

**HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.:  
THE REMNANTS OF TAXPAYER STANDING IN THE ERA  
OF THE WHITE HOUSE OFFICE OF  
FAITH-BASED AND COMMUNITY INITIATIVES**

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INTRODUCTION

Whether or not they agree with its application, many Americans have at least a vague idea that the U.S. Constitution mandates some degree of separation between the government and religion.<sup>1</sup> Although beliefs differ as to how wide this separation should be, most individuals can identify a level at which they believe the government and religion have become too intertwined. While they might take their concern to the editorial page, public outcry may not be enough to halt the particular harm. Indeed, the majority of the public may even support it. So when an individual is offended by what she believes to be a violation of the required separation between government and religion, embodied in the Establishment Clause of the First Amendment, what recourse does she have?

Forty years ago, the United States Supreme Court established a remedy.<sup>2</sup> It granted taxpayers the right to sue Congress for violations of the Establishment Clause of the First Amendment made pursuant to the Taxing and Spending Clause of the U.S. Constitution.<sup>3</sup> The Court reasoned, in *Flast v. Cohen*, that a litigant may have a personalized stake in a dispute sufficient to support standing, even though her connection to the potential Establishment Clause violation is primarily that she is a taxpayer.<sup>4</sup> Since *Flast*, the Court

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1. McCormick Tribune Foundation, *Characters from "The Simpsons" More Well Known to Americans than Their First Amendment Freedoms, Survey Finds*, Mar. 1, 2006, <http://www.mccormicktribune.org/news/2006/pr030106.aspx>.

2. *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

3. *Id.* at 105-06.

4. *Id.* at 103.

has declined to broaden the right of taxpayers to sue Congress for other constitutional violations,<sup>5</sup> despite indications in the decision itself that it might do so.<sup>6</sup>

Much litigation involving taxpayer standing and the federal government has sought to broaden the right to sue Congress.<sup>7</sup> However, this past Term, the Court considered whether to widen the scope of taxpayer standing to encompass executive branch actions funded by general appropriations of Congress.<sup>8</sup> The underlying issue in *Hein v. Freedom from Religion Foundation, Inc.*<sup>9</sup> was the activities of the White House Office of Faith-Based and Community Initiatives (WHOFBCI).<sup>10</sup> The WHOFBCI was founded in January 2001 to assist faith-based and community organizations that provide social services.<sup>11</sup>

Writing for the plurality in *Hein*, Justice Alito explained that standing could not be extended where there was no “link between congressional action and constitutional violation.”<sup>12</sup> In his concurrence, Justice Kennedy emphasized the concern that allowing taxpayer standing would cause excessive judicial intervention into the executive branch’s domain.<sup>13</sup> In contrast, Justice Scalia, joined by Justice Thomas, concurring in the judgment of the Court, wrote that the distinction *Hein* created between granting standing when the harm is caused by Congress, but not when it is caused by the executive branch, was illogical and that *Flast* should be overruled.<sup>14</sup> Finally, Justice Souter, writing for the dissent, agreed with Justices Scalia and Thomas that the distinction was irrational.<sup>15</sup> However, he instead concluded that taxpayer standing should be granted because the injury did not differ according to the government branch that caused it.<sup>16</sup>

The trouble with the Court’s decision in *Hein* is not simply that the distinction between allowing taxpayer standing to sue one branch of the federal government but not another for the same injury is illogical. In making its decision, the Court was aware that Congress

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5. See *infra* notes 57-59 and accompanying text.

6. *Flast*, 392 U.S. at 105 (discussing that provisions in the Constitution other than the Establishment Clause might serve as limits on congressional power).

7. See *infra* notes 57-59 and accompanying text.

8. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007).

9. *Id.*

10. *Id.*

11. See Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

12. *Hein*, 127 S. Ct. at 2566 (plurality opinion).

13. *Id.* at 2572-73 (Kennedy, J., concurring).

14. *Id.* at 2573-74 (Scalia, J., concurring).

15. *Id.* at 2584 (Souter, J., dissenting).

16. *Id.*

explicitly intended to fund the WHOFBCI,<sup>17</sup> and that the Government Accountability Office (GAO) found that activities of programs funded by the WHOFBCI created potential Establishment Clause violations.<sup>18</sup> Through *Hein*, the Court granted permission for Congress and the executive branch to narrow the separation between the government and religion with no practical oversight.<sup>19</sup>

This Note examines the status of taxpayer standing to bring Establishment Clause challenges following *Hein*. Part I discusses the disputed meaning of the Establishment Clause and the various tests the Supreme Court uses to interpret it. Part II explores the origins of taxpayer standing to sue for Congressional violations of the Establishment Clause. Part III examines the *Hein* decision and its background. Part IV considers the implications of *Hein* upon future taxpayer suits raising alleged Establishment Clause violations. Part V explores the structure of the WHOFBCI, the scope of the restrictions upon grantees, and the lack of grantee monitoring. Part VI discusses the emerging issue of what types of relief are available in Establishment Clause challenges. Finally, this Note concludes by considering the future status of the WHOFBCI.

## I. INTERPRETING THE ESTABLISHMENT CLAUSE

The First Amendment begins with the deceptively simple words of the Establishment Clause: “Congress shall make no law respecting the establishment of religion . . . .”<sup>20</sup> Despite these clear words, the Establishment Clause has been the subject of intense litigation, most often concerning the issues of school prayer, public displays of religious symbols, and government financial assistance to religious organizations.<sup>21</sup> These lawsuits are often a battle over where to place the meaning of the Establishment Clause between two extremes. One of these extremes prohibits any government involvement in religion, while the other prohibits Congress from legislating solely on the subject of a national religion.<sup>22</sup>

Although lawsuits often cast the discussion as dichotomous, there are actually three common interpretations of the

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17. *See id.* at 2568 & n.7 (plurality opinion).

18. *See id.* at 2560.

19. *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 325, 334 (2007) [hereinafter *Leading Cases*].

20. U.S. CONST. amend. I.

21. *See generally* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 4-41 (1991) (discussing the history of Supreme Court cases interpreting the Establishment Clause).

22. STEPHEN MANSFIELD, TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT’S HAPPENED SINCE 23 (2007).

Establishment Clause.<sup>23</sup> The strict neutrality perspective is the most skeptical towards religion, as it insists that laws must have secular purposes and opposes "all laws that either hinder or aid religion."<sup>24</sup> Strict separationists hold a middle position, requiring that states remain neutral towards religion, legislation have a secular purpose, and any governmental benefit towards religion be indirect.<sup>25</sup> Finally, the accommodationist position is the most lenient towards religion.<sup>26</sup> Though, as with the other two positions, it agrees that legislation must have a secular purpose, it also "allows for governmental accommodation of religion in ways that further religious freedom without endorsing a particular religion."<sup>27</sup>

The supporters of all three positions can easily find historical evidence to support their perspectives. Works written by James Madison and Thomas Jefferson during and after the drafting of the Bill of Rights are cited to bring light to the drafters' intentions.<sup>28</sup> Supporters also consider the history of individual state constitutions and their treatment of religion, the nature of the early federal government, and the drafting and ratification process of the Establishment Clause.<sup>29</sup>

Initially, the Supreme Court's review of the Establishment Clause did not fit neatly within any of the three described positions.<sup>30</sup> As with other provisions in the Bill of Rights, prior to its incorporation against the states in *Cantwell v. Connecticut*, the First

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23. 2 DAVID O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 672 (5th ed. 2003) (1991).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Strict separationists rely upon James Madison's *Memorial and Remonstrance*, Madison's *Detached Memorandum*, and Thomas Jefferson's letter to the Danbury Baptist Association (wherein he used the phrase "building a wall of separation between Church & State" to refer to the Establishment Clause), whereas, accommodationists cite to bills Jefferson introduced in the Virginia legislature. Compare MANSFIELD, *supra* note 22, at 33-47, 67-69, with LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 69, 246-49 (2d ed. 1994).

29. DRAKEMAN, *supra* note 21, at 52-71; LEVY, *supra* note 28; MANSFIELD, *supra* note 22. See generally T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS (1992). An analysis of which position is the closest to the drafters' understanding of the Establishment Clause is outside the scope of this Note. Indeed, some scholars consider invoking the "intent" of the drafters and their contemporaries to be utterly inconclusive. DRAKEMAN, *supra* note 21, at 70-72.

30. GUNN, *supra* note 29, at 13 ("Prior to deciding the 1947 case *Everson v. Board of Education*, the Supreme Court had not sought to interpret the Establishment Clause in any systematic way.").

Amendment applied only to the federal government.<sup>31</sup> Seven years after the First Amendment was incorporated, the Supreme Court first articulated a standard for assessing potential Establishment Clause violations:<sup>32</sup>

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . . The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.<sup>33</sup>

Despite that strong language in *Everson v. Board of Education of Ewing*, the Court has not established a single definitive test.<sup>34</sup> According to *Lemon v. DiCenso*, “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.’”<sup>35</sup> In *Agostini v. Felton*, the Court modified the *Lemon* test.<sup>36</sup> Noting that the latter two elements of the *Lemon* test relied upon similar factors,<sup>37</sup> the Court made the advancing religion prong into a three-factor test, of which the entanglement prong became one of the factors.<sup>38</sup> The Court continues to apply the *Lemon* test as modified by *Agostini*.<sup>39</sup>

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31. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); DRAKEMAN, *supra* note 21, at 6. For a further discussion on the incorporation issue, see DRAKEMAN, *supra* note 21, at 89-90, 130 n.50.

