

**PRELIMINARY INJUNCTIONS, EXCESSIVE  
ENTANGLEMENT, AND PRIOR RESTRAINTS: SHOULD  
COURTS TREAT POTENTIAL PRETRIAL RELIGIOUS  
INFRINGEMENT THE SAME AS POTENTIAL PRETRIAL  
SPEECH INFRINGEMENT?**

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## I. INTRODUCTION

In 1999, United States Customs officers seized shipments of *hoasca*, tea-like leaves containing a hallucinogen listed as a Schedule I controlled substance.<sup>1</sup> The shipment was bound for an O Centro Espirita Beneficente Uniao do Vegetal (“UDV”) compound in New Mexico, where the small Brazilian-based Christian Spiritist sect would drink the tea during religious ceremonies.<sup>2</sup> The UDV sued after the government investigated and threatened prosecution, claiming the *hoasca* ban violated the Religious Freedom Restoration Act (“RFRA”).<sup>3</sup>

A procedural aspect of the case, not raised by the parties or the court, raises important Establishment Clause questions.<sup>4</sup> The district court enjoined the government from enforcing the Controlled Substances Act<sup>5</sup> against the UDV’s sacramental use of *hoasca*.<sup>6</sup> But the judge attached conditions to the preliminary injunction that gave the government broad power to regulate the group, its members, and its religious ceremonies.<sup>7</sup> The injunction directed the UDV “to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*.”<sup>8</sup> Further, it “required that the church, upon demand by the [Drug Enforcement Administration] identify its members who handle *hoasca* outside of ceremonies, allow for on-site inspections and inventories, provide samples, identify times and locations of ceremonies, and designate a liaison to the DEA.”<sup>9</sup>

Scholars suggest the Supreme Court’s Establishment Clause jurisprudence means “[g]overnment must keep out of internal problems of religious bodies when those problems concern religious

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1. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006).

2. *Id.* at 425.

3. *Id.* at 425-26. The Supreme Court struck down RFRA because Congress exceeded the scope of its power under the Enforcement Clause of the Fourteenth Amendment and contradicted “vital principles necessary to maintain separation of powers and the federal balance.” *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). However, RFRA remains applicable in actions against the federal government. See Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 201 n.57 (2001) (citing *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9th Cir. 1999); *In re Young*, 141 F.3d 854 (8th Cir. 1998); *EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996)).

4. See MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 209 (Vicki Been et al. eds., 2d ed. 2006).

5. 21 U.S.C. §§ 801 et seq. (2004).

6. *Uniao do Vegetal*, 546 U.S. at 427.

7. *Id.*

8. *Id.*

9. See MCCONNELL ET AL., *supra* note 4, at 209.

understandings.”<sup>10</sup> Courts will generally strike down government programs resulting in “excessive entanglement” with religion under *Lemon v. Kurtzman*<sup>11</sup> and its progeny.<sup>12</sup> This Article argues that the *Uniao do Vegetal* injunction amounted to unconstitutional entanglement because it permitted government inspection of UDV facilities to monitor sectarian *hoasca* use.<sup>13</sup> In free speech cases, courts almost always refuse to restrict expression prior to a determination that it is protected.<sup>14</sup> This Article further argues, in light of history and the Court’s current attitude toward religion, that same principle should apply in cases implicating the Religion Clauses.

Part II of this Article discusses the *Lemon* test and several post-*Lemon* decisions applying the “entanglement” prong. Part II then argues that the preliminary injunction issued in *Uniao do Vegetal* improperly entangled the government with religious activities under *Lemon*. Part III describes the Court’s “prior restraint” doctrine, which bars judges from preliminarily enjoining speech except in rare cases, and examines historical, doctrinal, and pragmatic links between the Free Speech Clause and the Religion Clauses. Finally, Part IV argues these links between the First Amendment Clauses justify applying prior restraint principles when considering whether to enjoin potentially protected religious activity.

## II. THE *LEMON* TEST APPLIED TO INJUNCTIONS THAT GIVE THE GOVERNMENT SUBSTANTIAL REGULATORY POWER OVER RELIGIOUS PRACTICE

This Part explains the Court’s holding in *Lemon v. Kurtzman*,<sup>15</sup> focusing particularly on the “excessive entanglement” prong of the test, and outlines several post-*Lemon* applications of the doctrine. The second section concludes that, because the conditions attached to the

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10. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

12. *Id.* at 624-25.

13. *Uniao de Vegetal* is important for determining the scope of the “compelling interest” test in Free Exercise litigation and determining when an exemption is required under RFRA’s higher standard of scrutiny. See MCCONNELL ET AL., *supra* note 4, at 207-10. However, that aspect of the case is beyond the scope of this Article.

14. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) (“If one constant exists in Supreme Court first amendment theory, it is that ‘[a]ny prior restraint on expression comes to . . . [the] Court with a ‘heavy presumption’ against its constitutional validity.’”).

15. *Lemon*, 403 U.S. 602.

*Uniao do Vegetal* injunction required substantial government oversight and inquiry into UDV's beliefs and practices, it amounted to unconstitutional entanglement.

A. *The Lemon Test and "Excessive Entanglement"*

1. *Lemon v. Kurtzman*

The *Lemon* Court invalidated two state laws reimbursing private elementary and secondary schools, some affiliated with religious denominations, for expenses related to "specified secular subjects."<sup>16</sup> Some state dollars paid for secular school books and supplies, while a portion subsidized teacher salaries.<sup>17</sup> Considering the first and second prongs of the test, the Court held that the statutes advanced the secular purpose of enhancing educational quality.<sup>18</sup> But the Court's analysis centered on "excessive entanglement" between the state and religious institutions.

The Court began by stating that "total separation" between church and state is impossible.<sup>19</sup> For example, states may inspect religious schools for fire code violations or compliance with compulsory attendance laws.<sup>20</sup> After engaging in a searching, fact-intensive inquiry, the Court concluded that the funding schemes were unconstitutional because they excessively entangled state dollars with religious education.<sup>21</sup> Specifically, the state programs subsidized religious educators teaching secular subjects, creating the danger that teachers might, even in good faith, inculcate religion with the help of state dollars.<sup>22</sup> The states placed restrictions to make sure state money did not support religious proselytizing.<sup>23</sup> However, to ensure compliance with those restrictions, the Court found the state would have to employ "comprehensive, discriminating, and continuing surveillance."<sup>24</sup> This,

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16. *Id.* at 606-07.

17. *Id.* at 607.

18. *Id.* at 613. The first prong of the *Lemon* test requires courts to evaluate whether government action has a "secular purpose." The second prong states that government action must not have the "primary effect" of advancing or inhibiting religion.

19. *Id.* at 614.

20. *Id.*

21. *Id.* at 625.

22. *Id.* at 619.

23. *Id.* at 618.

