

From, Brest, Levinson, Balkin, Amar and Siegel, (5<sup>th</sup> edition 2006):

**BOWEN v. KENDRICK**

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

REHNQUIST, C.J., delivered the opinion of the Court.

This litigation involves a challenge to a federal grant program that provides funding for services relating to adolescent sexuality and pregnancy. Considering the federal statute both “on its face” and “as applied,” the District Court ruled that the statute violated the Establishment Clause of the First Amendment insofar as it provided for the involvement of religious organizations in the federally funded programs. We conclude, however, that the statute is not unconstitutional on its face, and that a determination of whether any of the grants made pursuant to the statute violate the Establishment Clause requires further proceedings in the District Court.

I

The Adolescent Family Life Act (AFLA or Act) was passed by Congress in 1981 in response to the “severe adverse health, social, and economic consequences” that often follow pregnancy and childbirth among unmarried adolescents. Like its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, the AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies “for services and research in the area of premarital adolescent sexual relations and pregnancy.” These grants are intended to serve several purposes, including the promotion of “self discipline and other prudent approaches to the problem of adolescent premarital sexual relations,” the promotion of adoption as an alternative for adolescent parents, the establishment of new approaches to the delivery of care services for pregnant adolescents, and the support of research and demonstration projects “concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing.”

. . . In drawing up the AFLA and determining what services to provide under the Act, Congress was well aware that “the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex.” . . . Accordingly, the AFLA expressly states that federally provided services in this area should promote the involvement of parents, and should “emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups.” . . . The AFLA implements this goal by providing . . . that demonstration projects funded by the government “shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.”

In addition, AFLA requires grant applicants, among other things, to describe how they will, “as appropriate in the provision of services[,] involve families of adolescents[, and] involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.”

. . . Since 1981, when the AFLA was adopted, the Secretary has received 1,088 grant applications and awarded 141 grants. Funding has gone to a wide variety of recipients, including state and local health agencies, private hospitals, community health associations, privately operated health care centers, and community and charitable

organizations. It is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious denominations. . . .

## II

. . . [W]e turn to consider whether the District Court was correct in concluding that the AFLA was unconstitutional on its face. As in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* standard, which guides “[t]he general nature of our inquiry in this area,” a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, if its primary effect is the advancement of religion, or if it requires excessive entanglement between church and state. We consider each of these factors in turn.

. . . AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood. . . . As usual in Establishment Clause cases, the more difficult question is whether the primary effect of the challenged statute is impermissible. Before we address this question, however, it is useful to review again just what the AFLA sets out to do. Simply stated, it authorizes grants to institutions that are capable of providing certain care and prevention services to adolescents. Because of the complexity of the problems that Congress sought to remedy, potential grantees are required to describe how they will involve other organizations, including religious organizations, in the programs funded by the federal grants. . . .

The services to be provided under the AFLA are not religious in character, nor has there been any suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services. Certainly it is true that a substantial part of the services listed as “necessary services” under the Act involve some sort of education or counseling, but there is nothing inherently religious about these activities and appellees do not contend that, by themselves, the AFLA’s “necessary services” somehow have the primary effect of advancing religion. Finally, it is clear that the AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy—for example, two of its stated purposes are to “promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations,” and to “promote adoption as an alternative”—but again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions.

Given this statutory framework, there are two ways in which the statute, considered “on its face,” might be said to have the impermissible primary effect of advancing religion. First, it can be argued that the AFLA advances religion by expressly recognizing that “religious organizations have a role to play” in addressing the problems associated with teenage sexuality. In this view, even if no religious institution receives aid or funding pursuant to the AFLA, the statute is invalid under the Establishment Clause because, among other things, it expressly enlists the involvement of religiously affiliated organizations in the federally subsidized programs, it endorses religious solutions to the problems addressed by the Act, or it creates symbolic ties between church and state. Secondly, it can be argued that the AFLA is invalid on its face because it allows religiously affiliated organizations to participate as grantees or subgrantees in AFLA programs. From this standpoint, the Act is invalid because it authorizes direct federal

funding of religious organizations which, given the AFLA's educational function and the fact that the AFLA's "viewpoint" may coincide with the grantee's "viewpoint" on sexual matters, will result unavoidably in the impermissible "inculcation" of religious beliefs in the context of a federally funded program.

