KENDRICK V. BOWEN AND THE CHASTITY ACT: ON THE HIGH WALL BETWEEN CHURCH AND STATE

by

Cheri Lewis

When Congress passed the Adolescent Family Life Act[1] (AFLA), the so-called "Chastity Act,"[2] it could hardly have intended to make bedfellows of the diverse religious denominations that have coalesced to challenge the constitutionality of the Act under the Establishment Clause. The AFLA, the constitutionality of which the Supreme Court will decide this term, was a federal grant program designed to address the social ills of adolescent pregnancy and premarital relations by allocating funds to various charitable, religious, and voluntary organizations to provide counselling and teaching of adolescents.

Suit was brought in 1983 to challenge the "Chastity Act" by the director of the Virginia American Civil Liberties Union after he learned of a program run by the Catholic Diocese of Northern Virginia in Arlington[3]. Since then, the AFLA has united such disparate groups as the American Jewish Congress, the National Organization of Women, Methodist ministries from Northern Virginia and Richmond, Planned Parenthood, and Americans for Religious Freedom in an effort to have the Act invalidated. In May of 1987, the U.S. District Court for the District of Columbia did just that in *Kendrick v. Bowen*,[4] which the Supreme Court has taken on direct appeal.[5]

Enacted in 1981, the AFLA was a $30 million-a-year grant program authorizing a variety of community organizations to counsel and teach adolescents on matters relating to premarital relations and pregnancy. The Act sought "to find effective means...of reaching adolescents before they become sexually active,"

---

[1] 42 U.S.C. § 300z (1982).

[2] The original Congressional draft of the AFLA bill spoke in terms of discouraging "adolescent promiscuity" and promoting "chastity." S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981).

[3] *'Chastity Act' Lawsuit is Pitting Religions Against One Another*, RICHMOND TIMES-DISPATCH, Mar. 6, 1988, at 1, col. 1.

[4] 657 F. Supp. 1547 (D.D.C. 1987), *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[5] The Supreme Court has taken this case because an Act of Congress was struck down as unconstitutional. *Appeal Pending*, No. 87-253, (1988).

"to promote adoption as an alternative for adolescents" and "to establish innovative, comprehensive and integrated approaches to the delivery of care services for pregnant adolescents..."[6] Congress had concluded that "legislation, to foster alternatives to abortion, and to encourage adolescents to bring their babies to term, serves a critical national interest."[7] However, the AFLA contained a major stipulation that grant payments would be restricted to organizations that did not provide abortions or abortion counselling or referral and that did not "advocate, promote, or encourage abortion."[8]

In *Kendrick v. Bowen*, the district court found the AFLA in violation of the Establishment Clause of the first amendment[9] under the tripartite test of *Lemon v. Kurtzman*,[10] the traditional test applied in such challenges.[11] Judge Richey's opinion held that, while the Act carried a valid secular purpose of addressing problems caused by teenage pregnancy and premarital sexual relations, both on its face and as applied, the AFLA had the primary effect of advancing religion and therefore violated the Establishment Clause.[12] Moreover, because many organizations receiving benefits from the AFLA have a religious character and purpose, and the activities they were involved in were counselling and education, often provided in small groups or on a one-on-one basis, *Kendrick* concluded that the degree of government monitoring necessary to prevent grantees from advancing religion would create "excessive entanglement" between government and religion.[13]

In addition to the fact that *Kendrick* has created a schism among various religious organizations, this case is noteworthy because it presents a number of ancillary constitutional issues offering alternative grounds for invalidation of the AFLA's program scheme. Although it is not likely that the Supreme Court will examine these issues, this article will endeavor to review them after an evaluation

---

[6] 42 U.S.C. § 300z(b)(1)-(3).

[7] S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981).

[8] 42 U.S.C. §300z-10(a). This section of the Act provided an exception to this restriction, stating that "any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral...." *Id.*

[9] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U. S. CONST. amend. I.

[10] 403 U.S. 602 (1971).

[11] 657 F. Supp. at 1556.

[12] *Id.* at 1564.

[13] *Id.* at 1568.

of the district court's decision of the case under the traditional Establishment Clause analysis of *Lemon.*

A VALID SECULAR PURPOSE WITH NO FACIAL "PRIMARY EFFECT"

In determining whether a governmental statute comports with the Establishment Clause, the Supreme Court begins by inquiring whether the statute explicitly or deliberately discriminates among religious denominations. If it does, the case must be reviewed under strict scrutiny analysis.[14] This analysis has been utilized in only a limited number of Establishment Clause cases where a statute's benefits were to be allocated *only* among religious organizations and most often where an intentional, not merely an incidental disparate impact, was evident.

