MONEY, SEX, AND THE RELIGIOUS RIGHT: A CONSTITUTIONAL ANALYSIS OF FEDERALLY FUNDED ABSTINENCE-ONLY-UNTIL-MARRIAGE SEXUALITY EDUCATION

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I. INTRODUCTION

"An educated populace is essential to the political and economic health of any community..."¹ This includes a sexually educated populace. Researchers are increasingly gaining evidence which supports the common sense conclusion that a sexually educated populace is more cost efficient to society as a whole. They are better able to prevent unintended pregnancies and the contraction of sexually transmitted diseases, thereby lowering immense medical and social costs. Section 510 of Title V of the Social Security Act,² enacted in 1996, takes a large step backwards in this realm. It provides federal funding for human sexuality education programs which are limited to promoting sexual abstinence until marriage, turning a blind eye to the proven benefits of contraception education. It puts a minority of people's religious views above the health of our nation's youth.

In this article, I will first discuss the landscape of sexuality education in America today. Included within this discussion are public opinions on sexuality education, teenage sexual behavior, information regarding sexuality education prior to the enactment of Section 510, and the most recent reports of Section 510 funding and application. I will then analyze the constitutionality of Section 510 under current Supreme Court Establishment Clause jurisprudence. Based upon the stated purpose and effect of § 510, I conclude that it is unconstitutional as violative of the separation between church and state.³

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3. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.
II. AN OVERVIEW OF SEXUALITY EDUCATION IN THE UNITED STATES

The vast majority of the American public supports human sexuality education in the schools. A national poll discovered that ninety-three percent of Americans support sexuality education in high school and eighty-four percent support sexuality education in junior high/middle school. Thirty-nine percent of those polled thought that young people today received information about sex, sexuality, and birth control too late. Approximately seventy-nine to eighty-four percent of those polled thought that young people should be given information to protect themselves from unintended pregnancies and sexually transmitted diseases ("STDs"). Seventy-two percent of those polled thought that preventing HIV/AIDS and STDs are public health issues better left for scientists and experts, rather than politicians.

This broad-based public support of comprehensive sexuality education in the schools is most likely due to the fact that parents realistically acknowledge the fact that teenagers engage in sexual activity and that many adults engage in sexual intercourse outside of the context of marriage. Women and men who marry do so on average three to four years later now than they did in the 1950s. By the age of seventeen, fifty-nine percent of teenagers have had intercourse. This rate rises according to age, i.e. the older the student, the more likely the chance that they have had intercourse, and the younger the student, the less likely the chance that they have had intercourse. By the age of nineteen, eighty-two percent of teenagers have had intercourse. At the other end of the spectrum, the younger the female teenager is, the more likely she is to have had involuntary sexual intercourse. Of those females who have had sexual intercourse before the age of fourteen, seventy-four percent have had sex involuntarily.

There are generally considered to be four types of sexuality education: comprehensive, abstinence-plus, abstinence-only, and abstinence-only-until-marriage. Comprehensive sexuality education


5. A state-wide poll conducted by the Washington Family Council, a socially conservative organization, was released in 1999, finding that sixty-six percent of Washington adults believed that couples should wait until marriage for sex, although sixty-two percent did not abstain from sex until marriage themselves. NARAL & NARAL FOUNDATION, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 222 (9th ed. 2000).


7. Id. at 28.
addresses abstinence, contraception, and other sexual health issues. It provides medically accurate information about sexuality, sexual behavior, and sexual health. Abstinence-plus sexuality education stresses the benefits of abstinence and delaying involvement in sexual behavior, but also gives accurate information on contraception. Abstinence-only sexuality education stresses the benefits of abstinence and delaying involvement in all sexual behaviors, and gives either no information on contraception or only stresses the failure rates of contraception. Some abstinence-only programs use fear and shame as a means to reduce teen sexual behavior. Abstinence-only-until-marriage sexuality education emphasizes abstinence from all forms of sexual behaviors outside of marriage. Like abstinence-only, this type of program gives either no information on contraception or only stresses the failure rates of contraception, and some use fear and shame as a means to reduce teen sexual behavior.\(^8\) For the purposes of this paper, I will consider abstinence-only and abstinence-only-until-marriage jointly as abstinence-only due to their almost identical nature.

Abstinence-only education has become a booming business in recent years thanks to § 510, with the development of approximately 900 new nationwide programs.\(^9\) Just a few years prior to the adoption of § 510, some abstinence-only programs, such as Teen Aid, Choosing the Best, and Sex Respect, taught such things as:

> Well, no one can deny that nature is making some kind of a comment on sexual behavior through the AIDS and herpes epidemics.

> There's no way to have pre-marital sex without hurting someone.

> A woman who waits can act in tune with her inner nature that says sex is a lifetime gift of love.

> The “mythology of contraception” must be challenged by anyone who teaches human sexuality.\(^10\)

But as these programs are increasingly being used in public schools, some of the publishers “have toned down their fear-based messages, corrected blatantly false information about STDs and con-

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doms, and removed overt references to specific religious teachings." However, these programs continue to use fear and shame in an attempt to coerce students into behaving a certain way, by portraying sex as a force that humans cannot control, camouflaging religious values by relying on terms such as "morals" and "ethics," idealizing the institution of marriage, fostering gender based stereotypes, misrepresenting facts on condoms and contraception, and either ignoring alternative lifestyles or portraying them as wrong.

Evaluations of sexuality education programs have been scarce until recently. However, there are some recently completed studies which assess whether and how various sexuality education programs impact teenage initiation of sexual intercourse. The majority of studies on abstinence-only education programs resulted in the conclusion that abstinence-only programs do not delay the onset of sexual intercourse. Comprehensive and abstinence-plus programs have been evaluated, with results conclusively showing that these curricula do not increase sexual intercourse, either by hastening the onset of intercourse, increasing the frequency of intercourse, or increasing the number of sexual partners. Some programs within these two categories, but not all, actually reduced sexual behavior, either by delaying the onset of intercourse, reducing the frequency of intercourse, or reducing the number of sexual partners. These studies also proved that some of these programs increased condom use or contraceptive use more generally.

Recently, Surgeon General Dr. David Satcher issued a "Call to Action to Promote Sexual Health and Responsible Sexual Behavior" on July 9, 2001. In this report, Dr. Satcher reviewed studies on the effectiveness rate of different sexuality education programs regarding the teenage pregnancy rate, the on-set of sexual activity, and their

11. SIECUS, TOWARD A SEXUALLY HEALTHY AMERICA: ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS THAT TRY TO KEEP OUR YOUTH "SCARED CHASTE" 7 (2001) (hereinafter "SCARED CHASTE").
12. See id.
13. DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, NO EASY ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 25, 47 (1997) ("[T]here does not currently exist any scientifically credible, published research demonstrating that they have actually delayed . . . the onset of sexual intercourse or reduced any other measure of sexual activity."); DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (SUMMARY) 8 (2001) (hereinafter "EMERGING ANSWERS").
14. KIRBY, EMERGING ANSWERS, supra note 13, at 8.
15. Id.
16. Id.
effect on frequency of sexual activity. These studies demonstrated that comprehensive and abstinence-plus programs do have positive influences on teenagers, and that there is insufficient evidence to back claims that abstinence-only programs have any success in delaying sexual activity among teenagers. Dr. Satcher urged communities to provide teenagers with thorough and medically accurate sexual education, endorsing it as the most effective method currently available for reducing teenage pregnancy, rapes, and STDs.

