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Untangling Entanglement

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ABSTRACT

The Court has increasingly signaled its interest in taking a more historical approach to the Establishment Clause. And in its recent American Legion *decision, the Supreme Court strongly suggested that the three-prong* Lemon *test is essentially dead letter. Such a result would make sense for the first two prongs of the* Lemon *test about secular purpose and the effects. Many scholars have observed that these aspects of the prong are judicial creations far afield of the Establishment Clause history. But what of the entanglement prong of the test? If we rejected all applications of this prong of the analysis, would we be essentially throwing the baby out with the bathwater? This Article cautions that this might be the case.*

A close analysis of the Court's entanglement jurisprudence, compared against historical support for the various applications, suggests that entanglement jurisprudence ought to remain good law in at least two contexts. First, where it has protected religious groups from government interference with the autonomy, internal affairs, and administration. Second, where it prevents government from treating certain religious groups in a preferential way, including by granting monopoly power in the performance of public functions. On the other hand, the Court's entanglement precedent is on far shakier historical ground in several contexts, including anti-sectarian skepticism of any sort of government aid to religious groups (and accompanying monitoring requirements to avoid religious use of funds), concerns about political divisiveness when government interacts with religious groups, and opposition to government classifications necessary to provide religious exemptions. If the Court were to modify its entanglement analysis to disregard ahistorical applications and embrace the historical ones, the upshot would be far less apparent tension between the Religion Clauses. Such an interpretation could facilitate an increase in religious pluralism and human flourishing and a decrease in unnecessary cultural fights aimed at excluding religion from the public sphere.

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INTRODUCTION

In the wake of the Supreme Court's recent decision in *American Legion*,[1] scholars have begun to debate the fate of the infamous *Lemon*[2] test. Six of the justices in *American Legion* seem to be in favor of rejecting the *Lemon* test to some extent. Justice Alito (joined by Chief Justice Roberts, Justice Breyer, Justice Kagan, and Justice Kavanaugh) criticized *Lemon* in the context of symbol cases,[3] Justice Kavanaugh stated that "[*American Legion*] again makes clear that the *Lemon* test does not apply to Establishment Clause cases,"[4] Justice Gorsuch suggested that *Lemon* is effectively "shelved,"[5] and Justice Thomas went as far as to say that the Court should "overrule the *Lemon* test in *all* contexts."[6] Justices Gorsuch and Kavanaugh argued that *Lemon* should no longer be good law,[7] and Justice Thomas favored expressly overruling *Lemon*.[8] A plurality opinion observed that the

1. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
2. Lemon v. Kurtzman, 403 U.S. 602 (1971).
3. *Am. Legion*, 139 S. Ct. at 2085 (longstanding religious displays have a "strong presumption of constitutionality"); *id.* at 2084–85 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.").
4. *Id.* at 2093 (Kavanaugh, J., concurring).
5. *Id.* at 2102 (Gorsuch, J., concurring).
6. *Id.* at 2097 (Thomas, J., concurring) (emphasis added).
7. *Id.* at 2093 (Kavanaugh, J., concurring); *id.* at 2101 (Gorsuch, J., concurring).
8. *Id.* at 2097 (Thomas, J., concurring).

Lemon Court's "ambitious[] attempt[] to find a grand unified theory of the Establishment Clause" has given way to "a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[9] In particular, the Court criticized the first two prongs of the *Lemon* test, focused on secular purpose and the effect of a law.[10] Scholars such as Michael McConnell have similarly sharply critiqued the first two prongs of the *Lemon* test, as "several steps removed from the actual experiences that lay behind the [original] decision to deny the government authority to erect or maintain an establishment of religion."[11]

Despite these clear criticisms of *Lemon*'s first two prongs, the Court left the status of *Lemon*'s third entanglement prong much less clear.[12] And the Court just relied on entanglement concerns in a case decided this term.[13] It thus appears that the entanglement strand of the *Lemon* analysis remains good law to some extent. But in which contexts, and why? Many scholars and jurists have argued that the Supreme Court should abandon entanglement analysis altogether, describing the test as incoherent, nonsensical, empty, and paradoxical.[14] Others have argued that

9. *Id.* at 2087 (plurality opinion).

10. *Id.* (majority opinion) (alleged establishments of religion "express *many* purposes and convey *many* different messages, both secular *and* religious" (emphasis added)); *id.* at 2084 (because "time's passage imbues a religiously expressive monument, symbol, or practice with . . . historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning").

11. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2205–06 (2003).

12. *See Am. Legion*, 139 S. Ct. at 2080 (plurality opinion) ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met."); *see id.* at 2081–82; *id.* at 2087 (plurality opinion) (opting to set aside *Lemon* by "tak[ing] a more modest approach that focuses on the particular issue at hand and looks to history for guidance"); *id.* (citing cases where the Court had "conspicuously ignored *Lemon*").

13. Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267, 2020 U.S. LEXIS 3547, at *39 (U.S. July 8, 2020) (noting that allowing courts to decide who qualifies as a co-religionist "would risk judicial entanglement in religious issues").

14. Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (O'Connor, J., dissenting) ("I adhere to . . . doubts about the entanglement test . . . ."), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Wallace v. Jaffree, 472 U.S. 38, 109–10 (1985) (Rehnquist, J., dissenting) (criticizing the entanglement test); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 768–69 (1976) (White, J., concurring in the judgment) (describing the entanglement test as "at once both insolubly paradoxical" and a "blurred, indistinct, and variable barrier" (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971))); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205, 230 (1980); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 19 (1979) ("The entanglement part of the Court's triad is either empty or nonsensical."); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 (1987) (arguing that the entanglement doctrine "should be eliminated"); David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 692 (1991) ("This Article argues that the Court should end its commitment to the entanglement prong, because the Court's entanglement inquiry is not coherent and conflicts with established constitutional principles.").

entanglement has served as "a blessing in disguise for religious choice and diversity."[15]

The Supreme Court has insisted that the doctrines governing Establishment Clause questions look to the "specific practice[s]" of history.[16] The question this Article explores, then, is whether any of the Court's entanglement jurisprudence finds support in the historical record regarding establishment of religions. Part I of this Article traces the evolution of the Court's entanglement jurisprudence and identifies at least six categories in which entanglement has taken on unique meaning. Part II of this Article untangles which of these applications seems to be more grounded in historical evidence about original concerns that led to an Establishment Clause and which applications are ahistorical judicial creations. It concludes that entanglement analysis fits with the historical record in two primary contexts: First, when it has protected religious groups from government interference with the autonomy, internal affairs, and administration. Second, entanglement analysis finds historical support where it prevents government from treating certain religious groups in a preferential way, including by granting monopoly power in the performance of public functions. While the Court need not continue these lines of cases under the label of "entanglement," this Article argues that this jurisprudence should remain good law. On the other hand, the Court's entanglement precedent is on far shakier historical ground in several contexts, including anti-sectarian skepticism of any sort of government aid to religious groups (and accompanying monitoring requirements to avoid religious use of funds), concerns about political divisiveness when government interacts with religious groups, and opposition to government classifications necessary to provide religious exemptions. Part III then explores the implications of modifying entanglement to conform to a historical approach, including how using history as a guide would curtail applications of the law that seemingly place the Establishment Clause and Free Exercise Clause in tension.

