## Notes

# THE TRANSFIGURATION OF THE *LEMON* TEST: CHURCH AND STATE REIGN SUPREME IN *BOWEN V. KENDRICK*

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## INTRODUCTION

The establishment clause of the first amendment to the United States Constitution prohibits Congress from making any law respecting the establishment of religion.[1] Since 1971 the three-part test articulated by Chief Justice Burger in *Lemon v. Kurtzman*[2] has guided the Court's analysis of issues involving the establishment clause almost exclusively.[3] Under this test, the Court will uphold the constitutionality of a governmental enactment only if it meets all three of the following criteria: 1) the enactment or action has a secular legislative purpose; 2) its principal or primary effect neither advances nor hinders religion; and 3) it does not create an excessive government entanglement with religion.[4]

This Note begins with a discussion of *Lemon* and the three-part test it prescribes for resolving establishment clause controversies. Next, this Note traces the development of each part of the *Lemon* test up to *Bowen v. Kendrick*.[5] Finally, it reveals the Court's departure from *Lemon* and seeks to clarify the effects *Bowen* will have on future establishment clause controversies.

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1. U.S. CONST. amend. I, provides that "Congress shall make no law respecting establishment of religion . . . ." In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court applied this prohibition to the states.

2. 403 U.S. 602 (1971).

3. In Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987), Justice Brennan noted that "[t]he *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*, 463 U.S. 783 [ ] (1983) where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the state did not violate the Establishment Clause. The Court based its conclusion in that case on the historic acceptance of the practice . . . ." In Lynch v. Donnelly, 465 U.S. 668, 679 (1984), Chief Justice Burger said the Court was unwilling "to be confined to any single test or criterion in this sensitive area." The Court went on to apply the *Lemon* test, however, concentrating on the secular purpose of the Christmas Creche display in question.

4. 403 U.S. at 612-13.

5. 487 U.S. 589 (1988).

## THE *LEMON* TEST: ITS ORIGINS AND SPECIES

*Lemon* addressed two cases joined for review. The first case involved a challenge to a Rhode Island statute allowing the state to subsidize parochial teachers' salaries if they taught only secular subjects using secular books.[6] The Rhode Island legislature passed the statute after finding that non-public school salaries could not attract quality teachers and therefore jeopardized the education of non-public school students.[7] The statute mandated that teachers receiving such subsidies could only teach secular subjects with the materials public schools used.[8] Further, the law strictly prohibited the teaching of religion by a teacher who received any supplemental salary.[9]

Citizens and taxpayers brought suit against the state asking the federal district court to declare the statute unconstitutional and to enjoin its operation.[10] The district court found the following:

1) 25% of the state's student population attended non-public schools;
2) 95% of these students attended Roman Catholic schools;
3) all of the 250 teachers applying for aid under the statute were employed by Roman Catholic schools; and
4) the Catholic parochial school system was an integral part of the Catholic Church's religious mission.[11]

The Rhode Island District Court struck down the statute, holding that it fostered "excessive entanglement" between government and religion.[12] The court's analysis turned on a prediction that significant state subsidies would inevitably produce state limitations on the freedom of denominational schools.[13] These limitations would occur as a result of schools adjusting the content of their curriculum in order to meet the statute's secular standards.[14] The court concluded that such government interference in parochial schools subverts the first amendment.[15]

The second case in *Lemon* challenged a Pennsylvania statute similar to Rhode Island's.[16] In Pennsylvania, the state reimbursed non-public schools for their expenses in providing secular educational services.[17] The federal district court sitting as a three judge panel convened and found:

1) over 20% of the state's student population attended non-public schools;
2) 96% of those students attended church-related schools, predominantly Roman Catholic; and

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6. 403 U.S.at 607.
7. *Id.*
8. *Id.* at 608.
9. *Id.*
10. DiCenso v. Robinson, 316 F. Supp. 112 (D. R.I. 1970).
11. *Lemon*, 403 U.S. at 608-09.
12. *Id.*
13. *DiCenso*, 316 F. Supp. at 121.
14. *Id.*
15. *Id.* at 122.
16. *Lemon*, 403 U.S. at 609.
17. *Id.*

3) over $5 million annually had been flowing to such schools since the statute's enactment.[18]

The Pennsylvania district court upheld the statute.[19] In granting defense motions to dismiss for failure to state a claim, the court reasoned that because the law in question was neutral "towards religion and among religions," it did not violate the establishment clause.[20]

The Supreme Court considered appeals of both the Rhode Island and Pennsylvania decisions under the name of the Pennsylvania case, *Lemon v. Kurtzman*.[21] Chief Justice Burger, writing for the majority, began his analysis of the constitutional issues presented in these cases by gathering the criteria the Court had previously used in establishment clause inquiry.[22] The standards he gleaned from the cases constitute the three prongs of the *Lemon* test: "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 government entanglement with religion.'"[23]

The *Lemon* Court traced the genealogy of the first two prongs of its test to *Board of Education v. Allen*.[24] The statute under challenge in *Allen* was enacted by the New York legislature and required the state to loan free school texts to all children.[25] Taxpayers challenged the loan of textbooks to parochial school students alleging that the activity aided the sectarian goals of religious schools.[26] Quoting *Abington School District v. Schempp*,[27] the *Allen* Court held, "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."[28] The *Schempp* Court's rationale for this rule was to avoid concert of action or dependency between the state and religion.[29] Applying the purpose and effect test to the facts of its case, the *Allen* Court simply accepted

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18. *Id.* at 610.
19. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).
20. *Id.* at 48.
21. 403 U.S. 602 (1971).
22. *Id.* at 612.
23. *Id.* at 612-13.
24. 392 U.S. 236 (1968).
25. *Id.* at 243.
26. *Id.* at 245.
27. 374 U.S. 203 (1963). The *Schempp* Court defined the test in this way:
> 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.
28. 392 U.S. at 243.
29. 374 U.S. at 222. The Court stated:
> The wholesome "neutrality" of which the Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.

It is this very fusion that Chief Justice Rehnquist urges in Bowen v. Kendrick, 487 U.S. 589, 108 S.Ct. 2562 (1988). *See infra* note 115 and accompanying text.

the express purpose of the New York legislature to further the educational opportunities available to its young and upheld the statute.[30]

The *Lemon* entanglement prong originated in *Walz v. Tax Commission*.[31] In this challenge to the tax-exempt status of church property in New York, the *Walz* Court held that the elimination of church tax-exempt status would expand the involvement of government in church matters by giving rise to government tax valuation of church property, by subjecting churches to tax liens, and by including churches in the whole machine of the legal process.[32] The rationale for prohibiting such "excessive entanglement" between church and state was to protect sectarian concerns from government encroachment.[33]

Applying its three-part test to the two appeals in *Lemon*, the Court simply accepted the stated legislative purposes of the Rhode Island and Pennsylvania statutes.[34] Hence, *Lemon's* first prong was satisfied. Because its decision turned on the excessive entanglement between government and religion that each statute would cause, the Court ignored the effects prong of the *Lemon* test, giving little direction on how to apply it.[35]

The *Lemon* Court struck down both the Rhode Island statute and the Pennsylvania statute because of problems the Court anticipated in the State monitoring sectarian programs.[36] The Court presumed the statutes would require comprehensive and continuous state surveillance to ensure that the subsidized teachers obeyed the statutes' teaching restrictions.[37] The Court concluded that such surveillance injects too much government into the parochial schools which were the overwhelming beneficiaries of the government aid.[38] Also, this type of government intrusion would inevitably lead to unacceptable government encroachment on the schools' sectarian enterprises. The Court envisioned sectarian schools adjusting their curriculum to meet the statute's funding requirements.[39] In its analysis, the *Lemon* Court framed the test for subsequent establishment clause inquiry,[40] but provided little guidance to its interpretation. However, further development and direction from the Court on *Lemon's* proper application occurred quickly.

