

COMMENT

BLESSED ARE THE BORN AGAIN: AN ANALYSIS OF CHRISTIAN FUNDAMENTALISTS, THE FAITH-BASED INITIATIVE AND THE ESTABLISHMENT CLAUSE*

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I. INTRODUCTION

“It’s not a dictatorship in Washington,
but I tried to make it one in that instance.”¹

President George W. Bush

The role of faith-based organizations in providing social services is a controversial subject with more than its fair share of passionate advocates and detractors. Advocates of government funding for faith-based organizations point to the supposed ineffectiveness of government programs meant to combat social ills such as poverty and drug addiction; they claim that faith-based organizations will do a better, more efficient job in combating these problems.² Detractors not only worry about the actual efficacy of the faith-based programs but also fear the break-down of traditional barriers between church and state.³ While this Comment seeks neither to analyze the actual effectiveness of government social services nor quarrel with the claimed successes of faith-based programs, it will discuss the constitutional implications surrounding government funding of faith-based organizations.

1. Remark made in a speech in New Orleans on January 15, 2004, referring to the executive order making federal funding available to faith-based organizations. Amy Goldstein, *Bush Courts Black Voters*, WASH. POST, Jan. 16, 2004, at A9. The text of the speech available on the White House website wisely omits this particular sentence. See President George W. Bush, Remarks to Faith-Based and Community Leaders (Jan. 15, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040115-7.html> (containing edited text of speech from which the above quote was taken).

2. See generally White House Office of Faith-Based & Cmty. Initiatives, U.S. Dep’t of Justice, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* (Aug. 2001), <http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf> [hereinafter *Unlevel Playing Field*] (containing the details of President Bush’s faith-based initiative).

3. See *infra* Part IV (containing arguments and sources from opponents to the faith-based initiative).

In a dismissive tone, advocates of a weakened barrier between church and state call those who fear government involvement with religion paranoid.⁴ The danger inherent in that fear, though, is the loss of a liberty enshrined in the First Amendment⁵—the right to be free from government-coerced worship and establishment of an official government religion.⁶ Sound bites and platitudes serve only to minimize this legitimate concern, and opponents of a church–state barrier are arrogant to summarily dismiss this legitimate fear as paranoid. Accordingly, this Comment asserts that current Establishment Clause jurisprudence prohibits the unfettered access Christian fundamentalists have gained to the government. Their influence has morally legitimized extreme free-market, fiscally conservative policies; in turn, these policies have led to a slash in government and secular services coupled with a rise in privatization and faith-based providers.⁷ These events have precipitated government actions that promote sectarian institutions and violate the complex, judicially developed church–state legal standards.⁸

To begin this story, Part II of this Comment provides an overview of Christian fundamentalism in the United States and Christian fundamentalists’ increasing role in and influence on the government. Part III surveys and critiques the various approaches used by courts to analyze Establishment Clause cases. Finally, Part IV ties the first two parts together through an analysis of how this increased influence violates separation of church and state. The Comment concludes by suggesting how courts should address future challenges to government funding of faith-based organizations.

II. CHRISTIAN FUNDAMENTALISTS IN THE GOVERNMENT

The influence Christian fundamentalists exercise over the U.S. government raises constitutional concerns surrounding the

4. See *Mueller v. Allen*, 463 U.S. 388, 400 (1983) (cautioning that, in reference to the historical foundations of the Establishment Clause, we should “keep these issues in perspective” (quoting *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part))).

5. U.S. CONST. amend. I (stating that “Congress shall make no law respecting an establishment of religion”); see also *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (cautioning against “the myriad, subtle ways in which Establishment Clause values can be eroded”).

6. *Lynch*, 465 U.S. at 677–78 (majority opinion).

7. See *infra* Part III (exploring in depth the influence of fundamentalists on the current government).

8. See *infra* Parts III–IV (discussing the constitutional implications of fundamentalists’ influence on the current government).

role of faith-based organizations. This Comment asserts that the type of access sectarian groups now have to the government and the policy preferences those groups are able to invoke at a very high level are the types of activities against which the Establishment Clause guards. This Part shows how the faith-based organizations became an attractive alternative to secular government services, coinciding with the Religious Right gaining power in American government.⁹

For decades, a coalition of Christian evangelicals and fundamentalists politically mobilized into an active, far-right wing of the Republican party.¹⁰ This constituency seeks to impose on the government a rigid set of religious, social, and political beliefs.¹¹ The following text will outline the religious and political beliefs of Christian fundamentalists, uncover the intimate ties the Religious Right has to the current government, and conclude by demonstrating how these connections helped create faith-based initiatives.

A. *The Religious and Political Beliefs of the Christian Fundamentalists*

Evangelicals and fundamentalists—two distinct, yet often lumped together, types of Christians¹²—often disagree over the role of government and the legitimacy of the government as an institution. Evangelicals work within the system, seek compromise with political leaders and ultimately accept the legitimacy of government in the context of God’s plan.¹³ Fundamentalists, on the other hand, often reject the notion that human governments have authority and seek separation from

9. See *infra* Part II.C (describing the effect of the Religious Right’s access to elected officials at high levels of government).

10. See JIMMY CARTER, OUR ENDANGERED VALUES: AMERICA’S MORAL CRISIS 2–4 (2005) (discussing the increased partisan rancor in Washington, largely caused by the rise of a vociferous fundamentalist constituency); see also WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 317–20 (1996) (outlining the transformation of the Christian Coalition in the early 1990s from a floundering grassroots organization to a mature political institution).

11. See *infra* Part II.A–B (describing fundamentalists’ political agenda).

12. Laurence R. Iannaccone, Heirs to the *Protestant Ethic? The Economics of American Fundamentalists*, in FUNDAMENTALISMS AND THE STATE 342, 343–44 (Martin E. Marty & R. Scott Appleby eds., 1993).

13. Cf. *Id.* at 344–46 (differentiating strict fundamentalist beliefs from evangelical beliefs in the context of economics—where evangelicals have actively sought to create “Christian economics” and fundamentalists have so far rejected participation in government as to refuse to participate in debate); see also CARTER, *supra* note 10, at 5–9 (describing his own experience as an evangelical Southern Baptist in politics and suggesting that the increased partisan rancor in Washington is partly a result of uncompromising fundamentalist tendencies).

this secular influence;¹⁴ they believe God's word should be the one and only source of authoritative teachings.¹⁵ Despite these differences, "a broad coalition of evangelicals drawn together by their conservative social and political agenda" embodies the core of the Religious Right's political power.¹⁶

While there are certainly strict separatist fundamentalists and left-leaning evangelicals that do not participate, the more accommodating fundamentalist thought does play a role in the group's political strategy.¹⁷ The size and scope of the American government makes it an inevitable dealing partner, and even though evangelicals and fundamentalists within the Religious Right disagree in their views on government, they have worked together to form a powerful lobby.¹⁸

One aspect of fundamentalism that influences many adherents' political outlook is the rejection of modern social developments and the emphasis on tradition.¹⁹ Fundamentalists believe in "centering the mythic past in the present"—making ancient scripture and traditions the model for today's life.²⁰ This emphasis on tradition also applies to their views on government. Fundamentalists subscribe to an image of the original American republic that ascribes to the Founding Fathers a Christian worldview that the Founders did not necessarily hold.²¹ Fundamentalists see free-market economics and capitalism as the intended foundations of the country and reject any traces of socialism or communism as inherent enemies of America's traditional economy.²² Accordingly, they see the welfare state as a socialist institution that should be opposed.²³ They argue government institutions that promote and fund social services are at odds with the traditional design and intent of the founding fathers.²⁴

14. Iannaccone, *supra* note 12, at 345.

15. *Id.* at 343 (describing characteristics of religious fundamentalists).

16. *Id.* at 345–46.

17. *Id.* at 345–36.

18. *Id.*

19. See RICHARD T. ANTOUN, UNDERSTANDING FUNDAMENTALISM 1–4 (2001) (describing fundamentalists' conservative world view that rejects change and embraces tradition).

20. *Id.* at 2.

21. See James Midgely, *The New Christian Right, Social Policy and the Welfare State*, J. SOC. & SOC. WELFARE, June 1990, at 89, 96–97 (describing fundamentalists' views that America was established by sacred design).

22. *Id.*; see also Iannaccone, *supra* note 12, at 345–48 (describing fundamentalist support for unfettered free-market economics).

23. Midgely, *supra* note 21, at 96.

24. *Id.* at 96–97.

In their view, funding faith-based programs helps to decrease the role of the secular welfare state.²⁵

Related to this emphasis on tradition and bringing back an idealized, simpler past, fundamentalists believe that purity and virtue are individual characteristics essential to reclaiming America's moral tradition.²⁶ This view emphasizes individual pursuits, such as piety and purity of the physique and spirit, instead of focusing on larger social injustices.²⁷ These social views and preferences are born of a focus on individual relationships with God and being "born again" into a relationship with Jesus.²⁸

This focus on individual salvation leads fundamentalists to focus politically on individual "values" issues, including abortion, abstinence, homosexuality, and pornography.²⁹ Fundamentalists explain social inequality as resulting from an individual's moral failings instead of economic, cultural, or societal problems.³⁰ The focus on individual responsibility also explains the fundamentalists' strong adherence to free-market economic theories;³¹ this purely capitalist view rejects any government attention to collective social justices like eliminating poverty, hunger, pollution, and racism.³²

The Religious Right's interpretation of scripture also guides the organization's political agenda. Religious fundamentalists are scriptural literalists who believe the Bible is inerrant and factually true in every way.³³ According to these literalists, the Bible calls for a market-based, capitalist state, and the welfare

25. See John King et al., *Bush Signs Order Opening "Faith-Based" Charity Office for Business*, CNN.COM, Jan. 29, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/stories/01/29/bush.faihbased.01/index.html> (paraphrasing President Bush: "Private and faith-based charities . . . will be the Bush administration's first line of defense against poverty, addiction and homelessness").

26. John H. Garvey, *Fundamentalism and American Law*, in *FUNDAMENTALISMS AND THE STATE*, *supra* note 12, at 28, 28–32.

27. *Id.* at 29–30.

28. *Id.*

29. See *id.* (listing homosexuality, pornography, adultery, abortion, and substance abuses as individual transgressions against God).

30. See *id.* at 30–32 ("The flip side of this preoccupation with personal virtue has been an apparent lack of interest in the larger concerns of social justice."); see also ESTHER KAPLAN, *WITH GOD ON THEIR SIDE: GEORGE W. BUSH & THE CHRISTIAN RIGHT* 53–59 (2004) (describing various faith-based programs which profess religion and Christian faith as integral to fixing individual problems); David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 562–63 (2002) ("Faith-based institutions and their proponents often attribute problems of poverty to personal moral failings.").

