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Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality

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Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality

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**BRINGING DOWN THE ESTABLISHMENT:
FAITH-BASED AND COMMUNITY
INITIATIVE FUNDING, CHRISTIANITY,
AND SAME-SEX EQUALITY**

*Anthony M. Lise**

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The laws of God, the laws of man,
 He may keep that will and can;
 Not I: let God and man decree
 Laws for themselves and not for me;
 And if my ways are not as theirs
 Let them mind their own affairs.
 Their deeds I judge and much condemn,
 Yet when did I make laws for them?
 Please yourselves, say I, and they
 Need only look the other way.
 But no, they will not; they must still
 Wrest their neighbour to their will,
 And make me dance as they desire
 With jail and gallows and hell-fire.
 And how am I to face the odds
 Of man's bedevilment and God's?¹

INTRODUCTION

Christian ideology is deeply embedded in our culture. Some, such as former President George W. Bush and those who adhere to his conception of Christianity, celebrate the marriage of Christianity and the law; however, that union violates a fundamental principle of American law—that “Congress shall make no law respecting an establishment of religion[.]”² However, because Christianity has become so instrumental in shaping the law, it is often difficult to distinguish religious interests from secular interests, or interests that favor an establishment of religion from those that do not. The inability to make such a distinction has rendered permissible both government funding of faith-based organizations and legally sanctioned discrimination against homosexuals.

¹ A.E. Housman, *The Laws of God, the Laws of Man*, in *THE PENGUIN BOOK OF HOMOSEXUAL VERSE* 238, 238–39 (Stephen Coote ed., 1983).

² U.S. CONST. amend. I.

The Establishment Clause was, in the words of Jefferson, meant to “[build] a wall of separation between church and State.”³ The Supreme Court, in its interpretation of the Establishment Clause, has departed dramatically from this strict separation. Instead, it has developed a series of elementized tests for determining whether government involvement with religion has run afoul of the Establishment Clause. Although this departure is unfortunate, the author intends to demonstrate that both government funding of faith-based organizations and legally sanctioned discrimination against homosexuals violates the Establishment Clause, even in its weakened state.

Recently, the Supreme Court, in *Hein v. Freedom from Religion Foundation, Inc.*,⁴ has effectively rendered the Establishment Clause meaningless with respect to actions by the Executive Branch. The Court, by denying standing to persons in their capacities as taxpayers, has immunized the Executive Branch from judicial review with respect to its general expenditures. In doing so, the Court has given license to the Executive Branch both to proselytize and to direct its funds to faith-based groups that discriminate. Although the Court has not deemed such actions constitutionally permissible *per se*, it has, by denying standing to those who may challenge those actions, rendered those actions practically permissible.

President Bush, through his Faith-based and Community Initiative (“FBCI”), has demonstrated his perception of the proper role of faith-based organizations in our society. However, his vision is fraught with the possibility that the government, through its funding of faith-based organizations, will use religion to discriminate against citizens of the United States. In fact, such discrimination has already occurred, and the Supreme Court, in *Hein*, has rendered that discrimination, at least with respect to the Executive Branch, permissible.

In the following pages, this Article will present the teachings of predominant Christian sects with respect to homosexuality, focusing on Catholicism. It will then provide a historical survey of Christianity to demonstrate how Christian teachings with respect to homosexuality have become embedded in American law.

The Article will then focus on the development and deconstruction of the Establishment Clause, focusing on what Madison and Jefferson understood it to mean, the Supreme Court’s different interpretations, and the role of religion in government as per-

³ Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802).

⁴ *Hein v. Freedom from Religion Found. Inc.*, 127 S.Ct. 2553, 2563 (2007).

ceived by President Bush as evidenced by his Faith-based and Community Initiative.

Then, the Article will briefly present the Supreme Court's holding in *Flast v. Cohen*⁵ to assist in understanding the Supreme Court's construction of that holding in *Hein*, which the Article will discuss in greater detail. It will also present recent Establishment Clause challenges by taxpayers to government funding of faith-based organizations prior to *Hein*. Afterward, the Article will present the decision of the Southern District of New York in *Lown v. Salvation Army, Inc.*,⁶ which suggests that such a challenge may be the only possibility of recourse for persons subjected to discrimination at the hands of government-funded faith-based organizations.

The Article will then analyze the repercussions of *Hein* with respect to the entanglement between the Executive Branch and religion as well as President Bush's Faith-based and Community Initiative. It will proceed to argue that government funding of faith-based organizations violates the Establishment Clause, that faith-based organizations use religion to discriminate against homosexuals and that the government, by funding those organizations, also discriminates. The Article will argue that legally sanctioned discrimination against homosexuals is merely an imposition of Christian ideology upon the electorate, and as such, violates the Establishment Clause. In the course of that discussion, it will demonstrate that both England's break with the Catholic Church and the medical profession have led to a misconstruction of religious interests as secular and have given secular and scientific clout to discrimination against homosexuals.

The Article then argues that, pursuant to *Hein*, the Executive Branch may, immune from judicial review, use religion to denounce homosexuality or provide funds to faith-based groups that do so.⁷ The article will discuss *Lown v. Salvation Army, Inc.*, which suggests that the Establishment Clause may be the only possibility for recourse for those who have been subject to discrimination by government-funded faith-based groups; but that the Supreme

⁵ *Flast v. Cohen*, 392 U.S. 83 (1968).

⁶ *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

⁷ A caveat: The author has consciously chosen to use the term "homosexual." The term is meant to encompass those who identify as "gay," "lesbian," "queer," "bisexual," or "transgender." The author stresses that this does not in any way demonstrate a belief on his part that those identities should be excluded from discourse but merely the reality that religious groups and the law generally do not recognize the diversity of the queer community. The author has decided to use the term "homosexual" for consistency and to alleviate confusion; however, when the term is used in his voice, it is meant to encompass the aforementioned identities.

Court, in *Hein*, foreclosed that possibility, at least with respect to general expenditures by the Executive Branch.

I. CHRISTIANITY AND THE LAW

A. *Heterosexual Morality as Christian Ideology: Homosexuality and Christianity*

The Bible serves as the primary justification for Christians who discriminate against homosexuals. The book of Leviticus considers homosexuality an abomination, warning believers that, “Thou shalt not lie with mankind, as with womankind: it is abomination,”⁸ and that “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”⁹ The texts, as well as modern culture, construe homosexuals as equivalent to sodomites. The book of Deuteronomy proclaims that, “There shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel. Thou shalt not bring the hire of a whore, or the price of a dog, into the house of the Lord thy God for any vow: for even both these are [an] abomination unto the Lord thy God.”¹⁰

Denunciation of homosexuality appears even in the New Testament, which Christians, especially Catholics, interpret as a symbol of and testament to the love of Christ for his followers.¹¹ The first book of Corinthians precludes the “effeminate” from inheriting the kingdom of God.¹² The Book of Romans describes a shameful scenario where men “leaving the natural use of the woman, burned in their lust, one towards another; men with men working that which is unseemly and receiving in themselves the recompence of their error which was meet.”¹³

Although the Torah and the Bible do not explicitly denounce sexual relations between women, proscriptions against same-sex relations have historically been construed throughout Anglo-European law as including both lesbian and gay male identities.¹⁴ The Catholic Church, a powerful political and religious force, considers

⁸ *Leviticus* 18:22.

⁹ *Leviticus* 20:13.

¹⁰ *Deuteronomy* 23:17–18.

¹¹ See CATECHISM OF THE CATHOLIC CHURCH, 566 §§ 2357–59 (Libreria Editrice Vaticana 1994).

¹² *1 Corinthians* 6:9–10.

¹³ *Romans* 1:24, 26–27.

¹⁴ See Ruthann Robson, *Lesbianism in Anglo-European Legal History*, 5 WIS. WOMEN'S L.J. 1 (1990) (refuting the misconception that Anglo-European proscriptions against homosexuality applied exclusively to men).

homosexuality a burden akin to a physical or mental handicap.¹⁵ Catholics do not deny the pervasive existence of homosexuals, but direct homosexuals to live a life of celibacy for which they will be rewarded in the afterlife.¹⁶ The Catholic Church condemns not what it considers the homosexual condition, but rather acts of homosexuality. It directs homosexuals to accept the plight that is their homosexuality and assures homosexuals they will be rewarded for their abstinence.¹⁷

Though the Catechism suggests that discrimination against homosexuals should be avoided, the Vatican, in 1992, in the wake of proposed anti-discrimination legislation in Congress issued a statement warning that anti-discrimination legislation could “encourage a person with a homosexual orientation to declare his homosexuality or even to seek a partner.”¹⁸ Though hypocritical, the statements by the Vatican are relatively humane compared to the statements by and proposals of members of the religious right—conservative Christians and Evangelicals. That same year, the director of the Coalition on Revival declared that “homosexuality makes God vomit,”¹⁹ while fundamentalists, angered by President

¹⁵ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 11.

¹⁶ *Id.*

¹⁷ *Id.*

“Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that ‘homosexual acts are intrinsically disordered.’ They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved. The number of men and women who have deep-seated homosexual tendencies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God’s will in their lives and, if they are Christians, to unite to the sacrifice of the Lord’s Cross the difficulties they may encounter from their condition. Homosexual persons are called to chastity. By the virtues of self-mastery that teach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.”

Id.

¹⁸ JIM HILL & RAND CHEADLE, *THE BIBLE TELLS ME SO: USES AND ABUSES OF HOLY SCRIPTURE* 72 (1996).

¹⁹ *Id.* at 70–71 (quoting *The Advocate*, Oct. 20, 1992) (the Coalition on Revival calls for the adoption of the Old Testament as American law).

Clinton's "pro-gay stance," called upon Rev. Billy Graham to break his tradition of leading the nation in prayer at the President's inauguration.²⁰

However, contemporary protest by Christian groups against homosexuality did not begin with the Clinton Administration. In the 1960s, the Roman Catholic Church, in response to the proposed repeal of New York State's sodomy law, led a campaign that defeated the proposal.²¹ When the New York Court of Appeals eventually invalidated the statute in 1980,²² the Church "urged that consensual sodomy must remain a crime because: 'We must take every reasonable step to inhibit [homosexuality's] spread and to eradicate it.'"²³ In 1977, singer Anita Bryant, driven by her Baptist faith, led a successful campaign to rescind a gay rights ordinance that had been passed in Dade County, Florida.²⁴ Bryant warned fellow believers that because homosexuals could not reproduce, "they must freshen their ranks with our children."²⁵ In response, queer advocates plead, "We are your children."²⁶

The rise of the AIDS crisis among the gay community in the early 1980s fueled further disdain of homosexuality by the religious right. Several representatives of the religious right, including former U.S. Senator, the late Jesse Helms, and founder of the Christian coalition and politico, Pat Robertson, called for the construction of quarantine camps for those suffering with AIDS to "protect the innocent."²⁷ In 1983, a spokesman for the Moral Majority warned that, "If homosexuals are not stopped, they will in time infect the entire nation, and America will be destroyed."²⁸ Jerry Falwell, co-founder of the Moral Majority, characterized homosexuals in 1984, as "brute beasts . . . part of a vile and satanic

²⁰ *Id.* at 70.

