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I. INTRODUCTION

The Adolescent Family Life Act (AFLA)[1] authorizes the Department of Health and Human Services (HHS) to distribute federal funds for, among other things, the counseling of teenagers on the perils of premarital sexual relations and the preferability of adoption over abortion.[2] Because the AFLA contemplates the participation of religious organizations in the counseling process,[3] certain taxpayers challenged the constitutionality of the AFLA under the Establishment Clause.[4] In the recent case of *Kendrick v. Bowen*,[5] the United States District Court for the District of Columbia struck down the AFLA as unconstitutional on its face and as applied.[6]

The district court's action in *Kendrick* is significant not only because it purports to invalidate portions of an Act of Congress, but also because it attempts to alter Congress' program for dealing with the burgeoning teen-pregnancy problem.[7] This note examines the district court's holding that the AFLA, on its face,

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1. 42 U.S.C. § 300z (1982 & Supp. II 1984).

2. *Id.* § 300z(b).

3. *Id.* §§ 300z(a)(8)(B), 300z(a)(10)(C), 300z-5(a)(21)(B); *see also* S. REP. No. 161, 97th Cong., 1st Sess., 15-16 (1981).

4. U.S. CONST. amend. I. The first amendment states: "Congress shall make no law respecting an establishment of religion . . . ." *Id.* The Supreme Court has explained that the Establishment Clause does not require hostility toward religion. Everson v. Board of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."). Rather, the government is to maintain a "benevolent neutrality." Walz v. Tax Comm., 397 U.S. 664, 669 (1970) ("[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship . . . .").

5. 657 F. Supp. 1547 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987).

6. *Id.* at 1560.

7. Pending review of the case, the Supreme Court has stayed the order of the district court. Bowen v. Kendrick, 108 S. Ct. 1 (1987). Thus, the practical effect of the severance on the participation of religiously affiliated organizations in AFLA programs remains to be seen.

has the "primary effect" of advancing religion in violation of the Establishment Clause. The note concludes that although the district court reached the correct result, the court's analytical framework and reasoning are flawed in several significant respects.

Section II summarizes the case and outlines the district court's framework for "primary effect" analysis. Section II then recounts the district court's three reasons for concluding that the AFLA, on its face, has the "primary effect" of advancing religion. Section III examines the district court's analytical framework and suggests that it unnecessarily and erroneously complicates the "primary effect" analysis and should be rejected. Section III then examines the district court's three reasons for concluding that the AFLA, on its face, has the "primary effect" of advancing religion and suggests that the court failed to apply the case law in its proper factual context. Section IV nevertheless concludes that the AFLA, on its face, fails the "primary effect" prong of the *Lemon* test because the statute does not contain adequate safeguards against the use of government funds for religious ends.

II. THE CASE

Kendrick v. Bowen[8] involves the constitutionality of the Adolescent Family Life Act.[9] The AFLA represents Congress' attempt to enact a comprehensive, integrated program of care and counseling services to address the growing problems of adolescent premarital sexual relations, pregnancy and parenthood.[10]

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8. 657 F. Supp. at 1547.

9. 42 U.S.C. § 300z (1982 & Supp. II 1984).

10. *See id.* §§ 300z(a), 300z(b). AFLA programs fall into three categories—"care services," "prevention services" and "research." *See id.* §§ 300z-2, 300z-7. "Care services" are "services for the provision of care to pregnant adolescents and adolescent parents" and their newborn. *Id.* § 300z-1(a)(7); *see also id.* §§ 300z-1(a)(4), 300z-1(a)(5). These services include "pregnancy testing and maternity counseling," "nutrition information and counseling," "adoption counseling and referral services," "primary and preventive health services including prenatal and postnatal care," "referral to appropriate pediatric care," "referral to licensed residential care," "mental health services," "child care sufficient to enable the adolescent parent to continue education or to enter into employment" and the like. *Id.*

"Prevention services" are "services to prevent adolescent sexual relations." *Id.* § 300z-1(a)(8). These services include "referral for screening and treatment of venereal disease," "educational services relating to family life and problems associated with adolescent premarital sexual relations," "vocational services," "outreach services to families of adolescents to discourage sexual relations among unemancipated minors," "family plan-

Congress found that "such problems are best approached through a variety of . . . services provided to adolescents and their families by other family members, *religious and charitable organizations*, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives."[11]

Consistent with these findings, the HHS authorized the distribution of federal funds to several religiously affiliated organizations for the purpose of providing AFLA care and counseling services.[12] As a result of these grants, certain taxpayers brought suit to challenge the constitutionality of the AFLA under the Establishment Clause.[13] The plaintiffs particularly opposed the involvement of religious organizations in counseling adolescents on sexual relations and in promoting adoption over abortion.[14]

After significant pre-trial proceedings, the district court granted summary judgment for the plaintiffs.[15] Applying the test

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ning services" and the like. *Id.* § 300z-1(a)(4).

Although these categories appear to be mutually exclusive, the statute contemplates that some aid recipients will provide a combination of care and prevention services. *Id.* § 300z-2(b).

11. *Id.* § 300z(a)(8)(B) (emphasis added). Congress also intended that the new AFLA programs be combined with existing public and private programs to form a comprehensive, integrated network of services. *Id.* § 300z-2(b). Accordingly, prospective AFLA grantees are required to describe in their applications how they "will, as appropriate in the provision of services . . . involve *religious and charitable organizations*, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." *Id.* § 300z-5(a)(21)(B) (emphasis added). For a more complete review of the varieties of information required on the application, see *id.* § 300z-5(a) in its entirety.

12. *See Kendrick*, 657 F. Supp. at 1564.

13. *Id.* at 1554.

14. *See id.* at 1553 n.3.

15. *Id.* at 1553-54. Although this note will not discuss the district court's "primary effect" "as applied" analysis, at least one Establishment Clause doctrine draws into question the propriety of the finding that there was no "genuine issue of material fact." Speaking of the one AFLA grantee that the court found had used explicitly religious materials, the court observed: "The [c]ourt understands that there is a dispute as to whether . . . religious material was taught, but there is no dispute that the curriculum that was taught was at least based on [such] materials, which spoke in terms of Church teachings on sexual matters and contained several references to God. *Id.* at 1565 n.15.

In light of the case law suggesting that the mere coincidence of statutory purposes or values with the tenets of any or all religions does not invalidate a statute, *see infra* notes 55-56 and accompanying text, the distinction between teachings merely based on religious materials and the materials actually taught becomes genuinely material in the "as applied" analysis. If, for example, an AFLA counselor suggests to pregnant adolescents that it is best to put their babies up for adoption rather than have abortions, but never mentions God, sin, or the teachings of any church on abortion, then the counseling does not necessarily offend the Establishment Clause.

established in *Lemon v. Kurtzman*[16] for determining the validity of a statute under the Establishment Clause, the district court held that although the AFLA has a valid secular purpose, it has the "primary effect" of advancing religion because it permits government-funded religious organizations to counsel adolescents on matters that are "fundamental elements of religious doctrine."[17] The district court enjoined AFLA funding of religious organizations[18] and subsequently ordered the severance of the words "religious organizations" from the statute.[19]

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16. 403 U.S. 602 (1971). The now-familiar, three-prong *Lemon* test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citations omitted).