31. See Iannaccone, *supra* note 12, at 344–48.

32. Midgely, *supra* note 21, at 97–98.

33. Garvey, *supra* note 26, at 32–34; see also Iannaccone, *supra* note 12, at 343 (stating that fundamentalists believe in the literal truth and inerrancy of the Bible).

state is often characterized as “antiscriptural.”³⁴ Jerry Falwell, a prominent fundamentalist leader and founder of the now defunct Moral Majority, is a leading advocate of the scriptural ordination of America’s capitalism.³⁵ James Midgely summarizes Falwell’s thoughts:

America’s commitment to individualist values, hard work, and the acquisition of property and wealth is divinely inspired. . . . [T]he state has transgressed its prescribed role by adopting interventionist economic policies and establishing a variety of social welfare programs. . . . [S]tate social programs should be condemned since they seek to modify God’s purpose: “the divine providence on which our forefathers relied, has been supplanted by the providence of the all-powerful state.”³⁶

A further scriptural argument states that the church alone is responsible for charitable endeavors; accordingly, government welfare and social service programs usurp a role intended for churches.³⁷ This position supports the Religious Right’s argument that antipathy for poor people does not motivate their opposition to the welfare state.³⁸ Rather, cutting welfare spending helps the church to “reassert its traditional welfare ministry” as commanded by scripture.³⁹ President Bush reflected this preference for religious-based services in 2001 by remarking that “private and faith-based charities” will eventually become his “administration’s first line of defense against poverty, addiction and homelessness.”⁴⁰ Whether or not Bush has achieved this goal, allowing faith-based groups to use government money while retaining their overtly religious character signals that the idea of the church as a natural social service provider is affecting policy decisions.⁴¹

In addition to emphasizing tradition and scripture, fundamentalists also believe in the “totality of religion,” meaning that religion applies to every aspect of life, “including politics, the

34. Midgely, *supra* note 21, at 95.

35. *Id.* at 97. For an overview of Falwell’s creation of and work with the Moral Majority, see MARTIN, *supra* note 10, at 191–220.

36. Midgely, *supra* note 21, at 97 (citing JERRY FALWELL, LISTEN, AMERICA! 69–71 (1980) (changes from the original made without indication in Midgely)).

37. *Id.* at 99–100.

38. *Id.* at 100.

39. *Id.*

40. King et al., *supra* note 25 (quoting President Bush as saying also that his “administration will look first to faith-based and community groups” to provide social services).

41. *Id.* (revealing Bush’s sentiment that the government’s historic refusal to fund faith-based groups constitutes discrimination).

family, the marketplace, education, and law.”⁴² Reconstructionist Christians, a sect of Christian fundamentalism, call for this totality in its most extreme form; they advocate an American theocracy in which the law is based on religion and religion is an inextricable part of the law.⁴³ Rousas John Rushdoony, an architect of Christian Reconstructionist ideology, criticizes the welfare state because it means accepting that the “religious and secular domains should be separated” and that this “amounts to the toleration of humanism as a competing religion” and thereby “[dethrones] God and the rule of His law over humankind.”⁴⁴ This fundamentalist society seeks to obliterate the separation of church and state rather than to enshrine it.⁴⁵

Fundamentalists do not subscribe to the separation of life into public and private spheres.⁴⁶ They believe in a religion that is not subjective; there is one God and individual experiences with Him are objectively verifiable.⁴⁷ Therefore, the government should not protect “a variety of choices against government interference—only one.”⁴⁸ Furthermore, assuming that government can build a wall, impenetrable by God, around itself is arrogant and ignorant of the fact that God is present in everything and cannot be separated from man-made institutions. In other words, “[t]he Establishment Clause cannot require us to treat law and religion like unrelated phenomena.”⁴⁹

To fundamentalist religious parties, the current understanding of the proper relationship between church and

42. ANTOUN, *supra* note 19, at 2.

43. Bob Allen, *Christian ‘Reconstructionist’ Says View at Odds with Neoconservatism*, ETHICS DAILY.COM, Nov. 30, 2005, http://www.ethicsdaily.com/article_detail.cfm; see also KAPLAN, *supra* note 30, at 61 (describing “the view that Christians are biblically mandated to take control of all secular and government institutions until Christ returns”); Nancy T. Ammerman, *North American Protestant Fundamentalism*, in FUNDAMENTALISMS OBSERVED 1, 50–54 (Martin E. Marty & R. Scott Appleby eds., 1991) (describing the Reconstructionist movement as one that rejects the separation of religion and government).

44. Midgely, *supra* note 21, at 101.

45. *Id.* One should note that Marvin Olasky, a “Reconstruction-influenced scholar [who] is credited with coining the well-known term ‘compassionate conservative’ . . . was a key adviser in creation of President Bush’s Office of Faith-Based and Community Initiatives.” Allen, *supra* note 43.

46. See generally John H. Garvey, *Introduction: Fundamentalism and Politics*, in FUNDAMENTALISMS AND THE STATE, *supra* note 12, at 13, 13 (writing that fundamentalists reject the modern liberal notion of dividing life into separate public and private spheres).

47. See Garvey, *supra* note 26, at 29–39 (describing the individual nature of the personal conversion, or being “born again,” and the manifestations of this rebirth that start with internal changes and later cause a person to develop a conviction for proselytizing).

48. *Id.* at 39.

49. *Id.*

state, based on modern constitutional jurisprudence, has no validity. After all, the Constitution protects religion from government interference.⁵⁰ Because God is an irremovable factor from all aspects of life,⁵¹ and as a byproduct of the view that social services should be reserved for the church, fundamentalists feel the provision of charitable services becomes tainted through the government's secular agenda.⁵² Under this view, the very act of providing charitable services through the government interferes with the free exercise of religion.⁵³

Even Bush's compromise of funding religious groups to help provide charitable services impedes on some measure of religious expression, as religious groups must serve the government's secular purposes in order to qualify for government money.⁵⁴ "[T]he church has become increasingly dependent on the state to operate its own welfare programs and this has weakened its autonomy."⁵⁵ In the view of these religious groups, removing religion from their programs in order to receive government funding infringes on their constitutionally protected right to free exercise.⁵⁶

B. The Intimate Ties Between Christian Fundamentalists and the Current Government

The previous section described how fundamentalist ideology shapes the goals of Christian fundamentalists. The text below will explore how those viewpoints are being translated into public policy by the current White House and Congress. First, this subpart will describe how the opinions of influential religious persons and organizations are being made into national public policy. Then this subpart will explore the effect of the fundamentalists' viewpoints on the President.

50. U.S. CONST. amend. I.

51. Garvey, *supra* note 26, at 39.

52. *Id.* (pointing towards government involvement in private religious schools as an example of the government's intolerance of conservative religious practices).

53. *Id.* at 39–40 (suggesting that the government's role in areas such as providing schools should be limited to protecting the ability of religious leaders to provide these services free from interference).

54. See King et al., *supra* note 25.

55. Midgely, *supra* note 21, at 99.

56. See Michelle Dibadj, Comment, *The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*, 26 S. ILL. U. L.J. 529, 555–56 (2002) (noting the concern of religious groups that their message will be diluted by the funding regulations in the faith-based initiative); see also King et al., *supra* note 25 (quoting President Bush as saying the White House faith-based initiative will not "discriminate" against religious charities).

1. *The Policies.* American policy, both foreign and domestic, is being heavily influenced by the opinions and preferences of fundamentalist Christians. The 2000 election that brought in a new White House and Congress was a breath of fresh air for the Religious Right, a movement frustrated by several years of unkept promises from previous Republican administrations.⁵⁷ The current administration seeks to appease the Religious Right on three fronts: “values” and other domestic policy issues, court appointees, and foreign policy.

Many hot-button issues fall under the umbrella of “values” issues that Christian fundamentalists believe should be addressed at a national level.⁵⁸ The White House and Congressional Republicans obliged.⁵⁹ For example, the passage of antiabortion laws memorialize the views of the Religious Right.⁶⁰ The current administration has been a ready source and proponent of antigay legislation.⁶¹ Finally, President Bush’s unwavering policy on abstinence promotes the Religious Right’s view.⁶²

President Bush and Congressional Republicans also pandered to the Religious Right by supporting conservative fiscal policies.⁶³ As discussed earlier in this Comment, most Christian fundamentalists see an unregulated free-market economy as the divinely ordained natural system of the United States.⁶⁴ This preference is born of their emphasis on individual responsibility.⁶⁵ Accordingly, President Bush’s tax cuts and conservative fiscal policies have had the full support of the

57. See Iannaccone, *supra* note 12, at 358 (reviewing the Religious Right’s dissatisfaction with President Reagan).

58. See KAPLAN, *supra* note 30, at 134–41 (detailing President Bush’s many pro-life actions, including: reinstating the global gag rule on international organizations that receive U.S. aid; signing a total ban on partial-birth abortions; “starving” pro-choice organizations and abortion providers of federal funds; and appointing staunchly antiabortion judges to the federal appeals court).

59. *Id.*

60. *Id.*

61. *Id.* at 155–61 (identifying President Bush’s capitulation to the Religious Right on the subject of gay marriage).

62. *Id.* at 198 (describing President Bush’s opinion that abstinence-only programs are the only guaranteed way to prevent teen pregnancy and the spread of sexually transmitted diseases).

63. *Id.*

64. See *supra* Part II.A (detailing the fiscal and economic opinions of fundamentalist Christians); see also, e.g., THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS? 70–76 (2004) (discussing the marriage of business and Christian conservatives in the Kansas Republican Party).

65. See Iannaccone, *supra* note 12, at 345–48 (describing fundamentalist support for free-market economics); Midgely, *supra* note 21, at 96–97.

Religious Right constituency.⁶⁶ The final domestic triumph for fundamentalist Christians is the unprecedented focus on and funding of faith-based organizations, which will be discussed in more detail later in this section.

In addition to the above-mentioned domestic policies, fundamentalist influence can also be seen in the Bush administration's court appointees. For decades, the Religious Right has pressured the White House to nominate only judges whose opinions pass strict litmus tests of conservative Christian values.⁶⁷ President Reagan and the elder President Bush were a source of great disappointment on this front.⁶⁸ However, the younger President Bush has proved more cooperative; he not only heavily consults with conservative Christian leaders in the nomination process but has already put forward much more palatable nominees.⁶⁹

Fundamentalist Christians approve of more than just current domestic policies: President Bush's foreign policy also meets the demands of the Religious Right.⁷⁰ In particular,

66. Cf. Midgely, *supra* note 21, at 96–97 (detailing the fundamentalists' frustration with previous administrations that supported a welfare-state and noting their support for candidates who reject such government programs). *But see* CARTER, *supra* note 10, at 192–94 (criticizing unregulated conservative fiscal policy for driving up deficits and increasing the wealth gap).

67. MARTIN, *supra* note 10, at 192–93. The buzzword for Religious Right observers is often whether a Presidential nominee says he will appoint judges who are strict constructionists. *See id.* (noting the call for judges who strictly interpret the Constitution in conformity with the Founders' supposed intent).

68. President Reagan appointed Justice O'Connor, who is not only a woman but also, to some conservatives, an unreliable vote on crucial issues surrounding abortion, prayer in schools, and gay rights. *See* David D. Kirkpatrick, *Conservatives Scrambling to Prepare for a Tough Fight*, N.Y. TIMES, Nov. 1, 2005, at A23 (quoting a conservative Christian leader as jumping at the chance to replace Justice O'Connor). While President Bush gave the Religious Right Justice Thomas, he also appointed Justice Souter, who turned out to be a closeted centrist and cannot be counted on to tow the conservative line. *See* Liz Harper, *Justice David H. Souter*, ONLINE NEWSHOUR, http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/justices/souter.html (last visited Jan. 12, 2007).