In *Kendrick* the plaintiffs below argued that the AFLA should have been reviewed under strict scrutiny, but the district court properly rejected this notion because the statute's plan was facially neutral and intended the inclusion of not only religious organizations, but secular organizations as well. Consequently, the district court applied the three-prong test of *Lemon v. Kurtzman.*[15]

To withstand constitutional scrutiny under the *Lemon* test, a statute 1) must contain 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.[16] Failure to meet any one of these three elements may render the provision unconstitutional.[17]

Judge Richey's opinion in *Kendrick* held that while the AFLA met the valid secular purpose of providing a means of combating teenage pregnancy and educating adolescents in sexual matters, it failed the last two elements of the *Lemon* test.[18] Plaintiffs below advanced the argument that the AFLA, when compared with its predecessor, Title VI of the Public Health Service Act, was a statute motivated wholly by religious purposes and therefore did not satisfy the

---

[14] Larson v. Valente, 456 U.S. 228 (1982).

[15] 657 F. Supp. at 1557.

[16] 403 U.S. at 612-13.

[17] 657 F. Supp. at 1557. Recently, though, in Lynch v. Donnelly, the Court has hinted that a regulation which fails one or more of the tests may nonetheless be held constitutional. *See* 465 U.S. 668 (1984).

[18] 657 F. Supp. at 1570.

first prong of the test.[19] Yet the district court found, based on the AFLA's abundant legislative history, that the AFLA possessed a valid secular purpose.[20]

Under the second prong of the *Lemon* test, the district court found that, on its face and as applied, the statute had the "primary effect" of advancing religion,[21] and thus, the AFLA impermissibly violated the Establishment Clause. That "primary effect" finding of facial invalidity appears to be based on only two narrow determinations: the fact that the legislative history of these provisions demonstrated that Congress clearly intended religious organizations to participate in these programs as both grantees and as unpaid participants[22], and the factthat the statute contained no explicit restriction against the teaching of religion *qua* religion.[23]

Congress' expressed intention to include religious organizations in the provision of AFLA services and counseling appears to be the primary basis for Judge Richey's decision. Relying heavily on the fact that the AFLA required applicant groups to describe how they "will, as appropriate in the provision of services...involve religious...organizations,"[24] the district court concluded that "the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction ... and [t]his possibility alone amounts to an impermissible advancement of religion."[25]

As appellants argue, simply requiring such information to be provided by each applicant cannot, without more, be viewed as statutorily *compelling* religious involvement.[26] The authoritative Senate Report[27] states that "religious affiliation

---

[19] *Id.* at 1559.

[20] Neither the Brief for Appellees nor any of the briefs filed by amici curiae in support of appellees before argument at the Supreme Court raise this issue of the *Lemon* test.

[21] 657 F. Supp. at 1560.

[22] *Id.* at 1562.

[23] *Id.* at 1562-63. Although the District Court took judicial notice of the fact that the Department of Health and Human Services' "Notice of Grant Award applicants to the AFLA stated that grants may not be used to "teach or promote religion," it nevertheless found this unpublished and unenforceable administrative warning inadequate to protect against the sectarian use of AFLA funds. *Id.* at 1563.

[24] 42 U.S.C. § 300z-5(a)(21)(B) (1982).

[25] 657 F. Supp. at 1563 (emphasis in original text).

[26] Appellant's Opening Brief and Appellant's Reply Brief at 7, *Kendrick v. Bowen*, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) [hereinafter Brief for Appellant].

is not a criterion for selection as a grantee."[28] Moreover, a number of Supreme Court cases make clear that absent an initial determination that a particular recipient is "so permeated by religion that the secular side cannot be segregated from the sectarian,"[29] religiously-affiliated organizations *may* participate fully in governmental programs.[30] Certainly, the Supreme Court has never held that theEstablishment Clause requires exclusion of religious organizations from publicly-supported social programs.[31]

Governmental funding schemes for social service programs administered by religiously-affiliated colleges and hospitals have been upheld in instances where the aid was shown to be clearly designated for other than a specifically religious purpose and where it was neutrally available to all types of groups.[32] Thus, programs authorizing non-categorical grants to private colleges,[33] state issuances of revenue bonds for construction of private college facilities,[34] and federal construction grants for private colleges[35] have been upheld by the Supreme Court, defying invalidation under the initial "primary effect" inquiry. Indeed, it can be said that a historical relationship exists between charitable factions of religious groups and government in the providing of social services. Religious organizations continue to participate in a variety of programs funded by state and federal governments including soup kitchens, drug abuse programs, orphanages, nursing homes, housing, job training, tutoring, school lunches, refugee resettlement, and foreign disaster relief.[36]

The district court opinion in *Kendrick* suffers from its failure to discuss analogous Supreme Court Establishment Clause cases involving social program

---

[27] S. Rep. 97-161, 97th Cong., 1st Sess.

[28] S. Rep. 97-161, 97th Cong., 1st Sess., 15-16 (1981).

[29] *See, e.g.*, Roemer v. Maryland Pub. Works, 426 U.S. 736, 759 (1976).

[30] *See* Bradfield v. Roberts, 175 U.S. 291, 199 (1899); Walz v. Tax Comm., 397 U.S. 664 (1970); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

[31] "[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." Hunt v. McNair, 413 U.S. 734, 742 (1973).