24. *Id.* at 619.

the Court held, amounted to excessive entanglement in violation of the Establishment Clause.<sup>25</sup>

## 2. Post-*Lemon* Case Law Applying the “Excessive Entanglement” Prong

*Lemon* established the general rule that government entangles itself with religion when it intrudes into, participates in, or supervises religious affairs.<sup>26</sup> Several post-*Lemon* cases provide more precise guidance. In the following cases, the Supreme Court found the state programs aiding religious institutions did *not* foster excessive entanglement with religion. Contrasting these holdings helps analyze entanglement issues raised by the *Uniao do Vegetal* preliminary injunction.<sup>27</sup>

In *Tilton v. Richardson*,<sup>28</sup> announced the same day as *Lemon*, a federal program<sup>29</sup> awarded construction grants to institutions of higher learning, some affiliated with religious groups, on the condition that schools used the funds only for secular purposes.<sup>30</sup> Plaintiffs sued the federal grant administrator, along with four religious colleges that received federal money to build libraries, a performing arts center, a science building, and a language laboratory.<sup>31</sup> After finding the federal statute reflected a secular legislative purpose and was not enacted primarily to advance or inhibit religion, the Court turned to the question of whether the grant program fostered excessive entanglement between religion and government.<sup>32</sup>

The Court distinguished *Lemon*. First, entanglement was not a great concern because, unlike elementary and secondary religious schools, the mission of religious higher education is not indoctrination.<sup>33</sup> Second, the Court found “the nonideological character of the aid that the Government provides” diminished entanglement concerns.<sup>34</sup> In *Lemon*, the state statutes funded teachers’ salaries directly.<sup>35</sup> In *Tilton*, the grants simply subsidized secular facilities.<sup>36</sup> Finally, the Court found that

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25. *Id.*

26. GEORGE BLUM ET AL., 16A AM. JUR. 2D CONST. LAW § 441 (2011).

27. *See infra* Part II.B.

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

29. Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711-21 (2004).

30. *Tilton*, 403 U.S. at 674-75.

31. *Id.* at 676.

32. *Id.* at 678-84.

33. *Id.* at 685-86.

34. *Id.* at 688-89.

35. *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971).

36. *Tilton*, 403 U.S. at 687.

because the grant was merely a “one-time” award for a specified purpose (unlike the “continuing payments” in *Lemon*) the funding scheme did not constitute entanglement.<sup>37</sup>

In *Roemer v. Board of Public Works*,<sup>38</sup> Maryland enacted a law “provid[ing] for annual non-categorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for ‘sectarian purposes.’”<sup>39</sup> To enforce the ban on “sectarian purposes,” a state agency determined eligibility by asking whether the college or university awarded “primarily theological or seminary degrees.”<sup>40</sup> If so, the institution was disqualified.<sup>41</sup> If not, the agency required eligible colleges or universities to submit an affidavit affirming that state money would not fund religious purposes.<sup>42</sup> The state also directed the institution to segregate funds and document that state money was not used to further sectarian activities.<sup>43</sup> A group of Maryland citizens sued the state and several religious institutions seeking declaratory and injunctive relief under the Establishment Clause.<sup>44</sup>

The parties did not contest the first prong of the *Lemon* test, and the Court held that the statute was not enacted to advance or inhibit religion.<sup>45</sup> Turning to entanglement, the Court found that the statute was distinguishable from *Tilton* “only by form of aid.”<sup>46</sup> The appropriations in *Roemer* were annual, while in *Tilton* they were one-time payments.<sup>47</sup> But the annual nature of the grants was not dispositive.<sup>48</sup> While certainly a consideration, the Court gave great weight to the “character of the aided institutions.”<sup>49</sup> Because the Maryland institutions served higher education purposes, as in *Tilton*, and because the institutions were capable of separating secular and sectarian uses, the statute did not foster excessive entanglement.<sup>50</sup>

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37. *Id.* at 688-89.

38. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976).

39. *Id.* at 739.

40. *Id.* at 741-42.

41. *Id.* at 742.

42. *Id.*

43. *Id.*

44. *Id.* at 744.

45. *Id.* at 754-60.

46. *Id.* at 764.

47. *Id.* at 764-66.

48. *Id.* at 766.

49. *Id.*

50. *Id.* at 766-67.

As these cases suggest, entanglement turns heavily on the government's method of policing the boundaries between church and state. As *Roemer* puts it, whether the Court finds excessive entanglement depends on "the ability of the State to identify and subsidize separate secular functions carried out at the school, *without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes*."<sup>51</sup> In *Lemon*, the state funding scheme essentially required government officials to intrude into the classroom to ensure teachers did not inculcate students in secular subjects. The schemes in *Tilton* and *Roemer* required no such method.

### 3. Post-Entanglement Case Law: A New Approach

The *Lemon* "entanglement" prong has been roundly criticized,<sup>52</sup> and its current status as constitutional doctrine is unclear.<sup>53</sup> The Supreme Court in *Agostini v. Felton*<sup>54</sup> suggested that the "excessive entanglement" prong may not be a distinct test, but rather a factor under the "principal effects" prong.<sup>55</sup> Further, the Court seems to have moved toward analyzing Establishment Clause issues under Justice O'Connor's "endorsement" test.<sup>56</sup> In *County of Allegheny v. ACLU*, holding that Christian and Jewish holiday displays on public property amounted to unconstitutional establishment, the Court understood the Establishment Clause to mean the government "may not involve itself too deeply in such an institution's affairs."<sup>57</sup> Justice O'Connor's concurrence stated the government establishes religion whenever it "endorses or

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51. *Id.* at 765 (emphasis added).

52. See Douglas 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, 1393-94 (1981) (arguing that the "entanglement" test does not fully encompass all relevant aspects of religious freedom, including a general "right to church autonomy."); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992) (arguing that the entanglement prong creates a Catch-22); *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (arguing in favor of limiting the entanglement inquiry institutional entanglement); *Wallace v. Jaffree*, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting) (agreeing with Justice White, who argued in his *Lemon* dissent that entanglement creates a paradox); *Aguilar v. Felton*, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting) (arguing that the entanglement prong resulted in "anomalous" decisions).

53. Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 544 n.242 (2005).

54. *Agostini v. Felton*, 521 U.S. 203 (1997).

55. *Id.* at 232.

56. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 625-26 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

57. *Id.* at 591 (citing *Aguilar*, 473 U.S. at 409; *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 619-22 (1971)).

disapproves of” religion.<sup>58</sup> “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community . . . . Disapproval of religion conveys the opposite message.”<sup>59</sup> The injunction in *Uniao do Vegetal* sent the message that the UDV’s religious beliefs were disfavored and that the group was considered by the court to be outside the mainstream. Under either test, it seems clear that the Court is willing to strike down laws either requiring comprehensive state surveillance of religious practice or expressing “disapproval” of a particular religion.

*B. Lemon Applied to the Preliminary Injunction Granted in Uniao do Vegetal*

1. The District Court’s Rationale for Imposing the Preliminary Injunction

The UDV moved to preliminarily enjoin the government from enforcing the Controlled Substances Act against it, based on the Fourth and Fifth Amendments, the Equal Protection Clause of the Fourteenth Amendment, principles of international law, the Free Exercise Clause of the First Amendment, and the RFRA.<sup>60</sup> The district court rejected all but the last argument.<sup>61</sup>

Under RFRA, the government may substantially burden a person’s religious exercise only if it demonstrates that the burden (1) furthers a compelling state interest and (2) is the least restrictive means of furthering that compelling interest.<sup>62</sup> The government asserted “compelling” interests in complying with a treaty, preventing health and safety risks, and preventing diversion of *hoasca* to non-religious use.<sup>63</sup> The Government conceded that the UDV was sincere in their beliefs and enforcing the drug laws against the UDV substantially burdened the religious group.<sup>64</sup>

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58. *Cnty. of Allegheny*, 492 U.S. 573 at 625 (O’Connor, J., concurring in part and concurring in the judgment).

59. *Id.* at 625.

60. *O Centra Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1239-40 (D.N.M. 2002).

61. *Id.* at 1241-55.

62. 42 U.S.C. § 2000bb-1(b) (2004).

