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David T. Raimer

DAMAGES AND DAMOCLES: THE PROPRIETY OF RECOUPMENT ORDERS AS REMEDIES FOR VIOLATIONS OF THE ESTABLISHMENT CLAUSE

*David T. Raimer**

INTRODUCTION

In June 2006, the United States District Court for the Southern District of Iowa handed down its decision in *Americans United for Separation of Church & State v. Prison Fellowship Ministries.*[1] The case involved the constitutionality of a faith-based prison rehabilitation program, which, while operated by a private organization (Prison Fellowship), was funded in part by public monies.[2] Notably, the party bringing suit was the eponymous public interest group—not the State of Iowa. Had the court simply found the program violated the Establishment Clause—which it did—the case would have received little attention. Courts had previously found similar programs to be unconstitutional with little fanfare.[3] At most, concerned parties on the left and the right would have viewed the case respectively as either upholding the doctrine of strict separation between church and state or as yet another example of a concerted effort to banish religion from the public square. Judge Pratt, however, did more than declare the program unconstitutional. In addition to enjoining the continued operation of the program,[4] the court also filed a recoupment order, requiring Prison Fellowship to repay over $1,500,000 to the State of Iowa.[5] The order was unprecedented.[6] Never before had a federal

* Candidate for Juris Doctor, Notre Dame Law School, 2008; B.A., Political Science, Pepperdine University, 2004.

1 (*Ams. United I*), 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

2 *See id.* at 864–66.

3 *See, e.g.*, Williams v. Lara, 52 S.W.3d 171, 194–95 (Tex. 2001).

4 *See Ams. United I*, 432 F. Supp. 2d at 935.

5 *See id.* at 941.

6 Prior to this case, the Seventh Circuit, in an opinion by Judge Posner, discussed *infra* Part I.B, had indicated that restitution was a viable remedy under the Establishment Clause. *See* Laskowski v. Spellings, 443 F.3d 930, 934–36 (7th Cir.

court required "a private party, at the behest of another private party, to reimburse the public treasury when the government itself ha[d] not sought reimbursement" for a violation of the Establishment Clause.[7] While this particular recoupment order was eventually overturned on appeal, the reviewing court did not preclude the use of such orders in future cases.[8] Moreover, at least one other circuit has indicated that recoupment is indeed a valid remedy.[9]

This Note argues that the use of such recoupment orders in the context of the Establishment Clause is not only constitutionally questionable, but also ill-advised from an equitable perspective. While the Supreme Court's recent decision in *Hein v. Freedom from Religion Foundation, Inc.*[10] marginally cabins the application of this remedy to legislatively appropriated funds, a very real potential for abuse remains. *Hein*'s limiting effect notwithstanding, the doctrine articulated by the district court in *Americans United I* and by the Seventh Circuit in *Laskowski v. Spellings*[11] hangs a veritable sword of Damocles over religious groups that receive public funding, essentially forcing them to wager their existence on their understanding of the Supreme Court's Establishment Clause jurisprudence.

Part I contains a synopsis of the taxpayer standing doctrine articulated in *Flast v. Cohen*,[12] and a brief recitation of cases in which it has been used to seek restitutionary relief. Part II addresses the relevant constitutional issues, first questioning whether actions for reimbursement of funds to a government treasury can properly be brought under *Flast* and then assessing the suitability of this remedy in light of concerns regarding the separation of powers and federalism. Part III discusses the equitable considerations involved in using restitution as a remedy for a violation of the Establishment Clause, and proceeds to detail the potential deterrent effect recoupment orders could have on faith-based organizations who seek public funds in order to provide

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2006), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007). However, the court did not actually grant restitutionary relief, but rather remanded the case back to the district court. *Id.* at 939.

7 Brief for the United States as Amicus Curiae Supporting Appellants at 5–6, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 3098141 [hereinafter Brief for the United States].

8 *Ams. United II*, 509 F.3d at 426–28. The Eighth Circuit held that there was indeed an Establishment Clause violation, but concluded that the district court had abused its discretion in ordering restitutionary relief. *See id.* at 423–28.

9 *See Laskowski*, 443 F.3d at 934–36.

10 127 S. Ct. 2553 (2007); *see infra* Part II.A.1.

11 443 F.3d 930; *see infra* Part I.B.

12 392 U.S. 83 (1968).

social services. Part IV concludes with the assertion that if recoupment orders are not stricken from the list of remedies for Establishment Clause violations, at the very least, courts should provide a safe haven akin to qualified immunity for religious groups who contract with government entities.

I. THE HISTORY OF RESTITUTION AS A POSSIBLE REMEDY FOR ESTABLISHMENT CLAUSE VIOLATIONS

Until recently, the thought of using restitution to remedy an Establishment Clause violation was unheard of. Bringing such an action in the form of a private taxpayer suit would have been even more unthinkable. In fact, even now "restitution[] hardly figures into constitutional remedies at all."[13] This is largely due to the simple fact that for nearly two hundred years of our nation's history, taxpayers lacked standing to bring suit for a violation of the Establishment Clause.[14] The Supreme Court's 1968 ruling in *Flast* dramatically altered this landscape.[15]

Flast arose from a request to enjoin the expenditure of federal funds received by religious schools.[16] The schools used these funds to finance educational programs and purchase schoolbooks, allegedly in violation of the Establishment Clause.[17] Initially, the lower courts ruled that the taxpayers bringing suit lacked standing to proceed.[18] With Chief Justice Warren writing for the majority, the Supreme Court reversed, finding an exception to the general rule against tax-

13 Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1353 n.40 (2002); *see also* Bradley Thomas Wilders, Note, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?*, 71 MO. L. REV. 1199, 1218 n.158 (2006) (noting that "refund[s]" are "rarely sought in Establishment Clause cases").

14 Taxpayers' lack of standing to challenge the constitutionality of a federal statute was confirmed in *Frothingham v. Mellon*, 262 U.S. 447 (1923). It has always been understood, however, that the government could seek restitution for improperly obtained government funds. "Congress . . . is the custodian of the national purse. . . . [I]t is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend . . . securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries . . . ." United States v. Standard Oil Co., 332 U.S. 301, 314–315 (1947).

15 *See* Debra L. Lowan, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651, 654 (2007) (noting that in *Flast*, "the Court reversed over four decades of standing jurisprudence and for the first time backpedaled . . . and created a separate standing doctrine for certain taxpayer suits").

16 *See Flast*, 392 U.S. at 85.

17 *See id.* at 85–86.

18 *See id.* at 88.

payer standing. The Court set out a two-part test, stating that first, taxpayers "must establish a logical link between [their taxpayer] status and the type of legislative enactment attacked."[19] For the Court's purposes, this means that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution."[20] Second, "taxpayer[s] must establish a nexus between [their taxpayer] status and the precise nature of the constitutional infringement alleged."[21] The Court clarified that this requires the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[22] Finding the Establishment Clause to be a "specific constitutional limitation" on Congress' power to tax and spend, the Court granted taxpayers standing to sue for its violation.[23]

Even with the ruling in *Flast*, however, there have been few cases in which taxpayers have sought restitution to a government treasury.[24] Indeed, "[w]hile . . . restitution orders are fairly common in government contract law . . . those orders are highly unusual in cases involving the First Amendment's Establishment Clause."[25] The few cases addressing the question are discussed below.

A. American Jewish Congress v. Bost

American Jewish Congress v. Bost[26] appears to be the first case in which the issue of restitution was discussed in a taxpayer suit. Plaintiffs challenged a contract between Texas and a nonprofit group of businesses and churches under the state's Charitable Choice program.[27] The complaint alleged that the $8000 grant involved had

19 *Id.* at 102.

20 *Id.*

21 *Id.*

22 *Id.* at 102–03.

23 *See id.* at 103.

24 However, "[t]here is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them through a restitution order." 42 C.J.S. *Implied Contracts* § 11 (2007).

25 Claire Hughes, *Embattled Christian Prison Program Asserts Its Legality*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, Oct. 10, 2006, http://www.religionandsocialpolicy.org/news/article.cfm?id=5221.

26 37 F. App'x 91 (5th Cir. 2002).

