

## Bowen v. Kendrick (1988)

On 29 June 1988, in *Bowen v. Kendrick*, the US Supreme Court ruled in a five-to-four decision that the 1981 Adolescent Family Life Act, or AFLA, was constitutional. Under AFLA, the US government could distribute federal funding for abstinence-only sexual education programs, oftentimes given to groups with religious affiliations. As a federal taxpayer, Chan Kendrick challenged the constitutionality of AFLA, claiming it violated the separation of church and state. The Supreme Court found that although AFLA funded programs that aligned with certain religious ideologies, it was constitutional because it did not encourage government involvement in religion, and it held a valid secular purpose in seeking to prevent adolescent pregnancy and premarital sexual relations. By upholding AFLA, *Bowen v. Kendrick* enabled the US government to continue funding abstinence-only education, which researchers have found to be ineffective.

There are generally two primary approaches to sexual education in the US, which include abstinence-only or comprehensive sex education. Abstinence-only education promotes sexual restraint and self-discipline until marriage as the only completely effective method of birth control. Because many religions prohibit premarital sexual relations, supporters of abstinence-only education tend to be from more religious or self-proclaimed conservative backgrounds. In contrast with abstinence-only education, comprehensive sex education includes education about abstinence, contraception, reproductive choices, anatomy and puberty, and relationships, among other similar topics. Research shows that comprehensive sex education is more effective than abstinence-only education. However, AFLA enabled the United States to fund abstinence-only education programs indefinitely. Given that teen pregnancy and sexually transmitted infection rates are high in the US compared to other developed countries, funding effective sex education has important implications for policymakers.

The stated purpose of the 1981 AFLA was to address the social and economic ramifications associated with pregnancy and childbirth among unmarried adolescents. Policymakers justified funding abstinence-only education via AFLA because, in the year 1978 alone, approximately 1,100,000 teenagers became pregnant, and of those teenagers, over half were not married. Given the high rates of premarital adolescent pregnancies, AFLA proposed that the issue of adolescent premarital sexual relations should be addressed via services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, groups in the private sector, and publicly sponsored initiatives. Some of the services that AFLA funded included pregnancy testing, adoption counseling, and abstinence-only education classes.

Meanwhile, AFLA would not fund organizations that enabled or encouraged services they deemed related to abortion, including education about contraception or abortions. Likewise, AFLA did not fund programs or projects that provided abortions, abortion counseling, or abortion referral, as well as those that subcontracted with or made payments to organizations or people who provided those services. That restriction on AFLA funding is particularly noteworthy because eight years prior to the enactment of AFLA, in 1973, the Supreme Court ruled in *Roe v. Wade* that the US Constitution protects a woman's liberty to choose to have an abortion without excessive government restriction. However, in 1982, around the time of the passing of AFLA, public funding was still unavailable for most abortions and eighty-two percent of abortion services were provided in nonhospital facilities, such as clinics specializing in abortion services and physicians' offices. The case made in *Bowen v. Kendrick* contested those restrictions.

From 1981 to 1988, AFLA enabled the government to give more than 100 million US dollars to religious organizations, many of which were Roman Catholic charities that used the funding to teach

abstinence-only education classes at churches and private schools with religious affiliations. The wording found within AFLA explicitly encouraged inclusion of religious organizations, like Roman Catholic and Christian charities, in AFLA-funded programs, allegedly because of their ideological alignment with the mission of AFLA and their capacity to encourage constructive behavior for adolescents. The Secretary of the US Department of Health and Human Services was responsible for determining which public and nonprofit organizations were eligible for grants. At the time when Congress passed AFLA, that Secretary was Bowen, a politician and physician who was affiliated with the US Republican Party. In 1983, Kendrick, on behalf of a group of federal taxpayers, clergy persons, and the American Jewish Congress, filed suit against Bowen based on the premise that AFLA violated the Establishment Clause of the First Amendment of the US Constitution, which prohibits the government from establishing an official religion or unduly favoring one religion over another, also known as establishing the separation of church and state.

In *Bowen v. Kendrick*, Bowen claimed that AFLA had an important role in preventing adolescent pregnancy and that it did not show preference to any religion. Charles Fried, then US Solicitor General, argued the Supreme Court case for Bowen, along with Richard K. Willard, James M. Spears, Donald B. Ayer, Robert J. Cynkar, Lawrence S. Robbins, Michael Jay Singer, Jay S. Bybee, and Theodore C. Hirt, who were presidentially-appointed government attorneys. The Bowen side had amicus curiae briefs filed for the Anti-Defamation League of B'nai B'rith, for Catholic Charities, and for the Unitarian Universalist Association. An amicus curiae, or friend of the court, is someone who is not a party in the case and assists the court by offering information or insight related to the issues in the case. The organizations that filed amicus curiae briefs for the Bowen side were all religiously affiliated, and they generally argued that AFLA did not violate the Establishment Clause, which prohibits governmental interference with religious choice. They claimed that AFLA did not endorse religion by funding religious organizations to promote abstinence-only education.

On the opposite side of *Bowen v. Kendrick*, Kendrick and his legal team argued that the legislation's focus on abstinence for adolescent pregnancy prevention enabled the appropriation of federal tax dollars to support religious teaching. Janet Benshoof, a human rights attorney who advocated for increased access to contraceptives and abortion throughout her career, argued the case for Kendrick. The Kendrick side had amicus curiae briefs filed for the American Public Health Association, for the National Organization for Women Legal Defense and Education Fund, for the Committee for Public Education and Religious Liberty, for the Council on Religious Freedom, for the National Coalition for Public Education and Religious Liberty, and for the Baptist Joint Committee on Public Affairs. Those organizations argued that AFLA violated the Establishment Clause, claiming that AFLA permitted too much intermingling between the government and religion.

