ARTICLES

Bowen v. Kendrick: Retreat from Prophylaxis in Church-State Relationships

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "It is proper to take alarm at the first experiment on our liberties."[1]

Introduction

In 1981, Sen. Jeremiah Denton (R-Ala.) and Sen. Orrin Hatch (R-Utah) introduced the Adolescent Family Life Act (AFLA),[2] legislation designed to counteract the perceived evils of the federal government's major family planning program,[3] Title X of the Public Health Service Act of 1970.[4] Certain members of Congress strongly objected to the fact that Title X provided funding to programs, such as Planned Parenthood, that offered abortion counseling; they also believed that by failing to require parental notification when adolescents received contraceptives through Title X programs, the federal government was responsible for creating barriers between adolescents and their families, to the detriment of American family life.[5] The supporters of the AFLA were convinced

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1. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

2. 127 CONG. REC. 7895, 7953-54, 7968-74 (1981) (statement of Sen. Denton). The AFLA was enacted as Title XX to the Public Health Services Act, Pub. L. No. 97-35, 95 Stat. 578 (1981) (codified at 42 U.S.C. §§ 300z to 300z-10 (1982)). *See infra* notes 75-85 and accompanying text.

3. N.Y. Times, Nov. 10, 1987, at A25, col.1 (report of interview in which Sen. Denton stated that the AFLA was introduced to provide an alternative to Planned Parenthood); *see also Adolescents in Crisis: Parental Involvement: Hearing Before the Subcommittee on Family and Human Services of the Senate Commitee on Labor and Human Resources*, 98th Cong., 2d Sess. 201, 239 (1984) (statement of Sen. Denton) (The AFLA "was intended to correct an already imposed immorality, which the government was paying for, and transmitting secretly, through family planning grantees, to our children . . . .").

4. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (1970) (codified at 42 U.S.C. §§ 300a to 300a-8 (1982)).

5. In urging passage of the Adolescent Family Life Bill, Sen. Hatch recommended it as a "family-centered solution" to the problems caused by adolescent sexual activity, in contrast to

that Title X was not the solution to the problem of teenage pregnancy, and that the easy availability of contraceptives and information about abortion was one of the major causes of the increase in sexual activity among American teenagers and the corresponding increase in the adolescent pregnancy rate.[6]

The AFLA provided grants to public agencies and private organizations to develop programs to provide assistance to adolescent parents and pregnant adolescents.[7] It incorporated most of the features of its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978,[8] but deviated from it in adding new components aimed at preventing premarital sex among teenagers, and at encouraging pregnant adolescents to choose adoption over abortion.[9] The AFLA also required parental notification as a condition to the provision of services,[10] and required the involvement and participation of religious organizations in its programs.[11]

In 1983, the constitutionality of the AFLA was challenged on the ground that the use of federal funds by religious groups to counsel adolescents in matters concerning sexual morality violated the Establishment Clause of the First Amendment.[12] The United States Supreme Court, in

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the Title X approach, which "emphasizes the biology of sex, and contraceptive technology . . . ," an approach that "encourag[es] federally-funded agencies to intervene between parents and their children." 127 CONG. REC. 8266 (1981) (statement of Sen. Hatch). *Cf. Oversight on Family Planning Programs Under Title X of the Public Health Service Act, 1984: Hearings Before the Subcommittee on Family and Human Services of the Senate Committee on Labor and Human Resources*, 98th Cong., 2d Sess. 4-7 (1984) (statement of Sen. Helms) ("[T]itle X tends to create an atmosphere in which teenage promiscuity is viewed as normal and acceptable conduct . . . . [I]t repudiates parental rights, familiar responsibility, and traditional morality."); 132 CONG. REC. S17196-98 (daily ed. Oct. 17, 1986) (Statement of Sen. Humphrey) ("[T]itle X . . . outrages parents, disrupts neighborhoods, and threatens to invade schools. . . . [It] has come to mean . . . publicly subsidized family planning services . . . for promiscuous children of affluent families . . . ."); 134 CONG. REC. S9788-91 (daily ed. July 25, 1988) (statement of Sen. Helms) ("1 1/2 billion in the hands of terrorists could not have inflicted the long-term harm to our society that Title X expenditures have done. . . . American . . . tax dollars are being used by Planned Parenthood and the abortion industry in this Nation to subsidize abortion-related activities . . . [and] to provide free contraceptives to minors . . . without parental consent . . . .").

6. *See* 127 CONG. REC. 8266 (1981) (statement of Sen. Hatch); *see also Forum for Families: Quality of American Family Life: Hearings Before the Subcommittee on Family and Human Services of the Senate Committee on Labor and Human Resources*, 98th Cong., 1st Sess. 39-50 (1984) (statement of Sen. Denton) ("The thrust of some programs is to motivate the minor to become sexually involved by giving prescription birth control drugs and devices in order to participate in sexual activity.").

7. *See infra* notes 77-78 and accompanying text.

8. Titles VI, VII, and VIII of the Health Services and Centers Amendments, Pub. L. No. 95-626, 92 Stat. 3595-3601 (1978); *see infra* note 75.

9. 42 U.S.C. §§ 300z(b)(1) and 300z(b)(2).

10. 42 U.S.C. § 300z-5(a)(22)(A)(i).

11. 42 U.S.C. §§ 300z(a)(10)(C), 300z-2, and 300z-5(a)(21)(B); *see infra* note 156.

12. *See infra* notes 86-92 and accompanying text.

Bowen v. Kendrick,[13] found the AFLA "facially neutral," and thus constitutional, in that it provided for the disbursement of funds to a broad spectrum of grantees, fewer than fifty percent of which were religious groups.[14] The Court remanded the case with instructions to the lower court to fashion a remedy for the admitted constitutional violations that had occurred in the administration of the statute.[15]

The standard that has guided the Court in its establishment clause rulings since 1971 is the three-part "*Lemon* test," first articulated in *Lemon v. Kurtzman*.[16] Simply stated, the *Lemon* test requires that a challenged statute have both a secular purpose and a secular effect, and that its implementation create no entanglement between church and state.[17] This Comment argues that the Supreme Court, by examining only the facial validity of the AFLA,[18] and refusing to consider the risk of impermissible effect or to factor the "as-applied" violations into its analysis,[19] has severely curtailed the "effect" prong of the three-part test, and has diminished the *Lemon* test's value as a delineator of impermissible government support of religion. In addition, the Court has sent a message that publicly funded instruction of children in religiously sensitive subjects has become "neutral,"[20] and hence permissible under first amendment establishment clause analysis, when the instruction is approved by Congress and when the subjects reflect "traditional morality."[21] In so doing, the Court has indicated the possibility of a new toleration of direct government funding of religious schools.

Part I of this Comment discusses the Establishment Clause and the three-part *Lemon* test. Part II describes the Adolescent Family Life Act and sets out the background and holding of *Bowen v. Kendrick*. Part III analyzes the Supreme Court's ruling, and argues that the Court should have found the AFLA invalid under all three prongs of the *Lemon* test. The Comment concludes that while the *Lemon* test has not been specifically overruled, the Court now contains a majority for reinterpreting the Court's previous rulings in favor of a new support for government funding of parochial education, and perhaps even for overturning the entire test.

13. 108 S. Ct. 2562 (1988).
14. *Id.* at 2575 & n.7.
15. *Id.* at 2580.
16. 403 U.S. 602 (1971).
17. For a discussion of the *Lemon* test, see *infra* notes 38-48 and accompanying text.
18. *See infra* notes 109-119 and accompanying text.
19. *See infra* notes 190-214 and accompanying text.
20. *See infra* note 29 and accompanying text.
21. *See infra* notes 105-108 and accompanying text.

I. The Establishment Clause And The *Lemon* Test

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[22] Because the purpose of this provision "was to state an objective, not to write a statute,"[23] the courts have had to struggle with the task of "developing rules and principles to realize the goal of the religion clauses without freezing them into an overly rigid mold."[24]

Realizing that strict separation of church and state is impossible as a practical matter,[25] the Court has not barred all aid to religion.[26] It has, instead, "attempted to devise a formula that would help identify the kind and degree of aid that is permitted and forbidden by the Establishment Clause."[27] The Court has abandoned the principle of the absolute "wall of separation" between church and state,[28] and has identified "neutrality" as the state's primary objective.[29] "The State must confine itself to secular objectives and neither advance nor impede religious activity."[30]

Most of the Supreme Court's establishment clause decisions fall into

22. U.S. CONST. amend. I (the Religion Clauses, or the Establishment Clause and the Free Exercise Clause).

23. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

24. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1155-56 (2d ed. 1988).

25. Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976); *see* Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 171-73 (1987) (arguing that absolute separation is impossible to maintain in the late twentieth century).

26. For example, the Court has permitted the state to provide transportation for children to and from school, whether public or private. Everson v. Board of Educ., 330 U.S. 1 (1947). It has also allowed the state to loan secular textbooks to students attending both public and parochial schools. Board of Educ. v. Allen, 392 U.S. 236 (1968).

27. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 821 (1973) (White, J., dissenting).

28. The concept of the "wall of separation" was borrowed from the writings of Thomas Jefferson, and was first articulated as a constitutional standard in *Everson*, 330 U.S. at 16.

29. *Roemer*, 426 U.S. at 747; *Nyquist*, 413 U.S. at 792-93; School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963). For a discussion of some of the complexities of the neutrality principle, see L. TRIBE, *supra* note 24, at 1188-1201. Not all constitutional scholars agree that neutrality is either a working or a workable objective. *See, e.g.*, Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 86 (1986) (arguing that *Everson* effectively created two incompatible conceptions of establishment clause neutrality: "a separationist conception prohibiting aid to religion, and an accomodationist conception allowing religious participation in secular governmental programs of general social benefit"); M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 249-52 (1988) (arguing that strict neutrality would prohibit the state from accommodating the free exercise rights of religious believers).

30. *Roemer*, 426 U.S. at 747; *see also* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Zorach v. Clausen, 343 U.S. 306, 313 (1952); McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948); *Everson*, 330 U.S. at 18.

one of three main categories.[31] First, in the cases involving government practices and regulations, the Court has used custom and historical precedent to justify such practices as Sunday closing laws, the use of legislative chaplains, and the display of religious symbols on public property.[32] In other cases, the Court has held unconstitutional legislation that requires a religious test as part of the qualification for holding public office.[33] Second, in the "general welfare services" cases, the Court has ruled that public funds may be used to provide bus transportation, school lunches, and secular textbooks to religiously affiliated schools.[34] The third category, the religion in education cases, can be further divided into two groups. In the first subgroup, the Court has consistently invalidated statutes that require religious activities (prayers, Bible reading, posting of the Ten Commandments) in public schools, or that prohibit the teaching of the theory of evolution or require equal treatment of evolution and "creation science" in public school science classes.[35] In the second subgroup, the cases involving public aid to sectarian educational institutions, the Court's decisions have been less predictable, and are less easy to categorize. In general, the Court has allowed public grants to religiously affiliated colleges and universities, when the funds are used entirely for secular purposes and there are statutory restrictions on the use of the funds.[36] The Court has generally disallowed direct grants or the furnishing of equipment (other than textbooks) or on-campus therapeutic services to "pervasively sectarian" elementary and secondary schools.[37]

31. For a more comprehensive survey of the Court's establishment clause jurisprudence, see Note, Bowen v. Kendrick: *Establishing a New Relationship Between Church and State*, 38 AM. U.L. REV. 953, 958-74 (1989).

32. Lynch v. Donnelly, 465 U.S. 668 (1984) (display of Christmas *crèche* on municipal property); Marsh v. Chambers, 463 U.S. 783 (1983) (maintenance of legislative chaplains); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws). For a general discussion of these "de facto" establishments of religion, see Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 725-29 (1986) (citing M. HOWE, THE GARDEN AND THE WILDERNESS 11 (1965)).

33. Torcaso v. Watkins, 367 U.S. 488 (1961).

34. *Everson*, 330 U.S. 1 (bus transportation); Board of Educ. v. Allen, 392 U.S. 236 (1968) (loan of secular textbooks); *see* Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 111, 117.

35. Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (requirement of equal treatment of evolution and "creation science"); Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments); Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition against teaching of evolution); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (Bible study); Engel v. Vitale, 370 U.S. 421 (1962) (prayers).

36. Roemer v. Board of Pub. Works, 426 U.S. 736 (1975); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). These are referred to *infra* as the "college cases"; *see* note 137 and accompanying text, and text accompanying note 213.

37. Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). The only exception to date is Committee for Pub. Educ. v. Regan, 444 U.S.

