ESTABLISHMENT CLAUSE—Adolescent Family Life Act Upheld as Facially Valid After a First Amendment Constitutional Attack on the Right of Religious Organizations to Receive Federal Funding to Counsel and Teach Adolescents—*Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

I. Introduction

In 1987 the United States District Court for the District of Columbia heard a claim brought by a group of federal taxpayers, clergymen, and the American Jewish Congress against Secretary of Health and Human Services Otis Bowen.[1] The plaintiffs challenged the constitutionality of the Adolescent Family Life Act[2] ("AFLA") and sought declaratory and injunctive relief.[3] The plaintiffs challenged AFLA on the grounds that AFLA violated the establishment clause of the first amendment, both facially and as applied.[4] The plaintiffs based their claim on AFLA's provisions that allow religious organizations to obtain "government funds for, *inter alia*, the counseling and teaching of adolescents on matters related to premarital sexual relations and teenage pregnancy."[5]

Congress passed AFLA in 1981 in response to the "severe adverse health, social, and economic consequences" caused by sexuality, pregnancy, and parenthood among adolescents.[6] Under AFLA, popularly known as the "Chastity Act," federal grants are distributed to eligible organizations for the following purposes: (1) to promote support and guidance to adolescents before they become sexually active;[7] (2) "to promote adoption as an alternative for adolescent parents";[8] (3) to establish a variety of "approaches to the delivery of care services for pregnant adolescents";[9] and (4) to encourage

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1. Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987), *rev'd*, 108 S. Ct. 2562 (1988).
2. 42 U.S.C. §§ 300z to 300z-10 (1982).
3. Kendrick v. Bowen, 657 F. Supp. at 1551.
4. *Id.* The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.
5. Kendrick v. Bowen, 657 F. Supp. at 1551. Several sections in AFLA refer to religious organizations receiving federal funds. *E.g.*, 42 U.S.C. § 300z(a)(8)(B) (1982) ("problems [of adolescent premarital sexual relations] 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"); 42 U.S.C. § 300z(a)(10)(c) (1982) ("services encouraged by the Federal Government . . . should emphasize the provision of support by other family members, religious and charitable organizations, . . ."); 42 U.S.C. § 300z-2(a) (1982) ("Demonstration projects shall . . . make use of support systems such as . . . religious and charitable organizations").
6. 42 U.S.C. § 300z(a)(5) (1982).
7. *Id.* § 300z(b)(1).
8. *Id.* § 300z(b)(2).
9. *Id.* § 300z(b)(3).

and support research and demonstration projects[10] "concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing."[11]

Congress intended that religious organizations be the direct recipients of federal funds, and in fact, AFLA expressly mentions the role of religious organizations in four different sections of the statute.[12] The plaintiffs claimed that under AFLA, a substantial amount of federal tax dollars were being paid, both directly and indirectly, to religious organizations. These organizations used the funds to teach government-approved religious doctrines on premarital sex and family life values, and to provide care services to pregnant adolescents.[13]

II. District Court Analysis

The United States District Court for the District of Columbia found the statute unconstitutional on its face and as applied.[14] The district court applied the tripartite test set forth in *Lemon v. Kurtzman*[15] to evaluate AFLA.[16] To withstand scrutiny under the *Lemon* test a statute: (1) must have a valid secular purpose; (2) must not have the primary effect of advancing or inhibiting religion; and (3) must not foster excessive entanglement between government and religion.[17]

The district court examined the first prong of the *Lemon* test and concluded that AFLA's purpose of solving problems caused by teenage pregnancy and premarital sexual relations was a valid secular purpose.[18] The district court emphasized the holding of *Lynch v. Donnelly*[19] and recognized

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10. The term "demonstration projects" is not defined by AFLA. The Act, however, refers to "demonstration projects" extensively in sections 300z-2 and 300z-3. 42 U.S.C. §§ 300z-2, -3 (1982). "Demonstration projects" appear to relate to an expression or display of care services, prevention services, or a combination of both. *See id.* § 300z-2(b) (1982).

11. *Id.* § 300z(b)(4)-(6) (1982). AFLA also lists several "necessary" services grantees could provide, including pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal care, and educational services relating to family life and problems associated with adolescent premarital sexual relations. *Id.* § 300z-1(a)(4) (1982).