[32] *Roemer*, 426 U.S. at 746.

[33] *Id.* at 736.

[34] Hunt v. McNair, 413 U.S. 734 (1973).

[35] Tilton v. Richardson, 403 U.S. 672 (1971).

[36] McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U.L. Rev. 405, 421.

schemes like the AFLA. More specifically, Judge Richey's decision may have been fortified by a comparison of this case to the factually similar line of SupremeCourt school prayer/moment-of-silence cases[37] or the line of cases involving federal funding of questionably religious programs in public schools.[38]

Here, *Kendrick* is distinguishable from a number of these cases as the AFLA was not directed solely at augmenting secular elements of otherwise sectarian organizations, but on its face solicits participation by "religious and charitable organizations, voluntary associations, and other groups in the private sector" as well.[39] The inclusion of religious organizations as participants in the AFLA, according to its legislative history, was aimed at the general desire to involve the whole targeted community in the programs.[40]

The AFLA's reference to religious groups as potential grantees of the Act's funds should not warrant invalidation of the statute without a more definitive showing that the statute's provisions had, under *Lemon*, the primary effect of establishing religion.[41] On this point, the district court's opinion, which applies an unconventional "direct and immediate" test to this issue, is clearly inappropriate.

The Supreme Court in *Hunt v. McNair*[42] articulated the standard for the "primary effect" prong of the *Lemon* test. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.[43]

In *Kendrick*, the district court chose to apply an apparently less stringent test for "primary effect" than Supreme Court precedent dictates, asking whether the statute had a "direct and immediate effect of advancing religion."[44] This inquiry eliminates the need to determine if the purported effect is "primary," and

---

[37] Such a discussion would have included Engel v. Vitale, 370 U.S. 421 (1962) and Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

[38] *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Two other recent and very applicable school cases are Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) and Aguilar v. Felton, 473 U.S. 402 (1985).

[39] 42 U.S.C. §300z-5(a)(21)(B) (1982).

[40] S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).

[41] *See* 403 U.S. at 602.

[42] 413 U.S. 734 (1973).

[43] *Id.* at 743.

[44] 657 F. Supp. at 1560 (citing *Nyquist*, 413 U.S. at 783).

instead directs the examination to the *quality* of the effect, regardless of whether it is "primary." In an unmethodical way, the district court has reduced the test'sthreshold requirement of a showing of "primary effect" to a showing of simply *any* effect.

Perhaps because it is not obvious that the AFLA's scheme, on its face, had the primary effect of advancing or inhibiting religion, the district court felt more comfortable in applying the *Nyquist* test of "direct and immediate." On this point the district court's decision is weak inasmuch as no Supreme Court case mandates such a conclusion absent a more purposeful and discriminatory showing on the face of the statute.

AS APPLIED, THE AFLA ESTABLISHES RELIGION

Following a somewhat haphazard factual review of the case record, the district court in *Kendrick* held that the AFLA "creates an explicit connection between a state-sponsored program, a religiously identified organization, and either a religiously-inspired curriculum or a classroom replete with religious symbols"[45] and that this interrelationship amounted to a "significant symbolic benefit to religion."[46]

The touchstone of findings of "primary effect" in Establishment Clause cases has been that the law in effect supplies government funds for the teaching of religion. Where government aid amounts to a subsidy of the religious organization and the subsidy cannot be segregated from religious activity, the Supreme Court has declared the subsidy to be unconstitutional.[47] The AFLA was a statute with a few constitutional strikes against it to begin with. Although Congress generally has the authority to impose conditions in the selection of institutions receiving federal funding under its various spending programs,[48] the AFLA program is exceptional in that it contemplates a large amount ($3 million) of direct funding to religious organizations. Moreover, the nature of the social service involved, the teaching and counselling of adolescents, is thought to present particular problems if agency monitoring of the programs becomes necessary to ensure that funds are not used for religious ends.[49] In particular, the Supreme Court has noted that, in certain contexts, a danger may inhere that teachers may abuse an apparently

---

[45] 657 F. Supp. at 1566.

[46] *Id.* at 116 (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)).

[47] Grand Rapids School Dist. v. Ball, 473 U.S. 372 (1985).

[48] *See infra* pp. 22-25.

[49] *See infra* pp. 19-22; *see also* Lemon v. Kurtzman, 403 U.S. 602, 615-20.

neutral scheme to promote religion.[50] Finally, the Court has repeatedly expressed a concern that adolescents are highly impressionable and thus are likely to perceive factors such as instruction at locations replete with religious symbols, for instance, as a union between church and state.[51]

The Supreme Court has previously noted, and one of the appellees in this case persuasively advances, that there is a special concern where religion is involved, albeit incidentally, in the teaching of emotionally vulnerable adolescents.[52] Particularly in the instant case, where it was clearly contemplated that AFLA programs would target pregnant adolescent women, there is an inherent danger that religiously-affiliated groups will take this opportunity to inculcate their religion to young individuals at a vulnerable time in their lives.[53]

In essence, the AFLA is program whose purpose is to teach morals, an objective which carries with it the inherent danger that religion will be used to instill such morals in these young individuals. "The Act expressly calls upon religious organizations to convey certain religious values to minors, not to provide a service such as passing out breakfast to children."[54] Indeed, it is the unique nature of the social services provided by the AFLA that jeopardizes the doctrine of separation of church and state; the pernicious combination of religious organizations teaching morality makes the AFLA particularly suspect.