In interpreting the Establishment Clause, the Supreme Court developed a three-part standard: A challenged statute or government regulation must have a secular legislative purpose,[38] its primary effect must be neither the advancement nor the inhibition of religion,[39] and the implementation of the statute must create no excessive entanglement between religion and the state.[40] This standard has come to be known as the "*Lemon* test," after the 1971 case of *Lemon v. Kurtzman*,[41] in which the Court first consolidated the three parts into one general ruling.

In a case decided the same day as *Lemon*, the Court stated that the three prongs of the test should not be viewed as mathematically precise absolutes, but rather as "guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."[42] The Court has stressed its unwillingness to be "confined to any single test or criterion in this sensitive area,"[43] but also repeatedly has affirmed that government action alleged to violate the Establishment Clause "should be measured against the *Lemon* criteria."[44] In addition, the Court has treated each of the prongs of *Lemon* independently, as absolute determinators, rather than as competing interests to be evaluated in a balancing test.[45] All three prongs must be met or a law will be struck down. For example, since the purpose prong of the *Lemon* test requires only that the legislation have a valid secular purpose (and not that the purpose be

646 (1980), in which the Court upheld reimbursement for secular services required by state law. For a discussion of the characteristics that distinguish a pervasively sectarian institution, see *infra* text accompanying notes 196-198.

38. McGowan v. Maryland, 366 U.S. 420, 449-50 (1961) (holding that Maryland's Sunday closing laws had the valid purpose of establishing a common day of rest); *Everson*, 330 U.S. at 6-7 (holding that the state of New Jersey had a valid secular purpose in providing free bus transportation to children attending parochial school).

39. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (allowing the loan of free nonreligious textbooks to parochial school students); *Schempp*, 374 U.S. at 222 (holding unconstitutional a Pennsylvania law that required the reading of a portion of the Bible in public schools at the beginning of each school day).

40. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (holding that general tax exemptions for religious property did not violate the Establishment Clause because the administrative entanglements were not excessive).

41. 403 U.S. 602 (1971). For a more complete discussion of *Lemon* and the three-part test, see L. LEVY, THE ESTABLISHMENT CLAUSE 130-31 (1986).

42. Tilton v. Richardson, 403 U.S. 672, 678 (1971); *see also* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383 (1985); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 n.31 (1973); Meek v. Pittenger, 421 U.S. 349, 359 (1975); *cf.* Hunt v. McNair, 413 U.S. 734, 741 (1973) (three prongs are "signposts").

43. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

44. *Ball*, 473 U.S. at 383.

45. Aid that the Court has classified as endorsing or advancing religion will be struck down, even though it may serve important government interests. *Developments in the Law*, 100 HARV. L. REV. 1606, 1678-79 (1987) (contrasting the Court's approach in establishment clause cases with its use of the balancing test in its decisions under the Free Exercise Clause).

completely secular),[46] the Court usually determines that the purpose prong has not been violated.[47] But the challenged statute will still be found unconstitutional if the Court determines that it impermissibly advances religion, or that it creates excessive entanglement.[48]

The results of the Court's efforts to interpret the Establishment Clause have not been entirely satisfactory.[49]

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution .... The considerable internal inconsistency in the opinions of the court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles.[50]

Of the Justices presently seated on the Supreme Court, Chief Justice Rehnquist and Justices White, O'Connor, and Scalia had, prior to *Bowen v. Kendrick*, unequivocally declared their dissatisfaction with all or part of the *Lemon* test and with many of the Court's rulings under the three-part test, particularly with the rulings in the aid to religious education cases.[51]

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46. *Lynch*, 465 U.S. at 680; Bowen v. Kendrick, 108 S. Ct. 2562, 2570 (1988).

47. *See infra* note 153.

48. "The propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774 (1973).

49. *See, e.g.*, Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 309 (1989) (arguing that the *Lemon* test's "sharp dichotomies (secular/religious, advance/not advance, excessive/acceptable entanglement) appear too rigid to do justice to the complex nature of modern church-state interaction, especially given the vast expansion in the range of government activities since the New Deal").

50. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970); *see also infra* notes 52-73 and accompanying text. For comments on the Supreme Court's "inconsistent adjudications" of establishment clause cases, see Beschle, *supra* note 25, at 163-64 (observing that the "imprecision" of the Court's terminology in its establishment clause cases has drawn heavy criticism); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 155-56 (1983) (contending that "the Court's past interpretation of the *Lemon* test has suffered from considerable internal contradiction"); Note, Grand Rapids School Dist. v. Ball *and* Aguilar v. Felton: *Confusion in Applying* Lemon v. Kurtzman's *Effects and Entanglement Tests*, 50 ALB. L. REV. 811, 815-22 (1986) (arguing that the "confusing semantics" used by the *Lemon* Court in setting forth the entanglement prong obscured the fact that "excessive entanglement" was, at its outset (in *Walz*), "merely one manifestation of an impermissible effect"); Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 6-7 (1987) (contending that decisions since *Lemon* "have produced a conceptual disaster area"); L. LEVY, *supra* note 41, at 136-64 (arguing that the Court has been erratic and unprincipled in its establishment clause decisions); *see also* Edwards v. Aguillard, 107 S. Ct. 2573, 2605 (1987) (Scalia, J., dissenting).

51. As noted, *infra* note 103, the *Bowen v. Kendrick* majority consisted of Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy. Justice Kennedy added a concurring opinion, his first judicial statement in an establishment clause case. *See infra* text accompanying notes 129-130. Subsequently, in County of Allegheny v. ACLU, 109 S. Ct.

Chief Justice Rehnquist, the author of the majority opinion in *Bowen v. Kendrick*, has been the Court's most outspoken opponent of the *Lemon* test. He believes that "[t]he three-part test has simply not provided adequate standards for deciding Establishment Clause cases . . . ."[52] He has argued that the purpose and effect tests articulated in *Lemon* emerged from a mistaken understanding of constitutional history,[53] and that the courts have mistakenly transformed the original intent of the Establishment Clause that Congress shall be neutral regarding competing religious views into a notion of neutrality between religion and irreligion.[54]

3086 (1989), a case involving the constitutionality of two holiday displays, one containing a *crèche* and the other consisting of a Hanukkah menorah, Kennedy wrote a lengthy opinion, concurring in part and dissenting in part, joined by Chief Justice Rehnquist and Justices White and Scalia. Kennedy began with a seeming attempt to deprecate the *Lemon* test's primacy as a constitutional standard: "*In keeping with the usual fashion of recent years,* the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question." *Id.* at 3134 (emphasis added). He added that although he was "content for present purposes to remain within the *Lemon* framework," he did not "wish to be seen as advocating, let alone adopting, that test as [the] primary guide in this difficult area." *Id.* He stopped short of actually finding fault with the Court's previous establishment clause rulings, however, observing only that "[p]ersuasive criticism of *Lemon* has emerged." *Id.* (citations omitted). Kennedy stated that the Court is bound by the precedent of its previous rulings, *id.* at 3134, but expressed a view that more closely matches Chief Justice Rehnquist's philosophy, *see infra* note 53, than it does the Court's prior decisions. Kennedy claimed that the Court's establishment clause cases have disclosed two limiting principles:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."

Id. at 3136 (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). *But cf. Nyquist*, 413 U.S. at 786 (proof of coercion not a necessary element of any establishment clause claim); *id* at 771 (law need not promote a state religion to qualify as establishment of religion).

52. Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

53. In a lengthy dissent in Wallace v. Jaffree, 472 U.S. at 91-144 (decision striking down an Alabama law authorizing a moment of silence in public schools, to be used for meditation or silent prayer), Justice Rehnquist analyzed the history of the Religion Clauses, and adopted the originalist view developed by scholars such as R. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982), and W. Berns in THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976). This version of history proposes that the Framers never intended to build the "wall of separation" between government and religion that was constitutionalized in Everson v. Board of Educ., 330 U.S. 1, 16 (1947), *see supra* note 28, but rather wanted simply to prevent the state from establishing a preferred religion or a national church. Wallace v. Jaffree, 472 U.S. at 98 (Rehnquist, J., dissenting). "The 'wall of separation between Church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." *Id.* at 106-07.

54. Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting); Wallace v. Jaffree, 472 U.S. at 106 (Rehnquist, J., dissenting); *see also Nomination of Justice William Hubbs Rehnquist: Hearings Before the Committee on the Judiciary, United States Senate*, 99th Cong., 2d Sess. 297 (1986) (testimony of Justice Rehnquist).

Justice White dissented from *Lemon v. Kurtzman*,[55] and has maintained a consistent position[56] through the seventeen years separating *Lemon* and *Bowen v. Kendrick*, particularly with regard to the Court's interpretation of the Establishment Clause in the context of public aid to private schools.[57] Two years after *Lemon* was decided, White announced, "I am quite unreconciled to the Court's decision in *Lemon*. . . . I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country."[58]

Both Rehnquist and White have argued that the entanglement test creates an "insoluble paradox" in certain cases,[59] particularly those involving government aid to sectarian schools.[60] Justice O'Connor has also argued for the abandonment of the entanglement prong, at least as a standard separate from the effect analysis.[61] She has theorized that the "anomalous results"[62] in many of the Court's establishment clause cases are " 'attributable to [the] "entanglement" prong,' "[63] and would not in-

55. 403 U.S. 602, 663.

56. The three-fold test of *Lemon* . . . imposes unnecessary, and . . . superfluous tests for establishing "when the state's involvement with religion passes the peril point" for First Amendment purposes. . . . As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason . . . to take the constitutional inquiry any further.

Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1975) (White, J., concurring) (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting)); *see also* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 490 (1986) (White, J., concurring); Widmar v. Vincent, 454 U.S. 263, 282 (1981) (White, J., dissenting).

57. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 400 (White, J., dissenting).

58. *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

59. The theory that the entanglement test creates an "insoluble paradox" was originally proposed by Justice White in his dissent in *Lemon*, where he claimed that under the *Lemon* standards, "the State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." *Lemon*, 403 U.S. at 666-68; *see also Roemer*, 426 U.S. at 768-69 (White, J., concurring). In *Aguilar v. Felton*, Rehnquist accused the Court of having

take[n] advantage of the "Catch-22" paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. . . . [W]e have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, J., dissenting).

60. Wallace v. Jaffree, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting).

61. Aguilar v. Felton, 473 U.S. at 422-30 (O'Connor, J., dissenting).

62. For example, we permit a State to pay for bus transportation to a parochial school, *Everson v. Board of Education*, 330 U.S. 1 (1947), but preclude States from providing buses for parochial school field trips, on the theory that such trips involve excessive state supervision of the parochial officials who lead them. *Wolman*, 433 U.S. at 254.

Aguilar v. Felton, 473 U.S. at 430 (O'Connor, J., dissenting).

63. Aguilar v. Felton, 473 U.S. at 430 (quoting Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 (1980)).

validate a statute that lacked a purpose or effect of advancing religion "merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion."[64]

O'Connor has also proposed a reformulation of the purpose and effect tests, suggesting that the proper inquiry under the purpose prong should be "whether the government intends to convey a message of endorsement or disapproval of religion,"[65] and that the effect prong should be interpreted to require that "a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[66]

Justice Scalia,[67] a strong believer in judicial restraint, has criticized the Court for being too "active."[68] He has suggested that legislatures enact vague and unclear legislation for political reasons, and argued that the courts have no business taking over the legislative function just because legislators lack the "political stomach" to do the job properly.[69] For this reason, Scalia is particularly opposed to the use of the purpose prong of the three-part *Lemon* test.[70] He has not condemned the entire *Lemon* test outright, but has stated that he finds the Court's establishment clause jurisprudence "embarrassing,"[71] and utterly confusing, "notoriously unclear," and "contradictory."[72] He has characterized the

64. Aguilar v. Felton, 473 U.S. at 430.

65. Lynch v. Donnelly, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring).

66. Aguilar v. Felton, 473 U.S. at 422 (O'Connor, J., dissenting); *see* Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1050-52 (1986). Chief Justice Rehnquist and Justices White, Scalia, and Kennedy do not seem favorably disposed towards Justice O'Connor's "no endorsement" test. *See* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 907 (1989) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.); County of Allegheny v ACLU, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., White, J., and Scalia, J.).

67. Prior to *Bowen v. Kendrick*, Scalia had written only one establishment clause opinion, the dissent in Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

68. Scalia, *The Judges are Coming, reprinted* in 126 CONG. REC. 18920, 18922 (1980).

69. *See* Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 385-87 (1988) and cases cited therein.