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15. Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 143 (1992).

16. Town of Greece v. Galloway, 572 U.S. 565, 577 (2014). As of 2006, "76% of the Justices who have written at least one Religion Clause opinion have appealed to history [i.e., specific founders or the founding era], and every one of the twenty-three Justices who authored more than four Religion Clause opinions have done so." Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 572 (2006).

I. THE EVOLUTION OF ENTANGLEMENT ANALYSIS

This Part traces the evolution of the Court's entanglement jurisprudence and identifies at least six categories in which entanglement has taken on unique meaning: anti-sectarian roots, religious autonomy or interference with internal church functions, *Lemon*'s prophylactic entanglement related to public support of religion, political entanglement, entanglement with public functions, and the Court's meandering entanglement approach to religious exemptions.

A. The Anti-Sectarian Roots of Entanglement

The legal concept of entanglement has a somewhat dubious pedigree at the Supreme Court. Entanglement is now most commonly associated with the three-prong *Lemon* test, created in 1971.[17] But it is the 1948 decision in *Illinois ex rel. McCollum* that marks the Supreme Court's first use of "entanglement" as a legal test to assess Establishment Clause violations.[18] There, the Court struck down an optional program parents could consent to which involved release time and religious education for students.[19] The education program was offered by a voluntary association, which had been formed by "interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths."[20]

In a concurring opinion, Justice Frankfurter asserted the principle that "the public school must keep scrupulously free from entanglement in the strife of sects."[21] In the case before it, the Court found this sort of problematic entanglement because "the State's tax-supported public school buildings" were being used by the religious program "for the dissemination of religious doctrines," and the state provided aid to the program in the form of the State's "school machinery."[22] The Court determined that this was not a "separation of Church and State."[23]

To justify the position that this public support was problematic, Justice Frankfurter stated, "[B]y 1875 the separation of public education from Church *entanglements*, of the State from the teaching of religion, was firmly established in the consciousness of the nation."[24] Justice Frankfurter then

17. Lemon v. Kurtzman, 403 U.S. 602 (1971).
18. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948); *id.* at 217 (Frankfurter, J., concurring).
19. *Id.* at 207–12 (majority opinion).
20. *Id.* at 207.
21. *Id.* at 216–17 (Frankfurter, J., concurring).
22. *Id.* at 212 (majority opinion).
23. *Id.*
24. *Id.* at 217 (Frankfurter, J., concurring) (emphasis added).

quoted a speech by President Grant advocating for the federal Blaine Amendment, which would have prohibited public funding of "sectarian" schools.[25] In this speech, President Grant stated, "I predict that the dividing line [in our country] will not be Mason and Dixon's, but between patriotism and intelligence on the one side and superstition, ambition and ignorance on the other."[26] This opinion also quoted approvingly President Grant's next statement, that "neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas."[27] Justice Frankfurter also noted that "every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'"[28]

Congress ultimately narrowly failed to pass the "Blaine Amendment."[29] But it did pass a law which stated it "to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."[30] And it was this same sort of policy that Justice Frankfurter was praising in *McCollum*.[31] This embrace of pro-Blaine rhetoric is no longer consistent with the Court's current approach.[32] In 2000, the Court observed that Blaine amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"[33] The Court described Blain Amendments as arising from "a shameful pedigree"[34] and a "doctrine, born of bigotry."[35] And the Court has since upheld government aid to churches,[36] including church schools, so long as parents and students had private choice in the matter.[37] In its recent *Espinoza* case, the Court held that government is in fact *required* to provide support for religious schools if it

25. *Id.* at 218.

26. Ulysses S. Grant, U.S. President, President Grant's Des Moines Address (Sept. 29, 1875), *in* 3 ANNALS OF IOWA 138, 139 (1897).

27. *McCollum*, 333 U.S. at 218 (Frankfurter, J., concurring) (quoting *The President's Speech at Des Moines*, 22 CATHOLIC WORLD 433, 434–35 (1876)).

28. *Id.* at 220 (quoting Enabling Act of 1889, ch. 180, 25 Stat. 676, 677).

29. *See, e.g.*, Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992).

30. Act of June 7, 1897, ch. 3, 30 Stat. 62, 79.

31. *See McCollum*, 333 U.S. at 218 (Frankfurter, J., concurring) (quoting *The President's Speech at Des Moines*, *supra* note 27).

32. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, No. 18-1195, 2020 U.S. LEXIS 3518, at *24 (U.S. June 30, 2020) (quoting Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion)).

33. *Mitchell*, 530 U.S. at 828.

34. *Id.*

35. *Id.* at 829.

36. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2025 (2017).

37. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

offers support for private secular schools.[38] Yet perhaps unwittingly, the Court had, until very recently in its *Espinoza* decision, continued to perpetuate the anti-Sectarian origins of Blaine in an entanglement analysis exhibiting skepticism of any public support of religion.

B. The Pivot to Religious Autonomy

The Court's entanglement jurisprudence next expanded to include an approach focused on protecting the autonomy of the religious organization in *Walz v. Tax Commission*, which rejected an Establishment Clause challenge to New York's property tax exemption for church property.[39] The majority opinion in *Walz* held that New York's tax exemption was permissible because it recognized "the autonomy and freedom of religious bodies," and it "create[d] only a minimal and remote involvement between church and state[,] . . . far less than taxation of churches."[40] So in this instance, the Court held that there could be "benevolent neutrality" between church and state "without sponsorship and without interference."[41]

Justice Harlan's concurring opinion in *Walz* took a similar position, but he reached his conclusion by emphasizing that the exemption's "administration [would] not entangle government in difficult classifications of what is or is not religious," in part because the exemption covered "broad and divergent groups."[42] This alternative notion of entanglement was more fully developed in *Texas Monthly*, which involved a Texas sales tax that applied to all secular publications, but exempted "[p]eriodicals that [were] published or distributed by a religious faith and that consist[ed] wholly of writings promulgating the teaching of the faith and books that consist[ed] wholly of writings sacred to a religious faith."[43] Justice Brennan's opinion noted the entanglement problem inherent in the statute. Specifically, it "requires that public officials determine whether some message or activity is consistent with 'the teaching of the faith.'"[44] Justice Brennan thus concluded that although taxing churches would also "enmesh the operations of church and state to some degree," enforcing the exemption would

38. Espinoza v. Mont. Dep't of Revenue, No. 18-1195, 2020 U.S. LEXIS 3518, at *20, *31 (U.S. June 30, 2020) ("Montana's no-aid provision discriminates based on religious status. . . . A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

39. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 680 (1970).

40. *Id.* at 672, 676.

41. *Id.* at 669–70.

