DEVELOPMENTS IN THE LAW OF CHURCH-STATE RELATIONS: THE 1987 TERM OF THE UNITED STATES SUPREME COURT

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The religious liberty cases decided by the United States Supreme Court during the October, 1987 Term [1] demonstrate that the Courts remains divided in its approach to cases involving the Religión Clauses of the First Amendment [2]. Nevertheless, the opinions of the individual Justices provide interesting hints concerning the Court's future direction on a number of important religious liberty questions.

Three religious liberty cases were decided on the merits during the 1987 Term [3]: *Bowen v. Kendrick, Lyng v. Northwest Indian Cemetery Protective Association,* and *Employment Division, Department of Human Resources of the State of Oregon v. Smith.* A fourth, *Karcher v. May,* was dismissed on jurisdictional grounds unrelated to the first amendment claim raised in the lower courts. *Kendrick* and *Karcher* were cases arising under the Establishment Clause and raised issues relating to the pla-

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1 Cases argued and decided between October, 1987 and July, 1988.

2 U.S. Const. Amend. I (1971) provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Though the language of the first amendment relating to religion is contained in the single phrase «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof», the first part has become known as the Establishment Clause», and the second as the «Free Exercise Clause». Thy are referred to collectively as the «Religion Clauses».

3 Bowen v. Kendrick, 108 S.Ct. 2562, 101 L. Ed. 2d. 520; 56 U.S.L.W. 4818 (June 29, 1988); Employment Division, Department of Human Resources of the State of Oregon v. Simth, 108 S.Ct. 1444, 99 L. Ed. 2d 753, 56 U.S.L.W. 4357; 46 Fair Empl. Prac. Cas. (BNA) 1061 (April 27, 1988); Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319, 99 L.Ed. 2d 534, 56 U.S.L.W. 4292 (April 19, 1988); Karcher, Speaker of the New Jersey General Assembly v. May, 108 S.Ct. 388, 98 L.Ed. 2d 327, 56 U.S.L.W. 4022 (December 1, 1987).

ce of religion and religious institutions in public educational programs, while *Northwest Indian Cemetery Protective Association* and *Smith* were Free Exercise Clause cases in which it was urged that the federal government (in *Northwest Indian Cemetery Protective Association)* and the states (in *Smith)* were required to modify existing programs and rules to accommodate the needs of Native American religions.

Religion and Education

Introduction

The Court's cases in the area of religion and education have become increasingly difficult. Not only is the subject matter inherently controversial, but the distinctions the Court is also compelled to draw have become increasingly close and, hence, increasingly subject to dispute. In *Bowen v. Kendrick,* for example, the Court reviewed the constitutionality of a sex-education program known as the «Adolescent Family Life Act» (A.F.L.A.). The program, which was designed and funded by Congress as an alternative to contraceptive-oriented sex-education programs, is intented to encourage teenagers to avoid premarital sex and abortion. Equally controversial was the constitutional issue in *Karcher v. May.* As framed by the United States Court of Appeals for the Third Circuit, the question presented was:

> May the state, acting through the legislature or through a school board or through an individual teacher, take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those whose to pray? [4].

Although the Supreme Court dismissed the appeal on an jurisdictional point which made *Karched* an unsuitable basis for a decision by the Supreme Court [5], the Court wic eventually be forced to face the question. The Court's prior decisions leave it little room to avoid the question of whether or not a legislatively mandated «moment of silence» in a public school unconstitutionally encourages prayer. The Court now

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[4] May v. Cooperman, 780 F.2d 240, 252 (3d Cir. 1985), *juris, postponed* 479 U.S. 1062 (1986).

[5] 108 S.Ct. 988, 98 L.Ed. 2d 327, 56 U.S.L.W. 4022 (December 1, 1987) (dismissed on standing grounds). At the time the appeal was filed, Mr. Karcher held the post of Speaker of the New Jersey General Assembly and filed the appeal in his capacity as a representative of the New Jersey legislature. By the time the case reached the Supreme Court, however, Mr. Karcher no longer held the post and no longer had any legally cognizable interest («standing») in the outcome of the case.

appears to be waitings for a more suitable case presenting the same issue[6]. *Kendrick* was, therefore, the only Establishment Clause case to be decided during the Term.