12. *Id.* §§ 300z(a)(8)(B), 300z(a)(10)(C), 300z-2(a), 300z-5(a)(21)(B) (1982).

13. Kendrick v. Bowen, 657 F. Supp. at 1564-65. Plaintiffs prepared a three-volume, four hundred-page "Statement of Undisputed Material Facts," which listed AFLA grantees and subgrantees and revealed their affiliations with a religious denomination. *Id.* at 1564 n.14.

14. Kendrick v. Bowen, 657 F. Supp. at 1570.

15. Lemon v. Kurtzman, 403 U.S. 602 (1971). *See infra* note 44 and accompanying text.

16. Kendrick v. Bowen, 657 F. Supp. at 1556-71. The court first disposed of the issue of standing. *Id.* at 1554-56. The court held that the federal taxpayers had standing to bring the constitutional challenge. *Id.* at 1554-56. The Supreme Court affirmed the standing issue. Bowen v. Kendrick, 108 S. Ct. 2562, 2579-80 (1988).

17. Lemon v. Kurtzman, 403 U.S. at 612-13. *See infra* note 44 and accompanying text.

18. Kendrick v. Bowen, 657 F. Supp. at 1558-59.

19. Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (a display of a creche sponsored by the city to celebrate the Christmas holiday and to depict the origins of that holiday were found to

that courts may invalidate legislation "on the ground that it lacks a valid secular purpose only when the statute or activity involved is motivated *wholly* by religious considerations."[20]

AFLA funds were "intended to alleviate the causes and consequences" of teenage pregnancy and premarital sexual relations.[21] Congress passed AFLA to remedy these problems, which it found "very damaging to society, particularly to adolescents."[22] Merely because AFLA "coincid[ed] or conflict[ed] with religious tenets [did] not transform [it] into a statute of sectarian purposes motivated *wholly* by religious considerations."[23] The court found that AFLA "was not motivated *wholly* by religious considerations, but has a valid secular purpose" of solving problems caused by teenage pregnancy and premarital sexual relations.[24] The court concluded that AFLA had a valid secular purpose, both facially and as applied.[25]

Second, the district court held that, on its face and as applied, AFLA had the primary effect of advancing religion because it funded religious organizations which taught or counseled on matters based on a religious-inspired curriculum.[26] The court noted that, among other dangers, "the statutory scheme [of AFLA was] fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction [was] directed."[27] The court found that "*this possibility alone amount[ed] to an impermissible advancement of religion.*"[28]

Third, the district court invalidated AFLA because a substantial amount of government monitoring would be necessary to prevent religious affiliated grantees from advancing religion.[29] Government monitoring at such a level would necessarily rise to the level of "excessive entanglement."[30] The court was concerned that even the best-intentioned grantees who offered teaching and counseling would be unable to segregate the religious from the secular without reaching an impermissible entanglement between church and state.[31] The religious nature of those groups funded by AFLA made them a "powerful vehicle for transmitting religion."[32]

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be legitimate secular purposes).

20. Kendrick v. Bowen, 657 F. Supp. at 1558 (emphasis in original).
21. *Id.*
22. *Id.*
23. *Id.* at 1559 (emphasis in original).
24. *Id.* at 1558-59 (emphasis in original).
25. *Id.*
26. *Id.* at 1562-67.
27. *Id.* at 1563.
28. *Id.* (emphasis in original) (citing School Dist. v. Ball, 105 S. Ct. 3216, 3225 (1985)).
29. *Id.* at 1567-68.
30. *Id.* at 1567. *See infra* notes 91-100 and accompanying text.
31. *Id.* at 1568.
32. *Id.*

Although AFLA had a valid secular purpose of solving problems caused by teenage pregnancy and premarital sexual relations, the district court reluctantly[33] held that AFLA, both on its face and as applied, had a primary effect of advancing religion, which violated the establishment clause.[34] The district court also found AFLA unconstitutional because the degree of government monitoring necessary to prevent grantees from advancing religion while educating adolescents would rise to a level of excessive entanglement between government and religion.[35]