27 *See* Am. Jewish Cong. v. Bost, No. A-00-CA-528-SS, 2002 WL 31973707, at *1 (W.D. Tex. July 16, 2002).

been used to purchase Bibles and sponsor religious instruction in connection with the faith-based group's job training program.[28] Since the suit was not brought until after the funds had been expended and the contract had not been renewed,[29] the district court mooted the plaintiff's claims for declaratory and injunctive relief.[30] As the case was moot, the court did not consider the plaintiff's request that the funds expended be returned to the public treasury. While the Fifth Circuit agreed with the lower court's decision on the declaratory and injunctive claims, in a two-paragraph unpublished per curium opinion, it nonetheless remanded the case for a consideration of whether restitutionary relief would be proper.[31] The implications of the court's decision to consider restitutionary relief even where the underlying claim was moot would later be made plain in *Laskowski*.[32]

On remand, the district court, in a brief opinion, "wholly reject[ed]" the plaintiffs claim for recoupment,[33] finding "no case law to support plaintiffs' tenuous position that taxpayer standing allows a suit for the damages plaintiffs seek."[34] The court based its ruling largely on standing grounds, distinguishing *Flast* by noting that it had dealt only with prospective injunctive relief.[35] Moreover, the court noted that even if the plaintiffs did have standing, an order for recoupment should not be issued when the relief sought is essentially de minimis.[36] In a footnote, the court elaborated: "To mix metaphors, plaintiffs are attempting to place an imaginary cart before a pygmy horse (after all, the total contract was only $8,000 dollars out of [a] state budget of over $41 billion in fiscal year 1999) that has long since left the barn."[37]

B. Laskowski v. Spellings

Bost appeared to be nothing more than a blip on the radar screen of Establishment Clause case law. However, *Laskowski* signaled what has the potential to be a sea change in First Amendment jurisprudence. *Laskowski* originated as an attempt to prevent Secretary of Education Margaret Spellings from issuing a grant to the University of

28 *See id.*
29 *See id.*
30 *See Bost*, 37 F. App'x at 91.
31 *See id.*
32 *See infra* Part I.B.
33 *Bost*, 2002 WL 31973707, at *3.
34 *Id.* at *2.
35 *See id.*
36 *See id.* at *3.
37 *Id.* at *3 n.4.

Notre Dame.[38] The $500,000 grant was specifically earmarked by Congress to fund the Alliance for Catholic Education (ACE), a training program for teachers in Catholic schools.[39] The taxpayers bringing suit alleged that ACE's religious components violated the Establishment Clause.[40] As was the case in *Bost*, since the one-time grant had already been expended, prospective injunctive relief was impossible. The district court accordingly dismissed the case as moot, finding that no meaningful relief could be granted.[41]

The Seventh Circuit, however, vacated the district court's ruling with Judge Posner writing the opinion.[42] Though the plaintiffs had not asked for restitutionary relief, the court raised the issue sua sponte.[43] Noting that "we cannot think of any reason why such relief should not be possible," the court went on to indicate that "[r]estitution is a standard remedy . . . in public-law as well as private-law cases."[44] Indeed, the court argued that restitution had to be a remedy available under the Establishment Clause. Otherwise, the court hypothesized, Congress could authorize direct aid for proselytization and the Treasury Department could disperse the funds the next day.[45] In such a scenario, plaintiffs would not be able to obtain an injunction in time to halt the expenditure of federal funds for patently unconstitutional purposes.[46]

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38 *See* 443 F.3d 930, 933 (7th Cir. 2006), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

39 *See id.*

40 *See id.*

41 *See id.*

42 *Id.* at 939.

43 *Id.* at 941 n.1 (Sykes, J., dissenting); Brief for the Federal Respondent at 6, *Notre Dame*, 127 S. Ct. 3051 (No. 06-582), 2006 WL 3609968 (noting that the Seventh Circuit's "extraordinary ruling" was made "without the benefit of briefing or argument on the question by the parties").

44 *Laskowski*, 443 F.3d at 934 (majority opinion).

45 *See id.*.

46 *See id.* The dissent responded by arguing that political safeguards were more than sufficient to address such an implausible situation, noting that there would clearly be electoral consequences for any politician who took such action. *See id.* at 946 (Sykes, J., dissenting) ("The hypothetical is far-fetched. Assuming such a flagrantly unconstitutional appropriation could escape notice during the entire Article I lawmaking process, any congressman or senator who voted for it would have some serious explaining to do in the next election cycle after it was discovered. The checks and balances of the ballot box are an effective disincentive against such unlikely and obvious congressional misuses of taxpayer money. Separation of powers requires the judicial branch to assume the general competence of Congress to enact laws that are constitutional.").

With restitution on the table, the court then considered how such a remedy could be implemented. As indicated previously, the government has always been authorized to seek reimbursement for funds received illegally.[47] Moreover, executive branch officials are generally authorized by statute to seek restitution for grant monies spent in an unconstitutional manner.[48] However, an executive branch agency has unreviewable discretion as to whether to take such enforcement action.[49] As Secretary Spellings had no desire to pursue an enforcement action, the court could not order her to do so. Instead, Judge Posner reasoned that the district court could "simply order Notre Dame to return the money to the treasury."[50] The court analogized the situation to "a case of money received by mistake and ordered to be returned to the rightful owner,"[51] dismissing Notre Dame's[52] argument that such relief would be improper because a private entity (the University) cannot violate the Establishment Clause.[53] Since restitution was available, the case was no longer moot, as plaintiffs could now recover some form of "meaningful relief" even if an injunction would have no effect.[54]

The court also briefly noted a variety of common law defenses to restitution. Most notably, if the recipient of the "illegal" funds did not "know[] or have . . . reason to know" it was receiving funds in violation of the Constitution and reasonably relied to its detriment on that belief, the recipient would not be liable.[55] As it did not decide the case on the merits, the court did not rule on the reasonableness of Notre Dame's belief in the constitutionality of its actions.[56]

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47 *See supra* note 14.

48 *See, e.g., Laskowski*, 443 F.3d at 934 (majority opinion).

49 Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (noting that, for various reasons, "an agency's decision not to take enforcement action should be presumed immune from judicial review").

50 *Laskowski*, 443 F.3d at 934.

51 *Id.* at 934–35.

52 Notre Dame had voluntarily intervened in the case as a defendant. *See id.* at 933.

53 *See infra* notes 136–39 and accompanying text.

54 *Laskowski*, 443 F.3d at 934.

55 *Id.* at 936.

56 Following the Seventh Circuit's ruling, Notre Dame filed a petition for certiorari with the Supreme Court. *See* Petition for a Writ of Certiorari, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3043822. Four days after its ruling in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), *see infra* Part II.A.1, the Court granted the petition for certiorari, vacated the opinion below, and remanded the case for further proceedings in light of *Hein*. *See Notre Dame*, 127 S. Ct. at 3051 ("Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for

C. Americans United for Separation of Church & State v. Prison Fellowship Ministries

With the holding in *Laskowski* that "there is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or in any other class of cases,"[57] it was only a matter of time before a case arose in which a court would order restitutionary relief. That case was *Americans United I*—the first case in which a court, absent special circumstances,[58] "ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause."[59]

As discussed earlier, Americans United brought the case as a challenge to a faith-based prison rehabilitation program created pursuant to a contract between the State of Iowa and Prison Fellowship Ministries.[60] In a lengthy and highly fact-specific decision, the court concluded that the program was "pervasively sectarian," and thus was ineligible to be supported by government funds.[61] For the purposes of this Note, the court's reasoning with regard to the remedy ordered is of particular significance.

With the constitutional violation established, the court still had to decide whether to award the restitutionary damages requested by the plaintiffs. Not surprisingly, the court relied heavily on *Laskowski* in

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further consideration in light of *Hein v. Freedom From Religion Foundation, Inc.*" (citation omitted)). Oral arguments before a Seventh Circuit panel were held November 5, 2007. *See* Laskowski v. Spellings, No. 05-2749 (7th Cir. Sept. 10, 2007) (docket).

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

58 The case of *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), is the reason for the "absent special circumstances" caveat. In preparation for the visit of Pope John Paul II, Philadelphia announced its plans to erect a platform upon which the Pope could celebrate Mass. *See id.* at 927. A group of taxpayers brought suit on Establishment Clause grounds. *See id.* "[T]he parties stipulated to an order under which construction was allowed to proceed, but the Archdiocese agreed to reimburse the City for the cost of the platform and related construction should there be a final judgment that the City could not constitutionally pay for the items." *Id.* at 927. The expenditure was subsequently found to be in violation of the Establishment Clause, and the Archdiocese was ordered to reimburse the city, per the terms of the agreement. *See id.* at 934.

59 Ira C. Lupu & Robert W. Tuttle, Americans United for Separation of Church and State (and Others) v. Prison Fellowship Ministries (and Others), ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, June 13, 2006, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=49.

60 *See supra* notes 1–5 and accompanying text.