32. GUNN, *supra* note 29.

33. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-18 (1947). The *Everson* decision has been criticized for finding no violation of the Establishment Clause in the underlying matter, despite the strong language excerpted here. *Id.* at 18-19 (Jackson, J., dissenting); MANSFIELD, *supra* note 22, at 64-65.

34. David E. Fitzkee & Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1, 11-13 (2007).

35. *Lemon v. DiCenso*, 403 U.S. 602, 612-13 (1971) (citing *Walz v. Tax Comm’n.*, 397 U.S. 664, 674 (1970)).

36. *Agostini v. Felton*, 521 U.S. 203, 232-34 (1997).

37. *Id.*

38. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 424 (8th Cir. 2007) (citing *Agostini*, 521 U.S. at 234-35). The advancing religion test is now: “whether government aid (1) results in governmental indoctrination; (2) defines recipients by reference to religion; or (3) creates excessive entanglement.” *Id.* (citing *Agostini*, 521 U.S. at 234-35).

39. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859-63 (2005).

However, despite declining to overrule the *Lemon* test, the Court does not always apply it.<sup>40</sup> For instance, in the case of a government-sponsored monument inscribed with the Ten Commandments at the Texas state capital, the Court looked to the history of the monument and the role of religion in American society since *Lemon* was not “useful” in evaluating a “passive monument.”<sup>41</sup> A more formal approach to this sort of historical analysis is the endorsement test.<sup>42</sup> It measures whether a reasonable observer would consider a government action to endorse religion after the role of the conduct in American cultural history is considered.<sup>43</sup> Finally, there is the coercion test, under which “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.’”<sup>44</sup> Thus far, the Court has refused to set a definitive standard for when it will apply one test—*Lemon*, endorsement, coercion, or historical analysis—instead of another.<sup>45</sup>

## II. TAXPAYER STANDING: ORIGINS AND CONTOURS PRIOR TO *HEIN*

In contrast to the plethora of standards the Court applies to potential Establishment Clause violations, the Court is more precise in defining taxpayer standing.<sup>46</sup> Standing, in its basic form, is

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40. Fitzkee & Letendre, *supra* note 34, at 11-13.

41. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). This distinction is particularly remarkable considering that *Van Orden* and *McCreary County* were decided upon the same day. *Id.* at 677; *McCreary County*, 545 U.S. at 844.

42. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-95 (1989) (including, for the first time, the endorsement test as an alternate means of analysis to the *Lemon* test).

43. *Id.*; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 690-93 (1984) (O'Connor, J., concurring) (advocating for the “reasonable observer” standard that became the endorsement test). While the endorsement test would seem indistinguishable from the historical analysis in *Van Orden*, nowhere in the plurality opinion of *Van Orden* is the endorsement test referenced. See *Van Orden*, 545 U.S. at 677-92. Indeed, the Court has found elsewhere that the lengthy history of a practice may be enough to keep it from violating the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 790-92 (1983) (finding that opening prayers to state legislative sessions did not violate the Establishment Clause where the practice had been done for over 100 years, Congress had had the same practice for over 200 years, and the latter was approved by the Establishment Clause’s drafters).

44. Here, the Court again refused to reconsider *Lemon*, which thereby caused the coercion test to be yet another alternative to *Lemon*. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

45. *Lynch*, 465 U.S. at 679 (“[W]e have repeatedly emphasized our unwillingness to be confined to a single test or criterion in this sensitive area.” (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971))); Fitzkee & Letendre, *supra* note 34, at 11-13.

46. See *infra* notes 47-51 and accompanying text.

necessary in every lawsuit to satisfy the “Case or Controversy” requirement of Article III of the Constitution.<sup>47</sup> To fulfill the standing requirement, a litigant in federal court must allege a personal stake in the controversy at issue arising from a specific injury caused by the opposing party that can be solved via the requested relief.<sup>48</sup> This limitation is intended to prevent courts from issuing advisory opinions or unnecessarily interfering in public life.<sup>49</sup>

With this limitation in place, it would seem that a potential litigant could not meet the standing requirement if she was not directly affected by the suspect government action. The potential litigant’s only connection to the dispute would be that some percentage of her taxes had supported the government action. Indeed, the Court initially rejected the idea of a “wallet injury” since the taxpayer’s relation to the Treasury was too minute and was shared with other citizens.<sup>50</sup> The Court also rejected the concept of a “psychic injury” caused by “the taxpayer’s mental displeasure that money extracted from him is being spent in an unlawful manner,” because the harm was too general.<sup>51</sup>

In 1968, *Flast* departed from this reasoning by stating that an individual taxpayer could potentially have the necessary personal stake in a dispute to meet the Article III standing requirement.<sup>52</sup> To show the connection between the taxpayer status and the asserted claim, a litigant would have to meet two requirements.<sup>53</sup> First, because the litigant would be asserting standing via taxpayer status, she must show that the legislative enactment was made “under the [authority of the] Taxing and Spending Clause of Art. I, § 8 of the Constitution.”<sup>54</sup> Second, the litigant must show that an express constitutional limitation upon Congress’s actions pursuant to the Taxing and Spending Clause has been violated, not merely that

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47. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

48. *Id.*; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-44 (2006); *Allen v. Wright*, 468 U.S. 737, 751 (1984). “[T]hough a taxpayer could sue in state court to enforce his federal right if the state didn’t impose as rigorous a standing requirement as Article III does.” *Freedom from Religion Found., Inc., v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006) (citing *Appleton v. Menasha*, 419 N.W.2d 249, 252-53 (Wis. 1988)), *rev’d on other grounds*, *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

49. *Warth*, 422 U.S. at 500.

50. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35 (1952); *Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923).

51. *Hein*, 127 S.Ct. at 2574 (Scalia, J., concurring) (emphasis omitted); *see also Doremus*, 342 U.S. at 434 (denying standing for taxpayers who share indefinite suffering with other members of the public).

52. *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

53. *Id.* at 102.

54. *Id.*

Congress has acted outside the scope of its authority.<sup>55</sup> The majority in *Flast* held that the Establishment Clause was one such limitation, though they reserved the question of other limitations for future cases.<sup>56</sup>

In subsequent cases, the Court has declined to extend the grounds for litigants to assert taxpayer standing, considering *Flast* to be a narrow exception in standing doctrine.<sup>57</sup> It has done so either by not finding other constitutional limitations on Congress's power<sup>58</sup> or by not allowing challenges to enactments authorized by provisions other than the Taxing and Spending Clause.<sup>59</sup> Lower courts have read *Flast* so narrowly that they have occasionally refused to grant standing where funding was authorized by the Taxing and Spending Clause *in addition to* other constitutional grounds.<sup>60</sup>

However, the Court continues to uphold *Flast*.<sup>61</sup> In *Bowen v. Kendrick*,<sup>62</sup> for example, the Court found taxpayer standing to assert that the Adolescent Family Life Act (AFLA) violated the Establishment Clause.<sup>63</sup> The AFLA was enacted by Congress

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55. *Id.* at 102-03. Neither wallet nor psychic injury to the taxpayer-litigant is an element of the *Flast* test. *Id.* Although concern for the psychic injury is present in the decision, "[t]he concern of [James] Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04. The necessity for recourse to the harm is also mentioned: "[T]he taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit." *Id.* at 98 n.17.

56. *Id.* at 104-05.

57. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346-49 (2006).

58. *See Tilton v. Richardson*, 403 U.S. 672 (1971) (finding that federal grants to religious colleges and universities did not violate Free Exercise Clause of First Amendment).

59. *See DaimlerChrysler*, 547 U.S. at 337 (finding no taxpayer standing for a violation of Commerce Clause); *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, Inc.*, 454 U.S. 464, 470-71 (1982) (finding that taxpayer lacked standing where conveyance of federal property was authorized by the Property Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (finding no logical nexus between taxpayer status and claim where challenge was brought under the Ineligibility and Incompatibility Clause); *United States v. Richardson*, 418 U.S. 166 (1974) (finding no logical nexus between taxpayer status and harm where challenge was brought pursuant to the Statement and Account Clause).

60. Brief for ACLU et al. as Amici Curiae Supporting Respondents at 16-17, *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (No. 06-157), 2007 WL 320994 (citing *Phelps v. Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987); *Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 199-200 (3d Cir. 1986)).

61. *Hein*, 127 S. Ct. at 2571-72.

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

63. Because the Court found that taxpayers had standing, the Court did not consider the standing of the clergy or the American Jewish Congress, who also brought the suit. *Bowen*, 487 U.S. at 620 n.15. Given the close parallels drawn between *Bowen*



pursuant to the Taxing and Spending Clause and provided for funds to be disbursed to grantees by the Secretary of Health and Human Services (HHS).<sup>64</sup> It was against this backdrop of taxpayer standing doctrine that the Court decided *Hein*.