Appellants in this case sharply contest the district court's factual findings and argue that it relied selectively on a few of the appellees' assertions in holding that the statute "in effect" established religion.[55] Certainly, the district court's discussion of the various groups participating in the program was arbitrary. By selectively focusing on a few of the more hyperbolic instances found during discovery involving sectarian groups, the Court's factual findings lack any comprehensive review of *all* the participating organizations. The Court briefly concludes that the statutory scheme of the AFLA was "fraught with the possibility that religious beliefs might infuse instruction and...[that] this possibility

---

[50] Wallace v. Jaffree, 105 S. Ct. 2479, 2492 (1985).

[51] Grand Rapids School Dist. V. Ball, 473 U.S. 373, 390 (1985).

[52] Lemon v. Kurtzman, 401 U.S. 602, 615-20 (1971).

[53] Brief for Appellees and Cross-Appellants at 47-49, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) [hereinafter Brief for Appellees].

[54] *"'Chastity Act' Lawsuit is Pitting Religions Against One Another," RICHMOND TIMES DISPATCH*, Mar. 6, 1988, at 12, col. 1.

[55] Reply Brief for Appellant at 2-5, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan 11, 1988).

alone amounts to an impermissible advancement of religion."[56]

Pointing to factually similar Supreme Court cases where instructional programs involving religious groups with concededly legitimate secular purposes were struck down,[57] the district court held that if the mere danger of inculcating religion, especially with adolescents, was considered to be enough in those cases, that the AFLA must also fail. *Kendrick* states, where there is a "possibility that religious organizations will exert pressure on 'matters sacred to conscience'... it renders the program invalid."[58]

The *Kendrick* decision suggests that the Supreme Court is scrutinizing more closely, and may be more willing to invalidate, programs which merely present the danger that religion may be inculcated. *Kendrick* reads the Supreme Court's cases to say that a presumption of unconstitutionality is created by programs where religiously-affiliated groups are even afforded the opportunity to proselytize and that such schemes will be invalidated without an ample factual showing that religion "in effect" was ever established under it.[59]

ESTABLISHMENT OF A RELIGION?

Neither the district court nor the Justice Department, as appellee, addressed the question of whether the AFLA tends to establish a particular religious belief or practice. This article suggests that the AFLA's conspicuous stipulation that only groups which "do not advocate, promote or encourage abortion"[60] may participate denotes a discrete governmental preference for certain religious

---

[56] Kendrick V. Bowen, 657 F. Supp at 1563.

[57] 657 F. Supp. at 1563-64. *See* Grand Rapids School Dist, V. Ball, 105 S. Ct. 3216 (1985); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948); and Felton v. Secretary of Education, 739 F.2d 48 (2d Cir. 1984) *aff'd sub nom.*, Aguilar v. Felton, 473 U.S. 402 (1985).

[58] 657 F. Supp at 1563. *See also* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J. concurring); Meek v. Pittenger, 421 U.S. 349, 366 (1975); and Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3225 (1985).

[59] 657 F. Supp. at 1563.

[60] 42 U.S.C. § 300z-10(a) (1982).

denominations in violation of the Establishment Clause prohibition.[61] Perhaps the clearest precept of the first amendment's Establishment Clause is that one religion may not be favored over another.[62] A statute which endorses a particular religious belief or practice that all citizens do not share offends the Establishment Clause.[63] Yet the program benefits of the AFLA may only be awarded to groups which do not currently advocate abortion. Thus, appellees and amici curiae argue, certain denominations, specifically Catholic, are favored by the largess of the AFLA. As such, this provision creates the "specter of the preferred church."[64]

Plaintiffs originally established standing in *Kendrick* by claiming federal taxpayer status pursuant to *Flast v. Cohen*[65] clause. Under *Flast*, taxpayer standing is permitted to challenge a congressional statute's constitutionality if the plaintiff can prove that a "logical nexus" exists between their status as taxpayers and their challenge to the appropriation.[66] No tangible injury need be shown.

