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Richard L. Marasse

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Notes and Comments

Bowen v. Kendrick: A New Era of Doctrinal Funding?

I. Introduction

Religious controversy played a significant role in the establishment of English-speaking colonies in North America.¹ When those colonies later coalesced to form the United States of America, political leaders were understandably haunted by the example of European sectarian strife looming in the background. They expressed their concerns with an attempt, in the Constitution, to delineate the proper relationship of church and state within the overall polity. It is, therefore, a matter of constitutional importance that "whenever the State itself speaks on a religious subject, one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'"² Recently, the United States Supreme Court decided an important case which presented this question of state endorsement of religion in the context of a controversial congressional initiative.

In *Bowen v. Kendrick*,³ the Supreme Court upheld the constitutionality of the Adolescent Family Life Act of 1981 (AFLA or Act)⁴ which provides federal funds to individual grantees for their services and research in promoting sexual abstinence among adolescents. The plaintiffs' challenge to the AFLA in fed-

1. Among the colonies founded as religious havens were the Massachusetts Bay Colony (Puritans), Maryland (Catholics), and Pennsylvania (Quakers). A. NEVINS & H.S. COMMAGER, *A SHORT HISTORY OF THE UNITED STATES* 23-28 (5th ed. 1966).

2. *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985) (striking down Alabama state sponsored moment of silent prayer or meditation) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring)).

3. 108 S. Ct. 2562 (1988).

4. 42 U.S.C. §§ 300z-300z-10 (1981 & Supp. 1988).

eral district court resulted in a grant of summary judgment for the plaintiffs. The court declared that the Act, both on its face and as applied, violated the establishment clause of the first amendment.⁵ By a five to four decision,⁶ the Supreme Court reversed the lower court's holding and found the AFLA to be constitutional on its face. The case was remanded to the district court for consideration of whether, under certain criteria, the Act was unconstitutional as applied in specific individual grants of federal funds.

This decision accomplishes three things: first, it legitimizes a novel legislative approach to social policy under the first amendment; second, it confers majority status on what was formerly a minority view of the underlying basis of the establishment clause; and third, it dramatically changes the *Lemon* test,⁷ which since 1971 has been the analytical vehicle utilized by the Court in this area. With Justice Powell's departure from the Court, and his replacement by Justice Kennedy, a change in establishment clause jurisprudence has taken place.⁸

Part II of this Note examines the interpretive history of the establishment clause, both before and after *Lemon v. Kurtzman*.⁹ The facts and holding of *Bowen v. Kendrick* are set forth in Part III, as is a discussion of the AFLA. Part IV examines the meaning and potential implications of the decision for establishment clause jurisprudence. This Note concludes, in Part V, that a strict application of the *Lemon* test would have prevented the unfortunate result in *Bowen v. Kendrick*, in which the new and dangerous practice of doctrinal funding¹⁰ was

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

6. *See infra* note 125.

7. This test originated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See infra* notes 41-55 and accompanying text.

8. For a discussion of the speculation surrounding the "unknown" Justice Kennedy's possible impact on a closely divided Supreme Court, see Williams, *The Opinions of Anthony Kennedy — No Time for Ideology*, 74 A.B.A. J. 56 (March 1988). "[D]espite having written more than 430 opinions during his 12 years on the 9th Circuit, and despite having undergone questioning by the same Senate Judiciary Committee that meticulously dissected Bork, no one knows how a Justice Kennedy would treat the most divisive issue of our day" *Id.*

9. 403 U.S. 602 (1971).

10. In this Note the term "doctrinal funding" is used to mean the calculated legislative decision to financially support a religious message in order to achieve a secular goal.

approved.

II. Background

The first amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹¹ Thus, there are two "religion clauses" in the Constitution: the establishment clause¹² and the free exercise clause,¹³ with separate jurisprudence emanating from each.¹⁴

A. *The Animating Principle*

Two interpretations of the establishment clause have competed for the allegiance of a majority of the Supreme Court.¹⁵ One view is that the clause compels the *separation*, as far as possible, of religion and any state undertaking.¹⁶ The other view

See *infra* notes 155-160 and accompanying text.

11. U.S. CONST. amend. I.

12. The establishment clause was made applicable to the states via the fourteenth amendment in *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

13. The free exercise clause was made applicable to the states via the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

14. There is a fundamental tension between the two clauses. See *Walz v. Tax Comm'n*, 397 U.S. 646, 668-69 (1970). "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* See generally Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

15. A remarkable number of Supreme Court opinions have been concerned with the historical background of the adoption of the first amendment religion clauses. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in judgment); *id.* at 91-114 (Rehnquist, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 787-92 (1983) (majority opinion of Burger, C.J.); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230-38 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 425-36 (1962) (majority opinion of Black, J.); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 244-48 (1948) (Reed, J., dissenting); *Everson v. Board of Educ.*, 330 U.S. 1, 8-16 (1947) (majority opinion of Black, J.); *id.* at 31-43 (Rutledge, J., dissenting).

16. In *Everson v. Board of Educ.*, 330 U.S. at 15-16, 31-32, both Justice Black, writing for the majority, and Justice Rutledge, dissenting, accepted and developed this view. While the two Justices disagreed on the result to be reached in this case (state funding of school bus transportation for parochial school children), their opinions, taken together, present a coherent historical view. According to the Justices, the opinions of Jefferson and Madison are the best bases for an understanding of the religion clauses of the first amendment. Jefferson urged a "wall of separation between church and State." *Id.* at 16

is that only government preferences among competing faiths or the creation of a nationally established church are prohibited. Thus, a certain religious-secular overlap is permissible.¹⁷

Under the first theory, almost all attempts by government to aid religion are suspect, and most are unconstitutional.¹⁸ Under the second theory, "[t]he Establishment Clause [does] not require government neutrality between religion and irreligion nor [does] it prohibit the Federal Government from providing nondiscriminatory aid to religion."¹⁹ Both theories purport to express the view of the drafters of the first amendment.²⁰

The Supreme Court has embraced the separation theory in its decisions beginning with *Everson v. Board of Education*,²¹ although by gradually shrinking margins. In *Wallace v. Jaffree*,²² a case in which the separation theory retained its controlling influence, Justice Rehnquist devoted a twenty-four page dissent²³ to an historical study of the adoption of the religion clauses and concluded that the separation theory was incorrect.²⁴ The majority's erroneous interpretation of the historical framework of the clause, according to Justice Rehnquist, had led to inconsistent results in many cases involving challenges to legislative attempts

(quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Madison counseled a strict separation of church and state to avoid "a corrupting coalition or alliance between them." 9 THE WRITINGS OF JAMES MADISON 487 (G. Hunt ed. 1910).

17. Justice Rehnquist embraced this position in his dissent in *Wallace v. Jaffree*, 472 U.S. at 106 (Rehnquist, J., dissenting). In brief, this position is that "Justice Rutledge sold his brethren a bill of goods when he persuaded them that the 'establishment of religion' clause of the First Amendment was intended to rule out all governmental 'aid to all religions.'" Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROBS. 3, 16 (1949). Some linkage between government and a specific religion is also required for a finding of unconstitutionality. See *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting).

18. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1166-67 (2d ed. 1988).

19. *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

20. The literature on this question is immense. See generally Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770. For the precursor to the Rehnquist view, see Corwin, *supra* note 17. For the view that neither position is historically correct, see L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

21. 330 U.S. 1 (1947). See also *supra* note 16.

22. 472 U.S. 38.

23. *Id.* at 91-114 (Rehnquist, J., dissenting).