## THE EVOLUTION OF THE *LEMON* TEST

### *The Secular Purpose Requirement: Any Avowed Purpose Will Do*

The *Lemon* secular purpose prong inquires into a statute's language to determine legislative intent. This analysis corresponds to "facial" review in other constitutional questions. The overbreadth doctrine in the area of freedom

30. 392 U.S. at 243.
31. 397 U.S. 664 (1970). The *Walz* Court held that a statute must not foster "an excessive government entanglement with religion." *Id.* at 674. But the Court recognized that "[t]he test is inescapably one of degree." *Id.*
32. *Id.*
33. *Id.* at 672-73.
34. 403 U.S. at 613.
35. *Id.*
36. *Id.* at 618, 621.
37. *Id.*
38. *Id.*
39. *Id.* at 620.

of expression best illustrates the Court's use of "facial" analysis. The overbreadth doctrine is the principle that "a governmental purpose to control or prevent activities constitutionally subject [to] regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[41]

In the leading case on overbreadth, *Broadrick v. Oklahoma*,[42] the Court upheld a statute prohibiting civil servants from engaging in certain types of political activity. Justice White, writing for the majority, found that the challengers had standing because "on its face" the statute might cause others not before the court to refrain from constitutionally protected speech or expression.[43] The Court described a "facial" analysis as a determination whether a statute attempting to restrict the freedom of expression represents a legislative judgment that the protected expression involved has to give way to other compelling needs of society.[44] Thus, *Lemon's* secular purpose prong emulates "facial" analysis in seeking out legislative intents and judgments.[45]

The Court rarely uses *Lemon's* first prong to overturn a statute or government enactment.[46] The Court recognizes as valid any plausible statement of a legislature's secular purpose.[47] However, the Court has used the secular purpose test to invalidate government action in three cases.[48]

In *Stone v. Graham*,[49] the plaintiffs challenged a Kentucky law that required posting the Ten Commandments in public schools. The avowed

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40. *See supra* notes 2-3 and accompanying text.
41. NAACP v. Alabama, 377 U.S. 288, 307 (1964).
42. 413 U.S. 601 (1973).
43. Here the Court describes a facial challenge based on an overbreadth claim as "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612.
44. The Court states:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered *legislative judgment* that a particular mode of expression has to give way to other compelling needs of society.

*Id.* at 611-12 (emphasis added).
45. *Id.* at 612. *See infra* notes 151-73 and accompanying text, where the majority in *Bowen* moves this "facial" inquiry into the *Lemon* "effects" prong.
46. In Wolman v. Walter, 433 U.S. 229, 236 (1977), a case in which citizens and taxpayers challenged the constitutionality of an Ohio statute providing aid to students in non-public schools, Justice Blackmun writing for a plurality stated, "[i]n the present case we have no difficulty with the first prong of this three-part test .... *As is usual in our cases*, the analytical difficulty has to do with the effect and entanglement criteria" (emphasis added).
47. *See, e.g.*, Mueller v. Allen, 463 U.S. 387 (1983). This case involved a challenge to the constitutionality of a Minnesota tax provision allowing deductions for tuition, transportation and textbooks for non-public school children. Justice Rehnquist wrote:

> Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.

*Id.* at 394-95 (citations omitted).
48. Hurt, *The Use of Endorsement in Establishment Clause Analysis—The Key to a New Consensus*, 8 MISS. C. L. REV. 1, 5-6 (1987).
49. 449 U.S. 39 (1980).

purpose was to teach the biblical basis of western civilization's legal code.[50] The Court dismissed this purpose as a smoke screen intended to obscure a plainly religious purpose of inducing children to read and perhaps venerate a religious text.[51] Justice Rehnquist's dissent foreshadowed the deference to state legislatures[52] that became the mark of the secular purpose analysis after *Mueller v. Allen*.[53] There, then Justice Rehnquist, writing for the majority, stated that even where an avowed secular purpose overlapped a religious one, such a situation should not render a statute unconstitutional.[54]

The second case rejecting a legislature's stated purpose in this area is *Wallace v. Jaffree*.[55] In *Jaffree*, the Court struck down an Alabama statute calling for a "moment of silence or prayer" in public schools. The Court found the statute had a completely religious purpose because it called for a moment of silence for meditation and prayer, while the statute it was based on had called only for a moment of silence.[56] In her concurring opinion, Justice O'Connor suggested a new standard for the first part of the *Lemon* test: Whether the government's purpose is to endorse religion.[57] Justice O'Connor had mentioned this formulation previously in *Lynch v. Donnelly*.[58] In *Jaffree*, however, she gave it full expression, stating that a test of government endorsement or disapproval gives analytical content to the Court's inquiry into legislative purpose.[59] Under this test, substantial deference is given to the legislature in its statement of purpose.[60]

The third Court opinion using *Lemon*'s first prong to reject a government enactment is *Edwards v. Aguillard*.[61] In this case, Justice Brennan, writing for the majority, quoted Justice O'Connor's formulation of the *Lemon* secular purpose requirement from *Lynch v. Donnelly*.[62] Using the test of whether the government action endorsed or disapproved of religion, the Court considered a Louisiana statute requiring the teaching of creation science whenever evolution was taught in public schools. Because of the close historical connection between creationism and fundamentalist Christian doctrine, the Court held that the statute did not possess a valid secular purpose.[63]

Presently, there is much debate about the status of *Lemon*'s secular purpose prong. At least one commentator suggests that the Court has not yet

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50. *Id.* at 41.
51. *Id.*
52. *Id.* at 43-44 (Rehnquist, J., dissenting). He stated: "This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due."
53. 463 U.S. 388 (1983).
54. *Id.* at 394.
55. 472 U.S. 38 (1985).
56. *Id.* at 57-61.
57. *Id.* at 69 (O'Connor, J., concurring in judgment).
58. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).
59. 472 U.S. at 69.
60. *Id.* at 74-75.
61. 482 U.S. 578 (1987).
62. Justice Brennan accepts Justice O'Connor's formulation wholecloth. "*Lemon*'s first prong focuses on the purpose that animated adoption of the Act. 'The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.' *Lynch v. Donnelly* 465 U.S. 668, 690 (1984)." *Id.* at 585.
63. *Id.* at 596-97.

accepted Justice O'Connor's formulation and that it should not.[64] Others argue that the use of the "no endorsement" test in *Edwards v. Aguillard* indicates the Court has accepted it.[65] In *Bowen v. Kendrick*, Chief Justice Rehnquist refers to the "no endorsement" test, citing *Edwards v. Aguillard* and assumes its acceptance and validity.[66] Consequently, *Lemon*'s first prong now appears to be an inquiry of whether the government's purpose is to endorse religion or disapprove of religion. In the analysis, substantial deference is given to the avowed legislative purpose.[67]

### *The Second Prong of the* Lemon *Test: The Effect of a Government Enactment*

The *Lemon* Court articulates the second requirement of its test in this way: "[a government enactment's] principal or primary effect must be one that neither advances nor inhibits religion . . . ."[68] In *Lemon*, the Court gives no indication of how to proceed in this analysis.[69] Subsequent cases, however, reveal that when the Court uses the *Lemon* "effects" prong, the nature of the inquiry resembles what the Court calls an "as applied" analysis in other constitutional areas.[70]

The Court defined the nature of an "as applied" challenge in the seminal case on discrimination, *Yick Wo v. Hopkins*.[71] There the Court considered a local ordinance prohibiting the operation of a laundry not located in a brick

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64. *See* Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). Smith claims that the approving references by the Supreme Court in *Edwards*, 482 U.S. 578, do not yet amount to an outright adoption of the "no endorsement" test. *Id.* at 275. Smith argues this point in the early part of his article, which is mainly directed at criticism of the "no endorsement" test.

