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Autonomous Adolescents, Sexual Responsibility, Religious Organizations, and Congress: An Illicit Church/State Relationship

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STUDENT COMMENTS

AUTONOMOUS ADOLESCENTS, SEXUAL RESPONSIBILITY, RELIGIOUS ORGANIZATIONS, AND CONGRESS: AN ILLICIT CHURCH/STATE RELATIONSHIP?

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> The right of the child to be educated requires that the educator shall have moral authority over him, and this authority is nothing else than the duty of the adult to the freedom of the youth[1]

INTRODUCTION

The thought of needy youngsters evokes deep concerns and calls for humane assistance.[2] Traditionally, many religious and charitable groups have heeded these calls and offered guidance and instruction to otherwise dispossessed youth.[3] Despite the demonstrable good achieved by religious

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1. J. MARITAIN, EDUCATION AT THE CROSSROADS 33 (1943).

2. *See generally* Wallis, *Children Having Children*, TIME, Dec. 9, 1985, at 78; Kosterlizt, *Split Over Pregnancy*, NATIONAL JOURNAL, June 21, 1986 at 1538 (reporting the high incidence of teenage pregnancy, especially among lower socio-economic groups); ALAN GUTTMACHER INSTITUTE, 11 MILLION TEENAGERS: WHAT CAN BE DONE ABOUT THE EPIDEMIC OF ADOLESCENT PREGNANCIES IN THE UNITED STATES 10 (1976) (reporting that over one million youngsters, aged 15 to 19, become pregnant every year; single women have most of these pregnancies).

For other social problems that have an impact on the teenage pregnancy problem and are impacted by teenage pregnancy, see J. KOZOL, DEATH AT AN EARLY AGE (1974) (describing the lack of educational opportunities for inner-city children); J. KOZOL, ILLITERATE AMERICA (1986) (reporting the prevalence of illiteracy in America); J. KOZOL, RACHEL AND HER CHILDREN (1987) (relating the plight of children who are homeless).

3. For Congressional commentary on the instrumental role of religious groups in providing social welfare to the poor, see the text and ac-

and charitable groups in providing such care, some have voiced concerns that such a relationship, if state-funded, constitutes an unconstitutional establishment of religion.[4] Naturally, both the religious groups who seek to aid the disadvantaged youngsters and those who endeavor to bar such aid on establishment clause grounds profess concern both for the supremacy of the Constitution and the dignity of the adolescents.

Endeavoring to reconcile these concerns, in 1981 the Congress, in a bipartisan measure, moved to combat the epidemic proportions of teenage pregnancy by enacting a law to encourage sexual responsibility among adolescents. The Adolescent Family Life Act (AFLA) dispersed funds to private organizations,[5] including religious and charitable groups, who through counseling and teaching promote self-discipline and adoption instead of permissiveness and abortion.

In *Kendrick v. Bowen*,[6] Judge Charles Ritchie found that AFLA,[7] on its face and as applied to "religious organizations," violated the first amendment of the United States Constitution.[8] The Supreme Court heard the case and has

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companying legislative history of the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (to be codified at 42 U.S.C. §§ 11301-11472 (1987)).

For scholarly commentary on the role of religious groups in providing social welfare programs, see Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

4. *See generally* Grand Rapids School District v. Ball, 473 U.S. 373 (1985); L. PFEFFER, CHURCH, STATE, AND FREEDOM (1953); L. PFEFFER, RELIGION, STATE AND THE BURGER COURT (1986).

5. 42 U.S.C. § 300z (1982).

AFLA is not simply part of the Reagan administration's conservative social agenda that provides $15 million to religious groups only, as one newspaper reported. Washington Legal Times, June 1, 1987, at 4.

AFLA is part of an agenda that seeks to stop poor, single, uneducated children from having children. It is representative of the federal government's efforts of using local groups of social workers to educate these children.

Senator Edward Kennedy remarked that AFLA helps to stem "a sad and unnecessary waste of priceless human potential. . . . This bill would permit our communities to continue the good work that we have already begun." S.Rep. No. 97-161, 97th Cong., 1st Sess. 32 (1987), Additional Views of Senator Edward M. Kennedy.

6. 657 F. Supp. 1547 (D.D.C. 1987).

7. 42 U.S.C. § 300z [Supp. III] (1981).

8. U.S. CONST. amend. I. The entire amendment reads, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the

rendered a decision.[9] The narrow issue decided by the Court was whether the State can use religious organizations to counsel and teach sexual responsibility without violating the establishment clause. Beyond this, the case offered the Court an opportunity to reveal its view of adolescents in educational settings.[10]

Constitutional decisions about adolescents are difficult, and that difficulty is reflected in United States Supreme Court cases that alternately treat them as children in some contexts and as young adults in others. It might shed some light on this pattern of treatment if one thinks of very young children as possessing primary autonomy[11] and adolescents as possessing an intermediate level of autonomy.[12] The Court's decisions have consistently recognized these two classes of maturity for youngsters. For example, in establishment clause

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press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Plaintiffs, a group of citizen taxpayers, Protestant clergymen, and the American Jewish Congress, sought injunctive relief from AFLA on grounds that the government violated the first amendment. The defendants, Otis Bowen through and by the United States Department of Health and Human Services, opposed the basis of the claim and the relief sought. The parties stipulated most of the facts and provided exhaustive data on the workings of the particular grantee and subgrantee at issue. With no material fact in dispute Judge Ritchie treated both parties' 12(c) motions as motions for summary judgment.

Judge Ritchie, relying on recent Supreme Court decisions, granted summary judgment in favor of the plaintiffs. The Court thus granted the plaintiffs' injunction against funding to "religious organizations under AFLA, that AFLA on its face and applied violates the first amendment" only insofar as "religious organizations are involved in carrying out the programs and purposes of the act." Chief Justice Rehnquist, sitting as Circuit Judge, stayed the District Court's order, thus allowing the statute to continue until further review. In doing so he noted probable jurisdiction.

9. The case was decided on June 29, 1988. 108 S.Ct. 2562 (1988).

10. Of course one might question the rationale of analogizing AFLA counseling centers to schools. But, given the break from traditional educational settings and the establishment of institutions other than schools, it appears that much of the nation's education will occur in non-traditional fora. The use of AFLA organizations to education and to perform the role of the schools comports with effective State education through mediating structures, such as private groups. *See generally* B. Hafen, *Institutional Autonomy in Public, Private, and Church-related Schools*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 405 (1988).

11. *See infra* note 17 and accompanying text.

12. *See infra* note 17 and accompanying text. These two classes of autonomy stand in contrast to the complete autonomy that the law imputes to adults. This idea of complete autonomy is something of a fiction in moral philosophy.

challenges to State funding of religiously-affiliated secondary schools, the Court has generally seen adolescents as lacking maturity and sophistication, thus making them susceptible to indoctrination and coercion.[13] Conversely, in cases dealing with a minor's decision to undergo an abortion[14] and in cases evaluating state funding of sectarian colleges,[15] the Court has characterized the adolescent as possessing enough responsibility and sensibility so as to make informed, uncoerced choices. Until *Kendrick* no single case has carefully probed the significance of these characterizations, or what may be termed a "double standard."[16]

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13. *E.g.*, Aguilar v. Felton, 472 U.S. 402 (1985); Grand Rapids School District v. Ball, 473 U.S. 373 (1985); Lemon v. Kurtzman, 403 U.S. 602 (1971).

14. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Carey v. Population Services International, 431 U.S. 678 (1977); Bellotti v. Baird, 443 U.S. 622 (1979).

These cases result from Roe v. Wade, 410 U.S. 133 (1973). This note in no way endorses the legal, ethical, or medical reasons underpinning *Roe*. *See generally* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); J. NOONAN, A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES (1979).

15. Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 297 (1973); Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976). *But see* Widmar v. Vincent, 454 U.S. 263 (1981).

16. The Court's paranoia about the influence of religion is most nakedly revealed in its suppositions about the social sophistication of school children. In its establishment clause decisions, the Court frequently adverts to the immaturity of school children and to their corresponding inability properly to distinguish the roles of church and state, and thus to withstand the implicit coercion of religious belief or disbelief that may be present in a church-state relationship. The observation often is made without supporting evidence that children are in fact confused or intimidated by either church or state, thus revealing that the Court considers children presumptively incapable of understanding church-state relationships. Accordingly, the Court acts to protect children from even the slightest hint of religious coercion that may emanate from such a relationship by banning virtually all connections between religion and public schools, on the one hand, and government and private religious schools, on the other.

Such solicitude for the simple and immature psyche is not always present in other constitutional contexts. Mature decisions about whether to terminate a pregnancy or to engage in sexual activity, for example, clearly require intellectual, moral, and social sophistication at least equal to that necessary to discern and withstand state promotions of religion. Nevertheless, statutes grounded in the (quite reasonable) assumption that children are presumptively incapable of making the complex judgments implicit in the decision to undergo an abortion or to use contracep-

The Court's characterizations relate to an individual's autonomy, or the capacity of an individual to determine his or her life choices.[17] Autonomy is inextricably tied to the dignity of the human being and to the maturity of the person. The individual's ability to be self-determining in the fullest sense is "full autonomy."[18] "Intermediate autonomy" denotes the partially developed capacity to determine one's life choices. "Primary autonomy" is a severely restricted and un-

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> tives have been uniformly struck down as unconstitutional impositions on the child's right to privacy. It is difficult to understand why there should be a conclusive presumption of immaturity in church-state contexts, but not in other contexts, unless one starts with the premise that exposure of children to public religious influences is a social negative and, therefore, to be minimized by keeping religious belief and activity scrupulously private.

Gedicks and Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1613-14 (1987).

17. The definition of autonomy has proved puzzling to philosophers for centuries. This comment shall offer a broadly Kantian account of autonomy. Kant's notion is complex, but it is tied to dignity, reason, and choice or determination. For example, Kant wrote:

> Autonomy is therefore the ground of the dignity of human nature and of every rational nature . . . . Autonomy of the will is the property the will has of being a law to itself (independently of every property belonging to the object of volition). Hence the principle of autonomy is "Never to choose except in such a way that in the same volition the maxims of your choice are also present as universal law."

I. KANT, THE MORAL LAW, 99, 101 (H. Paton trans. 1948). According to John Rawls, Kant held that: [A] person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being. J. RAWLS, A THEORY OF JUSTICE 252 (1971).

It is well outside the scope of this note to provide a coherent and thorough definition of autonomy. It will suffice to understand that when the note employs *autonomy* it generally springs from the Kantian tradition and thus encompasses the definition of autonomy as an informed choice of principles of action chosen in such a way as to comport with reason and freedom. It is helpful to think of *autonomy* in an etymological sense: *auto* springs from the Greek, meaning self; *nomos* comes from the Greek, meaning determination, governance, or law. Thus *autonomy* means self-determination, self-law, or self-governance.

18. Admittedly, when applied in a legal context this terminology is somewhat misleading. Under a Kantian scheme, a person cannot become fully autonomous. At best, a person is partially autonomous. It follows that adolescents and children are really lesser degrees of partially autonomous beings. To avoid the problems of attaching terminology to these lessening degrees of partial autonomy, this note adopts the legal fiction that adults are fully autonomous and proceeds from that point in its description of adolescents and children.

derdeveloped capacity to make life choices; nevertheless, it indicates that, by virtue of being a human being, one will develop those capacities for self-determination at some later stage in life.[19] Simply put, autonomy is meaningful and informed self-determination.[20]

The Court properly considers a youngster's stage of autonomy as a valid criterion in establishment clause analysis. This note, however, argues that Judge Ritchie erroneously saw the adolescents in *Kendrick* as mere children with primary autonomy, and thus highly impressionable and subject to indoctrination. This mistaken characterization tied his analysis to establishment clause cases challenging state-funding of elementary and secondary schools attended by primarily autonomous children who were susceptible to coercion. This note argues that the proper characterization of the adolescents in *Kendrick* is intermediately autonomous.