From its inception, the *Lemon* test has "guided" the Court's analysis of the "difficult questions of interpretation and application" that occur under the Establishment Clause, Mueller v. Allen, 463 U.S. 388, 392-94 (1983), and thus applies in this case. The Court has observed, however, that these principles merely provide "helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), by which to consider "the cumulative criteria developed over many years," Tilton v. Richardson, 403 U.S. 672, 677-78 (1971), "from the full sweep of the Establishment Clause cases." Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973). Those cases thus govern the determination of the AFLA's "primary effect."

However, this note will not discuss the current debate as to the exclusivity of the *Lemon* test for Establishment Clause analysis. *Compare* Lynch v. Donnelly, 465 U.S. 668, 682 (1984) (*Lemon* useful but not exclusive test) *with Lynch*, 465 U.S. at 694 (Brennan, J., dissenting) ("the Court properly looks for guidance to the *settled test* announced in Lemon v. Kurtzman") (emphasis added); *see also Kendrick*, 657 F. Supp. at 1556-57 (the Supreme Court has created a narrow exception to the *Lemon* text).

Furthermore, this note will not discuss the propriety of the *Lemon* test. For a negative appraisal of the *Lemon* test and the case law leading to it, see Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). This note will only discuss the district court's analysis of the "primary effect" prong of the *Lemon* test as it concerns the AFLA on its face.

17. *Kendrick*, 657 F. Supp. at 1562-63. The court also found that "the undisputed facts show that AFLA grants awarded to religious organizations have the primary effect of advancing religion." *Id.* at 1551. Furthermore, the court held that because of the level of surveillance that would be required to ensure that religiously affiliated grantees do not advance religion, the AFLA would necessarily foster excessive government entanglement with religion. *Id.* at 1567. Finally, the court ruled that because of the religious nature of the counseling, and the religious character of the organizations receiving funding, the AFLA was likely to incite political division along religious lines. *Id.* at 1569. This note will not discuss these elements of the district court's opinion.

18. *Id.* at 1570.

19. Kendrick v. Bowen, No. 83-3175 (D.D.C. Aug. 13, 1987) (order of the district court severing the words "religious organizations" from the AFLA). The Supreme Court granted a stay of the district court's injunction against funding religious organizations and noted probable jurisdiction. Bowen v. Kendrick, 108 S. Ct. 326 (1987). Direct appeal to the Supreme Court is provided for by 28 U.S.C. § 1252 (1982) whenever a district court invalidates an Act of Congress in any proceeding to which the United States is a

A. *The District Court's Analytical Framework For "Primary Effect" Analysis*

The district court began its analysis by noting that the AFLA's valid secular purpose does not immunize it from further inquiry under the *Lemon* test. Rather, the court must also consider whether the AFLA has the "primary effect" of advancing religion.[20] In an effort to deduce general principles from the Establishment Clause case law, the district court formulated the following framework for "primary effect" analysis:

> [1] [I]f the connection between religion and the challenged government statute or practice is clear from the face of the statute, the [c]ourt must determine whether that statute has the "direct and immediate" [or merely "remote and incidental"] effect of advancing religion. [2] Where the connection is less obvious, the [c]ourt must consider whether the government has benefitted . . . a pervasively sectarian institution or has funded a religious activity.[21]

According to the district court, a statute which has a "clear connection" with religion violates the "primary effect" prong of the *Lemon* test if the statute has the "direct and immediate" effect of advancing religion. On the other hand, a statute with a "less obvious" connection with religion violates the "primary effect" prong if it benefits "pervasively sectarian" institutions or " 'funds a religious activity in an otherwise substantially secular setting.' "[22]

The district court added three "sub-criteria" to this framework which it said pertain to both the "clear connection" and the "less obvious" connection branches of its analytical framework. First, the government program must not "allow participants in a government-funded program to 'intentionally or inadvertently inculcat[e] particular religious tenets or beliefs.' "[23] Second, the program must not " 'provide a crucial symbolic link between government and religion.' "[24] Third, the program "can-

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party.

20. *Kendrick*, 657 F. Supp. at 1560; *see also supra* note 16.

21. *Id.* at 1561.

22. *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). An organization is "pervasively sectarian" if "religion is so pervasive [within it] that a substantial portion of its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743.

23. *Kendrick*, 657 F. Supp. at 1561 (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985)).

24. *Id.* (quoting *Grand Rapids*, 473 U.S. at 385).

not impermissibly subsidize 'the primary religious mission' of the institutions that receive public funds."[25]

B. The District Court's Application

Employing the "clear connection"/"less obvious" connection dichotomy from its analytical framework, the district court determined that there is a "clear connection" between the AFLA and religion because the statute contemplates grants to religious organizations. Thus, the court maintained, the "direct and immediate" versus "remote and incidental" analysis was required.[26] Using the "sub-criteria" mentioned above, the court concluded that the AFLA on its face has the "direct and immediate" effect of advancing religion for three reasons.

First, the court held that AFLA counseling is tantamount to teaching religion because the program allows religious organizations to counsel adolescents on matters that are "fundamental elements of religious doctrine."[27] Second, the court held that the participation of religious organizations in counseling on such matters creates an impermissible "crucial symbolic link" between government and religion.[28] Third, the court held that because the AFLA involves the teaching of abstinence and the preferability of adoption over abortion, "the program contemplates subsidizing a fundamental religious mission" of the religious organizations which receive AFLA funds.[29]

For these reasons, the district court concluded that the AFLA, on its face, has the "direct and immediate" and therefore "primary effect" of advancing religion under the *Lemon* test. Since failure to satisfy any one of the three prongs of the *Lemon* test renders a statute invalid under the Establishment Clause, the district court concluded that the AFLA on its face is unconstitutional.[30]

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25. *Id.* at 1561 (quoting *Grand Rapids*, 473 U.S. at 385). The court added that although "indirect aid of a religious mission is not *per se* impermissible," the government grant is unconstitutional if it amounts to a subsidy for the religious organization and the subsidy is not separable from religious activity. *Id.* at 1562.

26. *Id.* at 1562.

27. *Id.* at 1562-63.

28. *Id.* at 1564.

29. *Id.* at 1563.

30. *Id.*

III. The District Court's Analysis Is Flawed In Several Significant Respects

Although the district court reached the proper conclusion on the "primary effect" issue, the court's analysis is flawed in two significant respects. First, the district court created a superfluous, erroneous, and misleading framework for the "primary effect" prong of the *Lemon* test. Second, the district court, in its facial examination of the AFLA, misapplied the "direct and immediate"/"remote and incidental" standard which governs "primary effect" analysis.

A. The District Court's Analytical Framework For "Primary Effect" Analysis Should Be Rejected

The district court's attempt to clarify and solidify the legal standard of *Lemon*'s "primary effect" prong is laudable because there has been concern about the usefulness and clarity of the *Lemon* test.[31] However, the district court's analytical framework unnecessarily and erroneously complicates the "primary effect" inquiry and should be rejected.

