1988

Federal Funds To Religious Groups: Where Are The First Amendment Boundaries?

Neal Devins
William & Mary Law School, nedevi@wm.edu

Federal Funds To Religious Groups: Where Are The First Amendment Boundaries?

By Neal Devins

Otis R. Bowen
v.
Chan Kendrick
(Docket Nos. 87-253, 87-431, 87-462 and 87-775)

Argued March 30, 1988

Bowen v. Kendrick promises to be one of this term's most controversial decisions. The conjunction of church state concerns and governmental efforts to influence adolescent sexual relations is explosive. The Court has previously considered the constitutionality of religious groups' support of Congress' decision to deny federal funding of abortion (*Harris v. McRae*, 448 U.S. 297 (1980)), upholding the constitutionality of the Hyde antiabortion amendment. However, it has never considered the propriety of church-affiliated organizations utilizing federal funds in discouraging abortions through counseling against premarital sexual relations as well as advising pregnant minors of adoption and referral services. Here, the Court will consider this highly emotional issue.

ISSUE

In this case, the Supreme Court will tackle the vexing issue of federal government assistance to religious social service organizations. Specifically, the Court will determine whether the Adolescent Family Life Act, which authorizes federal funding to religious organizations to conduct programs on adolescent sexuality issues, violates the Establishment Clause of the First Amendment.

FACTS

Congress passed the Adolescent Family Life Act (42 U.S.C. section 3000 in 1981 to replace the Adolescent Health Services and Pregnancy Care Act of 1978. The purpose of this Act is to prevent adolescent pregnancy. To achieve this end, the Act authorizes federal funds be granted to organizations to conduct care and prevention service programs. To rectify the lack of values taught in Title VI programs, Congress chose to include religious organizations in programs under the Act. Specifically, the Act requires applicants to describe how they will involve religious organizations in their programs and limits funding to programs which do not provide abortions or abortion services.

An action seeking declaratory and injunctive relief was filed on October 26, 1983 in the United States District Court for the District of Columbia by several individuals including federal taxpayers, four Protestant ministers and the American Jewish Congress. They challenged the Act on the ground that it violated the Establishment Clause of the First Amendment.

The district court found that the Adolescent Family Life Act violates the Establishment Clause both on its face and as applied. The district court also concluded that portions of the Act involving religious organizations were severable from the Act as a whole (657 E. Supp. 1547 (1987)). In reaching this conclusion, the court applied the three-part test set forth in *Lemon v. Kurtzman* (403 U.S. 602 (1971)). Under this test, a court must determine whether the legislation: has a valid secular purpose; it does not have the primary effect of advancing religion; and it does not cause excessive entanglements between the government and religion. Failure to meet any part of this tripartite test renders the legislation invalid. The district court found that the Act had the valid secular purpose of attempting to prevent teenage pregnancy, but failed the "primary effect" and "excessive entanglement" prongs of the test.

The district court found that the Act had the primary effect of advancing religion, in part, because it feared that one-to-one counseling might be a mechanism for religious teaching. In particular, the district court was concerned that adolescents suffering from the stress of pregnancy would be especially vulnerable and susceptible to religious indoctrination. The court concluded that the Act presents issues analogous to state aid to elementary and secondary parochial schools. In these cases, the Supreme Court—claiming that such schools are "pervasively religious"—has been reluctant to validate governmental assistance programs.

The Act was also found to have violated the "excessive entanglement" prong of the *Lemon* test. The district court concluded that—since the counseling services carried an inherent risk that religion would be promoted—extensive and continuous monitoring by government would be required to ensure against such promotion. The government—claiming that grantee religious organizations are not pervasively sectarian—argues that this case does not raise "excessive entanglement" concerns.

Finally, the district court found that the portions of the Act involving religious organizations were severable from the

Neal Devins is an Assistant Professor of Law at the College of William and Mary, School of Law, Williamsburg, VA 23185; telephone (804) 253-4304.

rest of the Act. The court therefore enjoined all funding of religious organizations under the Adolescent Family Life Act.

BACKGROUND AND SIGNIFICANCE

On appeal to the Supreme Court, the taxpayers argue that it is impermissible for Congress to propagate religion as it does in the Act. Specifically, they contend that the counseling services provided in Act programs are not neutral social services—arguing that it is virtually impossible to separate secular from religious values when counseling on matters central to religious beliefs. Finally, the taxpayers, noting that the Act's goals are more consistent with some religious beliefs than others—contend that it is impermissible to use federal funding to favor one set of religious beliefs over another.

The United States, on the other hand, argues that it is permissible to legislate religious values and provide funding for religious organizations if they are performing neutral social services. The government further claims that the Act is part of such a program both because counseling services are secular and because its grantees are informed that federal funds may not be used to inculcate religion. Finally, the government contends that the Establishment Clause does not prohibit neutral federal legislation from disproportionately benefiting certain religious organizations.

The United States argues that the Act's programs are analogous to government aid to religiously affiliated hospitals (where the Court nearly a century ago upheld such programs) because neutral social services are at issue. In making this argument, the United States emphasizes that religious organizations are particularly equipped to promote neutral social services; since over time they have developed extensive mechanisms for delivering social services to the community, such as adoption services and homeless shelters. The government therefore urges that counselors in the programs involved here could effectively set aside their religious beliefs and impart secular values to their clients.

Bowen v. Kendrick stands at the crossroads of two politically irreconcilable doctrines. At one end, *Roe v. Wade* and its progeny hold inviolable a pregnant woman's choice (including that of mature minors) to have an abortion. At the other end, *Harris v. McRae* holds that the government is not obligated to fund the exercise of that choice. The case now before the Court asks whether church social services can serve as a governmentally sponsored wedge between the two leanings.

If the Court here strikes down the Act, the case could severely limit cooperative efforts between government and religion in other areas. As noted in the government's brief, religious organizations have participated in a variety of governmental-funded programs including hospitals, soup kitchens, drug abuse programs, orphanages, emergency shelters, Head Start and mental health programs. The invalidation of the Act would certainly portend problems for church-affiliated social services which involve counseling. On the other hand, if the Act is validated, it is likely that religious organizations will seek greater governmental assistance for their social service programs.

ARGUMENTS

For Chan Kendrick *(Counsel of Record, Bruce Ennis, 1200 17th Street, NW, Washington, DC 20036; telephone (202) 775-8100)*

1. The Act violates the effects and entanglement prongs of the *Lemon* test.
2. The Act's provisions concerning religious organizations cannot be severed from the entire Act. Therefore, the entire statute must fall.

For Otis R. Bowen, Secretary of Health and Human Services *(Counsel, Charles Fried, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. The Act does not violate the Establishment Clause since it has a secular legislative purpose, does not advance or inhibit religion and does not foster excessive entanglement with religion.

AMICUS BRIEFS

In Support of Chan Kendrick

Planned Parenthood; American Psychological Association; NOW; the American Jewish Committee

In Support of Otis R. Bowen

The U.S. Catholic Conference; the Catholic League for Religious and Civil Rights; United Families of America