63. *Uniao do Vegetal*, 282 F. Supp. 2d at 1252-53.

64. *Id.* at 1253.



The court first noted that *hoasca* differed substantially from other drugs.<sup>65</sup> Many courts held that regulating marijuana is a compelling governmental interest, while *hoasca* occupied no such status.<sup>66</sup> The district court then evaluated the government's asserted interests in health and safety. The court stated that "*hoasca* tea plays a central role in the practice of the UDV religion . . . [and] UDV members drink *hoasca* only during regular religious services, held on the first and third Saturdays of every month and on ten annual holidays."<sup>67</sup> Research regarding *hoasca*'s health effects was sparse.<sup>68</sup> The UDV claimed the evidence was insufficient to conclude religious use of *hoasca* endangered the health and safety of its members.<sup>69</sup> The government argued that the evidence showed the drug was dangerous.<sup>70</sup> After considering expert testimony, the district court found the government failed to meet its heavy burden because the evidence was "in equipoise."<sup>71</sup>

The court next considered the government's interest in preventing *hoasca*'s diversion to the non-religious market. Government experts testified that *hoasca* might be diverted to non-religious use because an illicit market for the drug existed, the drug received publicity, and diverting the drug took little cost.<sup>72</sup> UDV experts emphasized the "thinness of the market" for *hoasca*, the small number of doses UDV members imported, and the UDV's strong incentive to prevent diversion because *hoasca* was sacramental.<sup>73</sup> The district court again sided with UDV.<sup>74</sup>

Because the government could not demonstrate a compelling state interest, the court did not reach "least restrictive means" analysis.<sup>75</sup>

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65. *Id.*

66. *Id.* at 1254.

67. *Id.* at 1255.

68. *Id.*

69. *Id.*

70. *Id.* at 1256.

71. *Id.* at 1262.

72. *Id.* at 1262-64.

73. *Id.* at 1264-66.

74. *Id.* at 1266. The district court then went on to discuss the government's interest in complying with the 1971 United Nations Convention on Psychotropic Substances and found the treaty did not extend to *hoasca*. *Id.* at 1266-69.

75. *Id.* at 1269.

## 2. Does the Preliminary Injunction Foster Excessive Entanglement?

Against this backdrop, the court preliminarily enjoined the government from enforcing the drug law against the UDV.<sup>76</sup> But the injunction required the UDV “to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*,<sup>77</sup> and allowed the DEA to inspect, take inventory of *hoasca*, and test the drug on site.<sup>78</sup> The UDV was also required to designate a liaison to the DEA and to allow government officials access to its ceremonies.<sup>79</sup>

The United States Court of Appeals for the Tenth Circuit stayed the preliminary injunction because the UDV “should have demonstrated to the district court that the right to relief was ‘clear and unequivocal.’”<sup>80</sup> First, the district court’s conclusion that an international treaty did not extend to *hoasca* was questionable.<sup>81</sup> Second, the lower court erred by finding the government’s interest in health and safety was not compelling.<sup>82</sup> The district court failed to give adequate weight to Congress’ findings that any Schedule I narcotic has high potential for abuse, no accepted medical use, and is unsafe.<sup>83</sup> The Tenth Circuit also noted that courts are generally unwilling to recognize religious exceptions.<sup>84</sup> Finally, the court stated the jurisprudence before the *Employment Division v. Smith*<sup>85</sup> decision disfavored “religious accommodations requiring ‘burdensome and constant official supervision and management.’”<sup>86</sup>

The Tenth Circuit did not engage in, and the parties did not raise the possibility of, entanglement analysis.<sup>87</sup> The order addressed only one side of the First Amendment coin—that Free Exercise disfavors

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76. *Id.* at 1270.

77. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427 (2006).

78. *MCCONNELL ET AL.*, *supra* note 4, at 209.

79. *Id.*

80. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 314 F.3d 463, 466 (10th Cir. 2002).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 467.

85. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

86. *Uniao do Vegetal*, 314 F.3d at 467 (emphasis added).

87. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc).

accommodations requiring substantial state oversight. However, the other side of that coin may require courts to strike conditions imposing substantial government oversight on religious activity from preliminary injunctions because the Establishment Clause disfavors the very same thing.

A finding that government oversight imposed on the UDV by the district court's preliminary injunction fosters excessive entanglement is consistent with the Supreme Court's Establishment Clause jurisprudence. The preliminary injunction permitted the government to use burdensome surveillance of the UDV's ceremonies and facilities to regulate secular problems associated with *hoasca*: health and safety and diversion of the drug to recreational users. To do so, however, government officials were necessarily required to examine, evaluate, and ultimately decide whether the religious use of *hoasca*, receiving it as communion in religious ceremonies, was legitimate. Under *Lemon* and its progeny, the court's arrangement fosters excessive entanglement. The preliminary injunction is much closer to the statutes invalidated in *Lemon* than those upheld in *Tilton* and *Roemer*. At least three judicially imposed conditions raise Establishment Clause concerns.

The first two problematic conditions are related. The district court required the UDV to provide DEA agents with names, addresses, and Social Security numbers of members who handled *hoasca* outside ceremonies, to keep the DEA informed about the times and locations of its ceremonies, and allow on-site inspections of *hoasca* shipments.<sup>88</sup> The rationale is secular: preventing diversion to the nonreligious market. In operation, though, the conditions required DEA agents to police the boundaries between religion and state. The government had to ask *why* and *for what purposes* members handled the drug outside ceremonies.<sup>89</sup> The inquiry required a detailed evaluation of the UDV's religious practice and the basic tenets of its faith. For example, perhaps UDV ministers blessed *hoasca* before ceremonies. Or maybe UDV ministers prepared the tea outside the ceremonial context. DEA agents were forced to examine these practices and determine whether the religious practice was legitimate. Further, the DEA was allowed on-site to ensure UDV members properly safeguarded *hoasca* from diversion to the illicit market. This condition operated similarly to the statute struck down in *Lemon*. Just as the state would need to employ "comprehensive, discriminating, and continuing surveillance" to make sure teachers

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88. MCCONNELL ET AL., *supra* note 4, at 209.

89. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

stayed on the secular side of the line,<sup>90</sup> DEA agents would be present at solemn religious events and inquire into the religious beliefs and practices of the UDV to ensure the drug did not divert to the market.

A third problematic condition required UDV church officials to warn “susceptible” UDV members of the potentially harmful effects of *hoasca*.<sup>91</sup> Again, the rationale was secular: protecting the health and safety of UDV members. But again, entanglement problems loomed. The court’s condition required the government to evaluate and monitor the *content* of the warning that UDV officials gave “susceptible” members.<sup>92</sup> In *Lemon*, the Court observed that teachers may, even in good faith, convey a religious message even if the academic subject is purely secular.<sup>93</sup> UDV officials, even in good faith, may have related a religious message by explaining the dangers of *hoasca* to UDV members. DEA officials, then, were required not only to identify the “susceptible” members of the UDV, but to monitor the warning to ensure it contained no religious message.<sup>94</sup>

In short, assume Congress determined the UDV was entitled to a religious exemption for *hoasca* use. Further, assume Congress included these three conditions in legislation exempting UDV from the Controlled Substances Act. Supreme Court case law strongly suggests that because the conditions require on-site inspections to prevent secular purposes from being entangled with religious purposes,<sup>95</sup> the legislation violates the Establishment Clause.