24. *Id.* at 112. "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Id.*

to aid religiously affiliated schools.²⁵

This dispute over the historical interpretation of the views of the drafters of the first amendment has been a critical one in the development of first amendment jurisprudence.²⁶ The views are quite different. While both would prohibit a federal "establishment" of religion, Justice Rehnquist's view would allow a church-state nexus on any issue, provided only that no national religion is designated or that no specific religious group is preferred over another.²⁷

B. *Judicial Interpretation of the Establishment Clause*

The initial standard of analysis used by the Supreme Court in its consideration of the establishment clause was the "wall of separation" espoused in *Everson v. Board of Education*.²⁸ This standard was also the basis for the Court's holdings in *Illinois ex rel. McCollum v. Board of Education*²⁹ and *Zorach v. Clauson*,³⁰

25. *Id.* at 106-07.

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified.

Id.

26. Should the views of the framers, even if they could be accurately determined 200 years after the event, constitute the principal guide to interpretation of the establishment clause? For one view, see *Abington School Dist. v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) ("A more fruitful inquiry . . . is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."). *But cf.* E. Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (revised version of remarks made to the American Bar Association, July 9, 1985).

27. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting). "The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designated to stop the Federal Government from asserting a preference for one religious denomination or sect over others." *Id.*

28. 330 U.S. 1. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18. The actual phrase "wall of separation" is Thomas Jefferson's. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter to the Danbury Baptist Association). *See also supra* notes 16-18 and accompanying text.

29. 333 U.S. 203 (1948) (disallowing instruction by religious teachers in the public schools during the school day).

30. 343 U.S. 306 (1952) (allowing early release of public school students to participate in religious instruction at other locations).

as the Court attempted to determine where the "wall" should be erected. The "purpose and effect" test articulated in *Abington School District v. Schempp*,³¹ aided this determination. In *Schempp*, the Court held that a public school program allowing voluntary Bible reading or the use of prayer had the effect of advancing religion³² and was unconstitutionally motivated by a religious purpose.³³ A further refinement, excessive entanglement,³⁴ was introduced by Justice Harlan in his concurring opinions in *Board of Education v. Allen*³⁵ and *Walz v. Tax Commission*.³⁶ Justice Harlan cautioned that such church-state involvement could possibly result in political disharmony.³⁷

In 1971 the Court combined the analytical strands of purpose, effect, and entanglement from previous cases to decide *Lemon v. Kurtzman*.³⁸ The Court has continued to use this three-prong test which emerged from *Lemon* as the touchstone of establishment clause analysis.³⁹ In addition, the test has sometimes been augmented by a recognition of "political divisiveness"⁴⁰ as a factor of constitutional concern. Dramatic alter-

31. 374 U.S. 203 (1963).

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

32. *Id.* at 223-25.

33. *Id.*

34. See *infra* text accompanying note 48.

35. 392 U.S. 236, 249 (1968) (upholding program which provided textbooks for secular studies to parochial school students) (Harlan, J., concurring).

36. 397 U.S. 664, 694 (1970) (upholding granting of tax exemptions to religious properties) (Harlan, J., concurring).

37. *Id.* at 695.

38. 403 U.S. 602, 612-13 (1971). See *infra* notes 42-58 and accompanying text.

39. See *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating that the *Lemon* test provides "[t]he general nature of our inquiry in this area . . .").

40. Political divisiveness was first mentioned as one of the elements making up entanglement in *Lemon*, 403 U.S. at 622-24. It was, however, not the deciding factor in the decision; it merely reinforced the Court's conclusions as to the desirability of the challenged program, which was invalidated because of excessive *administrative* entanglement. *Id.* In subsequent cases, however, the concept of potential political divisiveness seemed to blossom into a full-blown fourth prong of the test for constitutionality. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 365 n.15, 372 (1975) (auxiliary aid programs to parochial school students invalidated in part because of political divisiveness); *Commit-*

ations occurred in *Bowen v. Kendrick*,⁴¹ however, and the Court now appears launched on a new era of establishment clause interpretation.

C. *The Lemon Test*

*Lemon v. Kurtzman*⁴² involved, as have many other establishment clause cases, a challenge to the use of public funds to aid parochial schools. The challenged statutes were Pennsylvania⁴³ and Rhode Island⁴⁴ enactments which provided public funds for teachers' salaries in nonpublic schools, including parochial schools.⁴⁵ In striking down the statutes, Chief Justice Burger, writing for the Court, articulated a three-prong test for analysis of statutes that are challenged under the establishment clause. The Court stated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'"⁴⁶

The meaning of each prong emerges from an analysis of the test in light of the specific facts in *Lemon*. The purpose prong requires an evaluation of the "stated legislative intent" of the statute.⁴⁷ In *Lemon*, the Court found a valid secular legislative

tee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795-98 (1973) (neutral tuition voucher plan invalidated at least in part because aid to parochial school students would cause political division). In *Aguilar v. Felton*, 473 U.S. 402 (1985) (remedial education programs and services provided to parochial school students by state grants of federal funds struck down), Justice Powell seemed to say that political divisiveness was a reason for a strict application of the purpose, effect, and entanglement prongs of the test. *Id.* at 416-17. "[T]here remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources." *Id.* at 416. Thus it seems fair to conclude that political divisiveness has on occasion been a wild card in the interpretation of cases under the establishment clause.

41. 108 S. Ct. 2562 (1988).

42. 403 U.S. 602.

43. *Id.* at 607 n.1.

44. *Id.* at 609 n.3.

45. *Id.* at 606-11.

46. *Id.* at 612-13 (citations omitted).

47. *Id.* at 613. A valid secular purpose has been found lacking by the Supreme Court in four cases: *Edwards v. Aguillard*, 107 S. Ct. 2573, 2578-84 (1987) (statute requiring equal treatment for evolution and "creation science" in public school classrooms invalidated); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (statute mandating moment of silence

purpose in maintaining minimum standards in all schools within a state.⁴⁸ The Court suggested that an appropriate inquiry for the effect prong would be whether, *in spite of the validity of the stated or presumed secular purpose*, religion was in fact impermissibly advanced.⁴⁹ In *Lemon*, however, the Court did not actually undertake this inquiry because it found that the challenged statutes violated the entanglement prong.⁵⁰

Determining whether entanglement exists, according to the Court, involves an examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."⁵¹ In applying these criteria to the facts in *Lemon*, the Court first found that the aided institutions — Catholic elementary and secondary schools — were an essential element of the Catholic Church.⁵² The strict religious atmosphere of such schools made it likely that religion would be advanced, although perhaps unintentionally, in secular courses taught there.⁵³ Second, the Court found that the nature of the aid provided — subsidies for teachers' salaries — would create difficulties for monitoring because teachers, unlike textbooks, could not be examined in advance to insure that they would not attempt to inculcate religion.⁵⁴ Third, the Court found that an extensive monitoring program amounting to permanent surveillance would be necessary to "police" this legisla-

for voluntary silent prayer or meditation struck down); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (statute requiring public school classroom posting of the Ten Commandments invalidated); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (statute prohibiting teaching of evolution struck down).

48. 403 U.S. at 613.

49. *Id.* at 613-14. A good discussion of the effects prong is found in *School Dist. v. Ball*, 473 U.S. 373, 393-94 (1985) (an indirect subsidy to parochial schools may have the unintended unconstitutional effect of advancing religion).

50. 403 U.S. at 613-14.

51. *Id.* at 615.

52. *Id.* at 616. "[T]he District Court concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.' The various characteristics of the schools make them 'a powerful vehicle for transmitting the Catholic faith to the next generation.'" *Id.*

53. *Id.* at 618-19.