### III. THE *HEIN* DECISION

#### A. *Hein's Background*

In *Hein*, plaintiffs were the organization Freedom from Religion Foundation, Inc. and three of its federal tax-paying members.<sup>65</sup> For each executive branch department with a WHOFBCI, plaintiffs brought suit against the WHOFBCI director and that department's Secretary.<sup>66</sup> Facing defendants' motion to dismiss, plaintiffs agreed to drop all of their claims except those against two particular grants, each funded by the WHOFBCI through HHS.<sup>67</sup> First, plaintiffs alleged that Emory University, through a Compassionate Capital Fund grant, gave preference to religious organizations in its disbursement of grant money to subgrantees.<sup>68</sup> On their other claim, plaintiffs alleged that the activities and structure of the MentorKids U.S.A. program (MentorKids), through which children of prisoners received mentoring, violated the Establishment Clause.<sup>69</sup>

On summary judgment, the court found that plaintiffs had standing under *Bowen* and *Flast* to challenge both grants since the funding was given to the grantees under Congress's taxing and spending power.<sup>70</sup> On the issue of Establishment Clause violations, Emory's Compassionate Capital Fund Grant was not found to violate the *Lemon* test, as modified by *Agostini*, since plaintiffs were unable to prove that the alleged religious preference in fund disbursement

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and *Hein* in both the plurality and dissenting opinions of *Hein*, it is perhaps significant that the majority in *Bowen* found no violation of the Establishment Clause under an as-applied application of the three-prong version of the *Lemon* test. *Hein*, 127 U.S. at 2567 (plurality opinion), 2586 (Souter, J., dissenting); *Bowen*, 487 U.S. at 602-16. For a further discussion of the distinction found between these two cases by the *Hein* plurality, see *infra* Part III.B.

64. See generally U.S. CONST. art. 1, § 8, cl. 1; *Bowen*, 487 U.S. at 593-94.

65. The three members of Freedom from Religion Foundation, Inc. members named as Plaintiffs were Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker. *Freedom from Religion Found., Inc. v. Towey*, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444, at \*1 (W.D. Wis. Jan. 12, 2005).

66. *Id.* at \*1-2. For a further explanation of the structure of the WHOFBCI, see *infra* Part V.B.

67. See *Towey*, 2005 U.S. Dist. LEXIS 39444, at \*1-2.

68. *Id.* at \*17.

69. *Id.* at \*10, \*16.

70. *Id.* at \*17-18, \*27-28.

had occurred.<sup>71</sup> In contrast, the court did find MentorKids violated the Establishment Clause because the program hired only Christian mentors, stated in its articles of incorporation that its goal was to teach Christianity, and the training of mentors and the programming intended for the children were designed to meet this goal.<sup>72</sup>

On appeal, the Court of Appeals for the Seventh Circuit found that plaintiffs had standing to challenge both the aforementioned programs, as well as some of their claims that were dropped prior to summary judgment.<sup>73</sup> Specifically, the court read *Bowen* as not requiring that plaintiffs allege a violation of the Establishment Clause arising pursuant to a specific statute.<sup>74</sup> The AFLA did not mention religion; the plaintiffs in *Bowen* were challenging the disbursement of grants to religious organizations by an executive branch agency.<sup>75</sup> Thus, because the potential violation necessary to confer standing in *Bowen* was created by an executive branch action, the court ruled that the plaintiffs had standing to challenge executive branch actions where Congress had acted pursuant to the Taxing and Spending Clause.<sup>76</sup>

It is also pertinent to discuss the court of appeals' analysis of plaintiffs' claims other than the two aforementioned grant programs since it was the other claims that the Supreme Court considered.<sup>77</sup> Plaintiffs had alleged that conferences organized by the WHOFBCI

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71. *Id.* at \*19-27.

72. *Id.* at \*11-15, \*29. For example, as part of the organization's mission for 2003, MentorKids' President, John Gibson, wrote to case managers: "We pledge to provide the tools for you and your mentors to be equipped to maximize the possibility of the child developing an authentic life-changing relationship with Christ, through relevant bible disciplining interphased with life skills." *Id.* at \*14. Presented with this evidence, HHS had suspended the MentorKids grant until the program complied with the WHOFBCI's policies. *Id.* at \*15. However, the Court enjoined HHS from reinstating funding to MentorKids since HHS had not met its burden in showing that the violation of the Establishment Clause would not continue. *Id.* at \*28-29.

73. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 995-97 (7th Cir. 2006). The dissent agreed with the majority that there was taxpayer standing to challenge the MentorKids program; otherwise, no one would be able to challenge it. *Id.* at 999 (Ripple, J., dissenting). An individual affected by MentorKids would not be able to sue the organization, because MentorKids would not be considered a state actor. *Id.* Theoretically, a secular community organization that was denied funding—supposedly because it was secular—would not be able to satisfy standing since its alleged injury would be "indirect" and "speculative." *Id.* Finally, it would be unlikely that MentorKids would challenge its own funding. *Id.* However, the dissent argued that the majority had extended *Bowen* too far. *See id.* at 1000-01.

74. *Id.* at 992-93 (majority opinion).

75. *Id.*

76. *Id.* at 992-93, 996-97.

77. *Id.* at 996; *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2560-61 (2007).

within various executive branch agencies promoted the WHOFBCI to religious organizations and only assisted these groups with the grant application process.<sup>78</sup> Although the amount spent on the conferences was slight compared to the overall federal budget, the court of appeals noted that this did not bar the claim since this sort of injury is typical of taxpayer standing.<sup>79</sup> The court also addressed plaintiffs' claim that speeches by executive branch officials had advocated religion over irreligion.<sup>80</sup> Although the court conceded executive branch officials could violate the Establishment Clause in ways other than the targeted nature of conferences and provision of grants, this claim was too attenuated to find taxpayer standing since the costs of the speeches would be the same whether the violations occurred or not.<sup>81</sup>

Subsequently, defendants' petition for an en banc rehearing was denied by the court of appeals.<sup>82</sup> Two judges filed separate concurrences, noting that the decisions of the Seventh Circuit in interpreting *Bowen* had created a circuit split<sup>83</sup> that should be resolved by the Supreme Court.<sup>84</sup>

### B. *Hein at the Supreme Court*

A divided Supreme Court reversed the court of appeals' decision.<sup>85</sup> The plurality opinion, written by Justice Alito, was joined by Justice Kennedy and Chief Justice Roberts, with Justices Scalia and Thomas concurring only in the judgment.<sup>86</sup> The plurality opinion stated that the lower courts had misread *Flast* and *Bowen*.<sup>87</sup> In particular, the plurality found that the plaintiffs in *Bowen* were

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78. *Chao*, 433 F.3d at 994-95.

79. *Id.* at 995.

80. One example was: "[F]ormer Secretary of Education, Rod Paige, whom the plaintiffs accuse . . . of having given a speech at one of the[] [conferences] in which he said that 'President Bush does this because he knows first-hand the power of faith to change lives-from the inside out. And the reason he knows this is because faith changed his life.'" *Id.* at 996.

81. *Id.* at 995-96.

82. *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (7-4 decision).

83. *Chao*, 433 F.3d at 1000-01 (Ripple, J., dissenting) (comparing the majority's reasoning to that of *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988) and *In re U.S. Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989)); *Chao*, 447 F.3d at 989-90 (Easterbrook, J., concurring) (noting that the split was also caused by *Laskowski v. Spellings*, 443 F.3d 930, 941-46 (7th Cir. 2006) (Sykes, J., dissenting)).

84. *Chao*, 447 F.3d at 988 (Flaum, J., concurring).

85. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007).

86. *Id.* at 2558.

87. *See id.* at 2566-68.

granted standing because the executive branch actions they were challenging were done pursuant to a specific statute, the AFLA.<sup>88</sup> Thus, because the congressional action was a general appropriation to the executive branch, even if the funds were informally marked for the WHOFBCI, the necessary nexus between taxpayer status and congressional action pursuant to the Taxing and Spending Clause did not exist.<sup>89</sup>

In his concurrence, Justice Kennedy expanded upon the concerns of the plurality, stating that granting standing where the congressional action was a general appropriation would subject all executive branch activities to taxpayer suits for violations of the Establishment Clause.<sup>90</sup> Similarly, in rejecting the cost-based analysis suggested by the court of appeals, the plurality stated its concern that a workable standard could not be found.<sup>91</sup> For example, the plurality disagreed that a speech would necessarily cost the same whether or not it contained references that allegedly violated the Establishment Clause.<sup>92</sup> The Court also considered plaintiffs' suggestion that the expenditure be fairly traceable to the potential violation to be "vague and ill-defined."<sup>93</sup> While stating its concern that the executive branch would become flooded with litigation, the plurality utterly disregarded that, at the district court level,<sup>94</sup> plaintiffs were only granted taxpayer standing for their claims against the two grant programs.<sup>95</sup> Without considering the claim against MentorKids, where the district court found violations of the

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88. *Id.* at 2567.

89. *Id.* at 2567-68, 2568 n.7.

90. *Id.* at 2569 (plurality opinion), 2573 (Kennedy, J., concurring).