It is conceivable that this case would have been framed quite differently had it not been brought under taxpayer standing. Throughout the AFLA's history, only one group is reported to have been denied participation because it did not meet the requirements of the controversial abortion restriction. This statistic is perhaps attributable to the fact that the facial restriction most likely had the effect of discouraging any group "tainted" by its prior involvement in abortion counseling or referral from even applying for funding. Accordingly, none of the interested parties to the suit have plead that they had been injured by a denial of funding in order to sue on other constitutional grounds, e.g., equal protection or due process. For this reason, and because taxpayer standing was available,plaintiffs did not need to assert that the AFLA tended to establish "a

---

[61] Plaintiffs in the original action, B'Nai B'Rith Defamation League, contended that the AFLA has a tendency to benefit groups affiliated with certain denominations, namely Catholic ones which oppose abortion under any circumstances, and exclude others. Members of the Jewish faith do not regard a fetus as a living person, and therefore do not necessarily oppose abortion as part of their religious beliefs. Brief for Appellees 25, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[62] "The clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another," Larson v. Valente, 456 U.S. 228, 244 (1982).

[63] Wallace v. Jaffree, 472 U.S. 38, 76 (1985).

[64] *"'Chastity Act' Lawsuit is Pitting Religions One Against One Another," RICHMOND TIMES DISPATCH*, March 6, 1988, at 12, col. 1.

[65] 392 U.S. 83 (1968).

[66] *Id.* at 102-03.

religion" or a preferred group, but only that it tended to establish religion in general.

The AFLA's restriction clause is regarded as the red herring in *Kendrick* primarily because it injects the volatile issue of abortion into the case. As the district court stated, "The Court...does not decide any issue related to abortion."[67] However, the statute undeniably draws a distinction between organizations which will and will not qualify according to a criterion which deeply divides religious groups. This amounts to the establishment of a religion.

In effect, the AFLA endorses those religious organizations which embrace the religious tenets that premarital sex and abortion are forbidden and wrong.[68] Such a statute, which "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community,"[69] offends the Establishment Clause.

On this point, the government argues that abortion is an issue of public importance, the subject of both secular and theological concern, and that the Establishment Clause is not violated merely because the issue "happens to coincide with the tenets of some or all religions."[70] Although the government concedes that abortion is "a central concern of many religious faiths," it argues that abortion is equally capable of being discussed in secular terms.[71]

The Justice Department maintains that the issue is not whether abortion is *capable* of being discussed in religious terms, but whether a particular participant in the program must be presumed to be *unable* to convey that subject in lawful, secular terms.[72] Reasonable men would agree that abortion could be either a secular or a religious issue, depending on the context of discussion. However, the genuine legal issue here is whether the stipulation contained in the AFLA, presuming that abortion may be discussed by religiously-affiliated counselors under

---

[67] 657 F. Supp. at 1553 n.3.

[68] *See* Brief of Council on Religious Freedom as Amicus Curiae in Support of Appellees and Cross-Appellants, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[69] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[70] Brief for Appellant at 36, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) (citing McGowan v. Maryland, 366 U.S. 420, 421 (1961).

[71] *Id.*

[72] Brief for Appellant, *supra* note 26 at 37-38.

the terms of the statute[73] in a secular manner, tends to establish a preferred religion. A purely pragmatic examination of the AFLA might also include asking whether the stated primary purpose of the statute, to address the social ills of teenage pregnancy and premarital sexual relations, can be fulfilled in the context of a program which limits discussion of abortion.[74]

Implicit in the government's argument on the abortion issue is that *Kendrick* is governed by the Supreme Court cases of *Maher v. Roe*[75] and *Harris v. McRae*,[76] which held that the states and the federal government may refuse to fund medically-necessary abortions in furtherance of an articulated policy of favoring childbirth over abortion.

The Justice Department, relying on *McRae* and *Harris* for the proposition that a women's right to choose to have an abortion is not a fundamental, free-standing right and that governmental policy preferences may permissibly govern the allocation of funds affecting this right, maintains that the restriction clause of the AFLA is permissible.

The Justice Department may be overextending the precedential value of these two cases in contexts outside the conditional spending jurisprudence, as it is unclear whether this proposition carries any weight in an Establishment Clause context.[77] Furthermore, even if Congress is accorded great deference in creating a spending scheme to address compelling social problems, if it effectually validates a preferred social agenda known to be shared by some specific religions or factions and not others, has Congress in fact established a preferred religion?[78]

The district court opinion in *Kendrick* states that "a society is only free when individuals are left free from direct or indirect pressure to abandon their own cherished religious beliefs for whatever set of beliefs currently holds government favor."[79] Clearly, the language of the lower court's opinion speaks

---

[73] The condition of the grants are that they be "made only to projects or programs which do not advocate, promote or encourage abortion." 42 U.S.C. § 300z-10(a)(1982).

[74] See *infra*, text accompanying notes 92-101.

[75] 432 U.S. 464 (1977).

[76] 448 U.S. 297 (1980).

[77] *Harris* was a First Amendment/Due Process case; *McRae* was a Equal Protection Clause case. U.S. CONST. amend. I and amend. XIV, 1.

[78] *See infra* text accompanying notes 102-15.