42. *Id.* at 696–698 (Harlan, J., concurring).

43. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion) (first alteration in original) (quoting TEX. TAX CODE ANN. § 151.312 (1982)).

44. *Id.* at 20.

"produce *greater* state entanglement with religion than the denial of an exemption."[45]

According to Professor Zelinsky, these cases mark the beginning of an important distinction in what he calls the Court's "'entanglement' moniker."[46] In particular, Professor Zelinsky argues that the majority opinion in *Walz* addresses the entanglement problem that results from government's "enforcement-related" activities (such as taxes), which affect "the internal 'autonomy' of religious institutions."[47] Justice Harlan's opinion in *Walz* and the majority opinion in *Texas Monthly* focused on the entanglement problems at the "borderline" of government action, when government must police the boundaries of who qualifies for an exemption and who does not.[48]

In a somewhat similar posture to these cases dealing with administrative entanglement, Justice Brennan also recognized that the religious clauses require that "all organs of government [maintain] a strict neutrality toward theological questions."[49] More specifically, courts may not inquire into the merits of or otherwise weigh the value of or monitor religious organizations' doctrines, including prayers,[50] sermons,[51] doctrine,[52] internal administration,[53] faith,[54] and discipline.[55] As the Tenth Circuit explained, "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and

45. *Id.* at 20–21 (emphasis added).

46. Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1641–42 (2012).

47. *Id.* at 1641–42.

48. *Id.* at 1640–45.

49. Sch. Dist. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring).

50. *See* Engel v. Vitale, 370 U.S. 421, 435 (1962) (striking down mandatory school prayer, stating that religion should be left "to the people themselves and to those the people choose to look to for religious guidance").

51. *See* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (Jehovah's Witness allowed to conduct religious service in public place and government barred from regulating religious sermons).

52. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451–52 (1969) (property dispute between two churches beyond scope of courts, since civil courts are prohibited from interpreting or weighing church doctrine).

53. *See* NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979) (NLRB cannot condemn church employment practices, since government review would "involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to [its] school's religious mission").

54. *See* United States v. Ballard, 322 U.S. 78, 86–88 (1944) (courts cannot determine truth or falsity of belief), *rev'd on other grounds*, 329 U.S. 187 (1946).

55. *See* Serb. E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (Court could not decide which bishop should lead organization because civil courts are prohibited from delving into matters of discipline, faith, internal organization, ecclesiastical rules, custom or law).

practices, whether as a condition to receiving benefits (as in *Lemon*) or as a basis for regulation or exclusion from benefits (as here)."[56]

One of the cases highlighting this principle doesn't use the word entanglement, but describes the principle by other means. In the *Watson v. Jones* case, the Court rejected the English law that gave the state ultimate authority over ecclesiastical disputes, in favor of church autonomy over "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."[57] Later, in *NLRB v. Catholic Bishop of Chicago*, the Court recognized that even the "process of inquiry" by government into religious doctrine or sensitive internal affairs could "impinge on rights guaranteed by the Religion Clauses."[58] Thus, the Court refused to allow the National Labor Relations Board even to exercise jurisdiction over lay faculty members at two groups of religious high schools, or to order the schools to bargain with unions on behalf of teachers.[59] The Court explained that "[t]he key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."[60] The Court further made clear that "[g]ood intentions" of government would not "avoid entanglement with the religious mission of the school."[61]

Widmar v. Vincent is another case that involves elements of both doctrinal entanglement and government surveillance and monitoring.[62] There, the Court held that a state university could not bar student groups from using university facilities for religious purposes.[63] Furthermore, in response to Justice White's argument that the Establishment Clause permitted the university to bar use of public facilities for "religious worship" but not for "religious speech,"[64] the majority held that such a distinction would: (1) compel the university "to inquire into the significance of words and practices to different religious faiths, and in varying

56. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261 (10th Cir. 2008) (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984)).

57. 80 U.S. (13 Wall.) 679, 727 (1872); *see also* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (First Amendment gives religious organizations "independence from secular control or manipulation[,] . . . power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

58. *NLRB*, 440 U.S. at 502.

59. *Id.* at 506–07.

60. *Id.* at 501.

61. *Id.* at 502.

62. 454 U.S. 263, 267 (1981).

63. *Id.*

64. *Id.* at 284 (White, J., dissenting).

circumstances by the same faith,"[65] and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule."[66] This monitoring would have impermissibly entangled the government in the religious group's affairs. Thus, in these contexts, the Court was employing entanglement to prevent against excessive government monitoring or administrative evaluations of religious practices, affairs, or doctrines.

The Court just recently affirmed the relevance of entanglement analysis in the context of church autonomy in *Our Lady of Guadalupe School v. Morrissey-Berru*.[67] There, the Court affirmed the ministerial exception principle from its 2012 decision in *Hosanna-Tabor*, which prevents government from interfering with the employment relationship between a religious organization and a religious leader it selects. But the Court went on to clarify in *Our Lady* that courts should also refrain from deciding whether a leader is a "co-religionist," as this would "risk judicial entanglement in religious issues."[68] Thus, the ministerial exception is a protection that is not limited solely to "practicing" members of "the religion with which the employer is associated."[69] Justices Thomas and Gorsuch would have gone further and said that the "broader inquiry whether an employee's position is 'ministerial'" should be entirely off limits to the courts because of entanglement concerns.[70]

C. Lemon's Prophylactic Entanglement Related to Public Support

In 1971, the *Lemon v. Kurtzman* Court formally established the "*excessive* . . . entanglement" inquiry as an official prong of the Court's newly minted test.[71] In *Lemon*, the Court determined that state aid for religious schools constituted an establishment because the aid was conditioned on several entangling regulatory controls.[72] In efforts to prevent an establishment, one state had imposed a system of "comprehensive, discriminating, and continuing state surveillance"[73] to ensure that funds were not being used for "subject[s] . . . [of] religio[n], . . . morals or forms

65. *Id.* at 269 n.6.
66. *Id.* at 272 n.11.
67. No. 19-267, 2020 U.S. LEXIS 3547 (U.S. July 8, 2020).
68. *Id.* at *39.
69. *Id.* at *38.
70. *Id.* at *43 (Thomas, J., concurring).
71. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (emphasis added) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).
72. *Id.* at 616.
73. *Id.* at 619.

of worship."[74] One state's program even specifically targeted Roman Catholic schools, and no other religious private schools.[75]

On the same day, the Court decided a similar case, but reached a different conclusion.[76] In *Tilton v. Richardson*, the Court upheld the constitutionality of a public construction grant for a religiously affiliated college and university facilities because such grants did not require surveillance to prevent diversion to sectarian use.[77] Indeed, such grants were one-time, single-purpose grants that engendered no ongoing church-state monitoring and entanglement.[78] These cases highlighted the incorporation of the type of monitoring problems discussed above.