This note's plan is unorthodox yet simple, namely to use Supreme Court precedent concerning minors' access to abortions and apply it to establishment clause issues. The Court, in *Bellotti v. Baird*[21] and related cases, has offered a characterization of youngsters who seek information for abortion or procreative decisions: they are not mere children, and they are not impressionable. It will be argued that the rationale of *Bellotti* is valid even though the result, given the seriousness of the life and death nature of abortion, was clearly wrong. In other words, if the Court takes the rationale of *Bellotti* seriously — that many adolescents are mature enough to make life or death determinations — then, when applied to the preventive contraceptive matters of AFLA, it should recognize that the youngsters in *Kendrick* are not impressionable. Since the adolescents addressed by AFLA are intermediately autonomous, religious and charitable groups can supply secular, contraceptive and procreative education without the threat of state-sponsored religious indoctrination or coercion.

Part I of this note reviews the analysis of the district court in *Kendrick*. Part II discusses the case law underpinning that decision and illustrates how Judge Ritchie's decision re-

19. In reference to those who are mentally retarded, the definition of autonomy includes the notion that such persons *would* develop those capacities for self-determination if they were not retarded.

20. Coercive activity such as indoctrination defeats attempts to become self-determining. *See* I. KANT, THE MORAL LAW (H. Paton trans. 1948).

21. 443 U.S. 622 (1979) holding that informed consent provisions for an abortion violated minors' due process rights.

flects tensions within the Supreme Court's current establishment clause jurisprudence. Part III describes the competing conceptions of youngsters used by the Supreme Court: youngsters having primary autonomy and youngsters having intermediate autonomy. Part IV relates how AFLA, in allowing religious organizations to educate on matters of sexual responsibility, actually advances the autonomy of adolescents and meets constitutional dictates.

I. THE DISTRICT COURT'S OPINION

Judge Ritchie stated the issue in *Kendrick* succinctly: "The fundamental question in this case is the constitutionality of a statute that allows religious organizations to use government funds for, *inter alia*, the counseling and teaching of adolescents on matters related to premarital sexual relations and teenage pregnancy."[22]

In examining AFLA[23] the *Kendrick* court applied the three-pronged establishment clause test enunciated in *Lemon v. Kurtzman*.[24] The *Lemon* test requires a series of threshold examinations by the court. To meet constitutional muster under *Lemon*, AFLA must have a valid secular purpose, must not—on its face or as applied—have *the* primary effect of advancing or inhibiting religion, and must not foster an excessive entanglement between government and religion.[25]

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22. Kendrick v. Bowen, 657 F. Supp. 1547, 1551 (D.D.C. 1987).

23. *Id.* at 1551.

24. Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Lemon*, the Court decided that Pennsylvania's and Rhode Island's statutes providing state aid to church-related elementary and secondary schools violated the establishment clause. Pennsylvania's statute reimbursed these church-related schools for the costs of teachers' salaries, textbooks, and secular instructional materials. The Rhode Island statue provided private school teachers with a direct pay supplement.

After applying the establishment clause to the states in Cantwell v. Connecticut, 310 U.S. 96 (1940), and prior to *Lemon*, the Court's establishment clause jurisprudence proceeded on an *ad hoc* basis. Thus, the decisions gave little guidance and, at times, seemed inconsistent.

Of course, nobody should ignore the ruminations and rumblings, even among members of the Court, that the *Lemon* test is inadequate.

25. Quoting *Lemon*, 403 U.S. at 612; *Kendrick*, 657 F. Supp. at 1557.

The *Kendrick* court also considered a fourth inquiry relevant, namely that AFLA must not cause "political division along religious lines" (citing Meek v. Pittenger, 421 U.S. 349, 365 n.15, 372 (1975)). *Kendrick*, 657 F. Supp. at 1557.

A. *Valid Secular Purpose Inquiry*

The *Kendrick* court first addressed the purpose of the statute.[26] A statute lacking *a* valid secular purpose violates the Constitution.[27] The court emphasized that—at least for the purpose of determining a valid secular purpose—the simple sharing of purpose by religion and the state does not provide a *per se* basis for determining an invalid secular purpose:[28] "That these secular purposes coincide or conflict with religious tenets does not transform them into sectarian purposes motivated *wholly* by religious considerations."[29]

A review of the legislative history convinced the court that it was congressional concern for the grave effects of teenage pregnancy which prompted the enactment of the statute.[30] "[E]ncourag[ing] parents and family members to

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26. *Kendrick*, 657 F. Supp. at 1558.

27. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Engle v. Vitale, 370 U.S.421 (1962). Seldom does a statute get struck down under this prong. *But see* Wallace v. Jaffree 105 S. Ct. 2479 (1985); Edwards v. Aguillard, 107 S. Ct 2573 (1987).

Judge Ritchie wrote, "Courts invalidate legislation or government action on the ground that it lacks a valid secular purpose only when the statute or activity involved is motivated *wholly* by religious considerations." *Kendrick*, 657 F. Supp. at 1558.

28. *See* Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 725 (1986): "The secular purpose requirement thus means that if enough people take religion seriously, they cannot enact their program, but if they favor the same program for other reasons, they can enact it."

29. *Kendrick*, 657 F. Supp. at 1558. Is this conclusion consistent with the court's later "on the face" analysis at 1562 and 1563? It would seem not. If the "sharing" of purposes by both state and religion does not, by itself, transform the secular purpose into a religious purpose, it surely follows that the "sharing" of the means by which to advance those purposes (abstinence, adoption) does not magically transform a secular mission into a religious mission. (*Cf.* Harris v. McRae, 448 U.S. 319 (1980)).

30. In passing AFLA the United States Congress reacted to alarming increases in teenage pregnancies. 42 U.S.C. § 300z (1982). In 1978 alone approximately one million, one hundred-thousand teenagers became pregnant; a high percentage of those gave birth out of wedlock and eventually joined the welfare rolls. Significantly, these teenagers lacked basic information from which to make an informed choice concerning having a child, raising that child, and forming any definitive life plans. Also pertinent were the following findings: adolescents aged seventeen and younger accounted for more than one-half of the out-of-wedlock births to teenagers; in a high proportion of those cases, the pregnant adolescent is herself a product of an unmarried parenthood during adolescence and is continuing the pattern in her own lifestyle; pregnancy and childbirth among unmarried adolescents, particularly young adolescents, often results in adverse health, social and economic consequences, including: a higher incidence of low birthweight babies, a higher frequency of developmental disabilities, higher infant mortality and morbidity.

provide guidance and support to adolescents by promoting *prudent* approaches, such as *self-discipline* . . ." [31] constituted a valid secular purpose for AFLA.[32]

B. *Primary Effect to Advance Religion*

Under the second prong of the *Lemon* analysis, the court discussed what constitutes "*the*[33] primary effect to advance re-

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The Committee also expressed concerns that "there is a paucity of information and agencies attempting to get parents and their children together to deal effectively with the issue, both social and moral, surrounding premarital sexual relations." The Committee made a judgment: promiscuous safe-sex is, in their and experts' view, "dehumanizing." *Id.* The Committee stressed that the country ought to inculcate traditional morality, because "many adolescent girls require reassurance that it is 'alright' [sic] and 'normal' to be a virgin." S. Rep. No. 97-161, 97th Cong., 1st Sess. 7-8 (1981).

31. Referring to 42 U.S.C. 300z-2b. The court apparently vindicated Congress' endorsement of these virtues, thus positing "prudence" as an acceptable secular virtue.

32. Senator Jeremiah Denton (R-AL), then Chairman of the Senate Subcomm. on Labor of the Senate Comm. on Human Resources, characterized AFLA as

> authoriz[ing] appropriations for demonstration grants to individuals, public and non-public entities for services and research in the area of premarital sexual relations and pregnancy . . . [and to] encourage the involvement of the family and the community through religious, charitable, and voluntary associations, in helping adolescent boys and girls understand the secular purpose of premarital sexual relations, pregnancy, and parenthood.

S.Rep. No. 97-161, *supra* note 5, at 2.

The Committee emphasized the gravity and complexity of the situation, so as to require a continued federal concern: "[t]hus, the teenage pregnancy problem consists of several intertwined aspects: the *moral* issues of premarital sexual relations, *abortion*, and illegitimate birth; [and] questions concerning the well-being and prosperity of the family." Congress envisaged involvement of voluntary associations with both expertise and an understanding of local problems. Included in these local agents were a variety of voluntary, private associations: families, non-profit associations, charity groups, and religious organizations. *Id.* at 10. The inclusion of religious organizations as a private, voluntary social service group simply recognized that "non-profit religious organizations have a role to play in the provision of services." *Id.* at 15-16. Congress can help only in a limited way: ". . . the committee concludes that the causes of teenage premarital sexual relations and pregnancy are multifactional and, therefore, require an integrated family approach taking into account the sensitive and private nature of these problems." *Id.* at 5 (emphasis added).

33. It is interesting that the district court wrote the opinion using "the." Committee for Public Education and Religious Liberty v. Nyquist, 473 U.S. 756 (1973), seemed to have changed the test from "the primary effect" to "a primary effect." However, Justice Rehnquist, writing the ma-

ligion," and whether the primary effect of AFLA advances religion in this particular instance. In order to violate the Constitution, AFLA would have to have "the direct and immediate" effect of advancing religion.[34] There exists no precise formula for this determination. The strategies for evaluation include whether AFLA "allows participants in a government-funded program to 'intentionally or inadvertently inculcat[e] *particular* religious tenets or beliefs' "[37] involves "impressionable youngsters"[38] provides "a crucial symbolic link between government and religion"[39] or subsidizes the "primary religious mission" of those groups receiving monies.[40]

Judge Ritchie noted that aid of a religious group is not *per se* violative of the Constitution. The funding, however, cannot raise the inference of official subsidy of religious beliefs,[41]especially when the government "subsidy cannot be segregated from religious activity."[42] In short, AFLA cannot result in support of religion and it cannot restrict the autonomy of the youngsters involved in the program, if it is to be held constitutional.

1. On Its Face, AFLA has the Primary Effect of Advancing Religion.

Judge Ritchie ruled that, by funding religious organizations' teaching and counseling of adolescents[43] on matters re-

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jority opinion in Mueller v. Allen, 463 U.S. 388 (1983), emphasized that the Court was using "the" once again. The district court's cite to *Nyquist* is thus confusing.

34. This determination is not one of "metaphysical" proportions, rather it stems from general observations of the overall effects of the statute. In other words, it cannot be merely a "remote and incidental effect." Kendrick v. Bowen, 657 F. Supp. 1547, 1560 (D.D.C. 1987).

37. *Kendrick*, 657 F. Supp. at 1561 (citing Grand Rapids School District v. Ball, 105 S. Ct. 3216, 3223 (1985) (emphasis added).

38. *Kendrick*, 657 F. Supp. at 1561.

39. *Id.* (referring to *Grand Rapids*, 105 S. Ct. at 3223-34). *See also* Wolman v. Walter, 433 U.S. 229 (1977). The factor centers on the symbolic link in the eyes of impressionable youngsters.

40. *Kendrick*, 657 F. Supp. at 1561 (referring to *Grand Rapids*, 105 S. Ct. at 3226). *See also* Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 657 (1980); Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472, 476 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 774-81 (1973).

