Campbell Law Review

Volume 11
Issue 2 *Spring 1989*

Article 4

January 1989

Constitutional Law - The Constitutionality of the Adolescent Family Life Act: An Analysis of Bowen v. Kendrick and Its Impact on Current Establishment Clause Jurisprudence

Thomas G. Walker

NOTES

CONSTITUTIONAL LAW—THE CONSTITUTIONALITY OF THE ADOLESCENT FAMILY LIFE ACT: AN ANALYSIS OF *BOWEN V. KENDRICK* AND ITS IMPACT ON CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE

INTRODUCTION

Congress passed the Adolescent Family Life Act (A.F.L.A.) in 1981.[1] The purpose of the Act is to provide funding to public or nonprofit private organizations or agencies used in connection with counseling and adolescent services.[2] These services include counseling regarding premarital adolescent sexual relations. The Act, because it directly funds and involves religious organizations, was challenged by a group of federal taxpayers, clergymen and the Jewish Congress as an unconstitutional establishment of religion under the First Amendment of the United States Constitution.[3] The United States Supreme Court, in *Bowen v. Kendrick*,[4] held that such funding was not unconstitutional, affirming at least on its face, the existence of the A.F.L.A. This Note has four objectives: first, to examine the facts before the Court in *Bowen*; second, to provide a brief survey of several significant cases in the Establishment Clause arena; third, to critique the use of the traditional Lemon v. Kurtzman[5] analysis applied by the *Bowen* Court; and

1. 42 U.S.C. § 300z (1982 & Supp. II 1984).

2. *Id.* § 300z 1(a)(7).

3. U.S. Const. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion . . . ." Bowen v. Kendrick, 108 S. Ct. 2562, 2568 (1988).

4. 108 S. Ct. 2562 (1988).

5. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon* the Supreme Court determined that government acts many constitute an unconstitutional establishment of religion unless: one, the laws' have a secular legislative purpose; two, the laws' principal or primary effect "must be one that neither advances nor inhibits religion;" and three, the legislation must not foster an "excessive entanglement with religion."

fourth, to analyze the implications of the *Bowen* holding on Establishment Clause jurisprudence.[6]

THE CASE

Congress passed the A.F.L.A. was passed as a calculated response to a perceived health and moral crises.[7] After considering the alarming rate of teenage pregnancies,[8] Congress concluded that "pregnancy and childbirth, among unmarried adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences."[9] In an attempt to deal with these problems resulting from the adolescent pregnancy epidemic[10] Congress concluded that:

> [s]uch 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 associations and other groups in the private sector as well as services provided by public sponsored initiatives.[11]

The Adolescent Family Life Act, with this social problem in mind, was intended to fulfill several purposes.[12] Among the more significant objectives are: "to promote self-discipline and other

---

6. *Id.*

7. 42 U.S.C. § 300z(a)(1).

8. *Id.* § 300z(a)(5).

9. 42 U.S.C. § 300z(a)(1). "In 1978, an estimated one million, one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies to such teenagers were born out of wedlock."

10. *Id.* § 300z(a)(5).

11. *Id.* § 300z(B).

12. The A.F.L.A.'s stated purposes include: "to find effective means, within the context of the family, of reaching adolescents before they become sexually active . . ." § 300z(B)(10); "to promote adoption as an alternative for adolescent parents" § 300z(B)(2); "to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents who are seventeen years of age or under . . ." § 300z(B)(3); "to encourage and support research projects concerning . . . the causes and consequences of adolescent premarital sexual relations . . ." § 300z(b)(4); "to support evaluative research to identify effective services which alleviate, eliminate, or resolve any negative consequences of adolescent premarital sexual relations . . ." § 300z(b)(5); and "to encourage and provide for the dissemination of results, findings and information from programs . . . and research projects relating to adolescent premarital sexual relations, pregnancy and parenthood." § 300z(b)(6).

prudent approaches to the problem of adolescent premarital sexual relations;"[13] "to promote adoption as an alternative for adolescent parents;"[14] and "to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents."[15]

The A.F.L.A. places limitations and conditions on grantees who are eligible for the federal funds. Under the provisions of the Adolescent Family Life Act, the Secretary of Health and Human Services is authorized to ascertain whether grantees meet the Act's requirements.[16] No award of funds may be appropriated to programs that offer only abortion services.[17] The Act does, however, allow abortion referral counseling by eligible grantees if the adolescent and parents or guardians involved ask for such a referral.[18]

Any potential grantee that receives funds under the Act must submit an application which requires, among other things, that the potential grantee give a description of how the grantee will:

(A) involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent;
(B) *involve religious and charitable organizations*, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.[19]

In addition, the text of the Act contains no specific statutory restriction regarding the use of available A.F.L.A. funds in promoting religious purposes. The Act only requires that each grantee who receives federal funds under the A.F.L.A., file periodic reports indicating how the respective grantee is using the money.[20]