From these early "excessive entanglement" cases, it also appears that the Court was beginning to introduce a "prophylactic dimension" into its Establishment Clause jurisprudence, particularly related to public support of religious groups. Relationships between religious organizations and state authorities were forbidden not only if they resulted in direct government support of religious enterprises, but also if such relationships were "*pregnant with dangers* of excessive government direction" of the enterprises as well.[79] In some applications this "prophylactic dimension" perhaps strengthened the "wall of separation" between church and state. On its face, *Lemon* characterized this "wall" as "a blurred, indistinct, and variable barrier."[80] Yet it also described "excessive entanglement" as a doctrine that would tend "to *confine* rather than enlarge the area of permissible state involvement with religious institutions."[81]

The high-water mark of this "prophylactic dimension" within the excessive entanglement test occurred a few years later, in *Meek v. Pittenger*.[82] In *Meek*, the State of Pennsylvania passed a law that provided all schools with funding for testing services, counseling and health services, textbook loans, and other instructional materials.[83] In reviewing that law, the Court upheld the textbook loan program,[84] but struck down the other forms of aid.[85] The Court held that all the programs that gave aid directly to religious schools or teachers were unconstitutional, because "[t]he State

74. *Id.* at 620–21.
75. *Id.* at 615–16.
76. Tilton v. Richardson, 403 U.S. 672, 687–88 (1971) (plurality opinion).
77. *Id.*
78. *Id.*
79. *Lemon*, 403 U.S. at 620 (emphasis added).
80. *Id.* at 614.
81. *Id.* (emphasis added).
82. 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).
83. *Id.* at 351–52.
84. *Id.* at 352–55.
85. *Id.* at 359–62 (plurality opinion).

must be certain . . . that subsidized teachers do not inculcate religion," and yet because "a teacher remains a teacher, . . . the danger that religious doctrine will become intertwined with secular instruction persists."[86] In other words, it was unconstitutional for the State to provide religious teachers or schools with material "which from its nature *can be* diverted to religious purposes."[87] It also was unconstitutional for the State to rely "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained."[88]

The Court began to retreat from this particularly restrictive approach to entanglement. Only a few years later, the Court in *Roemer v. Board of Public Works of Maryland* held: "There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of 'excessive entanglement,' itself makes that clear."[89] Further, in *Regan*, the Court maintained that it will not inevitably assume "bad faith upon which any future excessive entanglement [c]ould be predicated."[90] Despite these initial criticisms, however, the "excessive entanglement" test continued to function as the Court's primary tool to assess whether government assistance programs violated the Establishment Clause for several decades.[91]

In 1973, the Court struck down a State law that reimbursed religious schools for expenses incurred to satisfy the State's testing requirement.[92] In that case, the Court feared that such an "inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do."[93] In 1977, the Court allowed counseling services held at sites away from religious school campuses, diagnostic services provided at the religious school campuses, and standardized test scoring services provided at nearby public schools.[94] However, it did not allow religious schools to receive funds for their own instructional materials or for field trips.[95] According to the Court, the State

86. *Id.* at 370–71 (majority opinion) (quoting *Lemon*, 403 U.S. at 619).
87. *Id.* at 357 (emphasis added) (quoting Meek v. Pittinger, 374 F. Supp. 639, 662 (E.D. Pa. 1974)).
88. *Id.* at 369.
89. 426 U.S. 736, 766–67 (1976) (emphasis omitted).
90. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 660–61 (1980).
91. 1 WILLIAM J. RICH, *Effects, Entanglement, and Aid to Religious Programs and Activities*, *in* MODERN CONSTITUTIONAL LAW § 10:13 (3d ed. 2017).
92. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973).
93. *Id.* at 481–82.
94. Wolman v. Walter, 433 U.S. 229, 255 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).
95. *Id.*

could not provide services that could be "diverted to sectarian uses."[96] The Court also struck down several other programs in the 1980s, which also fostered a "pervasive monitoring by public authorities in the sectarian schools," and required "ongoing inspection . . . to ensure the absence of a religious message."[97]

In 1997, however, the Court overruled many of these cases in *Agostini v. Felton*.[98] In *Agostini*, Justice O'Connor wrote that the Court had "abandoned the presumption . . . that the placement of public employees on parochial school grounds *inevitably* results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[99] This assertion therefore walked back applications of the "excessive entanglement" test, especially any presumption that "public employees will inculcate religion simply because they happen to be in a sectarian environment."[100] Similarly, in *Zelman v. Simmons-Harris*, the Court held that there is no entanglement where a state "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[101]

In *Lynch v. Donnelly*, the Court acknowledged some inconsistencies in this type of entanglement application.[102] After being asked to review a district court's finding regarding entanglement,[103] the Court decided to "not even apply the *Lemon* 'test'" because it found the "line-drawing process" to be too difficult.[104] In addition, Chief Justice Rehnquist later lamented that the Court's continued confusion about entanglement had become so perplexing, that he wondered "whether the possibility of meeting the entanglement test is now anything more than 'a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.'"[105]

In its recent *Espinoza* decision, the Court based its decision requiring public support for a religious school on a distinction between religious

96. *Id.* at 251 n.18.

97. Aguilar v. Felton, 473 U.S. 402, 412–13 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); *see also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 376–77 (1985), *overruled by Agostini*, 521 U.S. 203.

98. 521 U.S. 203.

99. *Id.* at 223 (emphasis added).

100. *Id.* at 234.

101. 536 U.S. 639, 652 (2002).

102. 465 U.S. 668, 684–85 (1984).

103. *Id.*

104. *Id.* at 679.

105. Meek v. Pittenger, 421 U.S. 349, 394 (1975) (Rehnquist, J., concurring in the judgment in part and dissenting in part) (quoting Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring)), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

status and religious use.[106] The Court left open some possibility that government might restrict funds that were being put to a religious "use."[107]

D. Political Entanglement

Along with establishing the "excessive entanglement" test, *Lemon* also created "[a] broader base of entanglement of yet a different character" which it defined as the "divisive political potential of the[] state programs."[108] In particular, the *Lemon* Court explained that while most "political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system," it held that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[109]

This doctrine took on a life of its own in later cases. For example, in *Nyquist*, the Court held that "competing efforts to gain or maintain the support of government" by religious groups had "occasioned considerable civil strife," which conflicted with the First Amendment.[110] Furthermore, in *Meek*, the Court held that "the prospect of repeated confrontation" between religious teachers and state officials "provide[d] successive opportunities for political fragmentation and division," and the attendant "danger that religious doctrine will become intertwined with secular instruction."[111]

In *Larson v. Valente*, the Court applied the political entanglement doctrine outside the school aid context.[112] At issue in *Larson* was a Minnesota reporting law which only applied to religious organizations that received more than half of their contributions from nonmembers.[113] In determining that the reporting requirement was unconstitutional, the *Larson* Court held that "the distinctions drawn by [the Minnesota statute], and its fifty per cent rule 'engender a risk of politicizing religion.'"[114] The *Larson* Court did not rely on the political entanglement doctrine outlined in *Lemon*. Rather, it compared the 50 percent statute to the "European legacy" of

106. Espinoza v. Mont. Dep't of Revenue, No. 18-1195, 2020 U.S. LEXIS 3518, at *16 (U.S. June 30, 2020) ("The provision plainly excludes schools from government aid solely because of religious status.").