54. *Id.* at 619. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Id.*

tion,⁵⁵ and that the resulting relationship between religious and secular authorities would compromise both.⁵⁶

Chief Justice Burger's majority opinion also discussed political divisiveness as a kind of entanglement that the establishment clause was designed to prevent.⁵⁷ Political divisiveness in this case would arise from the necessity for annual appropriations, insuring that the issue would remain a politically polarizing one, pitting one sect against another.⁵⁸

The *Lemon* decision broke new ground in two ways. First, by combining the methodology and terminology of previous cases, it provided a framework for future analysis of establishment clause cases. Second, in its extensive treatment of the excessive entanglement concept, the decision provided the Court with a firm basis with which to examine church-state overlap in future cases.

D. *Applying the Lemon Test*

Since 1971 the Supreme Court has had frequent occasion to interpret the establishment clause, and in so doing it has used the *Lemon* test as its analytical vehicle. The cases considered may be divided into four main groupings: (1) aid to parochial schools; (2) grants to institutions; (3) long-standing practices; and (4) nonfinancial enactments. Distinctions have been drawn by the Court in its treatment of each grouping.

1. *State Financial and Programmatic Aid to Parochial Schools*

Prior to *Lemon v. Kurtzman*,⁵⁹ the Supreme Court upheld state programs which provided basic student transportation,⁶⁰

55. *Id.* "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.*

56. *Id.* at 620.

57. *Id.* at 622. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* See also *supra* note 40 and accompanying text.

58. *Id.* at 623.

59. 403 U.S. 602 (1971).

60. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

textbooks,⁶¹ and tax-exempt status to church properties.⁶² Since the advent of the *Lemon* test in 1971, however, the Court has interpreted the establishment clause to mean that very little aid may go to religious primary and secondary schools. In a series of narrowly decided cases, the Court struck down most attempts by states to aid parochial schools using the criteria developed in *Lemon*.⁶³

2. Grant Programs to Institutions

In *Bradfield v. Roberts*,⁶⁴ the Supreme Court upheld a grant of funds to a hospital with a religious affiliation. This early case, therefore, stands for the proposition that not all programs which aid religiously affiliated institutions violate the establishment clause. The difficulty lies in determining how to distinguish between acceptable and unacceptable institutional recipients of funds. In *Hunt v. McNair*,⁶⁵ Justice Powell delineated a test for evaluating the effect of aid to an institution under the establishment clause:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is

61. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

62. *Walz v. Tax Comm'n*, 397 U.S. 646 (1970).

63. See *Aguilar v. Felton*, 473 U.S. 402 (1985) (state provision of remedial services to parochial school students on public school grounds struck down via entanglement prong plus the political divisiveness factor); *School Dist. v. Ball*, 473 U.S. 373 (1985) (state provision of nonreligious instruction to parochial school students to supplement parochial school curricula struck down via the effect prong); *Mueller v. Allen*, 463 U.S. 388 (1983) (state tax statute allowing all taxpayers to deduct their children's tuition costs upheld); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (reimbursement of private schools for expenses incurred in administering standardized tests and compiling state-required statistical data upheld); *Wolman v. Walter*, 433 U.S. 229 (1977) (textbook program, funds for statewide standardized testing, and health and diagnostic services all provided to parochial schools upheld; loan of instructional materials and use of state school buses for parochial school field trips struck down via the entanglement prong); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (tuition reimbursement, tax benefits, maintenance, and repair of parochial schools struck down via the political divisiveness factor); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (per-pupil payment to parochial schools for state-required record keeping and testing struck down via the effect prong); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (salary supplement to teachers in parochial schools struck down via the entanglement prong).

64. 175 U.S. 291 (1899).

65. 413 U.S. 734 (1973).

so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.⁶⁶

In all three cases in which it has considered the issue of grants to religiously affiliated colleges,⁶⁷ the Court, using a "pervasively sectarian" test, has upheld the challenged enactment after applying the three-prong *Lemon* analysis. In *Tilton v. Richardson*,⁶⁸ the Court upheld Title I of the Federal Higher Education Facilities Act of 1963,⁶⁹ which provided federal grants to colleges, some religiously affiliated, for the construction of campus facilities to be used for nonreligious purposes. In *Hunt v. McNair*,⁷⁰ the Court rejected a challenge to a state program which issued revenue bonds for private colleges, some of which were religiously affiliated. Similarly, in *Roemer v. Board of Public Works*,⁷¹ the Court approved a state annual grant program for religious colleges based on a percentage of the per-pupil amount the state spent on its public college students.

The different results reached in cases concerning institutions of higher education from those involving elementary and secondary schools can be attributed to the differing character of those institutions. The Court has concluded that, although they may have some religious affiliation, colleges and universities are not pervasively sectarian.⁷² That is, they are not presumptively permeated with religion in the same manner and degree as parochial elementary and secondary schools.

Consequently, aid to such institutions, if restricted to non-sectarian facets of the institutional operation, will not require an entangling administrative surveillance to prevent the advancement of religion.⁷³ A mere assurance by the institution and the

66. *Id.* at 743.

67. *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).

68. 403 U.S. 672. This case was decided the same day as *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

69. 403 U.S. at 674. For the text of the challenged enactment, see 77 STAT. 364 (current version at 20 U.S.C. §§ 711-721 (1964 & Supp. V)).

70. 413 U.S. 734 (1973).

71. 426 U.S. 736.

72. See *Roemer*, 426 U.S. at 758-60; *Hunt*, 413 U.S. at 743-44; *Tilton*, 403 U.S. at 781.

73. *Roemer*, 426 U.S. at 761-67; *Hunt*, 413 U.S. at 746; *Tilton*, 403 U.S. at 687.

government that the grant money will not be used for religious purposes will carry much weight.⁷⁴ The Court asserts, furthermore, that college students are not as impressionable as younger students, and therefore do not require protection from religious influences to the same degree as did the elementary school students identified in *Lemon v. Kurtzman*.⁷⁵ Finally, the Court found that programs of aid to higher education are not significantly politically divisive.⁷⁶

3. *Long-Standing Governmental Practices*

In three cases decided since 1970, the Supreme Court has considered establishment clause challenges to long-standing governmental practices.⁷⁷ In all three cases, the Court used an historical analysis, rather than the test articulated in *Lemon*, to conclude that the practice in question was constitutionally benign.⁷⁸ While an appeal to history "cannot justify contemporary violations" of the establishment clause,⁷⁹ a history marked by an absence of controversy over a long-established practice apparently makes more difficult any attempt to prove that religion has been unconstitutionally advanced.⁸⁰

4. *Nonfinancial Enactments*

The Supreme Court has applied the *Lemon* test in considering challenges to state legislative enactments which, although not constituting an attempt to aid an institution financially or programmatically, nevertheless raise an establishment of religion issue.⁸¹ These cases have not been particularly troublesome for

74. See *Roemer*, 426 U.S. at 759.

75. *Id.* at 764; *Tilton*, 403 U.S. at 686.

76. *Roemer*, 426 U.S. at 765; *Tilton*, 403 U.S. at 688.

77. See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (continuing display, on public grounds, of a Christmas nativity scene upheld); *Marsh v. Chambers*, 463 U.S. 783 (1983) (continuing use of a legislative chaplain who was employed to open the legislative day with a prayer upheld); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (state statute conferring tax-exempt status for church properties upheld).

78. See, e.g., *Marsh v. Chambers*, 463 U.S. at 792. Such practices are "simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.*

79. *Id.* at 790.

80. *Id.* at 790-92.

81. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (employment statute giving worker an absolute right to refuse to work on his preferred sabbath day

the Court because they have involved either an apparent delegation of a legislative function to a religious body or a demonstrable preference of one religious group over another.