---

13. *Id.* § 300z(b)(1).
14. *Id.* § 300z(b)(2).
15. *Id.* § 300z(b)(3).
16. *Id.* § 300z-10(a). "Restrictions" provision insures that appropriations are made "only to programs or projects which do not provide abortions or abortion counseling or referral. . . ."
17. *Id.* § 300z-10(a).
18. *Id.* § 300z-10(b). This provision states that "the Secretary shall ascertain whether programs or projects comply with subsection (a), (i.e., § 300z-10(c), and takes appropriate action if programs or projects do not comply with such subsection, including withholding of funds."
19. *Id.* § 300z-5(21)(A) and (B) (emphasis added).
20. *Id.* § 300z-5(c), stating "each grantee which receives funds for a demonstration project for services under this subchapter shall make such reports concerning its use of federal funds as the Secretary may require. Reports shall include, at such times as considered appropriate by the secretary, the results of the

Bowen v. Kendrick was first heard in federal district court in 1983.[21] The plaintiff challenged the A.F.L.A. on the grounds that it was unconstitutional under the first amendment's Establishment Clause.[22] The district court found the A.F.L.A. to be unconstitutional, concluding that both on its face and as applied, the Act violated the Establishment Clause because it allowed religious organizations to participate in federally funded programs.[23] The court analyzed the A.F.L.A.'s validity in light of the test arbitrated in *Lemon v. Kurtzman*.[24]

Lemon is the seminal case in Establishment Clause analysis. In *Lemon* the Supreme Court first announced and applied its current test of whether a contested government action establishes a religion in violation of the first amendment. *Lemon* involved two appeals concerning Rhode Island and Pennsylvania statutes.[25] Both state laws were struck down in application of the Court's new three prong analysis. The *Lemon* test states that a statute raising Establishment Clause issues will be constitutional if: first, the statute has a secular purpose; second, a primary effect that neither advances nor inhibits religion; and third, the statute does not foster excessive entanglement between church and state.[26]

Using the analysis set forth in *Lemon*, the district court in *Kendrick v. Bowen* held that the A.F.L.A. both "on its face" and "as applied" has the primary effect of advancing religion. Thus, the Act violated the first amendment's Establishment Clause.[27]

First, the district court held that the Adolescent Family Life

---

evaluations of the services supported under this subchapter."

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

22. *Id.*

23. *Id.* at 1570.

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

25. *Id.*

26. In *Lemon*, the Court struck down as unconstitutional the Rhode Island Salary Supplement Act and the Pennsylvania Nonpublic Elementary and Secondary Education Act. Both respective statutes were found to be unconstitutional on excessive entanglement grounds. The parochial schools receiving the aid under the Rhode Island statute "constituted an integral part of the religious mission of the Catholic church." *Lemon* at 616. The Court noted that the significant religious nature of the schools was the type of environment that would promote excessive entanglement between church and state. The Pennsylvania statute also fostered excessive entanglement since the state law required schools eligible for and receiving funds to keep a separate accounting of the specific expenditures to secular subjects taught. The effect of such a requirement created "an intimate and continuing relationship between church and state." *Lemon* at 622.

27. Kendrick v. Bowen, 657 F. Supp. 1547, 1560 (D.D.C. 1987).

Act "on its face" has the primary effect of advancing religion "because it funds teaching and counseling of adolescents by religious organizations on matters related to religious doctrine."[28] The district court found "a direct and immediate effect of advancing religion" from the Act's emphasis on counseling and education. The district court held that in reality these functions amounted to the "teaching" of the harm of pre-marital sexual relations and that "these elements are fundamental elements of religious doctrine."[29] The district court stressed in its finding that many religions have at their core teachings concerning the immorality of pre-marital sex. Thus, the district court viewed the Act as promoting the advancement of religious ideas in a manner that violated the Establishment Clause.[30]

In finding the A.F.L.A. unconstitutional, the district court found a "crucial symbolic link" between church and state.[31] The district court noted that link between church and state existed because religious organizations received federal funds and disbursed them in a manner which was "inescapably infused with religious beliefs."[32]

In addition, the district court held that "as applied" the A.F.L.A. has the primary effect of advancing religion in a manner in which the first amendment does not allow.[33] The court noted that several A.F.L.A. grantees were religious organizations and that such information provided conclusive evidence that a significant number of grantees were groups with religious affiliations.[34] This evidence led the district court to the inevitable conclusion that religious organizations used federal funds to espouse and teach ideas that the court considered as inextricably bound with religion.[35]

The district court also concluded that the A.F.L.A. fostered excessive entanglement between church and state because the Act

---

28. *Id.* at 1562.

29. *Id.*

30. *Id.* at 1563.