We consider the former objection first. As noted previously, the AFLA expressly mentions the role of religious organizations in four places. It states (1) that the problems of teenage sexuality are "best approached through a variety of integrated and essential services provided to adolescents and their families by[, among others,] religious and charitable organizations," (2) that federally subsidized services "should emphasize the provision of support by[, among others,] religious organizations," that AFLA programs "shall use such methods as will strengthen the capacity of families . . . to make use of support systems such as . . . religious . . . organizations," and (4) that grant applicants shall describe how they will involve religious organizations, among other groups, in the provision of services under the Act.

Putting aside for the moment the possible role of religious organizations as grantees, these provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed. Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . . In addition, although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services under the Act, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector."

In our view, this reflects the statute's successful maintenance of "a course of neutrality among religions, and between religion and non-religion." This brings us to the second ground for objecting to the AFLA: the fact that it allows religious institutions to participate as recipients of federal funds. . . . [A] fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. In this regard, then, the AFLA is similar to other statutes that this Court has upheld against Establishment Clause challenges in the past. In *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976), for example, we upheld a Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the State, including religiously affiliated institutions. As the plurality stated, "religious institutions need not be quarantined from public benefits that are neutrally available to all." . . . In other cases involving indirect grants of state aid to religious institutions, we have found it important that the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution.

We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs. To the contrary, in *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a new building on the grounds of the hospital. In effect, the Court refused to hold that the mere fact that the hospital was "conducted under the auspices of the

Roman Catholic Church” was sufficient to alter the purely secular legal character of the corporation, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter. In the Court’s view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was “wholly immaterial.” The propriety of this holding, and the long history of cooperation and interdependency between governments and charitable or religious organizations is reflected in the legislative history of the AFLA.

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 the aid flows to institutions that are “pervasively sectarian.” . . . [A] relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions. . . . In this lawsuit, 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.” . . . [W]e do not think the possibility that AFLA grants may go to religious institutions that can be considered “pervasively sectarian” is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations. We think that the District Court was wrong in concluding otherwise.

Nor do we agree with the District Court that the AFLA necessarily has the effect of advancing religion because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents. Of course, we have said that the Establishment Clause does “prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith,” and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to “advance the religious mission” of the religious institution receiving aid. But nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner. Only in the context of aid to “pervasively sectarian” institutions have we invalidated an aid program on the grounds that there was a “substantial” risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, . . . we refused to presume that it would be used in a way that would have the primary effect of advancing religion. We think that the type of presumption that the District Court applied in this case is simply unwarranted. . . .

We also disagree with the District Court’s conclusion that the AFLA is invalid because it authorizes “teaching” by religious grant recipients on “matters [that] are fundamental elements of religious doctrine,” such as the harm of premarital sex and the

reasons for choosing adoption over abortion. On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion.

Nor does the alignment of the statute and the religious views of the grantees run afoul of our proscription against "fund[ing] a specifically religious activity in an otherwise substantially secular setting." The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.

As yet another reason for invalidating parts of the AFLA, the District Court found that the involvement of religious organizations in the Act has the impermissible effect of creating a "crucial symbolic link" between government and religion. If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital—part of whose "religious mission" might be to save lives—and whatever government entity is subsidizing the purely secular medical services provided to the patient. We decline to adopt the District Court's reasoning and conclude that, in this litigation, whatever "symbolic link" might in fact be created by the AFLA's disbursement of funds to religious institutions is not sufficient to justify striking down the statute on its face.