65. *See, e.g.*, Note, Edwards v. Aguillard: *Constitutional Law—The Evolution of Secular Purpose In Establishment Clause Jurisprudence*, 62 TUL. L. REV. 261 (1987), and Note, Lynch v. Donnelly, *Has the Lemon Test Soured?* 19 LOY. L.A.L. REV. 133 at 159-670 (1985) [hereinafter Note, Lynch v. Donnelly].

66. The Chief Justice states: "There simply is no evidence that Congress' 'actual purpose' in passing the AFLA was one of 'endorsing religion.' See *Edwards v. Aguillard*, 482 U.S. at ___, 107 S.Ct. at 2578." 487 U.S. at ___, 108 S.Ct. at 2571.

67. *Jaffree*, 472 U.S. at 74-75. Several commentators have suggested improving Justice O'Connor's formulation. *See, e.g.*, Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551 (1987), in which the author suggests that the "purpose" prong should have two parts. An enactment would have a religious purpose when: 1) the government action is found to have a religious purpose; and 2) when there is a showing that the action meaningfully endangers religious liberties. *Id* at 552. In Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987), the author suggests that the *Lemon* test should be amended to invalidate any law that would not have been adopted if a sectarian purpose had not been considered. *Id.* at 910. In Note, Wallace v. Jaffree *and The Need to Reform Establishment Clause Analysis*, 35 CATH. U.L. REV. 573 (1986), the author would introduce a test asking whether the governmental enactment is coercive on the persons it affects. Such a consideration would question whether there was direct or indirect influence or coercion on an individual to embrace a religious belief or reject one. *Id.* at 591. In Note, Lynch v. Donnelly, *supra* note 65, the author proposes different categories for distinct applications of *Lemon*. These include a category for public schools, non-public schools and status quo (the category into which *Lynch* would fall because the Court decided the case, in part, on the principle that the Christmas creche has long been a fact) and government regulation of religious organizations. *Id.* at 169-77.

68. 403 U.S. at 612.

69. The Court ignored the "effects" part of the test because its analysis turned on the "excessive entanglement" prohibition. *Id.* at 620-22.

70. *See infra* notes 74-107 and accompanying text.

71. 118 U.S. 356 (1886).

building without the consent of the board of supervisors. Though the statute was neutral on its face, Yick Wo alleged that he and over 200 other Chinese launderers were the only applicants denied consent to operate laundries in wooden buildings.[72] The Court held that whatever the intent of the ordinances had been, the state applied them in a manner that denied equal protection of the laws.[73] The "as applied" analysis concerns a statute's actual operation in the real world and has little to do with the statute's stated purpose or facial integrity.

The Court has used the *Lemon* test's second prong to decide many cases. For example, the Court found no advancement of religion in *Tilton v. Richardson*,[74] where taxpayers challenged a federal statute allowing religious colleges to use federal money for capital projects. The statute in question imposed restrictions on the sectarian use of facilities built with such money. After refusing to assume that religion necessarily permeated secular subjects at a church-related college, the Court made an extensive review of the record to determine the statute's actual operation. Observing that the statute funded only secular functions and buildings at the college, the Court applied *Lemon*'s second prong and upheld the statute.[75]

Similarly, in *Hunt v. McNair*,[76] the Court relied on the lack of a record in upholding a statute that allowed the sale of government bonds to fund capital projects at sectarian colleges. Because there was no record proving the statute operated to advance religion, the Court held that the government aid at issue was not an instance of the state supporting religion.[77]

In another case involving state aid to colleges, *Roemer v. Board of Public Works of Maryland*,[78] the Court upheld a statute allowing state grants to any college meeting certain minimum criteria.[79] Grants could go to sectarian colleges if they awarded more than theological or seminary degrees and used the funds only for non-sectarian purposes.[80] The Court found that the statute did not have the primary effect of advancing religion. In its decision, the Court depended heavily on the fact that the colleges receiving the grants were not "pervasively sectarian" because they were autonomous from the Roman

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72. *Id.* at 374.
73. *Id.*
74. 403 U.S. 672 (1971).
75. The Court stated:

> This record, similarly, provides no basis for any such assumption here. Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in either of these facilities and that no restrictions were imposed by the institutions on the books that they acquired. There is no evidence to the contrary. The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their pronunciation in modern foreign languages—a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College.

*Id.* at 681.
76. 413 U.S. 734 (1973).
77. *Id.* at 743-44.
78. 426 U.S. 736 (1976).
79. *Id.* at 740.
80. *Id.*

Catholic Church and taught non-theological courses.[81] The Court also applied the facts developed in the district court to find that the statute only allowed funding for "the secular side" of the colleges.[82]

The Court also used the *Lemon* "effects" prong to uphold government action in *Witters v. Washington Department of Services for the Blind.*[83] In *Witters*, the Court found that funds provided by a Washington program to aid blind persons in vocational education passed the *Lemon* test even where the student used the money for *seminary* training. The Court did not mention legislative intent, but relied on the actual operation of the Washington statute.[84] The record showed that no aid went directly to a sectarian institution; that benefits were neutrally available to every blind student; and that if Witters received his aid, only an insignificant amount of the Washington program's aid to help the blind would go sectarian institutions.[85]

The Court has also has used the *Lemon* "effects" prong to overturn government enactments. In *Meek v. Pittenger*,[86] a group of taxpayers challenged a Pennsylvania statute granting funds for the benefit of children in non-public schools. The Court struck down certain types of aid based on a finding that 75 percent of the Pennsylvania statute's beneficiaries were church-related institutions.[87] Because the statute created a situation in which most of the government-provided aid earmarked for non-public school children went to pervasively sectarian schools, the Court declared it unconstitutional as an impermissible establishment of religion.[88]

In *Committee for Public Education and Religious Liberty v. Nyquist*,[89] taxpayers challenged a New York Education and Tax law providing maintenance and repair money to non-public schools and tuition reimbursement and tax breaks for parents paying tuition at non-public schools.[90] In the absence of a record proving that aid sanctioned by the New York law was going to sectarian institutions, the Court looked elsewhere for evidence of how the statute operated. The Court turned to *Committee for Public Education and Religious Liberty v. Levitt's*,[91] a case involving a similar challenge to the same New York statute. *Levitt's* record showed that funds under the statute went to primarily sectarian institutions.[92] Consequently, the Court held the New York

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81. *Id.* at 755-56.
82. *Id.* at 759.
83. 474 U.S. 481 (1986).
84. The Court stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible 'direct subsidy.'