31. The symbolic link image was also discussed in Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985). There the Supreme Court found such a link present by the appropriation of federal funds to parochial schools. Such a practice was seen as posing the unconstitutional risk that government funds were being used to "inculcate particular religious tenets or beliefs." *Grand Rapids*, 473 U.S. at 385.

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

33. *Id.* at 1551.

34. *Id.* at 1564.

35. *Id.* at 1565.

could be administered only by promoting a close relationship between the government and religion. After examining the factors which the courts will utilize to identify excessive entanglement,[36] the court found that the "nature" of the federal funding created the potential hazard that religious organizations receiving the funds would promote religion unless there was a significant monitoring by the government in order to insure the funds were not used in a manner that advances religion.[37]

BACKGROUND

To trace the growth and development of first amendment Establishment Clause jurisprudence is an ambitious task. This section provides a brief synopsis of several major Establishment Clause cases considered by the Supreme Court and an analysis of the contribution each case has made in the development of the current Establishment Clause test.

The Supreme Court heard the first major Establishment Clause case, *Bradfield v. Roberts*,[38] in 1899. In *Bradfield*, a unanimous Court rejected complainant's challenge that congressional funding to a hospital with strong religious affiliations was unconstitutional. The complainant argued that the hospital was:

> a private eleemosynary corporation and that to the best of complainant's knowledge and belief it is composed of members . . . of the Roman Catholic Church, and is conducted under the auspices of said church . . . in view of the sectarian character of [the hospital] . . . the contract between the same and the Surgeon General of the Army . . . are unauthorized by law . . . contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment.[39]

The Supreme Court rejected this argument and held that the hospital's pervasively sectarian nature did not "change the legal character of the corporation or render it on that account a religious or sectarian body."[40]

In *Everson v. Board of Education*,[41] the Supreme Court reached what has come to be accepted as a milestone decision in

36. Tilton v. Richardson, 403 U.S. 672, 688, (1971).
37. *Kendrick*, 657 F. Supp. at 1568.
38. 175 U.S. 291 (1899).
39. *Id.* at 293.
40. *Id.* at 297.
41. 330 U.S. 1 (1946).

Establishment Clause jurisprudence. The *Everson* Court confronted, and upheld as constitutional, a New Jersey law that allowed government-provided transportation for children to private religious schools and authorized fare reimbursement to parents of children attending either public or Catholic schools.[42] In its holding, the *Everson* Court attempted to clarify the meaning of the Establishment Clause by stating:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . Neither a state nor the Federal Government can openly or secretly, participate in the affairs or any religious organizations or groups and *vice versa*.[43]

In upholding the New Jersey bussing program, the Supreme Court affirmed the notion that secular objectives of legislation, in this case, bus transportation, which serve in the public's interest would not be found unconstitutional, at least when the law is substantially within the public's interest at large, even though religious bodies may indirectly benefit from such government acts.[44]

The following year, the Supreme Court confronted the next significant Establishment Clause case, *McCollum v. Board of Education*.[45] In *McCollum*, the Court struck down a time release program in schools which allowed students to receive religious instruction for one period a week. This practice was found to offend the barriers set by the first amendment since the program's practical effect involved the use of public school buildings for inculcating religious ideas to captive students.[46]

In contrast, the Court in *Zorach v. Clauson*,[47] upheld a time release program where the students left the public school premises in order to receive religious training. This time release program was found to be constitutional as distinguished from *McCollum*, because in *Zorach*, students left public school property to receive

---

42. *Id.*
43. *Id.* at 15-16.
44. *Id.* at 6.
45. 333 U.S. 203 (1947).
46. *Id.* at 205.
47. 343 U.S. 306 (1952).

religious instruction at nearby facilities.[48] Since religious counseling was not given in the public schools the Court found no unconstitutional establishment of religion despite the fact that the public school teachers played a minor role in effectuating the time release program.[49]

The *Zorach* decision is most noted for Justice Douglas' opinion which advocated what is now considered with ever growing popularity as the "accommodation doctrine." Holding that "we are a religious people whose institutions presuppose a supreme being,"[50] Justice Douglas argued that it is in the country's best interest when government cooperates with religion. In Justice Douglas's view government does not have to hold a "callous indifference" to religious groups in order to remain nonviolative of the Establishment Clause.[51]

In *Engel v. Vitale*,[52] the Supreme Court struck down a state written and sponsored school prayer in one of the most controversial of all church state decisions.[53] The *Engel* Court held unconstitutional a state law which required school principals to insure that a state written prayer be read aloud at the start of each school day.[54] The Court held the state prayer to be an establishment of religion notwithstanding the fact that the prayer was non-denominational and that students who did not wish to participate in the exercise could leave the classroom.[55]

In *Abington School District v. Schempp*,[56] the Supreme Court followed the rationale of previous Establishment Clause cases and held a state law requiring verses to be read aloud from the Bible at

---

48. *Id.*

49. *Id.* at 309. Appellants had argued, that because public school teachers "police" the time release program by maintaining an attendance sheet of students released, that such practice involved a unconstitutional degree of government sponsored religious activities.

