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Forbidden Fruit: Governmental Aid to Nonpublic Education and the Primary Effect Test under the Establishment Clause

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"FORBIDDEN FRUIT": GOVERNMENTAL AID TO NONPUBLIC EDUCATION AND THE PRIMARY EFFECT TEST UNDER THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

THE decisions of the United States Supreme Court concerning the establishment clause of the first amendment to the United States Constitution are inconsistent and contradictory, especially in the area of governmental efforts to aid nonpublic educational institutions or those who attend such institutions. Since the Court decided *Lemon v. Kurtzman*[1] the confusion has intensified. As Dean Jesse Choper has stated, "subsequent decisions have produced a conceptual disaster area."[2]

Despite the apparent confusion, some members of the Court have suggested that the Court has adopted a clear set of principles.[3] While the Court in *Lemon* did articulate a rubric which it

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1. 403 U.S. 602 (1971). In *Lemon*, the Court invalidated a Rhode Island statute supplementing the salaries of nonpublic school teachers and a Pennsylvania law authorizing the purchase of "secular educational services" from nonpublic schools. The Court articulated three tests for determining whether a statute violates the establishment clause of the first amendment: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster excessive governmental entanglement with religion. *Id.* at 612-13. Both the Rhode Island and the Pennsylvania statutes were found to violate the excessive entanglement prong because of the extensive governmental surveillance necessary to administer the programs. *Id.* at 614. For a further discussion of *Lemon*, see *infra* notes 3-14 and accompanying text.

2. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 6 (1987).

3. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) (stating that *Lemon* standards "have proved useful" and are "the only coherent

has persistently continued to apply, a clear set of principles should produce consistent and reasonably predictable results. However, *Lemon* has certainly not produced predictability, which is "among the most essential attributes of any legal system."[4] The Court's conflicting decisions and the bewildering assortment of multi-opinion cases demonstrate that the tests applied by the Court fail to produce reasonably consistent results.[5] Consequently, not only are scholars, other commentators, and the general public confused, but so are judges, who must apply the Court's tests.[6]

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test a majority of the Court has ever adopted"); Wolman v. Walter, 433 U.S. 229, 236 (1977) (Blackmun, J., writing for the Court) ("the Court's numerous precedents . . . now provide substantial guidance"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973) (Powell, J., writing for the Court) ("the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined"). Curiously, in *Nyquist*, former Chief Justice Burger also claimed to find a clear principle in the Court's prior decisions when he stated, "While there is no straight line running through our decisions . . . , our cases do, it seems to me, lay down one solid, basic principle . . . ." *Id.* at 799 (Burger, C.J., concurring in part and dissenting in part). However, he reached the opposite result from that of Mr. Justice Powell in that case. The lesson is clear: either there is no *clear* principle, or there are at least two sets of principles which are diametrically opposed to each other.

4. Lines, *The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?*, 17 J.L. & EDUC. 1, 3 (1988).

5. Dean Choper aptly describes the situation thus:

> The Court has held, on the one hand, that government can finance the bus transportation of children to parochial schools but, on the other hand, that government cannot finance the bus transportation for field trips from these parochial schools to cultural and scientific centers, such as museums. This is an extremely difficult distinction to maintain. The Court has held, on the one hand, that the state can lend state approved secular textbooks to students who attend parochial schools but, on the other hand, that the state cannot lend instructional materials (such as maps, films, movie projectors, or laboratory equipment) either to the students or to the schools. What makes a textbook less religious than a map is something that I have yet to discern. Perhaps time will demonstrate the wisdom of the distinction.
>
> On the question of "auxiliary services," such as remedial courses or guidance counseling, the Court has held, on the one hand, that if a public school teacher enters the parochial school to provide such services, that violates the establishment clause but, on the other hand, if these same services are offered by these same teachers to these same parochial school students outside of the parochial school, it is valid—even if the services are provided in a mobile unit that is parked right at the curb of the parochial school. This is an interesting geographic distinction, but difficult to justify as having constitutional significance.

Choper, *supra* note 2, at 6-7 (footnotes omitted).

6. *See, e.g.*, ACLU v. Allegheny County, 842 F.2d 655, 663 (3d Cir. 1988) (Weis, J., dissenting) ("The jurisprudence of the Establishment Clause . . . ranks high in confusion, inconsistency and emotional fervor."), *aff'd in part, rev'd in part*, 109 S. Ct. 3089 (1989).

When a well-developed body of case law leads to such confusion among judges, lawyers, and legal scholars, not to mention the general public, the confusion is usually the result of unclear thinking by the decision maker. The implication is that either the principles are not very clear, or they are not very good principles. Yet, despite the crescendo of criticism not only from commentators but also from an increasing number of members of the Court itself,[7] the three-part test enunciated in *Lemon* continues to survive.[8]

This article suggests that the *Lemon* analysis continues to survive primarily because two of its elements—the "secular purpose" test and the "primary effect" test—appear to reflect, at least to some extent, the purpose underlying the establishment clause,[9] which is the prevention of governmental action that threatens

7. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Wolman v. Walter, 433 U.S. 229, 265-66 (1977) (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated, in dissent, that he would abandon the "three-part test" first announced in *Lemon* because " '[c]orrosive precedents' have left us without firm principles on which to decide these cases." *Id.* (Stevens, J., concurring in part and dissenting in part). Justice White, who dissented in *Lemon*, has "long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools." Grand Rapids School Dist. v. Ball, 473 U.S. 373, 400 (1985) (White, J., dissenting). Justice Rehnquist, now Chief Justice, despite his apparent adherence to the *Lemon* formulation in his earlier dissents concerning the application of the *Lemon* test, *see, e.g.*, Meek v. Pittenger, 421 U.S. 349, 387-96 (1975), joined the ranks of its critics in his dissent in Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting). The Court's newest member, Justice Kennedy, has also signalled dissatisfaction with the *Lemon* formulation in his concurring opinion in Bowen v. Kendrick, 108 S. Ct. 2562, 2582 (1988) (Kennedy, J., concurring). Finally, even Justice Powell exhibited some ambivalence in Wolman v. Walter, 433 U.S. 229, 262-63 (1977) (Powell, J., concurring in part and dissenting in part).

8. It has been suggested that the *Lemon* standards persist because of the lack of any alternatives that are acceptable to the Court. *See, e.g.*, Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987). This is surprising in light of the many alternatives proposed by scholars. *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Note, Wallace v. Jaffree *and the Need to Reform Establishment Clause Analysis*, 35 CATH. U.L. REV. 573 (1986); Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 FORDHAM L. REV. 1209 (1984). Thus far, however, none of these alternatives has been accepted by the Court.