69. *See* Editorial, *Faith and the Court*, N.Y. TIMES, Oct. 18, 2005, at A26 (criticizing the contact between President Bush and religious leaders concerning court nominees); *see also* Kirkpatrick, *supra* note 68 (outlining efforts by conservative Christian groups to promote then-Judge Samuel A. Alito, Jr.). Justice Alito's personal opinions and prior rulings are seen by many to be in line with the preferences of the Religious Right. *See, e.g.,* Jo Becker & Charles Babington, *No Right to Abortion, Alito Argued in 1985*, WASH. POST, Nov. 15, 2005, at A1 (describing Alito's affirmative efforts "to bolster his conservative credentials"); David D. Kirkpatrick, *Alito File Shows Strategy to Curb Abortion Ruling*, N.Y. TIMES, Dec. 1, 2005, at A1; Neil A. Lewis, *Alito Often Ruled for Religious Expression*, N.Y. TIMES, Nov. 21, 2005, at A18 ("Judge Samuel A. Alito Jr. has compiled a brief but unmistakable record, lawyers and analysts say, that makes him a leader in the camp of conservative theorists . . .").

70. *See* KAPLAN, *supra* note 30, at 32–33 (finding that Christian fundamentalists reacted with welcome "when the younger George Bush shaped a tough unilateral foreign

fundamentalist Christians, who view the events in the Middle East as consistent with their end-times theology, agree with the current administration's policy toward the Middle East.⁷¹

2. *The Black and White World.* In addition to the influence of the Religious Right on national policies, the Religious Right carries a substantially more powerful and yet more subtle influence—the impact on the personal attitudes and viewpoints of the President. Many scholars and other observers express concern over what they see as President Bush's radical black-and-white allegiance to specific solutions to foreign and domestic issues.⁷² President Bush views society in moral absolutes that are informed by a rigid faith.⁷³ 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.⁷⁴

In the arena of domestic policy, Bush's worldview translates into dogmatic positions on values questions.⁷⁵ Life begins at conception, and all abortion is wrong.⁷⁶ The Bible condemns homosexuality and therefore the government cannot condone

policy instead”).

71. See CARTER, *supra* note 10, at 113–15 (“One of the most bizarre admixtures of religion and government is the strong influence of some Christian fundamentalists on U.S. policy in the Middle East.”). For an interesting discussion of how U.S. foreign policy relates to the end-times prophecies of fundamentalist Christians, see KAPLAN, *supra* note 30, at 30–33.

72. See Charles L. Butler, III, Comment, *Federal Funding to Faith-Based Organizations: Unconstitutional, Wherever the Spirit Moves Them*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 27, 53–59 (2005) (discussing President Bush's “Faith-Based Presidency”). The absolutism of Reconstructionist Christians has been explored already in this Comment, and some of Bush's advisors are influenced by this extreme version of Christianity. See Ammerman, *supra* note 43, at 49–54 (discussing the absolutism of Reconstructionist Christians); see also CARTER, *supra* note 10, at 3 (discussing fundamentalist influence on government and their “black-and-white” view of the world); Allen, *supra* note 43 (naming Marvin Olasky, an advisor to President Bush, and Tom DeLay as national leaders influenced by Reconstructionist philosophies).

73. See Butler, *supra* note 72, at 53 (“[George W. Bush] truly believes he's on a mission from God.” (quoting Ron Suskind, *Without a Doubt*, N.Y. TIMES MAG., Oct. 17, 2004, at 44, 46)).

74. *Id.*; see also KAPLAN, *supra* note 30, at 11–12 (“Bush's ‘peace’ about his decision to invade remained unshakable.”).

75. See Butler, *supra* note 72, at 53; see also CARTER, *supra* note 10, at 3 (“[F]undamentalists have become increasingly influential in both religion and government, and have managed to change the nuances and subtleties of historic debate into black-and-white rigidities and the personal derogation of those who dare to disagree.”).

76. See KAPLAN, *supra* note 30, at 129–30, 160, 198 (describing President Bush's standing ovations at a Right to Life rally, his support of anti-gay-marriage amendments, and devotion to abstinence-only programs).

nonheterosexuality by any means.⁷⁷ Only abstinence can prevent pregnancy and the spread of sexually transmitted diseases.⁷⁸ Some argue that these “values” positions are valid in a country that welcomes freedom of opinion.⁷⁹ Others question whether these absolutist opinions serve to foster tunnel vision, group think, and narrow-minded policies that are at odds with a system that also values pluralism and diversity.⁸⁰

President Bush’s religion-tinged attitude finds expression in his foreign policy as well.⁸¹ Like an Islamic fundamentalist who robotically condemns the decadence of the West, President Bush views terrorists in similarly narrow jihad-like terms: Terrorists are the enemy, driven by a dark force, and they cannot be reasoned with.⁸² It is therefore American policy to obliterate them instead of seeking out and addressing the root causes of extremism.⁸³

Former President Jimmy Carter cautions that this absolutist attitude is leading the United States down a dangerous path.⁸⁴ President Bush routinely dismisses the concerns of the international community,⁸⁵ diverting criticism by pointing to the

77. *Id.*

78. *Id.*

79. See Daniel O. Conkle, *Religion, Politics, and the 2000 Presidential Election: A Selective Survey and Tentative Appraisal*, 77 IND. L.J. 247, 255–56 (2002) (arguing that it is permissible, and even preferable, for religion to play a role in public policy).

80. See MARTIN, *supra* note 10, at 375–76 (discussing the Founders’ preference for separation of church and state in order to promote neutrality and eliminate preference for one sect over another). In the end, rigid stances on “values” questions are, in and of themselves, normative positions. Claiming that these normative judgments are distinctly American suggests that American values are based solely on the ideas and underpinnings of one faith group—conservative Christians. President Bush argues that his election and reelection gave him a mandate from the majority to translate these “values” into policy. The Author of this Article would argue to the contrary that a national election, in which an enormous number of issues were discussed, cannot possibly be a sweeping mandate for such broad policy pronouncements. Arguably, the same voter who voted for President Bush because of his tax plan could also be pro-choice and maybe even gay. In the same way, John Kerry would not have had a mandate to abolish the death penalty. His voters could have voted for him solely because they disliked corporate tax breaks.

81. Butler, *supra* note 72, at 53–54.

82. *Id.* The Bush administration’s policy toward Islamic fundamentalists is but one example of the influence of the fundamentalist, absolutist worldview. See CARTER, *supra* note 10, at 106–09 (condemning the Bush administration’s policy toward North Korea, which is increasingly confrontational and isolationist).

83. Butler, *supra* note 72, at 53–54 (“He believes you have to kill them all.” (quoting Suskind, *supra* note 73, at 46)).

84. See CARTER, *supra* note 10, at 4–5 (lamenting the current administration’s policy of disregard for international institutions).

85. See generally Butler, *supra* note 72, at 53–55 (noting several scholars and observers who criticize this stubborn policy of flippantly dismissing tough questions and valid criticism).

unwavering support of the Coalition of the Willing.⁸⁶ Instead of building true international support, thereby giving his policies true legitimacy, President Bush chooses to take unilateral actions and creates foreign policy that justifies using military force before a threat materializes.⁸⁷

This black-and-white attitude is particularly relevant to the issues surrounding government funding to faith-based organizations. When dealing with a leader whose ideological allies consider poverty, addictions, and other social ills personal moral failings, that leader is likely to favor simple moral solutions as opposed to broad-based secular programs.⁸⁸ For example, instead of fixing the economic, social, or cultural roots of problems, Bush would prefer to give money to an organization that “cures” the sinner through religious conversion and devotion.⁸⁹

C. *The Faith-Based Initiative as a Product of These Intimate Ties*

This subpart explores the implementation of Bush’s faith-based initiative. First, the Texas predecessor provides an important point of comparison to the current national faith-based initiative. Second, this subpart examines the White House Office of Faith-Based and Community Initiatives. Finally, this subpart considers who actually receives funding.

86. A name which, by its own terms, implies that those who don’t agree are not “willing” to help and therefore need not be consulted. Dana Milbank, *Many Willing, but Only a Few Are Able*, WASH. POST, Mar. 25, 2003, at A7 (lampooning the “shock . . . and awe” that should have accompanied the addition of Palau to the list of countries favoring, but not necessarily fighting, the war in Iraq—the “Coalition of the Willing”).

87. See also CARTER, *supra* note 10, at 4–5, 106–13 (discussing the dangers of this unilateralist, confrontational policy in general and specifically with regard to North Korea and Syria).

88. See, e.g., Cole, *supra* note 30, at 562–63 (stating the view of many fundamentalists that poverty and other social problems are the result of personal moral failings); see also KAPLAN, *supra* note 30, at 53–59 (finding that fundamentalists believe personal conversion to Christianity provides the best solution for problems like drug and alcohol addiction).

89. While these programs may provide excellent services, they potentially compromise the freedom of the people seeking assistance. See Cole, *supra* note 30, at 562–63 (warning of the dangers of faith-based programs that stress proselytization). It is interesting to note that President Bush credits his triumph over alcoholism to his personal religious conversion, a fact he frequently reiterates in public appearances related to his faith-based initiative. See KAPLAN, *supra* note 30, at 68–69; see also Pamela Colloff, *Remember the Christian Alamo*, TEX. MONTHLY, Dec. 2001, at 92, 166–67. This Comment does not quarrel with the efficacy of such programs but only questions the propriety of giving government money to programs that overtly use religion to treat social problems.

1. *The Texas Predecessor.* In May 1996, then-Governor Bush created the Faith-Based Task Force and ordered it to “(1) identify obstacles to faith-based groups and (2) recommend ways that Texas can create an environment in which these groups can thrive, free of regulations that dilute the faith factor.”⁹⁰ The task force was composed of clergy and volunteers who sought to craft legislative recommendations giving faith-based groups access to the same funding that secular groups and government agencies received, without the regulations the secular groups must follow.⁹¹ Bush contended that religion was an integral component to the success of these groups and that preventing groups with overtly religious goals and curricula from receiving government funding infringed on their constitutional right of free religious exercise.⁹² Bush further believed that removing religion hampered the potency of their programs.⁹³

On the federal level in August 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act with “Charitable Choice” provisions that allowed states to contract with faith-based organizations to provide welfare services.⁹⁴ Acting with this newly granted authority, in 1997, the Texas House passed two related measures that further cemented the place of faith-based groups in providing social services. House Bill 2482 allowed child care and child placement facilities to be reviewed and approved by a private board “as an alternative to state licensure.”⁹⁵ House Bill 2481 extended the exemption to

90. Texas Freedom Network, Faith-Based Initiative Timeline, <http://www.tfn.org/religiousfreedom/faithbased/timeline/index.php> (last visited Jan. 12, 2007) [hereinafter Timeline] (internal quotation marks omitted) (quoting now defunct website <http://www.governor.state.tx.us/Faith-Based/index.html>); see also HELEN R. EBAUGH, THE FAITH-BASED INITIATIVE IN TEXAS: A CASE STUDY 2 (2003), available at http://www.religionandsocialpolicy.org/docs/events/2003_annual_conference/case_study_2_003_texas.pdf (examining the history and the impact of the Texas faith-based initiatives). For a background of George W. Bush’s involvement with the Religious Right, see KAPLAN, *supra* note 30, at 68–71, which describes how Bush and Karl Rove courted the conservative religious vote starting during the elder Bush’s presidential campaign. The courtship culminated with the younger Bush’s election as Texas Governor and then as President. *Id.*

91. See Timeline, *supra* note 90; see also Colloff, *supra* note 89, at 167 (identifying the members and goals of then Governor Bush’s faith-based task force).