²¹ See John Sibley, *Overhaul Urged for Penal Code*, N.Y. TIMES, Mar. 17, 1964, at 1; Emanuel Perlmutter, *Penal Law Plan Meets Objection*, N.Y. TIMES, Nov. 25, 1964, at 43; Emanuel Perlmutter, *Catholics and Episcopalians Differ on Law for Sex Deviates*, N.Y. TIMES, Nov. 26, 1964, at 1; R.W. Apple Jr., *Revised Penal Code Sent to Legislature*, N.Y. TIMES, Mar. 17, 1965, at 1; John Sibley, *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1; John Sibley, *Governor Signs New Penal Law*, N.Y. TIMES, July 23, 1965, at 1.

²² *People v. Onofre*, 51 N.Y.2d 476 (1980).

²³ See Matthew Thomas Robinson, *People v. Onofre: Can the State Peek Into Your Bedroom?*, 2 BUFF. PUB. INT. L.J. 6, 6-7 (1980-1981).

²⁴ See, e.g., DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 292 (1999).

²⁵ *Id.* at 69.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

system [that] will be utterly annihilated, and there will be a celebration in heaven."²⁹

B. History of Christianity and the Law

Ancient societies, including the Greeks, tolerated and even condoned homosexuality; Greece was eventually consumed by the Roman Empire, which was consumed, in turn, by Christianity.³⁰ Christianity's control over the Roman Empire marks the genesis of Judeo-Christian entanglement with modern American law. Roman Emperor Caesar Flavius Anicius Justinianus ("Justinian") became convinced, based on his Christian beliefs, "that the earthquakes, famine, and pestilence his empire had suffered were the consequence of God's wrath upon homosexuals."³¹ His 77th Novella, promulgated in A.D. 538, reflects this belief by characterizing lust between men as disgraceful and as contrary to nature.³² As punishment for violation of the statute, homosexuals were to be "tortured, mutilated, paraded in public, and executed."³³

Justinian's Code served as a pretext to an even greater hostility toward homosexuality that arose in the 11th and 12th centuries. After the dissolution of the Roman Empire, a number of religious factions arose throughout Europe.³⁴ One of the most prominent of those factions was the Cathars.³⁵ The Cathars advocated "nonviolence, the end of private property, and 'spiritual,' i.e., chaste marriages."³⁶ The continued growth of the Cathars, especially in

²⁹ *Id.* at 69–70.

³⁰ C. Ray Cliett, *How a Note or a Grope Can Be Justification for the Killing of a Homosexual: An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African Americans and Women*, 29 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 219, 251 (2003).

³¹ HILL & CHEADLE, *supra* note 18, at 68.

³² Timothy W. Reinig, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 *BUFF. L. REV.* 859, 870 (1990).

[S]ince certain men, seized by diabolical incitement, practise among themselves the most disgraceful lusts, and act contrary to nature: we enjoin them to take to heart the fear of God and the judgment to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perished, together with the men in them.

Id. The "perish of cities" refers to conventional understanding of the biblical tale of Sodom and Gomorrah wherein the cities of Sodom and Gomorrah were destroyed by "brimstone and fire from the Lord out of heaven," because their inhabitants had engaged, among a number of other sins, in sodomy. Genesis 19:24–25.

³³ *Id.*

³⁴ *Id.* at 872.

³⁵ *Id.*

³⁶ *Id.*

France, eventually drew the attention of the Inquisition. Opponents, including the floundering Roman Catholic Church, claimed that in order to maintain their chaste marriages, the Cathars sodomized their wives.³⁷ To retain control, Pope Innocent II launched a crusade of a half million men, who slaughtered the Cathars throughout Provence.³⁸

The Roman Catholic Church accused a number of sects of sodomy, incest, bestiality and orgy well into the 14th century.³⁹ Pope Clement V, along with Philip IV of France, in an effort to seize their treasury, extinguished the Order of the Knights Templar.⁴⁰ Together, they forced the Templars to admit, under torture, that they had been “required to spit on the cross, enter [into] a pact with the Muslims, and commit sodomy with any Templar who demanded it.”⁴¹ According to scholar Arno Karlen, this formula of charges—heresy, treason, and homosexuality—became routine in heresy and witchcraft trials.⁴²

These medieval religious authorities characterized their inquisition not as a punishment, but as a cure. They prescribed, among other practices, burning at the stake for homosexuals.⁴³ In fact, the term *faggot* referred to the kindling used to light the fire under a criminal sentenced to burn.⁴⁴

Against this backdrop, Christian denunciation of homosexuality had permeated legal texts in England by the 14th century. Sir William Blackstone wrote that sodomy was a crime that “the express law of God, determine[s] to be capital. Of which we have a single instance . . . by the destruction of two cities by fire from heaven.”⁴⁵ The appropriate punishment for the sodomite was to

³⁷ *Id.* The characterization of the sodomite as a homosexual has been inconsistent throughout history. Sodomy seemed to be used interchangeably with sex between men, though that characterization was not exclusive. It would not become so until the medical profession created the term homosexual and made the homosexual synonymous with the sodomite in the 19th century.

³⁸ ARNO KARLEN, *Homosexuality in History*, in *HOMOSEXUAL BEHAVIOR, A MODERN REAPPRAISAL* 75, 88 (J. Marmor ed., Basic Books, Inc. 1980). The Cathars, for their claimed sodomizing of their wives, were analogized to the Bogomile sect of Bulgaria who were considered heretics. Consequently, the French word “bougre” came into use for sodomite. Its English translation is “bugger” which is commonly used in England as the word for both intercourse and homosexuality. *Id.*

³⁹ *Id.* at 88–89.

⁴⁰ *Id.* at 89.

⁴¹ *Id.*

⁴² *Id.*

⁴³ HILL & CHEADLE, *supra* note 18, at 68.

⁴⁴ *Id.*

⁴⁵ Phong Duong, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 GONZ. L. REV. 539, 543 (2004).

be buried alive.⁴⁶

Until the 16th century, regulation and punishment of homosexuality was the exclusive province of the Roman Catholic Church; however, the English monarchy secularized those proscriptions.⁴⁷ The 16th century hosted the great divide between England and the Roman Catholic Church. Henry VIII of England, in an effort to renounce Roman Catholic control, secularized Catholic doctrine by enacting it into law.⁴⁸ In 1533, the Reformation Parliament, at the behest of Henry VIII, made “the detestable and abominable vice of buggery committed with mankind or beast punishable by death.”⁴⁹ Elizabeth I reenacted the Act of 1533 with a mandatory death penalty.⁵⁰ At this time, however, the crime of sodomy or buggery was not exclusively characterized as an act between two men, but also as an act between a man and a woman.⁵¹

The proscription against sodomy in the United States began with the application of these English sodomy statutes in the colonies.⁵² “Colonial law was essentially religious law, and ‘all crime was . . . synonymous with sin.’”⁵³ Colonial Protestants condemned all sex outside of marriage and permitted sex within marriage only for the purpose of procreation.⁵⁴ John D’Emilio has suggested that the colonists considered non-procreative sexual activity as counter-utilitarian.⁵⁵ “Sexual behavior that did not support reproduction, not even considering the ‘counterproductive’ and ‘morally-wrong’ acts of homosexuality, was seen as deviant, [and] self-indulgent.”⁵⁶ Accordingly, all non-procreative sex, including sodomy, was generally prohibited,⁵⁷ although the colonies varied in their approaches

⁴⁶ *Id.*

⁴⁷ William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012 (1997), citing Act of 1533, 25 Hen. 8, ch. 6 (Eng.).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

⁵³ Brief for American Civil Liberties Union as Amici Curaie Supporting Petitioners, at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) No. 02-102, quoting WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY: 1760-1830* 39 (1975).

⁵⁴ *Id.*

⁵⁵ See John D’Emilio, *Sexual Politics, and Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* 10 (The University of Chicago Press) (1983).

⁵⁶ Duong, *supra* note 45.

⁵⁷ Brief for American Civil Liberties Union *supra* note 53, at 16.

to those prohibitions.⁵⁸

After U.S. Independence, the original thirteen states adopted anti-sodomy laws similar to the Act of 1533, though most abolished the requirement of the death penalty as punishment.⁵⁹ Similar to their English predecessors, the laws failed to clearly define what was meant by sodomy or buggery or to whom those acts extended. Interestingly, the language of the laws began to reflect what Blackstone termed the “infamous crime against nature” and made less explicit reference to passages of the Bible.⁶⁰ This clearly demarcates the point at which Christian ideology became cloaked behind the façade of secular law.

The medical profession, by the 19th century, concretized this distorted perception that Christian ideology was in fact secular law. It created the term *homosexual*, clearly defined the sodomite as synonymous with the homosexual, and provided scientific justification for discrimination against homosexuals where such discrimination had once only been justified by adherence to the Bible.⁶¹ In 1886, Richard von Krafft-Ebing published *Psychopathia Sexualis*.⁶² *Psychopathia Sexualis* was received widely among the medical profession in the United States and Europe.⁶³ Krafft-Ebing posited that men and women were biologically distinct and, as

⁵⁸ Eskridge, *supra* note 47, at 1013.

The American colonies followed a variety of approaches. The southern and middle colonies generally assumed or legislated that the Act of 1533 and its death penalty applied within their jurisdictions. Explicitly invoking biblical injunctions against men ‘lying’ with other men, New England colonies adopted statutes or policies covering more activities than the Act of 1533. Although the Massachusetts Bay Colony seriously considered but ultimately rejected the Reverend John Cotton’s 1636 proposal that intercourse between women be included as sodomy, the New Haven Colony in 1656 prohibited under pain of death men lying with men, women lying with women, masturbation (if aggravating circumstances), and any other ‘carnall knowledge.’ The crimes of masturbation and women lying with women were dropped as offenses when the Connecticut Colony was formed in 1665, however. On the other hand, the authorities in Connecticut and Massachusetts, like those in Virginia, were willing to prosecute men and on at least one occasion women for same-sex lewdness without a specific statutory basis. Altogether there are records of no fewer than twenty sodomy prosecutions, and four executions, during the colonial period.

Id.