Bowen v. Kendrick: Public Support for the Teaching of Morality

Due to the value-laden subject-matter of the Adolescent Family Life Program, the Congress expressly provided that a broad range of community organizations, including religious institutions, were to be among the agencies qualified to receive financial assistance to develop and offer the educational programs contemplated by the Act. To organizations and individuals who believe that there must be an absolute separation of church and state, and that no amount of public money should ever be given to religious organizations, the Adolescent Family Life Program was clearly unconstitutional: the desing of some of the programs which would receive federal funds we to be in the hands of religious organizations, and supervision of curriculum content and approach would come from the federal government. To supporters of the program, the design was perpectly legitimate: sex-education programs inevitably deal with highly charged moral issues central to the religious upbringing of children. In their view, to *exclude* religious organizations was unconstitutional. Thus, the program had —and continues to have— all of the ingredients for a controversial and hotly-contested constitutional controversy: sensitive subject matter (teenage sexuality and pregnancy, contraception, adoption, divergent religious and moral viewpoints on how to approach the problem of teenage sexuality and pregnancy (abstinence, contraception, abortion and adoption); a large sum of money ($120 Million, over four years)[7] to be divided among a wide range of competing groups which would undertake to develop a curriculum which was consistent with the Congressional goal of reducing teenage sexual activity and discouraging abortion, and a Supreme Court almost evenly split of the main issues.

The United States District Court for the District of Columbia took what migth be considered an «all or nothing» approach, and held the program unconstitutional because religious organizations were permitted to participate. In its view, *any* direct payment by the government to a religious institution for an educational program —especially one where the content of the program touched upon matters on which churches have divergent and strongly held moral opinions— is a unconstitutional «advancement of religion» because «religious beliefs might infuse [the] ins-

[6] *Compare* Bender v. Williamsport Area School District, 475 U.S. 534 (1986) (student-initiated prayer in public schools; rejecting appeal on standing grounds).

[7] 42 U.S.C. Section 300z-3 authorized the appropriation of $ 30 million per year for the fiscal years 1982-1985.

truction» [8]. According to the District Cour «(t)*his possibility alone*» is sufficient to hold a law unconstitutional [9].

In an interim order pending review by the full Supreme Court, William Rehnquist, the Chief Justice of the United States, issued an order delaying the effective date of the lower court's order. In his view, the validity of District Court's holding that the first amendment requires the total exclusions of religious groups from publicly-funded educational programs was «debatable» [10].

In a 5-4 decision written by the Chief Justice, the full Court agreed and held that the law, as written («on its face»), was constitutional, but sent the case back to the District Court for further proceedings to determine il «particular A.F.L.A. grants have had the primary effect of advancing religion» and if the Secretary of Health & Human Services' current grant review practices allow for the approval of such grants [11]. Although there are a number of important issues of addressed by the majority opinion, the most significant points for present purposes are:

1) It permits direct payments to religious organizations for educational programs below the university level and requires a case-by-case analysis of the programs challenged [12];

2) it expressly rejects the District Court's holding that the mere *possibility* that religious beliefs will be taught in an educational program is sufficient to invalidate the entire statutory scheme;

3) it rejected the proposition that where the position of the government coincides with religious doctrines held by some of the religious organizations receiving funding the statute unconstitutionally «advances» those religious beliefs; and

4) it expressly recognized that «(n)othing in (its) previous cases prevents Congress from... recognizing the important part that religion or religious organizations may play in resolving certain secular problems» [13].

The dissenting justices complained at length that the approach taken by the majority was distinctly different from that taken by the Court in other direct funding cases. Justice Blackmun's opinion for the dissenters called it «a sharp departure from (the Court's) previous precedents» [14], and argued that results noted above were plainly unconstitutional, not only because they depart from the Court's previous approach in educa-

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[8] Bowen v. Kendrick, 657 F. Supp. 1547, 1563 (D.D.C. 1987).

[2] Bowen v. Kendrick, 657 F. Supp. at 1563 (D.D.C. 1987) (emphasis in the original).

[10] United Families of America v. Kendrick, 108 S.Ct. 1 (1987) (Rehnquist, J. in chambers).

[11] Bowen v. Kendrick, 108 S.Ct. 2562, 2581.

[12] *Id.* at 2581 (O'Connor, J. concurring).

[13] *Id.* at 2573, *quoting* 42 U.S.C. Section 300z(a)10(A).

[14] 108 S.Ct. 2582, 2587 (Backmun, Brennan Marshall & Stevens, JJ., dissenting).

tion cases [15], but also because, in the dissenters' view, «the statute creates a symbolic and real partnership between the clergy and the fisc in anddressing a problem with substantial religious overtnes» [16]. The case is currently pending in the District Court.