First, the district court's analytical framework creates a superfluous and erroneous threshold inquiry for the "primary effect" prong of the *Lemon* test. Under the district court's framework, a court must initially decide whether there is a "clear connection" or a "less obvious" connection between the challenged statute and religion before it can determine which "primary effect" standard to apply. According to the district court, the "direct and immediate"/"remote and incidental" standard applies if there is a "clear connection" between the statute and religion; if the connection is "less obvious," then the "pervasively sectarian" and "religious activity" standards apply.[32]

However, the Supreme Court has never established such a threshold inquiry, nor does the "primary effect" prong of the

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31. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring) ("[T]he standards announced in *Lemon* should be reexamined . . . in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional 'signpost,' . . . to be followed or ignored in a particular case as our predilections may dictate." (citation omitted)); Note, Grand Rapids School District v. Ball: *An Educational Perspective on the Evolution of* Lemon, 1986 B.Y.U. L. Rev. 489, 489 (application of the general principles of the *Lemon* test has been confused).

32. *See* Kendrick v. Bowen, 657 F. Supp. 1547, 1560-61 (1987), *prob. juris. noted*, 108 S. Ct. 326 (1987).

Lemon test require a choice between multiple standards as suggested by the district court's framework. Under the *Lemon* test, a statute or government practice violates the Establishment Clause if it has the "primary effect" of advancing religion.[33] While the term "primary effect" suggests a weighing of the statute's secular and religious effects to determine which predominates, the Supreme Court has not adopted such a balancing process. Rather, a statute or government action has the "primary effect" of advancing religion if it has the "direct and immediate" effect of advancing religion, even if its predominant effect is arguably secular.[34]

Simply stated, a statute or government action must have the "direct and immediate" effect of advancing religion to violate the "primary effect" prong of the *Lemon* test.[35] If, on the other hand, the challenged statute or government practice has merely a "remote and incidental" effect of advancing religion, then it does not violate the "primary effect" prong of the *Lemon* test.[36] Thus, the proper standard for "primary effect" analysis is

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33. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

34. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). *But see* Mueller v. Allen, 463 U.S. 388, 397 (1983) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.")). The "direct and immediate" language was first employed by the Supreme Court in *Nyquist*. *See id.* However, that language did not establish a new standard; it was intended merely to clarify the old "primary effect" standard. *See id.* Thus, under a fair reading of *Nyquist*, the "direct and immediate" language can be used to describe any of the cases where the Supreme Court has previously found the "primary effect" of advancing religion.

In addition, while the Court often talks in terms of direct and indirect aid, its application of the concept has been inconsistent. The most that can be said of the direct/indirect distinction is that direct aid will likely be considered to be more objectionable, *see* Mueller v. Allen, 463 U.S. 388, 402 n.10 (1983), while indirect aid will likely be examined for is substance, *see, e.g.*, Wolman v. Walter, 433 U.S. 229, 250 (1977) (aid to the students considered aid to the parochial schools they attended); *Nyquist*, 413 U.S. at 783-85 (tax benefits to parents of children attending parochial schools have direct and immediate effect of advancing religion in the schools).

35. One classic example of a "direct and immediate" advancement of religion is the recitation of an established prayer or biblical verses in the public schools. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (daily Bible readings and recitation of the Lord's Prayer in public school invalidated); Engel v. Vitale, 370 U.S. 421, 425-30 (1962) (voluntary recitation of the Regents' Prayer in public school invalidated).

36. For example, the Supreme Court has upheld the inclusion of a nativity scene in a city Christmas display because it had merely a "remote and incidental" effect of advancing religion. Lynch v. Donnelly, 465 U.S. 668, 683 (1984); *see also* Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement to parents of all school children for costs incurred in transporting their children to school, including to parochial schools); Board of Educ. v. Allen, 392 U.S. 236 (1968) ("loan" of secular textbooks to school children, including children in parochial schools). Even though the beneficiaries of government

whether the challenged statute has the "direct and immediate" or only "remote and incidental" effect of advancing religion. That inquiry is answered by examining the criteria developed in the Establishment Clause case law as applied in the proper factual context.[37] Therefore, the district court's "clear connection" threshold inquiry is superfluous because the court must decide, in any event, whether there is a "direct and immediate" effect of advancing religion.[38]

Moreover, the district court's division of the case law into "direct and immediate"/"remote and incidental" cases, on the one hand, and "pervasively sectarian" cases on the other is erroneous. For example, the district court cites *Committee for Public Education and Religious Liberty v. Nyquist*[39] as a "clear connection" case requiring the "direct and immediate"/"remote and incidental" analysis rather than the "pervasively sectarian" analysis.[40] Yet, the Supreme Court itself explained its conclusion

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programs in the latter two cases were parochial schools, the government action provided only a "remote and incidental" benefit to religion. *See Allen*, 392 U.S. at 243-44. The benefit was only "remote and incidental" because the beneficiaries "simply share[d] benefits which government makes generally available to educational, charitable, and eleemosynary groups." *Schempp*, 374 U.S. at 301 (1963) (Brennan, J., concurring). Such benefits include "fire and police protection, tax exemptions, and pavement of streets and sidewalks." *Id.* at 260-61. The same reasoning applies when actual religious bodies obtain similar benefits. *See id.*

37. *See supra* note 16 (The three prongs of the *Lemon* test merely provide "helpful signposts" by which to consider the criteria developed from the "full sweep of the Establishment Clause cases."). Admittedly, if the beneficiaries of a government program are "pervasively sectarian," then the program is more likely to have the "direct and immediate" effect of advancing religion. For example, in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), plaintiffs challenged a state statute providing maintenance and repair grants to nonpublic schools. The Supreme Court concluded that the statute had the "direct and immediate" rather than a "remote and incidental" effect of advancing religion due to the "sectarian profile" of the benefitting institutions. *Id.* at 783 n.39; *see also* Roemer v. Board of Pub. Works, 426 U.S. 736, 752-54 (1976) (where the Court explained the result in *Nyquist* in terms of the "sectarian profile" of the benefitting institutions); *cf. infra* note 45 and accompanying text.

The doctrines relating to "pervasively sectarian" institutions will be particularly important to a "primary effect" analysis of the AFLA. *See, e.g., infra* notes 57-84 and accompanying text.

38. This note's rejection of the district court's analytical framework does not suggest that all attempts to extract general, guiding principles from the case law are useless. It simply suggests that the district court's analytical framework fails to provide an accurate and sufficiently fact-sensitive test for deciding which "primary effect" criteria do, and which do not, apply to any given government practice.