107. *Id.* at *17–18. The Court did note, however, that "[n]one of this is meant to suggest that we agree with the Department, . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.* at *19 (citation omitted).

108. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

109. *Id.*

110. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796 (1973).

111. *Meek*, 421 U.S. at 370, 372.

112. 456 U.S. 228 (1982).

113. *Id.* at 231–32.

114. *Id.* at 253 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 695 (1970) (Harlan, J., concurring)).

"excessive government direction . . . of churches" "and evaluation of . . . religious content," which was expressly condemned within "the history and logic of the Establishment Clause."[115]

The political entanglement doctrine has received significant pushback, however. As early as 1977, members of the Court were already considering whether political division even mattered at all:

> At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is [therefore] remote . . . .[116]

Later, in *Lynch v. Donnelly*, the Court also held that the mere fact that a city sponsored a nativity scene in a way that would likely result in political divisions along religious lines was insufficient to show entanglement.[117] Indeed, the Court explicitly explained that it has "not held that political divisiveness alone can serve to invalidate otherwise permissible conduct."[118]

Despite these rather pointed criticisms, the political entanglement doctrine resurfaced in later cases. Justice Breyer's dissent in *Zelman* contains his perspective that the Establishment Clause was created to avoid:

> religious strife, not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.[119]

Justice Breyer also asserted this opinion in *Van Orden v. Perry*, where he stated that political divisiveness "promotes social conflict, sapping the strength of government and religion alike."[120] Similarly, in *McCreary County v. American Civil Liberties Union*, Breyer joined an opinion stating that the Framers "intended not only to protect the integrity of individual

115. *Id.* at 244, 246, 255 (first aleration in original).

116. Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

117. 465 U.S. 668, 684–85 (1984).

118. *Id.* at 684.

119. Zelman v. Simmons-Harris, 536 U.S. 639, 722–23 (2002) (Breyer, J., dissenting) (emphasis omitted).

120. Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

conscience . . . but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate."[121]

That said, the majority in *Zelman* opposed Justice Breyer's arguments. "We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs."[122]

E. Entanglement with Public Functions

The Court has also expanded entanglement analysis to include some contexts where religious groups have been delegated discretionary government authority. For example, in *Larkin v. Grendel's Den, Inc.*, the Court held that a State could not delegate authority to churches by allowing them to ban liquor licenses from establishments within 500-feet of their property.[123] The Court determined that part of the problem was that the "churches' power under the statute is standardless," and also that the State had impermissibly "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body."[124] The Court discussed the "entanglement implications of a statute vesting significant governmental authority in churches," and thus "enmesh[ing] churches in the exercise of substantial governmental powers."[125] The Court determined that "few entanglements could be more offensive to the spirit of the Constitution."[126]

In *Kiryas Joel Village School District v. Grumet*, the Court similarly pointed to the "entangling" problem of delegating important, discretionary governmental powers to religious bodies because the state had created a separate school district for a village that consisted of members of the Satmar Hasidim tradition of Judaism.[127] The purpose of this school district was to prevent "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different" in normal public schools.[128] Although the Court did not treat it as dispositive that a religious group had received a benefit, the Court held that the State could not "single[] out a particular religious sect for special treatment."[129] Furthermore, according to Justice Kennedy's concurring opinion: "The real

121. 545 U.S. 844, 876 (2005).
122. *Zelman*, 536 U.S. at 662 n.7; *see also* Mitchell v. Helms, 530 U.S 793, 825 (2000).
123. 459 U.S. 116 (1982).
124. *Id.* at 125, 127.
125. *Id.* at 126.
126. *Id.* at 127.
127. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 697, 708 (1994).
128. *Id.* at 692 (alteration in original) (quoting Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988)).
129. *Id.* at 698, 706.

vice of the school district . . . [was] that [the government] created it by drawing political boundaries on the basis of religion."[130]

Yet the Supreme Court has not suggested that religious groups or individuals can never participate in public functions. In both *Marsh v. Chambers*,[131] and *Town of Greece v. Galloway*, the Supreme Court determined that local governments could permit chaplains to open government sessions with prayer.[132] And in *Bowen v. Kendrick*,[133] the Supreme Court upheld the constitutionality of a government program that partnered with organizations "that were affiliated with religious denominations and that had corporate requirements that the organizations abide by religious doctrines" to provide publicly funded social services to combat teen pregnancy.[134] The program allowed religious groups to fulfill an important function and "expressly contemplated that some of those moneys might go to projects involving religious groups."[135] The Court also rejected the claim "that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs,"[136] and emphasized that a "symbolic link" between the government and the religious organization did not constitute an improper entanglement with religion.[137]

F. A Meandering Approach to Religious Exemptions

In *McDaniel v. Paty*, Justice Brennan asserted that government is permitted

> to take religion into account when necessary to further secular purposes unrelated to the advancement of religion, and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.[138]

Justice Brennan viewed this as an exception to the principle that "government may not use religion as a basis of classification for the

130. *Id.* at 722 (Kennedy, J., concurring in the judgment) (emphasis added).
131. 463 U.S. 783 (1983).
132. 572 U.S. 565 (2014).
133. 487 U.S. 589 (1988).
134. *Id.* at 599.
135. Hein v. Freedom from Religion Found., 551 U.S. 587, 607 (2007) (plurality opinion).
136. *Bowen*, 487 U.S. at 609.
137. *Id.* at 613.
138. McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (footnotes omitted).

imposition of duties, penalties, privileges or benefits."[139] This was the first clear statement of the accommodation principle in a Supreme Court opinion.[140] Government thus need not fear entanglement with religious beliefs simply because it removes burdens on religious exercises, even if this requires the government to "use religion as a basis of classification" in a way it may not do elsewhere.[141] Justice Brennan noted that such "religious classifications" were sometimes necessary to "avoid '[a] manifestation of . . . hostility [toward religion]'" contrary to the Free Exercise Clause.[142] The Court later explained that when accommodations are made for religion in general rather than for one sect in particular, "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[143]

As notions of entanglement expanded under the *Lemon* test, the Court seemed to walk back from this more protective view of religion. In *Estate of Thornton v. Caldor, Inc.*, for example, the Court struck down a state law requiring employers to accommodate work schedules of their employees.[144] The Supreme Court noted that the statute required the State Mediation Board to decide "which religious activities may be characterized as an 'observance of Sabbath' in order to assess employees' sincerity."[145] The Court affirmed the lower court's determination that this sort of inquiry was "exactly the type of 'comprehensive, discriminating and continuing state surveillance' . . . which creates excessive governmental *entanglements* between church and state."[146] Similarly, in *Wallace v. Jaffree*, the Court struck down a state law that accommodated school children who may wish to engage in a moment of prayer by instituting a daily moment of silence.[147] Thus, the *Lemon* test seemed to require courts to take a suspicious view of religious accommodations.