41. *Kendrick*, 657 F. Supp. at 1562.

42. *Id.*

43. Congress believed that the situation merited a federal response,

lated to religious doctrine,[44] AFLA, on its face,[45] had the primary effect of advancing religion. AFLA's intention to allow religious organizations to teach on matters that are "fundamental elements of religious doctrine" alone demonstrated AFLA's "direct and immediate effect" of advancing religion.[46] Judge Ritchie noted that AFLA envisioned grantees

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one which would not displace and at the same time encourage local action in confronting the problem. AFLA allowed the Department of Health and Human Services to disperse grants to those groups meeting statutory guidelines. The monies were in fact disbursed according to the constitutionally infirm provisions of the act:

> 42 U.S.C. 300z—5(a): An application for a grant for a demonstration project for services . . . shall include—. . .
> (21) a description of how the applicant will, as appropriate in the provision of services—. . .
> (B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored activities

The restrictive guidelines for such grants provide that funding availability is contingent on the non-existence of family counseling services in the community and monies are available only to programs that do not provide abortion "counseling or referral." 42 U.S.C. 300z-3(b) (1982).

44. The court points out that *seven out of seventeen* services listed by AFLA involve some sort of "education or counseling." Worse, two other services, the Court shows, are involved with education insofar as they involve " 'outreach services to families of adolescents to discourage sexual relations among unemancipated minors' and 'family planning services.' " Kendrick v. Bowen, 657 F. Supp. 1547, 1562 (D.D.C. 1987) (citing to 42 U.S.C. §§ 300z-1(a)(4)(O) & (P)).

The district court in footnote 13 raises what may be an insurmountable problem for AFLA: Congress failed to express a *caveat* or condition to organization receiving funding so as to prohibit those organizations from using government funds to teach religion. The Supreme Court does not assume the existence of such a prohibition: " 'where Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.' *School Board of Nassau County v. Arline*, ___U.S.___, 107 S. Ct. 1123, 1132, 94 L.Ed.2d 307 (1987) (Rehnquist, C.J., dissenting) (*quoting Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1539, 67 L.Ed.2d 694 (1981))." *Kendrick*, 657 F. Supp. at 1563 n.13.

45. A facial attack on a statute is the most difficult to mount. *See* United States v. Salerno, 107 S. Ct. 2095, 2100 (1987); Roemer v. Maryland Board of Public Works, 426 U.S. 736, 761 (1976): "It has not been the Court's practice, in considering facial challenges of this kind, to strike them down in anticipation that particular applications may result in an unconstitutional use of funds."

In the case of a *federal* statute the attack must also overcome the deference accorded to the United States Congress. *See* Walters v. National Association of Radiation Survivors, 473 U.S. 305, 315 (1985). *See also* Scalia, *On Making It Look Easy By Doing It Wrong: A Critical View of the Justice Department*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD 177 (E. Gaffney ed. 1981).

46. *Kendrick*, 657 F. Supp. at 1562.

teaching about the ills of sexual promiscuity and abortion, matters of religious doctrine.[47] The court based this conclusion on the "fact" that many religions oppose premarital sex and abortion.[48] Judge Ritchie then concluded that AFLA subsidized the religious missions of sectarian organizations.[49]

Moreover, the district court ruled that the "mere possibility" of subsidized religious inculcation violated the first amendment. The court opined that the Congress could not expect religious counselors to forgo instruction on religious doctrine in administering AFLA.[50] According to Judge Ritchie, the fact that a single teacher, consciously or unconsciously, may instruct on religious matters violates the establishment clause: "*This possibility alone amounts to an impermissible advancement of religion.*"[51] The nature of the program

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47. "Put plain, these functions amount to *teaching* by grant recipients and subcontractors, including religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine." *Id.*

48. "It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful." *Id.* at 1563.

See also United States v. Dykema, 666 F.2d 1096, 1104 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

The court seems to equate religious disapproval of abortion with all opposition to abortion.

49. Judge Ritchie wrote that "contemplating that the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Kendrick*, 657 F. Supp. at 1563.

Likewise, the court notices the "crucial symbolic link" between government and religion by AFLA's envisioning of religious organizations counseling and teaching adolescents on premarital sex and abstinence. *Id.* at 1563-64.

But see Harris v. McRae, 448 U.S. 297 (1980) (the constitutionality of the Hyde amendment) "Although neither a State nor the Federal Government can constitutionally 'pass laws which aid one religion, aid all religions, or prefer one religion over another' *Everson v. Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions'. *McGowen v. Maryland*, 366 U.S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319.

50. *Kendrick*, 657 F. Supp. at 1563 ("[G]overnment would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine.") (emphasis in original).

51. *Id.* at 1563 (referring to Grand Rapids School District v. Ball,

established under AFLA, including the teaching of matters that coincide with religious doctrine, created a constitutionally impermissible endorsement and support of religion.[52] The mere possibility that an AFLA teacher or program will violate a youth's autonomy by instructing on religious matters violated the establishment clause.

2. The Constitutionality of AFLA as Applied.

The district court further opined that AFLA, as applied to the facts, had the primary effect of advancing religion. This occurred in two ways: (a) overt religious establishment activity—grantees and subgrantees were overtly religious organizations who were incorporated and managed by formal religious doctrines[53] and (b) covert religious establishment activity—grantees and subgrantees who, although not formal religious organizations, had at some time in their history, or in their literature, pronounced or recognized either a dedication or inspiration from religious principles.[54]

In the case of overt religious organizations, the court pointed to three instances as illustrative of unconstitutional behavior.[55] In describing covert religious activity, the court

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105 S. Ct. 3216, 3225 (1985)) (emphasis in original). The district court cites *Grand Rapids* for support, yet *Grand Rapids* speaks of the "substantial risk" rather than the "mere possibility." *Grand Rapids*, 87 L.Ed.2d at 280, (citing Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980)).

52. But a larger question looms: should constitutional principles depend on the recognizable affiliations of individuals; specifically, what guarantee does one have against a religious member of a purely secular organization making "unconscious reference" to religious doctrine?

Are we to believe that religious organizations cannot compete in the provision of *admittedly secular services* simply because a member of that organizations *might* inculcate religious values in youth?

This creates an odd situation. When a religious organization wants to provide the same services that Congress wants private groups to provide, they cannot. But, if they are non-affiliated, then it is permissible.

53. Kendrick v. Bowen, 657 F. Supp. 1547, 1564 (D.D.C. 1987).

54. *Id.*

55. In one case, St. Margaret's Hospital told *an* employee that she must abide by the guidelines articulated in a directive issued by a local religious office. *Id.* at 1564-65.

Similarly, employee guidelines barred the counselors at St. Ann's Infant and Maternity House from counseling, advocating, or aiding in abortion referrals. *Id.* at 1565.

However, this does not contradict AFLA's permissive exceptions on its restrictions:

Grants or payments may be made only to programs or projects

acknowledged that some grantees were, on the surface, simply a voluntary association of private individuals, yet constitutional problems existed since the organization or some of the individuals in the organization were inspired by religious teaching.[56] This connection between a private group and religion takes on a greater significance because of the subject matter of the case, namely "a federal program that implicates religious tenets."[57] Consequently, the court concluded that federal funds subsidized pervasively sectarian[58] organizations in their teaching of religious dogma.[59]

To analyze these challenges, the parties before the court urged application of different lines of first amendment case

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which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, *except* 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.

42 U.S.C. 300z-(10) (a) (1982) (emphasis added).

In still another instance the court found that one of the grantees had stated as a goal in its articles of incorporation that its goals included promoting the teachings of the Lutheran Church. Altogether the record indicated ten (10) grantees or subgrantees that were religious organizations that manifested overt religious bonds to sectarian organizations. *Kendrick*, 657 F. Supp. at 1565.

56. For example, a subgrantee under AFLA was the Family of the America's Foundation [FAF]. FAF is an affiliate of WOOMB-International. Since WOOMB states in some of its literature that it draws inspiration from the papal encyclical *Humanae Vitae*, and since WOOMB's director issues a report on the group's activities to the Pope, the court found an impermissible amount of religious influence. *Kendrick*, 657 F. Supp. at 1565.

This note realizes that deep problems exist for this part of the opinion and the free exercise clause of the First Amendment.

57. Kendrick v. Bowen, 657 F. Supp. 1547, 1565 (D.D.C. 1987).

58. "The district court elided that distinction entirely [between pervasively sectarian and non-pervasively sectarian institutions], assuming instead that any religious organization that participates in an AFLA program will inevitably inculcate religious doctrine or, on the other hand, will require excessive government monitoring in order to avoid doing so." Juris. Statement for Sol. Gen. at 9, Bowen v. Kendrick, 657 F. Supp. 1547 (D.D.C. 1987) (no. 87-253).

59. "Because these religious organizations use federal funds to educate or counsel on matters inseparable from religious dogma . . . the inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Kendrick*, 657 F. Supp. at 1565.

In short, the court found AFLA, as applied, had the primary effect of advancing religion because it allowed "religious" organizations to use state monies to subsidize their own religious messages. *Id.*

law to the largely undisputed facts: those challenging AFLA argued previous decisions invalidating state aid of religiously-affiliated primary and secondary schools, such as *Aguilar v. Felton*[60] and *Grand Rapids v. Ball*,[61] controlled; conversely, those supporting AFLA urged the Court to apply its precedent validating state support of colleges and universities with religious ties, such as *Tilton v. Richardson*,[62] *Roemer v. Maryland Board of Public Works*,[63] and *Hunt v. McNair*.[64] In essence, the challengers argued that AFLA participants were similar to elementary and secondary school children and AFLA organizations were similar to elementary and secondary schools. The AFLA supporters portrayed AFLA participants as similar to college and university students and the organizations as similar to colleges and universities. The district court agreed with the challengers by ruling that the AFLA organizations were "pervasively sectarian," thus depicting them and their participants as similar to religious elementary and secondary schools and their students.

As will be discussed below, the district court's analysis in *Kendrick* can be questioned on three grounds. First, it is questionable whether the court correctly found that the religious organizations receiving AFLA funds were pervasively sectarian (part II). Second, the court failed to address an essential criterion of establishment clause analysis, that of the appropriate view of adolescents' stage of autonomy: whether the adolescents were more similar to the children of *Grand Rapids* or to the "mature" college students of *Tilton* and *Bellotti* (part III).[65] Third, the court erroneously doubted the constitutionality of the State's use of religious organizations to impart secular values that coincide with the tenets of some religions (part IV).[66] To address each of these contentions, it

60. 472 U.S. 402 (1985).
61. 473 U.S. 373 (1985).
62. 403 U.S. 672 (1971).
63. 426 U.S. 736 (1976).
64. 413 U.S. 734 (1973).
65. Tilton v. Richardson, 403 U.S. 672 (1971); Bellotti v. Baird, 443 U.S. 622 (1979). One commentator has remarked, "Just as age has been a criterion in free exercise cases . . ., so it has been in the area of education. Colleges and universities have been approached differently from schools." J. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 428 (1987) (citations omitted). This observation is, to be sure, critical to this note's argument insofar as age relates to one's stage of autonomy.
66. This refers to the second prong of the *Lemon* test, the primary effect test.

This questioning of Congress' propriety in recognizing a value that coin-

is first necessary to refresh our understanding of relevant Supreme Court precedent.[67] It is to that immediate task that this note now turns.

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cides with a religious value contradicts the court's analysis with respect to the "*purpose*" test where it finds that the mere coincidence of these values does not establish a religion.