39. 413 U.S. 756 (1973). In *Nyquist*, several Minnesota taxpayers successfully mounted an Establishment Clause challenge to a state statute providing maintenance and repair grants to nonpublic schools. *Id.*

40. Kendrick v. Bowen, 657 F. Supp. 1547, 1560-61 (D.D.C. 1987), *prob. juris. noted,*

in *Nyquist*—that the statute had a "direct and immediate" effect of advancing religion—in terms of the "sectarian profile" of the statute's contemplated beneficiaries.[41] Thus, the proper standard to apply even when dealing with "pervasively sectarian" beneficiaries is whether the government action entails a "direct and immediate" effect of advancing religion. It is simply more likely that a government program which benefits "pervasively sectarian" institutions has the "direct and immediate" effect of advancing religion.[42]

Second, the district court's analytical framework should be rejected because it leaves the false impression that any type of aid to "pervasively sectarian" institutions is, without more, unconstitutional. Indeed, under the district court's "less obvious" connection branch of analysis, the sole question concerning "pervasively sectarian" institutions appears to be whether the beneficiaries of the government program are, in fact, "pervasively sectarian."[43] If the court answers affirmatively, then according to the district court's analytical framework the government program violates the "primary effect" prong of the *Lemon* test.[44]

However, government actions which benefit "pervasively sectarian" institutions do not necessarily have the "direct and immediate" effect of advancing religion in violation of the "primary effect" prong of the *Lemon* test. Many government benefits accrue to "pervasively sectarian" institutions without causing a "direct and immediate" effect of advancing religion.[45]

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108 S. Ct. 326 (1987).

41. *See Roemer*, 426 U.S. at 752-54 (1976).

42. *See supra* note 37; *cf. infra* note 45 and accompanying text.

43. The only other question under the "less obvious" connection branch of analysis is whether the government has funded a religious activity in a secular setting. *See Kendrick*, 657 F. Supp. at 1560-61.

44. It is possible that the district court is merely asserting that any funding which the government gives directly to "pervasively sectarian" institutions is unconstitutional. *Cf. supra* note 25. Although that assertion is not unfounded, the Supreme Court has not definitively settled the question. *See infra* note 102. More importantly, even if the impression was unintended, the district court's analytical framework gives the misleading impression that any aid to "pervasively sectarian" institutions is unconstitutional.

45. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968) ("loan" of secular textbooks to school children, including children in parochial schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement to parents of all school children for costs incurred in transporting their children to school, including to parochial schools). Even though the beneficiaries of government programs in these cases were parochial schools, the government action provided only a "remote and incidental" benefit to religion. *See Allen*, 392 U.S. at 243-44. The benefit was only "remote and incidental" because the

Thus, a government program is simply more likely to have the "direct and immediate" effect of advancing religion if the program benefits "pervasively sectarian" institutions; it does not conclusively settle the question.[46] As a result, the district court's analytical framework is misleading.

Third, even if the district court's analytical framework accurately reflected the proper "primary effect" analysis, the court's opinion does not adequately distinguish a "clear connection" with religion from a "less obvious" connection with religion. For example, the court cites *Nyquist*[47] as a "clear connection" case.[48] In *Nyquist*, several Minnesota taxpayers successfully mounted an Establishment Clause challenge to a state statute providing maintenance and repair grants to nonpublic schools. However, the statute contained no explicit references to religion and was challenged on its face before there were any actual beneficiaries.[49] Any "clear connection" between religion and the statute must therefore have been based on an inference that most of the aid would go to sectarian, nonpublic schools. Whether or not the particular inference drawn in *Nyquist* was justified, a standard that is based on such inferences is prone to uncertainty. For this reason, the district court's "clear connection"/"less obvious" connection dichotomy is ambiguous.

In sum, the district court's framework for "primary effect" analysis needlessly and erroneously complicates the "primary effect" prong of the *Lemon* test. Not only does it add a superfluous and erroneous threshold question to the already multipronged *Lemon* test, but it leaves misleading impressions and offers a muddled standard for determining which Supreme Court precedents apply in any given case. Consequently, the district court's framework for "primary effect" analysis should be rejected.

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beneficiaries "simply share[d] benefits which government makes generally available to educational, charitable, and eleemosynary groups." Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (Brennan, J., concurring). Such benefits may include "fire and police protection, tax exemptions, and the pavement of streets and sidewalks." *Id.* at 260 (Brennan, J., concurring). The same reasoning applies when actual religious bodies obtain similar benefits.

46. *See supra* note 37.

47. 413 U.S. 756 (1973).

48. Kendrick v. Bowen, 657 F. Supp. 1547, 1560 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987).

49. *Nyquist*, 413 U.S. at 756.

B. The District Court Misapplied The "Direct And Immediate"/"Remote And Incidental" Standard

Even though the district court in *Kendrick* ultimately employed the "direct and immediate"/"remote and incidental" effect standard for its "primary effect" analysis,[50] the court nevertheless misapplied the sub-criteria developed by the Supreme Court for determining whether a statute has the "direct and immediate" effect of advancing religion. Employing three of these sub-criteria, the district court held that the AFLA on its face has the "direct and immediate" effect of advancing religion for the following reasons: 1) AFLA counseling amounts to teaching religion, 2) the AFLA fosters a "crucial symbolic link" between government and religion, and 3) the AFLA "subsidizes a fundamental mission of 'religious organizations.' "[51] Each of these reasons will now be examined in turn.

1. AFLA counseling amounts to teaching religion

The district court's conclusion that AFLA counseling amounts to teaching religion could rest on two independent grounds: a) the AFLA is designed to teach religion, and b) allowing AFLA counselors from religious organizations to teach matters related to religious doctrine poses an unacceptable risk that religion will be infused into the counseling process.

a. The AFLA is designed to teach religion. First, the district court maintained that teaching abstinence from adolescent sexual relations and the preferability of adoption over abortion is tantamount to teaching "fundamental elements of religious doctrine."[52] If, in fact, these values are intrinsically "religious," then the AFLA should be struck down just as was the Regents' Prayer and the reading of Bible passages in the public schools,[53] regardless of the type of organization involved.[54]

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50. *See Kendrick*, 657 F. Supp. at 1562. As shown previously, the proper general standard for "primary effect" analysis is the "direct and immediate"/"remote and incidental" standard. *See supra* notes 33-38 and accompanying text.

51. *Kendrick*, 657 F. Supp. at 1562-64.

52. *Id.* at 1562.

53. *See supra* note 35 and accompanying text.

54. The district court failed to recognize that the logical result of its conclusion that abstinence and the preferability of adoption over abortion are "fundamental elements of religious doctrine" would be to disallow AFLA funding to *any* organization. *See* Hunt v. McNair, 413 U.S. 734, 743 (1973) (government programs must not fund "[a] religious activity in an otherwise substantially secular setting").

Nevertheless, the case law shows, and plaintiffs themselves conceded,[55] that abstinence and the preferability of adoption over abortion are not intrinsically "religious" values. That is, these values are not exclusively religious values and can be taught without reference to "God," "sin" or any other strictly religious principle. The Supreme Court has long recognized that statutory principles are not "religious," and therefore do not offend the Establishment Clause, simply because they accord with widely held religious principles.[56] Accordingly, the teaching of abstinence and the preferability of adoption over abortion is not, in itself, equivalent to teaching "religion."

b. The AFLA poses an unacceptable danger that AFLA counselors will infuse religion into the counseling process. Second, the district court held that allowing AFLA counselors from religious organizations to teach matters related to religious doctrine poses an unacceptable risk that religion will be infused into the counseling process.[57]

In this connection, the court expressed serious doubt that counselors from religious organizations could "put their beliefs aside when counseling . . . on matters that are part of religious doctrine."[58] The danger is heightened, the court maintained, because the AFLA contemplates one-on-one counseling—a situation with "few discernable constraints."[59] Moreover, the counseling involves "impressionable and unlearned adolescents" who

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55. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 33 n.57, Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987) (No. 83-3175), *prob. juris. noted*, 108 S. Ct. 326 (1987) ("Plaintiffs do not contend that teenage chastity or adoption over abortion could not be secular values and taught as such . . . .").