Even if the Court applied Justice O’Connor’s “endorsement” test, the injunction issued in *Uniao do Vegetal* sends a clear message to adherents of the faith that “they are outsiders, not full members of the political community.”<sup>96</sup> The injunction “disapproves” of the religion, and the trial court should not have been so quick to send the message that its practice needed such searching oversight. The next question is what source courts should use to decide whether to issue preliminary injunctions in cases implicating the Establishment Clause.

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90. *Id.* at 619.

91. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427 (2006).

92. *Id.* at 421.

93. *Lemon*, 403 U.S. 619.

94. *Uniao do Vegetal*, 546 U.S. at 421.

95. *Roemer v. Bd. of Public Works*, 426 U.S. 736, 765 (1976).

96. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 625 (1984) (O’Connor, J., concurring in part and concurring in the judgment).

### III. PRIOR RESTRAINTS AND INJUNCTIONS: A USEFUL FIRST AMENDMENT ANALOGUE

This Part first outlines the Supreme Court's prior restraint doctrine, with specific focus on court-issued injunctions. Second, this Part surveys the historical arguments and the Court's current debate surrounding the Religion Clauses and their interaction with the Free Speech Clause. Finally, this Part establishes a link between freedom of speech and freedom of religion and argues that this link justifies treating the two similarly when judges consider restraining religious practice prior to a full determination that the practice is unconstitutional.

#### A. *Prior Restraint Doctrine*

Prior restraints against speech are especially disfavored.<sup>97</sup> A typical example is a regulation requiring individuals to obtain licenses from government officials before speaking or distributing information.<sup>98</sup> But courts have also struck down as unconstitutional prior restraints and preliminary injunctions suppressing alleged libel<sup>99</sup> and even sensitive military information.<sup>100</sup> The fundamental problem created by preliminary injunctions in speech cases "is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."<sup>101</sup>

Of course, a permanent injunction *after* a full determination that speech falls outside the scope of the First Amendment is appropriate.<sup>102</sup> However, judicial standards governing preliminary injunctions give courts authority to impose injunctions where they find "a substantial likelihood of success by the plaintiff."<sup>103</sup> Combined with the collateral bar rule, which sanctions violations of court-ordered injunctions by contempt, preliminary injunctions against speech put a speaker in a bind.<sup>104</sup> When a district court preliminarily enjoins speech, "even when

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97. Redish, *supra* note 14, at 57.

98. *See id.*

99. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

100. *Near v. Minnesota*, 283 U.S. 697 (1931).

101. *Pittsburgh Pr. Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

102. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 170 (1998).

103. *Id.* at 164.

104. The collateral bar rule indeed makes prior restraints especially problematic as a structural matter. It poses a trilemma for the speaker—either obey the injunction and forego one's speech; appeal and risk losing valuable time, especially if the speech is time sensitive; or disobey the injunction, speak, and risk a contempt prosecution where one will be stripped of the First

the injunction is entered for the seemingly laudable purpose of preserving the status quo pending the final determination of whether the speech is protected,” it is nevertheless considered a prior restraint.<sup>105</sup>

The principle case governing prior restraints is *Near v. Minnesota*.<sup>106</sup> In *Near*, a Minnesota statute authorized local officials to obtain an injunction against newspaper publishers accused of defamatory speech.<sup>107</sup> The statute required the publisher to prove the material at issue was not only true, but published with “good motives” and for “justifiable ends.”<sup>108</sup> If the publisher failed to prove these elements, the court was authorized to temporarily or permanently enjoin the newspaper from printing the material.<sup>109</sup> The Court struck down the Minnesota statute because it constituted “the essence of censorship.”<sup>110</sup> However, the Court did not opt for a categorical ban against injunctions that restrain speech. The strong presumption against prior restraints yields when speech implicates national security, obscenity, or incitements to violence.<sup>111</sup>

While the Court has not marked the precise bounds of its prior restraint doctrine, Professor Redish argues that a preliminary injunction against speech might withstand constitutional scrutiny if “a strong likelihood exists that the government will be able to establish that the challenged expression is” not protected by the First Amendment.<sup>112</sup> This view has not gone unchallenged, and Redish himself acknowledged problems with this approach.<sup>113</sup> Professors Lemley and Volokh suggest that preliminary injunctions restricting speech may be permissible if they

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Amendment defense. Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643, 1661 (2005).

105. Lemley & Volokh, *supra* note 102, at 171-72.

106. *Near v. Minnesota*, 283 U.S. 697 (1931).

107. *Id.* at 701-02.

108. *Id.* at 702.

109. *Id.* at 703.

110. *Id.* at 713.

111.

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not “protect a man from an injunction against uttering words that may have all the effect of force. . . .”

*Id.* at 716; *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

112. *See* Redish, *supra* note 14, at 88; *see also* Lemley & Volokh *supra* note 102, at 177.

113. Lemley & Volokh, *supra* note 102, at 177-78.

conform to the Court's standard for administrative licensing schemes<sup>114</sup> announced in *Freedman v. Maryland*.<sup>115</sup> In that case, a Maryland law required movie theaters to submit films to the state Board of Censors before public screening.<sup>116</sup> The Court struck down the law because it failed to comply with "procedural safeguards designed to obviate the dangers of a censorship system."<sup>117</sup> To pass constitutional muster, the Court held that any licensing scheme must allow for prompt judicial review and, once in court, the burden had to rest with the government.<sup>118</sup>

Fundamentally, the Court sets an extremely high bar when *any* government entity, including the judiciary, seeks to prevent potentially protected speech from being uttered. The question is whether history and the Court's current approach counsels in favor of applying this high threshold in other First Amendment contexts.

## B. *Historical and Doctrinal Analogies between Freedom of Speech and Freedom of Religion*

### 1. The Historical Debates

Professor Douglas Laycock justifies strong church-state separation in part by appealing to history.<sup>119</sup> The States ratified the Religion Clauses against a backdrop of substantial governmental oppression.<sup>120</sup> The Framers witnessed regimes suppress minority religions, which "caused vast human suffering."<sup>121</sup> According to Laycock, James Madison proposed that the First Amendment should ban *all* governmental infringement upon religious liberty.<sup>122</sup> Because individuals value religion much more than civil government, the proper solution is to separate "the coercive power of government from all questions of religion, so that no religion can invoke the government's coercive power and no government can coerce any religious act or belief."<sup>123</sup> The state must be strictly neutral towards religion because intervention distorts religious development, leads to discrimination, and

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114. *Id.* at 179.

115. *Freedman v. Maryland*, 380 U.S. 51 (1965).

116. *Id.* at 52.

117. *Id.* at 58.

118. *Id.*

119. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

120. *Id.* at 317.

121. *Id.*

122. *Id.*

123. *Id.* at 319.

increases competition among religions for substantial government resources.<sup>124</sup> For reasons partially rooted in the debates surrounding ratification, Laycock takes the position that the government should be neutral towards religion not only when government acts coercively, but even when government does not exercise its coercive power.<sup>125</sup>

Philip Hamburger takes a different view.<sup>126</sup> Thomas Jefferson's approach, a forcefully separationist attitude that individuals should be "free from religion" because it stifles free thought, predominates the Court's jurisprudence.<sup>127</sup> But far from being the dominant position at the time of ratification, Hamburger argues that the doctrine of separation of church and state reflected post-ratification bigotry.<sup>128</sup> Alexis de Tocqueville's approach may also explain the Religion Clauses. De Tocqueville believed religion supplied baseline human rights that could not shift at the whim of majority factions.<sup>129</sup> Religion "could reduce the necessity of civil coercion . . . [and] also establish a lasting foundation in public opinion for the various rights that seemed particularly vulnerable to fluctuations in popular sentiments."<sup>130</sup> The goal is not to seal off religion from the state. Rather, religion is a legitimate object of government attention.<sup>131</sup> This interpretation, Hamburger argues, is most consistent with the history surrounding the ratification of the Religion Clauses.<sup>132</sup>

Professors Laycock and Hamburger enter into an interesting historical and philosophical dialogue and the argument helps answer the question whether judges should entangle themselves with religion. On the one hand, Laycock suggests government involvement in religion will

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124. *Id.* at 320-21.