Characteristics identified by multiple studies as effective sexual education curricula include the following: (1) focus specifically "on reducing one or more sexual behaviors that lead to unintended pregnancy or HIV/STD infection;" (2) use age-appropriate and culturally and socially sensitive material; (3) use of theoretical approaches which have been demonstrated to be effective, such as social cognitive theory, social influence theory, social inoculation theory, cognitive behavioral theory, and the theory of reasoned action; (4) last a sufficient length of time to fully discuss important information; (5) use a variety of teaching methods designed to involve students and assist them in internalizing the information; (6) provide basic and accurate information about the risks of unprotected intercourse and methods of avoiding unprotected intercourse; (7) address social pressures on sexual behaviors; (8) use role-playing exercises to teach communication, negotiation, and refusal skills; (9) use trained teachers who believe in the program; and (10) deliver and consistently reinforce a clear message of abstaining from sexual activity and/or using condoms or other forms of contraception.18

III. HISTORY OF RECENT FEDERAL SEXUAL EDUCATION LAWS

In 1981, Congress passed the Adolescent Family Life Demonstration Grants program ("AFLA").19 The essential purposes of AFLA were to prevent teenage pregnancy, to promote abstinence over sexual relations, and to encourage adoption over abortion.20 Project grant applications were to specify how "support systems such as other family members, friends, [and] religious . . . organizations" would be utilized.21 Applicants were required to provide a description of how they would "involve religious and charitable organizations, voluntary as-

sociations, and other groups in the private sector. Further, despite the fact that teenage females had, at the time, a fundamental constitutional right to an abortion, grants were to be made only to programs which did not provide abortions, abortion referrals, or abortion counseling.

In 1983, a group of clergy and other individuals brought suit challenging AFLA, in Kendrick v. Bowen, asserting that it was administered in such a way that violated the Establishment Clause of the First Amendment. A District of Columbia district court judge held that AFLA had a valid secular purpose, reducing teenage pregnancy, but that on its face and as applied had the primary effect of advancing religion, thereby violating the Establishment Clause. The ruling did not last long. The United States Supreme Court overruled the decision in a five to four opinion one year later. In his majority opinion, Chief Justice Rehnquist drew a thick line between the “on its face” and “as applied” type analyses commonly utilized by judges when considering constitutional challenges to statutes. Justice Rehnquist decided that AFLA was constitutional on its face because it did not have the “primary effect of advancing religion” and would not lead to “excessive government” entanglement with religion. However, the Chief Justice remanded the case to the district court for a determination of whether AFLA violated the Establishment Clause “as applied.” A flurry of commentary ensued, which may be seen for a more in depth analysis of the opinion than can be included here.

After protracted litigation, the parties reached a settlement agreement on January 19, 1993, just as President Clinton took office. The agreement established that AFLA-funded sexuality education may not include religious references, may not be offered in a site used for religious worship services, nor offered in sites with religious iconography. It further established that information disbursed by AFLA-
funded programs must be medically accurate. By 1993, AFLA appropriations for the fiscal year dwindled to less than $8 million, considerably less than the $30 million envisioned by the enacting Congress. However, funding reached $19 million for fiscal year 2000.

In 1994, great numbers of Republicans were voted into the 104th Congress based upon their “Contract With America.” The American welfare system came under heavy scrutiny and attack. In August 1996, Congress enacted and President Clinton signed into law the controversial welfare reform legislation titled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. It came under intense academic fire. Interestingly, one single component of the entire law somehow avoided all critique and criticism. Indeed, it was hardly noticed by anyone at all, including those it affected the most. To date, the amount of controversy in communities surrounding this and other sex education programs has continually declined.

Commonly known as § 510 of Title V of the Social Security Act, it states that “[t]he purpose of an allotment under . . . this section to a State is to enable the State to provide abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock.” Abstinence education is defined as: an “educational or motivational program” which

(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;

33. See SIECUS, BETWEEN THE LINES, supra note 8, at 13.
(B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
(C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
(D) teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity;
(E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
(F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society;
(G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.\footnote{\textit{Id.}}

Fifty million dollars have been allocated to the states for each fiscal year 1998-2002 for abstinence-only-until-marriage programs.\footnote{\textit{Id.}} States apply for the money themselves, then distribute the money as direct grants to applying organizations. These organizations include public junior high schools, public high schools, faith-based institutions, elementary schools, community-based health organizations, private social service organizations, and community-based education organizations.\footnote{\textit{Id.}} The types of programs funded vary from media campaigns such as billboard advertisements, to after-school mentoring programs, to educational programs in public and private schools. Sec-

38. Daley, \textit{SIECUS REPORT}, Apr./May 1997, at 5. Funding was allocated to each state and territory as follows: Alabama, $1,081,058; Alaska, $78,526; Arizona, $894,137; Arkansas, $660,004; California, $5,764,199; Colorado, $544,383; Connecticut, $330,484; Delaware, $80,935; District of Columbia, $120,439; Florida, $2,207,883; Georgia, $1,450,083; Hawaii, $313,519; Idaho, $205,228; Illinois, $2,096,116; Indiana, $857,042; Iowa, $424,908; Kansas, $391,185; Kentucky, $990,488; Louisiana, $1,627,850; Maine, $172,468; Maryland, $535,712; Massachusetts, $739,012; Michigan, $1,899,560; Minnesota, $613,756; Mississippi, $1,062,752; Missouri, $969,291; Montana, $186,439; Nebraska, $246,177; Nevada, $157,554; New Hampshire, $82,662; New Jersey, $843,071; New Mexico, $518,368; New York, $3,377,584; North Carolina, $1,151,876; North Dakota, $126,220; Ohio, $2,091,299; Oklahoma, $756,837; Oregon, $460,076; Pennsylvania, $1,320,070; Rhode Island, $129,592; South Carolina, $811,757; South Dakota, $169,576; Tennessee, $1,067,569; Texas, $4,922,091; Utah, $325,666; Vermont, $69,855; Virginia, $828,619; Washington, $739,012; West Virginia, $487,536; Wisconsin, $795,859; Wyoming, $80,935; American Samoa $44,992; Guam, $69,495; Northern Marianas, $42,493; Puerto Rico, $1,449,018; Palau, $13,501; Micronesia, $47,492; Marshall, $21,000; Virgin Islands, $136,509. \textit{Id.}
tion 510 does not require any kind of program evaluation, although some states created an advisory panel for their § 510 program. Only California and New Hampshire declined their allocation of federal funds for fiscal year 1998. In the third year of the program's funding, California was the only state that did not apply for the funds. The program was created as an entitlement, thus the federal funds are guaranteed each year.

Immediately prior to states' use of the Act's monies, the following facts were true. Among all U.S. school districts, sixty-nine percent had a policy to teach sexuality education generally. The remaining thirty-one percent without definitive policies left policy decisions to individual schools within the district or to teachers. Among the sixty-nine percent of districts with policies, fourteen percent used comprehensive sexuality education programs, fifty-one percent used an abstinence-plus programs, and thirty-five percent used abstinence-only programs. Put another way, of the sixty-nine percent of districts with policies, sixty-five percent of districts allowed discussions to portray contraception as effective in preventing pregnancy and STDs, and thirty-five percent of districts either did not allow discussion of contraception or highlighted the failure rates of contraceptive use.

Based on all school districts, those with policies and those without, ten percent had a comprehensive program, thirty-four percent had an abstinence-plus policy, twenty-three percent had an abstinence-only policy, and thirty-three percent had no policy. In terms of students in grade six or higher, nine percent attended school in a district with a comprehensive sexuality education policy, forty-five percent were in districts with an abstinence-plus policy (fifty-four percent received some effective contraception info), thirty-two percent were in a district with an abstinence only policy, and fourteen percent were in districts with no policy. The numbers indicated a general shift, during the years 1990-1995, away from comprehensive education programs to abstinence-plus programs, i.e. those which stress abstinence.