56. McGowan v. Maryland, 366 U.S. 420, 442 (1961); *see also* Harris v. McRae, 448 U.S. 297, 319 (1980) (The Court rejected plaintiffs' argument that statutory restrictions on funding abortion incorporated "the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences."); *cf.* Stone v. Graham, 449 U.S. 39, 41-43 (1980) (A Kentucky statute required the posting of the Ten Commandments in public classrooms. Although the statute was struck down, the Court drew a distinction between the arguably secular values—honoring parents; avoiding murder, adultery, stealing, false witness and covetousness—and explicitly religious tenets.); Abington School Dist. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (listing activities with religious origins which no longer have religious meaning).

57. *Kendrick*, 657 F. Supp. at 1563 (*"This possibility alone amounts to an impermissible advancement of religion."* (emphasis in original)).

58. *Id.* The court also intimated that to require AFLA counselors from religious organizations to teach about matters relating to doctrine, without reference to that doctrine, would be a violation of the Free Exercise Clause. *Id.* This note will not discuss the Free Exercise implications.

59. *Id.*

may not "detect" the inculcation.[60] The district court based this analysis on the Supreme Court's decision in *Grand Rapids School District v. Ball*.[61]

In *Grand Rapids*, the Court invalidated several state-funded programs which provided nonreligious courses to parochial school students and other members of the community.[62] The Court held that the programs had the "primary effect" of advancing religion because of the danger that state-paid teachers in a pervasively sectarian environment would intentionally or inadvertently indoctrinate the students with religious beliefs.[63] The Supreme Court thus made it clear that it was the "pervasively sectarian nature of the religious schools" that created the danger.[64]

Consequently, unless the grantees in a government program are "pervasively sectarian," the simple fact that the subject matter taught can be imbued with religion is of little consequence under *Grand Rapids*. Indeed, the Supreme Court has recognized elsewhere that even in the public school system there is some danger that teachers will inculcate religious belief.[65]

In apparent neglect of these principles, the district court in *Kendrick* maintained that the AFLA posed an unacceptable danger of advancing religion without first concluding that the

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60. *Id.*

61. 473 U.S. 373 (1985). In *Grand Rapids*, a school district adopted two programs that provided non-religious instruction to parochial school students during the day ("Shared Time") and to members of the community in the evenings ("Community Education Program"). The classes were held in rooms located in and leased from the parochial schools. Although the school district spoke in terms of "nonpublic schools," 40 of the 41 schools benefitting from the programs were in fact parochial schools. *Id.* at 375-79. Moreover, most of the teachers in the "Shared Time" program had taught previously in the parochial schools, even though they were full-time employees of the public school system. The teachers hired by the state for the "Community Education Program" were also concurrently teaching full-time in parochial schools. *Id.*

62. *Id.*

63. *Id.* at 379; *see also* Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472, 480 (1973).

64. *Grand Rapids*, 473 U.S. at 379; *see also* Aguilar v. Felton, 473 U.S. 402, 409 (1985) (Sending public school teachers to parochial schools to provide remedial instruction and other services is impermissible.); Meek v. Pittenger, 421 U.S. 349, 366 (1975) ("The very purpose of many of those [religion-pervasive] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472, 480 (1973) (danger that teachers in pervasively sectarian schools would use state-funded, teacher-prepared tests to inculcate religion). This danger was also alluded to in Lemon v. Kurtzman, 403 U.S. 602, 616-19 (1971).

65. *See* Wallace v. Jaffree, 472 U.S. 38, 44 n.23 (1985).

AFLA, on its face, contemplated "pervasively sectarian" grantees.[66] In fact, according to the district court the AFLA was to be examined on its face under the "clear connection" branch of analysis, not the "less obvious" connection branch where the court had catalogued the cases on "pervasively sectarian" institutions.[67]

Thus, to properly decide whether the AFLA on its face poses the danger described in *Grand Rapids*, the court should "paint a general picture of the institution[s] [intended to receive the aid]"[68] to determine whether they are "pervasively sectarian."[69] An organization is "pervasively sectarian" if "religion is so pervasive [within it] that a substantial portion of its functions are subsumed in the religious mission."[70] More importantly, an organization is not "pervasively sectarian" simply because of its religious affiliation. Indeed, in an important line of "primary effect" cases, the Supreme Court drew a distinction between institutions that are merely religiously affiliated—such as religiously oriented institutions of higher learning—and those which are "pervasively sectarian"—such as parochial schools.[71] Moreover, the Supreme Court upheld this distinction in spite of the fact that religious symbols and religious services were in some degree present on the campus of at least one of those institutions of higher learning.[72] Thus, the mere fact that the AFLA mentions "religious organizations" does not conclusively determine that the AFLA contemplates "pervasively sectarian" participants.[73]

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66. Kendrick v. Bowen, 657 F. Supp. 1547, 1563 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987).

67. *Id.* at 1562.

68. Roemer v. Board of Pub. Works, 426 U.S. 736, 758 (1976).

69. Although the Supreme Court has said that it cannot "strike down an Act of Congress on the basis of a hypothetical 'profile,' " Tilton v. Richardson, 403 U.S. 672, 682 (1971), the Court did so for a state statute in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *Nyquist* is particularly relevant because the statute in question was challenged on its face and was struck down as having the "primary effect" of advancing religion, as in *Kendrick*, even before there were any actual beneficiaries. *Nyquist*, 413 U.S. at 762.

70. Hunt v. McNair, 413 U.S. 734, 743 (1973).

71. *See, e.g., Roemer*, 426 U.S. at 736 (non-categorical subsidies given to religiously affiliated, non-"pervasively sectarian" institutions of higher learning upheld under the *Lemon* test); *Hunt*, 413 U.S. at 734 (government revenue bonds used to finance construction of buildings for religiously affiliated, non-"pervasively sectarian" institutions of higher learning upheld under the *Lemon* test).

72. *See, e.g., Roemer*, 426 U.S. at 755-57 (some instructors in clerical garb, religious symbols in some classrooms, mandatory religion courses, prayer at the beginning of some classes).