On May 15, 1987, the defendant docketed an appeal[36] in the United States Supreme Court.[37] In a 5-4 decision,[38] the United States Supreme Court *held*, reversed and remanded.[39] The Court found that, on its face, AFLA does not have a primary effect of advancing religion, even though the Act provides for grants to religious organizations without expressly prohibiting the use of funds for religious purposes.[40] Further, the Court found that AFLA does not create excessive entanglement of church and state and thus does not, on its face, violate the establishment clause of the first amend-

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33. District Judge Richey did not treat lightly his obligation to assess prudently the Act's constitutionality. He began the opinion:

> No judge enjoys deciding a constitutional challenge to a United States statute. Because federal laws are enacted by Congress and approved by the Chief Executive, courts rightly employ a variety of doctrines in order to avoid overruling our co-equal branches of government. In deference to the considered judgments of the other branches, a court must strive, if possible, to avoid the constitutional issue altogether . . . . As this case raises only constitutional issues, however, the [c]ourt does not have that option.

Id. at 1552.

34. *Id.* at 1551.

35. *Id.*

36. The defendants docketed their appeal pursuant to 28 U.S.C. § 1252 (1982), which provides for direct appeal in cases in which an Act of Congress has been held unconstitutional at the district court level. 28 U.S.C. § 1252 provides:

> Any party may appeal to the Supreme Court from [a] . . . final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party . . . .

28 U.S.C. § 1252 (1982).

37. Brief for Appellant at 8, Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (Nos. 87-253, 87-431, 87-462, 87-775). The Court noted probable jurisdiction in case nos. 87-253, 87-431, and 87-462 and consolidated the cases for argument. *Id.* The parties challenging AFLA consisted of federal taxpayers, Protestant clergy, and the American Jewish Congress. *Id.*

38. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Scalia, and Kennedy joined. Bowen v. Kendrick, 108 S. Ct. 2562, 2565 (1988). Justice O'Connor filed a concurring opinion. Justice Kennedy filed a concurring opinion in which Justice Scalia joined. *Id.* Justice Blackmun filed a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. *Id.*

39. *Id.* at 2581.

40. *Id.* at 2577.

ment.[41] However, the Court remanded the case to the district court for determination of whether AFLA, as applied, has the primary effect of advancing religion.[42] The Supreme Court instructed the lower court to determine whether AFLA grantees are permitted to use materials that have an expressly religious content or are designed to implant the views of a particular religious faith.[43]

III. Supreme Court Analysis

The Supreme Court analyzed the case by reapplying the three-prong test articulated in *Lemon v. Kurtzman*.[44] The Court in *Lemon* applied three factors in analyzing the validity of a statute.[45] Under the *Lemon* standard, a statute is constitutional if: (1) the statute has a secular legislative purpose; (2) the statute's primary effect is one that neither advances or inhibits religion; and (3) the statute does not foster an excessive entanglement between church and state.[46]

A. *Secular Purpose?*

The Supreme Court held that "AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood."[47] The Court agreed with the district court's conclusion that AFLA served a legitimate secular purpose "in helping adolescent boys and

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41. *Id.* at 2579.
42. *Id.* at 2581.
43. *Id.*
44. Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court in *Lemon* found the Rhode Island Salary Supplement Act (Salary Act) unconstitutional under the establishment clause of the first amendment. *Id.* The Salary Act provided a 15% salary supplement to elementary teachers in nonpublic schools who taught only courses offered in public schools. *Id.* at 607. The Court held that the Act caused impermissible entanglement between state and church in several respects. *Id.* at 615-22.

First, the Court in *Lemon* recognized that government funds were authorized to primarily advance religion. *Id.* at 615-20. Religion was primarily advanced by allowing federally-supported teachers, under religious control and discipline, to instruct children of impressionable age. *Id.* Such religious advancement required continuing state surveillance to ensure that the sectarian school teachers obeyed statutory restrictions and otherwise respected the first amendment. *Id.* at 619. Secondly, the state would have to supervise nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education. *Id.* at 621-22. Further, the government distributed funds on a post-audit basis rather than by a cash grant program, reserving the power to inspect financial records of church-related schools, which created an intimate and continuing relationship between church and state. *Id.* Overall, the Act required a high degree of monitoring by the state which inevitably led to excessive entanglement between church and state. *Id.*

45. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971).
46. *Id.* at 612-13.
47. Bowen v. Kendrick, 108 S. Ct. at 2571.

girls understand the implications of premarital sexual relations, pregnancy, and parenthood."[48]

The Court noted that although Congress, in amending Title VI[49] (AFLA's predecessor) with its adoption of the AFLA, increased the role of religious organizations, AFLA also enlisted the aid of family members, charitable organizations, voluntary associations, and other groups in the private sector.[50] The expansion of the statute merely reflected the legitimate goal of increasing broad-based community involvement in adolescent support services and education.[51] The Supreme Court found these to be legitimate secular concerns.[52]

B. *Primary Effect of Advancing or Inhibiting Religion?*

Upon reaching the conclusion that AFLA reflected legitimate secular purposes, the Court turned to the more difficult question of determining whether the primary effect of the challenged statute was to advance or inhibit religion.[53] Congress recognized the importance that religious organizations could play in resolving certain secular problems, particularly by influencing moral values, family life, and parental-child relations.[54] The Court, however, viewed this religious influence as "at most incidental and remote."[55]

The Court relied on *Committee for Public Education & Religious Liberty v. Nyquist*,[56] *Lynch v. Donnelly*,[57] and *Estate of Thornton v. Caldor, Inc.*[58] in holding that the effect of advancing religion was at most incidental and remote.[59] The Court in *Nyquist* held that "not every law that confers an indirect, remote, or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid."[60] The Court discussed at length Congress' intent to involve religious organizations and the impact these organizations would have on adolescent values.[61] Yet the Court failed to clarify how the advancement of religion was merely "incidental and remote in

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48. *Id.* (citing S. Rep. No. 161, 97th Cong., 1st Sess. 2, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396).

49. Title VI (formally 42 U.S.C. §§ 300a-21 to 300a-28) was repealed in 1981. Pub. L. 97-35, Title IX, § 955(b), Title XXI, § 2193(f), 95 Stat. 592, 828 (1981).

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

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 2573.

55. *Id.*

56. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

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

58. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

59. Bowen v. Kendrick, 108 S. Ct. at 2573.

60. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 771.

61. Bowen v. Kendrick, 108 S. Ct. at 2572-73.

effect."[62]

The dissent, on the other hand, recognized that AFLA advanced religion more than just incidentally and remotely.[63] Justice Blackmun noted that the government paid funds to "religious organizations to teach and counsel impressionable adolescents on a highly sensitive subject of considerable religious significance."[64] The teachers often directed their counseling on the premises of a church or parochial school and made no attempt to remove religious symbols from the sites.[65] The majority assumed that AFLA participants were not "pervasively sectarian."[66] Therefore, AFLA grantees were presumed likely to comply with statutory and constitutional mandates, and the Court dismissed as insubstantial the risk that indoctrination would occur through counseling.[67]

Blackmun found it "nothing less than remarkable" that religious organizations could teach and counsel youngsters on matters of serious religious significance, yet abstain from any reference to religion.[68] The dissent quoted the district court:

> To presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic . . . . Even if it were possible, government would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine. Moreover, that statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed.[69]

Similarly, the Court in *Lemon* recognized that the advancing of religion may occur without conscious effort on the part of a religious organization:[70]

> We need not and do not assume that teachers in parochial school will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between

62. *Id.* at 2588 (Blackmun, J., dissenting).
63. *See id.* at 2587-95 (Blackmun, J., dissenting).
64. *Id.* at 2588 (Blackmun, J., dissenting).
65. *Id.* (Blackmun, J., dissenting).
66. *Id.* (Blackmun, J., dissenting).
67. *Id.* at 2575-76.
68. *Id.* at 2588-89 (Blackmun, J., dissenting).
69. *Id.* (Blackmun, J., dissenting) (citing Kendrick v. Bowen, 657 F. Supp. at 1563).
70. *See* Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971).

secular teaching and religious doctrine.[71]