61 432 F. Supp. 2d 862, 920 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

making this determination.[62] The question ultimately came down to the reliance defense articulated in *Laskowski*. The court agreed with Prison Fellowship that

> "the propriety of relief . . . must be measured against the totality of the circumstances and in light of the general principle that, absent contrary directions, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith, and by no means plainly unlawful."[63]

In an effort to demonstrate its reliance interests, Prison Fellowship pointed to the intricate nature of Establishment Clause jurisprudence, the complexity of the factual situation at issue (as demonstrated by the fact that the case actually went to trial as opposed to being resolved at the summary judgment stage), and its "good faith effort" over the years "to comport with developing law."[64] Nevertheless, the court found several "compelling arguments" that "weigh[ed] in favor of recoupment."[65] First, the court decided that the severity of the Establishment Clause violation was "extraordinary."[66] Characterizing the program as an "intentional choice by the state of Iowa and InnerChange to inculcate prisoners as treatment for recidivist behavior," the court noted that Prison Fellowship's "reliance on the esoteric nature of Establishment Clause law can carry them only so far."[67] The court also determined that while the "financial burden [the recoupment order would impose on] Prison Fellowship will not be insignificant, . . . it [would] not be unmanageable."[68] Finally, the complexity of the case at hand failed to demonstrate that Prison Fellowship's reliance was reasonable. Given Prison Fellowship's access to competent counsel and the fact that similar faith-based prison rehabilitation programs had been struck down, the court reasoned that the defendants had sufficient notice that their conduct might be unconstitutional.[69] Thus, the court concluded that

> [t]he type of constitutional violation here, the substantial nature of that violation, the degree of knowledge of the Defendants about the risk associated with the program, and the financial impact of the judgment on the Defendants, taken together, outweigh the reliance

62 *See id.* at 938.

63 *Id.* at 939 (quoting Lemon v. Kurtzman (*Lemon II*), 411 U.S. 192, 209 (1973)).

64 *See id.*

65 *Id.*

66 *Id.*

67 *Id.* at 939. "InnerChange" is the name given to the rehabilitation program which operates under the auspices of Prison Fellowship. *See id.* at 871.

68 *Id.* at 940.

69 *See id.*

> InnerChange and Prison Fellowship had on the contract in this case.[70]

This holding, however, did not stand for long. Prison Fellowship appealed to the Eighth Circuit and a three judge panel (including former Supreme Court Justice Sandra Day O'Connor[71]), unanimously struck down the recoupment order.[72] The court found that the district court, while articulating the proper standard,[73] abused its discretion when applying that standard.[74] In this case, there were specific statutes on which Prison Fellowship validly relied that authorized its funding.[75] There was no finding of bad faith on the part of Iowa, nor could Prison Fellowship be considered to have had "clear notice [that] the program was plainly unlawful."[76] Moreover, the lower court

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70 *Id.* at 941.

71 *See* Tim Townsend, *Ex-Justice O'Connor on Panel Hearing Prison Ministry Case*, ST. LOUIS POST-DISPATCH, Feb. 14, 2007, at B5; *see also* Peter Slevin, *Ban on Prison Religious Program Challenged*, WASH. POST, Feb. 25, 2007, at A13 ("A trio of appellate judges, including former Supreme Court Justice Sandra Day O'Connor, is reviewing a lower court's decision that the [Prison Fellowship] program violates the separation of church and state."). Prison Fellowship's attorneys had requested reversal on standing grounds in light of *Hein*. *See* Anne Farris, *Controversial Christian Prison Program Cites Recent Supreme Court Ruling in Its Appeal*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 2, 2007, http://www.religionandsocialpolicy.org/newsletters/article.cfm?id=6699 ("'The Supreme Court has now vacated and remanded Laskowski to the 7th Circuit with instructions to reconsider its ruling in the light of *Hein*,' stated a letter to the U.S. Court of Appeals for the Eighth Circuit from Anthony Picarello, an attorney from the Becket Fund for Religious Liberty, who is representing InnerChange and Prison Fellowship Ministries. 'Thus, the anomalous legal basis for allowing private, taxpayer plaintiffs to compel restitution to the government is gone, and the decision below granting that remedy should be reversed.'"). This request was not granted, as the court found that essentially all of the taxpayer plaintiffs maintained standing, even in light of *Hein*. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406, 419–20 (8th Cir. 2007).

72 *See Ams. United II*, 509 F.3d at 426–28. The court did find, however, that Prison Fellowship had been operating in violation of the Establishment Clause at the time of the suit. *See id.* at 423–26.

73 *See id.* at 427 (taking into account "'the totality of the circumstances and . . . the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.'" (quoting Lemon v. Kurtzman (*Lemon II*), 411 U.S. 192, 208–09 (1973))); *supra* note 63 and accompanying text.

74 *Ams. United II*, 509 F.3d at 428 ("Given the totality of the circumstances, the district court abused its discretion in granting recoupment for services rendered before its order.").

75 *See id.* at 427. The court indicated that Prison Fellowship's reliance was further strengthened by the fact that "plaintiffs did not seek interim injunctive relief to prevent payment [of the state funds] during litigation." *Id.* at 428.

76 *Id.* at 427.

failed to give due deference to state officials statements that the program was beneficial.[77] The recoupment order could not stand under these circumstances. Significantly, however, the court nowhere disavowed the use of such orders in future cases.[78]

II. CONSTITUTIONAL CONCERNS

By importing restitution into Establishment Clause jurisprudence, the cases discussed above raise a variety of constitutional issues. If the doctrine formulated in *Laskowski* and *Americans United I* is not repudiated,[79] it could mark a major shift in the manner in which constitutional violations are enforced. Even now, those cases have significant implications for traditional standing doctrine as well as basic principles of separation of powers and federalism.

A. *The* Flast *Doctrine Does Not Extend to the Use of Restitution as a Remedy*

In the years since *Flast* was decided, it has proven to be a "limited exception to the general rule that citizens lack standing to sue in federal court on generalized grievances about the conduct of government."[80] Indeed, the Supreme Court "has steadfastly refused to expand *Flast* and has never recognized private party repayment to the Treasury as an appropriate remedy for an Establishment Clause violation in a suit based on taxpayer standing."[81] The doctrine articulated in *Laskwoski* and *Americans United I*, however, has the potential to lead to a "dramatic expansion of taxpayer standing."[82]

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77 *Id.* at 427–28. These statements, the court stated, did not "insulate the prison administrators' decisions from judicial review. However, in shaping equitable relief, a court should consider the views of prison administrators, which oppose recoupment in this case." *Id.* at 428.

78 *See infra* Part IV.

79 *See supra* notes 56, 71.

80 Laskowski v. Spellings, 443 F.3d 930, 939 (7th Cir. 2006) (Sykes, J., dissenting), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (noting the Court's "narrow application" of *Flast* in prior cases); Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (remarking on the "narrow exception" created by *Flast* to the "general rule against taxpayer standing"); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 481 (1982) (discussing the "rigor with which the *Flast* exception" should be applied).

81 *Laskowski*, 443 F.3d at 939 (Sykes, J., dissenting).

82 *Id.*

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

Before further analysis of the fit between traditional taxpayer standing doctrine and restitutionary relief, a brief discussion of the Supreme Court's recent decision in *Hein* is warranted. *Hein* began as a taxpayer suit challenging various executive branch agencies' use of funds in furtherance of President Bush's "Faith-Based Initiative."[83] However, all expenditures were drawn from general executive branch appropriations—there was no explicit congressional appropriation.[84] This distinction proved decisive. Justice Alito, announcing the judgment of the Court, noted that "[t]he expenditures challenged in *Flast* . . . were funded by a specific congressional appropriation and were disbursed . . . pursuant to a direct and unambiguous congressional mandate."[85] It was this "'logical link'"[86] that the Court found to be "missing" in *Hein*.[87] *Flast*, the Court stated, allowed challenges "'only [to] exercises of congressional power'"[88]—in *Hein*, the "expenditures resulted from executive discretion, not congressional action."[89] The Court therefore concluded that *Flast* stood only for the principle that taxpayers had standing to challenge direct legislative appropriations[90]—it did not allow taxpayers to do the same for funds distributed at the whim of the executive.[91]

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83 *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2560–61 (plurality opinion). Like *Laskowski*, this case originated in the Seventh Circuit in an opinion written by Judge Posner. *See* Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006), *rev'd sub nom. Hein*, 127 S. Ct. 2553.

84 *See Hein*, 127 S. Ct. at 2560 (plurality opinion).

85 *Id.* at 2565.

86 *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)).

87 *Id.* at 2566.

88 *Id.* at 2564 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982)).

89 *Id.* at 2566.