67. In discussing the intent and history of establishment clause one opens a jurisprudential Pandora's box: the historical record is muddled, the textual issues tangled, and the commentary generally inconclusive. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-3 (2d ed. 1988).

On the most basic level, all can agree that the framers, at the very least, sought to avoid the official establishment of a state religion. *See generally* R. MCCARTHY, J. SKILLEN, AND W. HARPER, DISESTABLISHMENT A SECOND TIME (1982); Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development Part II: The Non-Establishment Principle*, 81 HARV. L. R. 513 (1968).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

This note will eschew historical justification as the primary source for establishment clause adjudication in order to persuade those not so committed to original intent. *See* Abington School District v. Schempp, 374 U.S. 203 (1963):

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. . . . Second, the structure of American education has greatly changed since the First Amendment was adopted. . . . Third, our religious composition makes us a vastly more diverse people than were our forefathers. . . . Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve.

Id. at 237-41 (Brennan, J., concurring).

II. Supreme Court Case Law

A. *Funding to Religious Organizations Not Pervasively Sectarian*

In *Tilton v. Richardson*[68] the United States Supreme Court considered whether religiously-affiliated colleges could receive state funding without violating the establishment clause. The Court distinguished the colleges in *Tilton* from elementary and secondary schools insofar as colleges, universities, and similar educational institutions are not as pervasively sectarian as religious elementary and secondary schools.[69] The Court discussed the extent to which religion permeated the institutions[70] and whether the institutions restricted the freedom of its members, or of outsiders, by requiring participation in religious practices or limiting participation to members of its own faith.[71] Most significantly, the *Tilton* Court pointed to the maturity of the institution's students. This maturity provided a safeguard against the impression of state-sponsored religion: "*There is substance to the contention that college students are less susceptible to religious indoctrination.*"[72] This maturity, reflective of autonomy, provides the doctrinal underpinnings of the distinction between permissible aid to sectarian colleges and impermissible aid to elementary and secondary sectarian schools.[73]

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68. 403 U.S. 672 (1970).

69. *Id.*

70. *Id.* at 680-82 ("[R]eligion did not so permeate the defendant colleges that their religious and secular functions were inseparable . . . . [T]here was no evidence that religious activities took place in funded facilities.") Note the standard is not mere possibility, but rather evidence of specific incidents.

71. "No religious services were required to be attended" and the institutions "were not restricted to adherents of faith." *Id.*

Accord: "There are generally significant differences between religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not the dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' *Walz v. Tax Comm'n*, *supra*, at 671." Tilton v. Richardson, 403 U.S. 672, 685-86 (1971) (footnotes omitted).

Again, *Kendrick* organizations did not profess as their dominant policy anything of this sort.

72. *Tilton*, 403 U.S. at 68 (citation omitted) (emphasis added).

73. The *Tilton* Court made it clear that the autonomy of the particular citizen is an essential consideration: "There is substance to the contention that students are less impressionable and less susceptible to religious indoctrination." 403 U.S. at 686 (citing Gianella, *Religious Liberty, NonEst-*

In *Hunt v. McNair*,[74] citizens challenged the South Carolina Facilities Authority Act insofar as it proposed financing transactions involving the issuance of revenue bonds benefiting a Baptist-controlled college.[75] The Court held that the statute did not have the primary effect of advancing or inhibiting religion. Again, the Court drew attention to the character of the students in the institutions and the coercive aspects of the institutions on students' autonomy: "both the faculty and the student body are open to persons of any (or no) religious affiliation."[76] The simple existence of sectarian control of an organization, or mere formal denominational control over an educational establishment, does not violate the establishment clause.[77]

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ablishment, and Doctrinal Development Part II: The Nonestablishment Principle, 81 HARV. L. REV. 513, 574 (1968)).

This illustrates what may be the most defensible doctrinal underpinnings that have developed with respect to funding of schools: the determinate factor of the analysis is the maturity, or autonomy, of the citizen being educated rather than the character of the institution educating that citizen. Maturity is a component of autonomy.

Even Leo Pfeffer admits that this may be a valid justification for the Court's decisions involving both types of schools.

> A reasonable argument could be made to support Burger's distinguishing between higher and lower educational institutions. As noted in the opinion, by the time students reach college age they are mature . . . . Their religious commitments are generally fixed so that they can reasonably be expected to withstand efforts by instructors to sway them from the faith of their fathers . . .

L. PFEFFER, RELIGION, STATE AND THE BURGER COURT 53 (1986).

74. 413 U.S. 734 (1973).

75. The plan here did not cost the taxpayers anything in the form of grants, but rather it gave colleges a break on interest rates.

76. *Hunt*, 413 U.S. at 746, n.8. Note that AFLA programs are open to all persons regardless of religious affiliation. The record reveals not a single instance contrary to this.

Hunt also illuminated the application of the primary effect to facial analysis : "Aid normally may be thought to have the primary effect of advancing religion when it flows to an institution in which religion is so persuasive that a substantial portion of its factors are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Id.* at 743.

77. More significantly, the *Hunt* Court dictated a burden of persuasion far different from Judge Ritchie's "mere possibility" standard. The *Hunt* Court wrote, "Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College [the religious organization] is church related, cf. *Board of Education v. Allen*, 392 U.S. at 248, and he has failed to show more than a formalistic relationship." *Id.* at 746-47 n.8.

In *Roemer v. Maryland Board of Public Works*[78] the Court faced the issue of a state's release of funds to private colleges, including religiously-affiliated institutions, provided that the funds were not used for "sectarian purposes."[79] Once again, the Court engaged the question by focusing on institutions *and* the students in those institutions. This allowed the Court to distinguish schools in *Roemer* from elementary and secondary schools insofar as the latter enrolled young, impressionable children.[80] Distinctively, the institutions in *Roemer* were "characterized by a high degree of institutional autonomy."[81]

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78. 426 U.S. 736 (1976). *See* Garvey, *Another Way of Looking at School Aid*, 1985 Sup. Ct. Rev. 61, 67. This review illuminates the conflicting and confusing decisions produced by *Lemon* and its progeny. Other factors in this analysis have either lost their attractiveness or created other conflicts:

> Although the fear of political divisiveness may still lurk in the background, it is no longer the primary impetus for adherence to a strict separation of church and state. . . . The rationale of protecting the integrity of the civic sphere from religious discord is problematic, however, because it hints at a form of content regulation at odds with the first amendment value of a marketplace of ideas.

Developments in the Law, Religion and the State 100 HARV. L. REV. 1606, 1686, 1685 (1987) (footnote omitted) [hereinafter *Developments*].

79. 426 U.S. 736 (1976). The statute in question proscribed that "[n]one of the monies payable under this subtitle shall be utilized by the institution for sectarian purposes." MD. ANN. CODE art. 77A, § 66 (e) (1975).

This seminal decision stressed the continued validity of Bradfield v. Roberts, 175 U.S. 291 (1899), which upheld state funding of a charitable hospital operated by a religious order.

80. This refers to those schools in Lemon v. Kurtzman, 403 U.S. 602 (1971). For example, the secondary schools in *Lemon* created an atmosphere that restricted the autonomy of its students: the funded schools were "characterized by substantial religious activity and purpose," *Roemer*, 326 U.S. at 748; "religious symbols abounded," *Roemer*, 326 U.S. at 747; and were run almost entirely by members of religious orders and regarded as "an integral part of the religious mission of the Catholic Church." *Lemon*, 403 U.S. at 616; *Roemer*, 326 U.S. at 747. Generally, the presence of religious symbols can be seen as subtle and not-so-subtle forms of inculcation, in respect to impressionable youngsters.

81. Roemer v. Maryland Board of Public Works, 387 F. Supp. at 1282, 1287 (1974). *Cf.* John Noonan's comment on the Court's characterization: "The Court brushed aside the facts that the colleges had required theology courses, that a number of teachers opened their classes with prayer, and that some members of the college faculties were members of religious orders." J. NOONAN, *supra* note 65, at 431.

It is helpful to distinguish between this institutional autonomy and the adolescent's autonomy spoken of earlier. In simplest terms, institutional autonomy represents the freedom of a collectivity to be self-determining. Yet, there is a limited range of options for this self-determination. In this way, institutional autonomy is far narrower that individual autonomy.

The *Roemer* schools had no policy of mandatory attendance at sectarian worship sessions, partly because they considered the spiritual development of their students a "secondary objective."[82] Under *Roemer*, state funding to religious organizations that respect the autonomy of their students is constitutional.[83]

In general, the rationale of *Tilton*, *Hunt*, and *Roemer* demonstrates that the Court gives weighty consideration to the students of a particular institution in determining whether that institution is pervasively sectarian. The determination of a pervasively sectarian organization turns on the degree of freedom afforded to students and to the maturity of those students in an educational institution.

B. *Funding To Pervasively Sectarian Organizations*

As noted, the challengers in *Kendrick* relied on *Grand Rapids* and *Aguilar*. These cases are clearly distinguishable. Plainly, *Grand Rapids* and *Aguilar* involve highly impressionable children in elementary and secondary schools, whose primary mission is to develop the faith of their students. As a general matter, Catholic elementary and secondary schools are pervasively sectarian without qualification: they admit that their primary purpose is to develop the spirituality of those youngsters who attend the schools. AFLA envisions no funding to comparable organizations.[84]

In *Grand Rapids v. Ball*, Michigan taxpayers challenged the state's Shared Time and Community Education[85] pro-

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82. Roemer v. Maryland Board of Public Works, 426 U.S. 736, 755-56 (1976).

83. *Roemer*, 426 U.S. at 746. *Cf.*: "The judgment of the district court places religious organizations [in *Kendrick*] under a disability, not imposed by Congress, to which no other organization, public or private, is subject." Juris. St. of the Solicitor General at 14, Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987) (no. 87-253).

Roemer again emphasized a principle that had guided the Court since the Founding, namely that religious institutions could compete without hostility for funds available to all: "And religious institutions need not be quarantined from public benefits that are *neutrally* available *to all*. *Roemer*, 426 U.S. at 746 (emphasis added).

84. Adolescent Family Life Act, 42 U.S.C. § 300z—5(a)(2) (1982).

85. Although the Community Education program is offered to adults as well as children, the appeal to the Supreme Court involves only the applicability to the Community Education classes held at the elementary and remedial levels. *See* Grand Rapids School District v. Ball, 473 U.S. 373 (1985).

grams on establishment clause grounds.[86] The Shared Time program provided funding to public school teachers to teach remedial classes in leased rooms of private schools.[87] In order to avoid constitutional problems, these private schools' classrooms were cleared of religious artifacts.[88] The Community Education program used non-public school teachers[89] to offer adults and youngsters a variety of evening classes.[90] In analyzing the challenges to these programs, the majority utilized the *Lemon* inquiry,[91] and they focused on the location of the education and the students being educated.[92]

In *Grand Rapids*, the Court based much of its analysis on the potential for indoctrination of an adolescent, which would threaten his or her freedom of belief.[93] Essentially, the Court pinned its analysis to the impact of a teacher's coercive actions that might infringe autonomy:

> Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they [the teachers] are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. . . . Teachers in such an atmosphere may well *subtly* (or overtly) conform their instruction to the environment in which they teach. . . .[94]

The costs of the autonomy loss were so significant that the "substantial risk" (not, "mere possibility") of such an autonomy infringement violated the constitution.[95] Thus, the

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86. 473 U.S. at 375.
87. *Id.*
88. *Id.* at 378.
89. *Id.* at 376.
90. *Id.*
91. *Id.* at 382. *But see id.* at 384 n.6 (where the majority attempts to justify the *Lemon* analysis rather than the *Roemer*, and its progeny, analysis).