Thus, great difficulty arises under AFLA in asking even the best-intentioned individuals in a teaching or counseling position to make a total separation between secular teaching and religious doctrine. Justice Blackmun further pointed out the inconsistencies of the majority holding. He cited to cases in which the Court (1) upheld statutes providing public funds for parochial schools' purchases of pre-approved public textbooks,[72] and (2) struck down statutes which provided similar funds for specifically designed or selected texts not previously approved for secular use.[73] Blackmun noted that AFLA did not require pre-approval of school materials.[74] The teaching and counseling materials that "may be purchased, developed, or disseminated with AFLA funding are in no way restricted to those already selected and approved for use in secular contexts."[75]

Justice Blackmun cited to the district court record with reference to St. Ann's, a home for unmarried pregnant teenagers, owned by the Archdiocese of Washington.[76] By using AFLA funds, St. Ann's purchased books containing Catholic doctrine on chastity, masturbation, homosexuality, and abortion, and distributed the books to class participants.[77] The materials contained explicit theological and religious references including a reference to a film entitled *Everyday Miracle*, "depicting the Miracle of the process of human reproduction as a gift from God."[78] Another AFLA participant's program was "designed, *inter alia*, 'to communicate the Catholic [diocese], Mormon (Church of Jesus Christ of Latter Day Saints) and Young Buddhist Association's approaches to sex education.' "[79]

The dissent argued that the majority unrealistically expressed confidence that administrators of religious organizations would not breach statutory proscriptions.[80] "To presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic."[81] The dissent viewed the indoctrination of religion as inherent in the very nature of the educational services provided through the use of AFLA funds.

The majority and dissenting opinions of the Court analyzed the "ef-

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71. *Id.*

72. Bowen v. Kendrick, 108 S. Ct. at 2587 (Blackmun, J., dissenting) (citing Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975)).

73. *Id.* (Blackmun, J., dissenting) (citing Levitt v. Community for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971)).

74. Bowen v. Kendrick, 108 S. Ct. at 2588 (Blackmun, J., dissenting).

75. *Id.* (Blackmun, J., dissenting).

76. *Id.* at 2588 n.7 (Blackmun, J., dissenting).

77. *Id.* (Blackmun, J., dissenting).

78. *Id.* (Blackmun, J., dissenting).

79. *Id.* (Blackmun, J., dissenting).

80. *Id.* at 2588 (Blackmun, J., dissenting).

81. *Id.* (Blackmun, J., dissenting) (citing Kendrick v. Bowen, 657 F. Supp. at 1563).

fects" prong of the *Lemon* test to different degrees. Although the entire Court agreed that AFLA had a valid secular purpose, only the dissent broke down categories of secular purposes and examined the effect religious organizations would have on those purposes. For example, the majority cited *Bradfield v. Roberts*,[82] which held that the federal funds advanced for the construction of a hospital were constitutionally valid, despite the fact that the hospital was "conducted under the auspices of the Roman Catholic Church."[83] The giving of federal funds to the hospital "was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was 'wholly immaterial.' "[84]

As the dissent pointed out, the statute examined in *Bradfield* can clearly be distinguished from AFLA. The purpose of the funds in *Bradfield* was wholly secular in that the funds were limited to the opening and administration of a hospital in the city of Washington for the care of sick and invalid persons.[85] Distribution of AFLA funds go beyond advancing a purely secular purpose, because the risk of religious advancement exists by merely accomplishing the promotion of moral values.[86] Justice Blackmun explained:

> There is a very real and important difference between running a soup kitchen or a hospital [in a religious setting], and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, 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.[87]

The dissent distinguished those situations in which the religious doctrine played little or no role in a public program from those situations in which the religious doctrine was at the core of subsidized activity.[88] In the former, religion "merely explains why the individual or organization has chosen to get involved in a publicly funded program."[89] In the latter, religion "affects the manner in which the service is dispensed" and thus, has a primary effect of advancing religion.[90]

C. *Excessive Governmental Entanglement?*

The majority concluded its analysis by examining the third prong of the

82. Bradfield v. Roberts, 175 U.S. 291 (1899).
83. Bowen v. Kendrick, 108 S. Ct. at 2574 (citing Bradfield v. Roberts, 175 U.S. at 298).
84. *Id.*
85. *Id.* at 2591 n.11 (Blackmun, J., dissenting).
86. *Id.* at 2590 (Blackmun, J., dissenting).
87. *Id.* at 2521 (Blackmun, J., dissenting).
88. *Id.* (Blackmun, J., dissenting).
89. *Id.* (Blackmun, J., dissenting).
90. *Id.* (Blackmun, J., dissenting).