9. The third element of the *Lemon* analysis—the so-called "excessive entanglement" test—also reflects an underlying constitutional principle embodied in the religion clauses of the first amendment. But it has been improperly used in establishment clause cases when the concerns it reflects are more properly dealt

religious freedom by endorsing or favoring one set of beliefs concerning religion over others.[10] The problem may not be with the two tests themselves, but may instead be with the manner in which the Court applies them. As a result, the need may not be so much for a complete rethinking of *Lemon* or for a totally new analysis, but rather for a modification of the way in which its tests are applied.

After briefly discussing some of the problems with the Court's present approach, I will propose a modification of the primary effect test. Although the proposed change in establishment clause doctrine may not, on the surface, appear to be significant, there are major implications for cases dealing with governmental aid to nonpublic education.

II. THE *LEMON* ANALYSIS: "HEADS I WIN, TAILS YOU LOSE"

In *Lemon* the Court, in an opinion written by former Chief Justice Burger, invalidated a Rhode Island statute which provided governmental subsidies for teachers' salaries and a Pennsylvania statute which reimbursed nonpublic schools for teachers' salaries, textbooks, and other instructional materials used in specified secular subjects.[11] The majority attempted to crystallize the hold-

with in cases arising under the free exercise clause. *See infra* notes 67-73 and accompanying text.

10. I use the phrase "set of beliefs concerning religion" because, for purposes of the establishment clause, the term "religion" includes "nonreligion," and even "irreligion" or "anti-religion." The constitutional provision that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, is meant to prohibit any governmental support of particular beliefs *in the area of religion*. As former Chief Justice Burger has pointed out, the first amendment's authors "did not simply prohibit the establishment of a state church or a state religion . . . . Instead they commanded that there should be 'no law *respecting* an establishment of religion.' " *Lemon*, 403 U.S. at 612 (quoting U.S. CONST. amend. I) (emphasis supplied by Court). The breadth of the term "*respecting* . . . religion" makes it synonymous with the term "beliefs concerning religion." Thus, since atheism is a belief concerning religion, it falls within the protection and the prohibition of the establishment clause. In other words, the establishment clause is meant not only to prohibit government from discriminating in favor of or against certain religious beliefs by aiding some religious sects at the expense of others, but it is also meant to prohibit government from compelling nonbelievers to adopt or support religious beliefs, or vice versa. *See, e.g.*, *Wallace*, 472 U.S. at 60 ("The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.").

11. *Lemon*, 403 U.S. at 607-14. The Pennsylvania statute provided for payments directly to the nonpublic educational institution, whereas the Rhode Is-

ings of its prior cases on aid to nonpublic schools into three tests. Chief Justice Burger articulated the tests as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.' "[12]

The first test—the secular purpose test—has not generated any appreciable controversy. The Court has always found that statutes providing aid to nonpublic education had a valid secular purpose.[13] However, the Court has repeatedly invoked either the primary effect test or the excessive entanglement test, or both, to strike down virtually every aid program it has examined since *Lemon*.[14]

Both commentators and the Court itself have recognized that the simultaneous application of the primary effect test and the excessive entanglement test poses an apparently insoluble dilemma for government in achieving a constitutionally permissible purpose.[15] As those tests have been applied by the Court, where aid

land statute provided for salary supplements which were paid directly to teachers who applied for them. *Id.* at 606-10. The majority found no significance in the distinction between payments made to the institution as opposed to those which do not flow through the institution but which instead go directly to the individuals involved. *But see, e.g.*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486-87 (1986) (Marshall, J., writing for the Court) (aid program that provides money directly to persons for educational purposes is constitutional even though recipient uses aid to enroll in bible college).

12. *Lemon*, 403 U.S. at 612-13 (citations omitted).

13. *See, e.g., id.* at 613 (no basis for conclusion that legislative intent was to advance religion when statutes clearly state that they are intended to enhance quality of secular education in all schools). The same is not true in establishment clause cases dealing with prayer in public schools. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (statute which authorized period of silence for "meditation or voluntary prayer" had no secular purpose and was thus unconstitutional). Although the Court has not invalidated school aid programs because of a lack of a secular purpose, certain opinions of individual Justices have a tone which suggests that the author suspected the existence of an improper purpose. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (Commenting on New York law upheld by majority which authorized loan of textbooks to parochial school students, Justice Black stated that "powerful sectarian religious propagandists . . . have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes.").

14. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 396 (1985) (Court invalidated two after school hours, government-financed enrichment programs conducted on parochial school premises because aid would have "primary effect of providing a direct and substantial advancement of [a] sectarian enterprise").

15. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 418, 420-21 (1985) (Powell, J., concurring, and Rehnquist, J., dissenting).

is made available to schools which also have a religious mission, it does not seem possible to avoid violating the primary effect test without creating a monitoring system designed to avoid the prohibited effect.[16] When government has not monitored the uses to which governmental aid is put by the religiously affiliated school, the Court has held that it cannot uphold the constitutionality of the particular program because there is insufficient assurance that a constitutionally impermissible effect will be avoided.[17] Yet, the required monitoring system makes it impossible to avoid excessive entanglement between government and the religiously affiliated schools. Consequently, it seems that there cannot possibly be a constitutional method for achieving the concededly proper purposes which underlie governmental aid to nonpublic education.

Moreover, it is not only the simultaneous application of both tests which creates the seemingly incongruous result of government not being able to find a feasible way to further constitutionally permissible purposes.[18] Even when considered alone, the Court's application of the primary effect test is defective.

A. *The Arbitrariness, Ambiguity, and Uncertainty of the Primary Effect Test as Applied by the Court*

The second prong of the *Lemon* formulation requires that the "principal or primary" effect of a statute must not be to advance or inhibit religion.[19] This formulation might suggest that the Court engages in some sort of balancing process, in which the various effects of a statute are compared in order to determine the "primary" or "principal" effect of the statute. If that were the

16. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (surveillance necessary to assure that professional public school staff members who provide auxiliary services to nonpublic schools such as counseling and testing do not advance religious mission of church-related schools in which they serve); *Lemon*, 403 U.S. 602 (continuous state surveillance and inspection of school records were necessary to ensure that statutory restrictions were obeyed).

17. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) (Court noted that grants were given largely without restriction on usage and no attempt was made to restrict payments to those expenditures related to upkeep of facilities used exclusively for secular purposes).