91. *Id.* at 2570-71 (plurality opinion). The plurality's willingness to dismiss the court of appeals' test without considering a test of their own does not mean that a workable test could not be articulated given the number of times the Court has devised its own test for finding a right. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (O'Connor, J., concurring) (describing the undue burden test); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing the trimester framework).

92. *Hein*, 127 S. Ct. at 2570-71. The conferences that allegedly assisted religious organizations, but not non-sectarian ones, were referenced, but not discussed. *Id.* at 2572 (Kennedy, J., concurring).

93. *Id.* at 2571 (plurality opinion). It was "ill-defined" since the violation would always be traceable to a congressional expenditure, but never traceable to litigants' individual tax contributions.

94. While the two grant programs were not raised on appeal, *Freedom from Religion Found., Inc. v. Chao*, 443 F.3d. 989, 996 (7th Cir. 2006), it is telling that nowhere in the Court's opinions are the two programs referenced even in passing, especially in light of MentorKids' activities. *Hein*, 127 S. Ct. 2553 (plurality opinion; Kennedy, J., concurring; Scalia, J., concurring; Souter, J., dissenting); *see supra* note 72 and accompanying text.

95. *Freedom from Religion Found., Inc. v. Towey*, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444, at \*1-2 (W.D. Wis. Jan. 12, 2005).

Establishment Clause, the plurality focused upon the claims that the district court had weeded out as frivolous.<sup>96</sup>

Justice Scalia, joined by Justice Thomas in his concurrence, and Justice Souter, joined by Justices Breyer, Stevens, and Ginsburg in his dissent, agreed that the distinction drawn by the plurality was illogical.<sup>97</sup> They agreed that the injury caused by the Establishment Clause violation was the same regardless of the source, but from there they diverged.<sup>98</sup> On the one hand, Scalia saw *Flast's* two-part test as a departure from *Frothingham* and *Doremus* that did not satisfy the standing requirement of Article III and, thus, should be overruled.<sup>99</sup> In contrast, Souter focused on the severity of the alleged injury, and would have granted standing to plaintiffs under *Bowen* for the same reasons given by the court of appeals.<sup>100</sup> Thus, a majority of the Court would uphold *Flast*,<sup>101</sup> but a plurality would limit it to where Congress has enacted a statute under the Taxing and Spending Clause.<sup>102</sup>

#### IV. THE IMPACT OF *HEIN*

Thus far, *Hein* has been characterized as a part of the Roberts Court's theme of limiting access to the courts<sup>103</sup> or "practic[ing]

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96. *Id.*; *Hein*, 127 S. Ct. at 2586 n.1 (Souter, J., dissenting); see *supra* note 80-81 and accompanying text. Despite this lack of belief in the ability of lower-level courts, once *Hein* was remanded to the court of appeals by the Court, the decisions of the district court were upheld. *Freedom from Religion Found., Inc. v. Chao*, 250 F. App'x 751 (7th Cir. 2007); see *supra* notes 70-72 and accompanying text.

97. *Hein*, 127 S. Ct. at 2573-74 (Scalia, J., concurring), 2584 (Souter, J., dissenting).

98. *Id.* at 2573-74, 2584.

99. *Id.* at 2574-76 (Scalia, J., concurring). More specifically, Justice Scalia argued that the psychic injury claim underlying *Flast* and *Bowen* is too generalized to satisfy the Article III requirement that the alleged injury be particularized. *Id.* at 2582-83.

100. *Id.* at 2585-88 (Souter, J., dissenting). Responding to Justice Kennedy's concern about a flood of litigation, Justice Souter remarked that if the claims were meritorious, their numerosity would be irrelevant. *Id.* at 2586 n.1. Justice Souter also replied to Justice Scalia's disdain for psychic injury by noting other areas where psychic injuries have been recognized. *Id.* at 2587 (citing *United States v. Hays*, 515 U.S. 737, 744-45 (1995) (stating that injury was "living in racially gerrymandered electoral district"); *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (indicating that injury was inability to compete for contract on equal footing, not the contract's loss)). Justice Souter also clarified the court of appeals' reading of *Bowen* further by explaining that because the Court found the AFLA constitutional and analyzed the statute as-applied through the actions of HHS, the formal existence of the statute was irrelevant. *Id.* at 2586.

101. *Id.* at 2571-72 (plurality opinion), 2584-85 (Souter, J., dissenting).

102. *Id.* at 2567 (plurality opinion).

103. See Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 94-96 (2007).

judicial restraint,”<sup>104</sup> depending on one’s judicial philosophy. The exact effect that *Hein* will have upon taxpayer suits is uncertain, especially since the plurality was so divided.<sup>105</sup> Given that much of faith-based organizations’ (FBOs) funding from the federal government first passes through an approval process with state legislatures, it is possible that *Hein*’s application will be limited.<sup>106</sup> However, defendants may still use it to argue that taxpayer standing is disfavored and should only be granted narrowly.<sup>107</sup>

The most obvious result of *Hein* is perhaps the impact it will have on federal policymaking. Where the plurality opinion distinguished between funding specifically authorized by statute and legislative appropriations to an executive,<sup>108</sup> the difference was irrelevant with regard to the injury to taxpayers.<sup>109</sup> However, it is no longer irrelevant since it grants Congress leave to enact policy by providing lump sums to the executive.<sup>110</sup> Contrary to the concerns expressed in the plurality opinion and Justice Kennedy’s concurrence,<sup>111</sup> the separation of powers issue is the expansion of the executive branch at the expense of the legislature, not the invasion of the executive’s discretion by the judiciary.<sup>112</sup> The Court should have encouraged Congress to make controversial legislative policy

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104. William E. Thro, *An Essay: The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 ED. L. REP. 491, 492, 501-02 (2007).

105. See *supra* Part III.B.

106. IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2007: LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 2 (2007) [hereinafter STATE OF THE LAW 2007].

107. *Id.*

108. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2567-68 & n.7 (2007).

109. *Id.* at 2573-74 (Scalia, J., concurring), 2584 (Souter, J., dissenting).

110. *Leading Cases*, *supra* note 19, at 325-26.

111. *Hein*, 127 S. Ct. at 2569 (plurality opinion), 2573 (Kennedy, J., concurring).

112. *Leading Cases*, *supra* note 19, at 325. Another reason why the distinction was disingenuous is that once standing is granted, an as-applied challenge that examines whether the Establishment Clause was violated in a particular case will unavoidably consider executive action and discretion. See Lauren S. Michaels, Recent Development, *Hein v. Freedom from Religion Foundation, Inc.: Sitting this One Out—Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 HARV. C.R.-C.L. L. REV. 213, 230 (2008); see also F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 318-19 (2008) (“The principal reason for dividing powers among the three branches is to prevent tyranny and unwarranted government intrusion on individual rights.”). But see generally Debra L. Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651 (2007) (arguing for the result reached in *Hein* with consideration given to the separation of power issue).

decisions in the public eye,<sup>113</sup> rather than through budgetary earmarks.<sup>114</sup>

The greatest impact in terms of future litigation may be upon taxpayer suits against local governments.<sup>115</sup> Usually, taxpayer standing to sue in federal court is analyzed the same way, regardless of whether the defendant government is local, state, or federal.<sup>116</sup> In *DaimlerChrysler Corp. v. Cuno*,<sup>117</sup> the Court denied taxpayer standing to sue Ohio under the Commerce Clause for tax incentives granted to defendant since granting taxpayer standing would not comport with *Flast*.<sup>118</sup>

In the time since *Hein* was announced, courts have thus far been consistent in applying it to clear-cut cases. For example, taxpayer standing was granted in *ACLU Foundation of Louisiana v. Blanco*<sup>119</sup> where “unrestricted, unmonitored, non-neutral grants” to churches were specifically designated in an appropriations bill passed by the state legislature and signed by the governor.<sup>120</sup> As *Blanco* illustrated, when a legislature collects plaintiffs’ taxes and passes a statute as to how those taxes should be used, *Hein* dictates that taxpayer standing be granted.<sup>121</sup>

However, when the government body that decides to fund a particular organization is not the same body that generated the funding through taxation, taxpayer standing is less clear.<sup>122</sup> In *Bats v. Cobb County, Georgia*,<sup>123</sup> plaintiffs challenged the sectarian nature of opening prayers at the meetings of the county Board of Commissioners and Planning Commission and the method with which those who offered the prayers were selected.<sup>124</sup> Cobb County collects taxes directly from its residents,<sup>125</sup> and the Board of Commissioners is the non-judicial head of government within Cobb

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113. *Leading Cases, supra* note 19, at 334-35.

114. *See generally* Brief of the Center for Inquiry and the Council for Secular Humanism as Amici Curiae in Support of Respondents, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (No. 06-157), 2007 WL 386930 (documenting the paper trail between the White House and Congress over WHOFBCI funding).

115. STATE OF THE LAW 2007, *supra* note 106, at 17-18.

116. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-49 (2006).

117. *Id.* at 332.

118. *Id.* at 343-49.

119. No. 07-04090, 2007 U.S. Dist. LEXIS 74718, at \*2 (E.D. La. Oct. 5, 2007).

120. *Id.*

121. *See* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2567-68 (2007).