. . . This, of course, brings us to the third prong of the *Lemon* Establishment Clause "test"—the question whether the AFLA leads to "an excessive government entanglement with religion." There is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause. Accordingly, this litigation presents us with yet another "Catch-22" argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. For this and other reasons, the "entanglement" prong of the *Lemon* test has been much criticized over the years. Most of the cases in which the Court has divided over the "entanglement" part of the *Lemon* test have involved aid to parochial schools. . . .

Here, 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. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees. Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use.

The Secretary may also wish to have Government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements. But in our view, this type of grant monitoring does not amount to “excessive entanglement,” at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily “pervasively sectarian.” In sum, . . . we have concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state. . . . [W]e conclude that the AFLA does not violate the Establishment Clause “on its face.”

### III

We turn now to consider whether the District Court correctly ruled that the AFLA was unconstitutional as applied. . . . On the merits of the “as applied” challenge, it seems to us that the District Court did not follow the proper approach in assessing appellees’ claim that the Secretary is making grants under the Act that violate the Establishment Clause of the First Amendment. Although the District Court stated several times that AFLA aid had been given to religious organizations that were “pervasively sectarian,” it did not identify which grantees it was referring to, nor did it discuss with any particularity the aspects of those organizations which in its view warranted classification as “pervasively sectarian.” The District Court did identify certain instances in which it felt AFLA funds were used for constitutionally improper purposes, but in our view the court did not adequately design its remedy to address the specific problems it found in the Secretary’s administration of the statute. Accordingly, although there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees, we feel that this lawsuit should be remanded to the District Court for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered. . . .

[Concurring opinions by Justice O’Connor and by Justice Kennedy, joined by Justice Scalia, are omitted.]

BLACKMUN, J., with whom BRENNAN, MARSHALL, and STEVENS, JJ., join, dissenting:  
. . . It is unclear whether Congress ever envisioned that public funds would pay for a program during a session of which parents and teenagers would be instructed:

“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.”

Or of curricula that 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.”

Or the teaching of a method of family planning described on the grant application as “not only a method of birth regulation but also a philosophy of procreation,” and promoted as helping “spouses who are striving . . . to transform their married life into testimony[,] . . . to cultivate their matrimonial spirituality[, and] to make themselves

better instruments in God’s plan,” and as “facilitat[ing] the evangelization of homes.”

Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record developed thus far in this litigation makes all too clear, federal tax dollars appropriated for AFLA purposes have been used, with Government approval, to support religious teaching. Today the majority upholds the facial validity of this statute and remands the action to the District Court for further proceedings concerning appellees’ challenge to the manner in which the statute has been applied. Because I am firmly convinced that our cases require invalidating this statutory scheme, I dissent.

I

. . . By 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, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* “effects” prong particularly sterile and meaningless. By 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. In my view, a more effective way to review Establishment Clause challenges is to look to the type of relief prayed for by the plaintiffs, and the force of the arguments and supporting evidence they marshal. Whether we denominate a challenge that focuses on the systematically unconstitutional operation of a statute a “facial” challenge—because it goes to the statute as a whole—or an “as-applied” challenge—because we rely on real-world events—the Court should not blind itself to the facts revealed by the undisputed record.

. . . [T]his law suit has been litigated primarily as a broad challenge to the statutory scheme as a whole, not just to the awarding of grants to a few individual applicants. The thousands of pages of depositions, affidavits, and documentary evidence were not intended to demonstrate merely that particular grantees should not receive further funding. Indeed, because of the 5-year grant cycle, some of the original grantees are no longer AFLA participants. This record was designed to show that the AFLA had been interpreted and implemented by the Government in a manner that was clearly unconstitutional, and appellees sought declaratory and injunctive relief as to the entire statute. . . .

II

Before proceeding to apply *Lemon*’s three-part analysis to the AFLA, I pause to note a particular flaw in the majority’s method. A central premise of the majority opinion seems to be that the primary means of ascertaining whether a statute that appears to be neutral on its face in fact has the effect of advancing religion is to determine whether aid flows to “pervasively sectarian” institutions. . . .