18. Of course, even though the tests produce the anomalous result of making it impossible to achieve a concededly constitutional purpose, it may be that there are no alternative tests which will effectuate the establishment clause and protect the values which it embodies. If that is the case, then we will just have to accept the present approach. However, it is difficult to accept the notion that there is no constitutionally permissible method for achieving a constitutionally permissible purpose.

19. *Lemon*, 403 U.S. at 612.

case, a statute could have the effect of advancing religion but nevertheless be constitutional because it might advance secular interests to an even greater extent. In other words, the "primary" or "principal" effect might be a permissible secular one, with the result that any "secondary" effect which benefits or inhibits religion would not invalidate the statute.

Nevertheless, that is neither what the Court purports to do, nor what the Court actually does in practice.[20] The Court's decisions do not attempt in any way to measure or evaluate and then compare the different effects of a statute to determine whether the "secular" effects outweigh, or are "primary" with respect to, any effect which the statute may have in promoting or inhibiting religion. Rather, the test is applied so as to invalidate a statute whenever, in the Court's view, a significant effect of the statute is to advance religion, regardless of the relative significance of the secular effects of the statute.[21]

However, the Court's failure to engage in a balancing approach is not the fundamental problem with its application of the primary effect test. Indeed, the use of a balancing approach might only further confuse the situation. It is difficult enough for the members of the Court to agree on where to draw the line in searching for the effects of a statute which makes aid available to nonpublic schools or their students. A balancing process would only create additional room for differences of opinion among the members of the Court concerning which particular effects of a statute are predominant.

Instead, the basic problem is that the Court has no objective standard or principle for determining the effects of a particular statute.[22] The Court has not developed any principled way of de-

20. *See* Marshall, *supra* note 8, at 503 n.47 ("The Court decisions cannot be explained as the result of a balancing of interests, since the Court does not employ a balancing test in its establishment jurisprudence.").

21. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (Court invalidated two after school hours government-financed enrichment programs for adults and children conducted on parochial school grounds because primary effect of aid would be to advance religion); *see also* Lines, *supra* note 4, at 24 (noting that Court allows legislation to stand in other areas such as racial discrimination, free speech, and free exercise of religion if there is a second valid purpose that outweighs discriminatory purpose, but does not apply this analysis in establishment clause cases).

22. Justice Kennedy may have sensed that the difficulty with the Court's establishment clause approach under *Lemon* lies in the Court's attempt to determine effects in a vacuum, with the result that, in many cases, the Court bases its decisions on hypothetical or theoretical possibilities rather than on an evidentiary record which assesses the actual effects of the statute. He suggests that an establishment clause challenge based on the primary effect test is not a challenge

termining how the search for the effects of a statute should be conducted and where it should end. As a result, the Court has often relied on extremely attenuated "effects" in holding that an aid program is unconstitutional.[23]

Under these circumstances, it is inevitable that application of the primary effect test will lead to arbitrary results and uncertainty from case to case. As the Court's decisions demonstrate, one Justice's "effect" is another Justice's "non-effect." It is not difficult to find instances where one Justice vehemently insists that a particular statute is unconstitutional because it has the effect of advancing religion, while another Justice in the same case vehemently insists that the statute is constitutional because it does *not* have the forbidden effect of advancing religion.[24]

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to the statute on its face but rather is an "as applied" challenge, which requires the development of a factual record. *See* Bowen v. Kendrick, 108 S. Ct. 2562, 2582 (1988) (Kennedy, J., concurring). This suggestion may be an effort to grapple with the Court's reliance on hypothesized or possible effects.

Justice Kennedy is correct in noting that too often the Court relies on assumed or "soft" facts rather than on facts developed on an evidentiary record. But again, that is only part of the problem.

An "as applied" challenge assumes that the statute itself is valid and asserts that those who administer the statute are doing so in a constitutionally improper way. On the other hand, a claim of facial invalidity looks primarily at the statute itself rather than at its actual implementation. An attack on the facial validity of a statute based on an allegedly unconstitutional effect and an attack on the statute as applied both require the development of an evidentiary record, but the types of facts relevant to each analysis are different. A facial attack based on an improper effect looks for facts which show what results when the statute is properly applied according to its strict terms. However, in an "as applied" challenge, the inquiry is how the statute is actually implemented by those charged with the task of doing so.

The distinction may appear at first blush to be merely semantics. However, the consequences of finding a constitutional violation differ markedly in the two situations. In a case of facial invalidity the statute does not survive and may no longer have *any* effect, whereas in an "as applied" situation, the statute itself survives and may still be given effect by being implemented in a constitutionally proper way.

To say that a statute is facially valid and that the challenge is therefore to the statute "as applied" is a helpful distinction which keeps the Court's inquiry from improperly relying on speculation concerning possible effects rather than on actual facts. But it still does not answer the question where the line should be drawn in searching out the actual effects of the statute for purposes of determining whether the statute itself—as opposed to how it is applied—is constitutional.

23. *See, e.g.*, *Grand Rapids*, 473 U.S. 373 (aid to after school hours secular enrichment courses conducted on parochial school grounds is unconstitutional since primary effect would be to advance religion); *see also* Lines, *supra* note 4, at 13 (noting that Court relies on possible effects, not proven effects).

24. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 396-402, 414 (1983) (Rehnquist, J., writing for the Court, and Marshall, J., dissenting); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779-80, 804-05 (1973) (Powell, J., writing for the Court, and Burger, C.J., dissenting).

Any effort to distinguish between "direct" and "indirect" effects, or between "incidental" and "nonincidental" effects has the same inherent defect as the current approach or as a balancing approach—one person's "incidental" or "indirect" effect is another person's "primary" or "direct" effect. The terms "primary," "direct," "indirect," and "incidental" are merely labels which describe a conclusion rather than substantive tests used to arrive at the conclusion.

This makes it almost impossible to predict the result of a future case from past cases. For example, in *Everson v. Board of Education*,[25] the Court, in an opinion written by Justice Black, upheld a state statute which reimbursed parents for bus fares paid for the transportation to and from school, by public carriers, of children attending nonpublic as well as public schools. One might assume from *Everson* that it would likewise be constitutional for a state to pay for bus transportation for field trips from parochial schools to nonreligious public scientific or cultural museums or events. Yet, in *Wolman v. Walter*,[26] the Court held that the government may *not* reimburse parochial schools for the cost of bus transportation for field trips to cultural and scientific institutions because to do so would have the effect of advancing religion.[27] Why the prohibited effect was found in the case of the bus transportation at issue in *Wolman* but not in *Everson* is mystifying.