E. *The Entanglement Prong Controversy*

The Supreme Court has frequently used the entanglement prong of the *Lemon* test to strike down legislative enactments as void under the establishment clause.⁸² This approach has sometimes meant that statutes which demonstrate a valid secular purpose and appear to further no proscribed end are nevertheless unconstitutional because the degree of administrative monitoring required to assure that religion is not advanced is itself an excessive entanglement between church and state.⁸³ This entanglement analysis has been controversial and has split the Court.⁸⁴

This dispute was sharply highlighted in the 1985 case of *Aguilar v. Felton*.⁸⁵ In this case, the majority used the entanglement prong to strike down a New York program which used federal funds for remedial educational services to students at parochial schools.⁸⁶ The four dissenting opinions, taken together, signify nothing less than a declaration of war against the entanglement prong. Chief Justice Burger seemed to disavow his own

struck down because it established a preference for employees with religious beliefs over those who had no such beliefs); *Larson v. Valente*, 456 U.S. 228 (1982) (statute regulating charitable contributions struck down because it waived reporting requirements for religious groups and thus created a dual system which amounted to a "denominational preference"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (zoning law effectively giving the Roman Catholic Church veto power over the issuance of liquor licenses struck down).

82. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

83. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (statute struck down on basis of entanglement prong and the wild card of political divisiveness).

84. *Id.* at 418.

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments . . . to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion and avoiding excessive entanglement.

Id. (citation omitted).

85. 473 U.S. 402.

86. *Id.* at 413.

work when he criticized "the Court's obsession with the criteria identified in *Lemon v. Kurtzman*" ⁸⁷ In a similar vein, Justice Rehnquist inveighed against "the 'Catch-22' paradox of [the Court's] own creation whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." ⁸⁸ Justice O'Connor's dissent embraced the Rehnquist "paradox" argument ⁸⁹ and pointed out that policing this statute had involved no entanglement at all, since in the nineteen years of the program's operation there had not been one reported attempt to inculcate religion. ⁹⁰

III. *Bowen v. Kendrick*

A. *The Adolescent Family Life Act*

Bowen v. Kendrick ⁹¹ originated in a legal challenge to the Adolescent Family Life Act of 1981 ⁹² (AFLA or Act). The AFLA authorizes the Secretary of Health and Human Services (HHS) to award federal grants to individuals and to various public or nonprofit organizations and agencies for their services and research in promoting several goals, which include increased sexual "self-discipline" among adolescents, the choice of "adoption as an alternative for adolescent parents," and awareness of "the consequences of . . . contraceptive use." ⁹³ Grants are specifically restricted to programs "which do not advocate, promote, or encourage abortion." ⁹⁴ Perhaps not surprisingly, the AFLA has acquired the derisive label of the "Chastity Act." ⁹⁵

The AFLA specifically creates a role for religion within its

87. *Id.* at 419 (Burger, C.J., dissenting).

88. *Id.* at 420-21 (citation omitted) (Rehnquist, J., dissenting).

89. *Id.* at 429 (O'Connor, J., dissenting).

90. *Id.* at 428.

91. 108 S. Ct. 2562 (1988).

92. 42 U.S.C. §§ 300z-300z-10 (1981 & Supp. 1988).

93. *Id.* § 300z(b)(1), (2), and (4).

94. *Id.* § 300z-10(a). See also S. REP. NO. 161, 97th Cong., 1st Sess. 230 (1981) [hereinafter SENATE REPORT]. The AFLA seeks "to encourage adolescents to bring their babies to term." *Id.*

95. See, e.g., Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988). Benshoof noted that the original draft of the AFLA indicated that one of its purposes was to "promote self-discipline and chastity." *Id.* at 1916 n.4 (citation omitted).

framework⁹⁶ by mentioning religion in four places. It provides: (1) that problems of adolescent sexuality "are best approached through a variety of integrated and essential services provided to adolescents and their families by [among others] religious . . . organizations;"⁹⁷ (2) that federal programs "should emphasize the provision of support by [among others] religious . . . organizations;"⁹⁸ (3) that the AFLA "shall use such methods as will strengthen the capacity of families . . . to make use of support systems such as . . . religious . . . organizations;"⁹⁹ and (4) that applicants for grant money must describe how they will "involve religious . . . groups"¹⁰⁰ (among others) in undertaking their AFLA activities. The AFLA "lacks an express provision preventing the use of federal funds for religious purposes."¹⁰¹

In addition, the legislative history of the AFLA establishes that the involvement of religious groups was intended. Congress concluded that "promoting the involvement of religious organi-

96. It was argued at trial that the legislative sponsors of the AFLA provided for participation of religious groups in the AFLA because they wished to enlist the powerful forces of religion in getting their message across and that, therefore, the AFLA was enacted for a wholly impermissible religious purpose. Both the federal district court for the District of Columbia and the Supreme Court rejected this contention in their finding of a valid secular purpose for the AFLA. See *Kendrick v. Bowen*, 657 F. Supp. 1547, 1558-59 (D.D.C. 1987); *Bowen v. Kendrick*, 108 S. Ct. 2562, 2571 (1988). Both courts found that there was *some* valid legislative purpose in the enactment of the AFLA, and that this was enough to satisfy the purpose prong of the *Lemon* test. See *supra* note 44 and accompanying text.

97. 42 U.S.C. § 300z(a)(8)(B) (1981 & Supp. 1988).

98. *Id.* § 300z(a)(10)(C).

99. *Id.* § 300z-2(a).

100. *Id.* § 300z-5(a)(21)(B).

101. 108 S. Ct. 2562, 2577 (1981). In 1984, three years after the AFLA was enacted and the original grantees selected and funded, and with litigation under way, the Secretary of HHS began to include, in the "Notice of Grant Award" to new grantees, a clause which stated that public funds may not be used to "teach or promote religion." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1563 n.13 (D.D.C. 1987). The district court felt that this was a case of too little, too late. 657 F. Supp. at 1563. The district court and the Supreme Court dissenters, 108 S. Ct. at 2591-94, thought that the absence of a statutory restriction was significant, because the three cases which approved grant aid to religiously affiliated colleges (*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 (1972)) had relied on such explicit assurances in approving the challenged aid. Chief Justice Rehnquist disagreed, however, insisting that "if there were such a provision in this statute, it would be easier to conclude that the statute on its face could not be said to have the primary effect of advancing religion, but we have never stated that a *statutory* restriction is constitutionally required." 108 S. Ct. at 2577 (citation omitted) (emphasis in original).

zations in the solution to these problems is neither inappropriate or illegal” but rather “would be a simple recognition that non-profit religious organizations have a role to play in the provision of services to adolescents.”¹⁰² Religion, according to the Senate Committee, can help overcome “the limitations of Government in dealing with a problem that has complex moral and social dimensions”¹⁰³

A total of 141 AFLA grants were awarded between 1981 and 1988.¹⁰⁴ In the words of Chief Justice Rehnquist, “[i]t is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious denominations,”¹⁰⁵ and “there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees.”¹⁰⁶ It is also undisputed that a number of grantees, during the course of their presentations to adolescents, made explicit linkage between specific religious tenets and the AFLA-authorized message of sexual restraint,¹⁰⁷ and that some of the presentations took place at private “sites adorned with religious symbols” and were administered by members of religious orders.¹⁰⁸

B. *The District Court Decision*

In 1983, a group of taxpayers, clergymen,¹⁰⁹ and the American Jewish Congress brought suit in the federal district court in Washington, D.C., to have the AFLA declared unconstitutional and to enjoin its enforcement.¹¹⁰ Using the three-prong *Lemon*

102. See SENATE REPORT, *supra* note 94, at 16.

103. *Id.* at 15.