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40. Id. at 20, 25.
41. Id. at 8.
42. ADVOCATES FOR YOUTH & SIECUS, supra note 30, at 9-10.
43. SIECUS, BETWEEN THE LINES, supra note 8, at 7.
45. Id.
46. Id.
47. Id. The article provides a compilation of data as calculated and is displayed in various tables and charts. Id.
48. Id.
through adolescent years, but also provide information on the benefits to be gained from effective use of contraceptives. 49

Information from the first fiscal year of implementation of § 510 is now available. The federal money from the grant is changing the terrain of sexuality education in the schools, although more time is needed to fully evaluate its effect. 50 At the end of fiscal year 1998, there were 698 new abstinence promotion grants to community-based organizations and education agencies across the country that did not previously exist. 51 There were twenty-one new abstinence media campaigns which were not in place prior to the enactment of § 510. 52 And, at least five states have passed state laws mirroring § 510. 53

Out of the forty-eight states which accepted § 510 money, twenty-five states made a total of 251 grants to education agencies. Most of the states which made grants to education agencies awarded them to school districts (twenty-two states). Abstinence-only was the key message for grantees in fourteen states. 54 Abstinence was the key message in the remaining eight states. 55 These programs included classroom and after school activities, including recreational and mentoring programs. Regarding the classroom activities, twenty states continued their already existing abstinence program, 56 twenty-two states introduced a new abstinence-only program, 57 one state replaced an existing sexuality education program, 58 one replaced an existing abstinence program, 59 and three changed their provision on contraceptive and STD prevention information. 60 At least seven of these states utilized sexuality programs which use fear-based teaching tactics. 61

49. Id.
50. Id.
51. Id.
52. Id.
53. Id. (Georgia, Mississippi, Oklahoma, Indiana, and North Carolina).
54. Id. at 67 (Alabama, Arizona, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, and Tennessee).
55. Id. (Colorado, Michigan, Minnesota, Mississippi, Nebraska, New York, Utah, and Washington).
56. Id. at 69 (Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Minnesota, Mississippi, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Washington).
57. Id. (Alabama, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Washington).
58. Id. (Iowa).
59. Id. (Missouri).
60. Id. (New Mexico, Texas, and Utah).
61. Id. at 87, 97, 103, 106, 121, 131, 134-35, 147 (Arkansas, Georgia, Iowa, Missouri, North Carolina, Ohio, and Texas).
The National Coalition for Abstinence Education, a Colorado based organization associated with Focus on the Family\textsuperscript{62} and other Christian groups, issued a national report card with individual grades to states implementing § 510 dollars with the purpose of making sure that states implemented the funds in strict accordance with congressional intent, i.e. that the “exclusive purpose” of the money was to teach abstinence-only, not contraception or just abstinence without the context of marriage.\textsuperscript{63} Any program which used language such as “not-fear-based” or “fact-based” to describe the program received an “F.”\textsuperscript{64} Controversy has erupted in some states over use of the funds. Some states have received critical attention for using the funds for fear-based abstinence-only programs developed by Christian based organizations.\textsuperscript{65} Other states have received criticism for straying too far from the “exclusive purpose” by funding mentoring or recreation programs which might have as a side effect abstinence, but which do not teach it.\textsuperscript{66} Other states have been criticized for using the money for sexuality education programs that stray too far from the strict eight-point guidelines.\textsuperscript{67}

Currently, twenty states, including the District of Columbia, require schools to provide sexuality education.\textsuperscript{68} Of these twenty states, four require that sexuality education teach abstinence, but do not re-

\textsuperscript{62} Focus on the Family’s mission is “[t]o cooperate with the Holy Spirit in disseminating the Gospel of Jesus Christ to as many people as possible, and, specifically, to accomplish that objective by helping to preserve traditional values and the institution of the family.” Focus on the Family, Our Mission, at http://www.family.org/welcome/aboutfo/a0005554.html (last visited Apr. 9, 2002).

\textsuperscript{63} Daniel Daley, Obstinence or Abstinence? The Choice Between Ideology and Public Health, SIECUS REPORT, Apr./May 1998, at 21-22, available at http://www.siecus.org/siecusreport/volume26/26-4.pdf. The report card grade is based on how closely the program follows § 510 guidelines. Id. at 22. Three states received an “A,” eleven were awarded a grade of “C,” sixteen received a “D,” and fourteen received failing grades. Id. Three states did not receive a grade. Id. These grades were sent to the states’ governors, states’ Maternal and Child Health Bureau (“MCH”) directors, states’ congressional delegations, the U.S. House Ways and Means Committee, the federal MCH Bureau and the U.S. House Commerce Committee. Id.

\textsuperscript{64} National Coalition for Abstinence Education: What’s the Priority—Obstinance or Abstinence?, SIECUS ADVOCATES REPORT, Summer 1998, at http://www.siecus.org/policy/AdvReport/adrp0007.html (last visited Apr. 23, 2002); see also NARAL, supra note 5, at 18.


\textsuperscript{66} See, e.g., Tamar Lewin, Did Utah Misuse Abstinence Funds?, THE DESERET NEWS (Salt Lake City), Apr. 19, 1999, at B01, 1999 WL 15641352.


\textsuperscript{68} See NARAL, supra note 5, at 41, 44, 54, 68-69, 80, 85-86, 91-92, 107-08, 126, 154, 161, 175-76, 208, 213, 222-23, 232, 236, 248, 258. The states requiring sexuality education are Alabama, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kansas,
quire the inclusion of information about contraception. Of these four states, two specify that abstinence-only be taught. Also among the twenty states, nine require that schools provide sexuality education which teaches both abstinence and provides information about contraception. Of these nine states, five require the education to emphasize abstinence.

Thirty-one states do not require schools to provide sexuality education. Of these states, ten require that if sexuality education is taught, it must include abstinence instruction, but need not include contraception information. Of these ten states, six specify that abstinence only until marriage be taught. Also of these thirty-one states, five require that if sexuality education is taught, it must include instruction concerning both abstinence and contraception. Of these five states, three specify the schools must emphasize abstinence.

IV. ANALYSIS OF THE CONSTITUTIONALITY OF § 510
A. ESTABLISHMENT CLAUSE JURISPRUDENCE BACKGROUND

Whether or not the Supreme Court deems § 510 constitutional depends largely, at this stage in the Court's First Amendment Establishment Clause jurisprudence, on the current make-up of the Court. Supreme Court jurisprudence in this area could not be much more confusing and disjunctive than it already is. Most Justices utilize

Kentucky, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wyoming. Id.
69. Id. at 68-69, 91, 232 (Alabama, Illinois, Kentucky, Utah).
70. Id. at 68-69, 232 (Illinois and Utah).
71. Id. at 41, 54, 161, 175, 208, 213, 222, 236, 248 (Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia).
72. Id. at 54, 175-76, 213, 222 (Alabama, Georgia, North Carolina, South Carolina, and Tennessee).
74. Id. at 15, 32, 50, 74, 98, 120, 131, 192, 218, 227 (Arizona, Colorado, Florida, Indiana, Louisiana, Michigan, Mississippi, Oklahoma, South Dakota, and Texas).
75. Id. at 49-50, 74, 98, 131, 227 (Florida, Indiana, Louisiana, Mississippi, and Texas).
76. Id. at 26, 56, 137, 196, 240 (California, Hawaii, Missouri, Oregon, and Virginia).
77. Id. at 26-27, 137, 240 (California, Missouri, and Virginia).
their own individual Establishment Clause test, based loosely on the Lemon test. The Lemon test, established by Justice Burger in Lemon v. Kurtzman,\textsuperscript{79} held that for a government action to be upheld, it must (1) have a secular purpose, (2) have a primary effect "that neither advances nor inhibits religion," and (3) does not involve an excessive entanglement with religion.\textsuperscript{80} The current Justices generally vote five to four on these types of cases,\textsuperscript{81} with plurality opinions common and Justice O'Connor often making her presence felt as the swing vote, concurring in the judgment but offering her own reasoning.\textsuperscript{82} Chief Justice Rehnquist\textsuperscript{83} and Justices Kennedy,\textsuperscript{84} Scalia,\textsuperscript{85} and Thomas\textsuperscript{86} rarely find an Establishment Clause problem under their analysis, whereas Justices Souter,\textsuperscript{87} Ginsburg, Breyer,\textsuperscript{88} and Stevens\textsuperscript{89} more typically identify Establishment Clause problems.