⁵⁹ *Id.* at 1013.

⁶⁰ *Id.* at 1013–14.

⁶¹ Eskridge, Jr., *supra* note 47, at 1010–11.

⁶² RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (Franklin S. Klaf trans., Arcade Publishing ed., 1998) (1886).

⁶³ Eskridge, Jr., *supra* note 47, at 1022 (discussing Von Kraft-Ebing’s work).

such, had different sexual instincts.⁶⁴ “Man ‘has beyond doubt the stronger sexual appetite’ and is ‘aggressive and impetuous,’ while nurturing woman ‘remains passive’ as the man woos her.”⁶⁵ According to Krafft-Ebing, the anthropological development of a race was evidenced by the contrasts between the male and female genders.⁶⁶ He assumed that normal sex was vaginal intercourse between the masculine male and the feminine female and described any other sexual act as an array of deviations from that norm.⁶⁷ According to Krafft-Ebing, any predisposition to deviate from the norm was “rooted in a congenital defect in the deviant’s brain or constitution.”⁶⁸ “‘Inversion’ by women or men revealing physical or psychological characteristics of the opposite sex was for Krafft-Ebing a leading sexual pathology reflecting a broader mental or physical ‘degeneration,’ or reversion to a prior evolutionary status.”⁶⁹ According to William Eskridge, Jr., “Americans were most fascinated with Krafft-Ebing’s idea that any departure from strict binary gender roles (man=masculine, woman=feminine) represented a ‘degeneration’ to more primitive forms.”⁷⁰

II. THE ESTABLISHMENT

A. *A Survey of Governmental Approaches to the Separation of Church and State: Bringing Down the Establishment*

The Establishment Clause of the First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion”⁷¹ Although the text is seemingly clear, the question of what constitutes an establishment of religion has been a matter of controversy since before the adoption of the Constitution.

1. Madison and Jefferson

Debate as to the role of religion in the burgeoning nation arose in 1785 upon a proposal to establish religion in the State of Virginia.⁷² Both Thomas Jefferson and James Madison, two men

⁶⁴ *Id.* at 1022–23.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1023.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; see also JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 193 (The University of Chicago Press 1997) (1988).

⁷⁰ Eskridge, Jr., *supra* note 47, at 1023.

⁷¹ U.S. CONST. amend. I.

⁷² Brief for Legal and Religious Historians and Law Scholars as Amici Curaie, at

who would become instrumental in the creation and adoption of the U.S. Constitution, came out strongly against such an establishment.⁷³ Their warnings and philosophies provide guidance for what the framers intended when they prohibited laws respecting the establishment of religion.⁷⁴

James Madison, in his Memorial and Remonstrance against Religious Assessments in Virginia, maintained that religion is wholly exempt from the cognizance of civil society, and that because the legislators acted as representatives of the people, religion was beyond the purview of the legislature.⁷⁵ He insisted that free government depended not only on a strict separation of religious and civil authority but also that religion, in order to maintain freedom, must not be used in any way to overleap the civil rights of the people.⁷⁶ “The Rulers who are guilty of such an encroachment,” he stated, “exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.”⁷⁷

Jefferson, in opposing the establishment of religion in Virginia, purported that establishment of religion not only violated the civil rights of man, but also the will of God who “. . . chose not to propagate [religion]” by coercion, creating in humanity a free mind.⁷⁸ According to Jefferson, the assumption of dominion over the faith of others by legislators and rulers is impious and deprives a citizen of his liberty.⁷⁹ With respect to legally required financial contribution to religion, Jefferson stated that “. . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical”⁸⁰

After adoption of the Establishment Clause, Jefferson professed that the “act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ . . . [er-

16, *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007) (No. 06-157).

⁷³ *Id.* at 16, 21–22.

⁷⁴ *Id.* at 22.

⁷⁵ James Madison, Memorial and Remonstrance against Religious Assessments in The Papers of James Madison (June 20, 1785), available at <http://www.conservativeusa.org/againstreligiousassessment.htm> (last visited Oct. 29, 2008).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Thomas Jefferson, The Virginia Act for Establishing Religious Freedom (1786).

⁷⁹ *Id.*

⁸⁰ *Id.*

ected] a wall of separation between church and State.”⁸¹ Madison believed that the prohibition of establishment of religion went so far as to preclude appointment of chaplains to the Senate and House of Representatives.⁸²

Jefferson believed that the Establishment Clause applied not only to Congress but also to the President.⁸³ As President, he refused to declare a national day of fasting and prayer.⁸⁴ In response to criticism, he explained that civil powers alone have been given to the President of the United States and that he had no authority to direct the religious exercises of his constituents. “Congress thus inhibited from acts respecting religion, and the Executive authorized only to execute their acts, I have refrained from prescribing even occasional performances of devotion.”⁸⁵

Madison, although similarly opposed to the idea of a national day of thanksgiving, eventually succumbed to popular pressure; however, he later regretted his actions.⁸⁶ In hindsight, he wrote that “[r]eligious proclamations by the Executive recommending thanksgivings [and] fasts are shoots from the same root with the legislative acts reviewed,” and thus deemed the proclamations as “illegitimate as legislative establishment.”⁸⁷

2. Black

Justice Black, writing for the majority in the seminal case, *Everson v. Board of Education*,⁸⁸ recognized the strict separation between church and state which, according to Jefferson, had been created with the adoption of the Establishment Clause. Black, invoking Jefferson, stressed that government and religion should in no way be intertwined.⁸⁹

⁸¹ Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802).

⁸² James Madison, *Detached Memoranda* (1817).

⁸³ See DANIEL DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 41 (New York University Press 2002).

⁸⁴ *Id.* at 40–41.

⁸⁵ *Id.*

⁸⁶ Brief for Legal and Religious Historians and Law Scholars, *supra* note 72, at 16.

⁸⁷ *Id.* (quoting James Madison, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. 534, 559 (Elizabeth Fleet ed. 1946) (ca. 1817) [hereinafter *Madison's "Detached Memoranda"*]).

⁸⁸ *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁸⁹ *Id.* at 15–16. According to Justice Black,

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished

At issue in *Everson* was whether a local school board could reimburse the transportation costs of parents who had sent their children to private or parochial schools.⁹⁰ The Court conceded that the Establishment Clause prohibited the contribution of tax-raised funds to support institutions that teach the tenets of any faith; however, it held that the ordinance at issue did not violate that prohibition.⁹¹ It is unclear as to why the Court concluded as it did; however, the Court generally mentioned that the ordinance permitted reimbursement for parents who had sent their children to non-parochial private schools.⁹² The Court, in its dicta, adopted the strictly separationist views of both Madison and Jefferson, while its holding suggested that indirect government funding of religion was permissible.⁹³

3. Burger

Establishment Clause jurisprudence took a dramatic turn with *Lemon v. Kurtzman*,⁹⁴ the case which would become the keystone of Establishment Clause jurisprudence. In *Lemon*, the United States Supreme Court invalidated, in relevant part, a Pennsylvania statute that reimbursed religious schools for the costs of teachers' salaries and a Rhode Island statute that directly supplemented the teachers' salaries by fifteen percent.⁹⁵ In doing so, Chief Justice Burger announced a three-pronged test for determining whether a statute violates the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁹⁶

for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.

Id.

⁹⁰ *See generally id.*

⁹¹ *Id.* at 16.

⁹² *Id.* at 17.

⁹³ *Id.* at 18.

⁹⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁹⁵ *Id.*

⁹⁶ *Id.* at 612–13.

The Rhode Island statute required, as a prerequisite to application for a salary supplement, that the teacher agree in writing “not to teach a course in religion for so long as or during such time as he or she receives any salary supplements.”⁹⁷ The Court accepted the States’ intentions to “enhance the quality of the secular education in all schools covered by the compulsory attendance laws”⁹⁸ as a valid secular purpose.

The Court suggested with respect to the Rhode Island statute, that direct government funding of religious activity would always have the primary effect of advancing that religious activity.⁹⁹ It concluded that “a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals.”¹⁰⁰ The Court held further that the continuing state surveillance required to ensure that recipient-teachers remained religiously neutral created excessive entanglement with religion.¹⁰¹

The Court also invalidated the Pennsylvania statute based on similar grounds for invalidating the Rhode Island statute.¹⁰² The Court distinguished *Everson* in response to a claim, based on the Court’s decision in *Everson*, that the statute was constitutional because it provided indirect funding in the form of reimbursements as opposed to direct payment of salary.¹⁰³ The Court noted that the indirect payment in *Everson* was to parents, not to the religious schools.¹⁰⁴

The Court also concluded, with respect to both statutes, that the political debate along religious lines that had and would inevitably continue to ensue constituted an excessive entanglement with religion.¹⁰⁵ The Court stated that “[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”¹⁰⁶

⁹⁷ *Id.* at 608.

⁹⁸ *Id.* at 613.

⁹⁹ *Id.* at 618–19.

¹⁰⁰ *Id.* at 618.

¹⁰¹ *Lemon*, 403 U.S. at 620.

¹⁰² *Id.* at 620–21.

¹⁰³ *Id.* at 621.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 622.

Most notable, is the Court's suggestion that direct government funding of religious institutions "would be a relationship pregnant with involvement"¹⁰⁷ that would always require government surveillance that the underlying activities were not religious and would therefore always constitute excessive entanglement.

4. Rehnquist

Despite the Court's suggestion, if not outright holding, in *Lemon*, that direct government financial assistance to religious organizations always precipitates excessive entanglement with religion, the Court, in *Bowen v. Kendrick*,¹⁰⁸ held that religious organizations could, consistent with *Lemon*, receive direct financial assistance from the government.¹⁰⁹ In *Bowen*, a number of taxpayers and clergy challenged the constitutionality of the Adolescent Family Life Act, which Congress had enacted to combat teen pregnancy.¹¹⁰ Pursuant to the act, a variety of groups, including religious groups, would receive government funds to combat premarital sex and teen pregnancy.¹¹¹ Chief Justice Rehnquist, writing for the majority, accepted as a valid secular purpose the "prevention of the social and economic injury caused by teen pregnancy and premarital sex."¹¹² The ultimate issue became whether the government's direct funding of religious organizations had the primary effect of advancing religion.¹¹³ The Court held that it did not.¹¹⁴ The Court held that the Establishment Clause permits direct government funding of religious organizations but "prohibits the government from directly funding the inculcation of religious beliefs."¹¹⁵ Therefore, the Court suggested that direct funding of religious organizations by the government was permissible so long as the funds were used for secular purposes.