90 *See id.* at 2568. In a footnote, the Court indicated that informal legislative "earmarks" are not sufficient grounds for taxpayer standing. Specific statutory appropriations are required. *See id.* at 2568 n.7 ("Nor is it relevant that Congress may have informally 'earmarked' portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures are at issue here. '[A] fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.'" (alternation in original) (citation omitted) (quoting Lincoln v. Vigil, 508 U.S. 182, 192 (1993))).

91 *See infra* notes 186–90.

While this ruling insulates most participants in the White House's Faith-Based Initiative from suit and potential recoupment orders, there are still many organizations that receive government funds pursuant to congressional action.[92] Under *Hein*, these organizations are still subject to suit by taxpayer plaintiffs.[93]

Ultimately, while *Hein* is no doubt a landmark case in the area of taxpayer standing, it is of limited relevance to the question at hand. *Hein* dealt with the type of *appropriation* that could be challenged—it did not purport to address the type of *remedies* available to a taxpayer who successfully brought suit. However, by clarifying the scope of the *Flast* doctrine, the Court did (albeit inadvertently) reduce the number of faith-based organizations potentially subject to recoupment orders. The case also signaled that in some Justices' minds, the very notion of taxpayer standing rests on tenuous grounds.[94]

2. Taxpayer Standing Principles and Recoupment

Even when limited to challenges to legislatively appropriated funds, the doctrine of restitutionary relief does not fit within the Supreme Court's established taxpayer standing jurisprudence. It is an

92 *See Hein*, 127 S. Ct. at 2568 (plurality opinion) ("In short, this case falls outside the the [sic] narrow exception that Flast created to the general rule against taxpayer standing established in *Frothingham*. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite logical nexus between taxpayer status and the type of legislative enactment attacked." (internal quotation marks and citations omitted)).

93 For example, while the Court ordered the Seventh Circuit to reconsider its ruling in *Laskowski* in light of *Hein*, *see* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051, 3051 (2007) (mem.), its applicability is not immediately evident. *Laskowski* involved a specific legislative appropriation. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-262 (earmarking "$500,000 for the University of Notre Dame for a teacher quality initiative"); Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), *vacated mem. sub nom. Notre Dame*, 127 S. Ct. 3051. As *Hein* permits taxpayers to challenge disbursements "expressly authorized or mandated by [a] specific congressional enactment," *Hein*, 127 S. Ct. at 2568 (plurality opinion), the plaintiffs in *Laskowski* would still appear to possess standing.

The situation in *Americans United* was slightly different. There, only a portion of the funds were appropriated at the behest of the legislature. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries (*Ams. United I*), 432 F. Supp. 2d 862, 885–87 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007). The remainder of the monies was dispensed to Prison Fellowship at the discretion of executive branch agencies. *See id.* Ultimately, the Eighth Circuit found sufficient grounds to maintain taxpayer standing. *See Ams. United II*, 509 F.3d at 419–20 (8th Cir. 2007).

94 *See Hein*, 127 S. Ct. at 2573–84 (Scalia, J., concurring).

elementary principle of law that before a court will exercise subject matter jurisdiction to decide a case on the merits, the party bringing the suit must have standing.[95]

> Constitutional standing requires, "at an irreducible minimum," that the party invoking the court's authority "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."[96]

The burden is on the plaintiff to affirmatively demonstrate standing "'separately for each form of relief sought.'"[97] In fact, a lack of jurisdiction is presumed prior to such a showing.[98] Thus in a taxpayer suit for restitution, a plaintiff must show that she has standing to bring not only a claim for a violation of the Establishment Clause, but also that she has standing to seek a recoupment order. While a taxpayer plaintiff can establish the former, she cannot demonstrate the latter.

At the most basic level, a plaintiff cannot show any injury which can be redressed by a recoupment order. In *Hein*, Justice Scalia provides a helpful framework for understanding the type of "injury" courts will find sufficient for taxpayer standing purposes.[99] "Wallet Injury," he argues, "is the type of concrete and particularized injury one would expect to be asserted in a *taxpayer* suit, namely, a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action."[100] Alternatively, the taxpayer could attempt to claim an injury from the use of his tax dollars to support religious indoctrination. Justice Scalia refers to this type of "injury" as "Psychic Injury"—injury "consist[ing] of the taxpayer's

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95 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) ("The 'core component' of the requirement that a litigant have standing to invoke the authority of a federal court 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))).

96 *Laskowski*, 443 F.3d at 942 (Sykes, J. dissenting) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

97 *Id.* at 941 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)).

98 *See DaimlerChrysler*, 547 U.S. at 342 ("'[W]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.'" (quoting Renne v. Geary, 501 U.S. 312, 316 (1991))).

99 *See Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring).

100 *Id.*

mental displeasure that money extracted from him is being spent in an unlawful manner."[101]

However, it is unclear how either injury is sufficient to establish standing to seek restitutionary relief. "Wallet Injury" of this kind is neither traceable nor redressable.[102] Indeed, the Supreme Court has emphatically rejected the notion that such an injury is sufficient to establish standing. In *Frothingham v. Mellon*,[103] the Court held that a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others [and] is comparatively minute and indeterminable."[104] The effect of a purportedly unconstitutional act on an individual citizen's tax burden is too "remote, fluctuating and uncertain"[105] to rise to the level of the "actual injury" necessary for standing purposes.[106] Nothing in *Flast* purports to give taxpayers an interest in the public treasury.[107] To the contrary, "taxpayers in [those] suits are not vindicating losses sustained by the Treasury."[108]

Assuming, arguendo, that "Psychic Injury" is sufficient grounds for taxpayer standing,[109] restitutionary relief is still not proper. If taxpayer standing under *Flast* is designed to ensure "'that the taxing and spending power [is not] used to favor one religion over another or to support religion in general,'"[110] plaintiffs can prevent this "'evil[]'" by seeking prospective injunctive relief and consequently bringing the unconstitutional action to a halt.[111] As Justice Scalia noted, "Psychic Injury is directly traceable to the improper *use* of taxpayer funds, *and*

101 *Id.*

102 *See id.* ("It is uncertain what the plaintiff's tax bill would have been had the allegedly forbidden expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.").

103 262 U.S. 447 (1923).

104 *Id.* at 487.

105 *Id.*

106 *See* Laskowski v. Spellings, 443 F.3d 930, 943 (7th Cir. 2006) (Sykes, J., dissenting) (noting that "the effect of a congressional enactment on an individual citizen's tax burden is too minute, and a taxpayer's interest in money in the Treasury is too diffuse, to support standing to sue in federal court"), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

107 *See id.*

108 *Id.*

109 *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2575 (2007) (Scalia, J., concurring) ("[W]e have never explained why Psychic Injury, however limited, is cognizable under Article III.").

110 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (quoting Flast v. Cohen, 392 U.S. 83, 103 (1968)).

111 *Id.*

it is redressed when the improper use is enjoined."[112] Elsewhere, the Supreme Court has indicated that *Flast* is limited by its express terms to curtailing the exercise of the congressional taxing and spending power.[113] Taxpayer plaintiffs are allowed to seek an injunction to curb the unconstitutional exercise of this power—their standing does not extend to restoring any expended funds to the public treasury.[114]

Indeed, it is neither necessary nor appropriate to seek a recoupment order once an injunction is obtained. Again, the injury sustained by the taxpayer in this scenario is the *use* of his tax dollars in an allegedly unconstitutional manner. That injury is redressed by an injunction preventing any future use of the funds in such a manner. Any "Psychic Injury" to the plaintiff ceases at that point. Seeking a recoupment order in addition to the injunction can do nothing to redress the injury suffered. Once appropriated funds are expended towards an allegedly unconstitutional purpose, the damage, so to speak, has been done. A recoupment order cannot, for example, erase the memory of those subjected to unconstitutional government-sponsored proselytization. The bell cannot be unrung.

Even if a plaintiff could demonstrate actual injury of one form or another, there is yet another reason why that injury could not be redressed by a recoupment order. Just as the injury to the plaintiff must be personal, the "redress" provided by the court must likewise be personal. But in the case of a recoupment order, even if plaintiffs were to succeed on the merits, the relief afforded would be reimbursement of the contested funds to the public treasury.[115] The plaintiff derives no personal benefit from such action.[116] Thus, restitution is a particularly inapt remedy to "redress" the type of violation[117] at issue in the Establishment Clause context. Indeed, standing of this sort would empower "federal courts to adjudicate cases where plaintiffs are suffering no injury and have no financial stake in a favorable resolu-

112 *See Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring) (second emphasis added).

113 *See DaimlerChrysler*, 547 U.S. at 348 (indicating that taxpayer standing under *Flast* is limited to seeking "an injunction against" the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" (alteration in original) (quoting *Flast*, 392 U.S. at 106)); *Laskowski*, 443 F.3d at 943 (Sykes, J., dissenting).