One final point concerning the *Kendrick* decision is worth noting: it is the first case arising under the Religion Clauses in which the newest Supreme Court Justice, Anthony M. Kennedy [17], has voted. It is also the first church-state case in which he has written an opinion [18]. Since the Court's voting blocs shift slightly depending on the nature of the particular religious liberty at issue, the appointment of Justice Kennedy to fill the vacancy created by the retirement of Justice Louis Powell appears to have been important to the outcome; for Justice Powell's votes in previous cases involving «direct» aid to religious educational programs would probably have created a 5-4 majority to invalidate the statute [19]. The Court has been closely divided on many issues over the last few years, and religious liberty questions are among the most controversial. Because Justice Powell often provided the critical «swing» vote necessary to create a 5-4 majority on the nine-member court, Justice Kennedy's voting pattern in religious liberty cases will have a significant impact on the development of the law, evern if there are no personnel changes on the Court in the near future.

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[15] *See, e.g.,* Aguilar v. Felton, 473 U.S. 402 (1985); Ball v. School District of Grand Rapids, 473 U.S. 373 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971).

[16] Kendrick, 108 S.Ct. at 2596.

[17] Justice Anthony Kennedy was appointed to the Supreme Court by President Ronald Reagan on February 11, 1988 and officially took his seat on March 15, 1988.

[18] 108 S.Ct. at 2582. (Kennedy and Scalia, JJ., concurring.)

[19] In Aguilar v. Felton, 473 U.S. 402, 415 (1985), Justice Powell, concurred in the invalidation of a program designed to provide remedial education for children enrolled in religiously affiliated schools. He wrote:

> «Our cases have noted that «'[t]he State must be *certain,* given the Religion Clauses, that subsidized teachers do not inculcate religion,' ... This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here» (emphasis in the original).

By contrast, Justice Kennedy's opinion in *Kendrick,* which was joined by Justice Scalia, takes precisely the opposite approach. In the of Justices Kennedy and Scalia, the Court need not be certain; it is for the complaining party to *prove* that funds have been expended in an unconstitutional manner:

> In sum, where... a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and non-religious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as applied challenge is not whether the entity is of a religious character, but how it spends its grant. Bowen v. Kendrick, 108 S.Ct. at 2582 (Kennedy & Scalia, JJ., concurring).

The two Free Exercise cases decided during the 1987 Term involved the religious needs and practices of Native American Indians. *Lyng v. Northwest Indian Cemetery* is another in a long series of cases raising questions concerning the need of government to modify standards of general applicability to accommodate religious needs. In *Lyng* the United States Forest Service had granted road construction and logging permits for two sections of the Six Rivers National Forest in California. The sections involved, known as «high country, are located in the Siskiyou Mountains and are considered sacred by the Yurok, Karok and Tolawa Indians who live in the surrounding regions. Specific sites within these areas are used for prayer and other religious purposes which are central to the religious beliefs and practices of these Indian tribes. The tribes claimed that roads and logging wold destroy the environmental aspecets of the sites which make them sacred: the pristine environment and solitude necessary for medicinal and spritual practitioners to communicate with the «great Creator».

Lyng provides an important insight into the Supreme Court's views on the government's obligation to conform its *own* conduct to a standard which will enable individuals to practice their religion without interferente. A similar issue was raised in *Bowen v. Roy*[20], and caused substantial disagreement among members of the Court concerning the proper standards to be applied cases where it is alleged that the administration of government programs has a negative impact on the practice of individual religious beliefs[21]. In *Lyng* the United States Court of Appeals for the Ninth Circuit held «(t)he fact that the proposed government operations (logging and road building) would virtually destroy the plaintiff Indiana' ability to practice their religion differentiates this case from *Bowen v. Roy*»[22]. By a vote of 5-3 (Justice Kennedy not participating), the Supreme Court reversed the Court of Appeals decision[23]. Justice Sandra Day O'Connor wrote:

> Even if we assume that we should accept the Nith Circuit's prediction, according to which the G-O road will «virtually destroy the Indians' ability to practice their religion», 795 F. 2d, at 693 (opinion below), the Constitution simply does not provide a principle that could justify upholding (these) legal claims. However

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[20] Bowen v. Roy, 106 S.Ct. 2147 (1986).

[21] *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Bowen v. Roy, 476 U.S. 693 (1986).

[22] Northwest Indian Cemetery Protective Assn. v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986), *cert. granted sub nom.* Lyng v. Northwest Indian Cemetery, 107 S.Ct. 1971 (1987).

[23] Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319, 99 L.Ed. 2d 534, 56 U.S.L.W. 4292 (April 19, 1988).

much we minght that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities —from social welfare programs to foreign aid to conservation projects— will always be considered essential to the spritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions. *Cl.* (A. Hamilton, J. Madison, J. Jay) *The Federalist* No. 10 (suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects) [24].

The dissent, written by Justice William Brennan and jointed by Justices Thurgood Marshall and Harry Blackmun[25], focused on the essential differences between Native American religions and traditional Western beliefs [26]. Justice Brennan noted that «for Native Americans, religion is

[24] *Id.,* 108 S.Ct. at 1326-27.