*Id.* at 487.
85. *Id.* at 486-88.
86. 421 U.S. 349 (1975).
87. *Id.* at 364.
88. *Id.* at 366.
89. 413 U.S. 756 (1973).
90. *Id.* at 762-64.
91. 342 F. Supp. 439, 440-44 (S.D.N.Y. 1972), *aff'd*, 413 U.S. 756 (1973).
92. *Id.*

educational and tax provision unconstitutional because it produced the impermissible effect of subsidizing parochial schools.[93]

Similarly, in *Wolman v. Walter*, citizens and taxpayers challenged the constitutionality of an Ohio statute allowing various types of funding to non-public schools.[94] Permitting certain types of aid, while denying other types, the Court noted that its constitutional analysis rested on the aid's specific function in parochial schools. For example, in declaring the provision of instructional materials and equipment to pupils and parents unconstitutional, the Court reasoned that the very nature of such materials in a sectarian setting advanced the sectarian enterprise.[95] The touchstone of this analysis was that the statute in question directed most of the aid to parochial schools.[96]

Finally, in *School District of the City of Grand Rapids v. Ball*,[97] the Court struck down two school board policies providing instruction to non-public school students in classrooms at non-public schools. The Court considered the statute's actual operation in the district and found that out of forty-one participant non-public schools, forty were religious.[98] In addition, many of the teachers involved in the programs taught at religious schools.[99] Based on this record, the Court overturned the school board's policies because of the danger of teachers not being able to separate their religious mission from the secular pursuit.[100]

Whenever the Court has used the *Lemon* "effects" prong to consider a statute, it has relied upon information outside and beyond the statute's language. The Court analyzed the specific facts involved to determine the statute's actual operation. The factual analysis included: 1) the nature of the recipients;[101] 2)

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93. *Nyquist*, 413 U.S. at 794-98.
94. 433 U.S. 229 (1977).
95. *Id.* at 250.
96. The Court noted that:

> The parties stipulated that during the 1974-1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools.

*Id.* at 234. With regard to instructional material and equipment the Court stated:

> Although the exact nature of the material and equipment is not clearly revealed, the parties have *stipulated*: 'It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except that to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied.'

*Id.* at 249 (emphasis added). In striking down aid for instructional material and equipment, the Court quoted Meek v. Pittenger, 421 U.S. 349, 366 (1975), and stated, "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." 433 U.S. at 250. Similarly, the Court invalidated aid for field trips saying, "field trips are an integral part of the educational experience, and where the teacher works *within and for a sectarian institution*, an unacceptable risk of fostering of religion is an inevitable byproduct." *Id.* at 254 (emphasis added).
97. 473 U.S. 373 (1985).
98. *Id.* at 384.
99. *Id.* at 386-88.
100. *Id.*
101. *See, e.g., Tilton*, 403 U.S. 672, *Hunt*, 413 U.S. 734, *Meek*, 421 U.S. 349, and *Nyquist*, 413 U.S. 756. *See supra* notes 73-76, 85-92 and accompanying text.

the nature of the government aid;[102] and 3) the tenuous connection between the government aid and the sectarian enterprise.[103]

Justice O'Connor sought to refine the *Lemon* "effects" prong in *Lynch v. Donnelly*.[104] There she articulated the test in this way: "[T]hat a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[105] Justice O'Connor's formulation of the *Lemon* "effects" prong urges the Court to ask the following question: Would an objective observer, acquainted with the text, legislative history, and implementation of the statute, receive a message of endorsement from *the effects of the statute*?[106] Such a formulation reveals the need of specific facts relating to the statute's operation in the real world and illustrates that the *Lemon* "effects" prong is truly an "as applied" method of evaluating legislation. Three recent Court decisions indicate that it has fully embraced O'Connor's formulation.[107]

### *Excessive Entanglement: The "Catch 22"*

For a statute to pass constitutional muster in establishment clause inquiry, it "must not foster 'an excessive government entanglement with religion.'"[108] Unlike the first two prongs of its test, the *Lemon* Court provided guidance on how the excessive entanglement analysis should proceed. A court must consider

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102. *See, e.g., Roemer*, 426 U.S. 736, *Wolman*, 433 U.S. 229, and *Rapids*, 473 U.S. 373. *See supra* notes 77-81, 93-99 and accompanying text.

103. *See, e.g., Witters*, 474 U.S. 481. *See supra* notes 82-84 and accompanying text.

104. 465 U.S. 668 (1984) (O'Connor, J., concurring).

105. *Id.* at 692 (O'Connor, J., concurring). Justice O'Connor continued to press for her "no endorsement" test in Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring), where she stated, "[i]n my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance."

106. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring) (emphasis added).

107. In Texas Monthly, Inc. v. Bullock 109 S.Ct. 890 (1989), a sharply divided Court held a Texas sales tax exemption for religious periodicals unconstitutional. Writing for the plurality, Justice Brennan stated: "[T]he Constitution prohibits, at the very least, legislation that constitutes endorsement of one or another set of religious beliefs or of religion generally." *Id.* at 896. Singling out only religious publications for tax exemption was, in Brennan's view, state sponsorship of religious belief. *Id.* at 900. Later in 1989, the Court decided Hernandez v. C.I.R., 109 S.Ct. 2136 (1989). There, the plaintiff challenged an IRS tax decision that the mandatory fixed prices paid for "auditing" sessions designed to increase church members' spiritual awareness and train them to conduct auditing sessions, were not charitable donations and therefore not tax deductible. Justice Marshall, writing for a 5-2 majority (O'Connor, J., and Scalia, J., dissenting, Brennan, J., and Kennedy, J., taking no part), simply assumes the "no endorsement" test in finding for the IRS. Justice Marshall states: "It is not alleged here that Section 170 involves '[d]irect government action endorsing religion or a particular religious practice.'" *Id.* at 2147 (quoting *Jaffree*, 472 U.S. 38 (O'Connor, J., concurring in judgment.)). Later, in County of Allegheny v. ACLU Greater Pittsburgh Chapter _____ U.S. _____, 109 S.Ct. 3086 (1989), Justice Blackmun wrote the fractured plurality opinion holding that a creche scene displayed in the county building labeled with Latin words addressed to God violates the establishment clause, while a menorah displayed with a Christmas tree and a sign saluting liberty does not. Justices Brennan, Marshall, Stevens and O'Connor joined Blackmun in the portion of the opinion analyzing the *Lemon* test. There, Justice Blackmun states: "In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Id.* at 3100. Blackmun further explains that this principle means simply that the establishment clause prohibits government from appearing to take a position on questions of religion. *Id.*

108. *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674).

three factors in determining whether a government enactment passes the third requirement: 1) the character and purpose of the institutions that are benefited; 2) the nature of the aid provided; and 3) the resulting relationship between the government and the religious authority.[109]

In questions regarding an institution's character, the Court asks whether the institution is "pervasively sectarian" with a primary purpose of inculcating religious values.[110] To discover the nature of the aid in question, the Court asks whether it is susceptible to sectarian use. For example, secular school books, instructional materials, and state testing in parochial schools do not lend themselves to sectarian use.[111] Providing a teacher to a sectarian institution, however, is likely to violate *Lemon*'s third prong because, "[u]nlike 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."[112] The last question is how much government monitoring is necessary to ensure that the aid will be used in accord with the first amendment. If the monitoring requires comprehensive, discriminating and continuing state surveillance, such contacts will involve excessive entanglement between church and state.[113]

In *Aguilar v. Felton*, Justice Rehnquist's dissent criticized the excessive entanglement prong as a "Catch 22."[114] He characterized this prong as a paradoxical invention of the Court that requires the supervision of government aid to sectarian institutions to ensure no entanglement of church and state, but then makes the supervision itself reason for declaring the aid unconstitutional.[115] In *Bowen*, Chief Justice Rehnquist and the Court addressed the "Catch 22" and perhaps changed the *Lemon* analysis forever.[116]

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109. *Id.* at 615.