One might argue that the Court upheld the statute in *Everson* because there the aid was also available to students who attended public schools.[28] But if the test is whether the statute has the effect of advancing religion, the fact that the statute makes the same aid equally available to public school students as well as to parochial school students is irrelevant. Making the aid available to students who attend the religiously affiliated schools still has the effect of advancing the mission of those schools, regardless of whether it is also available to public school students. Making the aid available to public school students as well as to parochial

25. 330 U.S. 1 (1947).

26. 433 U.S. 229 (1977).

27. *Id.* at 253-54. The Court reasoned that "field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering religion is an inevitable by-product." *Id.*

28. Whether this distinguishes *Everson* from *Wolman* is questionable. The statute in *Wolman* authorized Ohio to "provide such field trip transportation and services to nonpublic school students *as are provided to public school students* . . . ." OHIO REV. CODE ANN. § 3317.06(L) (Supp. 1976) (emphasis added), *quoted in Wolman*, 433 U.S. at 252.

school students may lead to permissible secular effects *in addition to* the effect of advancing the mission of the religiously affiliated nonpublic schools, but it does not eliminate the latter effect of the aid—making it easier or less expensive to attend religiously affiliated schools.

One might also argue that in such an instance advancing religion is not the *primary* effect of the statute. But the distinction between "primary" effects and "nonprimary" effects is just as elusive as that between "direct" and "indirect" effects.[29] Moreover, it is not clear that a statute which makes aid available equally to public as well as to parochial school students can be so easily distinguished, on a "primary effect" basis, from a statute which provides aid only to nonpublic school students. Since all school-age students must attend *some* school, a statute which aids public as well as parochial school students does not promote public school attendance, whereas it may arguably assist students in choosing to attend religiously affiliated schools by making it easier or cheaper to do so.

Furthermore, the Court invalidated the statute at issue in *Wolman* because there was a danger that religious instruction might be given in connection with the field trips to museums.[30] Assuming this is true and assuming that it leads to the prohibited effect of advancing religion, it seems even more clear that the statute at issue in *Everson* would also have the prohibited effect since that statute provided transportation to the nonpublic school itself, where religious instruction would unquestionably be given.

Of course, *Everson* was decided long before *Lemon*. The Court, however, has recently indicated that it is not prepared to abandon *Everson*.[31] In any event, Justice Black's opinion for the Court in *Everson* and Justice Rutledge's dissent, which was joined in by Justices Frankfurter, Jackson and Burton, focused on what they perceived to be the effect of the statute at issue but differed in their assessments.[32]

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29. *See supra* note 24 and accompanying text.

30. *See Wolman*, 433 U.S. at 253 (since nonpublic schools control trips, unacceptable risk of fostering religion exists).

31. For recent cases citing *Everson* with approval, see County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989); Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 896 (1989); Bowen v. Kendrick, 108 S. Ct. 2562, 2574 (1988).

32. Justice Black, writing for the majority, found that the legislation "does not support" religious schools but instead "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Everson*, 330 U.S. at 18. On the other hand, Justice Rutledge argued in dissent that "[t]he funds

The loan of textbooks and other educational equipment provides another example of the arbitrariness of the Court's unguided search for a prohibited effect. In *Board of Education v. Allen*,[33] the Court held that the loan of approved textbooks dealing with secular subjects is constitutional. Implicitly then, the Court has determined that the loan of such textbooks does not have the primary effect of advancing religion, although the textbooks may be loaned to students attending religiously affiliated schools. Indeed, the Court in *Lemon* cited *Allen* as support for its endorsement of the primary effect test.[34] However, the Court has invalidated the loan of instructional materials and equipment such as nonreligious periodicals, maps, and laboratory equipment on the ground that the loan of such materials *does* have the primary effect of advancing the mission of religiously affiliated schools.[35] Why secular maps or laboratory equipment advance religion while secular textbooks do not is unexplainable.

The Court's application of the primary effect test could also result in the very same statute being constitutional in one state but not in another. Suppose, for example, that a state such as Maine, which has a number of private schools but very few religiously affiliated schools, enacts a statute which provides aid to nonpublic schools.[36] Under the primary effect test as currently applied by the Court, that statute would presumably pass constitutional muster since most of the aid recipients would not be religiously affiliated schools or students who attend such schools. However, the very same statute would be unconstitutional if en-

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used here were raised by taxation" and that "their use does in fact give aid and encouragement to religious instruction." *Everson*, 330 U.S. at 45 (Rutledge, J., dissenting). *See also id.* at 52-53 (Rutledge, J., dissenting).

33. 392 U.S. 236 (1968). The statute in question required local public schools to lend textbooks free of charge to public and private school students in grades seven through twelve. The Court stated that the law merely makes available to all children the benefits of a general program to lend school books free of charge and that the financial benefit is given to parents and children, not the schools. Even though this seemingly makes it more likely that a child will choose to attend a sectarian school, the Court noted that this factor alone does not demonstrate an unconstitutional degree of support for a religious institution. *Id.* at 243-44.

34. *Lemon*, 403 U.S. at 612.

35. *See* Meek v. Pittenger, 421 U.S. 349, 357, 364-66 (1975) (loan of instructional materials and equipment advanced religion since these items could be diverted to religious purposes and because benefit accrued to schools of predominantly religious character).

36. A 1988 survey of 100 private schools in Maine indicated that only 23 of the 93 reporting private schools were religiously affiliated. Telephone interview with Mr. Alton Sutherland, Office of the Commissioner of Education for the State of Maine (1988).

acted in a state like Pennsylvania, where the vast majority of nonpublic school students attend religiously affiliated schools.

Similarly, the Court's approach could result in a statute being constitutional at one time but becoming unconstitutional at a later time, or vice versa. For example, suppose parish churches or local synagogues in Maine decided to take advantage of the opportunity provided by the Maine legislation and established their own schools. The previously constitutional statute could then become unconstitutional once a significant number of such schools were established and began receiving aid under the statute. Thus, under the Court's approach, a state legislature can never be sure that a statute enacted and upheld as constitutional will remain constitutional.

On the other hand, suppose that, as a result of the lack of governmental aid, most religiously affiliated schools in Pennsylvania were ultimately forced to close, so that only those private schools which were not religiously affiliated remained open. Under these circumstances, a previously unconstitutional statute could become constitutional.[37] This results because, under the Court's approach, the prohibited effect exists, and an aid program is therefore unconstitutional, whenever the program is disproportionately taken advantage of by a particular religious sect or its members, or by religiously affiliated institutions in general.