\textsuperscript{79} 403 U.S. 602 (1971).
\textsuperscript{80} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\textsuperscript{83} Chief Justice Rehnquist has not yet outlined a specific test which he would use. Rather he has indicated which tests or parts of tests are objectionable to him, i.e. the Lemon test and a thick wall of separation between church and state. Langendorfer, 33 U. RICH. L. REV. at 722-23.
\textsuperscript{84} Justice Kennedy uses a coercion test not at all based on the Lemon test. Langendorfer, 33 U. RICH. L. REV. at 717. Kennedy phrases it thusly: "[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith... .'" Id. (quoting Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))).
\textsuperscript{85} Regarding non-private speech in public fora, Justice Scalia would use a strict application of the coercion test which would require more than indirect pressure to conform to particular religious beliefs. Langendorfer, 33 U. RICH. L. REV. at 721-22.
\textsuperscript{86} Justice Thomas, being a relatively new addition to the Court, has voiced no particular test, but tends to agree with Chief Justice Rehnquist, and Justices Kennedy and Scalia. Langendorfer, 33 U. RICH. L. REV. at 723-24.
\textsuperscript{87} Justice Souter uses a favoritism test: whether the government "fail[s] to exercise... authority in a religiously neutral way" by "prefer[ring] one religion to another, or religion to irreligion." Langendorfer, 33 U. RICH. L. REV. at 716 (quoting Ed. v. Grumet, 512 U.S. 687, 703 (1994)).
\textsuperscript{88} Justice Ginsburg and Breyer, like Justice Thomas, are new to the Court and have yet to participate in many establishment clause cases. They tend to agree with Justices Souter and Stevens. Langendorfer, 33 U. RICH. L. REV. at 724.
In *Bowen v. Kendrick*, Justice Rehnquist altered established First Amendment jurisprudence by creating a distinct separation between an analysis of statutes "on their face" versus an analysis of statutes "as applied." Prior to *Bowen*, these were not distinctly separate analyses. The analysis as proffered by Rehnquist has since become accepted despite criticism that it creates a "divide and conquer" style aimed at defeating these types of constitutional challenges.

In 1997, Justice O'Connor, writing for the majority in *Agostini v. Felton*, overruled *Aguilar v. Felton* and *School District of Grand Rapids v. Ball*. Therein, she refined and reformed the *Lemon* test, breaking it into a two rather than three step analysis, examining whether the purpose of the government act was to advance or inhibit religion, and whether the aid of the government has an impermissible effect. O'Connor's effect test combined steps two and three of the *Lemon* test, asserting that government aid has the effect of advancing religion if it (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement.

Establishment Clause jurisprudence was further muddied recently in *Mitchell v. Helms*, which overruled *Meek v. Pittenger* and *Wolman v. Walter*. The issue in *Mitchell* was whether a federal statute, which granted money to both public and private schools, including religious schools, had the effect of violating the Establishment Clause. As was the case in *Agostini*, the purpose of the statute was not at issue, as all parties agreed it was secular. Justices Thomas, Rehnquist, Scalia, and Kennedy used a narrower test than what Justice Stevens also uses an endorsement test like Justice O'Connor, but still largely adheres to the *Lemon* test. Langendorfer, 33 U. Rich. L. Rev. at 714. Stevens asks two main questions: whether the government's actual purpose is to endorse or disapprove of religion, and whether the government action in question has the effect of advancing or inhibiting religion. Id. However, unlike O'Connor who considers the context regarding religious displays, Stevens avoids any contextual inquiry. Id.

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89. Justice Stevens also uses an endorsement test like Justice O'Connor, but still largely adheres to the *Lemon* test. Langendorfer, 33 U. Rich. L. Rev. at 714. Stevens asks two main questions: whether the government's actual purpose is to endorse or disapprove of religion, and whether the government action in question has the effect of advancing or inhibiting religion. *Id.* However, unlike O'Connor who considers the context regarding religious displays, Stevens avoids any contextual inquiry. *Id.*


92. See Bowen, 487 U.S. at 626-30 (Blackmun, J., dissenting) ("While the distinction is sometimes useful in constitutional litigation, the majority misuses it here to divide and conquer appellees' challenge."); Joel T. Ireland, *The Transfiguration of the Lemon Test: Church and State Reign Supreme in Bowen v. Kendrick*, 32 Ariz. L. Rev. 365, 380-84 (1990) (analyzing how separating the facial and as applied aspects of the *Lemon* test severely weaken its effectiveness in finding Establishment Clause infractions).


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tice O'Connor used in *Agostini* in assessing whether the statute's effect violated the Establishment Clause. The plurality stated that "government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content."100 Justice Thomas's effect test simply asked whether the content was permissible, and whether eligibility requirements for the grant were neutral.101 Justices O'Connor and Breyer, concurred in the judgment, although they disagreed with the plurality's reasoning, finding it to be excessively overbroad.102 Indeed, O'Connor and Breyer expressed their dismay at the plurality's position, which would, taken to its logical conclusion, result in the permissibility of the actual diversion of secular aid by religious schools to advance their religion if it was distributed in a neutral manner.103 They noted that the Court has never held that government aid is constitutional simply because neutral criteria governed the distribution of the money at issue.104

B. FACIAL ANALYSIS OF § 510

1. Purpose

While Supreme Court jurisprudence has changed significantly in this area in the last thirty years, a consideration of older case law is nonetheless prudent and enlightening. Under the *Lemon* test, the correct query regarding purpose was whether the statute at issue had a secular legislative purpose.105

A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency. The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. Moreover, in determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute.106

By the plain language of § 510, the purpose is to teach certain values, not to actually reduce teenage pregnancy. The legislation

102. Id. at 837 (O'Connor, J., concurring).
103. Id. (O'Connor, J., concurring).
104. Id. (O'Connor, J., concurring).
states that its purpose “is to enable the State to provide abstinence education” that follows eight strict guidelines that place heterosexual marriage as the only proper and moral place for humans to express their sexuality. The legislation never mentions reducing teenage pregnancy rates or the rates of STDs as goals of the legislation. While proponents of the legislation may argue that the reduction of pregnancy rates is clearly implied, their argument lacks support in the facts. If the drafters had intended to reduce pregnancy rates, they could have easily incorporated words to that effect in the legislation. They chose not to. By the words of the legislation, states have the “option” to provide “mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock.” However, this is a secondary purpose, and is completely optional and not required.

Similarly, the drafters failed to define the term “sexual activity.” 107 Like mentioning reduction of teen pregnancy rates as a purpose, the drafters could easily have defined sexual activity, or used a more definite phrase such as “heterosexual intercourse.” However, they chose not to, indicating that they intended the broader implications of the phrase “sexual activity,” which conceivably covers behaviors ranging from kissing to heterosexual intercourse. It presumably includes, but is not limited to, hand holding, light kissing, deep kissing, heavy petting, masturbation (alone or mutual), and oral and anal sex. None of these activities lead to pregnancy, though depending upon the circumstances, could lead to the transmittal of STDs and/or contraction of HIV. Nor do the drafters seem to even contemplate same-sex partners, whose sexual activity will never lead to pregnancy, though like the behaviors described above, may lead to the contraction of STDs and/or HIV.