Lemon test—whether AFLA led to " 'an excessive government entanglement with religion.' "[91] The majority recognized the necessity to monitor AFLA grants to ensure that public money was spent as Congress intended and in a way which comported with the establishment clause.[92] The Court did not view AFLA grantees as "pervasively sectarian"[93] in the same sense as the Court had held parochial schools to be pervasively sectarian.[94] The Court saw no reason to "fear that the less intensive monitoring involved here [would] cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees."[95] In the majority's view, the AFLA grant did not amount to excessive entanglement between church and state.[96]

The dissent disagreed with the majority, and concluded that it was evident that AFLA provided an "unprecedented degree of entanglement between Church and State."[97] The dissent found that intensive monitoring would be necessary.[98] Justice Blackmun did not accept the notion that AFLA grantees were sufficiently different from parochial schools.[99] The dissent referred to the *Lemon* case in discussing excessive monitoring:

> [I]n *Lemon*, it was not solely the fact that teachers performed their duties within the four walls of the parochial school that rendered monitoring difficult and, in the end, unconstitutional. It seems inherent in the pedagogical function that there will be disagreements about what is or is not "religious" and which will require an intolerable degree of government intrusion and censorship . . . . "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."[100]

Thus, a greater amount of governmental surveillance would be required to

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91. Lemon v. Kurtzman, 403 U.S. at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The district court in *Kendrick* cited *Lemon* and set forth the following test in determining whether a statute fostered excessive entanglement: "1) the character and purpose of the institutions benefitted; 2) the nature of the aid; and 3) the nature of the relationship between the governmental and religious organization." Kendrick v. Bowen, 657 F. Supp. at 1567 (citing Lemon v. Kurtzman, 403 U.S. at 614-15).

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

93. *See* Aguilar v. Felton, 473 U.S. 402, 411 (1985). The Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were pervasively sectarian and had as a substantial purpose the inculcation of religious values. *Id.* at 413.

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

95. *Id.*

96. *Id.*

97. *Id.* at 2595 (Blackmun, J., dissenting).

98. *Id.* (Blackmun, J., dissenting).

99. *Id.* (Blackmun, J., dissenting).

100. *Id.* at 2596 (Blackmun, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

guarantee that teachers and counselors did not subject young minds to religious indoctrination. Since a greater amount of surveillance would be required, excessive entanglement between church and state would inevitably inhere.

D. *Remanded to Determine "As Applied" Challenge*

The majority held AFLA constitutionally valid on its face, but decided that on the merits of the "as applied" challenge the case should be remanded to the district court. The majority decided that the district court inadequately discussed the manner in which the statute should be administered.[101] The district court was instructed to consider "whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.' "[102] The Court deemed it relevant that a determination be made as to whether AFLA grantees were permitted to use materials that have an explicitly religious content or are designed to inculcate the views of a particular faith.[103]

While the district court did not engage in an exhaustive recitation of the record, the dissent noted the substantial amount of references made to representative portions of the record revealing the extent to which AFLA, as applied, advanced religion.[104] The district court record revealed that AFLA " 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, or permitted the use of federal tax dollars for education and counseling that amount[ed] to the teaching of religion."[105] To this end, Justice Blackmun found that of "approximately $53.5 million in AFLA funding, over $10 million went to the 13 organizations specifically cited in the District Court's opinion for constitutional violations."[106] Justice Blackmun found that those figures demonstrated substantial constitutionally-suspect funding through AFLA, rendering the majority's decision to remand unrealistic and unwarranted.[107]

According to the dissent, the majority mishandled its decision in remanding the "as applied" challenge. The Court risked "misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the AFLA."[108] The more effective way to review establishment clause challenges was to "look to the type of relief prayed for by the plaintiffs, and the force of the arguments and supporting evidence

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101. *Id.* at 2580.
102. *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
103. *Id.* at 2581.
104. *Id.* at 2584-85 (Blackmun, J., dissenting).
105. *Id.* (Blackmun, J., dissenting) (quoting Kendrick v. Bowen, 657 F. Supp. at 1564).
106. *Id.* at 2585 n.3 (Blackmun, J., dissenting). Blackmun examined the cumulative funding figures for AFLA for the fiscal years 1982-1986. *Id.*
107. *Id.* (Blackmun, J., dissenting).
108. *Id.* at 2584 (Blackmun, J., dissenting).