114 *See Laskowski*, 443 F.3d at 943.

115 Contrast this to an action seeking an injunction. In that case, the injury to the plaintiff is the unconstitutional exercise of the taxing and spending power. An injunction halts that exercise, thus redressing the injury.

116 This is especially true in light of the Court's pronouncements on the lack of individual taxpayer interest in the public treasury. *See supra* notes 103–07 and accompanying text.

117 Here, the unconstitutional exercise of the federal taxing and spending power.

tion,"[118] making a mockery of Article III's case or controversy requirement.

B. Separation of Powers and Federalism Concerns

Even assuming a taxpayer has standing to seek a recoupment order in this arena, a variety of other considerations militate against allowing such a remedy.[119] From a constitutional perspective, perhaps the most serious concern is the effect such a doctrine would have on principles of separation of powers and federalism.

1. Separation of Powers

In the federal separation of powers sphere, the court in *Laskowski* correctly noted that the decision of whether to seek reimbursement to the public treasury has traditionally been the province of the political branches, specifically, the executive branch. Such decisions are "immune" from judicial review.[120] In *Heckler v. Chaney*[121] the Supreme Court noted that "an agency's refusal to institute [enforcement] proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch."[122] The Court reasoned that this authority flowed from the fact that "it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[123] Consequently, in no circumstances could a court order an executive branch agency to take enforcement actions seeking recoupment of funds.

Laskowski attempted to avoid this potential constitutional controversy by allowing courts to order the private party receiving the government funds to make restitution.[124] However, this effort to "cut[] out the middleman"[125] does not alleviate the constitutional concern.

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118 Petition for a Writ of Certiorari, *supra* note 56, at 8.

119 *Cf.* Jennifer Mason McAward, *Congress' Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. (forthcoming 2008) (manuscript at 24), *available at* http://ssrn.com/abstract=997879 (noting that in addition to "develop[ing] justiciability doctrines in order to define and delimit the central prerogatives of the judicial Branch," federal courts have also "developed separation-of-powers principles that set the parameters for the proper exercise of the judicial power").

120 *See supra* note 49 and accompanying text.

121 470 U.S. 821 (1985).

122 *Id.* at 832.

123 *Id.* (quoting U.S. CONST. art. II, § 3).

124 *See supra* note 50 and accompanying text.

125 Laskowski v. Spellings, 443 F.3d 930, 935 (7th Cir. 2006), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

Indeed, the court itself noted that this shift was of no "practical significance."[126] The fact remains that the court is ordering the executive branch to receive the proceeds of a de facto enforcement action. Such a position allows courts to take an end run around *Heckler* any time they see fit. By acting directly on the subject of the potential enforcement action, courts could reduce executive discretion to a mere apparition. The majority in *Laskowski* characterized such action as a "routine instance[] of restitution,"[127] but the dissent correctly pointed out that "such an order would be neither simple nor routine. In the context of a taxpayer suit alleging an Establishment Clause violation, such an order would be extraordinary and unprecedented."[128]

2. Federalism

While separation of powers concerns prevent federal or state courts from ordering their colleagues in their respective executive branches from taking actions inherently discretionary in nature, principles of federalism likewise prevent federal courts from attempting to order state political branches to take such action. Justice Thomas articulated this point in the context of school desegregation in *Missouri v. Jenkins*,[129] explaining that

> what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers. There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running [state] school systems or prisons and courts running [federal] Executive Branch agencies.[130]

Here, the question is not whether an executive branch agency—at the federal or state level—has discretion to allow unconstitutional activity to continue. The question is whether the executive has discretion over the type of enforcement action it will pursue and the type of remedy it will seek. If a state executive branch agency wants to seek prospective injunctive relief rather than a recoupment order, a federal court cannot tell it otherwise. Principles of federalism constrain the power of federal courts over state executives in this realm of dis-

126 *Id.*

127 *Id.*

128 *Id.* at 940 (Sykes, J., dissenting).

129 515 U.S. 70 (1995).

130 *Id.* at 132–33 (Thomas, J., concurring); *cf.* Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006) (discussing potential constraints on Congress' "largely . . . unchecked" power over state courts).

cretionary action. Again, just as separation of powers principles prevent federal courts from usurping what are essentially prosecutorial functions of the executive branch,[131] principles of federalism prevent them from doing the same to state executives.

This usurpation is perhaps most evident in *Americans United I.* Far from seeking recoupment, Iowa was more than satisfied with the services provided to it by Prison Fellowship.[132] Charged as a defendant itself (and hence, on the losing side of the district court opinion), Iowa also supported Prison Fellowship in its appeal. In doing so, the author of the state's brief wryly pointed out the irony in the court's action, noting that "[p]robably in no other case has the State 'lost' the decision, but won restitution of all monies paid."[133] Iowa went on to indicate, in no uncertain terms, that it did not want the money. Rather than adhering to the state's wishes "[t]he . . . Court simply order[ed] all monies returned, in direct contradiction to the unanimous testimony of finance officer Baldwin, former Warden Mathes, current Warden Mapes, Deputy Warden Weitzell, and former Director Kautzky."[134]

III. EQUITABLE AND POLICY CONCERNS

In addition to the constitutional concerns discussed above, the issuance of recoupment orders in the Establishment Clause context is also problematic from an equitable perspective and in light of public policy considerations. Such orders ultimately turn traditional com-

131 *See supra* note 122 and accompanying text.

132 *See infra* note 140 and accompanying text.

133 State Appellants' Brief at 49, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 2840607.

134 *Id.* at 49. The irony of a private actor trying to force a state to take money it does not want was (perhaps intentionally, perhaps unintentionally) made apparent by Justice O'Connor during the oral arguments before the Eighth Circuit in *Americans United II.* As the lawyer for Americans United was beginning his argument, Justice O'Connor interrupted him and inquired into the party he was representing. *See* Oral Argument, *Ams. United II*, 509 F.3d 406 (No. 06-2741) (audio recording available at http://www.ca8.uscourts.gov/; follow "Oral Arguments" hyperlink, then follow "Case Number" hyperlink; search for "06-2741"; then follow "Play" hyperlink) ("You're here representing Americans United for Separation of Church and State, not the state as such. . . . You're not here representing the state, as such?").

Ultimately, in reversing the recoupment order, the Eighth Circuit ruled that the lower court had not given due deference to the opinions of state officials with regard to the beneficial nature of the services rendered. *See Ams. United II*, 509 F.3d at 427–28. It did not, however, style its critique in terms of separation of powers or federalism, deferring instead to the officials' expertise in the field of prison administration. *See id.*

mon law restitution analysis upside down, while placing humanitarian-minded religious organizations in an untenable position.

A. Equitable Considerations

As Judge Sykes noted when dissenting in *Laskowski*, "[A]dapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole."[135] The veracity of this statement is apparent from the anomalies this doctrine creates.

1. Private Actors Cannot Violate the Establishment Clause

To begin with, *Laskowski* states that "restitution is among the remedies that a federal court can order for a violation of federal law."[136] However, one must ask, what "federal law" has been broken? Perhaps a better question is what federal law *could* have been broken. It could not have been the Establishment Clause—at least, the faith-based organization could not have violated the Clause. It is a basic principle of First Amendment law that only the government can violate the Establishment Clause.[137] If nothing less, this reality is evident from the axiomatic notion that only a "state" can establish a "state" religion. In taxpayer suits of the kind brought in *Laskowski* and *Americans United I*, it is the *government* who has violated the Establishment Clause.[138]

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135 Laskowski v. Spellings, 443 F.3d 930, 941 (7th Cir. 2006) (Sykes, J., dissenting), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

136 *Id.* at 935 (majority opinion).

137 *See id.* at 943 (Sykes, J., dissenting) ("Such a claim [for restitution] is unknown to the law, probably because private parties cannot be held liable for Establishment Clause violations. The majority [casually] dismisses this rather fundamental objection . . . .").