The eight criteria that are supposed to be included in any program under this act are a mixed bag, at best. 108 Few dispute that teaching “abstinence is a healthy choice for adolescents and that premature involvement in sexual behavior poses risks.” 109 Additionally, criteria (G) especially, and (H) to a lesser degree, are valid, as they recognize the realities of teen life in America today. They teach “young people how to reject sexual advances and how alcohol and drug

107. Debra W. Haffner, What’s Wrong with Abstinence-Only Sexuality Education Programs?, SIECUS REPORT, Apr./May 1997, at 10, at http://www.siecus.org/siecusreport/volume25/25-4.pdf (last visited Apr. 23, 2002) (The Medical Institute for Sexual Health (MISH), a conservative organization, defines abstinence as “‘avoiding sexual intercourse as well as any genital contact or genital stimulation.’ Other fear-based curricula define it as any behaviors beyond hand holding and light kissing.”).
108. For a list of the eight criteria, see note 37, supra, and accompanying text.
109. ADVOCATES FOR YOUTH & SIECUS, supra note 30, at 12.
use increases vulnerability to sexual advances,” and “the importance of attaining self-sufficiency before engaging in sexual activity.” However, the other criteria force upon the Act’s recipients a moral recipe lacking in scientific corroboration.

First, the criteria expound a sexual lifestyle that has never been the norm in our country. Criteria (D) dictates that our young adults learn that humans are only to engage in sexual activity within the confines of a marital relationship. Sexual activity is generally considered a part of normal courtship in our country. Most people engage in heterosexual intercourse prior to marriage. This has been true for much of our nation’s history: one third of all pilgrim brides were pregnant when they married. However, this legislation suggests that divorced, widowed, and never married adults are to be held to this same standard, i.e. to refrain from all sexual activity regardless of their age. Most adults would not appreciate this restriction on their freedom. Lesbian and gay persons are put in a similar position. Because same-sex couples are currently not allowed to marry, unless they chose to interact sexually with persons of the other sex, they would be bound to a life of celibacy despite the fact that same-sex couples cannot procreate without significant medical intervention and planning. If the purpose of § 510 is to prevent teen pregnancy, it seems that same-sex couples should not be of any concern. They might even be considered laudable alternatives. However, it is clear by their silent exclusion and the focus on heterosexual marriage as the expected forum for sexual expression that this legislation is not actually concerned with the reduction of teen pregnancy. Rather, its purpose is to fortify and reassert the ideals of the “traditional” family.

Second, while the Maternal and Child Health Bureau guidelines suggest that grantees follow the Bowen settlement agreement, § 510 itself, by requiring the teaching of material that is not medically accurate, does not. Criteria (E) asserts that “sexual activity outside of the context of marriage is likely to have harmful psychological and physi-

112. But see Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples may not be excluded from benefits and protections of state’s laws provided to opposite-sex married couples).
113. See Mary Becker, Women, Morality, and Sexual Orientation, 8 UCLA WOMEN’S L.J. 165 (1998) (arguing for an increased acceptance of lesbian relationships, so that women have greater relationship choices, thereby forcing men to behave ethically in their relationships with women).
This statement is medically unproven. Similarly, there is no medical proof that "bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society." Nor does § 510 give any clue as to the proven, or even presumed, "social, psychological, and health gains to be realized by abstaining from sexual activity." This leaves the states in a conundrum of how to implement the legislation as instructed, teaching values that have no basis in medical fact, and adhering to the Bowen settlement agreement of ensuring that materials presented are medically accurate. Because there is seemingly little to no concern given by the drafters to the accuracy of their statements, it supports the theory that the purpose is not to reduce pregnancy or STD rates, but to teach certain values, values with no basis in reality.

The historical context of the enactment of the subject legislation also gives one reason to pause. U.S. Senators Lauch Faircloth and Rick Santorum originally introduced a related abstinence education program in September 1995. The language of this early legislation was developed by several right wing organizations, led by the Heritage Foundation. The mission of the Heritage Foundation is "to formulate and promote conservative public policies based on the principles of . . . traditional American values . . . ." This version of the legislation did not survive, but serves to show that the roots of § 510 lay in conservative right wing politics.

Congressional staffers writing on behalf of the authors of the legislation expanded upon § 510's purpose. In this document, Ron Haskins and Carol Statuto Bevan, staff for the U.S. House of Representatives' Ways and Means Committee, stated that the intent of Congress in passing § 510 was to attack illegitimacy based on the presumption that "sex outside marriage is wrong," rather "than on empirical evidence linking a particular policy with reduced nonmarital births." They continued:

Regardless of how one feels about the standard of no sex outside marriage, we believe both the statutory language and

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... the intent of Congress are clear. This standard was intended to align Congress with the social tradition—never mind that some observers now think the tradition outdated—that sex should be confined to married couples. That both the practices and standards in many communities across the country clash with the standard required by the law is precisely the point.\textsuperscript{120}

Recently, the actual difference between the drafters' intent to provide abstinence education as compared to reducing teenage pregnancy rates was made transparently clear. As previously discussed, the non-partisan National Campaign to Prevent Teen Pregnancy found that the only scientifically proven programs to prevent teenage pregnancy are abstinence-plus programs, not abstinence-only programs.\textsuperscript{121} When questioned about the current administration's support for a program that has been proven ineffective in obtaining reduced rates of teenage pregnancy, one of President George W. Bush's top advisers on welfare "shrugged and smiled when he was asked about this seeming contradiction. 'Values trumps data,' he said. 'Conservatives will be ferocious about this.'"\textsuperscript{122} This is completely congruent with the drafters' statement that their goal was "strong action," "never mind the lack of solid evidence that the action would produce substantial results." This is only more testimony to the fact that the stated purpose of § 510 is exactly what it says it is, i.e. abstinence education with a return to conservative values which coincide with Christian values, not reducing teenage pregnancy. Reducing teenage pregnancy rates is a legitimate purpose, while a return to traditional values is not.

\textsuperscript{120} Id. The authors go on to compare this piece of legislation with civil rights legislation and legislation purportedly designed to reduce cigarette smoking as attempts "to change both behavior and community standards for the good of the country." However, as was the case with both civil rights legislation and tobacco control legislation, these enactments resulted from increased knowledge and a significant move away from "tradition." In the case of the civil rights movement, slavery, oppression, and discrimination were the tradition. Enough people realized that the good of the country lay in the opposite direction. Likewise with smoking, people discovered that smoking was dangerous and that the tobacco industry had been lying to the public essentially for its entire existence, to the public's detriment. Again, legislation was enacted to move away from the "tradition" of smoking and this was done for the good of the citizens' physical health. Unlike the situations of civil rights and tobacco, the proponents of this legislation, after the general public has gained more information and has begun to move away from "tradition," are trying to move the country back from whence it came in the face of increased knowledge. Likening this legislation to the civil rights movement is wholly unpersuasive and insulting. Furthermore, the gains made for women's rights, the increased availability of sexual health information, and women's control over their reproductive lives, have all gone hand in hand. As women have gained more information about their bodies, they have been better able to control their lives. Again, this has represented a step away from "tradition" and a step toward progress.

\textsuperscript{121} See Kirby, \textit{Emerging Answers}, supra note 13, at 8.

The Supreme Court has found impermissible Congressional purpose in numerous contexts, regardless of whether the enacting Congress professed secular or non-secular reasons for its legislation. In *Schempp v. School District of Abington*, the Court held that two state statutes which required schools to begin each day with readings from the Bible or recitation of the Lord's Prayer had an impermissible purpose, violating the Establishment Clause, as applied to the states via the Fourteenth Amendment. In reaching this conclusion, the Court recognized the prevalent role religion has played in this country's development. However, this historical background did not change the language of Establishment and Free Exercise Clauses of the First Amendment, and the Court's interpretation of that language. “[P]ublic schools are organized ... [with] [t]he assumption ... that after the individual has been instructed in worldly wisdom he [or she] will be better fitted to chose his [or her] religion.” The Court found that the state prescribed readings in that case impermissibly preferred religion to irreligion, and particular religious beliefs to other religious beliefs. The purported legislative intent behind the statutes was to promote moral values, contradict the materialistic trends of the times, and to teach literature. Despite these seemingly good intentions, and despite the fact that students could opt out of the readings and prayer, the Court held that the statutes crossed over the line of strict neutrality.