The Court has grappled in another context with the question whether disproportionate impact alone is sufficient for a finding of unconstitutionality. In the case of claims of unconstitutional racial discrimination, the Court has explicitly rejected the argument that a racially disproportionate effect alone is sufficient to invalidate a statute "neutral on its face and serving ends otherwise within the power of government to pursue."[38] Instead, the Court has held:

> A rule that a statute designed to serve neutral ends

37. In South Carolina, just under 27,000 students attended denominational schools in 1988, and approximately 18,000 students attended nondenominational private schools. SOUTH CAROLINA DEP'T OF EDUC., 1987-1988 ANNUAL REPORT. Any significant reduction in the enrollment of the denominational schools could bring the enrollment of denominational schools roughly in balance with that of nondenominational private schools and thereby possibly change the constitutional calculus in favor of a statute that would otherwise be unconstitutional.

38. Washington v. Davis, 426 U.S. 229, 242 (1976). *Davis* involved a class action suit by black applicants seeking employment as police officers who claimed that recruiting procedures, particularly a written test, were racially discriminatory. The Court held that a law is not unconstitutional solely because it has a racially disproportionate impact. *Id.*

> is nevertheless invalid . . . if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . .[39]

However, in striking down statutes providing aid to nonpublic schools, the Court has repeatedly cited and relied exclusively on statistics showing that the majority of the beneficiaries of an aid program were religiously affiliated schools or their students.[40] This fosters the impression that the Court is hostile toward religion, or at least toward those religious sects which take advantage of the aid program. A statute which has the effect of conveying the impression, as an official policy, of governmental hostility toward religion offends the prohibition that Congress shall make no law respecting an establishment of certain beliefs concerning religion.

The primary effect test as presently applied clearly leads to arbitrary results as well as a great deal of ambiguity, uncertainty and instability in the law. This is contrary to sound constitutional adjudication. Just as the Court is always ready to invalidate arbitrary action by the states as well as by the legislative and executive branches of the federal government, so too it should also adhere to principles which avoid arbitrary results in its own decisions. If a particular analysis has demonstrated a history of producing arbitrary results, then the Court should either reject or modify that analysis.

B. *A Suggested Modification of the Primary Effect Test*

Given a prior finding of a valid legislative purpose, one might legitimately ask why the Court does not end its inquiry there. If the *purpose* which the legislature seeks to effectuate is constitutionally permissible, what possible reason could there be for not permitting the legislature to adopt a program which achieves that

39. *Id.* at 248.

40. *See* Meek v. Pittenger, 421 U.S. 349, 364 (1975) ("of the 1,320 nonpublic schools in Pennsylvania . . . [that] qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational institutions"); Sloan v. Lemon, 413 U.S. 825, 830 (1973) (90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations); *Lemon*, 403 U.S. at 608-10 (in Rhode Island, 95% of nonpublic elementary school pupils attended schools affiliated with the Roman Catholic Church, while in Pennsylvania 96% of students in nonpublic schools receiving state aid attended church-related schools).

purpose? This assumes, of course, that there is at least some rational relationship between the constitutionally permissible purpose and the method chosen to achieve that purpose.[41]

One sometimes gets the impression when reading some of the Justices' opinions in the aid to nonpublic education area that the Justices really suspect that the legislative purpose is not what it is purported to be.[42] Thus far, however, a majority of the Court has almost always been unwilling to say so.

In a system built on the concept of separation of powers and resulting checks and balances, there is nothing wrong with this skepticism. The best way to keep this skepticism within proper bounds is to recognize it openly and test the legitimacy of the stated legislative purpose by insisting on a rational relationship between that purpose and the provisions of the statute in question. After all, putting aside procedural protections explicitly set forth in the Constitution, such as the prohibition against unreasonable searches and seizures, the purpose of constitutional provisions delineating limits on legislative and other governmental powers is to confine the exercise of those powers to legitimate *purposes*, not to insure that the best, most efficient, or optimum method of implementation is chosen.

Nevertheless, the Court has gone beyond a pure purpose test, presumably in order to make sure that a constitutionally permissible purpose is not achieved in a manner which unwittingly undermines the constitutional values at stake. An effects test is one way of making sure that a well-intentioned legislature does not inadvertently infringe upon basic constitutional rights or values. In short, an effects test may arguably play a legitimate role in safeguarding constitutionally protected values. That is undoubtedly why the primary effect test has survived for many years, despite a great deal of criticism.

Moreover, given the history of establishment clause jurisprudence to date, it may be difficult for a stable majority of the Court to accept a situation in which the Court would blind itself to the

41. Again, the Court's decision in *Washington v. Davis* is instructive. In *Davis*, the Court held that "a law, neutral on its face and serving ends otherwise within the power of government to pursue," is constitutional even in the face of a claim that it has a racially disproportionate effect. *Davis*, 426 U.S. at 242; *see also id.* at 246 (governmental action is constitutional where it "is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.").

42. *See* Mueller v. Allen, 463.U.S. 388, 408-09 (1983) (Marshall, J., dissenting) ("The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses."); *see also supra* note 13.

effects of a particular statute, as long as the purpose of the legislation is proper. The key to an effective reformulation of doctrine in this area, then, must focus on protecting the constitutional value at stake while at the same time avoiding the arbitrariness exhibited by the Court's current "forbidden fruit" approach.

In its decisions to date, the Court has applied the secular purpose test and the primary effect test independently. The Court first determines whether the particular statute in question has a valid secular purpose. Once it makes that determination, it then looks beyond the purpose of the statute and attempts to determine whether the "principal or primary effect [is] one that neither advances nor inhibits religion."[43] If the "forbidden fruit" is found to exist, the statute is invalidated despite the propriety of the legislative purpose.

As previously indicated, this contrasts sharply with the Court's approach to cases concerning allegedly unconstitutional racial discrimination under the fifth and the fourteenth amendments to the Constitution.[44] In *Washington v. Davis*,[45] the Court specifically declined to divorce its analysis of the potential or actual discriminatory effect of governmental action from its analysis of the purpose of the governmental action in question. The Court stated: "Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[46]

I have already noted that when the Court finds that an aid program for nonpublic schools has a constitutionally permissible purpose but nevertheless invalidates the program solely because it happens to benefit only a certain segment of society, it creates

43. *Lemon*, 403 U.S. at 612.