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139. *Id.*

140. McConnell, *supra* note 15, at 176–77.

141. *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in the judgment).

142. *Id.* (alterations in original) (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948)).

143. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987); *see also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) ("[T]here is ample room for accommodation of religion under the Establishment Clause."); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970) (holding that government may "play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

144. 472 U.S. 703, 708–10 (1985).

145. *Id.* at 708.

146. *Id.* (alteration in original) (emphasis added) (quoting Caldor, Inc. v. Thornton, 464 A.2d 785, 794 (1983)).

147. 472 U.S. 38 (1985).

But the Court seems to have distanced itself again from that temporary suspicious posture, returning to a view that religious accommodations do not generally pose Establishment Clause problems, entanglement or otherwise.[148] In *Corp. of Presiding Bishop v. Amos*, the Court unanimously upheld Title VII's provision that exempts religious organizations from religious nondiscrimination requirements.[149] The Court explained that the exemption does not "impermissibly entangle[] church and state." Rather, it effects "a more complete separation of the two."[150] In *Employment Division v. Smith*, the Court expressed a favorable view of legislative religious exemptions, noting that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[151] Accordingly, the Court noted that permissive religious exemptions could still be provided consistent with the First Amendment through the "political process."[152] In *Hobby Lobby*, the Supreme Court addressed the interplay between a religious exemption statute called the Religious Freedom Restoration Act (RFRA) and the Establishment Clause.[153] The Court rejected the position that a religious exemption imposing externalities on others would necessarily violate the Establishment Clause.[154] And most recently, in *Little Sisters of the Poor v. Pennsylvania*, [155] the Surpeme Court upheld a religious exemption to the contraception mandate that the Trump Administration had crafted. Justice Alito explained in his concurrence, "[T]here is no basis for an argument—that the new rule" offering a religious exemption "violates th[e Establishment] Clause."[156]

Thus, with religious exemptions, the Court seems to have ended up in a similar position where it began on this issue: assessing religious beliefs to lift government burdens placed upon them does not result in an improper entanglement or other sort of Establishment Clause violation.

148. McConnell, *supra* note 15, at 182.
149. 483 U.S. 327, 330 (1987).
150. *Id.* at 339.
151. 494 U.S. 872, 890 (1990).
152. *Id.*
153. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729–30 (2014).
154. *Id.* at 729 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" But such "consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest" under strict scrutiny analysis. (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005))).
155. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, No. 19-431, 2020 U.S. LEXIS 3546 (U.S. July 8, 2020).
156. *Id.* at *61 n.13 (Alito, J., concurring).

II. UNTANGLING THE HISTORICALLY GROUNDED ASPECTS OF ENTANGLEMENT

The Supreme Court continues to insist that the doctrines governing Establishment Clause questions are uniquely shaped by "specific practice[s]" of history.[157] So if the Court does not throw out its *Lemon* jurisprudence entirely—which seems unlikely—this Part provides some preliminary thoughts on which aspects of the Court's entanglement jurisprudence seem most defensible on historical grounds that other scholars have identified.

A. Historically-Defensible Applications of Entanglement

We have a few sparse records of the concept of "entanglement" being discussed in a religious context at the founding. For example, John Adams, like many other Americans, feared that the Church of England would continue to exercise spiritual dominion over the former thirteen colonies after the Revolutionary War.[158] In particular, John Adams condemned the English tradition of allowing Parliament to "entangle [its] constitution[] with spiritual lords," who then subjected adherents of other religious groups to "the utmost artifices of bigotry."[159] The concept of religious "entanglement" was used by other members of the public as well. American Protestant pastors, for example, reviled the practice of the Anglican bishops who "entangle[d] [themselves] with the affairs of this life" through their authority to "intermeddle" in the affairs of all religious sects and to rule over "civil matters."[160] Another sermon given during the founding period argued that government must not "entangle the small" by binding the consciences of men and "prescribing creeds and making acts of conformity."[161] These early clergy were demanding that the government allow them to "stand on even ground," as well as to "equally enjoy their religious opinions, . . .

157. Town of Greece v. Galloway, 572 U.S. 565, 577 (2014). As of 2006, "76% of the Justices who have written at least one Religion Clause opinion have appealed to history [i.e., specific founders or the founding era], and every one of the twenty-three Justices who authored more than four Religion Clause opinions have done so." Hall, *supra* note 16, at 572.

158. Morgan W. Patterson, *The Contributions of Baptists to Religious Freedom in America*, 73 REV. & EXPOSITOR 23 (1976).

159. John Adams, *Defence of the Constitutions of Government of the United States of America*, *in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 3, 119 (Charles Francis Adams ed., 1851).

160. NOAH WELLES, VINDICATION OF THE VALIDITY AND DIVINE RIGHT OF PRESBYTERIAN ORDINATION 138 (T. Collier. ed., 1796).

161. TIMOTHY DWIGHT, A SERMON PREACHED AT NORTHAMPTON ON THE TWENTY-EIGHTH OF NOVEMBER 1781: OCCAISONED BY THE CAPTURE OF THE BRITISH ARMY UNDER THE COMMAND OF EARL CORNWALLIS 17, 31–32 (Nov. 28, 1781).

without molestation, or being exposed to fines and forfeitures or to any temporal disadvantages."[162] Thus, at least these records suggest an idea of entanglement linked to government control over religion and intermeddling with religious practices and the conscience of individuals.

These sorts of discussions track some of the hallmarks of an establishment that Professor Michael McConnell has identified, including government control over church doctrine, governance, and personnel, and prohibitions on worship in dissenting churches.[163] In this vein, Professor John Witte has explained that establishing Anglicanism in England "led to all manner of state controls of the internal affairs of the established Church."[164] Some of the Court's current entanglement jurisprudence falls within these hallmarks.

For example, the Court's case law cautioning against government monitoring or interference with church administration or doctrine helps protect the autonomy and religious integrity of institutions. These cases, including *Walz*,[165] *Watson v. Jones*,[166] *NLRB v. Catholic Bishop of Chicago*,[167] *Widmar*,[168] and *Our Lady of Guadalupe School*[169] are consistent with a historical approach. Perhaps the reasoning of some of these cases could be recast—it is unnecessary, for example, that the Court employ the "entanglement" moniker to arrive at these results. But continuing the use of entanglement analysis at least in this context would find rich support in historical sources.

The performance of public functions appears to be another area where entanglement analysis is historically justified, but this point should not be overstated. As I have written elsewhere,[170] historical sources do not reflect widespread establishment concerns about churches performing civil functions *at all*. Indeed, some charitable works originally performed by churches—like caring for orphans—did not even become civil functions the government took on until long after churches had been performing them as

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162. HENRY CUMINGS, A SERMON PREACHED AT BILLERICA DECEMBER 15, 1796, BEING THE DAY APPOINTED BY AUTHORITY, TO BE OBSERVED THROUGHOUT THE COMMONWEALTH OF MASSACHUSETTS AS A DAY OF PUBLIC PRAISE AND THANKSGIVING 13 (Dec. 15, 1796).