> Many of the schools in this case included prayer and attendance at religious services as part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely of the particular denomination, and give preference in adherence to children belonging to the denomination.

Id. 546 F. Supp., at 1080-1084.
92. Grand Rapids v. Ball, 473 U.S. 373, 384 (1985).
93. *Id.* at 385.
94. *Id.* at 387-88 (emphasis added).
95. *Id.* at 388 ("The Court of Appeals of course recognized that respondents adduced no evidence of specific incidents of religious indoctrination in this case. . . . But the absence of proof of specific incidents is not dispositive.") (citation omitted).

Court employed the strictest scrutiny of an educational program if the citizens involved were children susceptible to autonomy violations.[96]

In *Aguilar v. Felton*,[97] decided on the same day as *Grand Rapids*, the Court invalidated disbursement of federal funds to public school teachers to teach remedial reading in parochial schools in inner-city New York.[98] The program provided assistance only for parochial students.[99] Justice Brennan wrote that, despite the well-intentioned aid to deprived children, the program violated the first amendment.[100] These deprived children, elementary schools students, were threatened by the risk of indoctrination[101] posed by the message implicit in the link between religion and the state.[102]

In relation to the organizations themselves, one can readily distinguish *Kendrick* from *Grand Rapids*. AFLA organizations in *Kendrick* allowed a great deal of autonomy for their participants[103]; they neither discriminated nor preferred

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96. "The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Id.* at 389. The Court illustrates how this difference has translated into the establishment clause jurisprudence by comparing Marsh v. Chambers, 463 U.S. 783, (1983) (holding that prayers that open legislative sessions do not violate the establishment clause) with Abington School District v. Schempp, 374 U.S. 103 (1963) (holding that prayers that open public elementary and secondary school violate the establishment clause). *Grand Rapids*, 473 U.S. at 388.

Thus, the Court admits that establishment clause cases may turn on the characterization of the particular citizens involved in the program. If the citizens are fully autonomous (*Marsh*) the Court will not review with the strictest of scrutiny. If, on the other hand, the participants are less than intermediately autonomous, the Court will pay particular attention to the program.

97. 472 U.S. 402 (1985).

98. *Id.* at 406.

99. *Id.* at 404.

100. In an impassioned dissent, Chief Justice Burger writes,

> I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm. The notion that denying these services to students in religious school is a neutral act to protect us from an Established Church has no support in logic, experience, or history."

Id. at 420.

101. *Id.* at 413.

102. *Id. Compare* these with *Grand Rapids*, where the fact that there was no administrative overseer to guard against the inculcation of religious values risked forbidden entanglement between church and state. From these two cases, then, a Catch 22 emerges. *See Aguilar*, 472 U.S. at 420 (Rehnquist, J., dissenting).

103. Tilton v. Richardson, 403 U.S. 672 (1971).

participants on the basis of religious affiliation[104]; they were open to persons of any or no religious affiliation[105]; and most significantly, they considered their *primary* objective to be the physical and emotional needs, not the spiritual development, of the participants.[106] In these ways, the AFLA organizations in *Kendrick* should not be seen as pervasively sectarian. Rather, they should be seen as analogous to the colleges and universities in *Tilton*, *Hunt*, and *Roemer*.

III. The Supreme Court's Characterization of Youngsters

In the preceding section, this note described how the AFLA *organizations* in *Kendrick* were not pervasively sectarian. The note showed how the *Kendrick* organizations were similar to those in *Tilton* and dissimilar to those organizations in *Grand Rapids*. This comparison of institutions is the traditional manner of constitutional analysis. Yet, the preceding section hinted at an underlying factor in determining whether an organization is pervasively sectarian: the maturity or immaturity of the students attending those institutions.

Indeed, one may be able to find that a justifiable rationale for distinguishing permissible state aid to religious colleges from impermissible state aid to religious secondary schools lies in the characterization of the youngsters involved in the state-funded programs.[107] The characterization of youngsters as either immature (primarily autonomous) or mature (intermediately autonomous) is a valid and essential criterion in establishment clause analysis. Both case law and constitutional commentators support the validity of this criterion.

Most recently, Justice Brennan admitted that a citizen's maturity and impressionability inform the Court's analysis of establishment clause issues and, in fact, offer the basis for distinguishing between permissible and impermissible state ac-

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104. *Id.*

105. Hunt v. McNair, 413 U.S. 297 (1973).

106. Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976).

107. In concluding that state funding of sectarian organizations was impermissible, both *Kendrick* and *Grand Rapids* base part of their analysis on the fact that the youngsters in each school or program are impressionable and thus need protection. Nevertheless, the rationale of *Grand Rapids* is incorrectly applied to *Kendrick* insofar as *Grand Rapids* indulges a view of children as having primary autonomy, whereas the adolescents in *Kendrick* have intermediate autonomy.

tion. This rationale underpinned much of the *Grand Rapids* analysis. Throughout the opinion, the Court emphasized notions of involuntary belief, coercive pressures, and improper ideological indoctrination in reference to the youngsters' impressionable state. At one point Brennan writes,

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the government message are children in their formative years. . . . The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.[108]

Thus, the current state of law focuses on adolescents' susceptibility to religious coercion in educational programs.

The Court acknowledged, in a footnote,[109] that the status of those participating in a state-funded program is a valid criterion in analyzing the constitutionality of such a program. This footnote attempts to reconcile the Court's seemingly inconsistent holdings in *Marsh*, *Schempp*, and *Grand Rapids* (cases to be discussed below). In this effort at reconciliation, the Court elaborates on the notion that mature citizens are less susceptible to religious coercion.[110] Emphasis on differing degrees of susceptibility to coercion justifies the differing levels of scrutiny applied to programs involving impressionable and not-so-impressionable citizens. So, the Court's application of differing degrees of establishment clause scrutiny seemingly depends on citizens' various stages of development in autonomy.

In *Marsh v. Chambers*[111] the Court held that a state-funded chaplain opening the Nebraska Legislature with a prayer did not violate the establishment clause. Conversely, in *Abington School District v. Schempp*[112] the Court held that state-sponsored prayers opening the day in secondary and elementary schools did violate the establishment clause.[113] Jus-

108. Grand Rapids School District v. Ball 473 U.S. 373, 373 (1985).
109. *Id.* at 391 n.9.
110. *See* Tilton v. Richardson, 403 U.S. 672, 686 (1971).
111. 463 U.S. 785 (1983).
112. 374 U.S. 103 (1963).
113. This matter offers an illuminating revelation of the transformation of Justice Brennan's establishment clause jurisprudence. In *Schempp*, Brennan, concurring, offered dicta to the effect that the *Schempp* holding would not impact on certain practices, such as prayers in legislative cham-

tice Brennan, writing for the majority in *Grand Rapids*, accepted the validity of the distinction between permissible state-sponsored prayers for legislators and impermissible state-sponsored prayers for secondary school children.[114] The difference in the results of cases with similar facts lay in the distinction between state legislators' maturity and secondary school students' immaturity. Justice Brennan cited this distinction approvingly to illustrate the heightened sensitivity of the Court's analysis of establishment clause issues that involve impressionable children.[115]

Scholarly commentary has also recognized the pivotal role a citizen's impressionability to coercion plays in the Court's establishment clause analysis. John Noonan, Donald Gianella, Rex Lee, and Leo Pfeffer all have recognized that a citizen's immaturity and the accompanying susceptibility to religious indoctrination pose deep establishment clause problems in the eyes of the Court.[116] If a citizen's impressionability, or immaturity, lies at the core of the Court's establishment clause analysis, it is important to examine how the Court distinguishes between stages of development in autonomy, this note now turns to that inquiry.

The Supreme Court has articulated two divergent con-

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bers. Twenty years later, in *Marsh*, Brennan faced that specific question of prayers in legislative chambers. Surprisingly, and in the face of his concurrence in *Schempp*, he voted that the practice violated the establishment clause: "Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today." Marsh v. Chambers, 463 U.S. 483, 796 (1983) (Brennan, J., dissenting).

Interestingly, as far back as *Schempp*, Justice Brennan pointed to the maturity of the participants as a distinguishing criterion in evaluating an establishment clause claim. *See* Abington School District v. Schempp, 374 U.S. 103, 209-10 (1963) (Brennan, J., concurring).

114. Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985).

115. *Id.* This, by implication, also demonstrates why the Court has been less cautious in their approach to establishment clause cases involving less-than-impressionable youngsters (*Tilton*) and mature citizens (*Marsh*).

116. *See supra* notes 65 and 73, for Noonan's, Gianella's, and Pfeffer's comments.

For Former Solicitor General Rex Lee's comments, see Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337.

> Perhaps it is that public school teachers who come onto parochial premises might themselves be the object of religious proselytizing. But this notion is surely at odds not only with common experience but also with the Court's own observations that it is the susceptibility of children, not adults, to religious indoctrination that raises establishment clause concern.

Id. at 344.

ceptions of youngsters.[117] The first conception of youngsters, as having primary autonomy, arises, as seen above, in cases of state funding of religious elementary and secondary schools.[118] The second conception of youngsters, as having intermediate autonomy, dominates those cases involving a minor's decision to have an abortion[119] and, as seen above, in establishment clause cases involving college students.[120] If the participants in AFLA have only primary autonomy, then the Court may carefully consider the risk that these children will be unduly indoctrinated.[121] If, however, the participants in AFLA are seen as intermediately autonomous, there is perhaps less danger than the *Kendrick* court admitted of those participants being unduly influenced by religious influence.[122]

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117. "We have been reluctant to attempt to define the totality of the relationship of the juvenile and the state." Carey v. Population Services International, 431 U.S. 678, 692 (1977) (quoting In re Gault, 387 U.S. 1, 13 (1967)).

118. *E.g.*, Grand Rapids School District v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 472 U.S. 402 (1985); Wallace v. Jaffree, 105 S.Ct. 2479 (1985); Meek v. Pittenger, 421 U.S. 349 (1975).

119. Bellotti v. Baird, 443 U.S. 622 (1979) (state cannot require parental or judicial consent for non-emergency abortions for minors); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state may not force minor to obtain parental consent for abortion within first twelve weeks of pregnancy).

120. Tilton v. Richardson, 403 U.S. 672 (1971) and more recently, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university must offer equal access to religious groups who seek to make use of available meeting rooms on campus).

The main point to be taken from *Widmar* is the majority's statement concerning the autonomy of adolescents in the university setting: "*University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.*" *Widmar*, 454 U.S. at 272 n.14 (emphasis added).

121. Although *Grand Rapids* and *Aguilar* would apparently apply, there is a well-grounded hesitation to apply them strictly. Since the children will eventually become autonomous, it is incumbent upon their parents—or, in the absence of parents, upon society—to inculcate basic values and virtues. To fail to do so is an omission of the highest sort.

When children are seen as having emergent autonomy there exists a greater basis for paternalistic intervention by the state. In other words, there is a strong state interest in educating the children.

122. It would seem that the AFLA participants are more like those students in *Tilton*, rather than those in *Grand Rapids*. Thus, it follows that *Tilton* applies.

When children do not exhibit capacities for present autonomous action and, at the same time, have the potential to develop eventually into fully autonomous beings, the Court has safeguarded the children's potential for autonomous development. In the establishment clause cases involving financing to religious elementary and secondary schools, the Court has jeal-

Three conclusions follow from seeing the children in *Kendrick* as intermediately autonomous. First, the Court should presumptively apply the *Bellotti* and *Tilton* rationales to *Kendrick* insofar as the adolescents involved in both cases display the same characteristics. Second, Congress can legitimately offer education in sexual responsibility to adolescents, consistent with those adolescents' intermediate stage of autonomy. Third, Congress' decision to use religious and charitable groups is a constitutional and efficient means by which to educate these adolescents and to respect the autonomous nature of the youngsters.