“Pervasively sectarian,” a vaguely defined term of art, has its roots in this Court’s recognition that government must not engage in detailed supervision of the inner workings of religious institutions, and the Court’s sensible distaste for the “picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction.” Under the “effects” prong of the *Lemon* test, the Court has used one variant or another of the pervasively sectarian concept to explain why any but the most indirect

forms of government aid to such institutions would necessarily have the effect of advancing religion. For example, in *Meek*, the Court explained:

“[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania’s church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian.”

The majority first skews the Establishment Clause analysis by adopting a cramped view of what constitutes a pervasively sectarian institution. Perhaps because most of the Court’s decisions in this area have come in the context of aid to parochial schools, which traditionally have been characterized as pervasively sectarian, the majority seems to equate the characterization with the institution. In support of that, the majority relies heavily on three cases in which the Court has upheld direct government funding to liberal arts colleges with some religious affiliation, noting that such colleges were not “pervasively sectarian.” But the happenstance that the few cases in which direct-aid statutes have been upheld have concerned religiously affiliated liberal arts colleges no more suggests that only parochial schools should be considered “pervasively sectarian,” than it suggests that the only religiously affiliated institutions that may ever receive direct government funding are private liberal arts colleges. In fact, the cases on which the majority relies have stressed that the institutions’ “predominant higher education mission is to provide their students with a secular education.” In sharp contrast, the District Court here concluded that AFLA grantees and participants included “organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them.” On a continuum of “sectarianism” running from parochial schools at one end to the colleges funded by the statutes [that have been] upheld . . . at the other, the AFLA grantees described by the District Court clearly are much closer to the former than to the latter.

More importantly, the majority also errs in suggesting that the inapplicability of the label is generally dispositive. While a plurality of the Court has framed the inquiry as “whether an institution is so ‘pervasively sectarian’ that it may receive no direct state aid of any kind,” *Roemer v. Maryland Public Works Board*, the Court never has treated the absence of such a finding as a license to disregard the potential for impermissible fostering of religion. The characterization of an institution as “pervasively sectarian” allows us to eschew further inquiry into the use that will be made of direct government aid. In that sense, it is a sufficient, but not a necessary, basis for a finding that a challenged program creates an unacceptable Establishment Clause risk. The label thus serves in some cases as a proxy for a more detailed analysis of the institution, the nature of the aid, and the manner in which the aid may be used.

The voluminous record compiled by the parties and reviewed by the District Court illustrates the manner in which the AFLA has been interpreted and implemented by the agency responsible for the aid program, and eliminates whatever need there might be to speculate about what kind of institutions might receive funds and how they might be selected; the record explains the nature of the activities funded with Government money, as well as the content of the educational programs and materials developed and disseminated. There is no basis for ignoring the volumes of depositions, pleadings, and

undisputed facts reviewed by the District Court simply because the recipients of the Government funds may not in every sense resemble parochial schools.

### III

As is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems. Because I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose, and because I find the statute's effect of advancing religion dispositive, I turn to that issue directly.

A . . .

#### (1)

. . . The AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make "a total separation between secular teaching and religious doctrine." Where the targeted audience is composed of children, of course, the Court's insistence on adequate safeguards has always been greatest. In those cases in which funding of colleges with religious affiliations has been upheld, the Court has relied on the assumption that "college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations."

#### (2)

By observing that the alignment of the statute and the religious views of the grantees do not render the AFLA a statute which funds "specifically religious activity," the majority makes light of the religious significance in the counseling provided by some grantees. Yet this is a dimension that Congress specifically sought to capture by enlisting the aid of religious organizations in battling the problems associated with teenage pregnancy. Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature. Not surprisingly, the record is replete with observations to that effect. It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." . . .

There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter. . . .

### B

. . . [Justice Blackmun criticizes the statute for failing specifically to limit the ways that federal funds can be spent.]

### IV

. . . [T]he unconstitutionality of the statute becomes even more apparent when we

consider the unprecedented degree of entanglement between Church and State required to prevent subsidizing the advancement of religion with AFLA funds. . . .