104. 108 S. Ct. at 2568. There is much that is unclear about the grantees because during this initial period, HHS did not require that the grantees keep records of who received funds as subgrantees. *Id.* at 2585 n.3 (Blackmun, J., dissenting).

105. *Id.* at 2568.

106. *Id.* at 2580.

107. For example, by asserting that “the focus of sexuality [is] shifted to the total person in Christ.” Joint Appendix to Appellee’s Brief at 427, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462, and 87-775).

108. 657 F. Supp. 1547, 1566 (D.D.C. 1987).

109. The religious plaintiffs sued on the grounds that because of their pro-choice views on abortion, they were ineligible for AFLA money, and that therefore the AFLA discriminated against them by preferentially awarding money to other, antiabortion, religious groups. Brief for the Appellees at 5 n.10, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462, and 87-775).

110. *Kendrick v. Bowen*, 657 F. Supp. 1547 (D.D.C. 1987).

test to analyze the statute, the district court granted summary judgment for the plaintiffs on April 15, 1987, finding the AFLA unconstitutional both "on its face" and "as applied."¹¹¹

The court first found that the AFLA had a valid secular purpose: "to solve the problems caused by teenage pregnancy and premarital sexual relations."¹¹² However, because it had the direct and immediate effect of advancing religion, the AFLA failed the second prong of the *Lemon* test.¹¹³ Specifically, the court cited section 300z-5(a)(21)(B), which requires grantees to describe how they will involve religious organizations in providing services, as clearly having this effect.¹¹⁴ Further, the court found that the AFLA subsidizes the teaching, by religiously affiliated grantees, of ideas that may be considered "fundamental elements of religious doctrine."¹¹⁵

The district court next found that the AFLA as applied violated the effects prong of the *Lemon* test. In administering the AFLA, the HHS Secretary had allowed funds to go to "pervasively sectarian" institutions¹¹⁶ and had permitted within its approved programs counseling and educational presentations which "amount[ed] to the teaching of religion."¹¹⁷ The court, however, did not make detailed findings about the nature of the grantees, stating instead that "at least ten AFLA grantees or subgrantees were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine."¹¹⁸

The AFLA funding of religious groups also violated the entanglement prong of the *Lemon* test, according to the district court. Since the primary activities of the AFLA were counseling and teaching, a monitoring plan to successfully police the statute

111. *Id.* at 1551. The AFLA was declared unconstitutional and its enforcement was enjoined only insofar as it pertained to "religious organizations." *Id.* at 1570.

112. *Id.* at 1558-59.

113. *Id.* at 1560.

114. *Id.* at 1562.

115. *Id.* "It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful." *Id.* at 1563.

116. *Id.* at 1564. See also *supra* notes 68-72 and accompanying text.

117. *Kendrick*, 657 F. Supp. at 1564.

118. *Id.* at 1565. The court added that "[t]he religious character of other AFLA grantees or subgrantees is not as explicit but is nonetheless indisputable." *Id.*

would have to be so massive in scope as to constitute "excessive entanglement."¹¹⁹ In fact, the court held "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA."¹²⁰

Lastly, the district court found that the AFLA was likely to incite the kind of political divisiveness that the establishment clause was designed to prevent.¹²¹ This divisiveness would be heightened because of the depth of feeling on both sides of the abortion question¹²² and because of the annual nature of the appropriations process.¹²³

C. *The Supreme Court Decision*

The district court decision was appealed directly to the United States Supreme Court, which granted certiorari.¹²⁴ On June 29, 1988, the Supreme Court, in a five to four decision, upheld the AFLA's constitutionality on its face, and remanded the case to the district court for consideration of whether, under certain criteria, the Act was unconstitutional as applied in specific individual grants of federal funds.¹²⁵

1. *The Majority Opinion*

In his majority opinion, Chief Justice Rehnquist employed the three-prong *Lemon* test to analyze the case.¹²⁶ The majority agreed with the district court's finding that the AFLA was motivated by a valid secular purpose: to remedy the problems caused by adolescent sexuality.¹²⁷ Next, the majority found, in contrast to the district court, that the AFLA did not have the primary

119. *Id.* at 1568.

120. *Id.*

121. *Id.* at 1569.

122. *Id.*

123. *Id.*

124. *Bowen v. Kendrick*, 108 S. Ct. 326 (1987).

125. *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988). Chief Justice Rehnquist wrote for the majority (joined by Justices White, Scalia, Kennedy, and O'Connor), and Justice Blackmun wrote for the dissent (joined by Justices Brennan, Marshall, and Stevens). Justice Kennedy (joined by Justice Scalia) and Justice O'Connor also wrote brief concurring opinions in which they commented on the standard to be applied by the district court on remand. See *infra* note 149.

126. 108 S. Ct. at 2570.

127. *Id.* at 2571.

effect of advancing religion.¹²⁸

In response to the conclusion of the district court that the AFLA impermissibly advanced religion, the *Bowen* majority made several points. First, according to the majority, the explicit mention of religion four times in the text of the AFLA¹²⁹ "reflect[s] at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed"¹³⁰ and has only the "incidental and remote" effect of advancing religion.¹³¹

Second, the Court found that the participation of religious groups in the AFLA presented a situation similar to that considered in the aid to higher education cases — *Tilton v. Richardson*,¹³² *Hunt v. McNair*,¹³³ and *Roemer v. Board of Public Works*.¹³⁴ In those cases the Court had used a "pervasively sectarian" test in upholding the grants of aid to religiously affiliated colleges.¹³⁵ Under this test, aid is impermissible if it "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission"¹³⁶ Pervasively sectarian institutions are barred from receiving federal funds because the manner in which such institutions use their grants cannot, with precision, be separated into sectarian and nonsectarian components.¹³⁷ In the three aid to higher education cases, according to the Chief Justice, "it was foreseeable that some proportion of the recipients of government aid would be religiously affiliated, but that only a small portion of these, if any, could be considered 'pervasively sectarian.'"¹³⁸ Since there had been no detailed findings with respect to the specific character of the AFLA grantees, the Court reasoned that

128. *Id.* at 2571-77.

129. *See supra* notes 93-96.

130. 108 S. Ct. at 2573.

131. *Id.*

132. 403 U.S. 672 (1971).

133. 413 U.S. 734 (1973).

134. 426 U.S. 736 (1976).

135. *See supra* notes 65-76 and accompanying text.

136. *Hunt*, 413 U.S. at 743.

137. 108 S. Ct. 2562, 2574 (1988). "The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'" *Id.*

138. *Id.* at 2575.

the AFLA must be upheld.¹³⁹

Third, the Court held that the district court was wrong to conclude that the AFLA authorizes teaching on basic precepts of religious doctrine.¹⁴⁰ According to the Court, no such authorization had occurred.¹⁴¹ Congress and certain religious groups merely enjoyed a coincidence of views,¹⁴² and this fortuitous circumstance was "insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion."¹⁴³

The majority also found that the AFLA did not violate the entanglement prong of the *Lemon* test.¹⁴⁴ The Chief Justice refused to accept "yet another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid."¹⁴⁵ Since there had been no detailed finding that the AFLA grantees were "pervasively sectarian" in the same way that the Court had held parochial schools to be, no need existed for the extensive supervision.¹⁴⁶ As for political divisiveness, the Court simply stated that disagreement along political lines with respect to this issue was not enough to invalidate the Act.¹⁴⁷

The Court then remanded the case to the district court for detailed consideration of whether certain grantees were pervasively sectarian in the same manner as parochial schools had been classified.¹⁴⁸ If this were found to be the case, the majority found that the remedy would be to strike the individual grant,

139. *But see supra* note 118 and accompanying text.