As already noted, the Court's description of youngsters with primary autonomy is sketched in the establishment clause cases involving elementary and secondary schools.[123] Determining one's stage of autonomy springs from considerations of two factors: age (physical and emotional) and the seriousness of the situation the person faces. Thus, a youngster is primarily autonomous if she is emotionally young, or, more importantly, if she faces only those situations faced by a child.[124] These factors can be grouped into a single notion: that the autonomy of the youngster springs from her psychological development and life experiences. Under this distinction, the adolescents in *Kendrick* surely have more than pri-

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ously guarded the children's interests against the potential religious coercion or indoctrination.

The difference between indoctrination and coercion and inculcation is as follows: indoctrination is coercive insofar as it violates one's autonomy; inculcation aids one in his or her autonomous development. I will devote more attention to this distinction later in this note. *See generally* van Geel, *The Prisoner's Dilemma And Education Policy*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 301 (1988), especially at Section I-A. This implicates the importance of developing children into autonomous citizens. When the Court has viewed children as having an underdeveloped or primary autonomy, the Court has acted to protect children. See Grand Rapids School District v. Ball, 473 U.S. 373, 390 n.9 (1985).

123. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971), and its progeny. This note will use the Court's most recent school funding case, *Grand Rapids*, as illustrative of the Court's notion of primary autonomy. To avoid redundancy, the discussion will focus only on those aspects of *Grand Rapids* not yet evaluated in this note. (For the additional discussion of *Grand Rapids*, see *supra* text accompanying notes 85-110.) *Grand Rapids*, as previously discussed, involved youngsters who were impressionable to coercion and indoctrination.

124. On the other hand, a youngster could be seen as more than primarily autonomous if she demonstrates she is emotionally and physically mature or if she undertakes adult-like activities.
KEETON, PROSSER AND KEETON ON TORTS 181 (5th ed. 1984).

mary autonomy: the emotional age and adult-like activities of the adolescents in *Kendrick* indicate that they are more than the mere children of *Grand Rapids*.[125]

In matters related to sexual conduct and in cases of state funding to religious colleges, the Court has described adolescents as more than the mere children of primary autonomy in *Grand Rapids* and the previously discussed elementary and secondary school cases. In particular, the Court has generally seen youngsters seeking an abortion as intermediately autonomous.[126] It is argued here that the characteristic of intermediate autonomy may very well be correct in matters of sexual education. This should be especially apparent to a Court which has viewed—erroneously in light of the life and death

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125. The adolescents in *Kendrick* faced far graver life experiences (i.e., procreative decisions in the inner city) than the children in *Grand Rapids* seeking remedial reading assistance. In *Grand Rapids*, the Court based its characterization of the youngsters as impressionable on their age (emotional and physical) and the circumstances they faced. The use of chronological age as the dispositive factor is dangerous and inaccurate. Although age and maturity are surely related, different individuals mature at different times depending on their social and psychological circumstances. Indeed, these social and psychological circumstanced may prove more reliable in arriving at the proper characterization of individual adolescents. *See*, Note, *Cognitus Interruptus: The Courts and Minors' Access to Contraceptives*, 5 YALE L. & POL'Y REV. 212, 223 (1986) (reviewing judicial decisions on adolescents' procreative decisions both in the United States and Great Britain).

The students in *Grand Rapids* are arguably dissimilar from the AFLA participants in *Kendrick*. The two groups differ both in age (physically and emotionally) and in circumstances. To base development in autonomy — development in the capacity to be self-determining in a meaningful and informed way — on mere physical age for all circumstances is troublesome. Studies show that youngsters in this age group (10-12) lack the cognitive capacity to make reasoned judgments. This evidence comes largely from material cited in Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274, n.71 (1979). *See* W. DAMON, THE SOCIAL WORLD OF THE CHILD (1977). These children cannot think abstractly, not can they easily engage in long-term planning.

Although some research points to the period from 12 to 14 years old as the beginning of adult moral development, sparse research exists on the moral development and reasoning process of 12 to 14 year olds in reference to major questions like abortion. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1939). *See* C. Lewis, Three Studies of Adolescent Decision Making (unpublished Ph.D. dissertation, Stanford Univ. 1979), cited in Wald, at 274 n.71.

126. A *caveat*: This note shall rely heavily on cases decided in the wake of Roe v. Wade. These cases emphasize *Roe*'s implications for a minor seeking an abortion or contraceptives. This note makes no suggestion that these cases are correct or, for that matter, internally consistent. Indeed, these cases are deeply flawed, both legally and morally.

consequences of an abortion decision—in that manner. *Quite simply, if the Court seriously believes that youngsters seeking abortions are in such a stage of development so as to make a determination of life or death, then the youngsters in* Kendrick *must be mature enough to discern coercive attempts at indoctrination.*[127]

Intermediate autonomous adolescents display *limited* rationality and *limited* experience and judgment through which to make partially informed decisions.[128] As such, these adolescents are *not* highly impressionable, yet, at the same time, they need information and guidance. They are neither children, who may be treated paternalistically, nor adults, who can be completely left alone. The youngsters in *Kendrick* seeking information on procreative matters possess these characteristics.

The Court has seen youngsters as intermediately autonomous in procreative areas.[129] In *Planned Parenthood v. Danforth*[130] the Court defended a minor's right to make decisions on having an abortion. In *Danforth* the Court overturned Missouri's legislative decision to require the written consent of a parent in order for a minor to undergo an abortion.[131] The Court reasoned that the consent violated a minor's right of privacy.[132] The Court saw the minor as neither child nor

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127. Given this characterization, the Court should view the adolescents in *Kendrick* as less susceptible to coercion and indoctrination.

128. This characterization results from a reading of both majority and minority opinions in the cases discussed in the text. Of course, it is highly anomalous that the Court imputes these characteristics to youngsters in the context of making a life or death decision—namely, whether to undergo an abortion.

129. *See generally* Note, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1986).

130. 428 U.S. 52 (1976).

131. MO. REV. STAT. § 3(4) (1974).

132. This right was first recognized in Griswold v. Connecticut, 381 U.S. 479 (1965), for married couples in the area of procreation, and Roe v. Wade, 410 U.S. 133 (1973), in the area of abortion. Both these cases involved adults. Indeed, Dean Bruce Hafen of Brigham Young Law School has noted that the special status of youngsters creates an obligation to care: "The reality behind the concept of minority status is that children lack the capacity to formulate reasoned judgments. Their inherent dependency creates an obvious need—indeed a "right"—to affirmative nurturing and special forms of protection." Hafen, *Exploring Test Cases in Child Advocacy* (Book Review), 100 HARV. L. REV. 435, 446 (1986).

> This need suggests a general right of children to be protected from their own immaturity. Of course each child requires gradually increasing freedom to make important choices, even at the risk of harming himself through some bad judgments. The capacity to weigh risks in making personal choices is only developed as

adult. A plurality of the Court imputed to the minor the capacity to make her own rational determination for undergoing an abortion, if that minor was "mature."[133] Still, the Court refused to characterize minors as full adults having unfettered power to make an abortion decision:

> Minors, as well as adults, are protected by the Constitution and possess constitutional rights.[cites] The Court indeed, however, has long recognized that the State has somewhat broader authority to regulate the activities of children than of adults . . .[134]

Minors seeking an abortion in *Danforth* were more than mere children, less than full adults.

In *Carey v. Population Services International*,[135] the Court held that the state could not restrict a minor's freedom or autonomy in sexual activity.[136] In striking down a New York law prohibiting the sale of contraceptives to minors, the Court relied on the "right of personal privacy"[137] as "one aspect of the liberty protected by the Due Process Clause of the

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> children live with, and learn from, the unpleasant consequences of their decision. For this reason, adolescence should be seen as a time in which children are given low-risk levels of autonomy as a way of learning how to assume greater responsibility. Still, in a paradoxical but important sense, a child has a basic right to be protected from complete freedom.

Id. at 446. Youngsters, as intermediately autonomous citizens, have special needs.

133. The Court stated, "Our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for the termination of her pregnancy." Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

134. *Danforth*, 428 U.S. at 74-75 (citations omitted).

135. 431 U.S. 678 (1977).

136. But Justice White rejected the radical libertarian view of youngsters. In *Carey*, Justice White took issue with the majority's misguided emphasis on the rights and liberties of the mother, as opposed to the duties of individuals and of society. "Even as early as *Danforth* the majority of the Court saw the decision as the interests of the mother versus the interests of the father: nothing said of the duties of either, duties of society, or interest of the fetus." *Carey*, 431 U.S. at 104. As Justice White intimated, a commitment to the rights of youngsters may actually hinder their autonomy. The state cannot simply leave the youngster alone to exercise her rights; positive liberty must exist in order for a youngster to be truly free. *See* I. BERLIN, *Two Concepts of Liberty*, FOUR ESSAYS ON LIBERTY (1969). Both White in *Carey* and Stevens in *Danforth* realized that the state should provide adolescents with moral, personal and medical considerations so that the adolescent could exercise freedom consistent with her autonomy.

137. 431 U.S. at 684.

Fourteenth Amendment."[138] The inherent gravity of the decision to procreate finds strong constitutional protection.[139] The Court, as in *Danforth*, purported to view these youngsters as more than mere children, but did not confer on them all the liberties of an adults.[140] The youngsters were intermediately autonomous.

The Court offered an elaborate account of the intermediate autonomy of adolescents in *Bellotti v. Baird*.[141] Although the result in *Bellotti* cannot be squared with its rationale, one can glean from the case the Court's significant description of youngsters. In *Bellotti*, the Court affirmed the Massachusetts Supreme Court's invalidation of a statute regulating a minor's abortion decision. The Court held that a minor can make serious decisions,[142] yet the inherent dimensions of an abortion decision allow that a state provide additional guidance to guarantee a truly informed choice by the minor.[143] The import of the Court's holding is evident: many youngsters are mature enough to make an informed abortion decision, yet the state should provide educational information to safeguard an informed decision.

In *Bellotti*, the Court presented a deep theoretical analysis of the freedom, or autonomy, of youngsters. The *Bellotti*

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138. *Id.*

139. The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.

Id. at 685 (citations omitted).

140. In *Danforth*, Justice Stevens embarked on development of a thoughtful jurisprudence in considering the autonomy of youngsters and the duties society has to protect that autonomy. "The State's interest in the welfare of its young citizens justifies a variety of protective measures. . . . The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Danforth*, 428 U.S. at 102 (Stevens, J., concurring in part, dissenting in part).

Justice Stevens recognized that the grave consequences of abortion decisions give the state a strong interest in protecting the youngster. "But even if it [the abortion] is the most important kind of decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly with full understanding of the consequences of either alternative." *Id.* at 103 (Stevens, J., concurring in part, dissenting in part).

141. 443 U.S. 622 (1979).

142. *Id.* at 635.

143. *Id.* at 642-43.

rationale, *not the result*, sounds with the themes of intermediate autonomy. The Court gives special protection to youngsters because of, inter alia,[144] their "peculiar vulnerability, [and] their inability to make critical decisions in an informed, mature manner."[145]

The vulnerability of adolescents places them in precarious positions that may threaten deprivations of their liberty.[146] To safeguard the liberty of adolescents the state may allow adjustments of a legal system's rules and regulations accordingly: "[t]he State is entitled to adjust its legal system to account for children's *vulnerability* and their *needs* for 'concern, . . . sympathy, and . . . and parental attention.' "[147] In other words, the intermediate autonomy of youngsters warrants a legal system that conforms to their special status. The legal system should both recognize that the adolescents are not highly impressionable and at the same time that they are not yet adults.