Chief Justice Rehnquist also undermined, as he had done in previous dissents, the third prong of *Lemon*. He conceded that the mechanisms required to ensure that religion is not being advanced necessarily create an excessive entanglement with religion by the government¹¹⁶; however, here the Court asserted that the religious

¹⁰⁷ *Id.*

¹⁰⁸ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

¹⁰⁹ *Id.* at 593.

¹¹⁰ *Id.* at 597.

¹¹¹ *Id.* at 594.

¹¹² *Id.* at 598, 617.

¹¹³ *Bowen* 487 U.S. at 611–12.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 599, 606.

¹¹⁶ *Id.* at 616.

grantees “were not pervasively sectarian in the same sense as the court ha[d] held parochial schools to be.”¹¹⁷

The Court held that the statute at issue was constitutional on its face but remanded the case to determine whether it was constitutional as applied.¹¹⁸ The Court directed the lower court to determine whether funds had been used for religious purposes.¹¹⁹ In doing so, the Court suggested that evidence of religious neutrality permits a statute to survive constitutional scrutiny on its face.¹²⁰

5. O'Connor

Chief Justice Rehnquist's criticism of the third prong of the test announced in *Lemon* precipitated a revision of the test in *Agostini v. Felton*.¹²¹ The Court, in *Agostini*, considered whether the Federal Elementary and Secondary Education Act of 1965 violated the Establishment Clause.¹²² Pursuant to the Act, federal funds were disbursed to state boards of education who in turn distributed those funds to public schools.¹²³ Recipients of those funds would then send teachers to work in private and parochial schools.¹²⁴ The purpose of the program was to provide assistance to the children of low-income families who were attending private or parochial schools by supplementing the cost of education.¹²⁵ The Court accepted assistance to the children of low-income families as a valid secular purpose.¹²⁶ The Court held further that the statute did not have the primary purpose of advancing religion because the state made the funds available, “generally without regard to the sectarian–nonsectarian or public–nonpublic nature of the institution benefited.”¹²⁷ With respect to the excessive entanglement pro-

¹¹⁷ *Id.* at 616–17 (quoting *Kendrick v. Bowen*, 657 (D.D.C. 1987) (quoting *Hunt v. McNair*, 413 U.S. 734 (1973))).

¹¹⁸ *Id.* at 621–22.

¹¹⁹ *Id.* at 622.

¹²⁰ Elisabeth Divine Reid, *Thou Shalt Honor the Establishment Clause: The Constitutionality of the Faith-Based Initiative*, 28 *HAMLIN J. PUB. L. & POL'Y* 431, 452 (2007).

¹²¹ *Agostini v. Felton*, 521 U.S. 203 (1997).

¹²² *Id.* at 209.

¹²³ *Id.*

¹²⁴ *Id.* at 209–10.

¹²⁵ *Aguilar v. Felton*, 473 U.S. 402, 404–407 (1985). *Aguilar* was a corollary case that had described the mechanisms by which program function. The program, by supplementing the cost of teachers, thereby supplemented the cost to attend the school. Furthermore, parochial schools were required to remove any religious symbols from classrooms where those teachers would be working. The Court in *Agostini* overruled *Aguilar*.

¹²⁶ *Agostini*, 521 U.S. at 226.

¹²⁷ *Id.* at 225 (quoting *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782–83, n.38 (1973)).

hibition, the Court expressly abandoned any presumption that recipients would be unable to separate religious inculcation from their secular services, as suggested in *Lemon*. Consequently, government oversight is unnecessary to ensure that religion is not being advanced, and excessive entanglement does not result.¹²⁸ Notably, the Court, in *Agostini*, subsumed the third prong of the test announced in *Lemon*.¹²⁹ The current test, which has become referred to as the “*Lemon-Agostini* Test,” can be summarized as follows: A statute that provides direct financial assistance to religious organizations is constitutional where the statute serves a valid secular purpose and its principal or primary effect neither advances nor inhibits religion. A statute does not advance religion if it does not result in governmental indoctrination, define its recipients by reference to religion, or create excessive governmental entanglement with religion.¹³⁰

6. Thomas

Justice Thomas, writing for a plurality in *Mitchell v. Helms*,¹³¹ further diluted the test that had been announced in *Lemon*. According to Justice Thomas, a statute serves a valid secular purpose so long as it is applied to the state in a neutral manner.¹³² According to the plurality, a statute is neutral when “religious, irreligious, and areligious are all alike eligible for government aid.”¹³³ The issue in *Mitchell* was whether the Federal Education Consolidation and Improvement Act of 1981, under which public and private schools could opt to partake in a program where the state would provide secular educational materials purchased with federal funds, violated the Establishment Clause.¹³⁴ The plurality held that it did not.¹³⁵

Although the *Lemon-Agostini* Test seems to have been almost completely abandoned, the revised test announced in *Mitchell* is not binding precedent because the decision was reached by a plurality, not a majority of the Justices.¹³⁶ Justice O’Connor, in her concurrence, opined that “actual diversion of government aid to

¹²⁸ *Id.* at 233–34.

¹²⁹ *Id.* at 234.

¹³⁰ *Id.*

¹³¹ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹³² *Id.* at 809.

¹³³ *Id.* at 809.

¹³⁴ *Id.* at 801–803.

¹³⁵ *Id.* at 801.

¹³⁶ *Mitchell*, 530 U.S. 793.

religious indoctrination . . . is constitutionally suspect,”¹³⁷ and five Justices agreed. Notably, O’Connor warned that a presumption of constitutionality where funds are disbursed by the state in a neutral manner created too great a risk that those groups would divert those funds for religious purposes.¹³⁸

7. Bush

Former President Bush has been accused of being, among other things, a religious zealot.¹³⁹ On January 29, 2001, nine days after taking office, President Bush issued an Executive Order which established the White House Office of Faith-Based and Community Initiatives (“WHOFBCI”).¹⁴⁰ The President’s goal, as expressed in the Executive Order, was to provide faith-based entities with an equal opportunity to compete with secular service organizations for federal funds.¹⁴¹ The Executive Order also described the Office’s functions and integrated the Initiative throughout several federal agencies, “coordinated educational activities to mobilize the public, educated state, local, and community policy makers regarding the ways in which they can become involved, and eliminated unnecessary barriers that currently impede an effective FBCI.”¹⁴² That same day, President Bush signed a second Executive Order creating satellite offices within five federal agencies—the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development—and directed the agency heads to “coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of [faith-based and community organizations] in the provision of social services.”¹⁴³

Almost one year later, President Bush, on December 12, 2002, issued two more Executive Orders. One merely created satellite offices in two more federal agencies—the Department of Agriculture and the Agency for International Development¹⁴⁴; however, the second, and more notable of the two, established an unprecedented role for the Executive. Entitled “Equal Protection of the Laws for Faith-Based and Community Organizations,” the Execu-

¹³⁷ *Id.* at 840.

¹³⁸ *Id.*

¹³⁹ *See generally* Reid, *supra* note 120, at 440.

¹⁴⁰ Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

¹⁴¹ *Id.*

¹⁴² Reid, *supra* note 120, at 440.

¹⁴³ Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 29, 2001).

¹⁴⁴ Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 12, 2002).

tive Order extended the FBCI to all programs “administered by the Federal government, or by a State or local government using Federal financial assistance.”¹⁴⁵ It also implemented a number of substantive principles.¹⁴⁶ Pursuant to the Order, religious organizations receiving federal funds under the program are precluded from discriminating against program beneficiaries with respect to religion; the organizations, however, need not abandon their religious character.¹⁴⁷ According to the President, that an organization may retain its religious character means that it may discriminate on the basis of religion or adherence to religious principles in hiring.¹⁴⁸ Organizations that engage in inherently religious activity—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.”¹⁴⁹

It is important to remember that government funding of religious organizations engaged in social work did not begin with the Bush Administration. However, the creation of the FBCI Program is unique in at least two ways—it was conceived and executed solely by the Executive through the use of funds appropriated to the Executive Branch, and it expressly disposes of any need for religious organizations to create a secular entity to which government funds could flow. Traditionally, religious charities would create entirely separate secular affiliates for the administration of social services.¹⁵⁰ As a result of this process, those entities became familiar with intricacies of government funding and knew of the constitutional restraints associated with that funding.¹⁵¹ President Bush, in creating the FBCI, sought to dispose of such restraints and increase partnerships with religious organizations. This expansion raises concerns as to whether less experienced groups will use govern-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Former White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* (June 24, 2003), available at http://www.religionandsocialpolicy.org/docs/general/6-24-2003_whofbci_religious_hiring_rights.pdf.

¹⁴⁸ *Id.*

¹⁴⁹ Reid, *supra* note 120, at 444. (quoting Exec. Order No. 13,279).

¹⁵⁰ Sheila Suess Kennedy & Leda McIntyre Hall, *What Separation of Church and State? Constitutional Competence and the Bush Faith-Based Initiative*, 5 J.L. Soc’y 389, 390 (2004).

¹⁵¹ *Id.*

ment funds in ways that are unconstitutional.¹⁵²

B. Flast v. Cohen and Taxpayer Standing

Generally, “the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing”¹⁵³; however, the Supreme Court, in *Flast v. Cohen* created an exception to this general prohibition with respect to Establishment Clause claims.¹⁵⁴ In *Flast*, the taxpayer plaintiff had challenged the constitutionality of the Elementary and Secondary Education Act of 1965 under which religious schools received federal aid.¹⁵⁵ The Court concluded that a plaintiff has standing to challenge the government’s expenditure of funds as violative of the Establishment Clause subject to a two-part test requiring that the taxpayer establish: 1) a logical link between his or her status as a taxpayer and the legislation attacked, and 2) a nexus between that status and the precise nature of the alleged constitutional violation.¹⁵⁶

C. Recent Taxpayer Establishment Clause Challenges

Prior to the Supreme Court’s decision in *Hein v. Freedom from Religion Foundation, Inc.*, a number of plaintiffs used their statuses as taxpayers to challenge government funding of religious organizations.

¹⁵² *Id.*

¹⁵³ *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553, 2563 (2007).

¹⁵⁴ *Flast v. Cohen*, 392 U.S. 83 (1968).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 102–03.

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id.