140. 108 S. Ct. at 2576.

141. *Id.*

142. *Id.* "On an issue as sensitive and important as teenage sexuality, it is not surprising that the government's secular concerns would either coincide or conflict with those of religious institutions." *Id.*

143. *Id.*

144. *Id.* at 2578.

145. *Id.*

146. *Id.*

147. *Id.* at 2578 n.14.

148. *Id.* at 2580.

In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered "pervasively sectarian" religious institutions, such as we have held parochial schools to be. As our previous discussion has indicated, and as *Tilton*, *Hunt*, and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

Id. (citations omitted).

not to declare the statute unconstitutional.¹⁴⁹

2. *The Dissent*

Justice Blackmun's dissent took issue with the majority's use of the pervasively sectarian test, claiming that the majority had incorrectly interpreted the test to mean that *only* parochial schools are pervasively sectarian.¹⁵⁰ Justice Blackmun stated: "On a continuum of 'sectarianism' running from parochial schools at one end to the colleges funded by the statutes upheld in *Tilton*, *Hunt*, and *Roemer* at the other, the AFLA grantees described by the District Court clearly are much closer to the former than the latter."¹⁵¹

The dissent accused the majority of relying on a phrase to mask a refusal to make substantial inquiry.¹⁵² According to Justice Blackmun, the fact that an institution is not classified as pervasively sectarian is no excuse for failure to examine its specific potential for fostering religion in an unconstitutional manner.¹⁵³

Justice Blackmun believed that the true precursor to the AFLA case was not the sequence of higher education cases — *Tilton*, *Hunt*, and *Roemer* — where the targeted audience was the sophisticated college student, but rather the parochial school cases starting with *Lemon v. Kurtzman*.¹⁵⁴ An important common thread in the latter sequence of cases, according to Justice Blackmun, is the desire on the part of the Supreme Court to

149. *Id.* at 2581. There were two brief concurrences which addressed the issue of the standard to be applied on remand. Justice Kennedy, joined by Justice Scalia, stated that in his view the focus of the inquiry on remand should be "not whether the entity is of a religious character, but how it spends its grant." *Id.* at 2582 (Kennedy, J., concurring). Justice O'Connor seemed to indicate that the AFLA might yet be found unconstitutional as applied, stating "extensive violations — if they can be proved in this case — will be highly relevant in shaping an appropriate remedy that ends such abuses." *Id.* at 2581 (emphasis in original) (O'Connor, J., concurring).

150. *Id.* at 2586 (Blackmun, J., dissenting).

151. *Id.* at 2586-87.

152. *Id.* at 2585.

153. *Id.* at 2586.

154. 403 U.S. 602 (1971). The dissent in *Bowen v. Kendrick*, 108 S. Ct. 2582-97 (Blackmun, J., dissenting), cites *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). See *supra* note 63 for a brief description of these cases.

protect highly impressionable young children from religious indoctrination.¹⁵⁵ Justice Blackmun felt that here, as in those cases, the targeted audience is young and malleable, and thus deserving of special prophylactic measures to insure that religion is not impermissibly inculcated.¹⁵⁶

The dissent found the evidence overwhelming that the AFLA funding had the effect of advancing religion.¹⁵⁷ The use of religious personnel to perform a task — counseling sexual restraint — with respect to which there was no religious and political unanimity was inherently non-neutral and consequently violated the establishment clause.¹⁵⁸ Justice Blackmun further emphasized that “[p]ublic funds may not be used to endorse the religious message.”¹⁵⁹ The dissent also argued that any attempted grant-monitoring scheme would be excessively entangling.¹⁶⁰ Because of the special nature of the teacher-counselor function, policing the AFLA program would, of necessity, be overly intrusive.¹⁶¹

IV. Analysis

A. *The AFLA — Congress Undertakes Doctrinal Funding*

In enacting the AFLA, Congress sought, for the first time,¹⁶² to enlist, by funding, the active participation of religious groups

155. 108 S. Ct. at 2589. “The AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment.” *Id.*

156. *Id.* “Where the targeted audience is composed of children, of course, the Court’s insistence on adequate safeguards has always been greatest.” *Id.*

157. *Id.* at 2588.

158. *Id.* at 2591.

There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense . . . is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.

Id. See *Bradfield v. Roberts*, 175 U.S. 291 (1899) (federal funds allowed to go to religiously affiliated hospital).

159. 108 S. Ct. at 2591.

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

161. *Id.*

162. Neither the district court nor the Supreme Court was able to cite, in its opinion, any other statute which had ever *required* the participation of religious groups in the

in promoting a secular policy which it conceived to be in the national interest.¹⁶³ According to the majority opinion in *Bowen v. Kendrick*,¹⁶⁴ whatever overt and improper linkage occurred between religion and the valid legislative goal of promoting adolescent sexual abstinence was caused by slipshod administration, and not by any constitutional defect in the statute creating the AFLA.¹⁶⁵

This conclusion is open to question. The legislative history is clear that Congress sought to include religious groups in AFLA funding *because* of their spiritual zeal and special power to communicate their views to adolescents.¹⁶⁶ While the subject of this intended communication — the need for adolescent chastity — was a topic on which Congress and certain religious groups had a coincidence of viewpoint, this issue was clearly of fundamental *religious* significance to the groups funded.¹⁶⁷ Without in any way minimizing the role of ineffective oversight in the problems of the AFLA, it is plain that this planned religious-governmental partnership raises a constitutional problem by itself. May Congress, consistent with the establishment clause, engage in selective funding of religious groups with which it shares a particular philosophical point of view? After *Bowen v. Kendrick*, this practice of doctrinal funding stands approved.

The Supreme Court had previously faced a similar problem in a different context. In *Abington School District v.*

carrying out of congressional policy. This researcher has not found any such statute either.

163. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court upheld a federal grant to a religiously affiliated hospital for the construction of buildings. This hospital had previously been incorporated by an act of Congress. *Id.* at 296. The new grant was upheld on the grounds that the hospital charter was limited to the purpose of running a hospital, and therefore the hospital could not be described as "a religious or sectarian body." 175 U.S. at 298. It would be difficult to consider this case to be precedent for judicial approval of the AFLA, where Congress funded religious groups to make presentations on matters of doctrinal significance to those groups.

164. 108 S. Ct. 2562 (1988).

165. *Id.* at 2580.

166. SENATE REPORT, *supra* note 94, at 15-16.

167. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1562 (D.D.C. 1987). "The AFLA . . . funds teaching and counseling of adolescents by religious organizations on matters related to religious doctrine." *Id.* at 1562. "Thus, by contemplating the provision of aid . . . for the purpose of encouraging abstinence and adoption — the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 1563. The AFLA requires teaching "on matters inseparable from religious dogma . . ." *Id.* at 1565.

Schempp,¹⁶⁸ the Court, in disallowing Bible readings and the Lord's Prayer in public schools, rejected the state defense that Bible readings did not advance religion, but would rather provide for "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."¹⁶⁹ The issue, the Court said, was not whether religious practices could aid socially valid goals, but whether such usage is a government endorsement of a specific religious view.¹⁷⁰ According to Justice Brennan, concurring, "it seems to me that the State acts unconstitutionally . . . if it uses religious means to serve secular ends where secular means would suffice."¹⁷¹ Congress' position in funding the AFLA appears similar to the rejected state position in *Schempp*. In both cases government sought to use religion to achieve a valid secular goal involving adolescent behavior. In *Schempp*, however, the offending statute was struck down, whereas in *Bowen v. Kendrick* a large federal undertaking more ambitious than that in *Schempp* was sustained.