122. STATE OF THE LAW 2007, *supra* note 106, at 16-18.

123. 495 F. Supp. 2d 1311 (N.D. Ga. 2007).

124. *Id.* at 1313.

125. Cobb County Tax Information, <http://www.cobbcountyga.gov/tax> (last visited Aug. 13, 2008).

County.<sup>126</sup> But the Planning Commission is a subpart of the Community Development Department and, thus, is not directly involved in taxation.<sup>127</sup> Nevertheless, taxpayer standing was granted against the Planning Commission since plaintiffs were “Cobb County taxpayers [and] Cobb County tax funds were expended.”<sup>128</sup> The court labeled *Hein* “inapposite” by characterizing the Planning Commission as “a local legislative body” and instead relied upon *Marsh v. Chambers*, where taxpayer standing was granted.<sup>129</sup>

Yet courts will not necessarily follow this reasoning. In *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*,<sup>130</sup> the court of appeals denied taxpayer standing where plaintiffs alleged the practice of opening legislative sessions with a sectarian prayer violated the Establishment Clause.<sup>131</sup> Following *Hein* strictly, the lack of an authorizing statute or even any mention of the challenged expenses—thank-you cards and pictures mailed to ministers—in appropriations bills was dispositive.<sup>132</sup> However, the dissent argued no such specificity was necessary since it was done by the legislature *to benefit itself and no executive was involved*.<sup>133</sup> The factual similarities between *Bats* and *Hinrichs*—both defendants were non-executives and there were no statutes authorizing the funding—show that depending on whether a court is inclined to grant taxpayer standing, it can interpret *Hein* strictly or distinguish it.

## V. INSIDE THE WHOFBCI

The previous discussion of taxpayer standing and *Hein* shows that the ability of taxpayer-litigant plaintiffs to bring Establishment Clause claims is very limited. This Note now considers the aspects of the WHOFBCI that make the Court’s decision in *Hein* so troubling.

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126. Cobb County Government Organizational Chart, <http://www.cobbcountyga.gov/boc/downloads/OrgChart.pdf> (last visited Aug. 13, 2008).

127. *Id.*; Cobb County Community Development Department, [http://comdev.cobbcountyga.gov/planning\\_comm.htm](http://comdev.cobbcountyga.gov/planning_comm.htm) (last visited Aug. 13, 2008).

128. *Bats*, 495 F. Supp. 2d at 1318.

129. *Id.* at 1318 n.3; *see supra* note 43. In distinguishing *Hein*, the court did not discuss the lack of a statute—or ordinance—authorizing the particular funds, as required by *Hein*. *Bats*, 495 F. Supp. 2d at 1313-20; *see Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2567 (2007).

130. 506 F.3d 584 (7th Cir. 2007).

131. *Id.* at 585.

132. *Id.* at 598-99.

133. *Id.* at 607-08 (Wood, J., dissenting).



### A. *Funding to FBOs Prior to the WHOFBCI*

When President Bush established the WHOFBCI, it was not the first time that the federal government had funded FBOs.<sup>134</sup> Prior to 1996, FBOs were required to secularize themselves to receive funding based on the Court's ruling in *Committee for Public Education v. Nyquist*.<sup>135</sup> In *Nyquist*, the Court was concerned that where funding went directly to a FBO, the funding would be used for a religious purpose, however indirectly.<sup>136</sup> This secularization often required that the part of the FBO that would receive funding be incorporated separately from the part of the FBO that performed religious activities.<sup>137</sup> It also required that the FBO "refrain from religious activities in the publicly funded services, and remove religious symbols from the premises where the services were provided."<sup>138</sup>

In 1996, these restrictions were removed with the introduction of Charitable Choice Provisions (CCP).<sup>139</sup> Congress attached CCP to major pieces of legislation, such as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>140</sup> Where a CCP was attached to a bill that provided funding to states, it mandated that if a state used that funding to contract with a non-governmental organization, then it could not discriminate against FBOs.<sup>141</sup> In addition to abolishing the three aforementioned requirements of secularization, CCP also allowed FBOs "to make employment

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134. U.S. GEN. ACCOUNTABILITY OFFICE, GAO-02-887, CHARITABLE CHOICE: FEDERAL GUIDANCE ON STATUTORY PROVISIONS COULD IMPROVE CONSISTENCY OF IMPLEMENTATION 13 tbl.5 (2002) [hereinafter CHARITABLE CHOICE].

135. *Id.* at 1.

136. 413 U.S. 756, 775-77 (1973). One of the issues in *Nyquist* was New York's funding to a religious school for building maintenance. *Id.* at 762-63. The Court wrote that funding with a secular purpose, which allowed the school to set aside more funding for religious activities, would not necessarily violate the Establishment Clause. *Id.* at 775. However, the arguably secular purpose of maintaining buildings violated the Establishment Clause since New York would not have been allowed to finance the creation of the buildings. *Id.* at 777.

137. CHARITABLE CHOICE, *supra* note 134, at 1; IRA C. LUPU & ROBERT W. TUTTLE, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: STATE OF THE LAW—DECEMBER 2002 15-16 (2002) [hereinafter STATE OF THE LAW 2002].

138. CHARITABLE CHOICE, *supra* note 134, at 1.

139. *Id.* at 5.

140. *Id.* PRWORA is a welfare reform bill; thus, under it, FBOs could apply for funding related to job preparation and training, marriage promotion, drug treatment, and domestic violence. *Id.* at 6 tbl.1. For further discussion about what legislation and block grants incorporated CCP prior to the founding of the WHOFBCI and the types of programming funded, see STATE OF THE LAW 2002, *supra* note 137, at 54-69.

141. CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES 107-08 (2000).

decisions [based] on religious grounds.”<sup>142</sup> To balance First Amendment concerns about providing government funds to FBOs,<sup>143</sup> CCP also required that FBOs could not discriminate against clients on the basis of religion, that states must have accessible, nonreligious service providers, and that FBOs could not use the funding for “worship, religious instruction, or proselytizing.”<sup>144</sup> These CCP guidelines were essentially mirrored when the WHOFBCI was established.<sup>145</sup>

### B. *The Establishment and Structure of the WHOFBCI*

The activities of the WHOFBCI were the underlying issues that the *Hein* plaintiffs sought to challenge.<sup>146</sup> The WHOFBCI was established by executive order in January 2001.<sup>147</sup> The stated purpose of founding the WHOFBCI was to recognize that faith-based and community organizations (FBCOs) are well-equipped to provide beneficial social services alongside government offices.<sup>148</sup> Therefore,

142. CHARITABLE CHOICE, *supra* note 134, at 7 tbl.2. This provision has been justified using the rationale that in order to preserve their religious character, FBOs must be allowed to consider religion in employment decisions. GLENN, *supra* note 141, at 196-97. However, this provision has also drawn sharp criticism, such as when Rep. Robert Scott said: “Religiously affiliated organizations . . . can compete for and operate government programs. There are only two reasons Charitable Choice is necessary—to advance your religion in a publicly funded program and to discriminate in your employment based on religion when using taxpayer dollars.” Robert C. “Bobby” Scott, Congressman, Statement at Press Conference on Opposition to Charitable Choice (Apr. 24, 2001), [http://www.house.gov/scott/hotissues\\_charitablechoice\\_testimony\\_pc.shtml](http://www.house.gov/scott/hotissues_charitablechoice_testimony_pc.shtml). In particular, there was concern that the provision had been included specifically to allow religious organizations to circumvent sexual orientation antidiscrimination laws. Mike Allen & Dana Milbank, *Rove Heard Charity Plea on Gay Bias, White House Denied Senior Aides Had Role*, WASH. POST, July 12, 2001, at A01; Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays: Salvation Army Wants Exemption from Laws*, WASH. POST, July 10, 2001, at A01.

143. CHARITABLE CHOICE, *supra* note 134, at 2.

144. *Id.* at 7 tbl.2.

145. U.S. GEN. ACCOUNTABILITY OFFICE, GAO-06-616, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 13 (2006) [hereinafter FAITH-BASED AND COMMUNITY INITIATIVE]. The report notes that one CCP guideline that was not carried over was the requirement that an “alternative provider to which the client has no religious objection” be made accessible. *Id.*

146. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007).

147. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001). President Bush initially tried to pass legislation to formalize the WHOFBCI, but it was blocked in the Senate. Richard Benedetto, *Faith-Based Programs Flourishing, Bush Says*, USA TODAY, Mar. 9, 2006, at A.5.