110. Aguilar v. Felton, 473 U.S. 402, 411 (1985). Here, the Court characterizes pervasively sectarian institutions as those having "as a substantial purpose the inculcation of religious values." (quoting *Nyquist*, 413 U.S. at 768).

111. *See Wolman*, 433 U.S. 229, in which the Court held the provision of secular textbooks, the use of standardized tests and scoring services and the provision of diagnostic and therapeutic services were constitutional, but that instructional materials and equipment were not because they could be used in the sectarian enterprise.

112. *Lemon*, 403 U.S. at 619. *See also Aguilar*, 473 U.S. at 412, where the Court states the issue positively: "[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message."

113. *Lemon*, 403 U.S. at 619.

114. *Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting).

115. *Id.* at 421. Justice Rehnquist makes the same criticism in *Jaffree*, 472 U.S. at 109 (Rehnquist, J., dissenting). His determination in *Jaffree* is that the *Lemon* test is inadequate to decide Establishment Clause cases. *Id.* at 110. He would rather take an historical approach depending on the principles the drafters intended for the Bill of Rights. *Id.* at 113. Such an approach leads Justice Rehnquist to say: "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." *Id.* at 113. This is a foreshadow of the Court's holding in *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2573, where the Chief Justice writes: "Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems." *See infra* note 156 and accompanying text.

116. *See, e.g.*, Jimmy Swaggart Ministries v. Board of Equalization of California, 110 S.Ct. 688, 698 (1990), where a unanimous Court, although applying the *Lemon* "entanglement" prong notes again its criticism of it.

## THE ADOLESCENT FAMILY LIFE ACT

The petitioners in *Bowen v. Kendrick* challenged the constitutionality of the Adolescent Family Life Act (AFLA), which Congress passed as part of the Omnibus Budget Reconciliation Act of 1981.[117] The Act's stated purpose is to address the crisis of teenage promiscuity and provide solutions to the manifold problems created by teenage pregnancy.[118] The AFLA adopts the strategy of strengthening family ties,[119] promoting several types of counseling, including adoption counseling,[120] and encouraging research on the problem of adolescent premarital sex.[121] The AFLA funding scheme involves grants to organizations providing such services to pregnant adolescents or adolescent parents,[122] or to any service advancing the prevention of teenage premarital sex.[123] The AFLA also defines a list of "necessary services" that the guarantees must provide in order to receive funds. The list includes, almost exclusively, counseling and educational services for the adolescent and her family.[124] Under the AFLA,

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117. Adolescent Family Life Act, Pub. L. No. 97-35, 95 Stat. 578 (1981) (codified at 42 U.S.C. §§ 300z to 300z-10) (1982).
118. 42 U.S.C. § 300z(a) (1982).
119. 42 U.S.C. §§ 300z(a)(10)(A), 300z(b)(1) (1982).
120. 42 U.S.C. §§ 300z(b)(1), (2) (1982).
121. 42 U.S.C. § 300z(b)(4) (1982).
122. 42 U.S.C. §§ 300z-1(a)(7), 300z-2(b)(1) (1982).
123. 42 U.S.C. §§ 300z-1(a)(8), 300z-2(b)(1) (1982).
124. 42 U.S.C. § 300z-1(a)(4) (1982 & Supp. V 1987). This section states:

> (4) 'necessary services' means services which may be provided by grantees which are—
> (A) pregnancy testing and *maternity counseling*;
> (B) *adoption counseling* and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption agencies in the community if the eligible grant recipient is not a licensed adoption agency;
> (C) primary and preventative health services including prenatal and postnatal care;
> (D) nutrition information and counseling;
> (E) referral for screening and treatment of venereal disease;
> (F) referral to appropriate pediatric care;
> (G) *educational services* relating to family life and problems associated with adolescent premarital sexual relations, including—
> (i) information about adoption;
> (ii) education on the responsibility of sexuality and parenting;
> (iii) the development of material to support the role of parents as the provider of sex education; and
> (iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;
> (H) appropriate *educational* and vocational services and referral to such services;
> (I) referral to licensed residential care or maternity home services; and
> (J) mental health services and referral to mental health services and to other appropriate physical health services;
> (K) child care sufficient to enable the adolescent parent to continue education or to enter into employment;
> (L) consumer education and homemaking;
> (M) *counseling* for the immediate and extended family members of the eligible person;
> (N) transportation;
> (O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;
> (P) *family planning services*; and

however, the solution to teenage pregnancy cannot involve abortion. No funds may go to organizations providing abortions or abortion referral.[125]

The AFLA specifically recognizes that religious organizations may provide the "necessary services."[126] Grants may go indirectly to religious organizations;[127] and money has gone directly to organizations with institutional religious ties.[128] As a result, public funds supported programs during which parents and teenagers received sectarian instruction.[129] Further, the district court in *Kendrick v. Bowen* found that the grantees and sub-grantees included at least ten religious organizations describing their mission as promoting their religious teachings.[130] This inclusion of specifically religious organizations as grantees was a new addition to the AFLA's 1978 predecessor, Title VI.[131] Title VI previously required applicants to describe how they involve public and private agencies.[132] The AFLA, on the other hand, requires applicants to state how they involve "religious and charitable " organizations as well as public and private agencies.[133] These provisions and the uses of AFLA's funds became important issues in *Bowen v. Kendrick*.[134]

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(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary.

(emphasis added).

125. 42 U.S.C. § 300z-10(a) (1982).

126. 42 U.S.C. § 300z(a)(8)(B) (1982) states:

[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 publicly sponsored initiatives.

127. 42 U.S.C. § 300z-5(a)(21)(B) (1982) "An application for a grant . . . shall include a description of how the applicant will, as appropriate in the provision of services . . . involve religious and charitable organizations . . . ."

128. *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2568. "It is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious denominations."

129. The dissent in *Bowen* cites examples of sectarian teaching supported by funds from the AFLA. "You want to know the church teachings on sexuality . . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church." [Another] curricula taught: "The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life." *Id.* at ___, 108 S.Ct. at 2583 (Blackmun, J., dissenting) (citations omitted).

130. Kendrick v. Bowen, 657 F. Supp. 1547, 1564-65 (D.D.C. 1987). For example, "St. Margaret's Hospital, a self described 'Christian Institution' [is] committed to acting 'in harmony with the teaching of the Catholic Church.'" *Id.* at 1564. Additionally, Lutheran Family Services lists amongst its purposes "to promote the general welfare of children, families and individuals within the realistic resources of the corporation . . . and *the teachings of the Lutheran Church.*" *Id.* at 1565 (emphasis in original).

131. Grant Program, Pub. L. No. 95-626, tit. VI, 92 Stat. 3595-3601 (1978) [hereinafter Title VI].

132. *Kendrick*, 657 F. Supp. at 1559. Remarkably, the district court in *Kendrick* did not cite *Jaffree*, 472 U.S. 38, a case in which the Court struck down an Alabama "Moment of Silence" statute because it added "prayer" to the possible activities for a moment of silence.