138 *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) ("[T]he 'injury' alleged in Establishment Clause challenges to federal spending [is] the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion . . . ." (alterations in original) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968))). This point raises additional implications in the area of standing. Since the government is the only entity that can breach the Establishment Clause, it would seem evident that any attempt by taxpayers to seek redress for the violation of the Clause should be against the government. However, if taxpayers are seeking restitution, such a claim is incoherent. The government cannot reimburse itself—it is no longer in possession of the challenged funds. The only possible remedy the court could order in such a scenario would be to direct the government to seek restitution against a third party through its own enforcement action. However, as discussed *supra* Part II.B, such an action would violate principles of separation of powers and federalism. The Supreme Court has long

This raises one of the most glaring concerns in allowing recoupment orders in the case of Establishment Clause violations—such orders completely ignore the fact that the faith-based group has done no wrong. Indeed, in a very real sense, it is being severely penalized (in the case of *Americans United I*, ostensibly to the tune of millions of dollars) for committing a crime that, by definition, it cannot commit.[139]

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held that if no remedy is available against the wrongdoer due to various constitutional limitations (sovereign immunity, etc.), it will not adjudicate the case. *See* Petition for a Writ of Certiorari, *supra* note 56, at 18–19. As no redress is possible, the plaintiff would lack standing to proceed. A court order acting directly on the third party does not eliminate this constitutional infirmity. *See supra* notes 124–28 and accompanying text.

139 It is true that in *Americans United I*, the court—in a footnote—concluded that Prison Fellowship was a state actor and thus subject to the provisions of the Establishment Clause. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries (*Ams. United I*), 432 F. Supp. 2d 862, 865 n.3 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406. As with the Seventh Circuit's ruling on the availability of restitutionary relief in *Laskowski*, *see supra* note 43 and accompanying text, this issue was decided though "[t]he parties did not actively litigate, at any stage of the case, whether the Plaintiffs established that, under [42 U.S.C.] § 1983, the challenged actions of the private corporate Defendants, InnerChange and Prison Fellowship, were committed under the color of law," *Ams. United I*, 432 F. Supp. 2d at 865 n.3. The court nevertheless determined that

> [t]he contractual agreement between InnerChange, Prison Fellowship, and the Iowa Dept. of Corrections, and the executing of its terms is sufficient to show that the Defendants engaged in a joint action for the purposes of § 1983. Additionally, the rehabilitative treatment provided by InnerChange is a function traditionally and exclusively reserved to the state, thereby qualifying InnerChange's rehabilitation treatment as a state action under the public function doctrine.

Id.

The court went on to note that the "counseling and security services" the faith-based group provided "within the confines of the Newton Facility" created "a relationship, from the perspective of the inmates, in which the differences between private and state actions by InnerChange and Prison Fellowship [were] nonexistent." *Id.*; *see also id.* at 919–20 ("InnerChange and Prison Fellowship, in this case, are not private actors—they are state actors. As a state actor, InnerChange speaks on behalf of the government. It is not simply another voice in a forum opened for a discussion of the best rehabilitation programs for state prisoners. . . . [A]s state actors, InnerChange and Prison Fellowship employees cloak themselves in the mantel of government. As providers of a state-funded treatment program, they are burdened with the same responsibilities of any state employee: to respect the civil rights of all persons, including the First Amendment's prohibition on indoctrinating others in their form of religion." (footnote omitted)). On appeal, the Eighth Circuit was likewise persuaded that Prison Fellowship was a state actor. *Ams. United II*, 509 F.3d at 421–23.

Traditionally, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior

2. Unjust Enrichment

The inequity is further compounded by the fact that, invariably, the contractor or grant recipient will have provided the government with valuable consideration in exchange for the funds. For instance, in *Americans United I*, Iowa insisted that Prison Fellowship had provided it with essential services. In blunt terms, the state admitted, "we got our monies [sic] worth—we got a lot of 'bang for the buck[] value.'"[140] Whether or not there was an Establishment Clause violation involved does not diminish the fact that at some level, the state received secular services from the faith-based group ordered to make restitution. To name just one example, in *Americans United I*, Prison Fellowship had provided the state with training and counseling services for prisoners. The recoupment order took no notice of these services rendered.[141] Thus, there is nothing stopping a government entity from knowingly contracting with a private party in violation of the Establishment Clause, receiving services from the private organiza-

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'may be fairly treated as that of the State itself.'" Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)). The Court has admitted that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient," *id.*, but broadly speaking, state action may be found when a

> private actor operates as a willful participant in joint activity with the State or its agents. We have treated a nominally private entity as a state actor when it is controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies, or when government is entwined in [its] management or control.

Id. at 296 (alteration in original) (internal quotation marks and citations omitted).

Leaving questions as to the validity of the courts' assessment of Prison Fellowship's status to the side, at the very least, it is a limit case. One would be hard pressed to find a similar "close nexus" between most faith-based organizations receiving public funds and the government. Such a ruling obviously does not speak to private actors such as the University of Notre Dame, nor the host of other faith-based service providers who operate at arm's length from the government and whose functions are not traditionally "public." Indeed the Court has repeatedly held that neither entering into a government contract nor the receipt of government funds de facto transforms a private actor into a state actor. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1010–11 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982). Ultimately, a finding that a faith-based organization running a prison rehabilitation program is a state actor does nothing to establish whether faith-based organizations providing, for example, food to the homeless, counseling services, or educational facilities are engaging in state action.

140 State Appellants' Brief, *supra* note 133, at 49.

141 When striking down the recoupment order, the Eighth Circuit cited the lower court's failure to give due deference to state officials' opinions on the benefits of the Prison Fellowship program. *See Ams. United II*, 509 F.3d at 426–28.

tion, and then awaiting a taxpayer suit for reimbursement of the funds expended. This notion becomes even more absurd when one considers that in the end, the government would have its money *and* the benefit of the services rendered, but it would be in that position only *because it violated the Constitution.*[142] In essence, recoupment orders in this context "reward the Government for its allegedly unconstitutional behavior."[143] The government would, for all intents and purposes, be judicially empowered to have its cake and eat it too.

To analogize to the realm of contract law, allowing restitution in such a case is akin to a situation in which an individual hires a caterer to provide food for a party, lets the caterer complete the task, and then is reimbursed by the caterer for her failure to comply with local health codes. At that point, the individual has his meal and his money—and in the process found an exception to the rule that there is no such thing as a free lunch.

It is for this reason that Judge Sykes noted that attempting to fit the equitable remedy of restitution into Establishment Clause jurisprudence was ill-advised.[144] Restitution, by its very nature, is predicated on unjust enrichment.[145] In other words, restitution is "the conferral of a benefit by the plaintiff on the defendant under circumstances in which the retention of the benefit would be unjust."[146] In this scenario, however, the faith-based group has not been unjustly enriched—all funds received from the state are in fact used for the benefit of the state. The only party that is potentially unjustly enriched is the state—it receives all benefits provided by the faith-based group free of cost. Hence, application of restitution to this area of law effectively "turn[s the] doctrine on its head."[147]

Indeed, restitutionary relief in the Establishment Clause context makes nonsense of the common law understanding of restitution. The purpose of equitable restitution is "to restore to the plaintiff particular funds or property in the defendant's possession."[148] In the case of a recoupment order, the plaintiff does not have a right to any

142 *See supra* note 137 and accompanying text.

143 Petition for a Writ of Certiorari, *supra* note 56, at 2.

144 *See supra* note 135.

145 *See* RESTATEMENT OF RESTITUTION § 1, at 12 (1937).

146 Laskowski v. Spellings, 443 F.3d 930, 943–44 (7th Cir. 2006) (Sykes, J., dissenting), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

147 Brief of Defendants-Appellants Prison Fellowship Ministries & InnerChange Freedom Initiative at 57, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 2788099 [hereinafter Brief of Defendants-Appellants].

148 Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002).

of the funds possessed by the defendant.[149] Even if the plaintiff did have an interest in the money allocated to the defendant, clearly, no "funds or property" are "restored" to the plaintiff. All monies are returned to the public treasury. The plaintiff therefore fails to satisfy the two most basic elements of a common law restitution claim. As Judge Sykes indicated in *Laskowski*, "Such a claim is unknown to the law."[150]

3. The Complexity of Establishment Clause Jurisprudence

There are defenses to restitution, as Judge Posner noted in *Laskowski*,[151] and as Judge Pratt detailed in *Americans United I*.[152] However, because these defenses are inextricably linked to the concept of reliance, they can be insufficient when placed in the Establishment Clause context. Due to the lack of clarity in Establishment Clause jurisprudence, there is little to rely on in this area of law.[153]

To say the least, the Court's Establishment Clause jurisprudence is far from an "exact science"[154]—a fact not lost on the Justices themselves. Justice Breyer has remarked that "in respect to the First Amendment's Religion Clauses . . . there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'"[155] Justice Thomas has stated that "the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts,

149 *See supra* notes 103–07 and accompanying text.

150 *Laskowski*, 443 F.3d at 943 (Sykes, J., dissenting).

151 *See id.* at 936 (majority opinion).