44. *See* Lines, *supra* note 4, at 23-24 (noting that under free exercise, free speech, and equal protection clauses, test is intent alone). As previously indicated, the purpose of the establishment clause is not merely to prevent discrimination between or among different religious sects. *See supra* note 10 and accompanying text. "Nonreligion" and "irreligion" may also be protected by the establishment clause. However, as long as it is agreed that the injunction that "Congress shall make no law respecting an establishment of religion" means that Congress shall make no law respecting the establishment of any beliefs *concerning* religion, then the establishment clause should properly be analyzed as a prohibition against discrimination on account of one's beliefs with respect to religion, including, for example, a belief in atheism.

45. 426 U.S. 229 (1976).

46. *Id.* at 239; *see also id.* at 242 ("[W]e have not held that a law, . . . is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

the perception that it is hostile toward the group which takes advantage of the benefits provided by the statute.[47] Thus, one finds in the dissenting opinions of many cases the arguments that: (1) the Court's decision discriminates *against* religion;[48] (2) such an approach is not required by the establishment clause;[49] and (3) the Court's decision is itself contrary to the free exercise clause.[50]

When the Court applies the primary effect test, it often does not examine the *terms* of the statute. Instead, it looks only at the identity of those who take advantage of the aid program in question. As long as a significant number of beneficiaries are religiously affiliated schools, the forbidden fruit is said to exist and the statute is invalidated. It makes no difference whether there is an inherent or necessary causal nexus between the specific terms of the particular statute and the perceived "effect." The fundamental problem with the Court's approach is that the Court has applied its primary effect test without requiring some necessary causal linkage between the specific terms of the statute and the supposed "primary effect" of advancing religion.[51]

In other words, the source of the arbitrariness in the Court's decisions is that, in determining the effects of an aid statute, the Court relies on "accidental" facts—facts which are more the re-

47. *See supra* note 40 and accompanying text. *See also* Aguilar v. Felton, 473 U.S. 402 (1985) (overwhelming number of private schools participating in aid program were religiously affiliated); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (same). This perception fosters the notion that there is an inevitable tension between the establishment clause and the free exercise clause, a position with which I disagree. *See infra* notes 67-73 and accompanying text.

48. *See* Wallace v. Jaffree, 472 U.S. 38, 84 (1985) (Burger, C.J., dissenting). In the former Chief Justice's view, to suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion while one that simply provides for a moment of silence does not, manifests not neutrality, but hostility toward religion. *Id.* at 85 (Burger, C.J., dissenting).

49. *See Grand Rapids*, 473 U.S. at 400 (White, J., dissenting) ("I have long disagreed with the Court's interpretation and application of the establishment clause in the context of state aid to private schools . . . . [T]he Court's . . . decisions are 'not required by the First Amendment and are contrary to the long-range interests of the country.' ") (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting)).

50. *See* Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting).

51. If the statisticians of the world will forgive me, the concept of a "spurious correlation" may perhaps be used as a rough analogy. Two facts may be correlated with each other even though one is not the cause of the other. In such instances, it is incorrect to say that one is the "cause" and the other, therefore, is the "effect." In order to arrive at that conclusion, one must not only look to see if the two happen to coexist with each other; one must also be able to establish a rational and inherent causal nexus under which one fact "causes" the other fact to result.

sult of historical accident rather than necessary results of the statute in question—in assessing whether a scheme of governmental aid to nonpublic schools or their students undermines the establishment clause. Under the Court's analysis, there need not be an inherent causal relationship between the specific terms of the particular statute and the allegedly prohibited "effect." The Court never asks whether the prohibited "effect" is caused by the statute itself, or whether it is the incidental result of factors unrelated to the terms of the statute.

This failure to require an inherent causal connection or nexus between the terms of the statute and the fact that those who choose to take advantage of the aid provided by the statute happen to be primarily religious sects give rise to the perception that the Court is hostile toward religion. Such an approach is not consistent with the religion clauses.[52] In fact, once it is agreed that the establishment clause protects "nonreligion" as well as religion, one must conclude that the establishment clause protects both religion and nonreligion equally. As a result, it is contrary to the establishment clause (as well as to the free exercise clause) to prevent or prohibit adherents of religious sects from seeking the benefits offered under a facially neutral statute which has a constitutionally proper purpose.

Once the source of the arbitrariness in the Court's decisions is identified, the solution is straightforward. A governmental program providing aid to nonpublic education—whether the aid be given directly to the institution, or to its students or their parents—is unconstitutional only where the terms of the statute inherently or necessarily have the effect of promoting one set of beliefs concerning religion over others (including atheism). There must be some logical and necessary causal nexus between the specific terms of the statute and the advancement of certain beliefs concerning religion. The causal relationship must be inherent in the terms of the statute itself. If there is no such inherent nexus, then it cannot be said that *the statute* is the cause of a prohibited effect.

This means that any statute which happens to result in aid being made available to a religious institution is not necessarily unconstitutional by virtue of that fact alone. If the aid in question is equally available to adherents of other religious groups or to

52. *See supra* note 40 and accompanying text.

those who have no religious beliefs at all, then *the statute* cannot be said to produce the prohibited effect of advancing religion.

Some of the Court's decisions hint at the concept of an inherent causal nexus between the specific terms of an aid statute and the advancement of a particular set of religious beliefs. For example, in *Witters v. Washington Department of Services for the Blind*,[53] the Court held that it was not unconstitutional for the state to "finance petitioner's training at a Christian college to become a pastor, missionary, or youth director."[54] *Witters* involved a vocational rehabilitation program for the blind which provided aid to a blind student even though the student was attending "a private Christian college . . . and studying bible, ethics, speech and church administration in order to equip himself for a career as a pastor, missionary, or youth director."[55] Writing for the Court, Justice Marshall stated, "the *mere circumstance* that petitioner has chosen to use *neutrally available state aid* to help pay for his religious education [does not] confer any message of state endorsement of religion."[56] Although Justice Marshall did not say so directly, implicit in his statement is the recognition that there was nothing in the terms of the aid statute itself which would necessarily cause the advancement of religion. As a result, granting aid to the blind student involved in *Witters* was not unconstitutional merely because he chose to use the aid to further his religious studies.

This same reasoning could equally be used to uphold most of the aid programs which the Court has invalidated. However, since the Court has never explicitly incorporated an inherent causal nexus requirement into the *Lemon* analysis, the Court has usually not looked for this connection in reaching its decisions. This accounts in large part not only for the inconsistencies among the Court's decisions, but also for the disagreements among Justices in particular cases on the question whether a particular statute has the prohibited effect.[57] One Justice implicitly insists on the existence of a causal connection inherent in the terms of the statute itself, while other Justices do not and instead focus on the mere fact that only certain groups actually take advantage of aid that is freely available to all groups without regard to religious affiliation.