92. Cf. Timeline, *supra* note 90; Colloff, *supra* note 89, at 167.

93. See Timeline, *supra* note 90 (naming protection of the religious integrity of faith-based groups as a goal in Texas’s faith-based initiative).

94. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104(b), 110 Stat. 2105, 2162 (allowing states to contract with faith-based organizations to provide social services); see also Timeline, *supra* note 90 (describing the federal law, enacted in 1996, and the Executive Order of 2004 that further promotes faith-based charities).

95. Act of May 26, 1997, 75th Leg., R.S., ch. 42, § 1, 1997 Tex. Gen. Laws 2242; see also Timeline, *supra* note 90 (outlining the provisions of House Bill 2482).

faith-based alcohol and drug treatment programs that rely exclusively on funding from government regulations.⁹⁶

Following the passage of this legislation, Governor Bush created the Texas Association of Christian Child Care Agencies as an accreditation board for programs seeking alternative approval.⁹⁷ As a result, not only were faith-based groups able to receive money despite the religious content of their programs, they also escaped state licensing and regulation through the establishment of separate and private accreditation boards.⁹⁸ In the end, the Faith-Based Taskforce accomplished Governor Bush's goal—overtly religious groups gained access to government funding with little state oversight.⁹⁹ The separate accreditation process ultimately opened the door to groups that do not comply with the state's normal standards of regulation.¹⁰⁰

2. *The Office of Faith-Based and Community Initiatives.* By President George W. Bush's second week in the White House, he was pursuing the same measures at the federal level.¹⁰¹ To begin this effort, President Bush brought to the White House the same players who helped draft Texas's faith-based initiatives. For example, Don Willet, who wrote the Texas bill setting up alternative accreditation boards, was recruited to serve as the law and policy director of the White House office.¹⁰² On January 29, 2001, President Bush issued an executive order establishing the Office of Faith-Based and Community Initiatives¹⁰³ and later

96. Act of June 2, 1997, 75th Leg., R.S., ch. 464, § 1, 1997 Tex. Gen. Laws 2239 ("An act relating to faith-based chemical dependency treatment programs and counselors."); see also Timeline, *supra* note 90 (providing an overview of House Bill 2481).

97. See Colloff, *supra* note 89, at 167 (describing the Texas Association of Christian Child Care Agencies' make-up and accreditation process).

98. *Id.*

99. *See id.*

100. *See generally* Colloff, *supra* note 89, at 93–94, 163–65, 167–69 (describing the abusive tactics used by one religious institution to change the behaviors of young children seen to be sinners).

101. King et al., *supra* note 25 (reporting on the advent of Bush's faith-based initiative almost immediately following his 2001 inauguration).

102. See Colloff, *supra* note 89, at 170 (listing the numerous advisors then-Governor Bush took with him to the White House); see also KAPLAN, *supra* note 30, at 43–44 (naming the pervasively Christian staff running the Office of Faith-Based and Community Initiatives). It is this religion-tinged advice that is of particular relevance for the constitutional arguments contemplated in this Comment. The presence of so many overtly religious Christian advisors suggests President Bush's neutral language is but a smokescreen intended to hide the flood of funding to conservative Christian organizations. See CARTER, *supra* note 10, at 61 (expressing no doubt that "the goal is to finance programs that are clearly religious" and estimating the government funnels \$2 billion to religious institutions).

103. Exec. Order No. 13,198, 3 C.F.R. 752–54 (2001), reprinted in 3 U.S.C. prec. § 101, at 159–60 (Supp. IV 2004); Unlevel Playing Field, *supra* note 2.

issued another order requiring five government agencies—Health and Human Services, Housing and Urban Development, Education, Labor, and Justice—to investigate the barriers faith-based groups experience in qualifying for government funding.¹⁰⁴ The studies revealed many barriers, three of which are particularly relevant to this Comment.

First, over the last few decades, the Supreme Court shifted its stance toward religion and government by adopting a stronger “neutrality framework that honors evenhandedness and pluralism.”¹⁰⁵ According to the White House, this line of reasoning opened legal doors to funding religious groups as a part of neutrality-based decisionmaking, but other government officials still felt reluctant to fund religious organizations.¹⁰⁶

Second, a pervasive suspicion of religious groups caused the formation of regulations that exclude most faith-based groups from funding.¹⁰⁷ The White House claims that the overtly religious were discouraged from even applying.¹⁰⁸ Instead, the studies find that government officials view funding organizations using religion as an integral part of charitable work as tantamount to the government itself supporting a particular religion through funding decisions.¹⁰⁹

Finally the studies find, not only are the rules discouraging to faith-based groups, but that there are excessive restrictions on the groups that actually take the plunge to seek funding.¹¹⁰ Procedural regulations used to assess the eligibility of a group put faith-based programs through an “organizational strip-search” to root out overtly religious practices and then required these programs to change their nature to comply with funding guidelines.¹¹¹ Groups that rely on religion as an integral component of their success are thus stripped of their potency because of this antireligious requirement.¹¹²

In July 2001, the House of Representatives passed a bill based on the White House reports that allowed faith-based

104. Exec. Order No. 13,279, 3 C.F.R. 258–62 (2002), *reprinted in* 5 U.S.C. § 601, at 183–84 (Supp. IV 2004).

105. *Unlevel Playing Field*, *supra* note 2 (identifying “Barrier 1: A Pervasive Suspicion About Faith-Based Organizations”).

106. *Id.*

107. *Id.* (identifying “Barrier 2: Faith-Based Organizations Excluded from Funding”).

108. *Id.*

109. *Id.*

110. *Id.* (identifying “Barrier 3: Excessive Restrictions on Religious Activities”).

111. *Id.*

112. *Id.* This Comment seeks to challenge this exact idea—it is precisely the religious nature of these programs that should make funding them unconstitutional.

groups to compete for federal funding.¹¹³ The language in the bill included many of the deregulations that would allow faith-based groups to retain their religious character and still be eligible for government money.¹¹⁴ However, the bill never made it out of the Senate.¹¹⁵ The Senate tried and failed again in early 2002 with a scaled back bill.¹¹⁶ Frustrated by the lack of Congressional acquiescence, President Bush issued the second executive order on December 12, 2002 intended to bypass the legislative step.¹¹⁷ In 2003, the House of Representatives passed a watered-down version of the original initiatives, which did not include a charitable choice provision or some of the originally proposed more overt concessions to religious groups; the Senate never passed the legislation, so it was not enacted.¹¹⁸ In 2005, the House again attempted, and again failed, to pass the initiative.¹¹⁹

3. *Who's Getting the Money?* The most oft-repeated argument justifying government funding to religious organizations is that the money is available to organizations of all religious denominations.¹²⁰ However, most data show that Christian organizations benefit most heavily from the federal money.¹²¹ This fact discredits the claim that the money is going to organizations of all religious stripes.¹²² In the end, the neutrality justification is irrelevant; it is the religious nature of these

113. 145 CONG. REC. H4222 (daily ed. July 19, 2001) (statement of Rep. Pryce) (discussing H.R. 7, 107th Congress).

114. *Id.*

115. See Dibadj, *supra* note 56, at 531 (finding that Senate Democrats killed the bill because of the lack of protections against employment discrimination engaged in by faith-based organizations).

116. Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. (2002), reprinted in 148 CONG. REC. S546–56 (daily ed. Feb. 8, 2002).

117. See Exec. Order 13,279, *supra* note 104 (implying Christian faith-based organizations are a persecuted minority).

118. Charitable Giving Act of 2003, H.R. 7, 108th Cong. (2003).

119. Charitable Giving Act of 2005, H.R. 3908, 109th Cong. (2005).

120. See Unlevel Playing Field, *supra* note 2 (“The delivery of social services must be results-oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.”).

121. See KAPLAN, *supra* note 30, at 40–45, 63–67 (attending a White House sponsored training for faith-based groups seeking federal funds and finding an obvious absence of anything but evangelical Christian groups; also, explaining the preferential treatment conservative Christians receive in the White House); see also CARTER, *supra* note 10, at 61 (expressing near certainty that most faith-based funds will be funneled to fundamentalist Christian organizations).

122. Admittedly, as long as money is technically available to all types of religious organizations, the actual distribution of the funds may be irrelevant to proponents of the faith-based initiative.

programs and the unavailability of any secular alternative that offends the Establishment Clause.¹²³

III. THE EVOLUTION OF ESTABLISHMENT CLAUSE STANDARDS

An understanding of the development of Establishment Clause jurisprudence helps to grasp fully the scope and effect of religious influence on government. This Part examines why the Constitution includes the Establishment Clause in the First Amendment and explores the court-developed standards used to analyze cases dealing with religion and government.

The Establishment Clause of the First Amendment was intended to avoid the establishment of a government church.¹²⁴ Memories of religious persecution at the hands of government were fresh on the minds of the Founders; in fact, “[a] large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.”¹²⁵ Admittedly, scholars and judges disagree over the exact motivation behind the Establishment Clause,¹²⁶ but even advocates of a porous barrier between church and state concede that the Founders endeavored to create a protection against government-coerced religious worship.¹²⁷ In the end, the most straightforward interpretation of the Establishment Clause seeks to avoid a government-run church and compulsory adherence to a government-sponsored religion.¹²⁸

123. See *infra* Part IV (discussing the constitutional implications of funding overtly religious faith-based programs).

124. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947) (noting the many nuances in court interpretation of the Establishment Clause and advocating a broad reading).

125. *Id.* at 8.

126. Some judges and other writers advocate for strict separation of church and state. See *id.* at 16 (calling for a “wall of separation between church and state” (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))); see also MARTIN, *supra* note 10, at 376–77 (recognizing the debate between separationists and accommodationists and finding that the separationist view embodies the correct context of Jefferson’s letter containing the wall metaphor); Butler, *supra* note 72, at 33 (extolling the precedent of strict separation despite trends toward neutrality). Others disagree with the above characterization of Jefferson’s intent. See *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (disagreeing with the historical legitimacy of using Jefferson’s wall metaphor as continuing justification for the church–state barrier); see also Daniel P. Hart, Note, *God’s Work, Caesar’s Wallet: Solving the Constitutional Conundrum of Government Aid to Faith-Based Charities*, 37 GA. L. REV. 1089, 1100–02 (2003) (discussing the Court’s erroneous reliance on “Jefferson’s ‘wall’ metaphor in its interpretation of the Establishment Clause”).

127. See Aaron Cain, Comment, *Faith-Based Initiative Proponents Beware: The Key in Zelman Is Not Just Neutrality, but Private Choice*, 31 PEPP. L. REV. 979, 990 (2004) (discussing Madison’s efforts to “allay” fears of coerced, government religion).