1. *DeStefano v. Emergency Housing Group*

In *DeStefano v. Emergency Housing Group*,¹⁵⁷ the Second Circuit held that New York State's funding of the Middletown Alcohol Crisis Center ("MACC") violated the Establishment Clause.¹⁵⁸ MACC received ninety-five percent of its funding from the State of New York through its Office of Alcohol and Substance Abuse Services ("OASAS").¹⁵⁹ Joseph Destefano, the mayor of Middletown, New York, in his capacity as a taxpayer, claimed that MACC's use of Alcoholics Anonymous ("AA") in its recovery program violated the Establishment Clause.¹⁶⁰ Using the test announced in *Agostini*, the court, while accepting that the state had a valid secular purpose for funding the program, held that involvement by MACC with AA would constitute government indoctrination with religion if AA staff supervised meetings and showed clients AA videos.¹⁶¹ The court explained that a state is responsible for indoctrination where it directly funds programs that inculcate its recipients with religion.¹⁶²

2. *Freedom from Religion Foundation v. McCallum*

The district court for the Western District of Wisconsin invalidated a program under which the State of Wisconsin provided funds to Faith Works, Inc., a faith-based addictions treatment program, in *Freedom from Religion Foundation v. McCallum*.¹⁶³ Wisconsin's governor and the head of the Department of Corrections, among others, challenged the expenditure in their capacities as taxpayers.¹⁶⁴ The Department of Corrections instituted a program under which parole officers would recommend the program to parolees.¹⁶⁵

Although this case presented a similar controversy to that in

¹⁵⁷ *DeStefano v. Emergency Housing Group*, 247 F.3d 397 (2d Cir. 2001).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 403.

¹⁶⁰ *Id.* at 404. Alcoholics Anonymous, in its recovery program suggests that members make "a decision to turn [their] will and [their] life over to the care of God as [they] underst[and] Him." Whether this submission is in fact meant to be religious, is highly contested. One AA member was "saddened and offended" by the Supreme Court's misinterpretation of the statement. To members, submission to belief in God means nothing more than submission to a belief that certain things are beyond one's control, such as addiction to alcohol and drugs.

¹⁶¹ *Id.* at 417-420.

¹⁶² *Id.* at 417.

¹⁶³ *Freedom from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wisc. 2002).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 962.

DeStefano,¹⁶⁶ where the State of New York distributed funds to a secular organization whose association with AA led to the violation, in *McCallum*, the State of Wisconsin provided funds directly to a faith-based organization.¹⁶⁷

The program at issue in *McCallum* called participants to accept that addiction is the product of “deep ‘soul sickness’”¹⁶⁸ and that addiction could be overcome only through developing a personal connection with God.¹⁶⁹ Similar to the court in *DeStefano*, the court in *McCallum* focused on whether the program led to religious indoctrination. In its analysis, the court first determined whether the program itself led to religious indoctrination and then considered whether that indoctrination was fairly attributable to the government.¹⁷⁰ The court found that the program, which included Bible studies and mandatory meetings on Christian values, led to religious indoctrination.¹⁷¹ In fact, most participants arrived with no religious beliefs and left the program claiming some relationship with God.¹⁷² In determining whether that indoctrination was fairly attributable to the government, the court summarily concluded that “[d]irect subsidies are viewed as governmental advancement or indoctrination of religion.”¹⁷³ Consequently, the expenditure of funds to Faith Works, Inc. was found unconstitutional.¹⁷⁴

3. *Freedom from Religion Foundation v. Montana Office of Rural Health*

In *Freedom from Religion Foundation v. Montana Office of Rural Health*¹⁷⁵ the district court of Montana invalidated a program receiving funding pursuant to President Bush’s FBCI.¹⁷⁶ The defendant, the Montana Office of Rural Health’s (“MORH”) mission was “to improve health care . . . for all Montanans through health promotion, disease prevention, and reduction of the impact of illness, disease and disability.”¹⁷⁷ The primary director of MORH, in

¹⁶⁶ *DeStefano*, 247 F.3d 397.

¹⁶⁷ *McCallum*, 179 F. Supp. 2d at 960.

¹⁶⁸ *Id.* at 959.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 970.

¹⁷¹ *Id.* at 953.

¹⁷² *Id.* at 957.

¹⁷³ *Id.* at 970 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995)).

¹⁷⁴ *McCallum*, 179 F. Supp. 2d at 978.

¹⁷⁵ *Freedom from Religion Foundation v. Montana Office of Rural Health*, 2004 U.S. Dist. LEXIS *29139 (D. Mont. Oct. 26, 2004).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2.

awarding sub-grants, gave preferential treatment to parish nursing programs.¹⁷⁸ The plaintiffs claimed that the state had violated the Establishment Clause by providing funds directly to those parish nursing programs.¹⁷⁹ The court, applying *Agostini*, agreed.¹⁸⁰ Most notable is the court's discussion of the secular purpose requirement of the *Agostini* test. The court rejected the state's asserted purpose, which was to provide secular health care through faith-based organizations, and instead held that the director of MORH "acted with the clear primary purpose of promoting and endorsing the use and application of Judeo-Christian principles in the provision of otherwise secular health care."¹⁸¹ The court explained that the Supreme Court has given deference to the "government's statement of a secular purpose" unless it is clear that the "statement is a sham or insincere."¹⁸² Here, the court detected such insincerity.

D. Roadway Blocked: Lown v. Salvation Army, Inc.

In *Lown v. Salvation Army, Inc.*,¹⁸³ eighteen former employees of the Salvation Army filed suit against the government in their capacities as taxpayers, claiming, in relevant part, that the government had, in funding the Social Services for Children ("SSC"), a Salvation Army program, violated the Equal Protection Clause of the Fourteenth Amendment and the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution.¹⁸⁴

The SSC, through its contract with New York State, administers child welfare services and day care on behalf of the state.¹⁸⁵ Nearly ninety percent of its clients are "referred by or in the custody of government agencies and are assigned to SSC involuntarily."¹⁸⁶ SSC derives nearly ninety-five percent of its budget from its contracts with the government.¹⁸⁷ The plaintiffs alleged that the SSC diverted the percent of its revenue from those contracts to the Salvation Army Church.¹⁸⁸ Although it had not previously done so, SSC, in the months prior to initiation of the suit, began to infuse religion into the workplace and monitor employees for adherence

¹⁷⁸ *Id.* at *4.

¹⁷⁹ *Id.* at *5.

¹⁸⁰ *Id.* at *37.

¹⁸¹ *Id.* at *25–26.

¹⁸² *Id.* at *20 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987)).

¹⁸³ *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

¹⁸⁴ *Id.* at 235.

¹⁸⁵ *Id.* at 228.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 229.

to the religious tenets of the Salvation Army.¹⁸⁹ The Salvation Army implemented a “Reorganization Plan” dedicated to ensuring the employment of Salvationists and other Christians.¹⁹⁰ As its justification for the plan, the Salvation Army stated that it was not a social service organization, but a “Christian movement with a Social Service Program.”¹⁹¹ As part of its plan, Salvation Army directors required the Human Resources Department at SSC to compile a report of the religious affiliations of its employees and to disclose the names of homosexuals working at SSC.¹⁹² The SSC revised its employee manual to include a section entitled, “The Rules of Conduct,” which, although advising that the Salvation Army did not discriminate on the basis of sexual orientation in hiring, stated that the Salvation Army reserved the right to make employment decisions based on conduct that might be incompatible with the tenets of the Salvation Army.¹⁹³

Employees were then required to fill out a form acknowledging receipt of the manual and agree not to engage in any conduct that would “conflict with, interfere with, or undermine,” the Salvation Army’s programs.¹⁹⁴ The Executive Director of the SSC, at the time the policy was adopted, was fired for his disagreement with the policy of requiring employees to make such a declaration.¹⁹⁵ His successors, including Lown, the named plaintiff, failed to implement the policy.¹⁹⁶ Both resigned, characterizing their resignations as precipitated by a hostile work environment.¹⁹⁷ The plaintiffs claimed that since implementation of the Reorganization Plan, “manifestations of Christian faith [had] appeared in the workplace, including recitation of prayers at staff meetings and functions, frequent depositing of religious publications in employee mailboxes, conspicuous display of religious publications and regular public postings for prayer meetings and other religious events.”¹⁹⁸ The plaintiffs claimed that this resulted in a hostile

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 230.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 231 (“Although ‘[t]he Salvation Army does not make employment decisions on the basis of an individual’s sexual orientation or preference[,]’ it nonetheless ‘reserve[s] the right to make employment decisions on the basis of an employee’s conduct or behavior that is incompatible with the principles of the Salvation Army.’”) (quoting Am. Compl. ¶ 140) [internal quotations omitted].

¹⁹⁴ *Lown*, 393 F. Supp. 2d at 223.

¹⁹⁵ *Id.* at 232.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 233.

work environment that precipitated the resignation of a number of employees, including the plaintiffs.¹⁹⁹

New York State moved to dismiss the plaintiffs' motions. The District Court for the Southern District of New York granted the defendant's motion to dismiss with respect to the Equal Protection claim.²⁰⁰ It explained that the plaintiffs never alleged that the government had expressly classified on the basis of religion, "intended to discriminate, nor possessed animus in the execution of the contracts at issue."²⁰¹ The court ruled in favor of the defendants with respect to the Free Exercise claim. The court explained that in order to prevail on a Free Exercise claim, "the [plaintiff] must show that a state action sufficiently burdened his exercise of religion."²⁰² To do so, the plaintiff must demonstrate that private action can be fairly attributed to the state based on a close nexus between the private entity and the state.²⁰³

The court held that a sufficient nexus did not exist between the state and the Salvation Army because the state was not responsi-

¹⁹⁹ *Id.* The United States participated in the litigation as *amici curiae* on the grounds that it had a particular interest in the outcome due to its Faith-Based and Community Initiatives Program. See Former White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved*, available at http://www.religionandsocialpolicy.org/docs/general/6-24-2003_whofbci_religious_hiring_rights.pdf.

²⁰⁰ *Loun*, 393 F. Supp. 2d at 237.

²⁰¹ *Id.* at 236.

²⁰² *Loun*, 393 F. Supp. 2d at 241 (quoting *Genas v. State of N.Y. Dep't of Corr. Servs.*, 75 F.3d 825, 831 (2d Cir. 1996)).