152 *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries (*Ams. United I*), 432 F. Supp. 2d 862, 935–41 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406. The Eighth Circuit eventually found a version of such a defense persuasive on appeal. *See Ams. United II*, 509 F.3d at 426–28.

153 *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory. On a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases. At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards. Many of the Justices have endorsed several different—and often conflicting—constitutional standards. Justice O'Connor alone authored or signed opinions that relied on five different (and again, often contradictory) standards for enforcing the Establishment Clause.").

154 Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766 (1976) (plurality opinion).

155 Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

governments, and believers and nonbelievers alike confused—an observation that is hardly new."[156]

This confusion in Establishment Clause jurisprudence is no less evident when the Court specifically addresses funding to faith-based organizations. For example, in the first *Lemon* case,[157] the Court noted that "the line of separation [between permissible and impermissible allocations of funds], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[158] If the Supreme Court "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"[159] can one truly expect a faith-based organization to do any better?

The situation in *Americans United I* is again illuminating. As noted above, Prison Fellowship sought to rest its defense on its best understanding of Establishment Clause jurisprudence at that time. The court was not persuaded, pointing to a Texas case in which a faith-based rehabilitation program had been struck down.[160] Ironically, this only further exemplifies what a "variable barrier" the Establishment Clause has become. In *Williams v. Lara*,[161] the Texas Supreme Court found a faith-based prison rehabilitation program to be unconstitutional.[162] However, Prison Fellowship's InnerChange program was also operating in Texas at that time. Post-*Williams*, InnerChange continued to operate "*without* legal incident."[163] At least to a layman, such a result might well indicate that Prison Fellowship's program passed constitutional muster.

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156 *Id.* at 694 (Thomas, J., concurring); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring) ("Our jurisprudential confusion has led to results that can only be described as silly."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (suggesting that the Court's "Establishment Clause jurisprudence is in hopeless disarray"); Edwards v. Aguillard, 482 U.S. 578, 639–40 (1987) (Scalia, J., dissenting) (speaking of attempts "to justify our embarrassing Establishment Clause jurisprudence").

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

158 *Id.* at 614.

159 *Id.* at 612.

160 *See supra* note 3.

161 52 S.W.3d 171 (Tex. 2001).

162 *Id.* at 194–95. The Eighth Circuit found that this case was insufficient to put Prison Fellowship on notice that its actions were "plainly unlawful." *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406, 427 (8th Cir. 2007).

163 Brief of Defendants-Appellants, *supra* note 147, at 56.

B. A "Chilling Effect" on Faith-Based Organizations

From a policy perspective, there is every reason to believe that if *Laskowski* and *Americans United I* stand, faith-based organizations will be deterred from seeking government funding. Indeed, supporters of the decision in *Americans United I* referred to the ruling as a "body blow to so-called faith-based initiatives."[164] If that proves to be true, the American public's access to a variety of invaluable and highly respected social service providers will be jeopardized.

The contributions of faith-based organizations to civil society cannot be understated. The White House Office of Faith-Based and Community Initiatives has noted that while their actions often go unnoticed, "faith-based grassroots groups play large and vital roles everywhere."[165] The services they provide are as diverse as the organizations which offer them. These groups can include "local congregations offering literally scores of social services to their needy neighbors; small nonprofit organizations . . . created to provide one program or multiple services; and neighborhood groups that spring up to respond to a crisis or to lead community renewal."[166]

Many faith-based organizations are small nonprofits that rely almost exclusively upon charitable donations for funding. In all likelihood, there are few that possess sufficient capital to survive a recoupment order of the magnitude issued in *Americans United I*.[167] A sum of

164 Press Release, Ams. United for Separation of Church & State, Federal Court Strikes Down Tax Funding of Iowa Prison Program (June 3, 2006), *available at* http://www.au.org/site/News2?abbr=pr&page=newsArticle&id=8245&security=1002&news_iv_ctrl=1941.

165 WHITE HOUSE OFFICE OF FAITH-BASED & CMTY. INITIATIVES, UNLEVEL PLAYING FIELD 3 (2001) [hereinafter UNLEVEL PLAYING FIELD], *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf.

166 *Id.*; *see also* RAM A. CNAAN ET AL., THE NEWER DEAL 275–76 (1999) ("[R]eligious organizations represent a major part of the American welfare system. Tens of thousands of people in the Philadelphia area [alone] are being helped by all kinds of programs, from soup kitchens to housing services, from job training to educational enhancement classes. One can only imagine what would happen to the collective quality of life if these religious organizations would cease to exist.").

167 The implications of the court's choice of words notwithstanding. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries (*Ams. United I*), 432 F. Supp. 2d 862, 932 (S.D. Iowa 2006) (using the term "coffers" twice), *aff'd in part, rev'd in part*, 509 F.3d 406; *cf.* Richard W. Garnett & Benjamin P. Carr, 10 GREEN BAG 2D 299, 305 (2007) (suggesting that using the term "coffers" to describe the financial accounts of faith-based organizations "demeans and distracts more than it describes").

that amount would dwarf the annual budgets of most faith-based groups.[168]

Additionally, neither *Laskowski* nor the *Americans United* opinions provide any readily apparent deadline beyond which an organization may not be held liable for past expenditures.[169] For example, had the recoupment order stood, Prison Fellowship would have been forced to repay funds it received over a period reaching back seven years.[170] *Laskowski* sets perhaps a more disturbing precedent in that it dealt with a one-time grant which had been long-since expended.[171] This leaves open the potential for faith-based groups to find themselves forced to repay funds spent years, or perhaps even decades, in the past. When assessing whether or not to compete for a government grant, there is no doubt that these considerations would factor into an organization's decisionmaking process. When coupled with the difficulties already facing faith-based organizations seeking government funds,[172] it is easy to see how such groups could choose to refrain

168 It is true that the court in *Americans United I* considered the financial stability of Prison Fellowship before ordering relief. *See supra* note 68 and accompanying text. However, the court failed to give any meaningful benchmark as to when a faith-based group could demonstrate financial hardship sufficient to preclude a recoupment order. Even in *Americans United I*, the court only looked at the organization's ability to pay. It did not look at the potentially devastating impact such a payment could have on the organization's normal operations.

169 Decisions such as these impose

> a severe disincentive on religiously-affiliated institutions from receiving public aid, for fear that they may be haled into court many years later to return the long-spent money, solely because a court determines that the public officials making the grant did not impose some unspecified level of "appropriate conditions" on it.

Petition for a Writ of Certiorari, *supra* note 56, at 10.

170 *Ams. United I*, 432 F. Supp. 2d at 941.

171 See Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

172 *See* Brief of *Amici Curiae* We Care America, Evangelicals for Social Action, Center for Neighborhood Enterprise, and the Center for Public Justice in Support of Petitioner at 5, *Notre Dame*, 127 S. Ct. 3051 (No. 06-582), 2006 WL 3449038 [hereinafter Brief of *Amici Curiae* We Care America et al.] ("FBOs [faith-based organizations] already 'often face serious managerial and political obstacles' to helping fulfill 'the Nation's social agenda.' FBOs must wade through the bureaucratic red-tape that accompanies government programs, jump through extra hoops because they are faith-based, worry how their religious-based hiring policies will open them to liability, and endure restrictions on their religious activities that are not prohibited by the Constitution." (citation omitted) (quoting UNLEVEL PLAYING FIELD, *supra* note 165, at 3)).

from seeking funding rather than run the risk of finding themselves liable for restitution years later.[173]

Thus, under this line of cases, every time a faith-based organization accepts government funds, the group is essentially betting its existence on its understanding of Establishment Clause jurisprudence.[174] At worst, this requires faith-based entities "to do the impossible: accurately predict when the government is violating the Establishment Clause."[175] At best, religious organizations are now forced to think twice before seeking government funding for their charitable efforts. In other words, those "who take faith-based funding may find that they've made an expensive misjudgment if their faith-based funding is challenged."[176]

In the wake of *Americans United I*, several events occurred which lend credence to this perception. In October 2006, the Federal Bureau of Prisons officially canceled its request for proposals for a faith-based prison rehabilitation program.[177] The program was originally intended to be adopted in as many as six federal prisons.[178] While the Bureau had suspended its request in May of 2006 following a lawsuit challenging its constitutionality, the proposal was not definitively shelved until after the ruling in *Americans United I*.[179] The Bureau did not comment on the reason for its withdrawal, but it is at least plausible that its decision was motivated by the decision out of Iowa. Not only is the constitutionality of faith-based prison programs now increasingly in doubt, but there is also the possibility that fewer faith-based groups will even be willing to risk participation in such programs.