[79] 657 F. Supp. at 1569.

not only of the danger of establishing "a" preferred religion,[80] but also alludes to the danger of institutionalizing the moral or secular beliefs of the current political majority. Not all religions, nor all people agree that premarital sex and abortion are wrong or sinful. To subordinate the will of the individual for the will of the instant majority on "matters sacred to the conscience" violates the core prohibition of the Establishment Clause.

POLITICAL ENTANGLEMENT AND DIVISIVENESS

The *Kendrick* Court determined that the third prong of the *Lemon* test, whether the statute fosters an excessive entanglement between church and state, was satisfied.[81] In appraising excessive entanglement, the Supreme Court examines three factors: 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.[82] The *Kendrick* Court found that because the religious organizations receiving benefits have a religious character and purpose, and because the risk of abuse with direct monetary grants was great, that the risk of institutionalization of a religious doctrine could only be overcome by government monitoring so continuous that it would rise to the level of excessive entanglement.[83]

As noted above,[84] the nature of the counseling and instructional programs under the AFLA is likely to present a danger that religious beliefs will be inculcated in those taking advantage of the programs. Based on a number of Establishment Clause cases, the Court found excessive entanglement because of the oversight which the program would require.[85] "Unlike a book, a [counselor] cannot be inspected once to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[86] The entanglement prong of the *Lemon* test has been the subject

---

[80] "When the power, prestige, financial support of government is placed behind a particular religious belief, the indirect coercive pressure on religious minorities to conform to the prevailing officially approved religion is plain." Engel v. Vitale, 370 U.S. 421, 431 (1962).

[81] 657 F. Supp. at 1567.

[82] Lemon v. Kurtzman, 403 U.S. at 615.

[83] 657 F. Supp. at 1567.

[84] *See supra* text accompanying notes 45-59.

[85] 657 F. Supp. at 1567-68.

[86] *Lemon*, 403 U.S. at 619.

of recent criticism, though. Justice Rehnquist has called it the "Catch-22" paradox of the Court's creation, citing findings such as *Kendrick* which state that the type of program necessarily requires supervision to avoid entanglement, yet the that supervision itself would cause the entanglement.[87] Another commentator asserts that the entanglement prong of the *Lemon* test is largely responsible for the anomalous results in many Establishment Clause cases.[88]

In *Lynch v. Donnelly*, Justice O'Connor suggested that the entanglement prong be replaced by a test that asks whether the government intends to convey a message of endorsement or disapproval of religion.[89] This new test would require courts to make a broader factual examination of the history of a program such as the AFLA and would require more than a showing that a "danger of establishing religion" inhered in the program. If applied to the AFLA, this new test would affirm the district court's finding under the "effect" prong of the *Lemon* test that Congress' scheme was one under which certain religious affiliations would be benefited.

The entanglement prong has also been viewed by the Court as an inquiry into whether the program tends to create "political divisiveness."[90] Although at least one justice does not believe that this is an appropriate test for Establishment Clause purposes,[91] the "political divisiveness" that the AFLA creates is conspicuous. The Act has the effect of "religious gerrymandering" by choosing, in restricting access to federal funds, to champion one side of a highly inflammatory and polemic issue that deeply divides religions. If the AFLA works to benefit certain religions and not others because of a restriction that is very politically divisive, religion has in effect been established.

THE CHASTITY ACT AND CONDITIONAL SPENDING

Although *Kendrick* was not brought to challenge the AFLA as a

---

[87] *Aguilar*, 473 U.S. at 420-21.

[88] Choper, *"The Religion Clauses of the First Amendment; Reconciling the Conflict,"* 41 U. PITT. L. Rev. 673, 681 (1980).

[89] 465 U.S. 668, 691-94 (1983).

[90] *See Nyquist*, 413 U.S. at 796; *Lemon*, 403 U.S. at 623.

[91] Justice O'Connor has stated, "In my view, political divisiveness along religious lines should not be an independent cause test of constitutionality," Lynch v. Donnelly, 465 U.S. at 689 (concurring). She has recently added that any discussion of the entanglement prong should be limited to institutional entanglement in the nature of the governmental activity, and should not review the possible political divisiveness that the program creates among partisan interest groups. *Felton*, 473 U. S. at 421-30.

congressional coercive spending case, it raises a few profound constitutional concerns about such programs. The General Welfare Clause of article I[92] confers on Congress only a power to spend; it confers no express independent power to regulate.[93] It has long been held that government may not regulate matters indirectly which it cannot regulate directly.[94]

While Congress today has the broad power to choose to subsidize or otherwise encourage certain activities, its power to discourage or penalize other activities by attaching conditions or privileges is questionable. In two very recent cases, the Supreme Court has held that unconstitutional conditions compelling the surrender of independent constitutional rights are invalid.[95]

In *FCC v. League of Women Voters*,[96] the Court invalidated a provision of the Public Broadcasting Act that prohibited any noncommercial educational station receiving public funds from endorsing candidates or editorializing. The Court held that under the scheme the stations would have to forfeit their first amendment right of freedom of expression if they wished to receive funding. The case is notable because of its treatment of the conditional spending restriction on free speech as a direct regulation.