50. *Id.* at 314.

51. *Id.* at 314. Douglas in his infamous "accommodation" opinion went on to state that "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against the efforts to widen the effective scope of religious influence."

52. 370 U.S. 421 (1962).

53. *Id.* at 422.

54. *Id.* The New York State Board of Regents had composed the prayer which read: "Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country."

55. *Id.* at 430.

56. 374 U.S. 203 (1963).

the beginning of each school day to violate the first amendment.[57] The Court pointed out its disagreement with the argument that the religious practices were "minor" and therefore constitutional under the first amendment.[58] The Court also refuted the assertion that its decision had the effect of establishing a religion of secular humanism in the public schools.[59]

The *Abington* decision is most significant for announcing Justice Clark's two part test to be used in determining whether the legislation violates the Establishment Clause. In order to pass constitutional muster, the legislation must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[60] This two part test would later be incorporated into the current Establishment Clause test.

Then Chief Justice Burger, in *Walz v. Tax Commissioner*,[61] formulated the third prong of the presently used *Lemon* test. In *Walz*, a property owner sought an injunction from the New York courts asking for a prohibition of tax exemptions given to religious bodies for properties those groups used only for religious activities.[62] Appellant argued this tax exemption violated the Establishment Clause since the state was directly contributing to the advancement of religion. Justice Burger cast aside any notion that the first amendment lays out strict rules regarding the separation of church and state.[63] He noted that there is much room in church-state relations to promote a "benevolent neutrality" between government and religion.[64] After concluding that tax exemptions are in the best interest of America's heritage and are not *per se* considered an establishment of religion, the Court then added a third prong to its analysis in the assurance that such practices did not amount to "excessive entanglement between church and state."[65]

The *Walz* opinion is significant not only for its announcement of the "excessive entanglement" analysis, but also for the Court's

---

57. *Id.* at 225.
58. *Id.*
59. *Id.*
60. *Id.* at 222.
61. 397 U.S. 664 (1970).
62. *Id.* at 667.
63. *Id.* at 669.
64. *Id.*
65. *Id.* at 674. The *Walz* opinion is significant for its introduction of the "excessive entanglement" analysis. Such analysis would become the third prong of the *Lemon* test.

predictions of what might be considered to be a genuine secular legislative purpose.[66] The Supreme Court affirmed the right of the states to acknowledge the positive and contributing role religious bodies play in our society by recognizing that such groups "foster" [society's] "moral or mental improvement [and] should not be inhibited in their activities by property taxation."[67]

From these cases evolved the most current analysis of the Establishment Clause articulated in *Lemon v. Kurtzman*.[68]

ANALYSIS OF THE SUPREME COURT'S HOLDING IN *Bowen v. Kendrick*

In Bowen v. Kendrick,[69] the Supreme Court held that the A.F.L.A. "on its face" did pass constitutional muster but remanded for a determination of whether the A.F.L.A. "as applied" violates the Establishment Clause.[70] In reversing the district court's decision, the Supreme Court analyzed the A.F.L.A. applying the *Lemon* analysis.[71]

A. Secular Purpose

In its holding, the Supreme Court determined initially that the Adolescent Family Life Act was supported by a legitimate secular purpose.[72] The Court placed particular emphasis on the Act's wording which itself revealed that its purpose was the "elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood."[73] The Court's opinion, au-

---

66. L. MANNING, THE LAW OF CHURCH STATE RELATIONS, 69 (West Publishing Company, 1980).

67. *Walz*, 392 U.S. at 672.

68. 403 U.S. 602 (1971).

69. 108 S. Ct. 2562 (1988).

70. *Id.*

71. The Court stated that only a small number of cases in the Establishment Clause spectrum have made the distinction between a statute "on its face" and "as applied." Bowen v. Kendrick, 108 S. Ct. 2562, 2569 (1988). In Edwards v. Aguillard, 107 S. Ct. 2573 (1987), the Court made such a distinction, finding the Louisiana Creationism Act to be facially invalid. Also, in both Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976) and Tilton v. Richardson, 403 U.S. 672 (1971), the opinions of the Supreme Court discuss the "on the face" and "as applied" distinction.

72. The Court noted in *Lemon* that a statute must have a genuine secular legislative purpose and not a purpose which is not secular in nature.