Moreover, there is evidence that plaintiffs are making use of the doctrine articulated in *Laskowski* and *Americans United I*. In August of 2006, a federal district court in Pennsylvania allowed a taxpayer suit to proceed against a prison rehabilitation program similar to the one

173 This is not a theoretical exercise. Several faith-based organizations filed amicus briefs in the Notre Dame case asserting as much. *See* Brief of *Amici Curiae* We Care America et al., *supra* note 172, at 6 ("The knowledge that a grant, once taken, can be the subject of an action for restitution years later will likely make seeking government funding for charitable work more trouble than it is worth for many [faith-based organizations].").

174 A dubious prospect. *See supra* notes 151–59 and accompanying text.

175 *See* Brief of *Amici Curiae* We Care America et al., *supra* note 172, at 8.

176 Press Release, Ams. United for Separation of Church & State, *supra* note 164.

177 Neela Banerjee, *Proposed Religon-Based Program for Federal Inmates Is Canceled*, N.Y. TIMES, Oct. 28, 2006, at A11.

178 *See id.*

179 *See id.*

challenged in *Americans United I*.[180] Notably, the taxpayer plaintiffs in that case sought "monetary damages for the recoupment of the funds used for religious purposes."[181] In its ruling, the court cited *Americans United I* as one of the grounds for refusing to dismiss the case.[182] Similarly, in an employment discrimination case pending in the Western District of Kentucky, a plaintiff sought to amend her complaint in order to pursue a recoupment order from a faith-based children's home.[183] That order would have exposed the orphanage "to a liability of somewhere from *$30 to $100 million dollars*."[184] Needless to say, an order of that magnitude would bankrupt that—or any other—faith-based entity.[185]

This trend jeopardizes executive and congressional policy expressed in various statutes and Executive Orders. Congress has passed legislation—most notably, the Charitable Choice Program[186]—designed to make federal funding available to faith-based groups.[187] President Bush's Faith-Based Initiative is likewise designed to ensure that federal agency and department heads structure their grant programs in such a way that they "ensure equal protection of the laws for

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

181 *See id.* at 319.

182 *See id.* at 321–22.

183 *See* Brief of *Amicus Curiae* The Thomas More Law Center in Support of Petitioner at 3, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3462958.

184 *See id.* at 4 (emphasis added).

185 *See id.* The court, however, denied the plaintiffs motion to file an amended complaint. *See* Pedreira v. Ky. Baptist Homes for Children, Inc., No. 3:00CV-210-5, 2007 WL 316992, at *2 (W.D. Ky. Jan. 29, 2007). Notably, the court cited the excessive delay in filing, not the unavailability of the remedy as grounds for its decision. *See id.*

186 42 U.S.C. § 604a(b) (2000) ("The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.").

187 *See, e.g.*, Community Services Block Grant Act of 1998, 42 U.S.C. § 9920 (2000) (indicating that in dispersing the grant funds authorized by the act, federal, state, and local governments may not "discriminate against an organization . . . on the basis that the organization has a religious character); Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858n(2) (2000) (indicating that nothing in the Act bars the use of federal funding for "sectarian child care services"); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (2000) (indicating that religious organizations may receive federal grant monies under the Temporary Assistance to Need Families program "on the same basis as any other private organization").

faith-based and community organizations"[188] who seek to obtain those funds. Post-*Hein*, it appears likely that participants in the Faith-Based Initiative will be insulated from suit.[189] As the case law now stands, however, faith-based organizations receiving legislatively appropriated funds are still subject to taxpayer suit under *Flast*.[190] Only time will tell, but participation in such programs by faith-based groups may very well decline as few organizations will be willing to make their survival contingent on what amounts to a constitutional roll of the dice. Indeed, it was in the interest of the integrity of these programs that the United States intervened as amicus curiae in the *Americans United I* appeal.[191]

These policy considerations may also give rise to constitutional issues. The Supreme Court has suggested, in a similar context, that those participating in government programs should not be forced to proceed at "peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional."[192] In another area of First Amendment law, the Court will consider striking down statutes that might have a "chilling effect" on the freedom of speech.[193] One could make a colorable argument that an analogous protection should apply to scenarios akin to those presented in *Laskowski* and *Americans United I*. Just as speech may be chilled by indirect and undue burdens, free exercise of religion may well be jeopardized by a sword of Damocles in the form of restitutionary liability.

IV. POTENTIAL SOLUTIONS

For the reasons discussed above, restitutionary relief is wholly out of place in Establishment Clause jurisprudence. Its application violates basic principles of standing, separation of powers, and federalism; leads to the inequitable resolution of cases; and deters religiously affiliated institutions from exercising their right to compete with other organizations for federal funding. Courts would be best served

188 Exec. Order No. 13,279, 3 C.F.R. 258 (2003), *reprinted in* 5 U.S.C. § 601 note (Supp. V 2005).

189 *See supra* Part II.A.1.

190 *See supra* Part II.A.1.

191 *See* Brief for the United States, *supra* note 7, at 2–3. The United States also expressed this concern in its brief in the Notre Dame case. *See* Brief for the Federal Respondent, *supra* note 43, at 17.

192 Lemon v. Kurtzman (*Lemon II*), 411 U.S. 192, 207 (1973).

193 *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–18 (1973); *id.* at 630 (Brennan, J., dissenting).

to reject any further use of these orders in the context of the Establishment Clause.

At the very least, if courts continue to find such remedies appropriate, faith-based organizations receiving government funds should be afforded protections similar to those a state official would have in the case of a civil rights action under 42 U.S.C. § 1983[194]—namely, qualified immunity. Under that defense, "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[195] Even while permitting recoupment orders to be issued, the Seventh Circuit suggested a similar defense in *Laskowski*.[196] In fact, the Supreme Court itself, when discussing the reliance of private institutions on government contracts, hinted at such a standard, indicating that reliance was reasonable so long as the unconstitutional nature of the action was not "clearly foreshadowed"[197] or "plain from the outset."[198] By striking down the recoupment order in question while leaving the door open for identical orders to be issued in the future, the *Americans United II* court took several steps towards implementing such a regime, at least in the Eighth Circuit.[199]

This defense should be available to the religious organization regardless of whether or not it is found to be engaging in "state action" for the purposes of § 1983.[200] While the Supreme Court has previously rejected the qualified immunity defense for private entities

194 At least one court has chosen to consider the faith-based organization receiving government funds a state actor. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries (*Ams. United I*), 432 F. Supp. 2d 862, 865 n.3 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007); *supra* note 139.

195 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

196 Laskowski v. Spellings, 443 F.3d 930, 936 (7th Cir. 2006) (suggesting a possible defense to restitution if the recipient of the funds did not "know[] or have . . . reason to know" that the action was unconstitutional), *vacated mem. sub nom.* Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

197 *Lemon II*, 411 U.S. at 206 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)).

198 *Id.* at 207.

199 *See supra* Part I.C. The court did allow for a type of good faith reliance test, but it gave little specific instruction beyond requiring an assessment of the totality of the circumstances. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (*Ams. United II*), 509 F.3d 406, 426–428 (8th Cir. 2007).

200 *See supra* note 139.

engaging in state action,[201] it has left open the possibility for a "good faith" defense.[202] Whatever the name, a defense should be available to a private organization receiving government funds when actions it reasonably believed to be constitutional are challenged in court.

CONCLUSION

Ultimately, if faith-based organizations are to continue to play a role in providing social services to the public, they must be reassured that they will not be held liable for their good faith actions. The *Laskowski* and *Americans United* line of cases undermine the ability of these organizations to effectively participate in public affairs on a level playing field. Eliminating the use of recoupment orders in the context of the Establishment Clause, or at a minimum, providing a qualified immunity-like defense, is the only resolution to this problem. As the United States argued in its amicus brief in the *Americans United I* appeal,

> Just as government officials should not be forced to "stay their hands until newly enacted state programs are 'ratified' by the federal courts" at the risk of "draconian, retrospective decrees," private contractors or grant recipients should not have to forgo the opportunity to participate in government programs at the risk of the drastic and financially crippling remedy of recoupment should the program later be held unconstitutional.[203]

201 *See* Richardson v. McKnight, 521 U.S. 399, 412 (1997) (concluding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case"); Wyatt v. Cole, 504 U.S. 158, 168–69 (1992) (holding that "qualified immunity . . . is [not] available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute").

202 *See Richardson*, 521 U.S. at 413–14 (emphasizing the narrowness of its holding, and refraining from ruling on a potential "good faith" defense); *Wyatt*, 504 U.S at 169 (leaving, "for another day," "the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens").

203 Brief for the United States, *supra* note 7, at 12 (citation omitted) (quoting *Lemon II*, 411 U.S. at 207–08).