The 1986 case of *Babbitt v. Planned Parenthood Federation*,[97] concerned a state funding program similar to the AFLA. The state of Arizona appropriated state funds to pay for family-planning services on the condition that such funds would not be made available to groups offering abortions, abortion referral or counseling for abortions. The state argued that the measure was permissible under *Maher v. Roe*[98] as an exercise of a state's right to withhold public funds from abortion-related services. The Supreme Court, in summary affirmance of the Court of Appeals for the Ninth Circuit, held that it was improper to flatly deny

---

92 "The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8.

93 United States v. Butler, 297 U.S. 1 (1936).

94 Sherbert v. Verner, 374 U.S. 398 (1963), held that a state may not deny unemployment benefits to a person who refuses to work on Saturday for religious reasons.

95 FCC v. League of Women Voters, 468 U.S. 364 (1984) and Babbitt v. Planned Parenthood Fed., 107 S. Ct. 391 (1986), *aff'g* Planned Parenthood of Central & Northern Arizona v. Arizona, 789 F.2d 1348 (9th Cir. 1986).

96 468 U.S. at 364.

97 107 S. Ct. at 391.

98 432 U.S. 464 (1977).

money to groups which could separate their abortion-related from their non-abortion services and thereby qualify for funding under the program.[99]

Both of these recent cases stand for the proposition that Congress may not coercively manipulate constitutionally protected rights by denying funding for certain programs. Although the Court's opinion in *Babbitt* did not address this point expressly, the fact that it struck down the state's plan in the face of *Maher v. Roe* weakens the precedential value of the *Maher* decision in this area.[100] Interestingly, these two decisions, relied upon by appellants in *Kendrick* who assert that these cases squarely stand for the proposition that federal and state governments may choose to champion childbirth and choose not to fund abortions, are in question after *Babbitt.*

Professor Laurence Tribe and other authorities have stated that at the time it was decided, *Maher* seemed to ignore all of the Court's earlier cases establishing that the government's decision to fund a program and not another may be unconstitutional if its purpose is to discourage the exercise of a constitutionally-protected right.[101] If indeed *Maher* has now been narrowed and a woman's right to an abortion, whether "fundamental" or not, may not necessarily be interfered with by the state, *Kendrick* should also be regarded as acase which confirms the notion that Congress may not regulate in areas which affect constitutionally-safeguarded rights of the individual.

If, through the AFLA, Congress has not impermissibly regulated the constitutional right of a woman's access to groups willing to offer her the constitutionally-protected right choice to abortion, it has impermissibly restricted her first amendment guarantees by a content-based regulation of her right of access to information about sexual matters and abortion.

---

[99] It should be noted that the Ninth Circuit Court of Appeals rejected the State of Arizona's assertion that funding must be denied outright to groups such as Planned Parenthood which applied for funds for its non-abortion related services, but which also provided abortion-related services. The Court found that it was not "impossible," as the State contended, to monitor through a review of accounting records, where allocated funds were directed. 789 F.2d at 1351. Contrast this with the Court's trend in recent Establishment Clause cases to apply a slapdash answer to the entanglement prong of the *Lemon* tests. *See, e.g., Grand Rapids School District*, 473 U.S. at 398, where the Court treated the issue in one sentence on the last page of its opinion and *Lynch*, 465 U.S. at 683-84, where the issue was mentioned in one paragraph.

[100] *See supra* note 98.

[101] Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332-37 (1985). *See also* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1142-56, 1158-59 (1987).

Although *Kendrick* was never plead as a first amendment[102] free speech case, the abortion restriction clause of the AFLA can be scrutinized as a form of censorship or restraint of free speech. The language of the AFLA states that "grants may be made only to projects or programs which do not advocate, promote or encourage abortion."[103] Although this restriction primarily serves as a prerequisite that must be met by groups applying to participate in the AFLA, it may also be viewed as a prospective limitation on the activities of those groups which have already received funding.

As mentioned above,[104] the Supreme Court in *Federal Communications Commission v. League of Women Voters* recently held that federal funds cannot be denied under a restriction which has the effect of limiting free speech.[105] Likewise, the AFLA should not be able to silence grant applicants who may believe that providing information about contraception and abortion, whether or not this is regarded as "advocating" or "promoting," may be a legitimate means of preventing adolescent pregnancy, the purported purpose of the Act. The Supreme Court has stated that "where...a speaker desires to convey truthful information relevant to important social issues such as family planning and prevention of venereal disease...the first amendment interest served by such speech is paramount."[106] When viewed in this light, the restriction clause of the AFLA begins to look much like impermissible prior restraint.

The Supreme Court has held that Congress cannot discriminate in their subsidies in such a way that "aims at the suppression of [what are seen as] dangerous ideas"[107] Additionally, government may not attempt to *reduce* in any way the amount of information available to it citizens.[108] Fundamental to the first amendment is the notion that government may not forbid the suppression of ideas which may differ from the beliefs of whatever majority is currently in

---

[102] U.S. CONST. amend. I.