163. McConnell, *supra* note 11, at 2131.

164. JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 186 (2006).

165. 397 U.S. 664, 680 (1970).

166. 80 U.S. (13 Wall.) 679, 727 (1872).

167. 440 U.S. 490, 502 (1979).

168. 454 U.S. 263, 267 (1981).

169. Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267, 2020 U.S. LEXIS 3547 (U.S. July 8, 2020).

170. Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 557 (2019).

a ministry.[171] But religious performance of public functions did become problematic when the church was given preferential treatment or monopoly power over the function. For example, in the early republic, an article in a newspaper called the *Pennsylvania Journal* expressed concern about a law that only allowed members of an established church in England to teach in schools. The law also prevented parents from sending their children to a religious school consistent with the parents' religious beliefs.[172]

Thus, establishment restrictions were created both to disallow government's ability "to control and harness religion in service of the state,"[173] as well as the church's ability to control and harness the state in service of one religion.[174] As a result, the Court's entanglement decisions in *Zelman v. Simmons-Harris*,[175] *Bowen v. Kendrick*,[176] and *Espinoza*[177] seem historically sound. These decisions approve government partnerships with religious groups to perform public functions so long as beneficiaries have various options and real choice in the matter.[178]

B. Dubious Applications of Entanglement

Other aspects of the Court's entanglement jurisprudence seem much further afield from historical justifications. These include the anti-sectarian concerns about any sort of public funding to support religion, monitoring issues that are problems of the Court's own making, fear of political divisiveness, and concerns about religious exemptions.

To begin with, the Court's rhetoric expressing concern about aid to any religious groups (even in an even-handed way) can be traced back to the

171. Private religious organizations largely developed the adoption and foster care system. *See* E. Wayne Carp, *Introduction: A Historical Overview of American Adoption*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 1, 3–4 (E. Wayne Carp ed., 2002); *see also* ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 60, 125 (2008); BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 15 (2002); Paula F. Pfeffer, *A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago, 1833–1933*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES, *supra*, at 101, 103–05.

172. *See The Remonstrant, No. IV*, PA. J., Nov. 3, 1768, *reprinted in* COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 83, 85 (1769) ("[T]he Toleration Act . . . deprived all parents that were not of the established Church, of the great trust committed to them by GOD, and nature, to train up their own children according to their own sentiments in religion, and the fear of GOD. No catechism was to be taught to children, but that of the Church of England, and no man under severe penalties, was allowed to teach even an English school, who did not, in all things, conform to that Church. Let our Anatomist call this unmerited abuse . . . .").

173. McConnell, *supra* note 11, at 2208.

174. Barclay et al., *supra* note 170, at 557.

175. 536 U.S. 639 (2002).

176. 487 U.S. 589 (1988).

177. Espinoza v. Mont. Dep't of Revenue, No. 18-1195, 2020 U.S. LEXIS 3518 (U.S. June 30, 2020).

178. *Id.* at 615–17; *Zelman*, 536 U.S. at 662–63.

Court's first entanglement decision in *McCollum*, in which it praised policies such as Blaine Amendments.[179] Scholars have thoroughly canvassed the fact that this concern about any financial support of "sectarian" education was linked to a groundswell of nativist opposition to any governmental support for the Catholic Church.[180] Massive Catholic immigration in the mid-1800s created friction, and no "area of disagreement between Protestants and Catholics caused more friction than the place of religion in the public schools."[181] The 1844 "Bible Riots" in Philadelphia left more than fifty people dead (and many more injured) and destroyed Catholic Churches.[182] In 1859, Boston expelled 400 Catholic students for refusing to say the Lord's Prayer.[183]

In its actual application, anti-sectarian didn't really mean no aid for religion. As Noah Feldman has explained, "the theorists of the common schools thought that the schools must impart some foundational moral values to promote civic virtues and believed that those moral values must derive in some way from Christian religion."[184] "Non-sectarianism, it was thought, would . . . enable the state to take a stance in favor of broadly shared, foundational Christian values."[185] Horace Mann, the leader of the common schools movement, argued that common schools "should teach the 'fundamental principles of Christianity.'"[186] A nonsectarian school "earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible."[187] He also stated, "In every course of studies, all the practical and preceptive parts of the Gospel

179. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 218 n.6 (1948).

180. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193–251 (Harv. Univ. Press paperback ed. 2004); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003); Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause* (Univ. of Ga. Sch. of Law Research Paper Series, Paper No. 2019-34, 2019).

181. Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. POL. 503, 507 (1970).

182. Frank S. Ravitch, *A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 296, 298 (Stephen M. Feldman ed., 2000); Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840*, 8 HIST. EDUC. Q. 44, 75–76 (1968).

183. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 40 (2012). Nevada's Blaine Amendment was enacted in response to public funding of a Catholic orphanage. *A Much Needed Amendment*, DAILY NEV. TRIB. (Carson City), Feb. 21, 1877 ("[This] is a stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States.").

184. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L & POL. 65, 67 (2002).

185. *Id.* at 66.

186. GREEN, *supra* note 183, at 21.

187. HORACE MANN, TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD OF EDUCATION, *in* TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION TOGETHER WITH THE TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD 13, 117 (1849).

should have been sacredly included; and all dogmatical theology and sectarianism sacredly excluded."[188] In other words, the historical roots of anti-sectarian rhetoric really supported preferential public support for certain religious beliefs—precisely the type of preferentialism the Establishment Clause was meant to prevent against.

Furthermore, as I and other scholars have argued elsewhere, the historical evidence does not support a conclusion that at the founding period any form of public support for religious organizations was viewed as equivalent to an establishment of religion.[189] Rather, public support became problematic if it involved public support given in a way that preferred established churches to other congregations,[190] or resembled a coerced church tithe in that it was a special earmarked tax directly given to churches.[191] For example, regarding preferential public support, Rhode Island Pastor Ezra Stiles in his 1760 discourse at the Convention of the Congregational Clergy details that specific financial advantage was given exclusively to the established church. He stated, "In Maryland and Virginia it is episcopacy [that is established], with appropriations of large revenues from tobacco for the established clergy only."[192] Similarly, in a 1774 pamphlet, Thomas Bradbury Chandler stated,

> An established religion, is a religion which the civil authority engages, not only to protect, but to support; and a religion that is not provided for by the civil authority, but which is left to provide for itself, or to subsist on the provision it has already made, can be no more than a tolerated religion.[193]

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188. HORACE MANN, GO FORTH AND TEACH: AN ORATION DELIVERED BEFORE THE AUTHORITIES OF THE CITY OF BOSTON, JULY 4, 1842 (July 4, 1842), *reprinted in* GO FORTH AND TEACH: AN ORATION DELIVERED BEFORE THE AUTHORITIES OF THE CITY OF BOSTON *BY* HORACE MANN *ALSO* OTHER MATERIALS RELATING TO HIS LIFE 1, 44–45 (Comm. on the Horace Mann Centennial Nat'l Educ. Ass'n 1937).