70. Edwards v. Aguillard, 107 S. Ct. at 2607. Scalia doubts whether the "purpose" prong is a proper interpretation of the Constitution. *Id.* at 2593. In addition, he has argued that while "legislative purpose" in the context of the *Lemon* test means "the 'actual' motives of those responsible for the challenged action," *id.*, "discerning the subjective motivation of those enacting the statute is . . . almost always an impossible task," *id.* at 2605. He would therefore accept as valid a "sincere" secular purpose, regardless whether that purpose is likely to be achieved by the challenged legislation. *Id.* at 2593.

71. *Id.* at 2607.

72. *Tuition Tax Relief Bills: Hearing on S. 96, S. 311, S. 834, S. 954, S. 1570, S. 1781, S. 2142 Before the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance*, 95th Cong., 2d Sess. 295-97 (1978) [hereinafter *Tuition Tax Hearing*] (statement of Antonin Scalia).

three-part test as less a tool of analysis than a convenient basis "for rationalizing results reached in some other fashion," an elastic abstraction that can be "applied strictly or liberally . . . in order to support the outcome."[73]

Despite such negative attitudes on the part of the individual Justices toward the *Lemon* test and its application in past cases, however, the Court has never contained a majority for overruling *Lemon*, and has maintained the three-part test as the appropriate standard for ascertaining the limits of permissible government accomodation of religion.[74] In ruling on the constitutionality of the Adolescent Family Life Act, the Court in *Bowen v. Kendrick* again followed the *Lemon* analysis, but in a way that calls into question its future ability to articulate the boundaries of behavior foreclosed by the Establishment Clause.

II. Facts and Procedural History of *Bowen v. Kendrick*

A. The Adolescent Family Life Act

In 1981, Congress enacted the Adolescent Family Life Act[75] in response to the "severe adverse health, social, and economic consequences" that often follow pregnancy and childbirth among unmarried adolescents.[76] The AFLA provides grants to organizations to set up demonstration projects providing two basic kinds of services: "care services," which include "necessary services for the provision of care to pregnant adolescent parents and adolescent parents,"[77] and "prevention services,"

73. *Tuition Tax Hearing*, *supra* note 72, at 296-97.

74. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383 (1985); Hunt v. McNair, 413 U.S. 734, 741 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-73 (1973).

75. 42 U.S.C. §§ 300z to 300z-10 (1982). Both the AFLA and its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, *see supra* note 8 and accompanying text, were enacted to provide grants to public agencies and non-profit private organizations for programs that provide services to adolescent parents and pregnant adolescents. The "prevention" component of the 1978 Act focused on the prevention of pregnancy, in contrast to the AFLA's emphasis on the prevention of adolescent premarital sexual activity. For a discussion of the differences between the AFLA and the 1978 Act, see Mecklenburg & Thompson, *The Adolescent Family Life Program as a Prevention Measure*, 98 PUBLIC HEALTH REPORTS, Jan.-Feb. 1983, at 25-27, *reprinted in Pregnancy-Related Health Services: Hearings Before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce*, 99th Cong., 1st Sess. 80-88 (1985).

76. 42 U.S.C. § 300z(a)(5). The enactment of the AFLA was also motivated by Congress' perception that "the Federal Government has a responsibility to help states develop adequate approaches to the serious and increasing problems of adolescent premarital sexual relations and pregnancy." S. REP. NO. 161, 97th Cong., 1st Sess. 4 (1981). For a lucid and comprehensive discussion of the political background of the enactment of the AFLA and its predecessor program, see M. VINOVSKIS, AN "EPIDEMIC" OF ADOLESCENT PREGNANCY?—SOME HISTORICAL AND POLICY CONSIDERATIONS 76-86 (1988).

77. 42 U.S.C. § 300z-1(a)(7). These services include pregnancy testing, maternity counseling, adoption counseling and referral services, primary and preventive health services including prenatal and postnatal care, nutrition information and counseling, referral to

or "necessary services to prevent adolescent sexual relations."[78] Most of the "necessary services" enumerated in the AFLA involve some form of teaching, counseling, or referral.

The AFLA has, among its stated purposes, "to find effective means, within the context of the family, of reaching adolescents before they become sexually active in order to . . . promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations . . ."[79] and to promote adoption as an alternative to abortion.[80] The AFLA provides that since "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex,"[81] such problems are "best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary organizations, and other groups in the private sector."[82] The AFLA therefore provides that applications for grants "shall include . . . a description of how the applicant will, as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . . ."[83]

The only statutory restrictions on the use of AFLA funds state that none of the AFLA grants may be used for projects that provide abortions or that involve abortion counseling, and that grants may be made only to projects or programs that do not promote, advocate or encourage abortion.[84] In addition, AFLA funds may not be used for the provision of family planning services if such services are available elsewhere "in the community."[85]

B. The Facts and Holding of *Bowen v. Kendrick*

In 1983, plaintiffs (including federal taxpayers, four Protestant ministers, and the American Jewish Congress) filed suit in the United States District Court in Washington, D.C., challenging the constitutionality of

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appropriate pediatric care, referral to maternity home services and mental health services, childcare sufficient to enable the adolescent parent to continue education, consumer education and homemaking, and transportation. 42 U.S.C. § 300z-1(a)(4).

78. 42 U.S.C. § 300z-1(a)(8). These services include referral for screening and treatment of venereal disease; and educational services relating to family life and problems associated with adolescent premarital sexual relations, including information on adoption, education on the responsibilities of sexuality and parenting, and assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality. 42 U.S.C. § 300z-1(a)(4).

79. 42 U.S.C. § 300z-1(b)(1).

80. 42 U.S.C. § 300z(b)(2); *see also* S. REP. No. 161, 97th Cong., 1st Sess. 20 (1981).

81. 42 U.S.C. § 300z(a)(8)(A).

82. 42 U.S.C. § 300z(a)(8)(B).

83. 42 U.S.C. § 300z-5(a)(21)(B).

84. 42 U.S.C. § 300z-10(a); *see infra* note 239 and accompanying text.

85. 42 U.S.C. § 300z-3(b)(1).

the AFLA on the ground that it violated the Establishment Clause of the First Amendment.[86] The plaintiffs contended that Congress had enacted the AFLA with the purpose of promoting a religious solution to the teenage pregnancy problem.[87] The plaintiffs also argued that the federal government, through the Department of Health and Human Services, had endorsed religion in the implementation of the AFLA by injecting religious bias in the grant-making process,[88] by condoning the advancement of religion in AFLA programs,[89] and by supporting religious institutions that promote religious tenets.[90] The plaintiffs further contended that the AFLA had the direct effect of advancing religion because it channeled tax revenues to religious organizations for the specific purpose of teaching young children and teenagers about subjects laden with religious and moral content.[91] Finally, the plaintiffs claimed that the AFLA fostered excessive entanglement between government and religion because the surveillance required to prevent government funding of the teaching of religion in AFLA programs would create an impermissible degree of entanglement between church and state.[92]

In ruling on cross-motions for summary judgment, the district court "carefully and exhaustively consider[ed] the motions, the statements of material facts not in dispute, the allegations of undisputed facts, the golconda of documents submitted to the Court, and the case law,"[93] and found that the AFLA was unconstitutional on its face and as applied

86. Appellees' and Cross-Appellants' Brief at 5, Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462, 87-775).

87. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 32-34, Kendrick v. Heckler, 657 F. Supp. 1547 (D.D.C. 1987) (No. 83-3175) (later Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987), *rev'd*, 108 S. Ct. 2562 (1988)) [hereinafter Plaintiffs' Motion for Summary Judgment].

88. In a lengthy description of the grant review and awards process, the plaintiffs detailed the way in which the Director of the Office of Adolescent Pregnancy Programs (of the Department of Health and Human Services) selected, as readers (evaluators) of the grant applications, persons who were either employed by religious organizations, such as Catholic Charities, or affiliated with religious groups that had strong anti-abortion theologies. Plaintiffs' Motion for Summary Judgment, *supra* note 87, at 35-37. The plaintiffs also described incidents illustrating the grant readers' bias against projects that did not emphasize moral values and "spiritual development," or that did not take a sufficiently emphatic anti-abortion position. *Id.* at 37-44.

89. The plaintiffs cited specific instances of AFLA grantees using AFLA funds to teach sex education in parochial schools, using religious curricula. *Id.* at 44-46.

90. The plaintiffs listed numerous AFLA-funded programs run by religious hospitals, maternity homes, and social service agencies, wholly owned and controlled by various Christian churches. The plaintiffs described the ways in which AFLA funds enabled religious institutions to expand pre-existing services, thereby promoting their religious philosophies concerning human sexuality and family planning. AFLA funds were also used to pay the salaries of religious personnel in a number of programs. *Id.* at 48-68.

91. *Id.* at 69-77.

92. *Id.* at 78-81.

93. Kendrick v. Bowen, 657 F. Supp. 1547, 1554 (D.D.C. 1987), *rev'd*, 108 S. Ct. 2562 (1988).

insofar as religious organizations were involved in carrying out the programs and purposes of the Act.[94]

The district court explained that while the distinction between an establishment clause challenge to a statute "on its face" and a challenge to the statute "as applied" had not been clearly delineated by the Supreme Court, establishment clause precedents required the court first to consider the possible applications of a particular statute, and then to analyze the statute's actual applications; if the application was the only constitutionally offensive element, the court would nonetheless be required to strike the statute down on its face.[95] The court applied the three-part *Lemon* test and found that the AFLA was not motivated wholly by religious considerations, and that it had a valid secular purpose.[96] Nevertheless, the court held that the Act was unconstitutional both on its face and as applied.

The court first determined that the AFLA was facially invalid because it had a direct effect of advancing religion, in that it funded the teaching and counseling of adolescents by religious organizations on matters relating to religious doctrine.[97] The court then cited representative portions of the record (rather than engaging in an "exhaustive recitation" of the undisputed facts)[98] and held that the AFLA was unconstitutional as applied because the record revealed that the Act had directly "advanced religion, [h]ad funded 'pervasively sectarian' institutions, [and had] permitt[ed] the use of federal tax dollars for education and counseling that amount[ed] to the teaching of religion."[99] Finally, the court ruled that because many of the organizations funded by the AFLA had a religious character and purpose, "the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement."[100] The court ordered that the government be enjoined from funding any religious organizations under the AFLA.[101]

The Department of Health and Human Services (HHS) appealed the district court's decision to the United States Supreme Court,[102] which held, in a five-to-four ruling,[103] that the AFLA was not invalid on its face because, first, it was motivated primarily by a valid secular purpose: "the

94. *Id.* at 1551.
95. *Id.* at 1552.
96. *Id.* at 1558-60.
97. *Id.* at 1562-64.
98. *Id.* at 1564.
99. *Id.*
100. *Id.* at 1567.
101. *Id.* at 1570.
102. The appeal was brought pursuant to 28 U.S.C. § 1252. Brief for the Appellant, Otis R. Bowen at 12, Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462).
103. Bowen v. Kendrick, 108 S. Ct. 2562 (1988). Chief Justice Rehnquist wrote the majority opinion, joined by Justices White, O'Connor, Scalia, and Kennedy. Justice O'Connor

elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood."[104]

The Court asserted that Congress' inclusion of "religious organizations" in the AFLA reflected a legitimate secular goal: "the entirely appropriate aim of increasing broad-based community involvement in 'helping adolescent boys and girls understand the implications of premarital sexual relations, pregnancy and parenthood.' "[105] The Court noted that the legislative history showed that Congress approved of the fact that religious groups had been grantees of the AFLA's predecessor program, and intended to acknowledge the role that religious organizations can play in helping solve the problems to which the AFLA is addressed.[106] The Court refused to accept the premise that Congress' inclusion of religious groups signified an impermissible purpose "simply because some of the goals of the statute coincide with the beliefs of certain religious organizations."[107] The majority contended that the services provided under the AFLA were "not religious in character," that there was "nothing inherently religious about these activities," and that the AFLA's "particular approach toward dealing with adolescent sexuality and pregnancy . . . is not inherently religious . . . ."[108]

Second, the Court found that the AFLA did not have the primary effect of advancing religion, since it was a "facially neutral" statute that provided for a broad-based distribution of grant funds, and since nothing on the face of the statute indicated that a significant portion of the federal funds would be disbursed to "pervasively sectarian" institutions.[109]

The Court identified the two ways in which it claimed that the AFLA, considered on its face, could theoretically be found to have the primary effect of advancing religion. First, by expressly "recognizing that 'religious organizations have a role to play' in addressing the problems associated with teenage sexuality,"[110] the AFLA could be said to endorse religious solutions to the problems addressed by the Act, and to create a symbolic link between religious organizations and the govern-

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wrote a concurring opinion, as did Justice Kennedy, joined by Justice Scalia. Justice Blackmun wrote the dissent, joined by Justices Brennan, Marshall, and Stevens.