73. *Bowen*, 108 S. Ct. at 2571 (1988). (The Court cited Edwards v. Aguillard, 107 S. Ct. 2573 in support of its contention that the A.F.L.A. was motivated by a

thored by Chief Justice Rehnquist, relied on previous Establishment Clause cases. The Court concluded there was no evidence to support an assertion that Congress' actual purpose in enacting the A.F.L.A. was to promote religion.[74] It thus appears from the opinion that legislation, if worded correctly, can pass the *Lemon* test's first hurdle with little difficulty. The Court is willing to defer to Congress' apparent intent and find that a legitimate secular purpose, exists at least when the statute's plain language purports to promote sincere and genuine secular purpose.

Appellees argued the A.F.L.A.'s purpose was unconstitutional due to the Act's mandate that any grantee show how it would employ the services of religious organizations in reaching the Act's objectives.[75] The Supreme Court followed the district court by disagreeing with these contentions and noted that religious organizations were only one of several targeted charitable organizations and other private sector groups.[76] Thus, the Court is hesitant to find an impermissible purpose when a statute seeks only to include religious organizations as eligible grantees of federal funds. More importantly, the Court will not find an impermissible purpose when that Act requires a potential grantee of federal funds to show how that grantee will employ and involve religious organizations.[77] In its holding, the Supreme Court affirmed the usefulness of religious organizations in meeting desired social ends without concluding that religion is being promoted because the objectives of a statute happen to coincide with mainstream beliefs of several religions.[78]

---

legitimate secular purpose).

74. *Bowen*, 108 S. Ct. at 2571, at 537. The Court pointed out that it was unwilling to conclude that the purpose of the A.F.L.A. was unconstitutional simply because some of the secular objectives in the Act correlate and coincide with tenets of certain religious beliefs. (citing Harris v. McRae, 448 U.S. 297, (1980)); McGowan v. Maryland, 366 U.S. 420 (1961).

75. *Bowen*, 108 S. Ct. at 2571. *See also* Edwards v. Aguillard, 482 U.S. _, 107 S. Ct. 2573, 96 L.Ed. 2d 510 (1987).

76. § 300z-5(a)(21) of the A.F.L.A. requires "a description of how the applicant will, as appropriate in the provision of services — (A) involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent; and (B) involve religious and charitable organizations, voluntary associations and other groups in the private sector as well as services provided by publicly sponsored initiatives."

77. § 300z(a)(8)(B).

78. *Bowen*, 108 S. Ct. at 2572.

B. Primary Effect

After determining that the statute's advancement of religion was only "incidental and remote,"[79] the Court considered several arguments that the A.F.L.A. violated the second prong of the *Lemon* test by having the primary effect of advancing religion. The Court's analysis in rejecting those arguments may reveal the direction the Supreme Court will take in future Establishment Clause cases.[80]

First, the Supreme Court determined that it is possible, at least constitutionally, to promote the desired social end of sexual morality without advancing religion.[81] This holding specifically refutes the rationale of the district court which found the A.F.L.A. advanced religion simply because the Act embodied values that many sectarian groups hold as fundamental tenets of faith.[82] The *Bowen* opinion itself reveals that the current Supreme Court does not equate morality with religion nor does the Court agree that morality cannot be promoted without unconstitutionally involving religion. The Court concluded that there "is nothing inherently religious" about the activities and purposes the A.F.L.A. promotes and that religious organizations are not "uniquely qualified" to meet the purposes of the A.F.L.A.[83]

Chief Justice Rehnquist addressed two other arguments that the Act had the effect of advancing religion. First, appellees argued the Act advanced religion solely because the A.F.L.A. "recognized" the use of religious organizations in meeting the statute's objectives. The Court refuted this contention after examining the role that religious organizations were to play under the A.F.L.A..[84] The

79. *Id.*
80. *Id.*
81. *Bowen*, 108 S. Ct. at 2575-76.
82. *Kendrick*, 657 F. Supp. at 1562.
83. *Id.* at 538.
84. § 300z(a)(8)(B) states that the teenage pregnancy epidemic is "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 associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives"; § 300z(a)(10)(C) states that the services promoted by the government "should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable groups . . ."; § 300z-2(a) states that demonstration projects under the A.F.L.A. "shall use such methods as will strengthen the capacity of families to deal with sexual behavior, pregnancy or parenthood of adolescents and to make use of support systems or other

Court held that the Act reflects only the "collective wisdom of Congress" which concluded that the Act's desired moral and social purposes would be efficiently brought about by including religious organizations.[85] The Court acknowledged the right of Congress to solicit the aid of religious bodies to "solv[e] certain secular problems."[86] Any effect on religion from such aid will be seen as only incidental.[87]