128. See CARTER, *supra* note 10, at 57–58 (discussing the church and state as “two

The last half-century witnessed a slow but definite evolution in the Court's approach to the Establishment Clause. To begin, the Court consistently rejected an absolutely rigid standard of interpretation in favor of a more malleable and fact-specific analysis.¹²⁹ Along the same lines, the Court recognized some inevitable interplay between government and religion.¹³⁰ In more recent jurisprudence, however, the Court is abandoning this purposeful flexibility in favor of a more rigid and formulaic analysis of Establishment Clause cases along neutrality and private-choice lines.¹³¹ But this trend is not set in stone.¹³²

Finally, before this Comment begins its analysis of the standards applicable to faith-based organizations, one should note that very little case law directly deals with faith-based organizations and the Establishment Clause. Most Establishment Clause case law centers on government funding of parochial schools, voucher programs, and government-sponsored public religious displays.¹³³ The most applicable standards for analyzing the constitutionality of faith-based organizations are strict separation, the *Lemon-Agostini* test, the Endorsement test, and neutrality and private choice.

different realms of service"); see also *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985) (noting the history behind the Establishment Clause and the Founders and colonists' desire to avoid a state-run church), *rev'd on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997).

129. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984); see also *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (finding no clear "lines of demarcation" in analyzing church-state separation).

130. *Lynch*, 465 U.S. at 672-73; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (noting America's history as having no "entirely sanitized separation between Church and State"); see also *Mueller*, 463 U.S. at 393 (rejecting an automatic disqualification of aid to religious groups as unconstitutional).

131. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (noting the Court has "consistently held" that government money flowing to sectarian programs neutrally and through true private choice does not violate the Establishment Clause); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (emphasizing the Court's "consistent and unbroken" preference to treat private-choice programs neutrally); Laura J. Rees, Comment, "No [Christian] Child Left Behind": *The Supreme Court's Jurisprudence in Establishment Clause Cases Involving Schoolchildren*, 42 HOUS. L. REV. 197, 199-200 (2005) (discussing the Court's newly formalistic approach to Establishment Clause cases).

132. See *Mitchell v. Helms*, 530 U.S. 793, 837-38 (2000) (O'Connor, J., concurring in the judgment) (questioning the plurality's elevation of neutrality and private choice to factors of primary importance).

133. See, e.g., *Zobrest*, 509 U.S. at 3 (government funding of parochial schools); *Lynch*, 465 U.S. at 671 (government-sponsored public religious displays); *Mueller*, 463 U.S. at 390 (voucher programs).

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A. Strict Separation

Justice Black in *Everson v. Board of Education of Ewing* concisely articulates strict separation.¹³⁴ In analyzing whether a town could reimburse the parents of parochial school students for bus fare to and from school, the Court stated that the Establishment Clause

means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will No tax in any amount, large or small, can be levied to support any religious activities or institutions Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.¹³⁵

This standard, arguably the broadest, is still quoted and advocated by Establishment Clause scholars.¹³⁶ The strict separation approach embodies Thomas Jefferson's metaphor of an impregnable wall that separates church and state.¹³⁷ Although falling out of favor with the Court, the strict separation approach is still relevant. For instance, the pervasively sectarian nature of some faith-based organizations makes it nearly impossible to discern between the requisite secular goals of their programs and the overtly religious means by which those goals are achieved.¹³⁸ Strict separation may still prove a useful tool when dealing with such programs.

B. The Lemon–Agostini Test

After several decades of applying strict separation to Establishment Clause cases, the Court shifted gears slightly in *Lemon v. Kurtzman*.¹³⁹ The *Lemon* Court recognized the inevitability of some government involvement with religion while cautioning that establishment can still occur by actions that do

134. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

135. *Id.*

136. *See* Butler, *supra* note 72, at 60–63 (claiming the Court should still look to the strict separation approach despite a move toward neutrality and private choice).

137. *Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)); CARTER, *supra* note 10, at 60.

138. *See* Butler, *supra* note 72, at 34–35 (warning of the dangers of a weak Establishment Clause for both government and religion).

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

not actually set up a government church.¹⁴⁰ To balance these concerns, the Court established a three-part test to determine the constitutionality of government aid to religious schools.¹⁴¹ First, the program must have a secular purpose; second, the program cannot have the primary effect of advancing or inhibiting religion; finally, the program must not excessively entangle government and religion.¹⁴²

Nearly two decades later, the Court modified the *Lemon* test in *Agostini v. Felton*.¹⁴³ The *Agostini* modification reformulates the *Lemon* test as having only two prongs, collapsing the excessive “entanglement prong” into the “effects prong.”¹⁴⁴ The Court now holds that government funding of religious organizations does not violate the Establishment Clause if the organization’s program (1) has a legitimate secular purpose and (2) does not have the primary effect of advancing or inhibiting religion by (a) resulting in government indoctrination, (b) defining “recipients by reference to religion,” or (c) creating excessive government entanglement with religion.¹⁴⁵

The nuanced *Lemon–Agostini* test recognizes the inevitable interaction between government and religion by relegating the excessive entanglement prong from a primary to secondary analytic factor.¹⁴⁶ Because government funding of religious organizations necessarily involves extensive oversight to regulate the content of the programs, the excessive entanglement prong of the original *Lemon* test would almost automatically invalidate funding for faith-based charitable organizations.¹⁴⁷ As a result,

140. *Id.* at 612 (stating the Establishment Clause draws the line at “sponsorship, financial support, and active involvement” in religious activity by the state (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970))).

141. *See id.*

142. *Id.*

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

144. *Id.* at 232–33.

145. *See id.* at 222–34 (adopting new criteria for assessing whether aid to religious organizations has an impermissible effect while maintaining the requirement that the religious aid have a legitimate secular purpose).

146. *See Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (noting *Agostini*’s modification of the *Lemon* test by recasting the third entanglement prong as one factor of the purpose and effects prong).

147. *See Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 967 (W.D. Wis.) (suggesting that without the refinements to the *Lemon* test by *Agostini*, government oversight of religious organizations receiving funding would be improper: “Such monitoring does not necessarily amount to excessive entanglement, especially given the parameters established in *Agostini*” (emphasis added)), *modified*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003).

the reformulation of the test better protects the funding of faith-based organizations.¹⁴⁸

C. *The Endorsement Test*

Another standard relevant to analyzing the constitutionality of funding for faith-based organizations is the Endorsement test developed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*.¹⁴⁹ *Lynch* questioned whether a Christmas display erected by the City of Pawtucket, Rhode Island, violated the Establishment Clause.¹⁵⁰ Relying on a fact-intensive, flexible analysis,¹⁵¹ the majority held that the display did not violate the Constitution largely because of the unavoidable and inevitable interplay between government and religion.¹⁵² The Court found this interplay to be a consistent theme in the history and jurisprudence of the Establishment Clause.¹⁵³

Justice O'Connor chose to refine the majority's holding by writing separately in her concurrence. O'Connor clarifies the *Lemon* test as a tool to focus "on institutional entanglement and on endorsement or disapproval of religion" to determine whether a government action runs afoul of the Establishment Clause.¹⁵⁴ Under O'Connor's analysis, government action results in excessive and institutional entanglement if it "interfere[s] with the independence of the institutions, give[s] the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster[s] the creation of political constituencies defined along religious lines."¹⁵⁵ Further, a government action endorses religion when it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."¹⁵⁶ To determine whether a government action is an

148. *Id.*

149. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

150. *Id.* at 671.

151. *See id.* at 678–79 ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.").

152. *See id.* at 685–87 (rejecting the idea that a religious symbol, placed in a public setting to foster the holiday spirit violates the Constitution by giving several examples of traditional interplay between religion and government).

153. *See id.* at 672 (recognizing that the "total separation of [church and state] is not possible in an absolute sense").

154. *Id.* at 689 (O'Connor, J., concurring).

155. *Id.* at 687–88.

156. *Id.* at 688; *see also* *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989) (explaining that the government must refrain from affiliation with any religious sect and must remain secular "to avoid discriminating among citizens on the basis of their

endorsement, courts should look to a reasonable observer's understanding of the purpose of the government action.¹⁵⁷ More specifically, the government action violates the Establishment Clause if the action is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement . . . of their individual religious choices."¹⁵⁸

According to O'Connor, both the purpose and effect prongs of the *Lemon* test are best analyzed by focusing on the endorsement by government.¹⁵⁹ First, the purpose prong is not satisfied merely by a legislatively articulated secular purpose; under the Endorsement test, the government's intent to convey a message of endorsement or disapproval will make irrelevant any articulated secular purpose.¹⁶⁰ Second, government actions are not void automatically because they "in fact cause[] . . . advancement or inhibition of religion."¹⁶¹ Practices that intentionally or unintentionally communicate a message of endorsement by "mak[ing] religion relevant, in reality or public perception, to status in the political community" violate the Endorsement test.¹⁶² Above all, O'Connor emphasizes the importance of fact-specific analysis, judging each challenged "government practice . . . in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."¹⁶³ She furthermore calls for "careful judicial scrutiny" of government displays of religiosity because of "the myriad, subtle ways in which Establishment Clause values can be eroded."¹⁶⁴

Whereas *Lynch* deals with a municipality's public religious display, the issues surrounding funding to faith-based organizations undoubtedly will involve different facts and circumstances. For instance, a message of endorsement or disapproval might be found more obviously in a religious display

religious faiths").

157. *Lynch*, 465 U.S. at 692, cited in *Allegheny*, 492 U.S. at 595.

158. *Allegheny*, 492 U.S. at 597 (internal quotation marks omitted) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

159. See *Lynch*, 465 U.S. at 691–92 ("The proper inquiry under the purpose [and effect] prong[s] of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.").

160. *Id.* at 690–91.

161. *Id.* at 691–92.

162. *Id.*

163. *Id.* at 694; see also *Allegheny*, 492 U.S. at 597 (finding unconstitutional government use of religious symbolism if this action effectively endorses a religious belief, depending on the religious symbolism's context).

164. *Lynch*, 465 U.S. at 694.

erected by the government.¹⁶⁵ However, the explicit nature of this type of endorsement does not diminish the potential tacit endorsements that the government may make when approving funds for pervasively sectarian organizations.¹⁶⁶ The overtly religious methods the organization uses send a message of government endorsement of a particular sectarian practice.

To protect against this threat, this Comment advocates for the use of O'Connor's Endorsement test as an appropriate way to analyze the constitutionality of funding faith-based organizations. The validity of this test becomes clear when distinguishing between two types of suspect funding: (1) the use of vouchers for and funding of parochial schools and (2) funding of faith-based organizations. This Comment will show how using the purpose and effects prongs of current Establishment Clause jurisprudence, tempered by the Endorsement test, will produce different results when applied to the two different types of cases.