133. 42 U.S.C. § 300z-5 (a)(21)(B) (1982).

134. *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2571-76 (1988).

## BOWEN V. KENDRICK: THE *LEMON* TEST TRANSFIGURED

### *The District Court Decision*

In 1987, a group of federal taxpayers, clergymen and the American Jewish Congress challenged the constitutionality of the AFLA under the establishment clause of the first amendment.[135] The plaintiffs argued in the trial court that the AFLA violated all three requirements of the *Lemon* test. First, the plaintiffs alleged that Congress created the AFLA pursuant to a religious motivation, demonstrated by the fact that Congress amended the AFLA's 1978 predecessor, Title VI, to specifically enlist the aid of religious institutions.[136] The district court was unconvinced by this argument. The court held that a statute does not violate the *Lemon* secular purpose prong unless it is *wholly* motivated by a religious goal.[137] The district court noted that amending Title VI might indicate a partial religious motivation, but reasoned that Congress had an undeniably clear secular concern about the damage teenage premarital sex and teenage pregnancy inflicts on our society.[138]

The plaintiffs also alleged that the AFLA violated the *Lemon* effects prong because, both on its face and as it was applied, the AFLA had the impermissible effect of advancing religion.[139] In its so called "facial" analysis, the district court reasoned that the AFLA's emphasis on education and counseling amounted to teaching by the grantees.[140] If such grantees were religious organizations, teaching on the matters of premarital sexual relations and adoption would necessarily inculcate sectarian doctrine.[141] The district court based this conclusion on a finding that it is a fundamental tenet of many religions that premarital sex and abortion are sinful.[142] Using that as its rationale, the district court misnamed its "facial analysis." The court's inquiry began with a facial inquiry of the AFLA but turned on the specific factual determination concerning the tenets of certain faiths. The court itself recognized this departure but stated, "establishment clause case law has not always neatly demonstrated a facial challenge from a challenge to a law as applied."[143]

In its "as applied" analysis of the *Lemon* "effects" prong, the court listed the ten religious institutions receiving AFLA grants, each of which had a

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135. *Kendrick*, 657 F. Supp 1547.

136. The district court noted the amendment of Title VI:

> Title VI [of the Public Health Service Act] required applicants to describe how they will involve public and private agencies, whereas the AFLA explicitly requires applicants to describe how they 'will . . . involve . . . *religious* and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives . . . .'

*Id.* at 1559 (citations omitted) (emphasis added).

137. *Id.* at 1558.

138. *Id.* at 1559. The Court based its conclusion on two grounds. The first was the "uncontroverted fact that a significant amount of AFLA grants have been awarded to non-sectarian grantees . . . ." The second was that when "secular purposes coincide or conflict with religious tenets [it] does not transform them into sectarian purposes . . . ."

139. *Id.* at 1560.

140. *Id.* at 1562.

141. *Id.* at 1563.

142. *Id.*

143. *Id.*

statement of purpose or self-definition which made clear that its goal in working with families and teenagers was to further its religious mission.[144] From this, the court concluded the AFLA created an explicit connection between the state-sponsored program and the religious mission of those sectarian institutions.[145] Further, where these religious organizations used AFLA funds to "counsel" and to "educate," they could not separate their religious goals from the AFLA's secular goals.[146]

The district court could have concluded its analysis at this point; when a government action or enactment fails any one of the *Lemon* prongs, it is unconstitutional.[147] Instead, the district court considered *Lemon*'s final requirement — the "entanglement" prong. The court held that the degree of monitoring necessary to ensure religious grantees would not advance religion in their teaching and counseling capacity would be so great as to cause excessive entanglement of church and state.[148]

### *The Supreme Court Decision*

After the district court held that AFLA failed the *Lemon* test, respondents appealed directly to the Supreme Court.[149] Writing for the majority, Chief Justice Rehnquist, after a brief comment on the petitioners' standing to raise this challenge,[150] adopted the district court's distinction

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144. The district court listed the ten recipients of AFLA funds who had goals stating that their purpose in working with pregnant teenagers and their families was to further their religious mission:

> These organizations are: St. Ann's Infant and Maternity Home; Center for Life of Providence Hospital, Washington, D.C.; Catholic Charities of Washington, D.C.; Family Life Bureau of the Diocese of St. Cloud, Mn.; Catholic Charities of the Diocese of Arlington, Va.; Catholic Family Services of Amarillo, Tx.; Catholic Family Services of Wayne County, Mich; St. Margaret's Hospital; Catholic Social Services of SW Ohio; Lutheran Family Services.

*Id.* at 1565 n.16 (citations omitted).

As an example of the goal statements of these AFLA grantee organizations, the court cites the Articles of Incorporation of Lutheran Family Services in Iowa: "To promote the extension of the kingdom of God through compassionate Christian love and to aid the Lutheran Churches in Iowa to fulfill their reponsibilities of compassion and love .... To promote the general welfare of children, families and individuals within the realistic resources of the corporation ... and the *teachings of the Lutheran Church.*" *Id.* at 1565 (emphasis in original). Granting government money to counsel and teach sectarian dogma even while pursuing a valid secular goal was in the district court's view tantamount to "the use of tax dollars to 'teach' religion." *Id.* at 1567. It is the same issue the *Lemon* Court faced when it declared that subsidizing parochial school teachers' salaries is unconstitutional. There the Court noted the conflict in trying to keep the sectarian and secular functions separate in a religious setting: "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation." 403 U.S. at 617.

145. *Kendrick*, 657 F. Supp. at 1565.

146. *Id.* at 1566.

147. *Edwards*, 482 U.S. at 583.

148. *Kendrick*, 657 F. Supp. at 1568.

149. 28 U.S.C. § 1252 (1982) provides for direct appeals to the Supreme Court from any final judgment in a federal court invalidating an Act of Congress.

150. Before undertaking the "as applied" analysis, the Court briefly analyzed the petitioners' standing to bring this claim. The Court characterized the appellees' claim that the AFLA funds are being used unconstitutionally by individual grantees as a challenge to congressional taxing and spending power even though such spending has flowed through the Secretary of Health and Human Services. *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2579. This case was distinguishable from Valley Forge Christian College v. Americans United for

between challenging a statute's constitutionality "on its face" and "as applied" in the *Lemon* effects prong.[151] The Chief Justice reasoned that, although there were few cases in the establishment clause area explicitly distinguishing between "facial" challenges to a statute and attacks on the statute "as applied," there existed "precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications."[152]

Having distinguished a "facial" challenge and an "as applied" challenge within the *Lemon* "effects" prong, the Court reaffirmed the *Lemon* test for establishment clause analysis.[153] Then, after a brief comment noting that the appellees dropped their claim that the AFLA does not have a legitimate secular purpose,[154] Chief Justice Rehnquist began the *Lemon* "effects" prong facial analysis of the AFLA. The talisman for the majority in upholding the facial validity of the AFLA was the statute's facial neutrality. The Court recognized two possible arguments supporting the notion that the AFLA "facially" advances religion. The first argument contends that the statute's language asserts religion could have a role in solving the problems associated with teenage pregnancy.[155] The Court rejected this argument noting that the AFLA maintains "a course of neutrality among religions, and between religion and non-religion" in the organizations it seeks to enlist in fighting the secular problem of teenage pregnancy.[156] If Congress preserves such a neutrality, the Chief Justice reasoned, it may use religious organizations to resolve secular problems.[157]