²⁰³ *Id.* at 242. The court stated:

For SSC's personnel policies to be properly characterized as state action, plaintiffs must claim 'both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor.' . . . 'For the conduct of a private entity to be fairly attributable to the state, there must be such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.' . . . 'A nexus of "state action" exists between a private entity and the state when "the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies." ' . . . The close nexus requirement is meant to 'assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'

Id. (internal citations omitted).

ble for the conduct of which the plaintiffs complained, rendering the nexus requirement unsatisfied.²⁰⁴ The court reached this conclusion despite the fact that SSC received ninety percent of its funds from government contracts.²⁰⁵

The court denied the defendants' motion to dismiss with respect to the Establishment Clause claim based on taxpayer standing.²⁰⁶ The court conceded that the plaintiffs had standing to challenge the government funding based on the exception created by *Flast v. Cohen*.²⁰⁷ However, it did not reach a decision on the merits of the claim.²⁰⁸ The Establishment Clause challenge, made by the plaintiffs in their capacities as taxpayers, was their only claim to survive.²⁰⁹

E. No Detour: Hein v. Freedom from Religion Foundation, Inc.

The Supreme Court, however, seemingly foreclosed that possibility, at least with respect to actions by the Executive, in *Hein v. Freedom from Religion Foundation, Inc.*²¹⁰

In *Hein*, the plaintiff claimed that the conferences held as part of President Bush's FBCI Program, that contained speeches using "religious imagery" and praised the efficacy of faith-based programs in delivering social services,²¹¹ violated the Establishment Clause. The plaintiff, a corporation opposed to government endorsement of religion, relied on its status as a taxpayer to file the suit.²¹² The issue in *Hein* ultimately became whether the plaintiff had standing in that capacity.²¹³ The Court recognized the exception created by *Flast v. Cohen*, but framed the issue as whether that exception, which permits taxpayers to challenge the constitutionality of government expenditures with respect to religion, applied to expenditures made by the Executive Branch. The Court held that it did not.²¹⁴

In doing so, the Supreme Court reversed the decision of the U.S. Court of Appeals for the Seventh Circuit that had held that federal taxpayers have standing to "challenge Executive Branch

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 239.

²⁰⁶ *Id.* at 239–41.

²⁰⁷ *Id.* at 238–39.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 241.

²¹⁰ *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007).

²¹¹ *Id.* at 2559.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 2559.

programs on Establishment Clause grounds so long as the activities are ‘financed by Congressional appropriation.’”²¹⁵ The majority of the Seventh Circuit concluded that taxpayers have standing to challenge expenditures “even where ‘there is no statutory program’ enacted by Congress and the funds are ‘from appropriations for the general administrative expenses, over which the President and other executive branch officials have’ . . . discretionary power.”²¹⁶ The Court of Appeals overruled the district court, which had dismissed the plaintiff’s claims for lack of standing by concluding that “federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of ‘exercises of congressional power under the taxing and spending clause of Art. I, § 8.’”²¹⁷

After a lengthy discussion of the principle and requirements of standing, the Supreme Court narrowly construed the exception created by *Flast v. Cohen*.²¹⁸ The respondents asserted that *Flast v. Cohen* created an exception through which a taxpayer could challenge the expenditure of all government funds as a violation of the Establishment Clause²¹⁹; however, the Supreme Court, by a controlling plurality, characterized the exception as applying only to those expenditures made pursuant to an act of Congress.²²⁰

The Court warned that “[b]ecause almost all Executive Branch activity is ultimately funded by some Congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer in federal court.”²²¹

Justice Souter, with whom Justices Stevens, Ginsburg, and Breyer joined, seeing no basis for distinguishing between expenditures by the Executive and Legislative Branches in either logic or precedent, dissented.²²² Souter, citing *Flast* and invoking Madison, maintained that the “‘injury’ alleged in Establishment Clause challenges to federal spending” is “the very extract[ion] and spen[ding] of ‘tax money’ in aid of religion.”²²³

In a sharply worded concurrence, Justice Scalia, with whom

²¹⁵ *Id.* at 2561 (quoting *Flast v. Cohen*, 433 F. 3d 989, 997 (7th Cir. 2006)).

²¹⁶ *Id.* at 2561 (quoting *Flast v. Cohen*, 433 F. 3d 989, 994 (7th Cir. 2006)).

²¹⁷ *Id.* at 2561 (quoting *Flast v. Cohen*, 392 U.S. 83, 88, 88 S. Ct. 1942 (2007)).

²¹⁸ *Hein*, 127 S.Ct. at 2565.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 2569.

²²² *Id.* at 2584.

²²³ *Id.* at 2584–85 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006)).

Justice Thomas joined, accused the plurality of making unreasoned and unprincipled distinctions between expenditures by the Executive and Legislative Branches.²²⁴ Justice Scalia concurred in the judgment because he believes the exception created by *Flast v. Cohen* was wholly without merit, therefore agreeing that the respondents did not have standing. However, he criticized the majority for drawing the distinction it drew, urging the majority either to reject *Flast* entirely or apply it universally.²²⁵

Justice Scalia opined that the plurality's opinion invited demonstrably absurd results. "For example," he stated, "the plurality would deny standing to a taxpayer challenging the President's disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner."²²⁶

III. IMPLICATIONS

A. *Taxpayer Standing Limited*

1. The Far-reaching Implications of *Hein v. Freedom from Religion Foundation, Inc.*

The structure and purpose of President Bush's FBCI is disconcertingly vague. It is almost impossible to understand how the system works and the specific functions it serves. The President's statements with regard to the initiative demonstrate that the program was created to ensure that faith-based groups have the opportunity to compete equally with secular organizations; however, precisely what constitutes such an assurance is unclear. The nominal information that exists explains that the initiative is not in itself a source of funding—its purpose is to eliminate barriers to the receipt of federal funding by faith-based groups from sources already in existence. The FBCI offices throughout the agencies are overseers in place to ensure that barriers to the receipt of funding, including regulations, are eliminated.

²²⁴ *Id.* at 2573.

²²⁵ *Id.* at 2573–74 (Scalia, J., concurring) ("If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen*, should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated.") (internal citation omitted).

²²⁶ *Id.* at 2580.

However, the program clearly has a more substantive component. Groups can receive government funds pursuant to the program because those groups, in the absence of the initiative, might have previously been denied. Furthermore, the Executive Orders responsible for the creation of the initiative provide that a faith-based group need not create independent secular entities for the administration of social services or abandon their religious character. This means that faith-based organizations may discriminate on the basis of religion with regard to hiring, though they may not deny aid to prospective recipients of those services on the basis of religion.

The underlying issue in *Hein* was not whether the substantive component of the program, namely, assuring that faith-based organizations had equal access to federal funds, was constitutionally permissible; rather, the issue was whether speeches containing “‘religious imagery’ and prais[ing] the efficacy of faith-based programs in delivering social services,” delivered at conferences organized at the behest of the Executive and financed through Executive funds, constituted an unconstitutional endorsement of religion by the government in violation of the Establishment Clause.²²⁷ Ultimately, the Supreme Court was not asked to decide whether simplifying the process by which faith-based organizations could receive funding was constitutional but rather to determine whether the expenditures made by the Executive to organize the religion-tinged conferences, or to pay the salaries of those who organized the conferences or delivered the speeches, constituted government-funded endorsement of religion. However, the Supreme Court in *Hein* effectively neutralized the issue by denying taxpayer standing to challenge expenditures, made by the Executive, of funds acquired through general executive appropriations with respect to the Establishment Clause.

Although Justice Scalia called for the abandonment of taxpayer standing in his concurrence, he illuminated the far-reaching implications of the plurality’s opinion in *Hein*. The immediate consequence of the Court’s decision in *Hein* is that proselytization by the Executive branch is effectively immunized from judicial review with respect to Establishment Clause claims. Therefore, proselytization by the Executive has become, for all practical purposes, permissible so long as that proselytization is funded through general executive appropriations. However, the Court, by retaining the *Flast* exception with respect to expenditures made by Con-

²²⁷ *Id.* at 2559.

gress, has made those expenditures, which would be immunized if made by the Executive, subject to Establishment Clause challenge. The result certainly contradicts Madison's statement that "[r]eligious proclamations by the Executive . . . are shoots from the same root with . . . legislative acts reviewed,' and thus [are] . . . as illegitimate as legislative establishment."²²⁸

The prospect that the Executive Branch may proselytize, however, is less alarming than the other possibilities opened by the Court's decision in *Hein*. As Justice Scalia suggests, the Executive may, immune from judicial review, implement programs that blatantly violate the Establishment Clause so long as those programs are financed through general executive appropriations and not specifically appropriated by Congress to that end. For example, the President could reorganize the FBCI so as to constitute a new source of funding for private faith-based organizations; he could eliminate any safeguard that those groups will not use those funds to inculcate religion, and in fact, he could encourage those groups to do so; he could decide to fund only those groups which advance the religion to which he adheres; or he could decide to fund only those religious groups which promote an agenda with which he agrees. Further, he could direct those groups to deny services to potential recipients based on their religious affiliations; and could direct those groups to deny services to potential recipients whose practices conflict with the tenets of a particular religion. This could all occur, of course, only where the funds expended by the Executive to implement the program or fund its recipients were derived from general executive appropriations. The plurality in *Hein* suggests that Congress would never make an appropriation so large and undefined as to permit this parade of horrors; however, as Justice Scalia suggests, there is nothing to prevent Congress and the President from negotiating as to the purpose of executive appropriations "behind closed doors" while formally labeling those appropriations "general."

By immunizing the Executive Branch from accountability to taxpayers, the Supreme Court has effectively given license to the Executive to proselytize or make expenditures in ways that would undoubtedly violate the Establishment Clause had such proselytization or expenditures been made by Congress. The plurality in *Hein* warned that construing *Flast* so as to apply to actions by the Executive would bring into question any number of actions by the Execu-

²²⁸ Brief for Legal and Religious Historians and Law Scholars, *supra* note 72, at 16 (quoting Madison's "Detached Memoranda," *supra* note 87).

tive with respect to the Establishment Clause. However, it is difficult to understand why such a result would be scorned as opposed to celebrated since the very purpose of the Establishment Clause was to prevent “the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion.”²²⁹

B. Government Dis-Establishment

1. Government Funding of Faith-based Social Service Organizations Serves No Secular Purpose

The meaning of the Establishment Clause has been irreparably distorted. What was once perceived as an impenetrable wall between church and state has become a discourse impotent with language of neutrality and elementized tests. Current Establishment Clause jurisprudence has rendered unrecognizable what Madison and Jefferson understood it to symbolize and even what the Court had understood it to mean in *Everson*. Courts can no longer distinguish between secular interests and religious interests. Religion has become so predominant in our culture that the courts often take for granted that the interests it accepts as secular are based on religious ideologies.

The United States, for its own failure to provide for its citizens, has turned to faith-based organizations to fulfill the duties that it has failed to perform. What seems beyond the purview of the Court’s understanding is that faith-based organizations engage in social service activities because of their faiths. It is religion that drives them, and, similar to the perspective of the Salvation Army, they are not social service organizations but religions that, in the context of their faiths, perform social work. From that perspective, any claim that government funding of faith-based organizations serves a secular purpose seems beyond comprehension. Funding of faith-based social services organizations merely assists those organizations in performing those services their religions call them to provide. Similar to the district court’s suggestion in *Freedom from Religion Foundation v. Montana Office of Rural Health*, government funding of faith-based organizations in some situations does not assist in providing secular services; it promotes the use and application of religious principles in the administration of otherwise secular services.²³⁰

²²⁹ See *Hein*, 127 S.Ct. at 2585 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348).