125. *Id.* at 323.

126. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 483-86 (Harv. Univ. Pr. 2002).

127. *Id.* at 485-86.

128.

In the election 1800, Republicans used the idea of separation to limit the speech of clergymen in political matters. Beginning in the mid-nineteenth century, Protestants repeatedly relied on the concept to deny Catholics equal rights in publicly funded schools and to discourage Catholic political activity. In the 1870s, the National Liberal League attempted to use the idea of separation of church and state to limit the political participation of religious groups and to challenge otherwise secular laws that benefited these groups, that were influenced by them, or that coincided with their distinctive moral obligations.

*Id.* at 483-84.

129. *Id.* at 485.

130. *Id.*

131. *See id.*

132. *See id.*



lead to religious conflict and the emergence of a dominant religion.<sup>133</sup> Jefferson goes further: government should not be involved in promoting religion because “most churches undermined the inclination and ability of individuals to think for themselves.”<sup>134</sup> Laycock’s view suggests government should be concerned about religion and that religion should be concerned about government. On the other hand, Hamburger argues that the original understanding of the Establishment Clause made room for government involvement in religion because it was a source of human rights that should be cultivated.<sup>135</sup> In contrast to Laycock, Hamburger’s approach suggests neither government nor religion should worry about close contact with each other.

But what does this say about the historical relationship between religion and speech? Professor David A.J. Richards surveyed the historical work of Leonard Levy and his analysis of James Madison’s “striking interpretive analogy” of the Free Speech Clause to the Religion Clauses.<sup>136</sup> The predominant historical understanding is that the Religion Clauses serve different ends than the Free Speech Clause.<sup>137</sup> To be sure, this view is plausible. Federalists argued that textual differences between the clauses meant Congress had the power to regulate seditious libel.<sup>138</sup> The Free Speech Clause says Congress shall make no law “abridging the freedom of speech, or of the press.”<sup>139</sup> The Religion Clauses, though, say simply that Congress shall make no law “respecting an establishment of religion.”<sup>140</sup> Federalists claimed “that the difference in language justified the interpretive inference that Congress, unlike the religion clauses, could make laws respecting but not abridging speech; that is, Congress could regulate speech through laws like seditious libel laws.”<sup>141</sup> Madison, who was committed to the Jeffersonian vision of freedom of religion, rejected this argument.<sup>142</sup> He drew a clear line: the state has no power to regulate religion.<sup>143</sup>

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133. See Laycock, *supra* note 119, at 320-21.

134. HAMBURGER, *supra* note 126, at 485.

135. *Id.*

136. David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1872 (1987).

137. *Id.* at 1871 (“Historians of the first amendment typically contrast the original highly libertarian understanding of the religion clauses with the extremely circumscribed understanding of the free speech and press clauses.”).

138. *Id.* at 1872.

139. U.S. CONST. amend. I.

140. *Id.*

141. Richards, *supra* note 136, at 1872.

142. *Id.* at 1878-79. Essentially, Madison and Jefferson believed civil government had no power to use its coercive powers to advance or inhibit religion.

Madison shares with Jefferson this principled understanding of the meaning of religious

But according to Richards, Madison went further than Jefferson and linked freedom of conscience with freedom of speech.<sup>144</sup> Madison's argument has been described as follows:

[t]he state may have no power over religion because enforceable state judgments about the worth or value of religion are corrupted by society's illegitimately sectarian beliefs about the true religion, which degrades the reasonable moral independence essential to a community of free people. Madison saw that the same argument justified a comparable protection for communicative independence because the state was familiarly inclined to make and enforce the same kinds of suspect judgments about the worth of speech and thus to compromise the communicative foundations of moral independence and of conscience itself. The principle of free speech was accordingly directed at a comparable prohibition on the enforcement of these types of state judgments.<sup>145</sup>

In other words, Madison treats the two clauses with equal respect because *both* are necessary as a bulwark against the state's coercive power. If the government begins to involve itself in advancing or inhibiting religion, distortion or suppression of minority religions and individual liberties is not far behind. For Madison, the same is true when government involves itself in promoting or suppressing speech.

These views inform the Supreme Court's current debate regarding the Religion Clauses and how the Justices may answer the question whether district courts should enjoin or entangle themselves in religious practice. Further, Madison's willingness to link the constitutional importance of speech with religion provides historical support for the proposition that courts should be extremely wary of issuing injunctions like the one in *Uniao do Vegetal*.

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liberty. Madison's advocacy in Virginia of Jefferson's Bill coupled with his clearly stated dependence on the Virginian understanding behind the adoption of the religion clauses of the first amendment confirm the place of these principles in the original understanding of the religion clauses.

*Id.*

143. *Id.* at 1879.

144. Richards, *supra* note 136, at 1875, 1879 ("Madison's argument is not only that the principles of religious liberty and free speech are analogous but also that they rest 'equally on the original ground of not being delegated by the Constitution' and are 'equally and completely exempted from all authority whatever of the United States.'").

145. *Id.* at 1879.

## 2. The Supreme Court's Current Debate

A relatively unexplored area of recent Supreme Court jurisprudence is the interplay between the Establishment Clause and the Free Speech Clause, particularly when it comes to “government speech.”<sup>146</sup> By examining two cases implicating both clauses—*Rosenberger v. University of Virginia*<sup>147</sup> and *Good News Club v. Milford Central School*<sup>148</sup>—two distinct attitudes towards freedom of religion emerge, and seem to closely track the contrasting views of Professors Laycock and Hamburger.

In *Rosenberger*, the University of Virginia implemented a system that used student fees to pay printing costs for various student groups and publications.<sup>149</sup> However, the University withheld payments for publications promoting beliefs “about a deity or an ultimate reality.”<sup>150</sup> Justice Kennedy’s opinion for the Court held that the University created a “metaphysical” limited public forum.<sup>151</sup> Excluding religious publications discriminated based on viewpoint, and therefore the University’s policy was unconstitutional.<sup>152</sup> Granting student groups access to school facilities “on a religion-neutral basis” does not cause an Establishment problem.<sup>153</sup> Justice Kennedy also distinguished the student fees used to pay the printing costs, which did not conflict with the Establishment Clause, from a tax that directly supported a religion, which did.<sup>154</sup> None of the funds went directly to the student groups.<sup>155</sup>

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146. Harvard Law Review Association, *Government Speech*, 123 HARV. L. REV. 232, 232 (2009). A full discussion regarding the limited public forum doctrine and the strict scrutiny required when the court finds “viewpoint discrimination” is beyond the scope of this Article. Essentially, the government can create a “limited public forum” by opening facilities or space to expressive activity (such as public library meeting rooms). 16A AM. JUR. 2D CONST. LAW § 542 (2001). Once the government does so, it is not required to open the forum to *all* types of speech. *Id.* Restrictions must only be reasonable and viewpoint neutral. *Id.* Viewpoint discrimination is a particularly disfavored subset of content discrimination, and occurs when the government licenses “one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.” *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). For example, the government may not prohibit fighting words motivated by hatred if it does not also prohibit the same type of speech motivated by motives the government deems “good.” *See id.*

147. *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995).

148. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

149. *Rosenberger*, 515 U.S. at 822-23.

150. *Id.* at 823.

151. *Id.* at 830.

152. *Id.* at 831 (“By the very terms of the . . . prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”).

153. *Id.* at 842.

154. *Id.* at 840.

Rather, the University paid a contractor to print student publications on a neutral basis.<sup>156</sup> If the contrary view became law, “it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content.”<sup>157</sup> Justice Kennedy said this approach would cause much greater problems under the Establishment Clause than paying for printing costs on a neutral basis.<sup>158</sup>

Justice Souter, joined by Justices Stevens, Breyer, and Ginsburg, dissented. Justice Souter found no viewpoint discrimination because the University’s policy barred payment for both atheistic and theistic publications.<sup>159</sup> More importantly, the dissent was disturbed that the University would be required to directly subsidize a student publication with a mission “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.”<sup>160</sup> The publication was not simply a “descriptive examination” of Christian doctrine.<sup>161</sup> Rather, it announced an evangelical call to the Christian faith.<sup>162</sup> Therefore, the University was using public funds to directly subsidize “preaching the word,” which the Establishment Clause categorically bars.<sup>163</sup> For historical support, Justice Souter cited Madison’s Memorial and Remonstrance Against Religious Assessments.<sup>164</sup> In 1785, the Virginia legislature was slated to renew a tax levy that supported ministers of the Anglican Church.<sup>165</sup> Both Jefferson and Madison led the charge against the tax assessment and, in response to Madison’s Remonstrance, the Virginia General Assembly killed the bill in committee.<sup>166</sup> Instead, the legislature enacted

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155. *Id.*

156. *Id.* at 843.

157. *Id.* at 844.

158. *Id.*

159. *Id.* at 895 (Souter, J., dissenting).

160. *Id.* at 865.

161. *Id.* at 867.

162. *Id.* at 868.

163. *Id.*

164. *Id.* Madison wrote, “Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?” Madison was responding to a proposed Virginia tax assessment bill that would be used to support religious entities.

165. Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN ST. L. REV. 683, 725 (2008).

166. *Id.* at 725-26.

Jefferson's Bill for Religious Freedom.<sup>167</sup> The dissent read Madison's Remonstrance to stand for the proposition that, originally understood, the Establishment Clause was designed not only to prevent government from preferring one religious denomination over another, but from preferring religion over non-religion.<sup>168</sup>

Justice Thomas' concurrence criticized the dissent's reading of the Remonstrance. Madison did not object to the Virginia bill because he thought "that religious entities may never participate on equal terms in neutral government programs."<sup>169</sup> Rather, the bill offended Madison because it singled out some churches for benefits while burdening others.<sup>170</sup> Justice Thomas noted scholarly disagreement over the Virginia Assessment Controversy,<sup>171</sup> and opted for the view that the "Framers saw the Establishment Clause simply as a prohibition on government preferences for some religious faiths over others . . ."<sup>172</sup>

In *Good News Club*, a school policy allowed district residents to use a school building after hours for educational purposes or "social, civic and recreation meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."<sup>173</sup> The school denied a Christian organization's request to host after-school religious activities because the policy prohibited use "for religious purposes."<sup>174</sup> The Good News Club sued, alleging the school's denial violated its free speech and religious exercise rights.<sup>175</sup>

Justice Thomas' opinion for the Court found clear-cut viewpoint discrimination because the school barred religious activities from a limited public forum.<sup>176</sup> The school argued that even if it did

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167. *Id.* at 726.

168.

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's three pence. The University exercises the power of the State to compel a student to pay it . . . and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment.

*Rosenberger*, 515 U.S. at 873-74.

169. *Id.* at 854 (Thomas, J., concurring).

170. *Id.* at 855.

171. *Id.* ("Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy.")

172. *Id.*

173. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

174. *Id.* at 103.

175. *Id.* at 104.

176. *Id.* at 107.

discriminate on the basis of viewpoint, its policy survived strict scrutiny because of the compelling interest in not violating the Establishment Clause.<sup>177</sup> The Court found that “the school has no valid Establishment Clause interest.”<sup>178</sup> First, the Good News Club sought access to the forum only on the same terms as secular groups.<sup>179</sup> Reasonable parents (and even reasonable children) would not believe the school endorsed religion simply by allowing a religious organization access to the building after school.<sup>180</sup>

Justices Stevens, Souter, and Ginsburg dissented.<sup>181</sup> Justice Stevens was willing to distinguish religious viewpoint from religious proselytizing.<sup>182</sup> The school’s concern that religious clubs would aim to “recruit” or coerce children to join their particular religion was reasonable.<sup>183</sup> In other words, the school did not exclude *all* religious viewpoints, only proselytizing.<sup>184</sup> In a concurrence, Justice Scalia responded by arguing that any “peer pressure” or “coercion” was merely a byproduct of free association.<sup>185</sup> “What is at play here is not coercion,” Scalia wrote, “but the compulsion of ideas—and the private right to exert and receive that compulsion . . . is protected by the Free Speech and Free Exercise Clauses, not banned by the Establishment Clause.”<sup>186</sup>

Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens’ distinction between religious description and religious proselytizing.<sup>187</sup> On the Establishment Clause question, Justice Souter

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177. *Id.* at 112.

178. *Id.* at 113.

179. *Id.* at 115.

180. *Id.*

181. *Id.* at 101.

182. *Id.* at 131 (“Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization.”) (Stevens, J., dissenting).

183. *Id.* at 132.

184. *Id.*

185. *Id.* at 121 (Scalia, J., concurring).

186. *Id.*

187.

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. The majority avoids this reality only by resorting to the bland and general characterization of Good News’s activity as ‘teaching of morals and character, from a religious standpoint.’ . . . Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

would require courts to undertake a detailed factual inquiry designed to ensure that Good News did not “dominate the forum in a way that heightens the perception of official endorsement.”<sup>188</sup> Because of this concern that, in practice, the school would actively endorse the club’s religious mission, further fact-finding on matters such as the timing of Good News’ meetings and which other groups met at the school was necessary to ensure that school activities did not bleed over into religious ones.<sup>189</sup>

The dialogue between the majority and dissents illustrates the prevailing views on the Court regarding “religious” speech and its relationship to the Establishment Clause. The dissenting Justices bifurcate religious speech into a simple explanation and discussion of church doctrines, on the one hand, and proselytizing, on the other. Under this view, the government may subsidize or grant access to groups that engage in the former type of religious speech, but never the latter. The dissenting Justices draw a bright line: whenever religious groups “preach the word,” the government may not directly subsidize that group.<sup>190</sup> Fairly read, this view reflects Laycock’s concern that the government must not involve itself in religious affairs because it may distort both religious and secular thought.

The Justices in the majority are unwilling to bifurcate religious speech and see no plausible reason to treat religious speech aiming to “preach” different from other types of religious speech. In fact, the Constitution tolerates “coercion” resulting from the government granting access to religious groups because of free association and free exercise principles.<sup>191</sup> Further, the majority’s position regarding the Establishment Clause meshes with Hamburger’s historical view of religion. Like de Tocqueville, the conservative Justices are more comfortable with government involvement in subsidizing or granting access to religious groups because religion creates “public goods” and may help explain where human rights come from. This view correlates with Hamburger’s view that government need not seal itself off from religion, particularly because religion can offer something positive to the marketplace of ideas and provide a basis for important rights that the government should address.<sup>192</sup>

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*Id.* at 138-39 (Souter, J., concurring).