104. Bowen v. Kendrick, 108 S. Ct. at 2571.

105. *Id.* (quoting S. REP. No. 161, 97th Cong., 1st Sess. 2, 15-16 (1981)).

106. Bowen v. Kendrick, 108 S. Ct. at 2572 n.9.

107. *Id.* at 2571 n.8 (referring to Harris v. McRae, 448 U.S. 297, 319-20 (1980) (upholding the constitutionality of the Hyde Amendment, which prohibits the use of federal funds for abortions); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (upholding Maryland's Sunday closing laws against establishment clause challenge)).

108. Bowen v. Kendrick, 108 S. Ct. at 2572.

109. *Id.* at 2575. The *Bowen v. Kendrick* majority did not define "pervasively sectarian." For a discussion of the use of this term in earlier cases, see *infra* text accompanying notes 190-202.

110. *Id.* at 2572 (quoting S. REP. No. 161, 97th Cong., 1st Sess. 16 (1981)).

ment.[111] Second, by allowing religiously affiliated organizations to participate as grantees or sub-grantees in the AFLA programs, the AFLA could be viewed as authorizing the "impermissible 'inculcation' of religious beliefs in the context of a federally funded program."[112]

In response to the first possibility, the Court stated that such recognition of the role of religious organizations reflected "at most" nothing more than the judgment of Congress that religious organizations could help solve the problems to which the AFLA is addressed, and concluded that if this Congressional recognition had any effect of advancing religion, it was "at most 'incidental and remote.' "[113] The Court commented that although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services, it also requires them to describe the involvement of nonreligious providers, such as "charitable organizations" and "voluntary organizations."[114] The Court interpreted this provision as a reflection of " 'a course of neutrality among religions, and between religion and nonreligion.' "[115]

Regarding the second possibility (that in encouraging the participation of religious groups, the AFLA authorizes the teaching of religion), the Court claimed that because the AFLA is neutral on its face with respect to the grantee's status (religious or secular), a fairly wide spectrum of organizations is eligible to apply for funding. "[N]othing on the face of the statute suggests that the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."[116] In addition, the majority asserted that "[t]his Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs,"[117] and referred to the "long history of cooperation and interdependency between governments and charitable or religious organizations."[118] The Court concluded that a "facially neutral" statute, providing for distribution of federal funds to a variety of groups, but not specifically directing that government aid to any "pervasively sectarian" institution, could not have the effect of advancing religion.[119]

111. Bowen v. Kendrick, 108 S. Ct. at 2572.

112. *Id.*

113. *Id.* at 2573 (quoting Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985); citing Lynch v. Donnelly, 465 U.S. 668, 683 (1984); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973)).

114. *Id.*

115. *Id.* (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 382 (1985)).

116. *Id.* at 2573.

117. *Id.* at 2574. In support of its argument, the Court cited an 1899 case, Bradfield v. Roberts, 175 U.S. 291, 298, which held that using federal funds to construct a building on the grounds of a religiously affiliated hospital did not violate the Establishment Clause.

118. Bowen v. Kendrick, 108 S. Ct. at 2574.

119. *Id.* at 2575.

After responding to what it perceived as the two ways the statute could, on its face, have the effect of advancing religion, and determining that the Act's "facial neutrality" precluded such an effect, the Court summarily disposed of the lower court's arguments[120] in support of the court's holding that the AFLA, on its face, had the primary effect of advancing religion.[121] The Court refused to consider the district court's finding that the AFLA was invalid as applied, claiming that the district court had not followed "the proper approach in assessing appellees' claim that the Secretary is making grants under the Act that violate the Establishment Clause . . . ."[122]

Finally, the Court stated that since the religious AFLA grantees were not "pervasively sectarian," they would require only a low level of monitoring, and the government would thus not have occasion to intrude unduly into the affairs of the religious organizations receiving grants.[123] Consequently, the Court concluded, the AFLA did not create excessive entanglement betweeen religion and state.[124] The Court then remanded the case to the district court for a consideration of whether the statute, as applied, violated the Constitution, and for an appropriate remedy in the event that the lower court found that grants were being made in violation of the Establishment Clause.[125]

Justice O'Connor wrote a brief concurrence to explain why she did not believe that the Court's approach reflected tolerance for "the kind of improper administration that seems to have occurred" in the administration of the AFLA.[126] She emphasized that any use of public funds to promote religious doctrines would violate the Establishment Clause, but added that because the lower court had not engaged in a "detailed discussion of the voluminous record," it was not clear to what extent the instances of impermissible behavior by AFLA grantees were attributable to "poor administration by the Executive Branch."[127] She concluded that the appellees might "yet prevail on remand" if they could prove "*extensive* violations" of the prohibition against the use of public funds for religious purposes.[128]

120. *See* Kendrick v. Bowen, 657 F. Supp. at 1562-64.

121. Bowen v. Kendrick, 108 S. Ct. at 2575-77.

122. *Id.* at 2580. The Court complained that, although the lower court had identified certain instances in which AFLA funds were being used for improper purposes, it did not discuss with sufficient particularity "the aspects of those organizations which in its view warranted classification as 'pervasively sectarian' [and] did not adequately design its remedy to address the specific problems it found in the Secretary's administration of the statute." *Id.*

123. *Id.* at 2578.

124. *Id.*

125. *Id.* at 2581.

126. *Id.* (O'Connor, J., concurring).

127. *Id.*

128. *Id.* (emphasis in original).

Justice Kennedy added a concurring opinion (joined by Justice Scalia) in which he asserted that the fact that public funds go to pervasively sectarian institutions is not sufficient to invalidate a statute that has been found constitutional on its face.[129] "The question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant."[130]

Justice Blackmun, writing for the dissent, asserted that "[t]he AFLA, without a doubt, endorses religion" and stated that he would find the statute unconstitutional without remanding it to the district court.[131] Before evaluating the AFLA in light of the three-part test, Blackmun discussed two areas of the majority's analysis to which he took exception. He commented that the district court had rightfully felt compelled to analyze the AFLA both "on its face" and "as applied" because in the past, the Supreme Court has in some cases ruled on the facial validity of a statute, and in others has limited its review to the particular applications at issue.[132] But, Blackmun claimed, the majority misused the distinction.[133] By dividing the analysis[134] and characterizing the appellees' attack as a "facial" challenge, "the majority justifie[d] divorcing its analysis from the extensive record developed in the district court, and thereby . . . render[ed] the evaluation of the *Lemon* effects prong particularly sterile and meaningless."[135]

Blackmun then identified what he considered "a particular flaw in the majority's method," the premise that "the primary means of ascer-

129. *Id.* at 2582 (Kennedy, J., concurring).

130. *Id.* The Court apparently rejected this suggestion. "[I]t will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions . . . ." *Id.* at 2580; *see also* Justice Blackmun's dissent at 2597 n.16.

131. *Id.* at 2596 (Blackmun, J., dissenting).

132. *Id.* at 2583. The lower court in *Kendrick v. Bowen* stated:

> The precedents take as their form of analysis a consideration of the *possible* applications of a particular statute, *see, e.g.*, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 779-83 (1973) . . . . [The court must] then analyze the statute's actual application, *see e.g., id.*; Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472, 479-82 (1973), and finally, even if the application is the only constitutionally offensive element to which the court has pointed, strike down the statute on its face. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 255 (1977); Roemer v. Board of Public Works, 426 U.S. 736, 767 (1976).

657 F. Supp. at 1552 (citations omitted) (emphasis in original).

133. Bowen v. Kendrick, 108 S. Ct. at 2583-84 (Blackmun, J., dissenting).

134. The district court, on the other hand, viewed the "on its face/as applied" analysis as a unified process. *See supra* note 132 and accompanying text. "While little else is clear in Establishment Clause law, it is obvious that the distinction between a challenge to a statute on its face and as applied has not been clearly delineated." Kendrick v. Bowen, 657 F. Supp. at 1552. "[B]ecause Establishment Clause case law has not always neatly demarcated a facial challenge from a challenge to a law as applied," the court found it necessary to consider both aspects as part of its constitutional analysis. *Id.* at 1564.

135. Bowen v. Kendrick, 108 S. Ct. at 2584 (Blackmun, J., dissenting).

taining whether a statute that appears to be neutral on its face in fact has the effect of advancing religion is to determine whether the aid is going to 'pervasively sectarian' institutions."[136] He argued that the Court had erred both in "adopting a cramped view of what constitutes a 'pervasively sectarian' institution,"[137] and in suggesting that the absence of a finding of pervasive sectarianism ends the inquiry into the use that will be made of direct government aid.[138] Establishment clause cases "do not require a plaintiff to demonstrate that a government action *necessarily* promotes religion, but simply that it creates such a substantial risk."[139]

Blackmun agreed with the majority that the AFLA had a valid secular purpose,[140] but stated that it clearly had the effect of advancing religion.[141] "Whatever Congress had in mind . . . it enacted a statute that facilitated and, indeed, encouraged the use of public funds for [religious] instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation."[142] He contended that the AFLA specifically authorized the expenditure of funds in ways similar to those previously held unconstitutional, such as direct subsidies to parochial schools for books or teaching materials when the materials would be selected or designed by the schools themselves.[143] He also argued that the Court's characterization of the religious grantees as "social-welfare services"[144] did not eliminate the risk that those grantees would be advancing religion at public expense when they were "directly engaged in pedagogy, with the express intent of shaping belief and changing behavior."[145]

136. *Id.* at 2585.

137. *Id.* at 2586. Blackmun suggested that the majority's error originated in its determination that since the AFLA grantees were not (for the most part) parochial schools, the institutions to which the Court had in the past attached the label of "pervasively sectarian," *see*, Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), the relevant analysis must therefore be that developed by the Court in the college aid cases, *see*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). For a discussion of the distinctions the Court has made between parochial schools and colleges in the context of direct government aid, see generally *infra* notes 190-202 and accompanying text. Blackmun argued that, based on the lower court record, the AFLA grantees more closely resembled parochial schools on the continuum of "sectarianism." Bowen v. Kendrick, 108 S. Ct. at 2586-87 (Blackmun, J., dissenting).

138. Bowen v. Kendrick, 108 S. Ct. at 2587 (Blackmun, J., dissenting).

139. *Id.* at 2594 (emphasis in original).

140. *Id.* at 2587.

141. *Id.* at 2596.

142. *Id.* at 2583.

143. *Id.* at 2588; *see* Wolman v. Walter, 433 U.S. 229, 248-51; Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973); Lemon v. Kurtzman, 403 U.S. 602, 620-21.

144. *See supra* notes 117-118 and accompanying text.

145. Bowen v. Kendrick, 108 S. Ct. at 2591 (Blackmun, J., dissenting).

Blackmun claimed that the impermissible effect of the AFLA was exacerbated by the lack of any statutory restrictions on the use of the AFLA funds to promote religion.[146] He noted that the Court has, in past cases, upheld statutes providing direct grants specifically because of direct statutory prohibitions on use of funds for religious purposes[147] and argued that this deficiency in the AFLA was all the more remarkable in the light of the elaborate restrictions on the use of AFLA funds for other purposes, such as abortion counseling or the provision of contraceptives and other family planning services.[148] Blackmun also observed that the AFLA "stands out among similar grant programs, precisely because of the absence of such restrictions."[149]

As for the "entanglement" prong of the *Lemon* test, Blackmun noted that despite the disfavor with which some members of the Court have recently viewed this part of the test,[150] it still "remains a part of the applicable constitutional inquiry."[151] He argued that the majority's dismissal of the appellees' claim that the religious AFLA grantees were pervasively sectarian did not eliminate the need to examine the three entanglement factors: "(1) the character and purpose of the institutions benefitted; (2) the nature of the aid; and (3) the nature of the relationship between the government and the religious organization."[152]

III. Case Analysis

A. The Purpose Test

Under the first prong of the *Lemon* standard, a court may invalidate a statute only if it is motivated wholly by an impermissible purpose.[153] Both the majority and the dissent in *Bowen v. Kendrick* agreed with the lower court that the AFLA was motivated "primarily, if not entirely" by

146. *Id.* at 2591-92; *see supra* notes 84-85 and accompanying text.