The practice of using religious groups to deliver a government favored secular message is clearly a perilous undertaking. This practice involves the granting, by government, of denominational preferences, something it has no right to do under even the most relaxed view of the establishment clause.¹⁷² The fact that the AFLA may be facially neutral¹⁷³ cannot obscure the reality of the statute's selectivity. Religions have widely disparate views on the questions of abortion and birth control, and to favor one with funding over another in effect endorses the particular religious view funded.

168. 374 U.S. 203 (1963).

169. *Id.* at 223.

170. *Id.* See also *Lynch v. Donnelly*, 465 U.S. 668 (1984). "Focusing on . . . endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." *Id.* at 689 (O'Connor, J., concurring).

171. 374 U.S. at 281.

172. See *supra* notes 14-20 and accompanying text.

173. The majority in *Bowen v. Kendrick* calls the AFLA "facially neutral" in several places in its decision. See, e.g., 108 S. Ct. 2562, 2576 (1988). The Court recognized that: "[t]he facially neutral projects authorized by the AFLA . . . are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." *Id.* See *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976). "[T]he State may send a cleric, even a clerical order, to perform a *wholly secular* task." *Id.* at 746 (plurality opinion) (emphasis added).

This endorsement may occur overtly, as it did in the case of the unfortunate incidents ascribed to maladministration in *Bowen v. Kendrick*¹⁷⁴ or it may occur with greater subtlety as nonadherents merely feel excluded from the government sponsored orthodoxy.¹⁷⁵ Use of doctrinal funding imparts an aura of religion, with all its potential for fanaticism,¹⁷⁶ to what should be essentially merit-based discussions about personal conduct. Government certainly has a duty to undertake programs which it believes will promote health and happiness, but the government does not have a monopoly on virtue. Such a monopoly is implied, however, by the use of religious groups for achieving secular goals in the area of sexual morality because such usage enshrines one set of sectarian values as proper, while implicitly denigrating other views. This cannot be anything but an establishment of religion.

The parameters of the doctrinal funding approved by the Supreme Court in *Bowen v. Kendrick* are as yet unclear, but some startling scenarios are conceivable following this case. Congress may be tempted to fund religious speakers on issues more overtly political than teenage chastity. Under the principle of this case, for example, a Zionist group could arguably be funded by Congress to proselytize for the government's Middle East policy, since the views of the organization and the government coincide. More dramatically, in the event of another unpopular military conflict, the *Bowen v. Kendrick* principle of coincidence could permit the federal funding for campus appearances of members of a religious organization which supported the conflict as "God's war."

174. 108 S. Ct. 2562 (1988).

175. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

176. Religious fanaticism is, sadly, much in the news today.

Reviled, sentenced to death by a religious authority, a price offered for his head, forced to flee his home and live under guard — has ever a writer been persecuted as Salman Rushdie is?

...
Religious fanaticism has discovered censorship's Final Solution for that enemy of darkness, the word. I write that with a shudder.

Gordimer, *Surely a Novel Can't Shake Islam*, N.Y. Times, Feb. 22, 1989, at A27, cols. 1,5.

B. *The Animating Principle Revisited*

Since the decision in *Everson v. Board of Education*,¹⁷⁷ two theories of the underlying principle animating the adoption of the establishment clause of the first amendment have competed for the allegiance of the Supreme Court. The first theory is that the clause requires the separation, as far as practicable, of government and religion — a “wall of separation” to use Jefferson’s famous phrase.¹⁷⁸ The other theory is that the religion clauses of the first amendment, taken together, require only that the federal government create no established national church and make no denominational preference between faiths.¹⁷⁹ The former view had prevailed until the Supreme Court announced its decision in *Bowen v. Kendrick*.

In his dissent in *Wallace v. Jaffree*,¹⁸⁰ Justice Rehnquist expressed the view that, based on his reading of history, “nothing in the Establishment Clause . . . prohibit[s] Congress or the States from pursuing legitimate secular ends through non-discriminatory sectarian means.”¹⁸¹ The decision in *Bowen v. Kendrick* is inexplicable without a majority of the Supreme Court embracing this view. Thus the decision in this case marks the triumph, after forty years of debate, of an alternative view of the history of the adoption of the establishment clause, and the relegation to minority status of the separation view of that event.¹⁸²

While such a view would arguably have changed the result in some past decisions involving the establishment clause had it prevailed at the time of decision, it should not have made any difference in *Bowen v. Kendrick*. Ironically, this reversal of majority and minority views occurs in a case which demonstrates precisely that denominational preference which even Justice Rehnquist recognizes as constitutionally improper.¹⁸³ Even if we concede that the establishment clause, as a matter of history,

177. 330 U.S. 1 (1947).

178. See *supra* note 28 and accompanying text.

179. See *supra* note 17 and accompanying text.

180. 472 U.S. 38 (1985).

181. *Id.* at 113 (Rehnquist, J., dissenting).

182. See *supra* notes 19-25 and accompanying text.

183. See *supra* note 27.

permits neutral aid to all religions, it is difficult to claim that the AFLA aids all religions neutrally. In fact, this enactment singles out certain religions for special preference in government funding. Admittedly, this preference does not appear in the wording of the statute, but rather follows inevitably from the fact that certain religious groups will receive funding because of their religious views, and others will not be recipients because they do not share these views. There is no national religious unanimity on questions of adolescent sexual behavior, and the government may not constitutionally establish a preference for one religious view over another.¹⁸⁴

C. *The Lemon Test After Bowen v. Kendrick*

The Supreme Court has, since 1971, used the three-prong *Lemon* test to analyze whether a statute or a practice violates the establishment clause. To satisfy the *Lemon* test a program must have a valid secular purpose, its primary effect must be one that does not advance religion, and it must not create an excessive entanglement between government and religion.¹⁸⁵ In analyzing entanglement, the Court considers three factors: the character and purposes of the institution benefited, the nature of the aid provided, and the resulting relationship between government and religious groups.¹⁸⁶ While resulting political divisiveness has never been sufficient by itself to make a statute unconstitutional, the existence of political divisiveness has been a factor considered by the Court in deciding a program's validity under the establishment clause.¹⁸⁷

In applying the *Lemon* test, the Supreme Court has distinguished between aid to parochial schools and aid to religiously affiliated colleges and universities. The former are deemed to be "pervasively sectarian" institutions which may not receive government aid without some kind of supervisory government presence to insure that the money is not used to further the institutional religious mission.¹⁸⁸ The latter are deemed not pervasively

184. *But see supra* notes 97-101 and accompanying text.

185. *See supra* notes 46-51 and accompanying text.

186. *See supra* notes 52-57 and accompanying text.

187. *See supra* notes 40, 57 and accompanying text.

188. *See supra* note 72 and accompanying text.

sectarian, and aid flowing to them will not require any supervision to insure that only the secular portion of the institutional operation is aided.¹⁸⁹ In *Bowen v. Kendrick* the Supreme Court elevates this pervasively sectarian inquiry to a position of pre-eminence within the *Lemon* test. Because the grantees and sub-grantees were not, according to the Court, found with specificity to be "'pervasively sectarian' religious institutions, such as [the Court has] held parochial schools to be,"¹⁹⁰ aid may be freely provided to them without large-scale supervision.

This conclusion is logically suspect. The method of analysis used when aid to an institution is challenged¹⁹¹ is inappropriate here because the legislative goal of the AFLA is not to aid an institution, but to use groups, some linked to religion, to achieve a social goal. The institutional inquiry is a red herring in this case, distracting us from an examination of a controversial application of government funds.