53. 474 U.S. 481 (1986).

54. *Id.* at 489.

55. *Id.* at 483.

56. *Id.* at 488-89 (emphasis added) (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

57. *See supra* note 24 and accompanying text.

Requiring that a statute have an inherent tendency, by its terms, to advance religion would validate most governmental aid programs for nonpublic education previously struck down by the Court. In virtually every case considered by the Court, there has been nothing in the terms of the particular statutes which would inevitably advance religion by making aid—or more aid—available to groups holding one set of beliefs concerning religion as opposed to other groups with different beliefs. Instead, the "effects" which have led the Court to invalidate statutes under *Lemon* were merely "accidental" effects.

On the other hand, the "inherent nexus" test proposed here would have resulted in the invalidation of at least one program which has been upheld by the Court. In *Zorach v. Clauson*,[58] the Court upheld a "dismissed-time" statute under which students were released from public schools early in order to receive religious instruction at their religious institutions. The Court distinguished this situation from the "released-time" program struck down in *Illinois ex rel. McCollum v. Board of Education*[59] on the ground that the religious instruction in *McCollum* was provided on public school premises.[60] However, as one commentator has stated, this fact "had nothing to do with the rationale of *McCollum*; in each case, students were detained without purpose unless they went to church."[61] Under the "inherent nexus" test, however, both programs would be unconstitutional since inherent in the very terms of both statutes is the effect of advancing religion.[62]

Likewise, the "inherent nexus" test might invalidate an aid program which would cover the cost of *all* textbooks used by nonpublic schools, since it necessarily follows from the terms of such a statute that the state would subsidize the cost of religious textbooks used in religiously affiliated schools and would thereby support and advance particular sets of beliefs concerning religion. This inherent nexus between the terms of the statute and

58. 343 U.S. 306 (1952).

59. 333 U.S. 203 (1948).

60. *Zorach*, 343 U.S. at 315.

61. Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 422 (1986).

62. One might argue that *Zorach* is not a good example of a situation where the "inherent nexus" test invalidates a program upheld by the Court because the statute in *Zorach*, a pre-*Lemon* case, might not be upheld under the *Lemon* test. Yet, the Court has not indicated that it would overrule *Zorach* and has attempted to distinguish it in recent cases. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390-91 (1985); Wallace v. Jaffree, 472 U.S. 38, 73 n.2 (1985) (O'Connor, J., concurring).

the support or advancement of particular beliefs concerning religion disappears, however, if the statute's terms authorize reimbursement only for the cost of textbooks on secular subjects which are also available to and approved for use in public schools. Thus, the Court's decision approving such programs was correctly decided.[63]

The proposed "inherent nexus" requirement is not such a radical departure from existing doctrine. Other alternative approaches which have been proposed seem to be groping for this same concept. For example, the neutrality principle suggested by Professor Philip Kurland is in many ways similar, in that it too is an attempt to bring the Court's analysis back to the terms of the particular statute rather than concentrating on facts which are more the result of circumstance or historical accident.[64]

However, the neutrality approach has its own deficiencies.[65] First, it apparently requires only that the statute not single out religion or any particular religious sect for favorable or unfavorable treatment. As a result, the test is unduly restricted to an analysis only of the statute's terms, without any attempt to determine the actual effects of the statute in operation. In contrast, the "inherent nexus" test requires an analysis of the terms of the statute, of its actual effects in the real world, and of the nature of the link between the two. Rather than putting the emphasis on either the terms of the statute or on its effects, both parts of the analysis are equally necessary and important, and the two must be related to each other.

Similarly, the neutrality approach could invalidate statutes which do not undermine establishment clause values. A statute which is not "neutral" may nevertheless be constitutional if it does not have the effect of advancing a particular set of religious beliefs. For example, a statute which has the purpose of ensuring that a particular religious sect is treated equally with other religious sects would not be "neutral," but it would be constitutional if its effect is to redress otherwise unequal treatment. The mere terms of the statute itself, without any determination of its effects,

63. *See* Meek v. Pittenger, 421 U.S. 349 (1975) (Court upheld portion of statute that provided for textbook loans because books loaned were limited to those that would be acceptable for use in public schools).

64. *See* Kurland, *supra* note 8. Kurland argues that the establishment clause and the free exercise clause must be read together to mean that religion may not be used as a basis of classification for purposes of governmental action, whether that action be the conferring of rights or the imposition of duties. *Id.* at 5.

65. *See* Choper, *supra* note 8, at 688-90.

should not always control the result.[66]

Looking for some inherent nexus between the terms of an aid statute and an effect on beliefs concerning religion should go a long way toward removing the arbitrariness inherent in merely identifying those who happen to take advantage of the aid made available by the statute. By requiring that the prohibited effect be inherent in the terms of the statute itself, the tendency to focus on attenuated effects would at least be vastly reduced, if not eliminated. In other words, it would be more difficult for one person's "effect" to be seen as a "noneffect" by another. Instead, the question would be whether the effect really results from the nature of the statute itself.

C. *A Postscript on the Entanglement Test*

The excessive entanglement test has been the most heavily criticized aspect of *Lemon*, and with good reason.[67] When one reads the establishment clause cases which invalidate governmental aid on entanglement grounds, one is struck by the fact that the reasoning used in applying the entanglement doctrine often reads as if the Court were attempting to protect religious institutions from the corrosive effect on their beliefs which governmental in-

66. The neutrality test could create a tension between the establishment clause and the principle of accommodation under the free exercise clause. A statute which seeks to accommodate certain religious practices could arguably violate the establishment clause under the neutrality principle because the statute by its nature must make a distinction in its terms based on religious beliefs. Yet, not to make the accommodation might arguably violate the free exercise clause.

This tension need not exist. The establishment clause should not be read automatically to invalidate any statute which mentions or refers to a religion or a set of beliefs concerning religion. Otherwise, the drafters would merely have written that "Congress shall make no law *respecting religion*." But the establishment clause does *not* say that "Congress shall make no law *respecting religion*." Rather, it states that "Congress shall make no law respecting *an establishment of* religion." U.S. CONST. amend. I (emphasis added). Thus, a statute is not automatically unconstitutional merely because it mentions or deals with religion. To be invalid, the statute must also tend to favor—or "establish"—one set of beliefs over another.

The phrase "respecting *an establishment of* religion" indicates that government need not act as if religion does not exist. The phrase indicates the concept that government should not prefer one set of beliefs concerning religion over others. But neither should Congress unnecessarily penalize religious beliefs. A religious distinction in a statute does not violate the establishment clause as long as it does not have the effect of preferring certain beliefs concerning religion. Adherents of a religious belief do not receive a preference from an effort by government to accommodate their religious beliefs in order to avoid a clash with free exercise clause values.