147. Bowen v. Kendrick, 108 S. Ct. at 2592 (Blackmun, J., dissenting); *see* Tilton v. Richardson, 403 U.S. 672, 682-83 (1971); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 569 (1980); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774, 780 (1973); Roemer v. Board of Pub. Works, 426 U.S. 736, 760 (1976).

148. Bowen v. Kendrick, 108 S. Ct. at 2592 n.13 (Blackmun, J. dissenting).

149. *Id.* at 2594 n. 15 (Blackmun, J., dissenting).

150. *See supra* notes 59-64 and accompanying text.

151. Bowen v. Kendrick, 108 S. Ct. at 2595 (Blackmun, J., dissenting).

152. *Id.* at 2596 (referring to Lemon v. Kurtzman, 403 U.S. at 614-15 (1971)).

153. Lynch v. Donnelly, 465 U.S. 668, 680 (1984); Bowen v. Kendrick, 108 S. Ct. at 2570. The Court has invalidated only a few statutes solely on the basis of impermissible sectarian purpose: Epperson v. Arkansas, 393 U.S. 97 (1968) (Arkansas statute that prohibited the teaching of evolution in public schools); Stone v. Graham, 449 U.S. 39 (1980) (Arkansas statute that mandated the placing of a copy of the Ten Commandments in every public school classroom); Wallace v. Jaffree, 472 U.S. 38 (1985) (Alabama statute that provided for daily period of silence in public school classrooms, to be used for meditation or prayer); Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (Louisiana statute that required equal treatment of teaching of "creation science" whenever the theory of evolution was taught in public schools).

a valid secular purpose.[154]

The stated goals of the AFLA—to foster alternatives to abortion and to prevent or delay sexual relations among teenagers[155]—are probably not inherently indicative of an impermissible religious purpose. Nevertheless, Congress' explicit intent to use religious as well as secular means[156] to accomplish the AFLA's secular objectives is, at the very minimum, constitutionally suspect.

The Court's analysis of Congress' purpose in enacting the AFLA overlooked the significant question of exactly what role Congress intended religious groups to play in the furtherance of the AFLA's secular purpose. Neither the majority nor the dissent considered whether the secular objectives could have been accomplished wholly through secular means. The AFLA gives money to organizations for the specific objective of influencing the behavior of teenagers by teaching them to abstain from sex before marriage, and by counseling them that adoption is better than abortion.[157] The obvious role of religious organizations (as opposed to secular social service providers) in that enterprise, as Justice Blackmun suggested in the dissent, is to employ their authority as religious groups to inculcate sexual morality.[158] Whether this morality is "religious" or "secular," it is unlikely that religious organizations could or would provide purely "secular" counseling unconnected to their religious

154. Bowen v. Kendrick, 108 S. Ct. at 2751; *see supra* text accompanying notes 96, 102-108, 140.

155. S. REP. NO. 161, 97th Cong., 1st Sess. 2, 20 (1981); *see supra* notes 79-80 and accompanying text.

156. The AFLA states that the problems of adolescent sexual relations "are best approached through a variety of . . . services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups . . . ," 42 U.S.C. § 300z(a)(8)(B); that "the Federal Government should . . . emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups . . . ," 42 U.S.C. § 300z(a)(10)(C); that the demonstration projects funded under the Act "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior . . . of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations," 42 U.S.C. § 300z-2(a); and that an application for a grant under the Act "shall include a description of how the applicant will . . . involve religious and charitable organizations, voluntary organizations, and other groups . . . ," 42 U.S.C. § 300z-5(a)(21)(B).

157. 42 U.S.C. §§ 300z(b)(1) and 300z(b)(2) (1983); *see* S. REP. NO. 161, 97th Cong., 1st Sess. 2, 8-10 (1981) ("[T]he teenage pregnancy problem consists of several intertwined aspects: [among which are] the moral issues of premarital teenage sexual relations, abortion, and illegitimate births . . . .") *Id.* at 2.

158. Bowen v. Kendrick, 108 S. Ct. at 2590 (Blackmun, J., dissenting). The Senate committee report that accompanied the 1984 reauthorization of the AFLA acknowledged the way this religious authority functions: "[P]rojects which target hispanic and other minority populations are more accepted by the population if they include sectarian as well as non-sectarian organizations in the delivery of these services." S. REP. NO. 496, 98th Cong., 2d Sess. 10 (1984).

world views.[159]

The involvement of religious organizations was not necessary to teach the virtues of sexual abstinence. In fact, Congress did not identify any legitimate purpose that would not have been fully served by involving only secular organizations as AFLA grantees or participants in the delivery of "prevention services."[160] Indeed, the Senate bill introduced in December 1987 (after the lower court had found the AFLA unconstitutional) to reauthorize the AFLA amended the Act to strike out the references to religious groups, while retaining the Act's other essential provisions.[161] This shows that it was within the contemplation of the AFLA's supporters that the Act's secular goals could be achieved without the involvement of religious organizations.

If a government uses religious means to accomplish a secular goal, it sends out a message of endorsement of the religious vehicle,[162] and implies that nonadherents are outsiders.[163] If, on the other hand, an objec-

159. *See infra* notes 204-227 and accompanying text; *see also* Bowen v. Kendrick, 108 S. Ct. at 2590 n.9, where Justice Blackmun cites statements of AFLA administrators and participants. For example, one Baptist minister is quoted as stating, "In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings."

160. It is, of course, generally difficult to ascertain legislators' actual, subjective motives. *See, e.g.,* Justice Scalia's comments on various hypothetical components of "legislative purpose" in Edwards v. Aguillard, 107 S. Ct 2573, 2605 (1987). The Court has never explained exactly where evidence of legislative purpose is to be found, nor has it defined the point at which a law's religious purpose can be said to overwhelm its secular aims. L. TRIBE, *supra* note 24, at 1209. It seems clear, however, that the AFLA's sponsors developed the legislation in an attempt to remedy what they saw as a lack of moral values in the pregnancy prevention services available to adolescents through federal programs. *See supra* notes 2-11 and accompanying text. The *Bowen v. Kendrick* majority cited the 1981 Senate report, S. REP. NO. 161, 97th Cong., 1st Sess., for the proposition that Congress' express purpose in enacting the AFLA was "to expand the services already authorized by Title VI, to insure the increased participation of parents in education and support services, to increase the flexibility of the programs, and to spark the development of new, innovative services"—in the Court's view, all laudable secular goals. Bowen v. Kendrick, 108 S. Ct. at 2571. On the other hand, Professor Vinovskis argues that the Title VI Adolescent Pregnancy Program, transformed in 1981 into the AFLA with its "prevention" component, *see supra* note 75, had little support in the House of Representatives until the supporters of the reauthorization of the Title X Family Planning Services Program realized that the AFLA package could be used as a "bargaining chip" in the fight to save Title X. M. VINOVSKIS, *supra* note 76, at 77-83. *See also Conferees Vote Teen-age Chastity Program*, 1981 CONG. Q. WEEKLY REP. 1388 (reporting that Senator Hatch offered to "give up" the AFLA in return for the elimination of federal funding of family planning).

161. 133 CONG. REC. S18210-12 (daily ed. Dec. 16, 1987).

162. "In applying the purpose test, it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion.' " Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring); *see* L. TRIBE, *supra* note 24, at 1285-88.

163. Larkin v. Grendel's Den, 459 U.S. 116, 123-26 (1982); *cf.* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963):

tive can be accomplished only through sectarian means, then that objective should be suspect in the eyes of the Court.[164] Teaching morality using religious means is not a valid secular use of taxpayers' money.[165]

In *Wallace v. Jaffree*,[166] the Court struck down an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer,"[167] on the ground that the purpose of the statute was to endorse religion. At the time that the Alabama legislature enacted the challenged statute, another statute authorizing a period of silence "for meditation" had been in effect in the state for three years.[168] The Court ruled that since Alabama had not identified any secular purpose not fully served by the earlier statute before the enactment of the second statute, only two conclusions were consistent with the text of the second statute: "(1) [T]he statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose."[169] The Court refused to consider the possibility that the statute was enacted with no purpose.[170]

Similarly, since Congress specified no secular function to be performed by the religious groups in carrying out the "prevention" component of the AFLA (other than vague assurances about the need for strong community support and the "simple recognition" that religious groups have a role in helping to solve such a complex problem as preventing adolescent sexual activity),[171] it is possible to conclude that the inclusion of religious groups in this section of the statute was intended to convey a message of government endorsement and promotion of religious values, and that Congress had a highly suspect, if not a

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> We also held . . . in Torcaso v. Watkins [367 U.S. 488 (1961)] . . . that a State may not constitutionally require an applicant for [public office] to swear or affirm that he believes in God . . . . The [oath in *Torcaso*] involved an attempt to employ essentially religious (albeit non-sectarian) means to achieve a secular goal to which the means bore no reasonable relationship. . . . [T]he teaching of both *Torcaso* and [the Sunday closing laws cases] is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.

Schempp, 374 U.S. at 265 (Brennan, J., concurring); *see id.* at 269 n.29 (citing cases illustrating the principle that when first amendment freedoms are affected, government must employ those means that will least inhibit the exercise of constitutional liberties).

164. *See* Lynch v. Donnelly, 465 U.S. at 699-700; Larkin v. Grendel's Den, 459 U.S. at 123-24.

165. *Schempp*, 374 U.S. at 223 (rejecting argument that Bible readings in Pennsylvania public schools would not advance religion, but would simply promote moral values and teach literature).

166. 472 U.S. 38 (1985).

167. *Id.* at 40 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

168. Wallace v. Jaffree, 472 U.S. at 40.

169. *Id.* at 58-59.

170. *Id.* at 59-60 (citing United States v. Champlin Refining Co., 341 U.S. 290, 298 (1951)).

171. S. REP. NO. 161, 97th Cong., 1st Sess. 15-16 (1981).

clearly sectarian, purpose in specifying religious organizations as AFLA grantees.

B. The Effect Test

Under the second prong of the three-part *Lemon* test, a statute will be found invalid if its primary effect is the advancement of religion.[172] The Court's analysis of the effect prong in *Bowen v. Kendrick*, while somewhat confusing in its distinction between facial validity and validity in application, nevertheless appears to signal a new direction in the use of the *Lemon* test. In determining that the AFLA, on its face, did not have the primary effect of advancing religion, the Court relied solely on a textual analysis of the statute, and concluded that the AFLA was valid because, first, it provided for grants to a "wide spectrum" of groups, both religious and secular,[173] and second, it nowhere indicated that the religious grantees were to be "pervasively sectarian."[174] The Court thus avoided examining the issue of the risk of impermissible advancement of religion inherent in the AFLA, with its complete lack of statutory restrictions on the use of federal funds to teach religion.[175]

1. The Court's "Neutral Provision of Benefits" Argument

In making the argument that the AFLA is facially valid because it provides for grants to a "wide spectrum"[176] of groups, both religious and secular, Chief Justice Rehnquist relied on the reasoning he first used in *Mueller v. Allen,*[177] in which the Court upheld a Minnesota statute that allowed a tax deduction to parents of school children for tuition, textbook, and transportation expenses.

Writing for the *Mueller* majority, Justice Rehnquist argued that because the deduction was allowed whether the child attended public or private school, the statute's "neutral" provision of benefits to a " 'broad . . . spectrum of groups,' " religious as well as nonreligious, was " 'an important index of secular effect.' "[178] The Court upheld the challenged statute as an "attenuated financial benefit, ultimately controlled by the

172. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Bowen v. Kendrick, 108 S. Ct. at 2570. One way in which direct government aid will have the effect of advancing religion is "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ." Hunt v. McNair, 413 U.S. 734, 743 (1973); *see* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985).

173. Bowen v. Kendrick, 108 S. Ct. at 2573; *see infra* text accompanying notes 176-178.

174. "There is no requirement in the Act that grantees be affiliated with any religious denomination . . . . The services to be provided under the AFLA are not religious in character . . . ." Bowen v. Kendrick, 108 S. Ct. at 2573.

175. *See infra* notes 228-251 and accompanying text.

176. Bowen v. Kendrick, 108 S. Ct. at 2573; *see supra* note 116 and accompanying text.

177. 463 U.S. 388 (1983).