The second argument posed by the appellee's was that the A.F.L.A. was unconstitutional because by its nature it permits religious organizations to receive federal funds.[88] The Court noted that the Act allows for a broad array of eligible grantees and that such a wide spectrum of potential grantees denotes neutrality to such an extent so as to pass constitutional scrutiny.[89] Pointing out that the Court has never disqualified as violative of the first amendment any participation by religious organizations in meeting social welfare needs, the Court drew support from a broad list of previous cases in which religious organizations were allowed to receive federal funds.[90] For instance, in *Roemer v. Maryland Board of Public Works*,[91] the Supreme Court upheld a state law that allowed state funds to be appropriated to both state and private religious colleges.[92] The *Roemer* Court noted that "religious organizations need not be quarantined from public benefits that are neutrally available to all."[93] In *Tilton v. Richardson*,[94] the Court also approved of a congressional plan to pay eligible state colleges and universities construction grants, whether the colleges were affiliated with a religious denomination or not.[95]

The opinion indicates that any argument against the constitutionality of direct government subsidies to religious organizations,

---

family members, friends, religious and charitable organizations, and voluntary associations." *See also* § 300-z-5(a)(21)(A).

85. *See Bowen*, 108 S. Ct. at 2573.

86. *Id.*

87. *See* Grand Rapids School District v. Bell, 473 U.S. 373, 382 (1985). The Court quoted from the *Grand Rapids* opinion, noting that the text of the A.F.L.A. was one of neutrality.

88. *See Bowen*, 108 S. Ct. at 2573.

89. *Bowen*, 108 S. Ct. at 2575.

90. Citing Bradfield v. Roberts, 175 U.S. 291 (1899).

91. Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976).

92. *Roemer*, 426 U.S. at 746.

93. *Id.*

94. Tilton v. Richardson, 403 U.S. 672 (1971).

95. *Id.* at 689.

at least when it has not been shown that a significant number of grantees receiving the federal funds are pervasively sectarian in nature and when the statute itself has on its face what the Court concludes are adequate safeguards against pervasively sectarian groups receiving direct funding, will be rejected by the current Supreme Court.[96]

C. *Excessive Entanglement*

Chief Justice Rehnquist carefully pointed out that although direct federal funding in particular cases to religious organizations does not, at least on its face, violate the Establishment Clause, such grantees must not be found to be what the Court labels a "pervasively sectarian institution." Federal aid given to what the Court finds as a pervasively sectarian institution will be seen as having the unconstitutional effect of advancing religion since that situation presents the threat that federal funds will be used directly to meet those grantee's "religious mission" and not the secular purpose of the statute.[97] Relying on *Hunt v. McNair*,[98] Chief Justice Rehnquist noted that:

> [a]id normally may be thought to have a primary effect of advancing religion 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. . . .[99]

In *Grand Rapids School District v. Bell*,[100] the Court examined how religion is unconstitutionally advanced when pervasively sectarian groups receive direct government funding.[101] The *Grand Rapids* Court held that a determination of whether a grantee of federal subsidies is pervasively sectarian must initially begin with a determination of the "nature" of that grantee.[102]

After referring to this existing precedent concerning pervasively sectarian institutions, the Court concluded that " . . . nothing on the face of the A.F.L.A. indicates that a significant proportion of federal funds will be disbursed to pervasively sectarian

---

96. Hunt v. McNair, 413 U.S. 734 (1973) and Board of Educ. v. Allen, 392 U.S. 236 (1968).

97. *See Bowen*, 108 S. Ct. at _, 101 L.Ed. 2d at 541.

98. 413 U.S. 734 (1973).

99. *Id.* at 743.

100. 473 U.S. 373 (1985).

101. *Id.* at 385.

102. *Id.* at 384.

institutions."[103] The unanswered question, however, is what the Supreme Court intends by this interpretation. It appears the Court will not uphold, at least facially, direct federal funding to pervasively sectarian groups when it cannot be shown that more than an insignificant portion of grantees can be labeled as pervasively sectarian. This contention, if accurate, would indicate a weakening stance by the Court than in earlier Establishment Clause cases. The parochial aid cases in particular address the unconstitutionality of direct federal funding to pervasively sectarian groups, regardless of whether the grantees were significant[104] in number or not.[105]

Despite the apparant similarities, the Court distinguished the parochial aid cases from the A.F.L.A. funding to religious organizations. The Court pointed out that in the parochial aid cases, such as in *Grand Rapids*, the Court faced a program that apportioned federal funds "almost entirely to parochial schools."[106] Instead of identifying the plight of the A.F.L.A. with that of the parochial aid cases, the Court found the funding provided under the A.F.L.A. to be that of similar government funding programs upheld in *Roemer v. Maryland Board of Public Works*,[107] and *Tilton v. Richardson*.[108]

In *Roemer*, the Court upheld a Maryland statute that authorized the appropriation of state funds to any college in the state that met certain mandatory requirements.[109] Using the *Lemon* test, the Court found such colleges were not pervasively sectarian in nature notwithstanding their direct relationship to the Roman Catholic church.[110] Ironically, the Maryland statute upheld in *Roemer* had an express statutory restriction against sectarian use. There is no such express statutory preclusion in the text of the A.F.L.A. Nevertheless the Supreme Court sees the two cases as being so similar that these types of government subsidies will not be considered as direct federal funding to pervasively sectarian institutions to such an extent that the funding violates the Establishment

103. *See Bowen*, 108 S. Ct. at 2575.