²³⁰ See *Freedom from Religion Found., Inc. v. Montana Office of Rural Health*, 2004 U.S. Dist. LEXIS 29139, 25–26 (D. Mont. 2004).

The Court has given great deference to the government in its assertions of a secular purpose; however, it has afforded that deference, in the context of funding of faith-based organizations (and with regard to justifying discrimination against homosexuals), unwisely. It is admittedly difficult to distinguish, given the Christian influence in the United States, secular justifications from religious justifications; however, in the context of state funding of faith-based organizations, the distinction could not be any clearer. Recognition of the fact that it is religion that drives these organizations to provide the services they do makes any consideration of whether those services have the primary effect of advancing religion, result in governmental indoctrination, define recipients by reference to religion, or create excessive governmental entanglement with religion, obvious and inconsequential.²³¹

Current Establishment Clause jurisprudence requires that direct government funding of a faith-based organization serve a valid secular purpose and that it not advance religion.²³² In determining whether the expenditure advances religion, the Court considers whether the expenditure results in governmental indoctrination with religion, whether it defines its recipients by reference to religion, or creates excessive entanglement with religion.²³³ Courts have repeatedly suggested that the oversight required to ensure that government funds are not being used for the promotion of religion necessarily creates an excessive entanglement with religion. However, the more proper assertion is that the funding itself creates the excessive entanglement. It seems clear that the funding is problematic if it requires intensive government oversight to ensure its proper use. Irrespective of the legalese, it seems, as a matter of common sense, that when the government pays religious organizations to provide services that it has failed to perform the payment itself creates an excessive entanglement between the government and that religious organization. If one accepts the assertion that faith-based organizations provide social services because of and in furtherance of their religious mission, it is undeniable that the government's funding of those services advances that religion and that there is no use of that funding which is not religious.

More interesting are prohibitions against religious indoctrination and the definition of recipients with respect to religion. If the

²³¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²³² *Id.*

²³³ *Id.*

government were to fund organizations based only on formal affiliations with recognizable religions, or if government funded services caused their recipients to identify with a particular religion, courts would, under the current standard, generally find the government expenditure impermissible. However, the focus of the courts is misdirected.

Courts consistently fail to recognize that for some, perhaps even most, beliefs and practices are informed by religious affiliation and ideology and, with respect to faith-based social service organizations, those practices and beliefs pervade the services they provide. Indoctrination does not result only where a program participant adopts a belief in Jesus Christ or Allah as a result of participation in the program. Indoctrination occurs where a participant adopts a belief or practice associated with the religion that has administered the program. Therefore, if a faith-based organization were to promote abstinence until marriage as a means for preventing sexually transmitted diseases or denounce homosexuality or abortion, and a recipient of that service were to adopt a belief that she had done something wrong by contracting a sexually transmitted disease or by having sex before marriage; or by having an abortion; or if she failed to have an abortion because she had learned it was not a viable option; or if she adopted an aversion toward homosexuals as a result of her participation, then she is indoctrinated with that religion.

Similarly, while it is impermissible for an organization to deny a prospective recipient services because of his religious affiliation, it may deny those services because of beliefs he may hold or practices in which he may engage that do not comport with the tenets of the organization's religion. Under the current framework, if an organization were to deny services to drug users, or homosexuals, or women who have had abortions, or any other person who had engaged in activity with which the organization did not agree, it would be permissible. To discriminate on the basis of religion means more than denying services to someone because he is a Jew, or a Christian, or a Muslim—it means denying services to a person because one does not agree, based on his religious beliefs, with the actions or “lifestyle” of that person. This sort of religious activity can never be separate in time or place from the social services it provides. If one is to understand religion as a series of practices and beliefs, one could recognize that religion is present during every point at which the service is administered—the religion is inherent in the service.

Pursuant to President Bush's Executive Order, organizations that engage in inherently religious activity, 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."²³⁴ President Bush similarly misconstrues activities or justifications that are inherently religious. One must recognize that given the nature of faith-based organizations, *all* activities in which they engage are inherently religious—they are driven by their faiths to administer the activities and therefore the activities, even social services, are inherently religious. Furthermore, the manner in which faith-based organizations provide their social services is inherently religious—in the methods they use, the concepts to which they adhere, and the clientele to which they choose to cater.

2. Governmental Discrimination Against Homosexuals Violates the Establishment Clause

Justifications for discrimination against homosexuals have become similarly convoluted. Courts either do not recognize, or fail to admit, that interests asserted by the government to justify the denial of equal benefits and equal opportunities to homosexuals are inherently Christianity-based. As such, those justifications render discrimination against homosexuals unconstitutional pursuant to the Establishment Clause.

Aversion to homosexuality is pervasive in the dominant denominations of Christianity and more particularly, in Catholicism. Traditionally, homosexuals and sodomites were subject to punishment by death and torture; however, many Christians now view homosexuality as a yoke that each homosexual must bear. The homosexual is meant to remain celibate so as not to commit the sin he has the tendency to commit. For his suffering, they would say, the homosexual will be rewarded in the afterlife.

However, this form of discrimination is moderate compared to those more fanatical sects of Christians who view homosexuals as predators, a group of persons conspiring to transform children into homosexuals themselves. Others, some of whom are our nation's leaders, view HIV/AIDS as punishment for the homosex-

²³⁴ Reid, *supra* note 120, at 444.

ual—a plague sent by God to purge the United States of these sinners.

Either form of discrimination against homosexuals—moderate or fanatical—is impermissible in a nation founded on a separation between church and State; yet such discrimination is pervasive in U.S. law. Christianity has become so deeply embedded in the law that the government, the courts, and the electorate can no longer distinguish those state interests that are secular from those that are merely an imposition of Christian ideology. This phenomenon is reflected both in government funding of faith-based organizations and in the justifications used to deny homosexuals equal treatment, equal opportunities—indeed, equal citizenship. Some, President Bush for example, celebrate the influence of Christianity in the law. President Bush's actions were guided by what some would call fanatical adherence to Christian views. His lack of remorse for questionable actions is justified by his sense of morality, which clearly distinguishes what is right from what is wrong.²³⁵

Many Christians find this sort of advocacy comforting. While others, with respect to discrimination against homosexuals, have merely misconstrued religious justifications for secular ones. The inability to distinguish Christian from secular justifications, at least with respect to homosexuality, has its roots in history. Although homosexuality was accepted, and even condoned at the time of the Greek Empire, civil law became, at the rise of the Roman Empire, Christian law. The Catholic Church and the civil government were indistinguishable, as emperors like Justinian served at the pleasure of the Church. Everyone recognized that the law was based on Christianity; yet, it seems, in time, the people had forgotten and began to characterize Christian ideals as secular truths. This conflation, at least with respect to the United States, can be attributed primarily to two moments in history—England's purposefully disas-

²³⁵ Megan A. Kemp, *Blessed Are the Born Again: An Analysis of Christian Fundamentalists, the Faith-Based Initiative, and the Establishment Clause*, 43 HOUS. L. REV. 1523, 1534–35 (2007). According to Megan A. Kemp,

President Bush views society in moral absolutes that are informed by a rigid faith. The President demonstrates this worldview each time he is confronted with dissenting opinions and differing points of view; he summarily dismisses opposition and reaffirms his views as morally superior. In the arena of domestic policy, Bush's worldview translates into dogmatic positions on values questions. Life begins at conception, and all abortion is wrong. The Bible condemns homosexuality and therefore the government cannot condone nonheterosexuality by any means. Only abstinence can prevent pregnancy and the spread of sexually transmitted diseases.

Id.

sociation from the Catholic Church, and, in the 19th century, the medical profession's re-characterization of homosexuality as an evolutionary defect.

In an effort to clearly break with the Catholic Church, England, in the 16th century, statutorily enacted law governing behavior that had previously been governed exclusively by the Catholic Church. This symbol on the part of the monarchy created the illusion that the monarchy no longer acted at the behest of the Catholic Church, but was a nation of civil law. However, the proscriptions against homosexuality were merely Christian ideals re-characterized as secular law. This law made its way to the colonies and eventually arose in State statutes. The statutes generally referred to sodomy and did not universally characterize the act as an act exclusively between two men; however, the proscriptions against sodomy were rooted in the Christian denunciation of non-procreative sex. Discrimination against homosexuality in the law has been characterized as deeply rooted in our nation's history for that reason; yet, in reality the roots of such discrimination lead to Christianity. Consequently, those proscriptions violate the Establishment Clause because they serve no valid secular purpose.

The medical profession, and especially Richard von Krafft-Ebing in the 19th century gave scientific justification to discrimination against homosexuals. Krafft-Ebing, in *Psychopathia Sexualis*, both concretized the sodomite as synonymous with the homosexual, and, by characterizing homosexuality as an evolutionary defect, gave society a medical justification for its repression. He assumed that normal intercourse was penile-vaginal intercourse, and that any deviation from the norm was a sign of de-evolution.

Petitioners and their *amici* in *Lawrence v. Texas*²³⁶ insisted that historically, the practice of sodomy was not associated exclusively with homosexuals and therefore that Texas's statute, which criminalized sodomy between persons of the same sex, but not persons of the opposite sex, was underinclusive.²³⁷ Those advocates purported that the Bible's prohibition of sodomy was not a denunciation of homosexuality but a denunciation of sex without the possibility of procreation. They argued, therefore, that the Texas statute at issue, which prohibited only homosexual sodomy, was underinclusive because heterosexual sodomy could similarly not lead

²³⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²³⁷ See Brief for the Cato Institute as Amicus Curiae In Support of Petitioners at 21, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Respondent's Brief in Opposition at 18).

to procreation. In doing so, they conceded the state's interest in ensuring procreation within marriage.²³⁸

Those advocates, however, glaringly missed the point by using the Bible as the justification to override a statute. Similar to the statute's proponents who used the Bible to justify the discrimination against homosexuals, these advocates used their interpretation of the Bible to justify its invalidity, thereby reifying the place of the Bible as an instrument by which one should determine the constitutionality of a law. What the statute's opponents either failed to realize, or felt was too controversial to suggest, is that the Bible's teaching with regard to homosexuality is irrelevant to the matter of whether a statute is constitutional. Using any religious text as the basis for the construction or interpretation of law blatantly violates the First Amendment's Establishment Clause. In *Lawrence*, the State of Texas, as justification for the statute, asserted that "[h]omosexual conduct cannot lead to biological reproduction, or occur within or lead to a marital relationship."²³⁹ Notably, the Catholic Church uses that same justification for denouncing homosexuality.²⁴⁰

Interestingly, the Court framed the issue such that it concluded that the right to privacy, derived from the Due Process Clause of the Fourteenth Amendment, included a right to consensual, sexual conduct within the home. By doing so, the Court was able to avoid the issue of whether homosexuals must be treated equally to heterosexuals under the law in the context of sexual conduct or otherwise.²⁴¹ However, Justice O'Connor, in her concurrence, utilized equal protection. Although she did not assert that there were no legitimate interests that would justify unequal treatment of homosexuals,²⁴² she felt that the statute at issue in particular demonstrated no other interest than moral disapproval of a particular group of people and that such disapproval was insufficient to justify a law that discriminates among a group of persons under rational basis review.²⁴³

²³⁸ *Id.* at 21–22.