Likewise, § 510 impermissibly seeks a return to “traditional moral values” by teaching abstinence from sexual activity by all unmarried people, whether school aged or adult. While attempting to reduce teenage pregnancy and STD rates are undisputed “good intention[s],” they are not the purpose of the legislation, nor is the legislation designed to accomplish those goals. It is designed simply to teach a very specific value structure that coincides with conservative Christian thought. These values, as outlined in criteria (A) through (G), reflect the values of certain religions, but not of other religions, nor of people who do not follow a religion. The support and involvement of

127. *Id.* at 218.
128. *Id.* at 223.
129. *Id.*
130. *Id.* at 225-26.
131. *See also* Associated Press, *State School Board Decides Abstinence is Best*, Dec. 15, 1999 (reporting a citizen as stating “abstinence is the only moral way to go. Obviously, morals have gone by the board in today’s society . . . . It sounds old-fashioned, but it is Bible based”).
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conservative Christian organizations in the enactment and implementation of this legislation also demonstrates how some religions are favored, and how religion is favored over irreligion. In addition, the statute does not allow for the teaching of medically accurate information if it contradicts these moral precepts. This prevents students from gaining important "worldly wisdom" in order to better assess her or his sexual values.

Similarly in Edwards v. Aguillard, the Court held that a Louisiana statute which required the theory of Creationism to be taught in public schools, but forbade the teaching of the theory of Evolution in public schools, served no secular purpose, and had as its primary purpose the promotion of a particular religious belief, violated the Establishment Clause. The Court stated that "[a] governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, or by advancement of a particular religious belief." The Court also considered an oft repeated concern for the students' academic freedom, i.e. the fact that students have an interest in receiving all relevant information, in order for them to make their own well informed choices and decisions: "If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind." "[I]t is not happenstance that the legislature required the teaching of a theory that coincided with this religious view."

Similarly, § 510 advances a particular religious belief: that "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity." Furthermore, to receive funding under this law, teaching sexuality education which has been proven effective in reducing teenage pregnancies and STDs is explicitly not allowed. Students' academic freedom is thereby jeopardized by their not receiving all relevant information necessary for making their own well-informed choices in their lives and their personal relationships. Of course, abstinence until reaching legal adulthood is the ideal. However, to ignore the reality that teenagers engage in sexual behavior, including intercourse, and that adults engage in sex outside of the context of marriage, is damaging and cost inducing to society.

134. Edwards, 482 U.S. at 585 (citations omitted).
135. Id. at 588.
136. Id. at 592.
Bowen v. Kendrick, 138 of course, is the most analogous case as it also dealt with a statute that provides federal funding for abstinence education. Chief Justice Rehnquist stated that, as was apparent from the plain language of the statute, "AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood." 139 Appellees argued in that case that impermissible religious motivation was evidenced by the Act's requirement that grant applicants describe how religious organizations will be involved in their AFLA funded program. A majority of the Court disagreed, reasoning that besides the inclusion of religious organizations, the Act also required inclusion of "family members, charitable organizations, voluntary associations, and other groups in the private sector," in approaching the problems correlated with adolescent sexuality. 140 The Court noted that there was no evidence in the legislative record indicating that Congress' "actual purpose" in passing AFLA was one of "endorsing religion." Further, the Court saw no indication that Congress' expressed purposes were a cover-up for their true, i.e. impermissible, reasons. 141

On the surface, it appears that AFLA and § 510 have much in common. In one superficial way, they do. The similarity is simply that they are both statutes which federally fund abstinence education programs. However, there are distinct and important differences which, assuming Bowen was correctly decided, conclusively place § 510 into the realm of unconstitutionality. The Congress which enacted AFLA made specific findings of fact regarding teenage pregnancy and related specific purposes of AFLA to those facts. 142 In contrast, the Congress which enacted § 510 made no findings of fact, and stated that its purpose is simply to teach abstinence, without regard to whether abstinence actually results from that education. 143 There was a full record of the debates surrounding AFLA, 144 but no discussion or debate regarding § 510. 145 Aside from the plain lan-

140. Bowen, 487 U.S. at 603 (quoting 42 U.S.C. § 300z(a)(8)(B) (1982)).
141. Id. at 604.
142. 42 U.S.C. § 330z (Findings and Purposes).
143. 42 U.S.C. § 701 (Authorization of appropriations; purposes; definitions).
145. See Daniel Daley, Exclusive Purpose: Abstinence-Only Proponents Create Federal Entitlement in Welfare Reform, SIECUS REPORT, Apr./May 1997, at 4, available at http://www.siecus.org/siecusreport/volume25/25-4.pdf (on file with the Sexuality Information and Education Council of the United States) ("The abstinence-only education provision in the welfare reform legislation was added in the final version of the legislation usually reserved for corrections and technical revisions. . . . It was inserted without the benefit of open public or Congressional debate."). The only record of § 510 was in
guage of the statute, the only document which discussed Congress's purpose in enacting § 510 was drafted by the employees of the senators who sponsored it.

Additionally, there is circumstantial evidence of the purpose to return to conservative Christian values via abstinence education, as opposed to a purpose of actually reducing teenage pregnancy rates. Section 510 does not state anywhere in its language, or in any Senate Report, that its money is not to be used to further religious purposes.146 Contrast that to AFLA, the subject legislation in Bowen, and the Elementary and Secondary Education Act of 1965 (“ESEA”),147 the subject legislation in Mitchell. The AFLA 1984 Senate Report states that “the use of [AFLA] funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation.”148 Nowhere in § 510 is there any mechanism that attempts to prevent the diversion of federal funds for impermissible reasons. Nor are there any Senate Reports which make a statement against such use of the funds. Rather, there is a statement by the drafters that the purpose of the statute is a return to conservative values, values that mirror those of conservative Christians. Furthermore, there is no federal requirement for any type of program evalu-

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146. But see Adam Sonfield & Rachel Benson Gold, States' Implementation of the Section 510 Abstinence Education Program, FY 1999, Fam. Plan. Persp., July/Aug. 2001, at 166 (stating that Maternal and Child Health Bureau guidelines recommend, but do not require, that states heed the Bowen settlement criteria with § 510 funds) (citing MCHB, HRSA, DHHS, Abstinence Advisory #1, May 12, 1997). As previously discussed, states will have a difficult time adhering to both the plain words of the statute, which require teaching material which is not medically accurate, and heeding the Bowen settlement criteria which requires that all material used must be medically accurate.


tion to determine if its goal is being reached, leading credence to the conclusion that the intent is not to affect teen pregnancy rates.\textsuperscript{149} If it were, they would logically be concerned with the effectiveness rates of their program.

Similar to AFLA, ESEA requires "secular, neutral, and non ideological services, materials, and equipment."\textsuperscript{150} ESEA also prohibits "the making of any payment . . . for religious worship or instruction."\textsuperscript{151} ESEA is a much more neutral grant as compared to § 510, giving basic classroom supplies, such as textbooks, globes, etc., to schools, rather than dealing with the thorny issue of teenage sexuality. In contrast, § 510 provides direct money grants to faith-based institutions so that they can teach that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." By not including any provisions into the statute, and by not giving any direction in a Senate Report or other document that expresses a congressional intent that these monies are not to be used to teach religious doctrine, the drafters virtually opened the door to the actual diversion of these funds toward religious instruction. This highlights § 510's impermissible purpose of teaching "moral" values, rather than actually decreasing teenage pregnancy rates.