148. Exec. Order No. 13,199, 66 Fed. Reg. 8499, § 1.

the mission of the WHOFBCI is to “enlist, equip, enable, empower, and expand the work of” FBCOs.<sup>149</sup>

To carry out this mission, a Center for Faith-Based and Community Initiatives (Center) was established within various federal agencies.<sup>150</sup> Each Center is headed by a director who acts as an intermediary between the head of the given agency and the director of the WHOFBCI.<sup>151</sup> There are now Centers within the Departments of Agriculture, Commerce, Education, HHS, Homeland Security, Housing and Urban Development, Justice, Labor, Transportation, and Veterans Affairs, as well as the Small Business Administration and the U.S. Agency for International Development.<sup>152</sup>

The WHOFBCI is a major expansion of the CCP. The priorities of each Center are to identify and eliminate any barriers for FBCOs receiving funding through the given agency, to make sure that FBCOs’ programs administered through state and local governments comply with equal treatment rules, promote donations to FBCOs, and to persuade the legislature to broaden CCP.<sup>153</sup> Where the CCP prohibited states from discriminating against FBOs in contracting work related to grant money stemming from a few major federal bills, FBCOs themselves can now apply for grant funding from nearly all of the executive agencies and from two independent agencies.<sup>154</sup>

Although grants through the WHOFBCI put essentially the same restrictions, which are called the “equal treatment rules,”<sup>155</sup>

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149. *Id.* §§ 2-3.

150. Exec. Order No. 13,198, 66 Fed. Reg. 8497, §§ 1-2 (Jan. 29, 2001).

151. *See id.*

152. *Id.* § 1(a) (establishing Centers in the Departments of Justice, Education, Labor, HHS, and Housing and Urban Development); Exec. Order No. 13,397, 71 Fed. Reg. 12,275, § 1(a) (Mar. 7, 2006) (establishing a Center in the Department of Homeland Security); Exec. Order No. 13,342, 69 Fed. Reg. 31,509, § 1(a) (June 1, 2004) (establishing Centers in the Departments of Commerce and Veterans Affairs, and the Small Business Administration); Exec. Order No. 13,280, 67 Fed. Reg. 77,145, § 1(a) (Dec. 12, 2002) (establishing Centers in the Department of Agriculture and the U.S. Agency for International Development). The Small Business Administration and U.S. Agency for International Development are independent agencies; all of the agencies listed as departments are executive branch agencies. Library of Congress: Newspaper & Current Periodical Reading Room, Official U.S. Executive Branch Web Sites, <http://www.loc.gov/rr/news/fedgov.html> (last visited Aug. 22, 2008). The executive branch agencies that do not have Centers founded within them are the Departments of Defense, Energy, Interior, State, and Treasury. *See id.*

153. *Compare* White House Faith-Based & Community Initiative, <http://www.whitehouse.gov/government/fbcipresident-initiative.html> (last visited Aug. 13, 2008), *with* § 3 of each of the four executive orders referenced *supra* in note 152.

154. *See* CHARITABLE CHOICE, *supra* note 134, at 18; FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 2.

155. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 12.

upon FBOs as those the CCP put on them,<sup>156</sup> one significant distinction is the inclusion of the “inherently religious” standard.<sup>157</sup> It provides that:

organizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services *separately in time or location* from any programs or services supported with *direct* Federal financial assistance, and participation in any such inherently religious activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance. . . .<sup>158</sup>

The given examples of “worship, religious instruction, and proselytization”<sup>159</sup> show inherently religious means, at a minimum, exclusively religious.<sup>160</sup> However, the inherently religious standard may also prohibit “significant religious content.”<sup>161</sup> In addition to some uncertainty as to how much “inherently religious” encapsulates,<sup>162</sup> there are several subtleties that allow FBOs to circumvent the standard altogether.

First, there is the distinction made in the text that the prohibition only applies to programs receiving direct funding.<sup>163</sup> Direct funding includes contracts, grants, subcontracts, subgrants, and cooperative agreements.<sup>164</sup> Thus, indirect funding, such as vouchers, coupons, and certificates, are not covered.<sup>165</sup> In those cases, program participants may be required to take part in religious activities, which do not have to be separate in time and place nor need they be privately funded.<sup>166</sup>

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156. *See supra* Part V.A.

157. Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2(e) (Dec. 12, 2002).

158. *Id.* (emphasis added).

159. *Id.*

160. IRA C. LUPU & ROBERT W. TUTTLE, *THE STATE OF THE LAW 2006: LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS* 5-6 (2006).

161. *Id.*

162. *Id.*

163. Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2(e) (Dec. 12, 2002).

164. WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, *PROMOTING EQUAL TREATMENT: A GUIDE FOR STATE & LOCAL COMPLIANCE WITH FEDERAL REGULATIONS* 8, <http://www.whitehouse.gov/government/fbci/pdf/etpc-presentation.pdf>.

165. *Id.*

166. *Id.* at 11. Thirty-seven states have constitutional provisions proscribing state funding of FBOs, of which six also specifically prohibit indirect aid, which could limit the funding of FBOs by the WHOFCI via the states. *STATE OF THE LAW 2002, supra* note 137, at 37, 78-79. However, if the state merely channels a federal block grant to a FBO, without contributing any of its own money, then it may be able to circumvent its own restrictions. *Id.* at 39.

Furthermore, even for direct funding, the inherently religious standard is still malleable. Per the equal treatment rules, FBOs can continue their religious activities as the same organization and in the same building.<sup>167</sup> Thus, FBOs can circumvent the “separate in time and place” provision simply by locating the religious activity in an adjoining room or waiting until after the WHOFBCI-funded program is “over” to invite participants to a religious activity.<sup>168</sup> Some participants may feel comfortable refusing an invitation to a religious activity or with the presence of religious activity in a neighboring room. However, other participants may feel they need to acquiesce with the invitation or presence of religious activity to access a government service.<sup>169</sup> This may be particularly true where the type of program provides a service that is necessary for participants’ livelihood, such as the marriage promotion and job training classes required to receive welfare benefits.<sup>170</sup>

### C. Investigation of WHOFBCI-Funded Programs

Compliance with the equal treatment rules among FBOs and state and federal agencies was one of the issues that the GAO investigated from March 2005 to June 2006.<sup>171</sup> The GAO interviewed federal officials who award and oversee the grants, state and local officials who monitor the FBOs, 26 FBOs, independent auditors who audited FBOs, and the documents that are provided to FBOs by the government.<sup>172</sup> Because the interviews were not done randomly, they cannot be generalized to all FBOs.<sup>173</sup> However, considering the thousands of FBOs and the billions of dollars that have been awarded to them,<sup>174</sup> it is reasonable to assume the results were not entirely isolated.

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167. Exec. Order No. 13,279, 67 Fed. Reg. 77, 141, § 2(e).

168. ESTHER KAPLAN, WITH GOD ON THEIR SIDE: HOW CHRISTIAN FUNDAMENTALISTS TRAMPLED SCIENCE, POLICY, AND DEMOCRACY IN GEORGE W. BUSH’S WHITE HOUSE 54 (2004) (citing DAVID FRUM, THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH 283 (2003)).

169. Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 31 (2007) (noting that religious minorities living in rural and suburban areas are particularly vulnerable to the advancement of religion by FBOs).

170. See CHARITABLE CHOICE, *supra* note 134, at 14.

171. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 3-5.

172. *Id.* at 4-5.

173. *Id.* at 5.

174. According to the data collection by the WHOFBCI, which does not count voucher or formula-grant programs or grants where the FBO is not a fiduciary agent, the awards to FBOs were at least \$1,700,000,000 in 2003, \$2,004,491,549 in 2004, \$2,154,246,246 in 2005, \$2,184,661,424 in 2006, and \$2,208,111,177 in 2007. WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, SELECT GRANTS TO FAITH-BASED ORGANIZATIONS AT FIVE AGENCIES 4 (2004), <http://www.whitehouse.gov/>

## 1. Difficulties with Monitoring FBOs

The GAO found that an initial hurdle to successful monitoring was that there is no standard process to identify FBOs.<sup>175</sup> If the FBOs do not classify themselves as such, then Centers have different definitions they use to attempt to identify the organization.<sup>176</sup> But without knowing with certainty whether an organization is an FBO, the officials monitoring it cannot really know if the equal treatment rules even apply.

In examining what information was provided to grantees about the equal treatment rules, the GAO found that not all of the federal grant program offices they investigated provided an explanation of their rules or their applicability,<sup>177</sup> or required FBOs to undergo training.<sup>178</sup> In whatever manner the FBOs apply the rules, if they do not at least know of their existence, then the likelihood the rules will be violated is even greater.<sup>179</sup>

## 2. Discovery of Violations of the Inherently Religious Standard

As it inspected how the equal treatment rules were being put into practice, the GAO found several FBOs in violation of the rule

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government/fbci/3-2\_final\_pres.pdf; WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GRANTS TO FAITH-BASED ORGANIZATIONS: FISCAL YEAR 2004 3 (2005), [http://www.whitehouse.gov/government/fbci/final\\_report\\_2004.pdf](http://www.whitehouse.gov/government/fbci/final_report_2004.pdf); WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GRANTS TO FAITH-BASED ORGANIZATIONS: FISCAL YEAR 2005 2 (2006), [http://www.whitehouse.gov/government/fbci/final\\_report\\_2005.pdf](http://www.whitehouse.gov/government/fbci/final_report_2005.pdf); WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, FEDERAL COMPETITIVE FUNDING TO FAITH-BASED AND SECULAR NON-PROFITS: FISCAL YEAR 2006 2 (2007), [http://www.whitehouse.gov/government/fbci/final\\_report\\_2006.pdf](http://www.whitehouse.gov/government/fbci/final_report_2006.pdf); FEDERAL COMPETITIVE FUNDING TO FAITH-BASED AND SECULAR NON-PROFITS: FISCAL YEAR 2007 2 (2008), [http://www.whitehouse.gov/government/fbci/final\\_report\\_2007.pdf](http://www.whitehouse.gov/government/fbci/final_report_2007.pdf). These amounts do not include the \$24,855,849 spent on administration from 2002 to 2006 by the Centers. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 20.

175. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 17. However, there is some evidence to suggest that where non-Christian organizations identify as such in the grant selection process, they may be discriminated against. KAPLAN, *supra* note 168, at 44-45.

176. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 17.

177. The documents examined included the grant announcement, grant application, and any additional information program officials provided to grant applicants or recipients. *Id.* at 29. One of the rules where FBOs were given little to no guidance was the rule that FBOs may use religion in their hiring decisions. *Id.* at 33. If some of the FBOs that would be inclined to make use of this rule do not do so, because they are unaware they have the right, then this may slightly alleviate the concern raised *supra* in note 142.

178. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 33-34.

179. *Id.* at 32.

that inherently religious activity be separate in time and place.<sup>180</sup> In two cases, FBO officials conceded that, at a beneficiary's request, they prayed with an entire group of beneficiaries during the federally-funded programming.<sup>181</sup> At another FBO, an official told the GAO "he began each program session, which provided services to children, with a nonsectarian prayer that at times included a brief reading from the Bible."<sup>182</sup> A fourth FBO official said that she discussed religious issues during the federally-funded programming "if requested by a participant and no other participants objected."<sup>183</sup>

In all of these examples, the inclusion of the religious message is not permissible simply because one program participant out of an entire group requested it or because none in the group objected. Even if all of the participants in a group were pleased to hear the religious message, the issue still remains that FBO officials should not be engaging in inherently religious activity during federally-funded programming.<sup>184</sup> As the GAO itself warned, these examples cannot be generalized to all FBOs.<sup>185</sup> However, they provide telling examples that the inherently religious standard was violated.<sup>186</sup>

### 3. Compliance Mechanisms

Given that these violations occurred, what monitoring is in place to make sure that they do not continue? The Single Audit Act "requires state and local governments and nonprofit organizations that expend \$500,000 or more in federal awards in a fiscal year to have a single audit, which is an audit of the federal grantee's financial statements and compliance with laws and regulations governing federal awards."<sup>187</sup> Aside from the fact that FBOs may not be subject to an audit if their funding does not match the \$500,000 amount,<sup>188</sup> there is no assurance that monitoring will catch a violation. Only two of the seven federal direct programs that the GAO investigated included the equal treatment rules in their monitoring guidelines.<sup>189</sup> The monitoring guidelines for another

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180. *Id.* at 34-35.

181. *Id.* Although the definition of "inherently religious" is vague, as might be expected by the specification in the equal treatment rules, the Court has left no doubt that prayer and worship are inherently religious activities. *Id.* at 35 n.40.

182. *Id.* at 35.

183. *Id.*

184. Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2(e) (Dec. 12, 2002).

185. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 5.

186. *See id.* at Highlights of GAO-06-616 a Report to Congressional Requesters.

187. *Id.* at 2-3.

188. *Id.* at 36.

189. *Id.* at 36-37.

seven programs did not even recognize that recipients were FBOs,<sup>190</sup> leaving the issue of whether the equal treatment rules should apply to the initiation of auditors.<sup>191</sup>

Even if a federal official knows what the equal treatment rules are, and that he must use them to monitor the FBO, the likelihood that a violation will be found is still low. It is unlikely that more than one site visit will be made during the entire course of a grant—if even one is made.<sup>192</sup> While the infrequency of site visits is partially related to the ratio of grant recipients to personnel in grant program offices, it is also because FBOs are not considered to be “at [a] higher risk for noncompliance [with program rules] than other organizations.”<sup>193</sup> Even if this assumption is somewhat warranted by the mandate that FBOs not be discriminated against based on their religious nature,<sup>194</sup> it ignores the reality that a FBO is much more likely than a secular organization to violate the inherently religious standard.

The GAO recommended that grant documents, monitoring guidelines, and auditing directions include information about equal treatment rules.<sup>195</sup> In response to the reaction of several departments that doing so would put an additional burden on auditors<sup>196</sup> and require singling out FBOs, the GAO clarified that it did not suggest that FBOs be monitored more frequently or differently than other organizations.<sup>197</sup> However, “creating a level playing field for FBOs does not mean that agencies should be relieved of their oversight responsibilities relating to the equal treatment regulations.”<sup>198</sup> The potential for violations and the lack of monitoring by program officials and auditors underscores why the refusal to allow taxpayer standing was such a troubling decision.

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190. *See id.* at 38.

191. *Id.* at 39.

192. *Id.* at 37 (noting that several federal agencies reported that they can visit only 5-10% of all grantees).

193. *Id.* at 36.

194. Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2(c) (Dec. 12, 2002) (“No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs.”).

195. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 53.

196. *Id.* at 9.

197. *Id.* at 55.

198. *Id.*



## VI. AVAILABLE REMEDIES IN ESTABLISHMENT CLAUSE CHALLENGES

The scope of a right is often defined by the remedies that are available to rectify violations of the right.<sup>199</sup> Parts III and IV of this Note considered how Establishment Clause rights will be limited by *Hein's* increased restrictions upon plaintiffs' ability to bring a claim. But once plaintiffs assert a claim that meets *Hein's* threshold, their remedy may be limited further by what types of relief are available. In an Establishment Clause claim against an FBO, injunctions have limited value, but stronger remedies, such as restitution, are currently receiving mixed application.

If the goal of litigation is simply to stop the harm of an alleged Establishment Clause violation, then an injunction can meet that need. It could halt programming and future payments to the FBO and even enjoin the government from reinstating funding.<sup>200</sup> However, injunctions are time-sensitive.<sup>201</sup> By the time a motion is made for summary judgment, all of the grant payments may have been made and expended, which would make injunctive relief, and potentially the lawsuit, moot.<sup>202</sup>

This scenario was exactly the situation in *Laskowski v. Spellings*.<sup>203</sup> Plaintiffs sued the University of Notre Dame for alleged improper allocation of funds to a sectarian subgrantee and for not monitoring use of the funds.<sup>204</sup> Less than two months after discovery concluded, all of the funds to the subgrantee had been spent.<sup>205</sup> Plaintiffs argued that the suit was not moot since the subgrantee could be forced to repay the funds to the government.<sup>206</sup> The district court held otherwise, finding that this repayment did not meet the traditional understanding of monetary damages and could not save the claim from mootness.<sup>207</sup>

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199. *Leading Cases*, *supra* note 19, at 333 nn.68-71.

200. *Freedom from Religion Found., Inc. v. Towey*, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444, at \*27-29 (D. Wis. Jan. 12, 2005), *aff'd sub nom.* *Freedom from Religion Found., Inc. v. Chao*, 250 F. App'x 751 (7th Cir. 2007).

201. See *Laskowski v. Spellings*, 443 F.3d 930, 933-34 (7th Cir. 2006).

202. *Laskowski v. Spellings*, No. 1:03-CV-1810 LJM-WTL, 2005 WL 1140694, at \*2 (S.D. Ind. May 13, 2005), *rev'd*, 443 F.3d at 933-34.

203. *Id.*

204. *Id.* at \*1. The subgrantee, Alliance for Catholic Education, trained Catholic schoolteachers and its program "ha[d] both secular and religious components." *Laskowski*, 443 F.3d at 933. In addition to administering training courses, teachers "resid[ed] in faith-based communities" and were "encourage[d] to live and work in accordance with the tenets of the Catholic faith." *Id.*

205. *Laskowski*, 2005 WL 1140694, at \*1.

206. *Id.* at \*2.

207. *Id.* ("Damages,' on the other hand, has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by a defendant's

The Court of Appeals for the Seventh Circuit reversed, holding that while injunctive relief was moot, the lawsuit itself was not, and restitution was a viable remedy.<sup>208</sup> The “case would be moot only if the district court could make no order that would compensate [plaintiffs] in whole or in part for the injury consisting of the improper expenditure. . . . It can be rectified simply by the restoration of the money to the U.S. Treasury.”<sup>209</sup> Although the reasoning supporting restitution was worded simply in terms of remedying the wrong,<sup>210</sup> there are also other considerations why restitution may be appropriate.

The district court in *Americans United for Separation of Church & State v. Prison Fellowship Ministries* articulated several such reasons when it ordered a \$1,529,182.70 repayment.<sup>211</sup> The court found that the InnerChange anti-recidivism program, affiliated with Prison Fellowship Ministries (PFM), violated the *Lemon* test as modified by *Agostini* where the state prison system incentivized participation in InnerChange, which was pervasively sectarian, while offering no secular alternative.<sup>212</sup> The court considered the severity of the violations<sup>213</sup> the contractual relationship between Iowa and PFM,<sup>214</sup> the financial ability of PFM to repay Iowa, and defendants’ knowledge that their actions were illegal.<sup>215</sup>

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breach of duty, and is different from equitable restitution.” (citing *U.S. v. Balistreri*, 981 F.2d 916, 928) (7th Cir. 1992))) .