The age of the class of persons to be potentially exposed to the religious message is another factor that has received repeated attention from the Court in establishment clause cases.¹⁹² The Justices have frequently stated that young, impressionable children are highly receptive to perceiving a message of government endorsement of religion, and, as a result, programs involving children must strike a balance in favor of preventing their indoctrination.¹⁹³ Although the age group targeted by the AFLA is the one previously held most vulnerable, the majority in *Bowen v. Kendrick* ignores this critical concern in its opinion in apparent disregard of the evidence in the record that some students receiving AFLA counseling stated that they felt they were

189. See *supra* note 73 and accompanying text.

190. 108 S. Ct. 2562, 2580 (1988).

191. The Court has analyzed challenges to institutional aid under the establishment clause in two main areas: aid to parochial schools and aid to religiously affiliated institutions other than parochial schools such as hospitals, colleges, and universities. See *supra* notes 64-76 and accompanying text.

192. See *supra* note 75 and accompanying text.

193. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981). "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality towards religion." *Id.* at 274 n.14. See also *School Dist. v. Ball*, 473 U.S. 373 (1985). "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Id.* at 390.

being exposed to a religious presentation rather than a secular one.¹⁹⁴

The most controversial feature of the *Lemon* test has been the use of the entanglement prong to strike down enactments which have a valid secular purpose and do not have the primary effect of advancing religion. This controversy reached an acrimonious stage in *Aguilar v. Felton*,¹⁹⁵ when four Justices called for the end of the use of entanglement prong analysis.¹⁹⁶ After *Bowen v. Kendrick*, it is apparent that a majority of the Court will not use the entanglement prong as it was previously used. Justices Scalia and Kennedy apparently agree with the "Catch-22 paradox" view of entanglement expressed by Justice Rehnquist's majority opinion, and Justices O'Connor and White have previously expressed their distaste for the use of that prong.¹⁹⁷

It is again ironic that such a shift in the viewpoint of the Court should have resulted from *this* case, when other cases had presented a much more appropriate setting for such a decision. For example, it is not impossible to sympathize with the dissenters in *Aguilar*; in that case programs were struck down¹⁹⁸ which in the words of Justice Powell "concededly have 'done so much good and little, if any, detectable harm,'"¹⁹⁹ merely because there was a "risk of government entanglement in the administration of the religious schools."²⁰⁰ In *Aguilar*, it was conceded that no *actual* religious inculcation had materialized in nineteen years, and the monitoring scheme was minimal.²⁰¹ Thus the act

194. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1566 (D.D.C. 1987).

195. 473 U.S. 402 (1985).

196. See *supra* note 85 and accompanying text.

197. See *supra* notes 86-92 and accompanying text.

198. New York City had created programs which used federal funds to provide instruction for educationally deprived parochial school students. The programs were conducted on parochial school grounds by public school teachers who were formally required to separate themselves from any religious activities taking place at those schools. *Aguilar*, 473 U.S. at 404-07.

199. *Id.* at 415 (quoting the lower court at 739 F.2d 48, 72 (2d Cir. 1984)) (Powell, J., concurring).

200. *Id.* (emphasis added).

201. *Id.* at 424 (O'Connor, J., dissenting). "Indeed, in 19 years there has never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense.'" *Id.* (citing *School Dist. v. Ball*, 473 U.S. 373, 397 (1985)).

of striking down the statute was purely prophylactic.

In stark contrast to the challenged program in *Aguilar*, serious improprieties had already been committed by AFLA grantees prior to the moment of judicial decision.²⁰² Further, the entanglement resulting from an attempt to police the AFLA would not be minimal, since it would necessitate the constant surveillance of teachers and counselors with a predisposition to religious fervor — a task the Court has previously found difficult.²⁰³ Such an effort would have to be national in scope, since the AFLA is itself a national program, and would involve an administrative determination of the religious content of secular curricula — a daunting prospect. If ever there existed a statute that would, under previous Supreme Court decisions,²⁰⁴ administratively entangle church and state, the AFLA is such an act. Yet the AFLA was upheld, whereas the far less “entangling” statute in *Aguilar* was struck down.

Another part of the *Lemon* analysis abandoned by the Court in *Bowen v. Kendrick* is the political divisiveness inquiry. Although the district court discussed the political divisiveness caused by the AFLA at some length,²⁰⁵ the majority opinion dismissed the subject in a footnote.²⁰⁶ The cases previously considered make clear that the Court has, on some occasions, considered political divisiveness an evil to be remedied by the first

202. *Bowen v. Kendrick*, 108 S. Ct. 2562, 2580 (1988). “[T]here is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees” *Id.*

203. For the distinction between providing teachers and textbooks to parochial schools, see *supra* note 51 and accompanying text.

204. For use of the entanglement prong see *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Aguilar*, 473 U.S. 402; *School Dist. v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

205. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1569 (D.D.C. 1987).

206. 108 S. Ct. 2578 n.14.

We also disagree with the District Court’s conclusion that the AFLA is invalid because it is likely to create political division along religious lines. It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day. In addition, as we said in *Mueller v. Allen*, the question of “political divisiveness” should be “regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.”

Id. (citations omitted).

amendment,²⁰⁷ and that the potential for such divisiveness could be the deciding factor in a close case.²⁰⁸ It is difficult to conceive of a more politically divisive issue than the moral ramifications of abortion and adolescent sexual abstinence have proven to be in the late twentieth century United States. Given the added fact that the AFLA does not involve a "one shot" funding scheme, passions will be continuously stirred by the need for ongoing congressional appropriations for the AFLA. In short, if the Court could find no political divisiveness to consider in this case, it may never find it, and the inquiry is discarded.

It is difficult to ascertain what remains of the *Lemon* test as a whole after *Bowen v. Kendrick*. Certainly the test was not applied in its customary manner with respect to the AFLA. Justice Brennan's acerbic comment on an earlier Supreme Court failure to properly apply the *Lemon* test is most appropriate here: "In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question . . . they would nearly unanimously find the practice to be unconstitutional."²⁰⁹ The same could be said about the AFLA challenged in *Bowen v. Kendrick*.

V. Conclusion

*Bowen v. Kendrick*²¹⁰ marks a watershed in judicial interpretation of the establishment clause. By this decision, the Supreme Court has eviscerated the *Lemon* test, which had been its primary analytical tool in establishment clause cases since 1971. Tests in areas of constitutional law are sometimes justly criticized because they focus on form over substance, and the *Lemon* test had been criticized, by the very Justice who authored the *Lemon* opinion, as "suggest[ing] a naive pre-occupation with an easy, bright-line approach for addressing constitutional issues."²¹¹ If the rigorous application of the *Lemon* test would have prevented the result in *Bowen v. Kendrick*, however, then

207. See *supra* note 40 and accompanying text.

208. Justice Powell seems ultimately to be most influenced by this factor in his decisive concurrence in *Aguilar*, 473 U.S. at 416-17 (Powell, J., concurring). See also *supra* note 40 and accompanying text.

209. *Marsh v. Chambers*, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting).

210. 108 S. Ct. 2562 (1988).

211. *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting).

there is much to be said for it.

In abandoning the *Lemon* test, the Court has approved the practice of doctrinal funding of religious groups which share the prevailing government opinion on controversial issues. This decision is profoundly disturbing since it approves an unprecedented church-state alliance on issues which sharply divide the nation. The eloquent warning of Justice Jackson is appropriate here: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" ²¹² In upholding the AFLA, the Supreme Court has taken a step towards allowing the creation of just such an orthodoxy.

Richard L. Marasse

212. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).