It is also possible to infer an improper purpose from what is absent in § 510's language. As previously mentioned, § 510 was enacted immediately after the Bowen settlement agreement expired. That agreement provided that AFLA services must not be offered in sites used for religious worship or in sites with religious iconography; that all referrals to AFLA grantees must be religiously neutral; that AFLA curricula may be reviewed by a peer review panel for religious content; and that the materials used must be medically accurate.\textsuperscript{152} Despite the drafters' knowledge of the constitutional issues raised by the circumstances which led to this agreement, § 510 does not mention

\textsuperscript{149} SIECUS, Between the Lines: States' Implementation of the Federal Government's Section 510(b) Abstinence Education Program in Fiscal Year 1998, 20 (1999). \textit{But see} Dept' of Health and Human Services: Maternal and Child Health Bureau, MCHB Final Guidelines: Application Guidance for the Abstinence Education Provision of the 1996 Welfare Law, (May 1997), at app. 6.8, at http://www.siecus.org/policy/Abstinence/abst0001.html (last visited Nov. 24, 1999) (on file with the author). While these guidelines do request information regarding the pregnancy rates for teenagers aged fifteen to seventeen, whether the proportion of adolescents who have engaged in sexual intercourse has been reduced, the incidence of teenagers aged fifteen to nineteen who have contracted STDs, and the rate of births to female teenagers aged fifteen to seventeen, the submission of this information is voluntary. \textit{Id}.


\textsuperscript{152} The Alan Guttmacher Institute, Settlement Reached in AFLA Lawsuit, Paving Way for Program Changes, Oversight, WASH. MEMO, Feb. 9, 1993, at 3-4.
the need for medical accuracy, does not mention the need for religious iconography to be removed from teaching facilities, does not require that grantees cannot provide the material in sites of religious worship, and does not allow for a peer review panel that considers the religious content of the curricula. Indeed, as previously discussed, the medical accuracy for at least three of the eight criteria listed in the legislation are suspect. By omitting any language dealing with these known concerns, the drafters demonstrate their lackadaisical attitude toward these issues. This increases the validity of the inference that Congress' purpose was to impermissibly support a particular religious dogma. While MCHB Guidelines suggest that states follow the Bowen agreement terms, a state's compliance with that request is entirely voluntary and not monitored.

Chief Justice Rehnquist concluded in Bowen that AFLA's purpose to decrease teenage pregnancy was a valid secular purpose. Unlike AFLA which followed both law and some religious precepts, § 510 only follows certain religious precepts by teaching that any sexual activity outside of marriage, regardless of a person's age, is morally wrong. That is the only conclusion which can be drawn from a plain reading of § 510. First, members of a religiously affiliated organization, the Heritage Foundation, originally drafted § 510. Second, the language of the statute goes far astray of what has been medically proven to be the benefits of abstinence, i.e. pregnancy and STD prevention, into statements which have no basis in fact but do have their basis in religious doctrine, i.e. "that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." Finally, the statute prefers the tenets of some religious beliefs but not others, and prefers religion to irreligion. Legislation that arguably could have an implied purpose of reducing the rate of teenage pregnancy and the spread of STDs should logically focus on proven effective programs. That the drafters of § 510 directed funding of programs based on their content without regard to their effectiveness rate dictates that any court considering it should give little deference to the possibility that its assumed purpose is that of reducing teen pregnancy. Therefore, Congress's purpose in enacting § 510 violates the Establishment Clause of the First Amendment. On this basis alone, a court could declare § 510 unconstitutional.

2. Effect

Section 510 is also unconstitutional considering the effect prong of Establishment Clause jurisprudence. Under § 510, direct money aid
will be going to religious institutions to teach, as is required under the statute, that "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity" and that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects."\textsuperscript{154} There is a strong presumption, based on the facts in \textit{Bowen} and \textit{Coleman}, that § 510 funds have already supported teaching that "teenagers who want to have pre-marital sex feel unfree, feel guilty," that "[b]ecause of the special nature of human sexuality, there's no way to have pre-marital sex without hurting someone," that "[a] woman who waits can act in tune with her inner nature that says sex is a lifetime gift of love," and that "[t]he 'mythology of contraception' must be challenged by anyone who teaches human sexuality."\textsuperscript{155}

"The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]."\textsuperscript{156} Since \textit{Agostini}, the majority of Justices on the Supreme Court consider three primary criteria when evaluating whether government aid has the effect of advancing religion: does the aid "[1] result in governmental indoctrination; [2] define its recipients by reference to religion; or [3] create an excessive entanglement."\textsuperscript{157}

First, the aid must not result in governmental indoctrination. The Supreme Court has "repeatedly recognized [that] government inculcation of religious beliefs has the impermissible effect of advancing religion."\textsuperscript{158} The situation with § 510 is much different than that in \textit{School District of Grand Rapids v. Ball}\textsuperscript{159} where the Court concluded that "there [was] no reason to presume that . . . a . . . teacher will depart from her assigned duties and instructions and embark on religious indoctrination" simply because of her physical placement in a religious based school.\textsuperscript{160} In contrast, here the teacher is specifically instructed to teach material which directly parallels some religions' doctrine. Where the teacher personally sympathizes with the teachings of § 510, whether in a public or private setting, it is certainly possible, if not likely, that they will take advantage of the opportunity, provided by the federal government and tax payers' money, to "embark on religious indoctrination." Where § 510 money is granted to

\begin{itemize}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{157} \textit{Agostini}, 521 U.S. at 234.
\item \textsuperscript{158} \textit{Id.} at 223.
\item \textsuperscript{159} 473 U.S. 373 (1985).
\item \textsuperscript{160} \textit{Agostini}, 521 U.S. at 226.
\end{itemize}
faith-based institutions which agree with the precepts of § 510, this
risk is so high as to be blatantly obvious.\[161\]

Rehnquist has considered it "unwarranted" to assume that reli-
gious organizations cannot carry out functions under AFLA without re-
ligious indoctrination.\[162\] He reasoned that the possibility or even
likelihood that religious organizations that received AFLA funding
agreed with Congress's message was insufficient to invalidate a stat-
ute as having the primary effect of advancing religion.\[163\] However,
AFLA does not put words in teachers' mouths as does § 510. While
AFLA does not allow grantees to mention abortion, unless asked by a
parent, and does promote adoption, it does not require the teaching of
very specific tenets, as does § 510.\[164\] Rehnquist asserts that just be-
cause the viewpoint expressed in AFLA coincides with the beliefs of
certain religions, does not mean that the statute is invalid.\[165\] As an
example, he notes that many religions give charitable services with
government support, such as hospitals. However, a majority of the
Court has disagreed with this reasoning. O'Connor concurred with
the dissent's statement in Bowen, that "there is a very real and impor-
tant difference between running a soup kitchen or hospital, and coun-
seling pregnant teenagers on how to make the difficult decisions."\[166\]
O'Connor noted in Agostini that there was no reason to believe that a
public employee would spontaneously begin teaching religion with
ESEA funds.\[167\] Such is not the case with § 510. There is a significant
difference between teaching teenagers the location of France and
teaching teenagers the location of a female's clitoris. The former does
not lend itself unhesitatingly to the inclusion of religious doctrine,
while the latter does. Thus, § 510 aid could easily result in
indoctrination.

Second, the aid must not define its recipients by reference to reli-
gion. While Justice Thomas has advanced a very conservative theory of
neutrality, a majority of the Court disagrees with his analysis of this
issue. In Mitchell, Thomas advanced the theory that "[i]f the relig-
ious, irreligious, and areligious are all alike eligible for governmental

\[161\] See generally Richard Marasse, Note, Bowen v. Kendrick: A New Era of Doctri-
nal Funding?, 9 PACE L. REV. 341, 364 (1989) ("This practice of using religious groups to
deliver a government favored secular message is clearly a perilous undertaking. . . .
Religions have widely disparate views on the questions of abortion and birth control,
and to favor one with funding over another in effect endorses the particular religious
view funded.").


\[164\] Id. at 605.

\[165\] Id. at 608.

\[166\] Id. at 623 (O'Connor, J., concurring) (citing Id. at 641 (Blackmun, J.,
dissenting)).

\[167\] Agostini, 521 U.S. at 226.
aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.\(^{168}\) O'Connor responded in her concurring opinion that the Court has never held that government aid is constitutional simply because neutral criteria govern distribution of the funds.\(^{169}\) In agreeing with the dissent, O'Connor formed a majority of Justices that agree that neutrality of distribution is a relevant criterion as to whether a statute has the effect of advancing religion, but that it is not the only one.\(^{170}\)

In general, the Court has examined "the character of the institutions benefited (e.g., whether the religious institutions were "predominantly religious"), and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological),"\(^{171}\) in determining whether recipients have been defined by reference to religion.