D. *Neutrality and Private Choice*

The final approach to Establishment Clause cases centers on the notions of neutrality and private choice. *Mueller v. Allen* was the first case to use these analytical concepts.¹⁶⁷ In *Mueller*, the Court judged the constitutionality of a Minnesota statute allowing parents to deduct the costs of their children's education, whether that education was at a public or parochial school.¹⁶⁸ The majority holding relegated the three-prong *Lemon* test to nothing more than a "helpful signpost"¹⁶⁹ and promoted the principles of neutrality and private choice as important analytic factors.¹⁷⁰ Moreover, the *Mueller* decision eroded the principle that any government subsidy to parochial schools, whether direct or indirect, constitutes impermissible government support for religious education.¹⁷¹ Before *Mueller*, both grants flowing directly

165. *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 966–67 (W.D. Wis.) (noting how the analysis would differ if the case concerned erection of a physical display), *modified*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003).

166. *See infra* Part IV.B (outlining why the Endorsement test would be the best method for judging the constitutionality of funding faith-based organizations).

167. *Mueller v. Allen*, 463 U.S. 388 (1983).

168. *Id.* at 390–92 (outlining the details of the statute in question).

169. *Id.* at 394 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

170. *See id.* at 398–99 (specifying neutrality and private choice among the "many factors to be considered").

171. *See id.* at 404–05 (Marshall, J., dissenting) (recognizing the majority's failure to adhere strictly to precedent by ignoring "the continuing vitality" of the points of law established in *Nyquist*). *Nyquist* held unconstitutional a New York statute that gave both direct aid to parochial schools in the form of maintenance and repair funds and indirect

to the school and tax credits flowing indirectly to the school equally violated the Establishment Clause.¹⁷² After *Mueller*, direct grants remained impermissible but the government found an open avenue for subsidizing religious education by giving tax breaks to parents who send their children to parochial schools.¹⁷³

The Supreme Court has yet to pass judgment on any Establishment Clause case concerning government funding to faith-based organizations.¹⁷⁴ However, the Court applied the neutrality and private-choice principles to many cases concerning vouchers for and funding of parochial schools.¹⁷⁵ The Court relied on neutrality principles to uphold government funding of sectarian institutions as long as the government made funding available to both secular and sectarian programs and did not discriminate among religious affiliations.¹⁷⁶ In addition to making the funding neutrally available, the funds must meet the additional requirement of reaching the sectarian institution by the private choice of the recipient; in other words, the recipient of the funds must be an individual who then exercises personal preference by using the money, tax credit, or reimbursement to fund religious education.¹⁷⁷ As mentioned briefly above, the Court's approach to these cases has become increasingly

aid through tuition reimbursement and tax credits to parents. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779–80, 783 (1973).

172. See *Mueller*, 463 U.S. at 404 (commenting that, prior to *Mueller*, direct and indirect subsidies to religious education violated the Establishment Clause).

173. See *id.* at 416–17 (stating that the majority has abandoned the fundamental principle that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions” (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947))).

174. The Supreme Court recently denied a petition for certiorari to a group challenging the constitutionality of giving AmeriCorps funding to recipients who teach in religious schools. See *Am. Jewish Cong. v. Corp. for Nat'l & Cmty Serv.*, 126 S. Ct. 1132 (2006), *denying cert. to* 399 F.3d 351 (D.C. Cir. 2005).

175. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Mitchell v. Helms*, 530 U.S. 793, 796 (2000); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 489 (1986); *Mueller*, 463 U.S. at 399 (majority opinion).

176. See *Zobrest*, 509 U.S. at 8 (stating that government benefits neutrally provided “to a broad class of citizens defined without reference to religion” do not automatically violate the Establishment Clause “just because sectarian institutions may also receive an attenuated financial benefit”); see also *Zelman*, 536 U.S. at 649 (noting “neutral government programs that provide aid directly to a broad class of individuals” are not readily subject to Establishment Clause attack).

177. See *Witters*, 474 U.S. at 486–87 (finding that tuition aid to a student who chooses to study at a seminary “flows to [the] religious institution[] . . . only as a result of the genuinely independent and private choices of aid recipients”); see also *Zelman*, 536 U.S. at 652 (noting that when funds reach sectarian institutions through private choices of the individual recipient of the funds, “the circuit between government and religion [is] broken” thereby avoiding an Establishment Clause violation).

formalistic.¹⁷⁸ Neutrality and private choice have essentially been promoted to the primary analytic tools by which to judge the constitutionality of government funding to religious organizations.¹⁷⁹ This analysis allows the Court to overlook the effects caused by funding religious institutions; these effects may include creating the perception that the government is favoring and promoting sectarian activity.¹⁸⁰

Even though the Supreme Court has not had many opportunities to pass judgment on faith-based organizations, several lower courts have addressed the Establishment Clause issues raised by funding these groups.¹⁸¹ Their approaches to the issue have varied. In *Freedom from Religion Foundation v. McCallum*, plaintiffs challenged Wisconsin state's funding of a religious alcohol treatment program; the program was funded through a contract with the Wisconsin prison system and a Department of Workforce Development grant.¹⁸² The district court originally ruled the funding unconstitutional as government aid to a pervasively sectarian organization.¹⁸³ Upon rehearing, however, the same district court found the funding

178. See *supra* note 131 and accompanying text. In the last two decades, cases before the Court concerning government funding of parochial schools or vouchers have been analyzed using this neutrality and private-choice framework. See *supra* note 175. The *Lemon-Agostini* emphasis on purpose and effect have been demoted in favor of this formulaic framework. See *supra* note 131 and accompanying text. Using this formalistic method, the actual purpose and effects of the funding are often justified by saying that any government-sponsored benefit to religion is merely incidental and coincidental because the "private choice" of the individual broke the impermissible link between government and religion. See, e.g., *Zelman*, 536 U.S. at 652 (establishing that a private choice suffices to breaking the link between government and religion for constitutional purposes).

179. *Accord Mitchell*, 530 U.S. at 837–39 (O'Connor, J., concurring) (disagreeing with the majority's singular focus on neutrality in assessing the validity of government action).

180. This is the crux of the critique of neutrality and private choice. In other words, neutrality and private choice are oversimplified tools through which the court can overlook the actual effects of a funding decision. Cf. *Cole*, *supra* note 30, at 561 (noting the "groundbreaking" nature of funding groups that profess to achieve success in providing charitable services precisely because of the group's religious nature).

181. *Moeller v. Bradford County*, 444 F. Supp. 2d 316 (M.D. Pa. 2006); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005); *Conley v. Jackson Twp. Trs.*, 376 F. Supp. 2d 776 (N.D. Ohio 2005); *Freedom from Religion Found., Inc. v. McCallum*, 214 F. Supp. 2d 905 (W.D. Wis.), *modifying* 179 F. Supp. 2d 950 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003).

182. *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 953 (W.D. Wis.), *modified*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd* 324 F.3d 880 (7th Cir. 2003).

183. See *id.* at 978 (finding that "plaintiffs have demonstrated that it is not possible to separate the religious components of the [treatment program] from its secular ones," the court ruled "both streams of funding represent governmental indoctrination of religion in violation of the establishment clause").

permissible because individuals chose to participate in the religious alcohol treatment by their own private choice.¹⁸⁴

In *Conley v. Jackson Township Trustees*, an individual plaintiff challenged the municipality's donation of money, office space, and other aid to the local YMCA.¹⁸⁵ The district court found no violation of the Establishment Clause because the YMCA was not a pervasively sectarian institution and the aid was available neutrally.¹⁸⁶ The combination of these factors indicated to the court that there was no government indoctrination.¹⁸⁷

In *Teen Ranch v. Udow*, plaintiff Teen Ranch, a Christianity-based residential facility for troubled youth, challenged a moratorium on funding to its organization.¹⁸⁸ The court in this case also used a neutrality and private-choice framework.¹⁸⁹ The court focused almost exclusively on the private-choice principle, using that concept to distinguish between the proper treatment of direct and indirect funding.¹⁹⁰ In other words, government funding is indirect and, as a result, constitutional if it reaches the faith-based organization through the private choice of the recipient.¹⁹¹ However, even using the same neutrality and private-choice framework as the courts above, the *Teen Ranch* court reached a different conclusion.¹⁹² The court could not find a

184. *McCallum*, 214 F. Supp. 2d at 917–20.

185. *Conley*, 376 F. Supp. 2d at 777–78.

186. *Id.* at 783–87. This case is a good example of how neutrality principles have permeated the court's analysis of Establishment Clause issues. *Id.* at 781–82 (casting the *Lemon-Agostini* test as a tool for assessing government neutrality). The case also provides an illuminating discussion of the *Lemon-Agostini* test. *Id.* at 781–83. Initially, courts must look to the legislative purpose of the statutory funding in assessing the purpose prong. *Id.* at 782. Once the court finds a secular purpose, the court should then consider the effects prong by analyzing whether (1) the funding resulted in government indoctrination, (2) recipients were defined by their religion, or (3) excessive government entanglement with religion resulted. *Id.* The court expounded on each of these considerations. *Id.* No government indoctrination exists if the benefit is "disbursed according to . . . neutral criteria." *Id.* The program does not define recipients by religion as long as the criteria used to distribute benefits does not create a financial incentive to use the aid for religious indoctrination. *Id.* The last inquiry, whether there is excessive entanglement, implicates yet another set of subissues. The court must consider "(1) the character and purposes of the [benefited] institutions," (2) the nature of the government aid, and "(3) the resulting relationship between the government and religious authority." *Id.* (internal quotations omitted).

187. *Id.* at 787.

188. *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 829–30 (W.D. Mich. 2005).

189. *Id.* at 834–37.

190. *Id.* at 834 ("[P]rivate choice transforms constitutionally troublesome 'direct' funding into constitutionally unobjectionable 'indirect' funding.")

191. *Id.*

192. *Id.* at 837 ("In light of the Supreme Court's determination that a student's choice to stand quietly or to remove himself from prayers . . . will not withstand constitutional scrutiny . . . , it is clear that the ability to choose not to participate in

true private choice in this case that dealt with the placement of youths in a faith-based home¹⁹³ because the children did not have the ability to opt out of the program.¹⁹⁴ Basically, the court ruled that there is no real choice when there is only one option from which to choose.¹⁹⁵ Without a free choice, there was nothing to break “the circuit between government and religion,”¹⁹⁶ so the court ruled the funding to Teen Ranch impermissible.¹⁹⁷

The two most recent cases concerning faith-based funding involved prison ministries and were decided in the summer of 2006. The court in *Americans United for Separation of Church & State v. Prison Fellowship Ministries* decided that state funding of the InnerChange Freedom Initiative rehabilitation and education program in an Iowa state prison violated the Establishment Clause.¹⁹⁸ InnerChange is an evangelical Christian organization that uses “transformational” techniques to aid prisoners in rehabilitating their criminal habits.¹⁹⁹ InnerChange teaches inmates that the only path to changing their behavior permanently is being “born again” in Christ.²⁰⁰ The court found that state funding to InnerChange violated the Establishment Clause because the organization is so pervasively sectarian that its secular purposes cannot be separated from its sectarian means.²⁰¹ Furthermore, because inmates were rewarded preferable living conditions by enrolling in the program and the prison provided no comparable secular alternative to InnerChange, the court ruled that the private-choice doctrine

religious activities [at the children’s home in question] cannot pass constitutional scrutiny.”).

193. *Id.* at 829–31.

194. *Id.* at 835 (determining that because the people at issue are children, they cannot exert true private choice).