The *Bellotti* Court recognized that absolute freedom to make a choice might in reality be no freedom at all. Children's rights may pose great danger to children.[148] Conferring freedom to make a choice without experience and judgment does not respect autonomy.[149] Thus, the State may

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144. "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Bellotti v. Baird, 443 U.S. 622, 634 (1979).

145. *Id.* at 443.

146. *Id.*

147. *Id.* at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (emphasis added).

148. Traditionally, the legal world has made an appeal to the *rights* of youngsters, yet this approach may be inadequate to remedy their situation.

> Focusing the potential marketplace on the needs of children is a difficult task. Children do not vote and do not make campaign contributions. They are not network anchor people or opinion makers. They are ineligible for public office, and they do not have money of their own. They do not have access to the traditional levels of political power.

Edelman and Weill, *Status of Children in the 1980's*, 17 COLUM. HUM. RTS. L. REV. 139, 140 (1985). *See also* O'Neill, *Children's Rights, Children's Lives*, 98 ETHICS 445, 459-63 (1988).

149. In order to make a meaningful choice, the patient (or the person seeking an abortion) must have a certain level of understanding of the procedure and its implications. Otherwise, the "choice" is no choice. *See generally* J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984).

constrict the range of freedoms for adolescents. The *Bellotti* Court wrote:

> States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors *often lack the experience, perspective, and judgment* to recognize and avoid choices that could be detrimental to them.[150]

Despite the Court's language concerning the limitations of adolescents, the Court allows them to make a life or death determinations on the question of abortion. The Court's rationale for this stark incongruency is unexplained and perhaps unexplainable. The Court's feeble attempt at explanation merely reasserts its belief that abortion is a fundamental right. In the Court's words:

> But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority . . . The pregnant minor's options in other situations are much different from those facing a minor in other situations, such as deciding whether to marry . . . Moreover, the potentially severe detriment facing a pregnant woman [cites] is not mitigated by her minority.[151]

Thus, in the name of youngsters' rights, the Court apparently endorses the notion that rights to make pregnancy decisions supply some level of maturity.[152]

Bellotti describes youngsters as less than full adults — as vulnerable, needy beings of limited rationality without the experience, perspective, and judgment to make a truly informed choice.[153] At the same time, *Bellotti* describes young-

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150. *Bellotti*, 443 U.S. at 636 (emphasis added).

151. *Id.* at 642.

152. There are deep problems with this emphasis on rights for adolescents. *See* O'Neill *Children's Rights, Children's Lives*, 98 ETHICS 445 (1988) and Hafen, *Children's Liberation and the new Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605. O'Neill sees the "children rights" movement as political and ethical failures while Hafen sees the phenomena of children's rights as both legal and ethical failures.

153. This import was substantiated in City of Akron v. Akron Reproductive Services, 462 U.S. 416 (1983) (where the Court struck down a city law prohibiting doctors from performing abortions on a minor under fifteen years old without parental consent or a valid judicial decree, *id.* at 440. The law failed to pass constitutional muster insofar as it presumed

sters as more than mere children: they have some decision-making capacity. They can make abortion decisions. They have some degree of freedom that must respected and nurtured by information and education.[154] Youngsters seeking an abortion are, according to *Bellotti*, more than mere children, less than full adults. In constitutional terms, these youngsters are not the mere children of *Grand Rapids*, but rather the partially mature adolescents of *Bellotti* and *Tilton*.

These cases—*Carey*, *Danforth*, and *Bellotti*—make clear the Court's conception of youngsters as intermediately autonomous beings with deep vulnerability and needs, yet capable of becoming fully autonomous.[155] The Court has said that

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that all pregnant children under 15 years old are too immature to make an abortion decision. But a minor may give a truly informed "consent" after appropriate counseling from a "qualified" person, the counseling is not exposure to relevant medical facts, and the a qualified person is not necessarily a doctor.) "The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Id.* at 448 (footnote omitted).

The accompanying footnote reads:

> We do not suggest that appropriate counseling consists simply of a recital of pertinent medical facts. On the contrary, it is clear that the needs of parents for information and an opportunity to discuss the abortion decision will vary considerably. It is not disputed that individual counseling should be available for those persons who desire or need it. See *e.g.*, National Abortion Federation Standards 1 (1981). . .; Planned Parenthood of Metropolitan Washington D.C. Inc., Guidelines for Operation, Maintenance and Evaluation of First Trimester Outpatient Abortion Faculties 5 (1980). Such an opportunity may be especially important for minors alienated or separated from their parents. . . . Thus, for most patients, mere provision of a printed statement of relevant information is not counseling.

Id. at 448 n.38.

154. There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring).

155. *See* Meyer v. Nebraska, 262 U.S. 390 (1923):

> Without doubt, it [liberty] denotes not merely freedom from bodily restraint [negative liberty] but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up

these youngsters are mature enough to make a life or death decision, if they are supplied with the proper information and education. Under this rationale, it follows that youngsters in *Kendrick* seeking an abortion or seeking information on sexual activity[156] are mature enough to be "less impressionable and less susceptible to religious indoctrination."[157]

IV. Moral Education: Autonomy and the Inculcation of Secular Virtue

Having suggested in the previous section that the youngsters in *Kendrick* are intermediately autonomous, this note now will examine how state-sponsored education in sexual responsibility best respects and actually advances adolescents' development in autonomy. Understanding that the state has undertaken an educatory function,[158] two issues need to be

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children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399 (citations omitted).

156. 42 U.S.C. § 300z (1982).

157. Tilton v. Richardson, 403 U.S. 672, 686 (1971).

158. The parents shall have primary responsibility for the development of the child's morals. Traditionally parents have been entrusted with the duties to inculcate morality in children. Prince v. Massachusetts, 312 U.S. 158 (1944).

The Court has treated this subject with special sensitivity. "The unique role in our society of the family, the institution by which 'we inculcate and pass down many of out most cherished values, moral and cultural,' (*Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion), requires that constitutional principles be applied to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979).

The state also has the duty to provide moral education in justice in a well-ordered society. "Moreover his moral education itself has been regulated by the principles of right and justice to which he would consent in an initial position in which we all have equal representation as moral persons." J. Rawls, *supra* note 17, at 515. This is acutely relevant in the absence of parents. This duty is to provide moral education, as opposed to indoctrination.

> The "tone" of a school—the extent of its own inherent decency—is the sum of its assembled humans' characters and not something that exists by fiat. A decent person has dignity; to order a person to be decent violates dignity. At best he can be persuaded, and the decency he ultimately exhibits will come from within, from his own convictions.

T. Sizer, Horace's Compromise 125 (1984).

Members of society ought to support this education insofar as it strengthens the moral fiber of the community. "Nor can someone in a well-ordered society object to the practices of moral instruction that inculcate a sense of justice." J. Rawls, *supra* note 17, at 515.

addressed: can the state legitimately teach sexual responsibility and can the state utilize religious organizations in local communities in order to offer this particular education. The conclusions from these analyses must be not only ethically justified but also constitutionally permitted.

Given the characterization of youngsters seeking information on procreative matters as intermediately autonomous, this note contends that the state can legitimately inculcate sexual responsibility in intermediately autonomous adolescents. This note also contends that the state may properly use local religious groups as educationally effective and constitutionally permissible means to accomplish this education.

A. *Sexual Responsibility: A Civic Virtue Advancing Adolescent Autonomy*

In order for one to make use of one's freedom, one must first understand what it is to be free and have a minimum of basic goods by which to exercise one's freedom.[159] Indeed, one can argue that in order to become autonomous citizens capable of exercising their constitutional rights,[160] youngsters require that minimum necessary conditions be met by society.[161] One must have access to information in order to be self-determining. Thus, an adolescent's autonomous development is tied to basic education.[162]

At the same time, basic education must not be unduly

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159. Isaiah Berlin writes, "to offer political rights to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or *education* before they can understand or make use of their freedom." BERLIN, *supra* note 136, at 124 (emphasis added).

160. *See Bellotti*, 443 U.S. at 638. ("This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.")

161. "By minimal economic security, or subsistence, I mean unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and *minimal preventive public health care. . . .*" H. SHUE, BASIC RIGHTS 23 (1980) (emphasis added).

162. Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

coercive. In order to respect youth's autonomy and to avoid coercion or indoctrination, the state should engage in moral education to the extent that the education respects and promotes the youth's autonomy.[163] In this way, education is inextricably tied to the autonomy of the individual and the autonomy of society.[164] To advance autonomy, state-sponsored moral education must not be coercive.[165]

The virtue of sexual responsibility is a valid civic virtue insofar as it allows adolescents to become self-determining as they grow older. Sexual responsibility is central to the development of an adolescent's autonomy: in practical terms, adolescent pregnancy often results in high-school drop outs, illiteracy, low birthweight babies, and abject poverty.[166] Quite simply, the emotional and physical hardships of promiscuity and abortion severely curtail opportunities to make life choices and to act as autonomous citizens.[167]

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163. "Thus moral education is an education for autonomy." J. RAWLS, *supra* note 17, at 516.

164. This definition recognizes the doctrinal underpinnings of our constitutional republic by emphasizing the civic virtues of liberty, fairness, due process, and privacy, as well as toleration of subversive speech and individual expression, and the fairness of the marketplace as civic virtues.

See generally van Geel, *supra* note 123. Professor van Geel argues that students have the right and society has the duty to educate our youth *subversively*. This education respects the moral autonomy of the student and makes our educational system and society efficient and strong.

For a recent statement on the value of fairness in the market, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 651 (1985) (where Justice Brennan points out "the extraordinary 'magnitude' of the value choices made by Congress in enacting the Sherman Act").

Indeed, constitutional history is replete with examples of deep value choices either made or condoned by the United States Supreme Court. *See generally* Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 72 GEO. L.J. 1665 (1984).

165. This comports with Kant's formula of the End in Itself: "treat humanity in your own person or in the person of any other never simply as a means, but always at the same time as an end." I. KANT, *supra* note 17, at 429. From this Kant argues that one cannot act on maxims of deceit or of coercion. Coercion and deceit, as action that would not be consented to, would violate the autonomy of another. *See generally* O'Neill, *Between Consenting Adults*, 14 PHILOSOPHY & PUBLIC AFFAIRS 252 (1985).

166. Lewin, *Fewer Teen Mothers, But More Are Unmarried*, New York Times, March 20, 1988, at E-26, col.1.

167. *See generally* Juhasz and Sonnenshein-Schneider, *Adolescent Sexuality: Values, Morality And Decision Making*, 23 ADOLESCENCE 579 (1987) (reporting that immature adolescents lack intellectual power of autonomous reasoning to dissuade themselves from engaging in sexual behavior); Streetman, *Contrasts In The Self-Esteem of Unwed Teenage Mothers*, 22 ADOLESCENCE 459 (1987) (reporting the effects on the self-esteem of an unwed

Insofar as religious virtue and civic virtue may both derive from the same historical roots and may both seek to advance the autonomy of their members,[168] the coincidence of the religious and the secular is inevitable at times. So, the analysis must focus on whether the religious virtue is a valid civic virtue that advances autonomy. A problem may arise when education in civic virtue coincides with education of religious virtue. Some may object that the potential for religious indoctrination exists and that this coercive activity, if allowed to occur, would violate the autonomy of youngsters.[169] The focus of this analysis must center on whether

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teenage mother); Namerow, Lawton, and Philliber, *Teenagers' Perceived And Actual Probabilities of Pregnancy*, 22 ADOLESCENCE 479 (1987) (reporting that teenagers sexual behavior was more closely related to the perceived risk of pregnancy than the actual risk of such). Most significant is Lowe & Radius, *Young Adults' Contraceptive Practices: An Investigation of Influences*, 22 ADOLESCENCE 291 (1987) (reporting the dangerous lack of information on contraceptive practices for teens).

