes or participation in certain activities. If it is significantly easier to complete these requirements in a faith-based prison or prison unit than it is in traditional prison units, the program runs afoul of the Establishment Clause.

C. The Problem of Higher Quality of Life

Faith-based prisons and prison units offer a variety of benefits to inmates, from religious to secular, significant to trivial. Non-safety and non-parole quality of life enhancement is not as problematic to faith-based programs' constitutionality as safety and parole benefits are, but at some point, the difference in quality of life between the religious and nonreligious options violates the Establishment Clause. The important question is still whether or not there were “adequate substitutes” available to prisoners.

Benefits can unconstitutionally coerce prisoners into practicing religion. A prisoner in the general population of a secular institution will naturally seek any opportunity to gain more privacy, more time with family, better access to education, rehabilitation programs, and vocational training. Thus, it seems unlikely that there is a “true and private choice” among adequate substitutes if prisoners must choose between a very comfortable existence in a faith-based prison wing or the overcrowded, benefit-free secular alternative. Here, determining “adequate substitute” becomes much more difficult. A few better meals and a little more privacy might not be enough to “coerce” an inmate to leave those he knows and likes in the non-religious prison or prison unit, to move to a different location further from non-

152 See subsection I-B.
incarcerated family or friends, or, more generally, to choose the unknown.

In her concurrence in *Zelman*, Justice O'Connor required that the secular alternatives be "adequate substitutes in the eyes of parents." O'Connor explained that the nonreligious choices available to parents in Cleveland were adequate substitutes because they were able to "compete effectively" with their religious counterparts. Traditional prisons might be able to compete effectively with faith-based prisons or prison units, even those that offer substantial enhancements to inmates' quality of life. It is a question of degree, a fact-specific inquiry that requires a careful analysis of all the benefits of residence in each of the available alternatives. More research is needed to determine why prisoners are choosing faith-based prison options over secular alternatives.

Since an inmate has no constitutional right to live in a particular place or have particular amenities, the scales are not as likely to tip towards an Establishment Clause violation as when there is a disparity in safety. But substantial differences in the quality of life between religious and traditional prisons sometimes should be considered an Establishment Clause violation.

**CONCLUSION**

Given the failures of corrections departments around the nation, it is easy to understand why government officials have thrown up their hands and given faith-based organizations a chance to fix a broken system. However, the nation's inability to prevent prisoners from re-offending does not mean programs like InnerChange or any of Florida's faith-based prisons are constitutional. These programs might offer a variety of coercive benefits to inmates, ranging from safety to simple material benefits that make living in prison more palatable, all for the seemingly small fee of religious indoctrination.

Although prisoners have more limited constitutional rights, the deferential standard announced in *Turner* should not be used to evaluate challenges to faith-based prison units. Instead these

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153 536 US at 670 (O'Connor concurring).
154 Id.
programs should be evaluated using the coercion test, as defined by Justice O'Connor in *Zelman*. If inmates are unable to make a true, private and genuine choice between the faith-based program and available alternatives because the alternatives are not adequate substitutes for the religious option, then the program should be held violative of the Establishment Clause.