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Separation of Church and State, Inc., 454 U.S. 464 (1982), where the challenged disposal of property was not a congressional action under the authority of the taxing and spending clause of the United States Constitution. *Bowen* has had significant impact on the issue of standing. Two Circuit Courts of Appeal made reference to *Bowen* on the issue of standing within the year after its publication. The D.C. Court of Appeals cites *Bowen* twice for the proposition that where at least one plaintiff has standing to make a constitutional challenge, the court need not consider the standing of other plaintiffs joined to the cause of action. *See* District of Columbia Common Cause v. The District of Columbia, 858 F.2d 1, 3 (D.C. Cir. 1988), and Hazardous Waste Treatment Council v. United States Environmental Protection Agency, 861 F.2d 270, 273 (D.C. Cir. 1988). The Eighth Circuit cites *Bowen* for making it clear that federal taxpayers do have standing to raise establishment clause challenges to executive administration of congressional spending programs. Pulido v. Bennett, 860 F.2d 296 (8th Cir. 1988).

151. *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2569-70.
152. *Id.* at ___, 108 S.Ct. at 2570.
153. *Id.*
154. *Id.* at ___, 108 S.Ct. at 2571.
155. *Id.* at ___, 108 S.Ct. at 2572-73.
156. *Id.* at ___, 108 S.Ct. at 2573.
157. *Id.* The Chief Justice has urged the validity of the state pursuing its goals by the use of religious institutions before. *See Jaffree*, 472 U.S. 38. *See Also supra* note 114. Chief Justice Warren first expressed the view that the establishment clause did not forbid government from using sectarian means to achieve its goals in McGowan v. Maryland, 366 U.S. 420, 442 (1961). The approach would meet with St. Paul's approval. *See, e.g.*, *Romans* 13: 1-4 (Rev. Standard Version)

> Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval. . . . But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.

The second argument in the facial analysis is that the AFLA allows Congress to grant money directly to religious institutions and as such is patently unconstitutional.[158] Again, noting former Supreme Court decisions do not forbid this congressional action, the Court held that "nothing on the face of the Act suggests the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."[159] Additionally, the Court stated, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion."[160] The Court analyzed whether the religious organizations involved were "pervasively sectarian."[161] Equating "pervasively sectarian" institutions with parochial schools,[162] the Court noted that the AFLA does not mention funding parochial education. Consequently, the Court found no unconstitutional element in the AFLA provision granting aid to religious institutions.[163]

The "facial" approach of looking only at the language of a statute in the *Lemon* effects prong is a marked departure from precedent. The Chief Justice himself recognized that the insertion of a "facial" consideration in the effects analysis of the *Lemon* test is without clear precedent.[164] The cases he cites for creating a "facial" element in the *Lemon* "effects" prong do not clearly support such a development.

The first case the Chief Justice cites as precedent for a "facial" inquiry in the *Lemon* "effects" prong is *Edwards v. Aguillard*.[165] In *Edwards*, the Court

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Some commentators, however, have recognized a danger in this both for the state and religion. In Engel v. Vitale, 370 U.S. 421, 431 (1962), the Court found that the "first and most immediate purpose of [the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to *degrade religion*." (emphasis added). There is also the "Dark Side of Church-State Partnerships" where the Government will place autonomy-threatening burdens on the religious institutions that share in the government largesse. Pickrell & Horwick, *Religion As An Engine of Civil Policy*, 44 LAW AND CONTEMP. PROBS. 111, 121 (Spring, 1981). Judge Arlin M. Adams of the Third Circuit Court of Appeals points out the danger in the joining of government and religion: "the possibility arises that the state or a party might seek to transform a religious institution into its own instrument." Bernardin, Martin & Adams, *The Role of the Religious Leader in the Development of Public Policy*, 34 DE PAUL L. REV. 1, 16-17 (1985). The playwrite Arthur Miller articulates the danger drawing on Iran's political atmosphere: "A Khomeini in our day is impossible to controvert, let alone dislodge, because he has achieved a total identification of religion with his political regime, so that to oppose him is to oppose God." N.Y. Times, March 12, 1984, at A17, col. 1.

158. *Bowen*, 487 U.S. at ___, 108 S.Ct. at 2572.

159. *Id.* at ___, 108 S.Ct. at 2573.

160. *Id.* at ___, 108 S.Ct. at 2574.

161. *Id.*

162. In its facial analysis, the Court held, "[h]ere, by contrast, there is 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." *Id.* at ___, 108 S.Ct. at 2578. In its "as applied" analysis, the Court makes the same identification: "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." *Id.* at ___, 108 S.Ct. at 2580.

163. *Id.* at ___, 108 S. Ct. at 2577.

164. Justice Blackmun noted, "[b]y designating appellees' broad attack on the statute as a 'facial' challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court . . . ." *Id.* at ___, 108 S.Ct. at 2583-84 (Blackmun, J., dissenting).

165. 482 U.S. 578 (1987). *See supra* notes 61-63 and accompanying text.

found a government enactment to be "facially invalid" with no record.[166] In that case, however, the Court relied on *Lemon*'s first prong to find the Louisiana Creationism Act unconstitutional, holding that the Act "on its face" had a religious purpose rather than the secular purpose the state legislature asserted.[167]

Next, the Chief Justice cites *Wolman v. Walter*[168] as a case in which the Court decided the validity of a statute with no record of how it actually operated in the world. However, the Chief Justice mischaracterizes the nature of the inquiry in *Wolman*. There the Court held that the statute allowing the state to provide certain instructional materials and equipment to pupils of non-public schools was unconstitutional because the very nature of those materials in a sectarian setting advanced religion.[169] The *Wolman* Court's analysis turned on the premise that 95% of the non-public schools the statute aided were sectarian.[170] Chief Justice Rehnquist's mistake in calling this a "facial" challenge may be due to the fact that the parties in *Wolman* stipulated to the statute's true operation.[171] The problem was not with the nature of the various types of aid *per se*, but with the statute's effect of diverting aid almost exclusively to parochial schools.[172]

Beyond this lack of precedent, the insertion of a "facial" analysis into the *Lemon* "effects" prong is oxymoronic. A "facial" analysis within the *Lemon* "effects" prong is a consideration of how a statute operates without the benefit of any facts relating to the statute's operation. Moreover, the *Lemon* secular purpose prong is equivalent to "facial" inquiry used in other constitutional areas.[173]

The significance of this "effects" prong dicotomy is in the remedy the *Bowen* Court allows when a statute fails the "as applied" test of the *Lemon* "effects" prong. Before *Bowen*, the remedy for a successful "effects" challenge was the overturning of the whole government enactment or the offending portion of it.[174] Now, however, if a facially neutral statute is applied

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166. In *Edwards*, the plaintiffs sought an injunction against the enforcement of a new "Creationism" statute in Louisiana. The district court granted an injunction and declaratory relief. *Id.* at 581-82. No record of the statute's application existed, so the Court of necessity made a "facial analysis." The Court did, however, look at information outside of the statute's language in its determination. For example, the Court considered the historical connection between Creationism and certain sectarian faiths. *Id.* at 589-92. Beyond the fact that in *Bowen* Chief Justice Rehnquist wishes to limit the *Lemon* "effect" prong to the statute's language, *Edwards* does not apply because it applied the *Lemon* "secular purpose" prong. *Id.* at 585-86.