73. The district court correctly observed in *Kendrick* that the AFLA does not state

Although it is a difficult question, the AFLA on its face does not appear to contemplate the participation of "pervasively sectarian" beneficiaries. As an initial matter, the text of the AFLA shows that the HHS will prefer those organizations which can provide the most services, because a key purpose of the statute is to provide a comprehensive, integrated approach to the provision of care and counseling.[74] Consequently, the HHS would probably choose a religiously affiliated organization such as a hospital or social services agency rather than an actual religious body. For this reason, the term "religious organizations" in the statute should not be construed to mean actual religious bodies, but rather religiously affiliated organizations. This preliminary conclusion also comports with the well-known doctrine that, for a facial analysis of a statute, the statute must be construed as constitutional if at all possible.[75]

However, the religiously affiliated organizations contemplated by the AFLA would be a hybrid of several other types of institutions, some of which *are* "pervasively sectarian." Namely, the organizations would have some of the characteristics of a parochial school,[76] some of the characteristics of a hospital or clinic[77] and perhaps even some characteristics of an institution of higher learning.[78]

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that religious organizations *shall* receive grants. Kendrick v. Bowen, 657 F. Supp. 1547, 1562 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987). Moreover, the AFLA does not define "religious organization." Therefore, in keeping with the well-established rule that courts should avoid holding a statute unconstitutional "if any other possible construction remains available," NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979), the AFLA should not be construed as contemplating "pervasively sectarian" participants. *See also* Rescue Army v. Municipal Court, 331 U.S. 549 (1947); *cf. Roemer*, 426 U.S. at 761 ("It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.").

However, the district court also correctly noted that the legislative history shows that "Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations." *Kendrick*, 657 F. Supp. at 1562.

74. *See* 42 U.S.C. § 300z(b)(3) (1982 & Supp. II 1984).

75. *See supra* note 73. If, however, the HHS did choose an actual religious body to supply counseling services, such an *application* of the AFLA would violate the "primary effect" prong of the *Lemon* test, for the three reasons given by the district court in *Kendrick*. *See supra* notes 23-25 and accompanying text.

76. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

77. *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899) (a government-funded hospital operated completely by a religious order not violative of the Establishment Clause).

78. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (annual subsidies to religiously oriented institutions of higher learning upheld because the institutions

The religiously affiliated grantee contemplated by the AFLA is like a parochial school in that counseling is akin to teaching.[79] Furthermore, the counseling efforts are directed at impressionable adolescents. On the other hand, the contemplated AFLA grantee resembles a hospital because of the many clinical and medical services it could be expected to provide.[80] Moreover, the grantee resembles a hospital and an institution of higher learning in that its primary or substantial purpose would probably not be to inculcate religion, such as is the case, for example, with a parochial school.[81] Rather, in keeping with the purposes of the AFLA, the religiously affiliated grantees' main purpose would likely be to help adolescents solve the many problems involved with adolescent sexual relations and pregnancy. Keeping in mind that a religiously affiliated institution is only "pervasively sectarian" if "religion is so pervasive [within it] that a substantial portion of its functions are subsumed in the religious mission [of inculcating religious belief],"[82] the fact that the AFLA grantees' main purpose would probably not be to inculcate religion is perhaps the most important reason why the religiously affiliated grantees contemplated by the AFLA should not be considered "pervasively sectarian."

In addition, a comprehensive list of criteria bearing on whether an organization is or is not "pervasively sectarian" can be found by compiling the factors listed in two additional Establishment Clause cases.[83] On balance, these criteria also suggest

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were not "pervasively sectarian").

79. In terms of educational institutions, AFLA grantees would probably fall somewhere between parochial schools and religiously oriented colleges.

80. *See* 42 U.S.C. §§ 300z-1(a)(4), 300z-1(a)(5), 300z-1(a)(7), 300z-1(a)(8) (1982 & Supp. II 1984).

81. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 364-66 (1975) (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring in part and dissenting in part)) (subsidizing "the *primary*, religion-oriented *educational function* of the sectarian school. . . . '[T]he secular education [parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence.' ") (emphasis added).

82. Hunt v. McNair, 413 U.S. 734, 743 (1973).

83. In Roemer v. Board of Public Works, 426 U.S. 736 (1976), the Supreme Court listed factors which lead to the conclusion that an institution is not pervasively sectarian. These include: (1) a high degree of institutional autonomy, (2) limited contact with the actual religious body, (3) limited (if any) control by the religious body, (4) voluntary attendance at prayer and devotional services, (5) encouragement of spiritual development as only a secondary objective, (6) religious indoctrination as not a substantial purpose, and (7) choice of participants without regard to religious affiliation. *Id.* at 755-58.

In Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Supreme Court listed several factors which lead to the conclusion that an

that the religiously affiliated grantees contemplated by the AFLA should not be considered "pervasively sectarian."[84] For these reasons, the district court erred in concluding that the AFLA poses the danger of allowing the intentional or inadvertent inculcation of religion as proscribed by *Grand Rapids*.

2. *The AFLA creates a "crucial symbolic link" between government and religion*

The district court also cited *Grand Rapids* in support of its conclusion that the AFLA has the "direct and immediate" effect of advancing religion because it creates a "crucial symbolic link" between government and religion.[85] Perhaps because the "crucial symbolic link" doctrine is relatively new to Establishment Clause jurisprudence, the standards to be applied are unclear.[86] However, in *Grand Rapids* the Supreme Court suggested that there would be a "crucial symbolic link" when government "fosters a *close identification* of its powers and responsibilities with those of any—or all—religious denominations,"[87] and when "this identification conveys a message of government endorsement or disapproval of religion."[88]

In *Kendrick*, the district court recited these phrases from *Grand Rapids* and reasoned that the "symbolic link [created by the AFLA] is quite strong" because "the education is directed at . . . pregnant adolescents who may be in a delicate and more

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institution is pervasively sectarian. These include (1) religious restrictions on admissions, (2) required attendance at religious activities, (3) required obedience to the doctrines and dogmas of a particular faith, (4) required instruction in the theology or doctrine of a particular faith, (5) substantial purpose to inculcate religion, and (6) imposition of religious restrictions on faculty appointments and what they may teach. *Id.* at 767-68.

84. *See supra* note 83. With respect to the AFLA on its face, all of the *Roemer* factors except perhaps the second—contact with the actual religious body—seem to weigh against a determination that religiously affiliated organizations contemplated by the AFLA would be "pervasively sectarian." Among the *Nyquist* factors, only the last—the presence of restrictions on the type of counselors and what they may teach—would seem to weigh in favor of such a conclusion.

85. Kendrick v. Bowen, 657 F. Supp. 1547, 1561, 1563-64 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987) (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985)).

86. *See* Note, *supra* note 31, at 495-99 (Two distinct theories are discernable: the "discrimination" theory and the "joint venture" theory.). Because there is so little case law applying the "crucial symbolic link" doctrine, the results in specific cases will be difficult to predict until further illustrations are given by the Supreme Court.

87. *Grand Rapids*, 473 U.S. at 389; *cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) ("fusion of government and religious functions").

88. *Grand Rapids*, 473 U.S. at 389.

than ordinarily receptive state of mind" and because "the subjects taught are, in the hands of a 'religious organization,' inescapably infused with religious beliefs."[89]

Nevertheless, statutes like the AFLA could seemingly convey "a message of government endorsement of . . . religion" in only two ways: 1) by providing for the teaching of religious principles, or 2) by allowing actual religious bodies or other "pervasively sectarian" institutions to provide the government-sponsored services.[90] The AFLA on its face presents neither of these dangers.