To determine whether a statute fosters excessive entanglement, a court must look at three factors: (1) the character and purpose of the institutions benefited; (2) the nature of the aid; and (3) the nature of the relationship between the government and the religious organization. Thus, in *Lemon*, it was not solely the fact that teachers performed their duties within the four walls of the parochial school that rendered monitoring difficult and, in the end, unconstitutional. It seems inherent in the pedagogical function that there will be disagreements about what is or is not “religious” and which will require an intolerable degree of government intrusion and censorship. . . . As the majority readily acknowledges, the Secretary will have to “review the programs set up and run by the AFLA grantees [,including] a review of, for example, the educational materials that a grantee proposes to use.” And, as the majority intimates, monitoring the use of AFLA funds will undoubtedly require more than the “minimal” inspection “necessary to ascertain that the facilities are devoted to secular education.” Since teachers and counselors, unlike buildings, “are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction.” . . .

#### *Discussion*

Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 includes the following language:

- (1) STATE OPTIONS A state may
  - (A) administer and provide services under the programs described [in the Act] through contracts with charitable, religious, or private organizations; and
  - (B) provide beneficiaries of assistance under the programs described [in the Act] with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations. . . .
- (b) RELIGIOUS ORGANIZATIONS The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described [earlier], on the same basis as any other nongovernmental provider without impairing the religious character of such organization, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.
- (c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS . . . [R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described [earlier] so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. . . .
- (d) RELIGIOUS CHARACTER AND FREEDOM
  - (1) RELIGIOUS ORGANIZATIONS A religious organization with a contract described [above] . . . shall retain its independence from Federal, State, and local governments, including such organization’s control over the definition, development,

practice, and expression of its religious beliefs.

(2) ADDITIONAL SAFEGUARDS Neither the Federal Government nor a State shall require a religious organization to

(A) alter its form of internal governance; or

(B) (B) remove religious art, icons, scripture, or other symbols; in order to be eligible [for federal funds]. . . .

(e) RIGHTS OF BENEFICIARIES OF ASSISTANCE

(1) IN GENERAL If an individual . . . has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance . . . , the State in which the individual resides shall provide such individual . . . within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

By 2000, both candidates supported the use of “faith-based institutions” to implement the welfare state; indeed, incorporation of such institutions into governmental programs has been a motif of President George W. Bush’s administration. Many constitutional issues are presented by such programs, most of them beyond the limited scope of this casebook. Consider for now only the following, based on the language of §104:

a) A young person seeking treatment for the use of drugs is assigned to a religiously sponsored program that meets in a room that prominently features the religious symbols of the particular religion. Assume as well that, upon registering an objection, the youngster is told that there are no other programs currently available. He sues. What result?

b) A state inspector, charged with the task of making sure that the beneficiaries of state funds do not use them for illegitimate purposes, discovers that religious symbols, as well as religious literature, are prominently displayed (with large signs in front of the stand containing the religious literature saying “TAKE SOME”) in the waiting room immediately outside the room in which the program meets, where every participant usually spends 10 to 15 minutes before moving into the room next door (which does not contain any religious symbols at all). The inspector demands that the literature be moved to a less prominent place. As the lawyer to the religious institution, what would you advise?

**Note: Disaster Relief, the Welfare State, and the Establishment Clause**

As noted earlier, the origins of the welfare state can be said to lie in the provision by the state to victims of disasters. An important agency of the contemporary national government is the Federal Emergency Management Administration (FEMA), which immediately responds to disasters, whether natural (e.g., a hurricane) or otherwise (e.g., the 1995 Oklahoma City bombing). FEMA commonly offers low-interest loans or outright grants to victims, including owners of damaged buildings, for purposes of repairing property that has been damaged. Can (or must) FEMA limit disaster relief to buildings that serve only “secular purposes,” or should aid be available, for example, to

rebuild the apse of a church or replace the shattered Ark of the Covenant in which Torah scrolls are placed in synagogues?