195. *See id.* at 836 (“[T]he court feels constrained to consider whether the ability to opt out of participation in religious activities [without being presented with other viable options from which to choose] is sufficient to save the Teen Ranch program from Establishment Clause concerns. The Court concludes that it is not.”).

196. *See supra* note 177.

197. *Teen Ranch*, 389 F. Supp. 2d at 836 (finding that absent secular alternatives, there is no true private choice to break the circuit between government and religion and the opt-out provision therefore does not pass Establishment Clause scrutiny).

198. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 864, 932–33 (S.D. Iowa 2006).

199. *See id.* at 875–76 (distinguishing InnerChange’s program of religious indoctrination from secular programs that use therapeutic means).

200. *Id.* (exploring InnerChange’s mission to “cure” prisoners “through a miraculous delivery by God—specifically, God in Christ”).

201. *See id.* at 925 (stating that there is “no set of enforceable safeguards or standards” that can be created to ensure that funding will go to secular aspects of the program alone).

could not justify state funding of InnerChange.²⁰² In other words, the state provided no real choice to inmates because InnerChange was the only rehabilitation program available.²⁰³

Finally, in *Moeller v. Bradford County*, taxpayers and a former inmate of a county prison sued the county for funding a vocational rehabilitation program that proselytized to inmates.²⁰⁴ The district court held that a plaintiff can state an Establishment Clause claim by producing evidence that a state-funded sectarian rehabilitation program is the only one available to the inmates.²⁰⁵ The court found that vocational and alcohol and drug treatment programs are essential to an inmate's recovery and that providing only a sectarian program coerces an inmate into adhering to a particular religious belief in order to avail himself of that necessary treatment.²⁰⁶

It remains to be seen whether the Supreme Court will import the analyses used by these lower courts or create a different framework. This Comment suggests that the Endorsement test is the most appropriate mode of analysis for challenges to faith-based funding. Even applying the more popular neutrality and private-choice principles, however, it becomes clear that funding faith-based organizations is unconstitutional.

IV. UNPRECEDENTED INFLUENCE BY FUNDAMENTALISTS VIOLATES THE ESTABLISHMENT CLAUSE

Government involvement with religion can be divided into two categories: funding of religious institutions and government-sponsored religious expression.²⁰⁷ The majority of the funding cases in the Court's catalog have dealt with direct and indirect aid to parochial schools—the “money cases.”²⁰⁸ The expression cases involve mostly school prayer or municipal religious displays.²⁰⁹ This Part discusses how funding faith-based organizations, coupled with the increased influence of Christian

202. See *id.* at 926, 930–31 (“There is no therapeutic community within the Iowa Dept. of Corrections comparable to the InnerChange program . . .”).

203. *Id.* at 930–31.

204. *Moeller v. Bradford County*, 444 F. Supp. 2d 316, 318 (M.D. Pa. 2006).

205. *Id.* at 333–34.

206. *Id.* at 334–35.

207. See Rees, *supra* note 131, at 198–200 & 199 n.3 (differentiating between the “money” and “prayer” cases).

208. *Id.* at 199–200.

209. See generally *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (being a prominent case for Establishment Clause issues surrounding government-sanctioned religious displays); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (same).

fundamentalists, violates the Establishment Clause jurisprudence outlined in the money cases. On one level, the analysis of the constitutionality of funding faith-based organizations would fall in line with the reasoning in the money cases. However, the highly visible presence of Christian fundamentalists in the current administration suggests that the Endorsement test, which was developed for expression cases, is the best means to judge the constitutionality of funding faith-based programs.

A. *Faith-Based Funding Does Not Pass the “Money” Tests*²¹⁰

Current jurisprudence governing the constitutionality of government funding of religious organizations requires that the religious program in question (1) have a secular purpose, and (2) not have the primary effect of advancing or inhibiting religion such that the program (a) results in government indoctrination of religion, (b) chooses recipients on the basis of faith, or (c) results in excessive government entanglement with religion.²¹¹ Contrary to older cases in which the Court engaged in fact-intensive analysis, courts seem to consider only two factors dispositive: neutrality and private choice.²¹² The *Lemon–Agostini* rule recently has been road-tested by lower courts in cases involving faith-based organizations.²¹³ Like the Supreme Court in other money cases, these courts also focus on neutrality and private choice even though their results differ.²¹⁴

210. The current test for cases involving government funding to religious organizations is the *Lemon–Agostini* test, in which neutrality and private choice are often the prioritized factors. *See infra* Part III.B (discussing the *Lemon–Agostini* test indepth).

211. *See supra* text accompanying note 145 (paraphrasing *Agostini v. Felton*, 521 U.S. 203, 222–23, 234–35 (1997)). The *Agostini* effects prong can be refined in the following way: government indoctrination is measured by the neutrality of the funding; whether recipients are chosen on the basis of faith is measured by the presence of a financial incentive to be faith-based; and excessive entanglement is measured by the character and purposes of the group, the nature of the aid provided, and the resulting relationship between the government and religious group. *See supra* note 186 (elucidating *Conley v. Jackson Twp. Tr.*, 376 F. Supp. 2d 776, 781–82 (N.D. Ohio 2005)).

212. *See supra* notes 176–80 and accompanying text (describing the neutrality and private-choice case law). *But see supra* note 131 and accompanying text (questioning the formulaic uses of neutrality and private choice as analytic devices in the money cases). One should remember, though, that the Supreme Court has not yet applied neutrality and private choice to faith-based programs, specifically.

213. *See Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 915 (S.D. Iowa 2006); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 831 (W.D. Mich. 2005); *Freedom from Religion Found., Inc. v. McCallum*, 214 F. Supp. 2d 905, 914 (W.D. Wis.), *modifying* 179 F. Supp. 2d 950 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003).

214. *See supra* notes 182–84, 188–203 and accompanying text (detailing the holdings in *McCallum*, *Teen Ranch*, and *Prison Fellowship Ministries*).

Although the Court's approach to the money cases has become increasingly formalistic, the circumstances surrounding the government funding of faith-based organizations are distinguishable from those surrounding the funding of parochial schools and vouchers. To begin, virtually any religious program could satisfy the purpose prong of the test because most organizations pursue a valid, secular purpose, including education, drug or alcohol treatment, or indigent social services.²¹⁵ The purpose prong, in effect, has become almost useless in ferreting out inappropriate funding because the current construction of the prong justifies practically any articulated secular purpose.²¹⁶ Accordingly, the effects prong is the true analytical battleground, and faith-based organizations will fail to meet the requirements under the effects prong of the analysis.

The religion portion of a parochial school education is but one component of that program; presumably, a student at a parochial school also learns secular subjects, such as literature, mathematics, and science. However, the danger in funding faith-based social services is the singular importance of religion in some of these programs.²¹⁷ Although the program technically provides a secular social service, it achieves its goal through the use of religion.²¹⁸ Arguably, if the government funds such a program, the government could be accused of indoctrinating religion through the organization;²¹⁹ if an organization can distinguish the sectarian from the secular, the government could side-step this accusation. Whether or not the organization espouses distinct sectarian and secular purposes, the pervasively

215. See generally *supra* Part III (discussing the money cases, none of which were found to have an impermissible purpose).

216. *Id.*

217. See *Cole*, *supra* note 30, at 561 (noting the novelty of government support of organizations "because they are religious entities"). Two cases examined already in this Comment provide examples of two programs that achieve secular goals by placing religion at the center of the program's strategy. See, e.g., *Prison Fellowship Ministries*, 432 F. Supp. 2d at 875-76; *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 969-70 (W.D. Wis.), *modified*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd* 324 F.3d 880 (7th Cir. 2003).

218. These programs claim to succeed by encouraging recipients to convert to Christianity as the "cure" to their problem. See KAPLAN, *supra* note 30, at 53-59 (identifying several programs receiving federal funds whose effectiveness centers on conversion).

219. See *Agostini v. Felton*, 521 U.S. 203, 226-27 (1997) (failing to find indoctrination attributable to the government, but scrutinizing the relationship between the funding provided by the government and religious expression in such a manner as to suggest the possibility); *cf. McCallum*, 179 F. Supp. 2d at 968 ("[D]irect state funding of persons who actively inculcate religious beliefs crosses the line between permissible and impermissible government action . . .").

religious nature and purpose of the program, and the resulting involvement of the government in that purpose, certainly offends the excessive entanglement requirement of the effects prong.²²⁰ As a result, the government constructively endorses a particular religious belief, causing the government to run afoul of the effect prong of the *Lemon–Agostini* test.

Some would respond that the neutrality of the funding and the private choice of the recipient breaks the impermissible link between government and the sectarian activity.²²¹ However, the technical neutrality in the availability of the funding is misleading. The vast majority of faith-based groups that receive funding are Christian organizations.²²² In fact, some argue that the White House’s faith-based program actually targets Christian groups and rewards those organizations politically friendly to the administration’s policies.²²³ So, despite the technical neutrality of the policy language, the real effect of the faith-based initiative favors Christian organizations.²²⁴ To be faithful to a meaningful construction of the effects prong, the Faith-Based and Community Initiative should fund a diverse variety of programs. Without true diversity in recipients, neutrality becomes an empty word used conveniently as an analytical tool to justify government funding of pervasively religious practices. The end effect of false neutrality, then, is a government program that has the impermissible effect of advancing a particular religious belief.

220. See *Agostini*, 521 U.S. at 232–33 (detailing what is required for excessive entanglement); see also *Prison Fellowship Ministries*, 432 F. Supp. 2d at 933 (finding impermissible entanglement inevitable in state funding of a pervasively sectarian program).

221. See *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (“If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination . . . has been done at the behest of the government.”); see also *Unlevel Playing Field*, *supra* note 2 (promoting neutrality as justification for the faith-based initiative).

222. See *supra* note 121 and accompanying text (revealing the bias in the faith-based initiative toward Christian organizations).

223. See CARTER, *supra* note 10, at 61 (writing that he has “no doubt that the goal [of the faith-based initiative] is to finance programs that are clearly religious”); see also Bob Allen, *Charities Use Disaster to Tout Bush’s Faith-Based Initiative*, ETHICS DAILY.COM, Sept. 23, 2005, http://ethicsdaily.com/article_detail.cfm?AID=6635 (listing faith-based organizations receiving funding for Hurricane Katrina relief and then attributing their success to President Bush); Max Blumenthal, *Pat Robertson’s Katrina Cash*, THE NATION, Sept. 7, 2005, <http://www.thenation.com/doc/2005/0919/blumenthal> (writing of the large grants given to an organization run by Pat Robertson, a staunch supporter of President Bush).

224. Cf. CARTER, *supra* note 10, at 60–61 (suggesting that the government funding to social faith-based initiatives appeals to those groups “who have no qualms about breaking down the historic wall between religion and government”).