178. *Id.* at 397 (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefits at issue in this case."[179] Despite evidence showing that over ninety-five percent of the taxpayers eligible for the tuition deduction sent their children to religious schools,[180] Rehnquist claimed that the Court could not consider empirical evidence on a case-by-case basis. The Court ruled that the statute's facial neutrality meant that it did not violate the Establishment Clause.[181]

Reliance on the *Mueller* reasoning is inappropriate, however, in an analysis of the constitutionality of the AFLA. In *Mueller*, the financial benefit flowed from the state to the parents, rather than directly to the schools.[182] Public funds indirectly benefitted sectarian institutions "only as a result of numerous private choices of individual parents."[183] The AFLA grants, on the other hand, go directly to the grantees; and the Department of Health and Human Services, not the individual parents, determines who the grantees will be. Since the grants for the demonstration projects are limited to two per state, the grant applicants are placed in the position of competing with one another for the funds.[184] Evidence suggests that the Department of Health and Human Services was biased in its selection process toward grant applicants that stressed a "pro-life" line.[185] By contrast, any Minnesota parent was eligible for the tax deduction in *Mueller*; the result was a "neutral" provision of benefits, which carried with it no "imprimatur of state approval" for the individual sectarian institution.[186]

The *Bowen v. Kendrick* majority claimed that the AFLA reflected

179. *Mueller*, 463 U.S. at 400.

180. *Id.* at 409.

181. *Id.* at 401-02. For a more detailed analysis of Justice Rehnquist's opinion in *Mueller*, see Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1116-20 (1985); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 879-86 (1984).

182. *Mueller*, 463 U.S. at 399.

183. *Id.*; *see* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring):

> *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries . . . . [In *Mueller*], the deduction was equally available to parents of public school children and parents of children attending private schools. . . . [A]ny benefit to religion resulted from the 'numerous private choices of individual parents of school-age children.'

184. *See* Plaintiffs' Opposition to Defendants' Motions for Summary Judgment and for Judgment on the Pleadings and Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 38, Kendrick v. Heckler, 657 F. Supp. 1547 (D.D.C. 1987) (No. 83-3175) (later Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987), *rev'd*, 108 S. Ct. 2562 (1988)).

185. *See supra* note 88.

186. *Mueller*, 463 U.S. at 397 (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

neutrality between religion and nonreligion[187] because it required the potential grantees to describe how they would involve "charitable organizations, voluntary associations, and other groups in the private sector" in addition to religious organizations.[188] This neutrality is cosmetic only. The AFLA may involve a "broad spectrum" of grantees, but it does not result in a neutral provision of state assistance to a "broad spectrum of citizens"[189] as did the challenged statute in *Mueller*.

2. *The Court's "Pervasively Sectarian Institutions" Argument*

The Court's conclusory assumption that the religious AFLA grantees were not pervasively sectarian underlay its entire analysis of the effect prong of the *Lemon* test as applied to the AFLA, and its determination that the AFLA is a facially neutral, and hence a constitutional, enactment.

The determination of whether an institution is pervasively sectarian is important as part of the process of deciding how strictly the use of the federal or state money must be controlled, but the larger issue is the degree to which a particular statute may contain the potential or risk of advancing religion. While it is true that in previous cases the Court has looked sometimes at the language of a challenged statute, and other times at the manner in which it has been administered in practice,[190] the standard since *Lemon v. Kurtzman* has always included a consideration of whether "the potential for impermissible fostering of religion is present."[191] Indeed, the Court has found that in a pervasively sectarian institution, a substantial risk of state sponsored religious indoctrination may exist even in the absence of evidence of specific incidents of impermissible behavior.[192] Part of the analysis of potential or risk must therefore include how, if at all, a statute has been put into practice.[193]

187. "[N]othing on the face of the Act suggests the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." Bowen v. Kendrick, 108 S. Ct. at 2573.

188. *Id.* (citing 42 U.S.C. § 300z-5(a)(21)(B)).

189. *Mueller*, 463 U.S. at 399.

190. Bowen v. Kendrick, 108 S. Ct. at 2569-70.

191. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

192. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 387-89 (1985) (finding an impermissible risk of inculcating religion in a Michigan program in which classes in secular subjects for nonpublic school students were financed by the public school system, were taught by religious-school teachers hired by the public school system to teach the classes in the special program, and were conducted in religious-school classrooms "leased" by the public schools).

193. *Id.* at 385 (describing three ways that schools may risk impermissibly advancing religion: teachers may inculcate particular religious tenets, the funded programs may provide a symbolic link between church and state, the programs may subsidize the primary religious mission of the institutions). Many establishment clause decisions have interpreted "effect" to include the advancement of religion in the application of a statute, and have invalidated statutes that have contained even the possibility of as-applied violations. *See* Wolman v. Walter,

The Court had never previously determined that an institution receiving public funds was, or was not, pervasively sectarian based solely on the wording of a statute. The distinction between institutions that are pervasively sectarian and those that are non-pervasively sectarian originated in a series of cases challenging statutes that provided state or federal aid to religiously affiliated schools and colleges. In *Hunt v. McNair*,[194] the Court upheld a South Carolina statute that provided financing for the construction of college facilities, ruling that the statute did not have a primary effect of advancing religion because a substantial portion of the college's functions were not subsumed in the religious mission and because the aid went toward the construction of secular facilities only.[195]

In a case decided the same day as *Hunt*, *Committee for Public Education v. Nyquist*,[196] the Court struck down a New York statute providing three forms of aid to nonpublic elementary and secondary schools. All three forms of aid were found to have an impermissible effect because they advanced the religious mission of sectarian schools.[197] The *Nyquist* Court provided what can be considered a "profile" of a pervasively sectarian school. A school is pervasively sectarian if it does any or all of the following: imposes religious restrictions on admissions, requires attendance of pupils at religious activities, requires obedience by students to the doctrines and dogmas of a particular faith, requires students to attend instruction in theology or religion, is an integral part of the religious mission of the church sponsoring it, has as a substantial purpose the inculcation of religious values, imposes religious restrictions on faculty appointments, or imposes religious restrictions on what or how the faculty may teach.[198]

Three years later, in *Roemer v. Board of Public Works*,[199] the Court applied the *Nyquist* analysis and held that a Maryland statute that provided general subsidies to private colleges was constitutional. The Court considered the "character of the aided institutions,"[200] but only in relation to the question whether there was any danger "that an ostensibly secular activity . . . will actually be infused with religious content or significance."[201] The Court stated that "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no state aid of any kind, it is necessary to paint a general picture of the institution,

433 U.S. 229, 248-51 (1977); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. at 620-21.

194. 413 U.S. 734 (1973).

195. *Id.* at 743-44.

196. 413 U.S. 756 (1973).

197. *Id.* at 794.

198. *Id.* at 767-68.

199. 426 U.S. 736 (1976).

200. *Id.* at 762.

201. *Id.*

composed of many elements."[202]

The *Bowen v. Kendrick* Court used "pervasively sectarian" in a much different way than did the *Nyquist* Court, which, at a minimum, identified lack of academic freedom as an indicator of a pervasively sectarian institution.[203] An examination of the record reveals that teachers in the programs run by certain of the religious AFLA grantees were trained and controlled by religious authorities, and were forbidden to teach certain subjects because they were contrary to the grantees' religious orientation.[204] Teachers in other AFLA programs provided medically inaccurate information in sex education classes because to do otherwise would have contradicted the grantees' religious message.[205]

The *Bowen v. Kendrick* Court ignored this evidence, which had led the district court to find that the AFLA contemplated the distribution of federal funds to pervasively sectarian institutions. The Court admitted that direct monetary aid, even if designated for secular purposes, may advance the religious mission of a pervasively sectarian institution.[206] But after citing the "college cases"[207] for the proposition that the Court has, on occasion, found religiously affiliated institutions to be *not* pervasively sectarian,[208] the Court declared that even if some of the funds *might* wind up in the hands of pervasively sectarian institutions,[209] "[w]e

202. *Id.* at 758.

203. *See supra* text accompanying notes 196-198.

204. For example, under the "Ethical and Religious Directives for Catholic Hospitals," approved by the Committee on Doctrine of the National Conference of Catholic Bishops, all Catholic medical facilities must reflect, in their policies and practices, "the moral teachings of the Church under the guidance of the local bishop." AFLA programs run under the auspicies of Catholic hospitals were therefore required to abide by these religious guidelines. Bowen v. Kendrick, 108 S. Ct. at 2591; Joint Appendix at 301-02, 312-15, 526-29 & 540-44 (filed Jan. 12, 1988), Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462) [hereinafter Jt. App.]. The "Boston Archdiocese Guidelines on Sex Education" state that "sex education should be based on Catholic teaching." Jt. App at 608-10. Adolescent girls in AFLA programs affiliated with St. Margaret's Hospital for Women in Dorchester, Massachusetts, were offered information on "natural family planning," but not on any other form of contraception because "it is in conflict with the teachings of the Catholic Church." *Id.* at 406-07.

205. Adolescents in certain federally funded AFLA programs were taught, for example, that all methods of contraception except "natural family planning" (i.e., selective abstinence) had negative medical side effects and were physically harmful, Jt. App., *supra* note 204, at 343; that the use of spermicides caused birth defects, such as Down's Syndrome, "limb reduction malformations," and "malignant neoplasms," *id.* at 352 & 586; that condoms were not effective in preventing the spread of sexually transmitted diseases, *id.* at 538; that there were never any medical or psychological indications for abortion, *id.* at 382 & 536-39; that "science has now proven, beyond a reasonable doubt, that human life begins at conception" and that "[t]he conceptus, from the very beginning, has its own life, is a totally new human being, a new person . . . . [A]bortion always takes an innocent, already existing life," *id.* at 358.

206. Bowen v. Kendrick, 108 S. Ct. at 2574.

207. *See supra* text accompanying note 137.

208. Bowen v. Kendrick, 108 S. Ct. at 2573-74.

209. The Court tried to hedge its bet by stating in the same paragraph that "of the eligible religious institutions, many will not deserve the label of 'pervasively sectarian.'" Bowen v.

do not think the possibility is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations."[210]

Despite the majority's insistence on identifying the religious AFLA grantees as mere participants in "publicly sponsored social welfare programs,"[211] the religious grantees resembled more closely the "pervasively sectarian" institutions described in the Court's aid to parochial school cases,[212] such as *Nyquist*, than they did the religiously affiliated liberal arts colleges in the so-called "college cases, such as *Hunt* and *Roemer*."[213] The AFLA funds were given directly to religious groups (not liberal arts colleges) for the specific purpose of teaching adolescents (not college students) the importance of sexual abstinence (not English or history or mathematics). Justice Blackmun pointed out the Court's misplaced reliance on the "college cases," and argued that

> [t]he voluminous record compiled by the parties and reviewed by the District Court illustrates the manner in which the AFLA has been interpreted and implemented . . . , and eliminates whatever need there might be to speculate about what kind of institutions *might* receive funds. There is no basis for ignoring the [record] simply because the recipients of government funds may not in

Kendrick, 108 S. Ct. at 2574 & n.12. But it should make no difference analytically whether a small or a large percentage of the AFLA funds go to pervasively sectarian grantees. *See Constitutional Law Conference*, 57 U.S.L.W. 2224, 2228-29 (1988); *see also* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 805 (1973). Chief Justice Rehnquist himself has criticized " 'the unsupportable approach of measuring the "effect" of a law by the percentage of' sectarian organizations benefitted." Meek v. Pittenger, 421 U.S. 366, 389 (1975) (Rehnquist, J., dissenting) (citing *Nyquist*, 413 U.S. at 804). In *Mueller v. Allen*, Rehnquist emphasized that the question whether a large or small percentage of the beneficiaries is sectarian is irrelevant in determining the constitutionality of a statute challenged on establishment clause grounds. 463 U.S. 388, 401 (1983).

210. Bowen v. Kendrick, 108 S. Ct. at 2574.

211. *Id.* The Court attempted to analogize the case to Bradfield v. Roberts, 175 U.S. 291 (1899), in which the giving of federal money for the construction of a religiously affiliated hospital was held not to violate the Establishment Clause. "[T]he long history of cooperation and interdependency between governments and charitable or religious organizations is reflected in the legislative history of the AFLA." Bowen v. Kendrick, 108 S. Ct. at 2574. Justice Blackmun criticized this argument, however, noting that the specific reason for the construction of the hospital in *Bradfield* was "the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation." *Id.* at 2591 n.11 (Blackmun, J., dissenting) (citing Bradfield v. Roberts, 175 U.S. at 299-300). As Blackmun noted, there is a significant difference between running a hospital or a soup kitchen and counseling teenagers "with the express intent of shaping belief and changing behavior." Bowen v. Kendrick, 108 S. Ct. at 2591 (Blackmun, J., dissenting).

212. For example, the district court observed that, based on the record before it, the AFLA grantees and participants included "organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, [were] religiously inspired and dedicated to teaching the dogma that inspired them." Kendrick v. Bowen, 657 F. Supp. at 1564.