they marshal."[109]

Justice Blackmun noted that because the case had been litigated primarily as a broad challenge to the statutory scheme as a whole, and not just against a few individuals, the Court should have granted declaratory and injunctive relief as to the entire statute.[110] The dissent noted that "[t]he thousands of pages of depositions, affidavits, and documentary evidence were not intended to demonstrate merely that particular grantees should not receive further funding . . . . This record was designed to show that the AFLA had been interpreted and implemented by the Government in a manner that was clearly unconstitutional . . . ."[111] Blackmun stated that in effect, the majority ignored the district court's specifically cited incidents of impermissible behavior of AFLA grantees and remanded the case because the district court "inadequately" made "references only to representative portions" of the record.[112]

The district court had set forth a number of situations where AFLA funds had directly and immediately advanced religion or permitted the use of federal tax dollars for education and counseling that amounted to teaching religion.[113] For example, St. Margaret's Hospital was an AFLA grantee, self-described as a " 'Christian institution' committed to acting 'in harmony with the teaching of the Catholic Church.' "[114] "At least one AFLA-funded employee of St. Margaret's was told that she must follow the directives set forth in 'Ethical and Religious Directives of Catholic Facilities.' "[115]

St. Ann's Infant and Maternity Home, another AFLA grantee, was affiliated with the Catholic Archdiocese of Washington.[116] St. Ann's staff could not counsel or refer patients for abortions, nor could they encourage any method of birth control not permitted by Catholic doctrine.[117] Similarly, among the purposes listed in the articles of incorporation of the Lutheran Family Services was the purpose " '[t]o promote the general welfare of children, families and individuals within the realistic resources of the corporation, . . . and *the teachings of the Lutheran Church.*' "[118] The district court cited several other instances of specific organizations receiving AFLA grants which in some respect or another advanced religious dogma.[119] It appears that on remand these same facts will be considered by the district court.

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109. *Id.* (Blackmun, J., dissenting).
110. *Id.* (Blackmun, J., dissenting).
111. *Id.* (Blackmun, J., dissenting).
112. *Id.* (Blackmun, J., dissenting).
113. Kendrick v. Bowen, 657 F. Supp. at 1564-66.
114. *Id.* at 1564 (citing Plaintiffs' Facts, Vol. 3, St. Margaret's, ¶ 7). *See supra* note 13.
115. *Id.* at 1564-65.
116. *Id.* at 1565 (citing Plaintiffs' Facts, Vol. 1, St. Ann's, ¶¶ 11, 33). *See supra* note 13.
117. *Id.*
118. *Id.* (citing Plaintiffs' Facts, Vol. 1, Lutheran Family Services, ¶ 3) (emphasis by the court). *See supra* note 13.
119. *Id.* at 1565-66.

Once again the district court must review the thousands of pages of depositions, affidavits, and documentary evidence.[120]

IV. Conclusion

If AFLA is upheld, teaching and counseling will continue on matters inseparable from religious dogma. Religious groups' fundamental underlying beliefs cannot realistically be separated from the counseling and teaching services provided by AFLA grantees. " '[S]uch sensitive and intimate material cannot be presented without touching on . . . religious beliefs.' "[121] As the dissent pointed out, "the answer to a teenager's question, 'Why shouldn't I have an abortion?' or 'Why shouldn't I use barrier contraceptives?' will undoubtedly be different from an answer based solely on secular considerations."[122]

The target audience of AFLA is composed of children, some of whom may be facing major hurdles in their lives with respect to premarital sex, pregnancy, and difficult family-life situations. These impressionable young minds should not be subjected to the direction of religious authorities sponsored by the government. The delicate subject matter, coupled with an impressionable audience, promotes the risk of AFLA conveying a message of government endorsement of religion.

Coreen K. Sweeney

120. Bowen v. Kendrick, 108 S. Ct. at 2584.
121. *Id.* at 2590 n.9 (quoting the record).
122. *Id.* at 2591 (Blackmun, J., dissenting) (footnote omitted).