A number of [Supreme Court] Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.\(^{172}\)

Typically, where the grant of money is made based on criteria which neither favor nor disfavor religion, nor which favor one or some religions over others, the aid is less likely to be found to have the effect of advancing religion.\(^{173}\) In this case, the language of § 510 both inclines certain faith-based institutions, but not others, to apply for the money, and virtually encourages those institutions that do apply to include their specific doctrine while teaching § 510 material because of its religiously dogmatic language.\(^{174}\)

Third, the aid must not create an excessive entanglement between church and state. Entanglement is considered to be one aspect of the effect prong, and is of import to the analysis only if it is "exces-

\(^{168}\) Mitchell, 530 U.S. at 809.

\(^{169}\) Id. at 837 (O'Connor, J., concurring).

\(^{170}\) Id. at 838-39 (O'Connor, J., concurring).

\(^{171}\) Agostini, 521 U.S. at 232-33 (citations omitted).

\(^{172}\) Id. at 230-31.

\(^{173}\) See Widmar, 454 U.S. at 274.

\(^{174}\) Not all religions, or even institutions of the same religion, will be interested in applying for § 510 funding. See, e.g., NARAL, supra note 5, at 169 (reporting that a South Tulsa Baptist Church conducted a ten week sexuality education program that discussed anatomy, sex, contraception, abstinence, STDs, marriage, homosexuality, dating, and how to conduct self exams for breast and testicular cancer) (citing Dana Sterling, Church Not Shy About Talking Sex, TULSA WORLD, Mar. 8, 1999). Clearly, the material covered in this church's education program would not be eligible for § 510 monies and this church would not be inclined to apply for those funds.
To assess entanglement, the Supreme Court considers “the character and purposes of the institutions that are benefited,” e.g., whether faith-based institutions are predominantly religious; “the nature of the aid that the State provides,” e.g., whether it was neutral and nonideological; and the “resulting relationship between the government and religious authority.” In other words, an excessive entanglement is present if (1) there is a need for pervasive monitoring; (2) there is a need for administrative cooperation; or (3) there are increased dangers of political divisiveness. With no facts set forth in relevant litigation, it will be difficult at this stage to determine whether entanglement is an “excessive” issue with § 510. However, if Bowen serves as a predictor, there is a strong likelihood that there are definite entanglement issues with § 510 funds.

In this case, § 510 funded materials in a religious context are the equivalent church-related instructional materials given the degree to which the eight § 510 criteria coincide with some religions’ doctrine. In this context, the secular and the sectarian in the realm of § 510 money becomes “inextricably intertwined.” For example, after Congress enacted § 510, the Louisiana Governor removed jurisdiction of the state’s abstinence-only-until-marriage program away from the State Public Health Department, and “placed it in his office under the direction [of a person] with close ties to conservative Christian activists.”

Furthermore, the entire Court recognizes the inherent difference between direct monetary aid and the provision of materials. A majority of the Court recognizes that there are special dangers associated with direct money grants to religious institutions. The entire Court agrees that the “actual diversion [of federal resources] is constitutionally impermissible.” Rehnquist agrees that direct government aid to religious institutions must not have the primary effect of advancing religion. If there is diversion of aid, a majority of the court agrees

175. Agostini, 521 U.S. at 233.
176. Id. at 232-33 (internal citations omitted).
177. Id.
180. See generally Mitchell, 530 U.S. at 859-60 (O'Connor, J., concurring); Bowen, 487 U.S. at 610.
182. Id. at 857 (O'Connor, J., concurring). See also Bowen, 487 U.S. at 623 (O'Connor, J., concurring) (“Any use of public funds to promote religious doctrines violates the Establishment Clause.”).
183. Bowen, 487 U.S. at 609.
that the logical conclusion of that diversion is that the government supports the advancement of that religion, especially where direct money subsidies are involved. It is highly likely, as was the case with Bowen, that some faith-based institutions have used the direct money aid of § 510 to support their religious doctrine.

Additionally, there are currently no monitoring requirements for § 510 fund recipients. However, to ascertain and ensure that these federal monies are not being diverted for religious purposes, some type of monitoring mechanism should be in place. The resulting relationship would require a significant degree of government involvement in the relevant faith-based institutions, running afoul of this element of the entanglement query. Certain members of the Court and some legal scholars berate this “catch-22” conundrum, where the efforts taken to ensure that there is no entanglement actually creates an entanglement. However, if the funding itself creates such a likelihood of actual diversion that such extensive monitoring is necessary, then a presumption logically follows that there is something constitutionally amiss. Such is the case with § 510, especially as it applies to faith-based institutions. Thus, § 510 probably has the effect of violating the Establishment Clause.

C. As Applied

In Bowen, there was “no dispute that the record contain[ed] evidence of specific incidents of impermissible behavior by AFLA grantees.” There is no reason to believe, given the more conservative and religious basis of § 510 as compared to AFLA, that this would not be the case here. In Bowen, Chief Justice Rehnquist remanded the case to the District Court to ascertain whether AFLA aid had been used to fund “specifically religious activit[ies] in an otherwise substantially secular setting.” It was following this remand that the parties settled and agreed that all sex education funded by AFLA must be factually based. It is more than likely that similar if not identical in-

185. See Bowen, 487 U.S. at 615-16; see also David Grindle, Note, Bowen v. Kendrick: The Malleable Lemon Test, 40 MERCER L. REV. 1063, 1076 (1989) ("Government monitoring of grant recipients with religious ties will result in an excessive entanglement between church and state in the sense previous cases defined such entanglement. Because decisions concerning sex, at least in Western thought, are so grounded in value judgments, morality, and religion, sex education is inseparable from the value judgments. Conversely, asking a religious organization to teach sex education without referring to its religious doctrine is asking the institution to deny its very existence. Such a request by the government then gets the government into another quagmire, that of interfering with the free exercise of religion.").
187. Id. at 621.
fractions are occurring currently under § 510 as occurred under AFLA. As such, they are impermissible violations of the Establishment Clause. For example, in 2000, Chicago school officials banned Pure Love Alliance, an organization with ties to the Unification Church, from teaching its abstinence-only-until-marriage curriculum in public schools, asserting that its in-school presence violated the separation between church and state.188

V. CONCLUSION

The youth of our nation have a right to neutral, helpful, and medically accurate information regarding human sexuality. Sexuality education programs that stress abstinence, but also provide information on contraceptives, preventing STDs and unintended pregnancies, and alternative lifestyles are proven effective at reducing teenage sexual behavior. Section 510 of the Welfare Reform Act severely limits the information available to our nation's youth, giving them information that is only in line with conservative Christian values. In expounding upon the purpose of § 510, congressional staffers describe the purpose as “strong action,” regardless of the lack of evidence showing that that action would produce any results. They also stated that it was based on the moral, i.e. religious, teaching that sex outside of marriage is wrong, not on any “empirical evidence linking a particular policy with non-marital births.” This conclusively shows that the purpose of the legislation is an impermissible desire to teach morals, not to reduce pregnancy rates. While it is difficult to judge without any facts on record, based on what is known, it is probable that § 510 has the effect of inculcating religion as well. Even if this were not the case, given the nature of the legislation and the facts of Bowen, § 510 almost certainly has violated the separation between church and state as applied. As such, the legislation is unconstitutional, as violative of the Establishment Clause.