213. Bowen v. Kendrick, 108 S. Ct. at 2586-87 (Blackmun, J., dissenting).

every sense resemble parochial schools.[214]

The Court premised the remainder of its analysis of the district court's ruling on this conclusion that the AFLA was a facially neutral statute that contemplated the involvement of only non-pervasively sectarian religious institutions. The Court first discussed the lower court's findings concerning the ways in which the AFLA, on its face, had the primary effect of advancing religion because it funded the teaching and counseling of adolescents by religious organizations on matters related to religious doctrine.[215] The Court admitted that the Establishment Clause prohibits " 'government financed . . . indoctrination in the beliefs of a particular religious faith,' "[216] but then claimed that it has in the past invalidated statutes on the basis of risk of religious indoctrination only in the context of aid to pervasively sectarian institutions.[217] The Court refused to presume such a risk in a non-pervasively sectarian institution.[218] As for the subject matter (the harm of premarital sex and the choosing of adoption over abortion), the Court stated simply that it was "not surprising" that the government's secular concerns would "coincide" with those of certain religions, and asserted that the facially neutral AFLA projects would not be converted into specifically religious activities by the fact that they were carried out by religiously affiliated organizations.[219]

As Justice Blackmun noted, however, the record before the Court was full of evidence showing how the "secular" values promoted by the AFLA took on a religious nature "when promoted in theological terms by religious figures."[220] For example, a number of the grantees used, as part of their curricula, explicitly religious materials containing theologi-

214. *Id.* at 2587 (emphasis in original). Ironically, Chief Justice Rehnquist voiced a similar complaint in his dissenting opinion in Meek v. Pittenger:

> [T]he Court's conclusion . . . is apparently no more than an *ex cathedra* pronouncement . . . since the District Court found the facts to be exactly the opposite . . . . The propensity of the Court to disregard findings of fact by district courts in Establishment Clause cases . . . is at variance with the established division of responsibilities between trial and appellate courts in the federal system. Fed. Rule Civ. Proc. 52(a).

421 U.S. at 392. And in *Roemer v. Board of Public Works*, the Court refused to set aside as "clearly erroneous" the lower court's findings concerning the role of religion in the sectarian institutions receiving state funding. "It is not our place . . . to reapprise the evidence, unless it plainly fails to support the findings of the trier of facts." 426 U.S. 736, 758 (1976).

215. Kendrick v. Bowen, 657 F. Supp. at 1562.

216. Bowen v. Kendrick, 108 S. Ct. at 2575 (quoting Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985)).

217. *Id.* at 2576.

218. "[N]othing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful secular manner." *Id.* at 2575-76.

219. *Id.* at 2576.

220. *Id.* at 2590 & n.9 (Blackmun, J., dissenting) (quoting statements of AFLA administrators and participants).

cal views on sexual conduct and abortion.[221] Other grantees counseled teenagers in parochial schools and church buildings adorned with religious symbols.[222] In certain AFLA programs, the sponsoring religious organization would follow the secular sex education portion, presented by the AFLA staffer, with a presentation in the same room and in the staffer's presence, of the organization's religious views on the same subject matter.[223] As a result, many of the participating adolescents believed that these federally-funded programs were sponsored by the religious denominations that controlled the schools and churches.[224] Yet in the face of hundreds of pages of uncontroverted facts[225] demonstrating what even the majority was forced to admit was "impermissible behavior by AFLA grantees,"[226] the Court dismissed as inconsequential the risk that the grantees would engage in religious indoctrination, just because "some of the religious institutions who receive AFLA funding . . . agree with the message that Congress intended to deliver to adolescents through the AFLA. . . ."[227]

3. *The Lack of Statutory Restrictions on Religious Teaching*

An even more serious flaw in the Court's analysis of the effect of the AFLA appears in its discussion of whether the AFLA's lack of an express statutory prohibition of religious teaching constituted an endorsement of religion. After "disingenuously"[228] arguing that "we have never stated that a *statutory* restriction is constitutionally required,"[229] the

221. *Id.* at 2583 (Blackmun, J., dissenting); Kendrick v. Bowen, 657 F. Supp. at 1565-66. For example, the Catholic-affiliated Family of the Americas Foundation AFLA program was described by its director (who "report[s] to the Pope regularly, two, three times a year personally and by correspondence, several times more than that," Jt. App., *supra* note 204, at 388) as "in line with the wishes of the Holy Father . . . [who] wants us to inform the young people of the truth and to tell them the virtues of chastity and virginity." *Id.* at 387. The Family of the Americas program taught "the moral advantages and the moral aspect of Christian sex education . . . that their body [sic] is a temple of the Holy Spirit." *Id.* at 388. The same program counseled on the technique of the Billings Ovulation Method (of "natural family planning"), which "fosters family life because . . . it facilitates the evangelization of homes." *Id.* at 382-85. St. Margaret's Family Life Education Program, *see supra* note 204, presented courses on sexuality and family life, mainly in parochial schools, where the program included the Catholic Church's teachings on abortion and contraception. Jt. App., *supra* note 204, at 414-16 & 465-67.

222. Bowen v. Kendrick, 108 S. Ct. at 2588 (Blackmun, J., dissenting); Kendrick v. Bowen, 657 F. Supp. at 1565-66; Jt. App., *supra* note 204, at 298.

223. Kendrick v. Bowen, 657 F. Supp. at 1566; Jt. App., *supra* note 204, at 172, 262-64, 267, 270, 568-69.

224. Kendrick v. Bowen, 657 F. Supp. at 1566.

225. *Id.* at 1564 n.14. *See generally id.* at 1564-67.

226. Bowen v. Kendrick, 108 S. Ct. at 2580.

227. *Id.* at 2576.

228. *Id.* at 2592 (Blackmun, J., dissenting).

229. *Id.* at 2577 (emphasis in original). *But cf.* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) ("The State must be certain, given the Religion Clauses, that subsidized teachers do not

Court ignored ample precedent,[230] and declared that because there was "no intimation in the statute that . . . religious uses are permitted,"[231] because the 1984 Senate Report on the AFLA states that the use of AFLA funds to teach religion " 'is contrary to the intent of this legislation,' "[232] and because the AFLA provides that the Secretary of Health and Human Services may require "reports concerning [the grantees'] use of Federal funds,"[233] the statute, on its face, did not have the primary effect of advancing religion.[234]

Even if not pervasively sectarian, a religiously affiliated institution may receive state aid only if there is adequate assurance that no sectarian activities will be funded.[235] The Court cannot assume, as did the majority in *Bowen v. Kendrick*, that because "there is . . . no intimation in the statute that . . . religious uses are permitted,"[236] the state is not required to monitor the use of funds given to religious institutions, or conversely, that the state will automatically do so.[237] "[W]here Congress intends to

inculcate religion."); Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973) ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.").

230. Bowen v. Kendrick, 108 S. Ct. at 2592-94 (Blackmun, J., dissenting) (citing Tilton v. Richardson, 403 U.S. 672, 679-83 (1981)); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 659 (1980); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774-80; Lemon v. Kurtzman, 403 U.S. at 621).

231. Bowen v. Kendrick, 108 S. Ct. at 2577.

232. *Id.* (quoting S. REP. NO. 496, 98th Cong., 2d Sess. 10 (1984)). The Court neglected to mention, however, that Congress expressly cautioned that this report should *not* be "considered legislative history for the purpose of interpreting . . . the Adolescent Family Life Act." H.R. CONF. REP. NO. 1154, 98th Cong., 2d Sess. 3 (1984).

233. Bowen v. Kendrick, 108 S. Ct. at 2577 (quoting 42 U.S.C. § 300z-5(c)). The only restriction actually placed on the grants by Health and Human Services consisted of a paragraph (in the "Notice of Grant Award") that was apparently added only after the litigation had begun in the district court. Bowen v. Kendrick, 108 S. Ct. at 2594 (Blackmun, J., dissenting). The district court observed that this precaution could be considered "neither a statutory prohibition nor an official administrative regulation" but rather "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat." Kendrick v. Bowen, 657 F. Supp. at 1563 n.13. Blackmun noted that what the majority referred to as the " 'mechanism whereby the Secretary can policy the grants,' " is of no help where the statute itself contains no restrictions, and where the Secretary has not promulgated any. Bowen v. Kendrick, 108 S. Ct. at 2594 (Blackmun, J., dissenting) (quoting the Court). It is also useless in dealing with objections (such as those of appellees in *Bowen v. Kendrick*) that question the manner in which the grant program was administered and the grantees were selected. *See supra* notes 88-90.

234. Bowen v. Kendrick, 108 S. Ct. at 2577.

235. Roemer v. Board of Pub. Works, 426 U.S. 736, 759 (1976).

236. Bowen v. Kendrick, 108 S. Ct. at 2577.

237. Not only did HHS not effectively monitor the activities of the grantees, *see* Bowen v. Kendrick, 108 S. Ct. at 2590 (Blackmun, J., dissenting), but substantial evidence exists that HHS tacitly approved of the grantees' teaching of religion. Successful applicants for AFLA funds submitted grant applications that proposed, for example, a sex education program "[i]n keeping with the Pope's strong guideline," Jt. App., *supra* note 204, at 576, the promotion of "a lifestyle based on biblical principles," *id.* at 572, and "church based character development"

impose a condition on the grant of federal funds, 'it must do so unambiguously.' "[238] The AFLA's lack of a statutory prohibition against the teaching of religion is particularly striking considering the great care Congress took both to restrict the use of AFLA funds to grantees that do not perform abortions or provide abortion counseling or referral,[239] and to ensure that the parental notification requirement would be rigidly adhered to by the grantees.[240]

The lack of statutory restrictions in the AFLA creates a clear potential for constitutional violations of the kind found by the Court in *Committee for Public Education v. Nyquist*[241] and *Levitt v. Committee for Public Education*.[242] In *Nyquist*, the Court struck down a New York statute that provided direct money grants to nonpublic schools to be used for maintenance and repair of facilities and equipment. The statute was struck down in part because it did not restrict payments to expenditures "related to the upkeep of facilities used exclusively for secular purposes."[243] The Court concluded that, "[a]bsent appropriate restrictions on expenditures . . . it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of . . . [the] schools."[244]

In *Levitt*, the Court held that a New York statute under which the State reimbursed private schools for costs of state-mandated testing and recordkeeping was unconstitutional because the weak disclaimer in the statute[245] did not provide an adequate guarantee that the teacher-prepared tests would be free of religious instruction.[246] The Court also found the statute unacceptable because it contained no provision guaranteeing that a school's actual costs were the same as the annual lump sum payment, nor did it contain any provision for the return of money in

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to "prevent immoral sexual activity," *id.* at 563. One organization described its program as based on work done by a priest on its staff "in developing a value-based sex education model for the Roman Catholic Church." *Id.* at 433.

238. School Bd. v. Arline, 480 U.S. 273, 289 (1987) (Rehnquist, C.J., dissenting) (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).

239. 42 U.S.C. § 300z-10; *see* Bowen v. Kendrick, 108 S. Ct. at 2592 n.13 (Blackmun, J., dissenting). While the AFLA grantees were strictly forbidden by the statute to offer any abortion counseling, or even to refer pregnant teenagers to an agency that would provide information about abortion, there were no restrictions on presenting any negative theories or comments about abortion. Many of the AFLA grantees, in fact, taught that abortion was morally wrong, regardless of the circumstances. *See* Jt. App., *supra* note 204, at 382, 536-39.

240. 42 U.S.C. §§ 300z-5(a)(22)(A), (B), (C) and 300z-5(d)(1).

241. 413 U.S. 765, 774 (1973).

242. 413 U.S. 473, 477 (1973).

243. 413 U.S. at 774.

244. *Id.*

245. " 'Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.' " 413 U.S. at 477 (quoting the challenged legislation).

246. *Id.* at 480.

excess of the cost of the mandated testing and recordkeeping.[247]

By contrast, in *Committee for Public Education v. Regan*,[248] the Court upheld legislation that New York had enacted in an attempt to correct the unconstitutional features of the act struck down in *Levitt*. The *Regan* Court found the challenged statute constitutional specifically because the tests would be prepared by the state, rather than by the teachers at the nonpublic schools, and because the statute provided for a state audit of the funds, "thus ensuring that only the actual costs incurred in providing the covered services are reimbursed out of state funds."[249] Similarly, in both *Hunt v. McNair*[250] and *Roemer v. Board of Public Works*,[251] the Court emphasized that part of its determination that the challenged statutes were constitutional was based on the presence in each of adequate restrictions, limiting the use of the funds to secular purposes.