In order to argue the *Bowen v. Kendrick* case and determine whether AFLA violated the Establishment Clause, the judges at both the District Court and Supreme Court levels utilized a three-part test. That three-part Establishment Clause test was developed in an earlier Supreme Court case in 1971, *Lemon v. Kurtzman*. For AFLA to withstand the three-part Establishment Clause test, the act had to have a secular purpose, not have a primary function of advancing or inhibiting religion, and not encourage excessive government involvement with religion.

In 1987, at the US District Court level in Washington, D.C., Charles R. Richey, the District Judge, found that although AFLA had a valid secular purpose, it was unconstitutional because it had a primary effect of advancing religion and that it fostered excessive government involvement with religion. Richey stated that the valid secular purpose of AFLA was that it aimed to solve the issues caused by adolescent pregnancy and premarital sexual relations. However, he found that AFLA advanced religion because it funded teaching and counseling of adolescents by religious organizations based on their religious doctrine. Though AFLA funding for abstinence-only education was not limited only to religious organizations, AFLA explicitly solicited the participation of religious organizations in all its programs, creating what Harry A. Blackmun, the Supreme Court Justice who wrote the dissenting opinion in the Supreme Court decision, called a symbolic and real partnership between the government and the clergy. He also argued that AFLA encouraged excessive government involvement with religion. He stated that because the government must monitor the programs it funds, the government would have to become overly involved with religious organizations to ensure that their programs did not advance religion. Thus, Richey ruled that AFLA violated

the Establishment Clause and was unconstitutional. Following the District Court ruling in favor of Kendrick in 1987, Bowen appealed the case to the US Supreme Court.

At the Supreme Court level, the majority decision in *Bowen v. Kendrick* ruled in favor of Bowen, finding that AFLA passed the three-part Establishment Clause test's conditions. William H. Rehnquist wrote the majority opinion, and was joined by Byron R. White, Antonin Scalia, Sandra Day O'Connor, and Anthony M. Kennedy. Notably, the Supreme Court had a conservative majority at the time of the *Bowen v. Kendrick* decision. The five Supreme Court justices in the majority concurred with the District Court assessment that AFLA had a valid secular purpose. However, the Supreme Court majority found that AFLA did not advance religion, which differed from the decision previously held by the District Court.

The Supreme Court justices in the majority argued that the programs of the religiously affiliated grantees of AFLA did not impose a substantial risk for religious indoctrination, which is the process of imparting religious doctrine in an authoritative way. Further, they found that the projects that AFLA authorized, such as pregnancy testing, educational services, and adoption counseling, were not themselves religious activities, and that they could not be considered religious activities simply because they were carried out by organizations with religious affiliations. Finally, they argued that although government monitoring of AFLA grants was necessary for Bowen to ensure public money was spent appropriately, the limited nature of that monitoring itself did not amount to excessive government involvement with religion. Thus, in 1988, the Supreme Court reversed the District Court decision and ruled that AFLA was constitutional.

Although the Supreme Court had declared AFLA as constitutional, the judges in the minority asserted that AFLA violated the Establishment Clause. Blackmun wrote the dissenting opinion and was joined by Supreme Court justices William J. Brennan, Thurgood Marshall, and John P. Stevens. While the majority wrote that AFLA passed the Lemon test in part because of its valid secular purpose, Blackmun wrote that the effect of a statute is more important to consider than its purpose. He asserted that the effect of AFLA was that it advanced religion. Blackmun argued that many teachers and counselors who received AFLA funds were under the direction of religious authorities and were using those funds for religious teaching. While adoption and abstinence-only education do not constitute religious teaching on their own, evidence presented in *Bowen v. Kendrick* revealed that immediately following some AFLA-funded programs, a member of a religious order would discuss their religious views in tandem with the subjects covered in the AFLA program. Because of that, the dissent asserted AFLA clearly advanced religion.

Given the concern that religious organizations could be misusing AFLA to advance their religion, the Supreme Court sent the lawsuit back to the District Court on 29 June 1988 to locate more factual evidence supporting that point. That Court was to decide whether religious organizations had used AFLA aid for activities outside of those considered secular. On 19 January 1993, the challengers of AFLA and the US Department of Justice Counsel for the Department of Health and Human Services reached a five-year settlement in the case, placing further conditions on grant recipients. For example, grantees would need their curricula reviewed and considered for potential advancement of religion prior to the disbursement of funding. The settlement also stipulated that programs had to be medically accurate and could not include religious references, use churches as venues, or be presented at religious schools during school hours.

*Bowen v. Kendrick* contributed to discussions surrounding the controversial issues of reproductive health education, abortion, and religion. In the aftermath of *Bowen v. Kendrick*, critics often cited AFLA's inability to demonstrate its effectiveness, even seventeen years after its inception. Federal funding for abstinence-only education began to decrease only after democratic presidents took office in the United States. In 1998, the Clinton Administration proposed that AFLA's funding be cut by seventy percent. In 2009, the Obama Administration budget eliminated most federal funding for abstinence-only reproductive health programs, and instead, funded other forms of comprehensive sex education. However, once the executive and legislative branches returned to a Republican majority after Obama left office, in 2018, the Trump Administration issued a funding announcement that explicitly encouraged the participation of programs that emphasize abstinence and sex cessation support.

Overall, the Supreme Court finding in *Bowen v. Kendrick* enables the executive branch to involve religious organizations in sex education, though the executive branch has control over what type of sex education they choose to fund.

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