67. *See generally* Lines, *supra* note 4.

terference would supposedly foster, rather than protecting against a corrosive effect which entanglement would have on government, which is the thrust of the establishment clause, as opposed to the free exercise clause.

For example, in *Aguilar v. Felton*,[68] Justice Brennan stated in his opinion for the Court:

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. *In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.*[69]

The latter concern—that governmental intrusion into sacred matters limits the freedom of religion of those affected by the governmental intrusion—is really the concern at which the free exercise clause is directed. It is not an establishment clause concern.[70]

As to the former concern—that entanglement between the state and a particular religious sect somehow limits the freedom of religious belief of those who are not members of the favored sect—that is just not so. Administrative supervision of those who receive aid under a statute does not limit the freedom of those who choose not to seek or receive aid under the statute. Such

68. 473 U.S. 402 (1985).

69. *Id.* at 409-10 (emphasis added).

70. Under the tests presently used by the Court, a tension between the free exercise clause and the establishment clause exists. However, the tension need not—in fact, it should not—exist. The two clauses are not contradictory to or inconsistent with each other, but rather were meant to be mutually supportive of each other. The two clauses are merely different sides of the same coin. Thus, doctrines underlying both religion clauses should be consistent with each other. That does not mean that the tests should be—or even can be—identical. Since they are directed at different aspects of the same problem, a different perspective and, therefore, different rules are appropriate in the case of each clause. Although it is not the subject of this article, I believe that if the tests that are relevant to free exercise concerns and cases are applied only to free exercise cases, while the tests developed to address the concerns involved in the establishment clause context are confined to cases raising establishment clause concerns, the alleged tension between the two clauses will largely disappear. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378-88 (1981) (arguing that an obstacle to coherent analysis of the religion clauses is the frequent failure to distinguish between them).

individuals remain free, without limit, to hold or express other beliefs, unless government somehow affirmatively restricts or limits their conduct or the expression of their beliefs. It is only when government excludes those who hold certain views from receiving aid or imposes restrictions on those who do not hold the favored view that the freedom of religious belief of non-adherents is affected. Then there is a *free exercise clause* violation, *not* an establishment clause violation.

This is not to say that government should be permitted to endorse or express a preference for one particular set of religious beliefs as opposed to other religious beliefs, as long as non-adherents are not restricted or penalized in any way. Government endorsement of a particular religious viewpoint runs afoul of the establishment clause. However, it does so *not* because of its effects or because it limits the religious freedom of non-adherents of the endorsed view. Rather, governmental endorsement of a particular religious viewpoint is unconstitutional independently under the establishment clause because of the lack of a proper secular legislative *purpose*. Governmental endorsement would be unconstitutional even if there were no free exercise clause because it is proscribed by the establishment clause. Moreover, such endorsement is unconstitutional under the establishment clause even if it has no prohibited effect.

At the heart of the excessive entanglement test is the desire to protect beliefs concerning religion from governmental interference. That is the purpose of the free exercise clause. On the other hand, the establishment clause is meant to protect against government being dominated by a particular religious sect. If one were to view any entanglement between church and state as violative of the establishment clause, then there could no longer be any role for religion to play in the life of a nation.[71] Some entanglement is inevitable.[72] This problem is not solved by prohibiting only "excessive" entanglement. That only leads to the same arbitrariness and uncertainty now found in the cases. Just as one Justice may find a "primary effect" where another Justice fails to find such an effect, so too one Justice may view a certain degree of entanglement as "excessive" while another may not view the same degree of entanglement as "excessive." Such

71. Alternatively, governmental regulations could never be applied to a religious institution, thereby putting such institutions completely above the law.

72. *See* Beschle, *supra* note 8, at 171-72 ("[T]he . . . separation . . . intended by the framers . . . is quite simply impossible in the twentieth century.").

concepts inherently lead to inconsistent and uncertain results. Instead, it is only when entanglement results in governmental action which actually limits or restricts the activities or the expression of beliefs of those who hold particular beliefs concerning religion that it becomes impermissible, and then it is impermissible as a restriction on the *free exercise* of religion, not as an "establishment" of religion.

In short, it is a mistake to import free exercise concerns and free exercise doctrines into the establishment clause context. The analytical confusion is largely the result of a failure on the part of the Court to separate the two clauses and the concerns each addresses.[73]

The lesson is clear. The excessive entanglement test should be discarded as a test of constitutionality under the establishment clause. If that doctrine has any role to play, it should be applied only in the case of challenges to governmental action under the free exercise clause.

III. CONCLUSION

The Court's present approach in the area of governmental aid to nonpublic education produces arbitrary and inconsistent results. One way to eliminate the confusion may be to reject the present framework of analysis and abandon both the primary effect test and the excessive entanglement test in favor of a new analysis.

However, the *Lemon* tests have so far withstood widespread criticism. This suggests that perhaps a modification of present doctrine, rather than a radical departure from it, may be all that is needed to correct the unpredictability of and the dissatisfaction with present doctrine.

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73. The primary effect test requires that an aid statute "must be one that neither advances *nor inhibits* religion." *Lemon*, 403 U.S. at 612 (emphasis added). The Court does not typically invalidate statutes granting governmental aid to nonpublic schools on the ground that such aid *inhibits* religion. The concept of examining statutes to see whether they "inhibit" religion is more properly conducted in the context of a challenge to a statute under the free exercise clause, rather than under the establishment clause. The use of the "inhibit" language in *Lemon* is another example of the confusion caused by failing to separate free exercise clause concerns from establishment clause concerns and thereby importing free exercise clause concepts into establishment clause cases. *See* Laycock, *supra* note 70, at 1380-82. This can only create confused thinking and lead to improper results. Each type of case should be analyzed separately, under its own tests, and without regard to the tests which are appropriate to enforce the other clause, although the tests adopted under each clause should be consistent with each other.

Since the present arbitrariness and uncertainty appear to result from an analysis which divorces the search for effects from the terms of the statute itself, the basic problem may be solved by joining together both of these facets of the analysis. In particular, the Court could introduce greater stability and predictability in its decisions and still preserve the values which the establishment clause is meant to protect by invalidating aid programs to nonpublic education only when there is a necessary and inherent causal nexus between the specific terms of the particular statute and the advancement of religion. In the absence of this nexus, the statute is not a "law respecting an establishment of religion" and therefore should be upheld.