First, the values of abstinence and the preferability of adoption over abortion are not intrinsically religious values.[91] Consequently, the teaching of those values does not, in itself, create a "crucial symbolic link" between government and religion by endorsing particular religious views. Second, the AFLA on its face does not contemplate the participation of actual religious bodies or other "pervasively sectarian" institutions.[92] According to *Grand Rapids*, therefore, the district court in *Kendrick* erred in concluding that the values taught pursuant to the AFLA would be "inescapably infused with religion."

Moreover, if the contemplated grantees are not "pervasively sectarian," then the mere fact that some religiously affiliated institutions may participate in the program should no more create a "crucial symbolic link" than the funding of religiously affiliated colleges or hospitals.[93] To deny AFLA funds to religiously affiliated institutions which are not "pervasively sectarian" on the basis of such an attenuated connection would be to manifest hostility toward religiously affiliated organizations—a result not required by the Establishment Clause.[94]

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89. *Kendrick*, 657 F. Supp. at 1564.

90. In the latter case, the "crucial symbolic link" would be caused either by the infusion of religious principles into the counseling process or by the association of the government with an institution that is pervaded with religious symbols or a religious purpose. In *Grand Rapids*, the "crucial symbolic link" was caused by the "pervasively sectarian" character of the parochial schools. *See* 473 U.S. at 397.

91. *See supra* notes 55-56 and accompanying text.

92. *See supra* notes 68-84 and accompanying text.

93. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (funding program for religiously affiliated college upheld); Bradfield v. Roberts, 175 U.S. 291 (1899) (funding program for religiously affiliated hospital upheld).

94. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.").

For these reasons, the district court erred in concluding that the AFLA on its face creates a "crucial symbolic link" between government and religion.

3. The AFLA contemplates subsidizing "a fundamental religious mission" of religious organizations

Finally, the district court concluded that the AFLA has the "direct and immediate" effect of advancing religion because it "contemplates subsidizing a fundamental . . . mission of [religious] organizations."[95] The court reasoned as follows: The AFLA is designed to teach abstinence from premarital sexual relations and the preferability of adoption over abortion, which concepts are "fundamental elements of religious doctrine."[96] Since Congress intended religious organizations to participate in AFLA programs, and since the teaching of those tenets is one of their fundamental religious missions, the AFLA contemplates subsidizing that mission.[97]

In support of the subsidy doctrine, the district court cited six Supreme Court cases, including *Grand Rapids*.[98] The district court failed to note, however, that in every case it was the *character* of the institution receiving the benefit that caused the prohibited subsidy. Namely, each of the cited cases involved "pervasively sectarian" beneficiaries—parochial schools.[99]

The rationale for the subsidy doctrine is that when religion is pervasive within an organization, any funding to that organization will subsidize the inculcation of religious beliefs—its "primary religious mission"—because the funding cannot be separated from the religious function.[100] This rationale underscores

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95. Kendrick v. Bowen, 657 F. Supp. 1547, 1563 (D.D.C. 1987), *prob. juris. noted*, 108 S. Ct. 326 (1987).

96. *Id.* at 1562.

97. *Id.* at 1562-63.

98. *Id.* at 1561-62 (citing Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 657 (1980); Wolman v. Walter, 433 U.S. 229, 248-51 (1977); Meek v. Pittenger, 421 U.S. 349, 366 (1975); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472, 472 (1973); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774-81 (1973)).

99. *See Grand Rapids*, 473 U.S. at 397; *see also Regan*, 444 U.S. at 657; *Levitt*, 413 U.S. at 472; *Nyquist*, 413 U.S. at 774-81; *cf. Wolman*, 433 U.S. at 248-51 (state funding of unsupervised field trips and instructional material and equipment for sectarian schools not segregated from religious activity); *Meek*, 421 U.S. at 366 (state funding of instructional material for sectarian schools not segregated from religious activity).

100. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 755 (1976) ("[N]o state aid

the crucial role that the character of the benefiting institution plays in the conclusion that the aid is a subsidy which has the "direct and immediate" effect of advancing religion in violation of the Establishment Clause.

The flaw in the district court's subsidy holding in *Kendrick* is that the religiously affiliated grantees contemplated by the AFLA are not "pervasively sectarian."[101] Consequently, the district court misapplied the "primary religious mission" language by removing the language from its proper factual context and applying it to the AFLA, without first concluding that the AFLA contemplates the participation of "pervasively sectarian" institutions.[102] Since the AFLA does not contemplate the participation of "pervasively sectarian" institutions,[103] the AFLA does not subsidize their "primary religious mission"[104] according to the cases cited by the district court. Moreover, as previously mentioned, the AFLA's promotion of values that coincide with

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at all [can] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones . . . .").

101. *See supra* notes 68-84 and accompanying text.

102. *See Kendrick*, 657 F. Supp. at 1562-63. Even when the language remains in its proper context, however, the Supreme Court is divided on how far to extend the subsidy argument. For example, on several occasions, the Court has said that it would not accept "the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Hunt v. McNair, 413 U.S. 734, 742 (1973); *see also Roemer*, 426 U.S. at 746-47; Tilton v. Richardson, 403 U.S. 672, 679 (1971). Indeed, although "no state aid at all [can] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, . . . if secular activities *can* be separated out, they . . . may be funded." *Roemer*, 426 U.S. at 755. Nevertheless, while "some forms of aid may be channeled to the secular without providing direct aid to the sectarian . . . the channel is a narrow one." *Nyquist*, 413 U.S. at 775.

In spite of these pronouncements, the Court has held in several instances that ostensibly secular aid to pervasively sectarian institutions like parochial schools was unconstitutional because the aid also amounted to a subsidy of the "primary religious mission" of the schools. For example, in Meek v. Pittenger, 421 U.S. 349 (1975), the Court struck down the provision of secular counseling and testing services and instructional materials which could not be adapted to religious uses because it had the effect of freeing the parochial schools' resources to devote to their religious mission. *Id.* at 364-66.

Since that time, the Court has once tried to narrow the doctrine and has once reaffirmed it. *Compare Regan*, 444 U.S. at 661-62 (*Meek* should be understood "more narrowly," i.e., aid for secular activities does not inescapably advance religion if it can be "shown with sufficient clarity that they would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views") *with Grand Rapids*, 473 U.S. at 397 (secular teaching subsidizes religious mission by taking over a substantial portion of the parochial schools' secular duties). Therefore, resolution of the issue must await further Supreme Court pronouncements.

103. *See supra* notes 68-84 and accompanying text.

104. *Grand Rapids*, 473 U.S. at 385.

widely-held religious beliefs does not, without more, cause a "direct and immediate" effect of advancing religion.[105]

For these reasons, the district court in *Kendrick* erred in concluding that the AFLA has the "direct and immediate" and therefore "primary effect" of advancing religion under the subsidy doctrine.