104. *Id.*

105. *See Hunt*, 413 U.S. at 743.

106. *See Grand Rapids*, 473 U.S. at 385. There the Court found that forty out of forty-one schools receiving the aid were pervasively sectarian.

107. 426 U.S. 736 (1976).

108. 403 U.S. 672 (1971).

109. *Roemer*, 426 U.S. at 740.

110. *Id.* at 758.

Clause.

In *Tilton*,[111] four church affiliated universities in Connecticut had been appropriated federal subsidies for construction projects.[112] Again the Court refused to find that the appropriation of federal funds to religious colleges was an unconstitutional appropriation of government aid to pervasively sectarian groups. The Court instead held that the college grantees had adhered to the statutory restrictions against using the federal monies for promoting religion.[113] Statutory compliance of the college prevented the Act from having either the purpose or effect of advancing religion. Again, however, the Supreme Court in *Tilton* faced a statute that contained an express statutory restriction against the use of the government funds for religious purposes.

Refusing to find, on the face of the A.F.L.A. a great risk that a significant number of grantees receiving the funds were pervasively sectarian, the *Bowen* Court noted that it was possible that only a small number of eligible grantees receiving government aid under the A.F.L.A. may be pervasively sectarian.[114] This position supports the idea that the first amendment is not violated *per se* anytime there is a small possibility that federal funds may be placed directly in the hands of pervasively sectarian organizations. Since the A.F.L.A. neutral grantee requirements enable the availability of a wide array of both public and private organizations, the risk of pervasively sectarian groups receiving funds is diminished greatly.[115] Furthermore, if any such organizations were to receive subsidies, their number and role in comparison to all eligible nonsectarian groups indicates that only a small percentage of eligible grantees would be considered as significantly sectarian in origin and purpose.[116]

The Court was also not persuaded by the "symbolic link" illustration. That argument is an attempt to prove the A.F.L.A. constitutionally defective from the mere fact that the Act disbursed funds to religious groups. In *Grand Rapids*, the Court found an impermissible link or union of church and state in a Shared Time Curriculum program which appropriated state provided public

111. *See Tilton*, 403 U.S. at 672.
112. *Id.*
113. *Id.*
114. *See Bowen*, 108 S. Ct. at 2575.
115. *Id.*
116. *Id.*

teaching in religious school buildings.[117] Unwilling to expand the *Grand Rapids* rationale to cover the A.F.L.A.'s fate, the Court determined that if any such "link" did exist, it was too insignificant to warrant a finding of impermissibly aiding religion.[118]

Finally the Court struck down the argument that the A.F.L.A. has the unconstitutional effect of advancing religion because it did not contain a statement that the appropriated funds to eligible grantees could not be used for religious purposes. Several inconsistencies arise in the Court's analysis at this point. In earlier cases,[119] the Court upheld statutes that sent funds directly to religious groups when those statutes contained an express statutory restriction against the use of those funds for the promotion of religion. Yet, in this case, the Court, notwithstanding the earlier decisions, nonetheless upheld the A.F.L.A. without the type express statutory preclusion stressed in the *Roemer* and *Tilton* cases. In support of its reasoning, the Court concluded that the Secretary of Health and Human Services had adequate supervisory powers under the A.F.L.A.'s provisions[120] and that sufficient safeguards existed to insure federal funds would not be unconstitutionally appropriated for the promotion of religion. The Court pointed out that § 300z-5(b)(1) of the Act requires "each grantee which receives funds for a demonstration project for services . . . shall expend at least one per centum but not in excess of five per centum of the amounts received under this subchapter for the conduct of evaluations of the services supported under this subchapter." This provision further states that the "[s]ecretary may not waive the requirement that such evaluations be conducted."[121] The Court also stressed the text of the Act requires each grantee of federal funds to submit reports to the Secretary concerning the use of those funds.[122]

---

117. *Id.* at 374. The Court in discussing the "symbolic link" illustration cited *Grand Rapids School District*, 437 U.S. at 373, 390. The Court rejected the argument that anytime a government program funds religious groups in an area where the government and religious organizations share an interest, the relationship creaks an impermissible "link" between church and state.

118. *See Bowen*, 108 S. Ct. at 2576.

119. *See Roemer*, 426 U.S. at 736 and *Tilton*, 403 U.S. at 672.

120. *See Bowen*, 108 S. Ct. at 2577.

121. § 300z-5(b)(1).