²³⁹ Respondent's Brief in Opp. to Petitioner at 18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

²⁴⁰ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 11, 566 § 2357.

²⁴¹ *See generally Lawrence*, 539 U.S. 558 (2003).

²⁴² Preserving the traditional institution of marriage, according to O'Connor, is a legitimate state interest. *Id.*

²⁴³ *Lawrence*, 539 U.S. at 582.

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disap-

Among those surprised with O'Connor's conclusion was Justice Scalia who, in his dissent, scoffed at O'Connor's suggestion that morality was not a sufficient justification for law. He recognized the impact that O'Connor's conclusion could have on limiting marriage to opposite-sex couples and correctly asserted that:

[The] reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. [Justice O'Connor] seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest . . . could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).²⁴⁴

Disturbingly, Justice Scalia's characterization of Justice O'Connor's statement is completely accurate. However, both Justices Scalia and O'Connor fail to recognize the ultimate issue. Using morality to justify discrimination against homosexuals in the context of marriage or otherwise is not simply a question of whether it may constitute a legitimate state interest under equal protection analysis, but is a question of whether Christian ideologies may be imposed to validate unequal treatment of a class of citizens.

In the context of same-sex marriage, courts have begun to frame justifications for the exclusion of homosexuals from the institution less in terms of moral superiority of heterosexuals over homosexuals, but rather emphasize the purposes the traditional institution functions to serve. Homosexuals are precluded from partaking in that institution not because they are morally inferior but because they cannot fulfill the purposes that marriage serves. What the courts fail to recognize, however, is that their characterizations of the purposes of marriage are based on the same Christian ideologies that denounce homosexuality. Recently, in *Hernandez v. Ro-*

proval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Id.

²⁴⁴ *Id.* at 601-02.

bles,²⁴⁵ the Court of Appeals of the State of New York held that the equal protection provision of the New York State Constitution did not preclude exclusion of homosexuals from the institution of marriage. Among the asserted state interests were the interests of encouraging procreation within marriage and encouraging heterosexual couples to procreate.²⁴⁶ Chief Judge Kaye, while dissenting, conceded that “encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State[.]”²⁴⁷ She concluded, however, that the exclusion of same-sex couples from marriage in no way furthered that interest. Judge Kaye, in her dissent, rejected the interest of encouraging heterosexual couples to procreate; however, she accepted, as a legitimate state interest, encouraging opposite-sex couples to procreate within marriage. Interestingly, the Catholic Church, the most dominant sect of Christianity and, as described above, the source of Christianity in the law, finds that same interest highly compelling.²⁴⁸

Even those who have advocated an end to discrimination against homosexuals have used Christian ideology as their justification for reform. This evidences just how deeply Christian ideology has become embedded in the law. However, it becomes apparent, when one recognizes that the source of discrimination against homosexuals is Christianity, that any justification for that discrimination serves no valid purpose, let alone a secular one. Discrimination against homosexuals is often justified by claims that a majority of Americans agree with such discrimination. As of 2007, Christians comprised 78.5% of the population in the United States, so there may be merit to that claim.²⁴⁹ However, oppression by a religious majority is exactly what the Establishment Clause was designed to prevent.²⁵⁰

3. Faith-Based Organizations and the Executive Discriminate Against Homosexuals

As was demonstrated in *Lown*, faith-based groups, through

²⁴⁵ *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

²⁴⁶ *Id.* at 391.

²⁴⁷ *Id.*

²⁴⁸ See generally CATECHISM OF THE CATHOLIC CHURCH, *supra* note 11.

²⁴⁹ CIA, THE WORLD FACTBOOK-UNITED STATES, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Feb. 6, 2009).

²⁵⁰ See Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-making*, 9 N.Y. CITY L. REV. 31, 66 (2005) (warning that religious references in the law coerce the minority to accept the “norms of the majority”).

Presidential mandate, may discriminate on the basis of homosexuality in hiring.²⁵¹ The FBCI permits faith-based organizations receiving funding to retain their religious character in hiring. In *Lown*, the Salvation Army used its faith to eradicate homosexuality from its workforce. The Salvation Army received ninety-five percent of its revenues from the government; yet, it was able to demonstrate blatant animus toward homosexuals and justify that discrimination by its religious tenets. For practical purposes, *Lown* demonstrates that the government may further an anti-homosexual agenda by contracting with private faith-based organizations that use religious beliefs to justify discrimination. As was discussed previously, that discrimination is not limited to its hiring practices. Although faith-based organizations receiving government funding may not deny services to potential recipients on the basis of religion, there is nothing to prevent those organizations from alienating homosexuals through the practices and beliefs to which they adhere. The conflation of religious and secular interests in the United States has led to the acceptance of justifications for the denial of services as secular where those justifications are, in fact, rooted in religious ideology. For example, a faith-based organization may offer HIV/AIDS services only to those who had contracted HIV through a blood transfusion. That HIV/AIDS service may be centered in Manhattan, and the leaders of that organization would know that the majority of HIV/AIDS infection occurs in New York City by unprotected sex between men. The faith-based organization may make a conscious decision not to serve that clientele because it believes their conduct is sinful and that their affliction with HIV/AIDS is merely due punishment. In doing so, the faith-based organization has used religion to deny its services to a group of people who do not adhere to the tenets of its religion; yet, it is likely its decision to serve only HIV/AIDS patients who had contracted the disease through blood transfusions would not be construed as such.

This is merely to demonstrate that religion pervades our culture. If a faith-based group is privately funded, its denial of services to persons based on their religious beliefs may be reprehensible but not legally cognizable; however, where the government funds those groups, it has endorsed the practices and prejudices of a religious group. Proponents of faith-based groups would assert that the hypothetical group described above is providing a social ser-

²⁵¹ See *Lown*, 393 F. Supp. 2d at 255.

vice—treatment of HIV/AIDS; yet opponents realize the potential for abuse.

The Supreme Court, in *Hein*, has exacerbated that potential for abuse. As a result of its decision, the Executive Branch may do directly, through expenditure of general executive appropriations, that which had been done indirectly in *Lown*. The Executive Branch may expend its general appropriations to proselytize against homosexuality and fund faith-based organizations directly to do so. Faith-based organizations receiving funding from a direct grant by the Executive could blatantly discriminate on the basis of religion and still be immune from judicial review. Any safeguard that might have existed before *Hein* has, in a sense, become inconsequential, because taxpayers no longer have standing to challenge violations of the Establishment Clause so long as a group is funded through general executive appropriations. The Supreme Court, in *Hein*, suggested that limiting taxpayer standing only to Congressional expenditures did not foreclose the possibility that others would have standing to challenge those executive expenditures.²⁵² However, it remains unclear to whom and to which challenges it was referring. It is clear that a faith-based group who had applied for executive funds and was denied the funds would have no incentive to challenge the constitutionality of a program on the basis of the Establishment Clause—as it would be, itself, a faith-based group. Furthermore, such an action would be inappropriate; more appropriate would be an Equal Protection claim—where two similarly situated faith-based groups had been denied equal treatment. However, this tactic offers no recourse with respect to the Establishment Clause violation.

Furthermore, the District Court for the Southern District of New York suggested that a person who had been discriminated against in hiring on the basis of religion had no other recourse than to make an Establishment Clause claim against the government, from which the faith-based group had received its funding. Even assuming the current safeguards apply—that a group cannot deny services on the basis of religion—it seems clear that if a person were denied services based on practices with which the religious organization disagreed, he would similarly only have an Establishment Clause claim against the government.²⁵³

²⁵² *Hein v. Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553, 2571–72 (2007).

²⁵³ The court in *Lown* concluded that although the Salvation Army had received 95% of its revenues from government contracts, it could not be characterized as a state actor. Therefore, the court held that the protections of the Equal Protection

Given the provisions of the FBCI, that a group may discriminate on the basis of religion in hiring, an Establishment Clause claim would unlikely be successful; however, after *Hein*, the possibility that the question would even be entertained by the courts—insofar as a group is funded by the Executive Branch—has been foreclosed. *Hein*, by denying standing to taxpayers to challenge general expenditures by the Executive Branch, has denied those taxpayers the ability to challenge the actions, however discriminatory, of executively funded faith-based organizations. The original purpose of the Establishment Clause, therefore, has been rendered meaningless.

CONCLUSION

Hein v. Freedom of Religion Foundation, Inc. has given the Executive Branch license to proselytize through the use of its general appropriations by foreclosing the ability of federal taxpayers to challenge the proselytization on the basis of the Establishment Clause. Further, the Court's decision has also opened the possibility that the Executive, through its general appropriations, may fund faith-based organizations thereby rendering their actions similarly immunized from judicial review. Government funding of faith-based groups, by any branch of the government, violates the Establishment Clause. It serves no valid secular purpose and, because those groups provide social services pursuant to their religious beliefs, inevitably advances religion. This violation, however, has become unclear as society has embedded religion, particularly Christianity, in the law. The government and the electorate conflate religious justifications for government actions with secular justifications.

This conflation has especially polluted the discourse surrounding homosexual equality. The State uses Christian ideology as justification for discriminating against homosexuals. However, because that ideology has become so deeply embedded in our law, it is unrecognizable as such. Pursuant to President Bush's FBCI, religious groups, including those advocating religions that denounce homosexuality, may discriminate in hiring on the basis of homosexuality. They may also pervert the meaning of social service by injecting religious ideologies into the practice of otherwise secular services. The Supreme Court, in *Hein*, has not only given the Executive

Clause and Free Exercise Clauses did not apply. The only claim to survive was an Establishment Clause claim against the government for funding the faith-based group. See *Lown*, 393 F. Supp. 2d at 255.

Branch license to proselytize, but has immunized groups, funded through general Executive appropriations, from judicial review with respect to the Establishment Clause. The Court has also given the Executive branch license to use religion to denounce whomever it pleases, including but not limited to homosexuals. The decision has truly brought God back into the White House.