188. *Id.* at 144-45.

189. *Id.* at 144.

190. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 868 (1995) (Souter, J., dissenting).

191. *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring).

192. See HAMBURGER, *supra* note 126, at 485.

#### IV. DISENTANGLING COURTS FROM RELIGION

This Part attempts to connect the principles of the prior restraint doctrine under the Free Speech Clause with the Establishment Clause. More specifically, this Part argues that debates at the time of ratification, more recent Supreme Court precedent, and policy considerations conceptually link the two Clauses. This Part then proposes that, just as courts are reluctant to enjoin speech prior to determining whether that speech is protected, courts should be wary of enjoining religious activity prior to determining whether those activities warrant First Amendment protection. To do so, courts should import the Free Speech Clause's prior restraint doctrine to analyze Religion Clause cases.

##### A. *Are Preliminary Injunctions Against Religious Practice Distinct From Those Against Free Speech?*

Two interrelated propositions justify treating restraints on religious practice similar to restraints against speech. First, the separationist view reflected in scholarship and in recent Supreme Court decisions is the correct legal policy. Second, historical support links the two clauses and counsels against government regulation of both speech and religion.

The first step is to answer the question whether, in light of underlying policies behind the Free Speech Clause and the Establishment Clause, pretrial injunctions against speech are analogous to pretrial injunctions implicating religious activities. The most obvious distinction is that the affected religious group remains free to practice its religion. Under the preliminary injunction issued in *Uniao do Vegetal*, group members could use *hoasca* for sacramental purposes.<sup>193</sup> The primary concern in free speech cases, however, is that enjoining speech will restrict potentially protected expression.<sup>194</sup>

Closer examination reveals this distinction is superficial. For example, consider a hypothetical case where an anonymous member of a group seeks to distribute handbills on a public street. The government claims the materials are obscene and sues to enjoin its distribution. The court first finds that the government is unlikely to prove the material is obscene, and further finds that an injunction in the government's favor would amount to an unconstitutional prior restraint. Therefore, the judge does not grant the government's injunction, and allows the handbill to be distributed. But the judge imposes several conditions on the speaker:

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193. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427 (2006).

194. *Lemley & Volokh*, *supra* note 102, at 171.



she must submit the names and Social Security numbers of all who played a role in crafting the handbill and must allow the government to inspect the document within a reasonable time prior to distribution.

Quite likely, the Court would strike this injunction down as a prior restraint even though it permits the group to distribute its handbill. The arrangement does not conform to the *Freedman* standard for administrative licensing schemes.<sup>195</sup> It also flaunts the policy purposes behind the doctrine, which reflect concerns that prior restraints “(1) hav[e] a greater chilling effect on potential speech; (2) subject[] a wider spectrum of speech to official scrutiny; (3) suppress[] speech at significantly less cost; and (4) encourag[e] greater speech suppression than laws in the form of subsequent sanctions.”<sup>196</sup> Further, the injunction fails to accommodate “anonymous” speech, which is generally protected under the First Amendment.<sup>197</sup>

Therefore, this hypothetical injunction is a prior restraint against speech and it cannot be meaningfully distinguished from the *Uniao do Vegetal* injunction because the policy justifications for separation of church and state are similar to those counseling in favor of applying the prior restraint doctrine. In addition to a historical basis for separation,<sup>198</sup> Laycock argues that because “religion is far more important to individuals than to the government,” the state should “leav[e] religion entirely to individuals and their voluntary groups.”<sup>199</sup> Further, “[t]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance.”<sup>200</sup> In other words, government should not discourage or involve itself in religious affairs because, among other reasons, government influence may distort religious beliefs and lead to discrimination by a dominant religion.<sup>201</sup>

The policies in the background of Justice Souter’s *Rosenberger* dissent are analogous. The Establishment Clause means the state must never directly subsidize religious groups when that money is being used

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195. *Freedman v. Maryland*, 380 U.S. 51 (1965).

196. Martin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 3 (1989).

197. *See, e.g., Talley v. California*, 362 U.S. 60, 64 (1960) (stating that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”).

198. *See supra* Part III.B.1.

199. Laycock, *supra* note 119, at 319.

200. *Id.* at 320.

201. *Id.* at 320-21.

to proselytize, according to Justice Souter.<sup>202</sup> This constitutes a governmental preference of religion over non-religion, and is unconstitutional because the government compels students to pay the fee and forces those same students to support a religious message that may not coincide with their conscience.<sup>203</sup>

Similar concerns drive the Court's free speech jurisprudence. The government generally should not restrain speech because it distorts "dominant" speakers and may amplify the government's preferred message.<sup>204</sup> To serve this end, courts do not enjoin speech because it requires increased government oversight.<sup>205</sup>

Both clauses reflect concerns that government restrictions on speech and religion may lead to distortions and discrimination among speakers and religious groups. In the speech context, courts handle this reality by refusing to enjoin expression before determining whether the speech at issue is protected. In the religious context, as *Uniao do Vegetal* shows, courts are more comfortable giving government substantial oversight of religious groups, even if that may amount to unconstitutional entanglement.<sup>206</sup> In the face of such searching government involvement in UDV's religious affairs, though, the danger that UDV members may leave the religion or stop fully practicing their religion while the injunction is in force and perhaps beyond is a real concern. This is true even though the *Uniao do Vegetal* judge determined the UDV had a substantial likelihood of proving their religious practice was protected.<sup>207</sup> Just as courts should be wary of restraining free speech, they should be careful when considering whether to restrain religious activity by injunction because the policies underpinning both free speech and free religion are linked.

Beyond policy considerations, Madison provides a historical justification for treating the two clauses similarly. First, at least some on

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202. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 868 (1995) (Souter, J., dissenting).

203. *See id.* at 873-74.

204.

Government censorship distorts the marketplace of ideas by not making all viewpoints available. For example, to the extent that 'Pro-Choice' or 'U.S. Out of Iraq' license plates are absent, speakers are denied the opportunity for self-expression, and readers are denied the opportunity to either hear about these views or know the extent to which other people support them.

Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 667 (2008).

205. Scordato, *supra* note 196, at 3.

206. *See supra* Part II.B.2.

207. *O Centra Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1269 (D.N.M. 2002).

the current court believe Madison's Remonstrance serves as evidence that the Establishment Clause reflected a concern that church and state should be separated.<sup>208</sup> More importantly, Madison argued that "religious liberty and free speech are analogous," and neither are proper subjects of government regulation.<sup>209</sup> The danger of government involvement with religion is that the state cannot legitimately evaluate "the worth or value of religion."<sup>210</sup> The state is similarly incompetent to judge which speech is worthy of expression. Therefore, the Free Speech Clause prevents government from restricting speech just as much as the Establishment Clause prevents the government from restricting religious activity.<sup>211</sup> If Madison is correct,<sup>212</sup> the prior restraint doctrine is relevant in Establishment Clause cases. Courts almost always refuse to enjoin speech before a full determination on the merits, in part because of Madison's concern that the government is incapable of properly valuing speech.<sup>213</sup> Similar concerns caution against injunctions that restrict religious activity not yet determined to be within the government's regulatory power.

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208. See *supra* Part III.B.2.