168. Religious virtue cannot be wholly eliminated from the inculcation of civic virtue in the schools. Note, *The Myth of Religious Neutrality By Separation in Education*, 71 VA. L. REV. 127, 166-68 (1985).

"Much acceptable American secular ethic is a direct extension of Judeo-Christian teaching and cannot be detached from it, however hard the constitutional lawyers may labor. Individualism, compassion, the sense of obligation for service to one's community, and a belief in the literacy all have, surprising as it may seem to some, religious roots." SIZER, *supra* note 158, at 127. Of course, those values whose roots do not lie in Judeo-Christian culture are also acceptable. "Nevertheless, the singular banishment of religious morality from political discourse does create serious problems. If religious morality can only be disguised as secular morality, then the implicit message sent by law is that the former is less legitimate that the other." Gedicks and Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1598 (1987). Indeed, much civic morality finds its inspiration in its religion's historical roots.

> The function of education, therefore, is to teach one to think intensively and to think critically. But education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. . . . We must remember that intelligence is not enough, intelligence plus character—that is the goal of true education.

M. KING, THE WORDS OF MARTIN LUTHER KING 41 (1983).

169. One must still distinguish between inculcation and indoctrination. To remain within the scope of this note, it suffices to remark that inculcation represents those education activities that provide one with the necessary information to make meaningful choices and to become self-determining. Inculcation treats each individual as an end and not as a mere means. Indoctrination, on the other hand, does not treat each individual as an end, but rather as a mere means. Indoctrination imposes others' ends on an individual.

the activity is coercive. Religious involvement is not per se coercive. Religious and secular notions need not be exclusive. As long as the religious virtue comports with the definition of civic virtue — that is, it advances autonomy and avoids coercion — the coincidence ought not matter.[170] To the extent that a religious virtue promotes and respects autonomy, it is a valid civic virtue.[171]

The Court has recognized that civic and religious virtues can constitutionally co-exist as one value. In *Harris v. McRae*,[172] the Court, in evaluating a challenge to the Hyde Amendment that restricted federal funds for abortions, rejected the argument that the Hyde Amendment violated the establishment clause because the Hyde Amendment incorporates Catholic doctrines concerning abortion and contraception.[173] The fact that Congress, in *Harris* endorsed "traditional values" that "happen to coincide or harmonize with the tenets of some or all religions" does not violate the establishment clause.[174] Just as state and religious prohibitions against murder result in advancing autonomy, so can state and religious admonitions against promiscuity advance autonomy. Religious values and traditional cultural and political values may be the same in communities.[175]

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170. The Supreme Court has recognized that religious, moral, and political principles will at times coincide, and the Court is applauded when it acknowledges this. One commentator has proposed: "Nonetheless, when widely shared religious systems do converge, the Court should take notice. Because the followers of organized religion generally connect normative systems to an omniscient Deity, the Court can either gain support by concurring with such systems where they converge or lose support by dissenting." Attanasio, *supra* note 164, at 1719 (1984).

Another commentator has noted that the law's moral substance emanates from religious foundations. "In the United States virtually all our moral principles are rooted in our Judeo-Christian tradition, in which the Bible is accepted as God's revealed word and the Ten Commandments as His revealed law. If the belief that the killing of unborn children is morally wrong cannot be the basis of public law because it is rooted in God's revealed law, the same must be said of the belief in the immortality of murder, theft, rape, child abuse, slander and every other practice condemned in the Bible." Blum, *Moral Foundations of American Democracy*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 65, 73 (1984).

171. *See generally* Harris v. McRae, 448 U.S. 297 (1980), pointing out that religious disapproval against murder and robbery does not preclude the state from penalizing the same activities.

172. 448 U.S. 297 (1980).

173. *Id.* at 319.

174. *Id.* at 319, citing McGowen v. Maryland, 366 U.S. 420, 442 (1961).

175. Moral discourse is part of the judicial process.

B. *Religious Organizations as Secular Providers of Virtue*

Assuming that the State can instruct youngsters in the civic virtue of sexual responsibility even if that secular policy coincides with religious belief, it remains to be seen whether the state must preclude religious organizations from using state funds to accomplish this instruction. In other words, do local religious and charitable organizations provide appealing avenues by which the state can implement social welfare programs, such as AFLA.

Since 1899, the Supreme Court has explicitly recognized the propriety of religious groups participating in and administering state-sponsored social welfare programs. In *Bradfield v. Roberts*,[176] the Court unanimously validated a $30,000 Congressional grant to a hospital operated by the Roman Catholic Church. The Court expressly rejected complaints that the hospital's religious affiliation would alter the secular program of providing treatment for the "sick and invalid."[177] It was inconsequential what organizations or what individuals performed the secular task: their religious affiliation, inspiration, or opinions were "not subject of inquiry."[178] This view has gained precedential value for educational programs throughout the 20th century, as affirmed by the Court in *Roemer*.[179] The Court has properly sanctioned the State's benign ties to religious organizations that pervade the most significant of social welfare programs.[180]

> Constitutional law can make no genuine advance until it isolates the problems of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place . . . . There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognize that law is no more independent from philosophy than it is from these other disciplines.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977). Dworkin, of course, offers a rights-based approach to moral theory. Nevertheless, his perceptions on the impact of moral discourse on law are valid.

176. 175 U.S. 291 (1899).

177. *Id.* at 299, n.1, referring to 13 Stat.43 (April 8, 1864).

178. *Id.* at 298-299.

179. Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976).

180. *See generally*, Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

Congress' intent to use religious groups in social welfare work stems from the efficiency and productivity of these organizations, as mediating structures,[181] in social welfare concerns. According to University of Chicago professor James Coleman, religious organizations provide social capital by which the government can efficiently achieve desired social results for the poor and disadvantaged.[182] Social capital, as opposed to financial and human capital, is found in informal community organizations.[183] This capital utilizes the "relations between persons."[184] Religious organizations are important forms of this social capital for education insofar as, outside the student's family, religious organizations provide support for youth in their educational endeavors.[185]

Most significantly, exclusion of religious groups from providing these educational services may *disproportionately harm poor youngsters* since religious organizations provides social capital in those areas most affected by poverty.[186] Whether the state's purpose has been to treat the sick, house the homeless, feed the poor, or educate the uninformed, the state has met its obligations through the local religious and

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181. These are the intermediate organizations and associations that stand between the individual and the state. They are typically small, private entities such as the family, neighborhoods, churches, and other voluntary associations that contribute toward the realization of "meaning, fulfillment, and personal identity" for the individual. The public sphere, by contrast, is dominated by the "megastructures" of our mass national markets and by large government bureaucracies. The megastructures have enormous social and economic influence, but they do not typically seek to tell us the meaning of our individual lives.

Hafen, *Institutional Autonomy In Public, Private, and Church-related Schools*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 405 (1988). *See generally*, P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977).

It is easy to see that AFLA organizations serve as a mediating structure; herein lies the reason for their successes, as voiced by Senator Edward Kennedy. *See supra* n.6.

182. *See generally* Coleman, *The Creation and destruction of Social Capital: Implications for Law* 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 375 (1988).

183. Informal in the sense that they are not government entities.

184. *Id.*

185. This support cannot be provided by Congress or by any other government arm. This social capital is a public good insofar as it induces youth to prosper in education and stay in school: it is easier for a local religious education groups to convince a youth to remain in school than it is for the United States Congress to do so. *Id.*

186. *Id.*

charitable organizations who share the same concerns. To begin a systematic exclusion of religious organizations from these social welfare programs would in many cases leave the poor unattended[187] or, worse yet, leave financially-strapped social welfare programs in the hands of those who lack commitment to the underlying values of the effort. Using the establishment clause to separate religious organizations from the dispossessed directly exacerbates the plight of the poor.

CONCLUSION

The centerpiece of Judge Ritchie's decision in *Kendrick* focuses on the state's subsidy of religious organizations' teaching and counseling on virtues that both religion and the state share.[188] This, he reasons, violates the Constitution:

> Put plain, these functions amount to teaching by grant recipients and subcontractors, including religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine.[189]

The judge perceived the commingling of civic and religious interest in these concepts: "It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful."[190] Thus, AFLA "contemplates subsidizing a fundamental religious mission of those organizations."[191] This judicial inquiry into the religious affiliation of organizations and their members who perform state-sponsored secular tasks

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187. For example, in caring for the homeless, religious groups aid two to three million homeless people throughout the United States. In the District of Columbia alone one Lutheran Church "houses, feeds, or counsels," 50,000 people per year. Congress, in passing the Stewart B. McKinney Homeless Assistance Act (P.L. No. 100-77, § 412, 101 Stat. 482, to be codified at 42 U.S.C. 11372), specifically intended for religious groups not to be excluded from federal monies in the groups' efforts to reach the homeless. To emphasize this, Congress examined HUD's regulations excluding religious groups from funding and recommended that HUD revise its regulations so as to include religious organizations in receiving federal funds to provide secular services.

188. "[T]he court's decisions do reflect the concern that the state itself will become a vehicle for the inculcation of religious values." *Developments, supra* note 78, at 1686.

189. Kendrick v. Bowen, 657 F. Supp. 1547, 1562 (D.D.C. 1987).

190. *Id.* at 1563.

191. *Id.*

demonstrates an unparalleled hostility to religious groups.[192]

This reasoning is flawed. It exemplifies modern confusion over the state's authority to educate youngsters in civic virtue. The state may educate youngsters to the extent that education advances individual and societal autonomy, and matters of sexual responsibility are legitimate civic virtues. Insofar as Judge Ritchie admitted that AFLA had a valid secular purpose,[193] the coincidence with religious virtues should not render AFLA unconstitutional on its face.

Once sexual responsibility is accepted as a civic virtue in which the state may offer instruction, the Court should not prohibit Congress from using any organization, including religious ones, from performing this secular task. The state's use of religious organizations to help poor, mature youngsters makes both constitutional and educational sense. This is especially true where the risk of religious indoctrination is minimal given the intermediate autonomy of the adolescents who are the intended beneficiaries of the Act.

The state, in respecting the autonomy of its young citizens, may use religious organizations to educate the country's young and dispossessed. Use of these organizations finds justification both in the Constitution and in modern educational and social theory. The Constitution and moral theory mandate that Congress be allowed to use religious organizations in reaching out to adolescents of this nation.[194] The allure of sending "a cleric, indeed a clerical order, to perform a wholly secular task"[195]—in this case, to educate adolescents—finds both constitutional and theoretical support.

ADDENDUM

After this note was written the Supreme Court decided *Bowen v. Kendrick*, 108 S.Ct. 2562 (1988). In a 5-4 decision, the Court found that AFLA was facially constitutional. This decision may signal a move towards a more rational establishment clause jurisprudence, a body of law that allows the gov-

192. Brief for Appellant at 39, Bowen v. Kendrick, 657 F. Supp. 1547 (D.D.C. 1987) (no. 87-253).

193. *See supra* text at notes 26-32.

194. "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

195. Roemer v. Maryland Board of Public Works, 426 U.S. 736, 746 (1976).

ernment to use religious organizations to teach adolescents on sensitive matters of concern to both the adolescents and to the country. In this way, the law will advance the autonomy of these adolescents.