Consider in this context a September 25, 2002, memorandum signed by Jay Bybee, then the head of the Office of Legal Counsel (OLC) within the Justice Department, for the General Counsel of FEMA analyzing “whether [FEMA] may . . . provide disaster assistance to the Seattle Hebrew Academy,” which, “like other Seattle institutions, sustained severe damage as a result of” an earthquake the previous year. The OLC is responsible for issuing authoritative opinions, upon request of the president or any given executive-branch agency, as to the meaning of federal statutes and their legitimacy under the Constitution. OLC opinions guide the executive branch interpretation of the Constitution until overruled by judicial decision, and hence determine the Constitution’s practical effect in a wide variety of situations.

FEMA had earlier denied the Academy’s application for assistance on the ground that “the Academy’s building was not a ‘private nonprofit facility’ ” within the meaning of the relevant statute “because it was not open to ‘the general public.’ ” The FEMA official had “determined that a religiously affiliated educational facility is not open to ‘the general public’ if it only admits students of a particular faith.” The OLC ruled that this was not a proper interpretation of the relevant congressional statutes. That did not conclude the inquiry, because the next question, of course, was whether such aid was permissible under the Establishment Clause.

. . . Although there is no precedent that directly controls this specific issue, we conclude that the Establishment Clause does not pose a barrier to FEMA’s provision of a disaster assistance grant to the Academy. The aid that is authorized by federal law is made available on the basis of neutral criteria to an unusually broad class of beneficiaries defined without reference to religion and including not only educational institutions but a host of other public and private institutions as well. Moreover, the program’s design is not characterized by the sort of administrative discretion that can readily be used to favor religion, and the evidence demonstrates that FEMA has exercised its discretion in a neutral manner. Thus, we believe that provision of disaster assistance to the Academy cannot be materially distinguished from aid programs that are constitutional under longstanding Supreme Court precedent establishing that religious institutions are fully entitled to receive generally available government benefits and services, such as fire and police protection.

[T]he FEMA grants in question are made available not only to public and private schools, but to “private nonprofit . . . utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.” 42 U.S.C.A. § 5122(9). Accordingly, we think that the “circumference” of this program can fairly be said to “ ‘encircle[] a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.’ ” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J.)). As the Court stated in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), “[t]he provision of benefits to so

broad a spectrum of groups is an important index of secular effect.” *Accord Texas Monthly*, 489 U.S. at 14-15 (plurality opinion) (“[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause” (footnote omitted)). . .

We cannot say, however, that there are no arguments to the contrary. Most important, there is an argument that providing FEMA disaster relief to repair a school used for religious instruction would run afoul of Supreme Court precedent restricting the use of “direct” aid that can be put to specifically religious uses. [One such case, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Discussed supra, at p. \_\_\_] In particular, one might argue that insofar as the grant used to rebuild the Academy’s building would ultimately support the building’s use for secular *and* religious purposes—*i.e.*, both secular and religious teaching—such aid is unlawful under Supreme Court decisions from the 1970s holding that public construction grants for educational institutions may not be applied toward buildings used for religious purposes. . . .

The argument that direct aid to education unlawfully advances the mission of religious schools applies with the greatest force where such schools constitute a substantial percentage of those that receive aid. That argument is much harder to make where the aid is provided to a range of nonprofit institutions of which schools are but one part. The broad class of beneficiaries that are eligible for aid under the statute here . . . confirms that, in contrast to the education-specific aid at issue in the foregoing cases, the disaster relief provided by FEMA serves goals entirely unrelated to education—namely, rehabilitation of a community that has suffered great loss from a natural disaster by helping to rebuild institutions that perform quasi-public functions and are (by virtue of their nonprofit status) most in need of assistance.