To support their neutrality argument, proponents of the faith-based initiative also emphasize the portion of the program that targets community-based programs.²²⁵ In other words, they argue that the level playing field aids both religious *and* secular groups, and this neutrality vitiates any threat to the Establishment Clause.²²⁶ However, community-based programs have always been eligible for federal funding because their nonreligious methods did not perk the suspicion of agencies dispersing grants.²²⁷ By lumping together secular, community-based programs with faith-based programs, the White House casts suspicion on the motives of the agencies that previously refused to fund faith-based programs.²²⁸ At the same time, creating the image that secular and sectarian groups should stand on equal footing conveniently bolsters the neutrality framework in-favor with the courts.²²⁹ Even if President Bush accurately depicts the relative strengths of secular and sectarian organizations, the constitution still requires true neutrality in the dispersion of the funds; until this neutrality is established, the Faith-Based and Community Initiative fails to meet a meaningful interpretation of the effects prong.²³⁰ Technical neutrality in the policy's language operates primarily to disguise the true partiality of the funding. No real neutrality exists when the majority of the funding is going to faith-based groups and not the community-based organizations the White House claims to be supporting equally.²³¹ In the end, even if this Comment were to

225. See White House Office of Faith-Based & Cmty. Initiatives, U.S. Dep't of Justice, President Bush's Faith-Based and Community Initiatives, Overview, <http://www.whitehouse.gov/government/fbci/overview2005.pdf> (last visited Jan. 12, 2007) ("The ultimate beneficiaries are America's poor, who are best served when the Federal government's [community-based and faith-based] partners are the providers most capable of meeting their needs.").

226. *Id.*; see also *Unlevel Playing Field*, *supra* note 2 (touting the recent popularity of neutrality analysis in the courts).

227. *Cf.* *Unlevel Playing Field*, *supra* note 2 (claiming that the reason faith-based programs had difficulty obtaining grants was the pervasive suspicion in the grant-giving agencies toward religion).

228. *Id.* ("The Government's restrictive policies and practices [regarding who may receive funding] *usually* are good-faith efforts to keep within constitutional boundaries. But often they have gone too far, even as the courts adopt less restrictive constitutional guidelines.").

229. *Id.* (highlighting Habitat for Humanity, an ecumenical Christian organization that builds homes for the poor, as an organization that received money from HUD historically, thereby suggesting the future propriety of funding other faith-based organizations).

230. See *supra* notes 222–24 (outlining the partiality of the faith-based initiative to religious programs).

231. Belying the White House's underlying motive, the speeches President Bush has given about the Faith-Based and Community Initiative (FBCI) reveal the White House's bias. A significant number of the groups the President has spoken to about the FBCI are

admit that neutrality somewhat defuses the impermissible effect of government funding of sectarian activity, the absence of true neutrality in the dispersion of the funds discredits the validity of neutrality as a safeguard.

In addition to neutrality, proponents of the faith-based initiative tout private choice as a legitimizing analytical factor.²³² As long as the money reaches the religious organization through the private choice of the recipient, the government is not advancing religion.²³³ However, this doctrine does not pertain in the situation of governmental funding of faith-based organizations because of the pervasively religious nature of these service providers. A true effects analysis would not be sidetracked by the fact that the money passes first through the hands of an individual. Private choice, as a theory, avoids the confines of the effects prong, justifying government money shooting through to virtually any type of religious organization. In the end, the effect, which the personal choice principle ignores, is that taxpayer money funds an organization that uses religion as its primary tool.²³⁴

More importantly, where no secular alternatives exist to the faith-based programs supported by the government, Americans are left with no real choice.²³⁵ The fundamentalists have encouraged the current administration to employ extremely conservative fiscal policies and to slash government and secular services.²³⁶ As the government retreats from providing social

religious organizations. See White House Office of Faith-Based & Cmty. Initiatives, U.S. Dep't of Justice, Archive of Speeches, <http://www.whitehouse.gov/government/fbcj/archive.html> (last visited Jan. 12, 2007) (chronicling President Bush's presence via satellite at two Southern Baptist Conventions and one National Association of Evangelicals Convention).

232. See Cain, *supra* note 127, at 1014–15 (advocating private choice and vouchers as the means of avoiding Establishment Clause barriers).

233. See *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (explaining why private choice short circuits constitutional prohibitions of government involvement with religion).

234. See *id.* at 837–39 (O'Connor, J., concurring) (disagreeing with the plurality's simplistic use of neutrality and private choice and calling for a more fact-intensive analysis of the effects prong). See *generally* Rees, *supra* note 131, at 233–35 (criticizing the Court for ignoring the actual effects of the government funding religious schools).

235. The cases already discussed in this Comment demonstrate that this seemingly far-fetched scenario happens more frequently than it should. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 930 (S.D. Iowa 2006) (“Without real, genuine choice by inmates among similar, comparable alternatives, the state of Iowa impermissibly advances religion”); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 836–37 (W.D. Mich. 2005) (finding no real choice for troubled teens besides the faith-based program in question); see also Cain, *supra* note 127, at 1014–15 (arguing for private choice as a legitimizing factor but cautioning that the absence of secular alternatives may weaken the faith-based initiative).

236. See *supra* Part II.A (detailing the religious and political beliefs of fundamentalist Christians, with an emphasis on their antiwelfare beliefs and desire for

services, Americans lose the ability to make a choice. In sum, the circuit between government and religion is not broken when the only real choice for the recipient is services provided by a faith-based organization.

B. Faith-Based Funding Should Be Judged by the Endorsement Test

Even though any government money flowing to religious organizations should be suspect,²³⁷ this Comment does not suggest that all religious organizations should be denied government funding. Instead of focusing on neutrality and private choice as the framework for judging the constitutionality of the funding, this subpart will suggest that Justice O'Connor's Endorsement test is a more appropriate analytical tool for determining whether a faith-based organization is too religious to receive government money. The Court conceived the Endorsement test in a case involving a municipal Christmas display.²³⁸ Although some might argue the Endorsement test should be confined to expression cases,²³⁹ this subpart will show how it is the best tool for faith-based money cases, as well. In particular, the Endorsement test would distinguish more effectively between those religious groups that are providing a purely secular service and those groups using sectarian belief as a tool in their programs.²⁴⁰

To determine whether a government action violates the Establishment Clause, the Endorsement test focuses on (1) the institutional entanglement between government and religion and (2) the perceived endorsement or disapproval of religion by the government.²⁴¹ Crucially, this test questions whether the government action related to religion sends a message to nonadherents that they are politically disenfranchised because

the government to remove itself from the provision of social services).

237. See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (cautioning against "the myriad, subtle ways in which Establishment Clause values can be eroded").

238. *Id.* at 671–72, 690–92.

239. See *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 967 (W.D. Wis.) (suggesting it is unnecessary to use the Endorsement test when analyzing cases that do not involve public religious expression), *modified*, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003).

240. Arguably, the Endorsement test is also more consistent with the historical purposes of the Establishment Clause than other tests. To the Founders, a government-sponsored church was unallowable, and disenfranchising citizens because of their adherence or nonadherence effectively establishes a government church. See *supra* notes 124–28 and accompanying text (outlining the history of the Establishment Clause).

241. *Lynch*, 465 U.S. at 688–89 (O'Connor, J., concurring).

they do not subscribe to the same beliefs.²⁴² Some faith-based organizations place such a singular importance on religion as to trigger analysis under the Endorsement test.²⁴³ As opposed to parochial schools that receive funding in order to promote the secular aspects of education, some faith-based groups claim success at providing social services merely because of their sectarian tools and therefore receive funding, not despite of, but rather because of, the religious nature of the institution.²⁴⁴ If the government gives money to such a program, the funding essentially endorses the effectiveness of religion as a social service tool.

Furthermore, the high-profile nature of the faith-based initiative increases the chances a nonadherent will notice the government funding of religious groups.²⁴⁵ This high profile environment makes it more likely that a nonadherent would feel disenfranchised by government support of pervasively sectarian organizations. Moreover, the fact that President Bush publicly aligns himself with fundamentalist Christians and professes his preference for faith-based social services increases the risk that nonadherents will feel excluded from government.²⁴⁶ Faith-based organizations that profess to work because of their sectarian religious approach send the message that faith works better than secular approaches.²⁴⁷ The government is therefore sponsoring a program because of its religious effect and communicating to nonadherents that the sectarian approach is superior to the secular approach. In other words, the White House sends an inappropriate sectarian message by professing confidence in

242. *Id.* at 688; *see also* *County of Allegheny v. ACLU*, 492 U.S. 573, 594–95 (1989) (using Justice O'Connor's Endorsement test in a majority opinion of the Court).

243. *See supra* notes 88–89 and accompanying text (discussing the nature of some faith-based organizations).

244. *See* Butler, *supra* note 72, at 57–58 (examining the Bush administration's preference for faith-based groups that are pervasively sectarian); *see also* Cole, *supra* note 30, at 561 (noting the “groundbreaking” nature of the faith-based initiative in that it seeks out programs that are religious in nature). When the sectarian nature of an institution becomes too blatant, the government should not fund the institution regardless of the benefits promised. *See, e.g., McCallum*, 179 F. Supp. 2d at 969–70 (finding the faith-based program in question pervasively sectarian and accordingly, the funding to it unconstitutional).

245. *See supra* note 223 (listing highly publicized distributions from President Bush's faith-based initiative).

246. *See* Goldstein, *supra* note 1 (quoting the President as saying, “Addiction is a problem of the heart. I know. . . I quit drinking because I changed my heart. I guess I was a one-man faith-based program.” (internal quotation marks omitted)); *see also supra* Part II.B (detailing the Religious Right's connection to the current administration).

247. *See supra* note 218.

certain religious beliefs and then funding organizations that utilize those beliefs.

Because it is so analytical and fact-intensive, the Endorsement test would be particularly effective in judging the constitutionality of faith-based programs.²⁴⁸ The detail-oriented Endorsement test would distinguish between those programs that just happen to be affiliated with a faith-based organization, but use secular methods, from those programs that are pervasively sectarian and profess to work through religious methods.²⁴⁹ The Endorsement test would provide the government with a balancing tool so that it would not have to callously shut all doors to religiously affiliated programs. Rather, the Endorsement test provides a method for seeking out and avoiding those organizations that overtly proselytize and rely on religious methods to achieve secular goals.

V. CONCLUSION

The very public alliance between President Bush and fundamentalist Christians creates the impression that he favors fundamentalists' opinions. Arguably, this common ground has been translated into national domestic policies that have led to decreased government services and a rise in privatization and faith-based providers. In the absence of comparable secular alternatives, faith-based options offend the Establishment Clause principles outlined above. Furthermore, in light of the highly public nature of President Bush's relationship with conservative Christians, the Endorsement test is the best alternative to judge the constitutionality of government funding of faith-based organizations.

In 1784, Edmund Burke said, "The people never give up their liberties but under some delusion."²⁵⁰ While this Comment would not be so arrogant as to minimize the value of religion (especially in light of its importance to so many American citizens), one would nonetheless be remiss to forget the lessons of history and assume that the suspicions the Founders had about government-sponsored religion are irrelevant today. To accommodate religion in the form of funding to pervasively sectarian faith-based programs is but the first step on the path toward an impermissible government alliance with sectarian activity. Encroachments on liberty are often subtle, and we

248. See *supra* Part III.C (outlining Justice O'Connor's Endorsement test).

249. *Id.*

250. Edmund Burke Quotes, WorldofQuotes.com, <http://www.worldofquotes.com/author/Edmund-Burke/1/index.html> (last visited Jan. 12, 2007).

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should not let ourselves be deluded by the promise of sectarian solutions to secular social problems.

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