209. Richards, *supra* note 136, at 1875.

210. *Id.* at 1879.

211. *Id.*

212. This view has been criticized. See, e.g., HAMBURGER, *supra* note 126; Roy, *supra* note 165, at 725.

[T]herefore, both commentators and the Supreme Court have turned to the church-state philosophies of Thomas Jefferson and James Madison. The premise here is that the philosophies of these two men are key to interpreting the religion clauses, particularly because of their role in the Virginia disestablishment battle. But the premise is wildly inaccurate. There were hundreds of actors from all over the country involved in the crafting and adoption of the First Amendment. It is safe to say that most did not draw their inspiration from either the personal opinions of Jefferson and Madison, nor from Virginia disestablishment fight most probably had never heard of.

Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 77-78; James J. Knicely, "First Principles" and the Misplacement of the "Wall of Separation": *Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171, 205 (2004) (arguing that the Supreme Court's reliance on Jefferson and Madison as evidence of the Establishment Clause's original meaning "established a powerful doctrinal engine for a completely new regime of law in all of the states. The slow but progressive revelation of its incomplete and distorted rendition of that history has produced, however, not only a doctrine in need of justification, but a body of law with underpinnings that cannot long withstand the absence of a legitimate rationale for decision.").

213. Redish, *supra* note 14, at 53.

B. *Applying Prior Restraint Principles in Religion Clause Cases: A Solution to the Entanglement Problems Raised by Injunctions Against Religious Practice*

Two plausible connections link the Free Speech Clause and the Religion Clauses. First, preliminary injunctions requiring religious groups to submit to substantial government surveillance amount to unconstitutional entanglement.<sup>214</sup> With that in mind, Madison links the concepts of free conscience and free speech.<sup>215</sup> Whether these connections justify importing, in some form, the Free Speech Clause's prior restraint doctrine into the Court's Establishment Clause jurisprudence depends on whether Laycock, and the Justices who track his separationist position, or Hamburger, and the Justices who follow his position, are more persuasive.<sup>216</sup>

This Article argues the former view is persuasive, and justifies prior restraint-style analysis when courts consider Religion Clause cases. Madison's argument that the two clauses advance the same fundamental purposes is correct.<sup>217</sup> Legislatures, no more than courts, are incompetent to evaluate the worthiness of political expression and of individual's deeply personal religious beliefs.<sup>218</sup> Once government involves itself in making these determinations about beliefs, distortion becomes a true danger.<sup>219</sup> Whether courts issue traditional preliminary injunctions that completely bar contested religious practice or ones giving the government substantial regulatory power over religious groups, courts should keep these principles in mind when deciding whether to restrict religious practice before fully deciding the practice is not protected.

In light of these connections, the status quo in cases involving religious activity should not be government regulation. Rather, the status quo should be nonestablishment. In *Uniao do Vegetal*, for example, both the trial court and the Tenth Circuit should have viewed UDV's sacramental use of *hoasca* as the status quo. Because the UDV showed a substantial likelihood of success on the merits, the proper

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214. See *supra* Part II.B.2-3.

215. See *supra* Part III.B.1.

216. See *id.*

217. Of course, Justice Thomas reminds us that "the views of one man do not establish the original understanding of the First Amendment." *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring).

218. Richards, *supra* note 136, at 1879.

219. See, e.g., *id.* at 1878-79; Laycock, *supra* note 119, at 320-21; *Rosenberger*, 515 U.S. at 868.

course under this proposed analysis would be to leave the UDV free to practice its religion, unencumbered by government oversight. Any other result risks restraining free religious practice before the trial court determines the religious exercise falls outside First Amendment protection. Even if the status quo remains in favor of government enforcement, the prior restraint doctrine should still apply.<sup>220</sup>

This approach gives greater deference to religious groups' free exercise and better accommodates concerns that government involvement should be extremely limited when it comes to religious affairs. A prior restraint-style rule forces judges to consider the full impact of enjoining religious practice or subjecting the religious group to government regulation. In *Uniao do Vegetal*, both the district judge and the Tenth Circuit overlooked potential Establishment Clause issues in their determinations. A prior restraint inquiry would have brought these concerns to the forefront and resulted in decisions respecting historical and theoretical concerns that government should be separate from religion.

However, just as in prior restraint cases against speech, religious activity is not unlimited.<sup>221</sup> Legal scholarship suggests two possible ways the government may overcome the presumption against prior restraints of speech. First, a court may possibly enjoin speech if the government shows "a strong likelihood" that the speech does not warrant First Amendment protection.<sup>222</sup> Second, a court may enjoin speech if the injunction complies with the *Freedman* factors for administrative licensing schemes.<sup>223</sup> If courts choose to import the prior restraint doctrine to religious inquiries, these exceptions should also apply. For example, if the government in *Uniao do Vegetal* made an extraordinary showing that *hoasca* is dangerous and a substantial illicit market existed, the trial court may have been justified in conditioning an injunction on government oversight. Or perhaps, under reasoning similar to *Freedman*, the judge could have enjoined the religious practice temporarily but expedited review to determine whether UDV's religious practice was protected.

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220. Lemley & Volokh, *supra* note 102, at 171-72 (noting that a preliminary injunction that restricts potentially protected speech is seen as a prior restraint "even when the injunction is entered for the seemingly laudable purpose of preserving the status quo pending the final determination of whether the speech is protected.").

221. *Freedman v. Maryland*, 380 U.S. 51 (1965).

222. Redish, *supra* note 14, at 88-89.

223. Lemley & Volokh, *supra* note 102, at 179.

While the precise scope of any exceptions is unclear, the fundamental point is that both historical and philosophical concerns with separation of church and state justify judicial reticence to impose injunctions that may restrain potentially protected religious activity.

## V. CONCLUSION

The UDV sincerely believes drinking *hoasca* tea is a way to commune with Jesus Christ, and the practice is central to their faith.<sup>224</sup> While the trial court found that the government failed to demonstrate a compelling interest in substantially burdening the UDV's religious exercise, the judge allowed federal officials to exercise substantial regulatory oversight of UDV members and their solemn religious ceremonies.<sup>225</sup> Under the Supreme Court's *Lemon* test, such oversight likely results in unconstitutional entanglement.

To say it differently, the preliminary injunction restrained the UDV's religious practice. It did so before a full determination that using *hoasca* fell outside First Amendment protection. If speech was at issue, a judge would refuse to enjoin the expression under the Court's prior restraint doctrine.<sup>226</sup> Any conditions that permitted the government oversight of the potentially protected speech would likely conflict with First Amendment principles. But founding-era authorities suggest the Free Speech and Religion Clauses are intimately related because both operate to bar the government from making moral judgments about the value of expression and individual beliefs.<sup>227</sup> A line of thought in both recent legal scholarship and Supreme Court cases is also concerned that government endorsement or disapproval of religious affairs may have a corroding effect and lead to discrimination.<sup>228</sup> These conceptual connections justify treating religion and speech similarly. Courts should greet government requests to enjoin or otherwise restrict religious practice with the same heavy skepticism as preliminary injunctions against speech.

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224. *O Centra Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1255 (D.N.M. 2002) ("The consumption of *hoasca* tea plays a central role in the practice of the UDV religion. *Hoasca* is a sacrament in the UDV. Church doctrine instructs that members can fully perceive and understand God only by drinking the tea.") (citations omitted).

225. *See generally id.*

226. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

227. *See Richards, supra* note 136.

228. *See supra* Part III.B.2.