122. § 300z-5(c) states, "[e]ach grantee which receives funds for a demonstration project for services under this subchapter shall make such reports concerning its use of federal funds as the Secretary may require. Reports shall include, at such times as are considered appropriate by the Secretary, the results of the evaluations of the services supported under this subchapter."

However, the Court's reliance on the Secretary of Health and Human Services "police power" over the grantees would seem to present an excessive entanglement problem. The Secretary must, it would seem, maintain a perpetual surveillance to insure grantees appropriately spend the federal subsidy. Thus, in voicing a theory in support of the statute, even without the statutory restriction, the Court paved the way for an excessive entanglement problem in the Act's application.

In applying the third prong of the *Lemon* test, the *Bowen* Court admitted that the surveillance by the Secretary was imperative, yet it did not hold that such monitoring was to such an extent as to amount to an "excessive entanglement" between church and state.[123] Previous cases were held to promote excessive entanglement between government and religion because the institutions and organizations receiving the aid were "pervasively sectarian" in nature.[124] Again, however, the Court drew upon its distinction between A.F.L.A. and the parochial school cases and stated, " . . . there was no reason to assume that the religious organizations which may receive grants are pervasively sectarian in the same sense as the Court has held parochial schools to be."[125] The type and amount of government supervision that the Act calls for on its face is not to such an extent and magnitude as to constitute the type of excessive entanglement the Court has held to be present in other cases.

The distinction between the monitoring called for under the A.F.L.A. and the parochial school cases may prove to be a distinction without a difference. The crucial question left unanswered is whether this distinction is sufficient to alleviate the apprehension of those who fear that the door is again being left open for federal aid in the parochial school aid context and other similar instances. The Court's decision seeks to calm these fears by pointing out that no evidence exists, at least on the face of the statute, that federal funds are being given directly to pervasively sectarian organizations. However, this distinction, founded upon an analysis concerning the "face" of the Act only, may not withstand problems of excessive entanglement that will arise in application of this Act.

---

123. *See Bowen*, 108 S. Ct. at 2578.

124. The Court in Aguillar v. Felton, 473 U.S. 402 (1985), found excessive entanglement because the private schools receiving the aid had as a "substantial purpose" the inculcation of religious values.

125. *See Bowen*, 108 S. Ct. at 2578.

Notwithstanding the Court's finding that the A.F.L.A. on its face is constitutional, the case has been remanded back to the district court for a determination of whether the A.F.L.A., "as applied," is in violation of the Establishment Clause. Thus, the Court's holding that the Act on its face did not work to the advantage of pervasively sectarian groups leaves open the question of whether the Act has the effect of aiding religion in its application.[126] On remand, the Supreme Court has asked for the district court to address two questions: first, whether in applying the Act, the Secretary of Health and Human Services has allowed aid given under the A.F.L.A. to be given to grantees who are pervasively sectarian in nature; and second, whether the Secretary has allowed federal funds to be spent on materials that are "designed to inculcate the views of a particular religious faith?"[127]

CONCLUSION

What does the *Bowen* case stand for in the realm of Establishment Clause jurisprudence? Several observations may be drawn from the Court's opinion despite the fact the case has been remanded.

First, it seems clear that it is possible for legislation to be drawn that allows direct funding to religious groups, at least when the face of the statute does not show that a significant number of grantees are pervasively sectarian in nature. Second, the Court appears unwilling to find legislation unconstitutional simply because the Act does not expressly preclude the use of federal funds for religious purposes. Third, more than just a showing that the objectives of the Act and religious values coincide is required before the Court will find that an act breeds excessive entanglement or advocates the cause of any religion. This conclusion substantiates the notion that the Court will not equate moral objectives of the law with the unconstitutional promotion of religion.

Finally, the opinion leaves several unanswered questions. It remains to be seen whether the "as applied" and "on the face" distinction concerning the Act's constitutionality will hold up to the scrutiny of the district court on remand. The district court's upcoming opinion may show that the A.F.L.A. is unconstitutional "as applied," notwithstanding the Supreme Court's holding that the Act is constitutional "on the face." The district court may reach

126. *Id.* 108 S. Ct. at 2580.
127. *Id.*

this result due to the impossibility of precluding religious grantees who are pervasively sectarian in nature from using the funds to promote religion. This impossibility may cause the courts to reach the conclusion that in application the Act will breed "excessive entanglement" due to the significant amount of government monitoring that will be needed to insure the Act is secularly applied. Perhaps the opinion presents a new era in Establishment Clause jurisprudence. An era that both opens the door of government accommodation towards religion and an era that endorses the belief that good government champions the incorporation of moral and religious principles in secular legislation. What appears to be definite, from the current Supreme Court, is a lack of opposition towards religion and a reaffirmation of the positive role religious groups can play in governing the people of this country.

Thomas Gray Walker