We find further support for our decision in the fact that [the 1970s cases] are in considerable tension with a long and growing line of cases holding that the Free Speech Clause does not permit the government to deny religious groups equal access to *the government’s own property*, even where such groups seek to use the property “‘for purposes of religious worship or religious teaching.’” *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). See *Lamb’s Chapel*. Providing religious groups with access to property is a form of direct aid—albeit not financial aid—and allowing such groups to conduct worship services plainly “advances” their religious mission. The Court, however, has consistently refused to *permit* (let alone require) state officials to deny churches equal access to public school property “on the ground that to permit its property to be used for religious purposes would be an establishment of religion.” Indeed, the Court has gone so far as to extend the reasoning of these cases to require equal *funding* of religious student expression, reasoning that “[e]ven the provision of a meeting room . . . involve[s] governmental expenditure” for “upkeep, maintenance, and repair of the facilities.” See *Rosenberger*.

As in *Rosenberger*, the issue here “lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.” In such a case, “[r]eliance on categorical platitudes,” such as an absolute “no direct aid” principle, “is unavailing.” . . . Accordingly, we conclude that the FEMA assistance here is more analogous to the police and fire services discussed in *Everson* than to the educational assistance at issue in [the 1970s cases].

For similar reasons, we do not believe that a reasonable observer would perceive an endorsement of religion in the government’s evenhanded provision of aid to a religious school damaged by an earthquake. . . .

Our conclusion is strongly supported by the evidence regarding FEMA’s application of the criteria for receiving funds under the Act. Apart from the Academy, of the 268 Nisqually Earthquake applications on which FEMA has ruled, 267 applicants—all but *one*—were declared eligible for funding. It thus appears that there is little exercise of discretion regarding religion in the distribution of grant funds—indeed, in this instance, funding was virtually automatic—and the diverse makeup of those that have received funds confirms that the program’s administration is not “skewed towards religion.” This largely (if not entirely) eliminates any “special risks” that direct aid “will have the effect of advancing religion (or, even more, a purpose of doing so).” . . . Of the funded institutions, 245 are public facilities, while only 22 are private nonprofit facilities. The public facilities include, among other things, schools and school districts (of which there are 63), fire stations, libraries, prisons, utilities, and buildings that provide public social services. The private facilities likewise include a broad array of institutions—hospitals and other health facilities, low income housing centers, social services organizations, and even a “maritime discovery center.” Judging from the names of the private organizations, moreover, it appears that only a handful have religious affiliations. In sum, we see no basis for concern that FEMA administrators have discretion to favor religious applicants, or that those administrators have exercised what little discretion they do have in a manner that favors religion.

#### *Discussion*

The OLC memo clearly gives the executive branch *permission* to award funds to religious institutions, as does a later memorandum, issued on April 30, 2003, concerning historic preservation grants to help restore still-operating churches of historical significance, such as the Old North Church in Boston from which Paul Revere received the signal to begin his famous ride.<sup>1</sup> This latter opinion reverses an earlier 1995 memorandum, written by then-Assistant Attorney General for OLC Walter Dellinger (see <http://www.usdoj.gov/olc/doi.24.htm>), that held such grants unconstitutional.<sup>2</sup>

The Seattle earthquake was of minor significance compared to the devastation wrought by Hurricane Katrina in 2005. No doubt many churches and synagogues were

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<sup>1</sup> See Memorandum from M. Edward Whelan III, to the Solicitor, Department of the Interior: Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as The Old North Church, available at <http://www.usdoj.gov/olc/OldNorthChurch.htm>.

<sup>2</sup> See Ira C. Lupu and Robert Tuttle, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, 43 Boston College L. Rev. 1139 (2002).

destroyed along with thousands upon thousands homes and businesses. So what should FEMA's response be when religious institutions ask for the same degree of aid as will undoubtedly be available to homeowners and businesses? Does the OLC memorandum—or *Rosenberger*--mean that FEMA or other agencies might be under a *duty* to award funds to religious institutions if they are, in effect, among the few (or only) institutions excluded from participation in a wide-ranging program of the modern welfare state. Does *Locke v. Davey* shed light on this question? If you were you assisting a member of Congress charged with drafting post-Katrina disaster-relief legislation, what would you advise?