[103] 42 U.S.C. § 300z-10(a).

[104] *See supra* text accompanying notes 95-96.

[105] FCC v. League of Women Voters, 468 U.S. 364 (1985).

[106] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 69 (1983).

[107] Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983). *See also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (government benefit designed to suppress a particular point of view with which the government disagrees is unconstitutional).

[108] Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

power.[109] Yet, the AFLA contains a conspicuous viewpoint-based restriction on free speech in the form of a condition for federal funds.

In addition to placing a restriction on the speech and activities of the organizations participating in the AFLA, it can also be said that the Act inhibits the privacy rights and right of access to information of individuals who seek counselling through one of these organizations.[110] The Supreme Court, in *Carey v. Population Services International*[111] held that government may not interfere with this correlative right of access to information about private decisions.

This speech restriction of the AFLA should be particularly disquieting when one considers the type of individual whom the AFLA is targeting. According to the statute, the AFLA was aimed at adolescents, some pregnant, who were more likely to live in low-income communities with high rates of regnancy.[112] Because of the economic status and youth of the individuals who would benefit from the AFLA, their needs would render them more vulnerable and their decisions would be more easily influenced[113]. Additionally, they are less likely to have access, through other avenues, to accurate information about abortion and contraception. In light of these facts, free speech concerns should clearly take on heightened importance where teenage sexual education is concerned.[114]

The Supreme Court may choose to embrace the argument advanced by the Justice Department here that because government may choose not to fund a woman's abortion,[115] it may therefore permissibly choose not to fund programs which "advocate" or "promote" abortion. Even so, the proposition that government may choose not to fund a woman's abortion does not grant that government authority to restrict her access to information regarding that decision,

---

[109] Abrams v. U.S., 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

[110] *See* Brief of Amici Curiae (NOW Legal Defense and Education Fund and National Abortion Rights Action League) In Support of Appellees and Cross-Appellants, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[111] 431 U.S. 678 (1977).

[112] "In approving applications for grants...the Secretary shall give priority to applicants who -- 1) serve an area where there is a high incidence of adolescent pregnancy; 2) serve an area with a high proportion of low-income families and where the availability of programs of care is low..." 42 U.S.C. § 300z-4(a) (1982).

[113] These decisions may include whether or not to carry a fetus to full term.

[114] In Bolger v. Youngs Drugs Products, 463 U.S. at 74 n.30, the Supreme Court said that "the right of privacy in matters affecting procreation applies to minors...[and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception."

[115] Under the authority of Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

whether that access is or is not publicly funded. In this light, the AFLA's provisions, to the extent that they jeopardize a woman's access to this information as well as the first amendment freedoms of groups participating in the program, are clearly unconstitutional.

CONCLUSION

The Supreme Court, in assessing the constitutionality of the Adolescent Family Life Act, should affirm the ultimate holding of the district court in *Kendrick*. When examined under the traditional test of *Lemon*, the AFLA should be found to contain a legitimate secular purpose and should not be held to have the facial effect of establishing religion. However, as applied, the statute tends to establish a religion.

First, because the AFLA sought to provide a social service which involves teaching and counseling of adolescents on "matters sacred to the conscience," the nature of the program itself falls into a somewhat suspect class of activity. The danger that religion will be inculcated in this setting is great, and the Court in *Kendrick* expressly states that the suspicious scheme of this program is a factor in its holding. Based on the presence of this danger, the district court, with an unsatisfactory review of the factual record of *Kendrick*, applied a less scrutinizing standard, finding that the AFLA had the "primary effect of establishing religion." However, the district court's opinion is not necessarily erroneous.

Judge Richey's opinion most likely reflects the sentiment that the AFLA, if it did not intend to establish religion, provided a program which enunciated a valid legislative purpose but was intended to be highly accommodating to religious interests. Moreover, in the imposition of an abortion-related restriction on participant groups, the AFLA further meddled in the religious sphere. In choosing to deny access to the program's funds to groups which could not guarantee that they would not promote abortion, the AFLA had the effect of "religious gerrymandering" among religious denominations, based on their particular belief on this divisive issue. In this way, the AFLA had the impact of benefitting only religious and secular organizations which shared the view that discussion of sexual relations and pregnancy must exclude any advocacy of abortion under any circumstances.

For purposes of Establishment Clause analysis, the abortion restriction clause is relevant only to the extent that it applies to the third prong of the *Lemon* test, excessive entanglement, and that it creates severe political divisiveness among religions. If the AFLA were challenged on an equal protection or first amendment basis, this controversial restriction would provide further grounds for invalidation of the Act.

The Supreme Court's disposition of *Kendrick* may elucidate the deficiencies of the *Lemon* test, in particular the "excessive entanglement" and "political divisiveness" inquiry, and will most likely refresh the Court's Establishment Clause analysis.