Even statutory restrictions may not save some legislation, however. In cases in which the Court has determined that the institutions receiving the benefit are pervasively sectarian, where "the teaching process is . . . devoted to the inculcation of religious values and belief,"[252] the Court has held that even a statutory restriction on the use of the funds may not be sufficient to prevent the direct advancement of religious activity, where "an atmosphere dedicated to the advancement of religious belief is constantly maintained."[253]

The Court's previous holdings, therefore, require that there be some restriction on the teaching of religion in a statute such as the AFLA. Many of the religious AFLA grantees may be too pervasively sectarian to be funded, even with a statutory prohibition against religious teaching. But if the Department of Health and Human Services continues to fund religious grantees, the problem of entanglement—reflected in the third prong of the *Lemon* test—arises.

C. The Entanglement Test

Rather than viewing the examples of "impermissible behavior by AFLA grantees"[254] cited in the record as proof of the AFLA's potential for advancing religion, the Court declared the AFLA facially neutral and remanded the case so that the district court might fashion a remedy. The

247. *Id.* at 477.

248. 444 U.S. 646 (1980).

249. *Id.* at 652.

250. 413 U.S. 734, 744-45 (1973) (interest-free bond financing for college construction).

251. 426 U.S. 736, 760-61 (1976) (general subsidies to private colleges).

252. Meek v. Pittenger, 421 U.S. 349, 366, (1975).

253. *Id.* at 371; *see also Levitt*, 413 U.S. at 480 (teachers under the authority of religious institutions are likely to prepare examinations "with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church").

254. Bowen v. Kendrick, 108 S. Ct. at 2580.

result of the Court's ruling will almost certainly be entanglement between religion and state.

Under the third prong of the three-part *Lemon* test, a statute will be held invalid if its application creates excessive entanglement between church and state.[255] The Court has identified two major varieties of entanglement: "administrative" and "political."[256] Administrative entanglement refers to the actual physical intermingling of religious authority with the state that results when the state is required to inspect funded activities to make certain that none of the public money is being used for religious purposes.[257] Political entanglement results when the state funds a program that has the potential for causing substantial political divisiveness because of its religious content.[258] This second branch of entanglement has never been used, independently, as grounds for invalidating a challenged statute, and was recently limited by the Court to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[259]

The Court in *Bowen v. Kendrick* included only a token discussion of the entanglement prong. This cursory treatment undoubtedly reflects the unpopularity of the entanglement doctrine as a constitutional determinator among certain members of the Court.[260] But as Justice Blackmun noted, the entanglement analysis "is and remains a part of the applicable constitutional inquiry."[261]

The Court began its analysis by first disparagingly referring to the entanglement prong as the "Catch-22"[262] provision: that "the very supervision of the aid to assure that it does not further religion renders the statute invalid."[263] The Court next admitted that monitoring of AFLA

255. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

256. Some commentators have isolated as many as five varieties of entanglement. *See, e.g.*, L. TRIBE, *supra* note 24, at 1226-27.

257. *See* Walz v. Tax Comm'n, 397 U.S. at 674-75; Tilton v. Richardson, 403 U.S. 672, 688 (1971); Meek v. Pittenger, 421 U.S. 349, 370 (1975); Aguilar v. Felton, 473 U.S. 402, 412-13 (1985).

258. Lemon v. Kurtzman, 403 U.S. 602, 622-25 (1971). The *Nyquist* Court expressed its concern that "assistance of the sort here involved [direct money grants to nonpublic schools] carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." 413 U.S. 756, 794 (1973).

259. Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983).

260. Bowen v. Kendrick, 108 S. Ct. at 2577-78; *see supra* notes 59-64 and accompanying text.

261. Bowen v. Kendrick, 108 S. Ct. at 2595 (Blackmun, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. at 613; Walz v. Tax Comm'n, 397 U.S. at 674).

262. Bowen v. Kendrick, 108 S. Ct. at 2577-78. This is an inappropriate metaphor at best. "To the extent any metaphor is helpful, I would be more inclined to characterize the Court's excessive entanglement decisions as concluding that to implement the required monitoring, we would have to kill the patient to cure what ailed him." *Id.* at 2595 (Blackmun, J., dissenting.)

263. *Id.* at 2578.

grants is necessary to ensure that the money is not spent in a way that would violate the Establishment Clause,[264] but then stated that because "there is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian,' " only a low level of monitoring would be required, which would not be sufficient to "cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees."[265]

As Justice Blackmun explained, however, the entanglement analysis involves more than just a quick identification of the institutions benefitted as pervasively sectarian or not pervasively sectarian.[266] The Court must also examine both the nature of the aid (whether a one-time grant, or a continuing program that would require on-going government involvement), and the ability of the institution and the state to identify and separate the secular activities or programs from the sectarian functions, without the necessity of on-site inspections to prevent diversion of funds to sectarian uses.[267] More supervision should be required, for example, when a Catholic social service agency, under the control of the Catholic archdiocese, uses AFLA funds to teach sex education in parochial schools and parish programs,[268] than when a religious college receives a grant of federal funds for building construction.[269]

Since, as the majority conceded, the necessary monitoring of the AFLA will require the Secretary of Health and Human Services and his or her employees to review the educational materials that a grantee proposes to use, and to visit the AFLA program sites to determine whether the grantees are following the constitutional and statutory requirements,[270] the federal government will undoubtedly be engaged in surveillance sufficient to create a degree of administrative entanglement between church and state[271] equivalent to that which the Court has previously found excessive.[272]

The Supreme Court's resolution of the constitutional challenge to the AFLA—to remand to the lower court for a remedy for the "poor administration by the Executive Branch"[273]—is likely to lead to both administrative and political entanglement. In order to remedy the constitu-

264. *Id.* at 2572.

265. *Id.* at 2578.

266. *Id.* at 2596 (Blackmun, J., dissenting).

267. *Id.* (citing Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976); Tilton v. Richardson, 403 U.S. 672, 688 (1971)).

268. For an example of such a program, see Jt. App., *supra* note 204, at 401, 408-09 & 414-16.

269. *See Tilton*, 403 U.S. at 688; *Roemer*, 426 U.S. at 761-64.

270. Bowen v. Kendrick, 108 S. Ct. at 2578.

271. *Id.* at 2596 (Blackmun, J., dissenting).

272. *See* Aguilar v. Felton, 473 U.S. 402, 411-14 (1985); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

273. Bowen v. Kendrick, 108 S. Ct. at 2581 (O'Connor, J., concurring).

tional abuses caused in part by the Department of Health and Human Service's failure to adequately monitor the AFLA programs, the Court may order the federal government not only to review the materials being used in the AFLA courses, but also to implement safeguards in the teaching process itself. Government supervision of the one-on-one counseling sessions that are a major feature of many religious AFLA grantees' sex education and pregnancy counseling programs[274] will lead to unprecedented involvement of the state in the affairs of religious organizations.[275]

Furthermore, case-by-case adjudications[276] of challenges to the administration of the AFLA will inevitably lead to excessive entanglement.[277] If district court judges are forced to become arbiters of disputes over whether individual religious groups' teaching of sexual morality constitutes teaching of religion, or just happens to "coincide with the approach taken by certain religions,"[278] the result, as the courts engage in searching for religious meaning, will be inconsistent adjudications culminating in political divisiveness. "The prospect of church and state litigating about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . ."[279]

274. For an example of such a program, see *Reauthorization of the Adolescent Family Life Demonstration Projects Act of 1981: Hearings Before the Subcommittee on Family and Human Services of the Senate Committee on Labor and Human Resources*, 98th Cong., 2d Sess. 32-46 (1984).

275. Another potential problem, discussion of which is outside the scope of this Comment, is the possibility of government interference with the free exercise of religion. As the Court observed (in a different context) in Corporation of Presiding Bishops v. Amos, 483 U.S. 327, 336 (1987),

> [I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

276. The AFLA funds "demonstration projects." 42 U.S.C. § 300z-2. The grants are renewable annually, for a maximum of five years. 42 U.S.C. § 300z-4(c)(1). Consequently, the grantees that were engaging in impermissible practices in 1982, when the litigation began, are no longer eligible for AFLA funding. The *Bowen v. Kendrick* Court stated that the district court should "consider on remand whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting,' " 108 S. Ct. at 2580 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)); and if the court finds that the Secretary of the Department of Health and Human Services has wrongfully approved grants to certain religious organizations, "an appropriate remedy would require the Secretary to withdraw such approval," *id.* at 2581. But this "remedy" will be useless in preventing the impermissible funding of grantees that are no longer eligible to be funded because they have already acquired their five years' worth of AFLA funds.

277. Gianella, Lemon *and* Tilton: *The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 181.

278. Bowen v. Kendrick, 108 S. Ct. at 2572.

279. New York v. Cathedral Academy, 434 U.S. 125, 133 (1977).

The Court's casual treatment of the entanglement prong suggests that a majority of its members may no longer consider it a vital part of establishment clause analysis.[280] Until specifically overruled, however, the test remains part of the applicable standard and the Court further confuses the law by ignoring the precedential weight of the no-entanglement requirement.

Conclusion

Bowen v. Kendrick represents an abrupt reversal in the development of establishment clause jurisprudence. Permissible government accommodation of religion is no longer limited to state-funded religious Christmas displays,[281] or references to God in public ceremonies,[282] but now extends to state funding of religious groups for the purpose of instructing teenagers in morally acceptable sexual behavior. No longer will courts be allowed to invalidate statutes that carry a significant risk that government aid will be used to advance religion, if that aid will be cast across a broad field that includes secular as well as sectarian recipients.

The decision in *Bowen v. Kendrick* is significant not so much for its validation of the AFLA—a small federal program involving a limited section of the American population[283] and relatively insignificant expenditures, at least by present-day federal standards[284]—as it is for the degree to which it has opened the door to increased state involvement in the funding of parochial education. It is now a very short step from a program in which the federal government makes direct grants to religious organizations for the purpose of educating teenagers about moral issues difficult or impossible to separate from religious doctrine, to a program providing reimbursement grants to parochial schools for maintenance, supplies, test preparation, or the hiring of teachers, all of which the Supreme Court has expressly struck down as unconstitutional in previous cases.[285]

The Court's departure from precedent in *Bowen v. Kendrick* appears to be more a product of the recent change in the composition of the

280. *See supra* text accompanying notes 260-261; *see also The Supreme Court—Leading Cases*, 102 HARV. L. REV. 143, 220 & n.68 (1988) .

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

282. Marsh v. Chambers, 463 U.S. 783 (1983).

283. *See supra* text accompanying note 184.

284. The average annual appropriation for the AFLA in fiscal years 1982-1985 was $13.5 million. *Federal Money for Abortion Alternatives... Counseling, Contraception, and Nutrition*, 1984 CONG. Q. ALMANAC 466-67 (citing Department of Health and Human Services).

285. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (maintenence); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (supplies); Wolman v. Walter, 433 U.S. 229 (1977) (test preparation); Lemon v. Kurtzman, 403 U.S. 607 (1971) (hiring of teachers).

Court[286] than of any logical evolution of establishment clause doctrine. The Court now contains a majority of Justices that have recorded their disapproval of decisions in previous religion cases,[287] although the Court has not yet rejected the *Lemon* test, nor expressly repudiated earlier decisions that have reiterated the significance of the three-part test in establishment clause jurisprudence.[288] But whatever the reason for the *Bowen v. Kendrick* decision, the result is that the Court has transformed the formerly sturdy effect prong of the *Lemon* test into an anemic standard that can be easily circumvented through clever legislative drafting.

The *Lemon* test is not a holy talisman, but the law that has grown up around it does represent the accumulation of forty years of attempts by our highest Court to fashion an adjudicative structure for the most transcendental of all human endeavors—religion. If a majority of the Supreme Court are dissatisfied with the *Lemon* test, then the solution is to create a new, intellectually defensible standard, rather than ignoring precedent and whittling away at *Lemon* until there is no law left at all.

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286. *See* Schwartz, *George Bush's Supreme Opportunity*, LEGAL TIMES, Jan. 2, 1989, at 16 (discussing the impact of the Supreme Court's new conservative majority). Professor Schwartz refers to this conservative quincunx as the "Rehnquist bloc." Schwartz, *The Court Next Term: Consolidating the New Majority*, THE NATION, Oct. 9, 1989, at 380.

287. *See supra* notes 51-73 and accompanying text.

288. *See supra* note 74 and accompanying text.

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