[25] 108 S.Ct. at 1330 (Brennan, Marshall & Blackmun, JJ., dissenting).

[26] Justice Brennan wrote:

> In marked contrast to traditional western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas.
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> Established or universal truths —the mainstay of western religions— play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. ... Where dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of land. The site-specifiac nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. *See* SUAGEE, «American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers», 10 *Am. Ind. L. Rev.*, 1, 10 (1982). Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living theings, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American southwest, «all... Indians held in some form a belief in a sacred and indissoluble bond between themselves and the lond in which their settlements were located.» E. SPICER, *Cycle of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the United States,* 576 (1962).

Id., 108 S.Ct. at 1331.

not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts in to non-Indian categories'» and that for most Native Americans, «(t)he area of worship cannot be delineated from social, political, cultur(al), and other areas o(f) Indian lifestyle» [27]. Since the proposed road would allegedly destroy the spritual nature of the area, the dissenters argued that the Court «essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest thereat to their religious practices» [28]. In their view, the Court should have held that the Free Exercise Clause «is directed against any form of governmental action that frustrates or inhibits religious practice», not just that which «coerces(s) conduct inconsistent with religious belief (or) penalize(s) religious activity» [29].

The other case involving Native American religious practices was *Oregon Dept. of Human Resources v. Smith* [30]. In *Smith,* individuals who are American Indians were fired from their jobs as social work drug counselors for using peyote as part of Native American religious ceremonies. The use of peyote is illegal in the state of Oregon [31], but federal law and some state cases have held that Indians cannot be prosecuted for using it in their traditional religious ceremonies [32]. These cases present a variation on the same theme. Here, adherents of traditional Native American religions work as social workers counselling individuals who have problems with addictive drugs. The State of Oregon prohibits anyone actively using drugs from serving as drug counsellors. Because the plaintiffs in these cases ware fired because the state felt that their drug use was inconsistent with their status as drug abuse counsellors, they were denied unemployment compensation.

The Supreme Court of the United States did not reach the merits of the constitutional claim, and, by a vote of 5-3 (Justice Kennedy not participating), sent the case back to the Supreme Court of Oregon with directions concerning the proper constitutional standard to be utilized when a religious liberty claim is used as a defense against a charge of illegal activity. In doing so, the Court reaffirmed its long-standing rule that «governmental regulation of certain overt acts prompted by religious beliefs or principles» is permissible» 'even when the action is in accord with one's religious convictions, (it) is not totally free from legislative

[27] *Id.,* 108 S.Ct. at 1130-31.

[28] *Id.,* 108 S.Ct. at 1330.

[29] *Id.*

[30] Employment Division, Department of Human Resources of the State of Oregon v. Smith, 108 S.Ct. 1444, 99 L.Ed. 2d 756, 56 U.S.L.W. 4357; 46 Fair Empl. Prac. Cas. (BNA) 1061 (April 27, 1988). (Decided together with *Oregon Dept. of Human Resources v. Black.*)

[31] *Ore. Rev. Stat.,* Sections 475.992(4) (a), 161.605(2) (1987).

[32] *See* Controlled Substances Act of 1970, 21 U.S.C. Section 812(c); People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal.Rptr. 69 (1964).

restrictions.'» when the conduct or actions pose some substantial threat to public safety, peace or order [33]. The case was therefore remanded to the Oregon Supreme Court for a determination of whether Oregon law prohibited peyate use during Native American religious rituals. If it did, denial of unemployment compensation would be permissible under the federal constitution. If it did not, denial of benefits would be unconstitutional [34].

The dissent argued that, regardless of the requirements of Oregon law, the persons involved in the case «were fired for practicing their religion» [35]. They would have reached the federal constitucional question on the basis of the prior opinion of the Oregon Supreme Court, which, in their view disclaimed any intention to criminalize religious use of peyote by American Indians. In the end, however, the religious liberty interest prevailed in this case: on remand the Oregon Supreme Court held that the first amendment to the Constitution of the United States «prevents enforcement of prohibitions against possession or use of peyote for religious purposes in the Native American Church» [36].

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[33] Employment Division, Department of Human Resources of the State of Oregon v. Smith, 108 S.Ct. 1444, 1450, *citing* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (Sunday closing laws); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (immunization laws); Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879) (laws prohibiting polygamy).

[34] *Id.,* 108 S.Ct. at 1452.

[35] *Id.,* at 1452 (Brennan, Blackmun and Marshall, JJ., dissenting).

[36] Smith v. Employment Division, 307 Ore. 68, 763 P.2d 146, 149 (1988).