IV. The AFLA Fails To Provide Adequate Safeguards Against The Advancement Of Religion

Despite the errors in its analysis, the district court correctly concluded that the AFLA violates the "primary effect" prong of the *Lemon* test. The AFLA violates the "primary effect" prong because it fails to provide adequate safeguards against the use of government funds to promote religious ends.[106]

Under the *Lemon* test, the overwhelming weight of authority suggests that government programs contemplating the participation of religiously affiliated institutions have the "primary effect" of advancing religion if the programs do not include adequate safeguards against the advancement of religion.[107] More importantly, even in those cases in which aid was given to religiously affiliated institutions which were *not* "pervasively sectarian," the Supreme Court required that there be adequate safeguards against the use of funds for the advancement of religious ends.[108] While the defendants in *Kendrick* argued that *statutory*

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105. *See supra* notes 55-56 and accompanying text.

106. Adequate safeguards might include any device which could be used to protect against the advancement of religion when a government program contemplates the participation of religiously affiliated institutions. Such safeguards might include (1) prohibitions in the statute itself, *see, e.g.*, *Roemer*, 426 U.S. at 740-43; (2) specific statutory enumeration of the authorized uses of the funds; (3) administrative regulations; and (4) the specific enumeration of powers and purposes in the aid recipient's corporate charter, *see, e.g.*, Bradfield v. Roberts, 175 U.S. 291, 298 (1899). *But see infra* note 110 and accompanying text (statutory safeguards almost essential).

107. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."); *see also Grand Rapids*, 473 U.S. at 387 (no attempt to monitor content of teachers' lessons a significant factor in finding "primary effect" of advancing religion); Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 659 (1980) (lack of adequate safeguards may have caused a different result); Wolman v. Walter, 433 U.S. 229, 240 (1977) (parochial schools' lack of control over subsidized state-mandated tests an important factor); Meek v. Pittenger, 421 U.S. 349, 361-62, 369-72 (1975) (no restriction on use of instructional material and equipment an important factor).

108. *See, e.g, infra* note 110 (first two cases cited).

safeguards are not a constitutional imperative,[109] the weight of authority dealing with the "primary effect" issue suggests that statutory restrictions are almost essential.[110]

This doctrine has particular import for the *Kendrick* case since the AFLA, on its face, contains no express restrictions against the use of funds for religious purposes.[111] Furthermore, unlike the government programs for religiously affiliated colleges which the Supreme Court has upheld,[112] the values advanced by the AFLA accord with widely held religious beliefs. Although the concurrence of statutory principles with widely held religious views is not in itself a violation of the "primary effect" prong of the *Lemon* test,[113] the concurrence of AFLA values with widely held religious principles at least suggests a greater need to provide safeguards in the AFLA, even if the religiously affiliated grantees are not "pervasively sectarian."[114]

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109. *See* Reply Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings and in Support of Defendant's Alternative Motion for Summary Judgment on Count II of the Complaint at 11-16, Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987) (No. 83-3175), *prob. juris. noted*, 108 S. Ct. 326 (1987).

110. For example, in Tilton v. Richardson, 403 U.S. 672 (1971), the Supreme Court struck down a provision limiting the United States' interest in federally funded buildings on campuses of religiously affiliated colleges to a period of 20 years. The Court said that after the 20-year period the statutory penalties against religious uses would be unenforceable. *Id.* at 682-83. Although the possibility of administrative regulations was not discussed in *Tilton*, the Court's holding at least implies that extra-statutory safeguards would be inadequate to protect against the advancement of religion.

Moreover, in Hunt v. McNair, 413 U.S. 734 (1973), the Court held that a statute allowing nonpublic colleges to use revenue bonds to finance building projects did not have the "primary effect" of advancing religion *because of* statutory provisions against use of the funds for religious buildings. *Id.* at 744-45. Finally, in *Nyquist*, the Court condemned an aid statute because "[n]o attempt [was] made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes . . . . Nothing *in the statute* . . . bars a qualifying school from paying out of state funds . . . [for sectarian ends]." *Nyquist*, 413 U.S. at 774. Thus, although the Supreme Court might hesitate to explicitly mandate that statutes contemplating the involvement of religious organizations contain express prohibitions against religious uses, the case law suggests that result.

111. *See Kendrick*, 657 F. Supp. at 1562-63. The district court considered and rejected the argument that the AFLA "Notice of Grant Award" and a verbal admonition to AFLA grantees sufficiently restricted the government funds to non-religious uses. *Id.* at 1563 n.13.

112. *See supra* note 71 and accompanying text.

113. *See supra* notes 55-56 and accompanying text.

114. Although the district court did not sufficiently stress the adequate-safeguards requirement that is apparent in the "primary effect" case law, the court was particularly disturbed with the concurrence of AFLA values with religious principles. *Kendrick*, 657 F. Supp. at 1562-63.

The AFLA is therefore considered inadequate, under present "primary effect" standards, to protect against the risk of advancing religion. Consequently, the AFLA is unconstitutional on its face under the "primary effect" prong of the *Lemon* test.[115]

V. CONCLUSION

The district court in *Kendrick v. Bowen* struck down the AFLA on its face as a violation of the Establishment Clause because the AFLA contemplates the funding of religious organizations to counsel adolescents on matters related to religious principles. Employing a novel framework for the "primary effect" prong of the *Lemon* test, the district court held that the AFLA on its face has the "direct and immediate" effect of advancing religion. The court reasoned that the AFLA funds or risks funding the inculcation of religious tenets, creates a "crucial symbolic link" between government and religion, and subsidizes "the primary religious mission" of publicly funded institutions.

However, the analytical framework adopted by the district court should be rejected because it needlessly and erroneously complicates the "primary effect" analysis. Not only does it add a superfluous and erroneous threshold inquiry to an already complicated test, but it is also misleading and provides a muddled standard for determining which precedents apply in any given case. Furthermore, the district court misapplied the "primary effect" case law to the AFLA by removing some of the language in several Supreme Court cases from its "pervasively sectarian"

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115. Although "primary effect" precedent effectively dictates this result, a strong argument can be made that the requirement of elaborate or statutory safeguards to supplement the Establishment Clause exalts form over substance. Consider Board of Education v. Allen, 392 U.S. 236 (1968). In *Allen*, a state statute provided for the loan of textbooks to students in elementary and secondary schools, including parochial schools. Although there was no express restriction against the loan of religiously oriented texts (the parochial schools were to choose them) the Supreme Court read restrictions against such texts into the statute. *See id.* at 239 n.3, 244-45 (absent evidence to the contrary, it must be assumed that participants will "honestly discharge their duties under the law").

Moreover, in Hunt v. McNair, 413 U.S. 734 (1973), the "adequate" safeguard consisted of a *single line* prohibiting religious uses for government funds given to a religiously oriented college. *Id.* at 744-45. Consider finally Roemer v. Board of Public Works, 426 U.S. 736 (1976). In *Roemer*, the Supreme Court said: "We must assume that the colleges . . . will exercise their delegated control over the use of the funds in compliance with the statutory, and therefore the constitutional, mandate." *Id.* 426 U.S. 736, 760. Query why the prohibition is any more effective because it is contained in a statute, than is the Establishment Clause, which is the supreme law of the land.

factual context and by applying it to the AFLA without concluding that the AFLA contemplates "pervasively sectarian" beneficiaries. In spite of the errors in the district court's analysis, however, the AFLA does not satisfy the "primary effect" prong of the *Lemon* test because it fails to provide adequate safeguards against the advancement of religion.

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