167. *Id.*

168. 433 U.S. 229 (1977). *See supra* notes 93-95 and accompanying text.

169. *Id.* at 250.

170. *Id.* at 234. *See also supra* note 95-96 and accompanying text.

171. *Id.* at 249.

172. *Id.*

173. *See supra* notes 41-45 and accompanying text.

174. *See, e.g., Meek*, 421 U.S. 349, in which the Court overturned the portion of the Pennsylvania statute that had the impermissible effect of giving direct aid to non-public schools, 75% of which were religiously affiliated; the Court upheld the portion of the bill which provided text books to children. The remedy in Grand Rapid School Dist. v. Ball, 473 U.S. 373 (1985), was similar. There, the Court upheld an injunction against the operation of a shared time program and community education program, both of which supplied education by government paid teachers in parochial schools. Of the 41 schools participating in the program, 40 were religiously affiliated. *Id.* at 379. Under the new rule articulated by the *Bowen* Court, a challenger would now have to call each of the 40 schools into court because in the "facial"

unconstitutionally, the remedy is to stop only the specific application in question.[175] The *Bowen* Court mandates piecemeal litigation on a case by case basis for establishment clause litigants objecting to a statute that operates to advance religion.[176] Hence, the result of splitting the *Lemon* "effects" prong into a "facial" and "as applied" analysis is that a broad challenge seeking to overturn a statute operating in an unconstitutional manner is no longer possible.[177] To overturn the entire statute the challenger must rely on the *Lemon* purpose prong, the "Catch 22" excessive entanglement prong[178] or the "facial" portion of the *Lemon* "effects" prong.

What then, are the elements of a successful effects "facial" challenge? Must the statute in question specifically state that its aid will go primarily to sectarian institutions? *Bowen v. Kendrick* stands for that proposition.[179] Further, the Court may have indicated that a statute must direct government aid to pervasively sectarian institutions to offend the establishment clause.[180] So long as the statute is facially neutral, not favoring religion over non-religion or religious institutions over non-religious institutions, the Court discerns little chance that its primary effect will be the advancement of religion unless the statute requires, on its face, that aid flow to pervasively sectarian institutions.[181]

The *Bowen* Court also questions the validity of the *Lemon* "excessive entanglement" prong. In a previous dissenting opinion, Chief Justice Rehnquist had criticized the "excessive entanglement" requirement as a "Catch 22."[182] In *Bowen* he brings that formulation into the majority opinion.[183] The "Catch 22" is that often a statute requires government supervision to assure that federal

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effects challenge, the challenger could not use the record, if the statute "on its face" seemed to have no preference for "pervasively sectarian" institutions.

175. 487 U.S. at ___, 108 S.Ct. at 2580.

176. The dissent observes, "[b]y characterizing appellees' objections to the real-world operation of the AFLA an 'as-applied' challenge, the Court risks misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the AFLA." *Id.* at ___, 108 S.Ct. at 2584 (Blackmun, J., dissenting.)

177. *Id.*

178. The *Bowen* Court has also questioned the validity of this *Lemon* requirement. *See infra* notes 182-186 and accompanying text.

179. The Court held:

> In this case, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to "pervasively sectarian" institutions. Indeed, the contention that there is a substantial risk of such institutions receiving direct aid is undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of 'pervasively sectarian.'

487 U.S. at ___, 108 S. Ct. at 2575.

180. The Court, ruling against the "facial" challenge in *Bowen*, laid out this analysis: "In this case, nothing on the face of the AFLA indicates that a significant proportion of federal funds will be disbursed to 'pervasively sectarian' institutions . . . ." *Id.*

181. The Court held:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if aid flows to institutions that are 'pervasively sectarian.'

*Id.* at ___, 108 S.Ct. at 2574.

182. *See Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting). There Chief Justice Rehnquist calls the third prong a "paradox." *See supra* notes 115 and accompanying text.

183. 487 U.S. at ___, 108 S.Ct. at 2577-78.

money given to sectarian institutions does not advance religion. But, where the supervision is excessive, such government intrusion in the affairs of a religious institution violates the free exercise clause.[184] Thus, the Chief Justice reasons that *Lemon* requires supervision for constitutionality and then says that because there is supervision the enactment in question is unconstitutional.

After pointing out this inconsistency, however, the Chief Justice considered whether the "excessive entanglement" prong applied to the AFLA. In *Bowen*, he notes that the Court employs this analysis mainly in cases where the government aid is going to "pervasively sectarian" institutions such as parochial schools.[185] Having reasoned earlier in the opinion that there was no reason to believe that AFLA grantees would be "pervasively sectarian," he concludes that the *Lemon* excessive entanglement prong did not apply in this case.[186]

*Bowen*'s discussion of "excessive entanglement" leaves *Lemon*'s third prong in a state of flux. Is it a "Catch 22" and therefore not to be used in establishment clause analysis? Is it limited to use only when "pervasively sectarian" institutions are at issue? Unfortunately, *Bowen* leaves these questions unanswered.

## CONCLUSION

Since 1971, the *Lemon* test has governed the analysis of establishment clause cases almost exclusively.[187] The *Lemon* test's three prongs require that a statute under establishment clause scrutiny have a legitimate secular purpose, that it not have the primary effect of advancing religion and that the statute not create excessive entanglement between the church and state. The advent of *Bowen v. Kendrick* marks an important transfiguration of these prongs. *Bowen* makes challenges to governmental enactments involving religious institutions significantly more difficult.

Historically, the use of the *Lemon* "purpose" prong has resulted in few successful challenges. The Court has shown great deference to legislatures in their statement of secular purpose. Any avowed legislative purpose will be valid, even if it coincides with a purely sectarian enterprize.

In *Bowen*, the Court split the *Lemon* test's "effects" prong into two parts: a "facial" analysis and an "as applied" analysis. The remedy for a successful "facial" challenge in the "effects" prong results in overturning the whole statute or its offending portion. After *Bowen*, however, a "facial" challenge will be very difficult to sustain. The petitioner must show that the statute's language indicates legislative intent to primarily benefit "pervasively sectarian" institutions. When a litigant seeks to challenge a statute's application, however, the remedy changes. The remedy for a successful "as applied" challenge is the withdrawal of government funds from the specific statutory application advancing religion. Consequently, after *Bowen*, the only remedy for establishment clause litigants objecting to a statute that operates to constantly and consistently advance religion is piecemeal litigation.

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184. *Id.* at ___, 108 S.Ct. at 2578.
185. *Id.*
186. *Id.*
187. *See supra* note 3 and accompanying text.

Finally, the *Bowen* Court calls into question the status of *Lemon*'s "excessive entanglement" prong. The Chief Justice, who has criticized this portion of the *Lemon* test in dissenting opinions, now moves his criticism into the *Bowen* majority opinion. A challenger using this approach is in a weak position especially since the Chief Justice apparently limits "excessive entanglement" challenges to those involving "pervasively sectarian" institutions.

The difficulty of a broad establishment clause challenge after *Bowen* sends a clear signal to legislative bodies. So long as the legislating body carefully maintains neutrality among religions and between religion and non-religion on the face of its statute, it may pursue secular ends through sectarian means. Indeed, the Chief Justice recommends it.[188]

188. *See supra* note 115 and accompanying text.