208. *Laskowski*, 443 F.3d at 933-34, 939. The remedy of restitution is based on the theory of unjust enrichment. *See id.* at 934-35. (“It would be like a case of money received by mistake and ordered returned to the rightful owner.”). Showing some favor for the use of restitution, the court specifically noted that federal courts may order restitution for violations of federal law, either public or private. *Id.* at 934. (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 203-05 (1967)).

209. *Id.* at 933-34.

210. *See id.*

211. 432 F. Supp. 2d 862, 939-41 (S.D. Iowa 2006). The court also granted declaratory judgment, announcing that Iowa, InnerChange, and Prison Fellowship Ministries, InnerChange’s parent organization, had violated plaintiffs’ Establishment Clause rights. *Id.* at 934. Additionally, the court granted injunctive relief, enjoining all future payments and payments due. *Id.* at 938.

212. *Id.* at 915-33. “For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one [of] its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates.” *Id.* at 933 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002)).

213. *Id.* at 939 (“The violations in *Lemon II* and *Cathedral Academy* appear quaint next to the intentional choice . . . to inculcate prisoners as a treatment for recidivist behavior.”).

214. *Id.* (noting that the ongoing nature of the relationship strengthened the appearance of InnerChange as a state endorsement of religion).

215. *Id.* at 940-41. The court noted InnerChange and PFM had been represented by counsel who were very familiar with First Amendment law, and that the California

However, the restitution order in *Prison Fellowship Ministries* was reversed by the Court of Appeals for the Eighth Circuit.<sup>216</sup> In noting that the district court had abused its discretion, the court of appeals explicitly refuted parts of the district court's analysis.<sup>217</sup> The court of appeals disagreed that defendants had notice of the illegality of their actions.<sup>218</sup> Second, the court remarked that InnerChange and PFM's ability to afford restitution should have no bearing on the use of restitution as a remedy since it would "deter[] financially sound organizations from contracting with the government."<sup>219</sup>

However, in a case where the Establishment Clause violation was evident, but the culpability of the defendants involved was uncertain, a court might reasonably disfavor restitution where it would cripple defendant organizations. But where the effect would not be completely destructive, it might be reasonable to order partial—or full—restitution. If courts are completely disallowed from considering ability to pay, then the likelihood that restitution would be used is probably significantly lower since its effects would be so harsh on small FBOs. Moreover, the concern should not be whether well-funded organizations will avoid seeking additional funding. Rather, it should be what remedies will cause FBOs to take their legal responsibilities towards programs participants seriously.

The court of appeals continued its analysis by pointing to several facts that weighed in favor of defendants' good faith.<sup>220</sup> In particular, the funding had been authorized by state statutes, the primary intent of the involved state officials was not to promote religion, and the legislature halted funding with the issue of the district court's injunction.<sup>221</sup> Presumably, the court's earlier-mentioned discussion that it did not consider defendants to have notice of illegality also weighed in favor of their good faith.<sup>222</sup> Additionally, the court wrote that the district court did not properly credit prison officials'

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Department of Corrections had provided them with a memorandum outlining why using their program would create Establishment Clause concerns. *Id.* at 940.

216. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 426-28 (8th Cir. 2007). However, the court affirmed the finding that Iowa's funding of InnerChange's programming violated the Establishment Clause. *Id.* at 425. The court's ruling may be given particular weight by other circuits considering that one member of the three-judge panel was retired Associate Justice Sandra Day O'Connor, sitting by designation. *Id.* at 413 n.1.

217. *Id.* at 427-28.

218. *Id.* at 427. The court dismissed the significance of the California Department of Corrections memorandum and said: "Even if there were some risk associated with the program, it cannot be said that resolution of this case was clearly foreshadowed." *Id.*

219. *Id.* at 428 (citing *Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973)).

220. *Id.* at 427.

221. *Id.*

222. *See id.*

testimony that the InnerChange program benefited inmates.<sup>223</sup> While not specifically labeled as a defense, the good faith analysis in *Prison Fellowship Ministries* echoes the defense to restitution the court of appeals articulated in *Laskowski*.<sup>224</sup>

The court of appeals noted in *Laskowski* that: "The recipient of the money . . . may not have known or have had reason to know that it was receiving money by mistake, and may have relied to its detriment on its honest and reasonable belief that it was legally entitled to the money."<sup>225</sup> Denying the petition for hearing en banc, the court was concerned its earlier words would be interpreted to expand the liability of fiscal intermediaries—here, a grantee who provides part of its grant to a subgrantee.<sup>226</sup> The court particularly emphasized the significance "that it knows or should know was wrongfully obtained" in determining whether restitution is appropriate.<sup>227</sup>

These qualifications on the use of restitution as a remedy underscore the need for the resolution of the concerns raised by the GAO regarding the lack of instruction to FBOs about equal treatment rules.<sup>228</sup> If an FBO can show a paper trail between itself and the awarding agency that is devoid of any, or only vague mention of the equal treatment rules, then a court may be convinced that the FBO acted in good faith.<sup>229</sup> However, if FBOs have been put on clear notice of the equal treatment rules, which is followed-up with at least minimal monitoring, then there should be no excuse for Establishment Clause violations.

Restitution is certainly a stronger remedy than an injunction in its effect upon a defendant FBO. Yet, in a given case, it may be a necessary one. In addition to the *Laskowski* scenario,<sup>230</sup> the nearer a grant is to completion, the less meaning an injunction will have. Plaintiffs who are granted taxpayer standing after *Hein* should at least be allowed a remedy sufficient to vindicate the violations of their Establishment Clause rights.

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223. *Id.*

224. *Id.*; see *Laskowski v. Spellings*, 443 F.3d 930, 936 (7th Cir. 2006).

225. *Laskowski*, 443 F.3d at 936.

226. *Laskowski v. Spellings*, 456 F.3d 702, 704 (7th Cir. 2006), *vacated sub. nom.* *Univ. of Notre Dame v. Laskowski*, 127 S. Ct. 3051 (2007) (remanding to court of appeals "in light of *Hein v. Freedom from Religion Found., Inc.*").

227. *Id.*

228. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 29, 33-34; see *supra* Part V.C.3.

229. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 427 (8th Cir. 2007).

230. *Laskowski v. Spellings*, No. 1:03-CV-1810 LJM-WTL, 2005 WL 1140694, at \*2 (S.D. Ind. May 13, 2005), *rev'd*, 443 F.3d 930 (7th Cir. 2006).

## CONCLUSION

As President Bush's time in office draws to a close, it seems rather unlikely that the WHOFBCI will be dismantled by a future administration. In *Hein*, the Court granted the executive and legislative branches wide discretion to fund FBOs so long as no statute is enacted.<sup>231</sup> It would be a rare president and Congress that would give up that much power to fund their social agendas<sup>232</sup>—and to use as a bargaining chip against the other political party.<sup>233</sup> Thus, discussions about the future of the WHOFBCI should center on how to ensure the WHOFBCI complies with Establishment Clause requirements.

As the GAO report made clear, FBOs need to be given clear instruction about what actions are impermissible under the equal treatment rules and be subject to at least minimal monitoring as to how they carry out their programming.<sup>234</sup> FBOs have the potential to provide services that are individualized to particular communities' needs,<sup>235</sup> but as long as they are funded by the government, they cannot carry out services in any manner they chose.<sup>236</sup>

Throughout those discussions, it should be remembered that there is an important constitutional value at stake. "In its most basic sense, religious 'liberty' means . . . the freedom to make religious choices for oneself, free from governmental compulsion or improper influence."<sup>237</sup> The significance of religious liberty stems from the centrality of religious beliefs to individuals' understanding of themselves and the world.<sup>238</sup> Beyond engaging in acts that could be considered coercive, FBOs should be careful not to convey the

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231. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2567-68 & n.7 (2007).

232. In the 2008 presidential primaries, candidates of both major political parties—Senators Clinton, McCain, and Obama—pledged to continue funding the WHOFBCI; the democratic candidates, however, expressed some caveats about how they would utilize the WHOFBCI. Sarah Pulliam, *Hazy Faith-Based Future*, CHRISTIANITY TODAY, Mar. 11, 2008, [http://www.christianitytoday.com/ct/article\\_print.html?id=53985](http://www.christianitytoday.com/ct/article_print.html?id=53985).

233. Political parties often act in ways that appear to contradict their stated interests, though their motivations can only be guessed. See Cheryl Wetzstein, *Congress Extends Funding for Abstinence Education*, WASH. TIMES, July 15, 2007, at A02.

234. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 29, 33, 36-37.

235. GLENN, *supra* note 141, at 77. But see Naomi Rivkind Shatz, Comment, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495 (2008) (arguing that particular programs are so imbued with religious values that funding them per se violates the Establishment Clause).

236. FAITH-BASED AND COMMUNITY INITIATIVE, *supra* note 145, at 55.

237. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 38 (2003).

238. *Id.* at 39.

message that “nonadherents . . . 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.”<sup>239</sup> Moreover, when Establishment Clause violations do occur, restitution should be used to remedy the violation fully. The religious liberty of taxpayers, including those being served by FBOs, should not diminish in importance when FBOs are funded by the government.

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239. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).