189. Barclay et al., *supra* note 170, at 557. For an excellent discussion of the types of church taxes that were concerning during the founding period, as opposed to those that were not, see Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PENN. L. REV. (forthcoming 2021).

190. Barclay et al., *supra* note 170, at 558 ("[O]ur results always involved public support given in a way that *preferred* established churches to other congregations. Sometimes government compounded the problem by leveraging that support to try to control church leadership or doctrine of the established church.").

191. *Id.* at 544, 548–49; *see generally* Storslee, *supra* note 189.

192. EZRA STILES, A DISCOURSE ON THE CHRISTIAN UNION: THE SUBSTANCE OF WHICH WAS DELIVERED BEFORE THE REVEREND CONVENTION OF THE CONGREGATIONAL CLERGY 99 (Apr. 23, 1760).

193. THOMAS BRADBURY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS 55 (N.Y., James Rivington 1774).

As for mandatory church tithes, John Murray stated in 1764 that the colonies "made an attempt to get themselves eased of the burden of tithes, which they could not conscientiously pay, and for refusal of which they have so greatly suffered."[194] If public support of religious groups in general was viewed as a problematic hallmark of an establishment, one would expect to see more concerns raised about things like tax exemptions or land grants. But the opposite is true.[195]

The ahistorical approach the Court has taken to concerns about religious groups receiving funds to use for religious purposes gave rise to secondary ahistorical issues about entanglement necessary to monitor the use of funds. In *Lemon* itself, the government believed that state aid for religious schools must be conditioned on several entangling regulatory controls, including "comprehensive, discriminating, and continuing state surveillance" to ensure that funds were not being used for "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[196] Given previous precedent expressing concern about public support of religion, the government had a reasonable concern that it could not just give money to religious schools without strings attached. But then these strings themselves became an entanglement problem.

To be sure, this sort of monitoring is problematic. But it is only needed because of anti-sectarian skepticism of giving support to churches even if support is even-handed. Chief Justice Rehnquist attacked the illogic of this position. "[T]he 'Catch-22' paradox of its own creation," results in a situation "whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."[197] Were we to remove the primary problem, the idea that even-handed public support of religious groups is an entanglement, we would avoid the secondary monitoring entanglement issue as well. In its recent *Espinoza* decision, the Court based its decision requiring public support for a religious school on a distinction between religious status and religious use.[198] The Court left open

194. 4 JAMES MURRAY, THE HISTORY OF RELIGION: PARTICULARLY OF THE PRINCIPAL DENOMINATIONS OF CHRISTIANS 240 (London, C. Henderson et al. 1764); *see also* Barclay et al., *supra* note 170, at 548–49.

195. "So ingrained was the practice of land grants for the support of religion that when Congress . . . organize[d] settlement of the Northwest Territory, its first two substantial grants specified that a section in each township would be set apart for the support of religion, along with one for education." McConnell, *supra* note 11, at 2150; *see also* Chapman, *supra* note 180.

196. Lemon v. Kurtzman, 403 U.S. 602, 619–21 (1971).

197. Aguilar v. Felton, 473 U.S. 402, 420–21 (1985) (Rehnquist, J., dissenting) (quoting Wallace v. Jaffree, 472 U.S. 38, 109–110 (1985) (Rehnquist, J., dissenting)), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

198. Espinoza v. Mont. Dep't of Revenue, No. 18-1195, 2020 U.S. LEXIS 3518, at *16 (U.S. June 30, 2020) ("The provision plainly excludes schools from government aid solely because of religious status.").

some possibility that government might restrict funds that were being put to a religious "use."[199] Notably, if the Court does allow government to discriminate against religious use of funds, and thus monitor the use of those funds, this may raise some of the entangling concerns that first gave rise to *Lemon*'s central holding in the school context. The inability to draw clean lines between status and use was a reason Justice Gorusch criticized reliance on this distinction.[200] But the heightened risk of government entanglement may be another reason for the Court to eschew this distinction altogether.

As to political entanglement, other scholars have argued that there is no factual basis for the view that the Framers of the Constitution believed that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[201] This iteration of entanglement is famously difficult to apply or predict. Indeed, sometimes courts have incorrectly found political divisiveness when it has been caused by a lawsuit rather than the religious activity itself.[202]

And finally, concerns about entanglement related to government provision of religious exemptions similarly are unsupported by the weight of the historical evidence. As I have written elsewhere, along with other scholars,[203] this argument is not a persuasive account of the Supreme Court's current Establishment Clause doctrine or the historical underpinnings of that provision. Indeed, there are widespread examples of exemptions at the Founding, including for Quakers from the draft or other groups from oaths.[204] And there is no evidence that these exemptions were

199. *Id.* at *17–18. The Court did note, however, that "[n]one of this is meant to suggest that we agree with the Department, . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.* at *19 (citation omitted).

200. *Id.* at *58–64 (Gorsuch, J., concurring).

201. *Lemon*, 403 U.S. at 622; *see, e.g.*, Gaffney, *supra* note 14. For an in-depth analysis of why political divisiveness should not inform the interpretation of the Establishment Clause, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

202. Stephanie Barclay, Note, *Passive Acknowledgement or Active Promotion of Religion? Neutrality and the Ten Commandments in* Green v. Haskell, 2010 BYU L. REV. 3, 13–15.

203. *See, e.g.*, Stephanie Barclay, *First Amendment "Harms,"* 95 IND. L.J. (forthcoming 2020); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015); Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105 (2016); Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 59 J. CHURCH & ST. 357 (2016); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 45 (2014); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1383–84 (2016); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019); Marc DeGirolami, *Holt v. Hobbs and the Third-Party-Harm Establishment Clause Theory*, MIRROR JUST. (Oct. 7, 2014), http://mirrorofjustice.blogs.com/mirrorofjustice/2014/10/where-has-the-establishment-clause-third-party-harm-argument-gone.html [https://perma.cc/X7SH-NBHP].

204. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1467–73 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

viewed as tantamount to an establishment of religion. Thus, though the Supreme Court took a detour away from historical evidence when it decided cases such as *Caldor*, its current jurisprudence about exemptions seems to have returned to an approach consistent with the historical evidence.

III. CONCLUSION AND IMPLICATIONS

In its recent *American Legion* decision, the Supreme Court strongly suggested that the three-prong *Lemon* test is essentially dead letter. If one is using a historical approach for the Establishment Clause, then disregarding the first two prongs of the *Lemon* test certainly makes sense. Many scholars have observed that these aspects of the test appear to have been created whole cloth by a judiciary unconcerned with historical origins of the Establishment Clause. But what of the entanglement prong of the test? This Article cautions that rejecting all applications of entanglement analysis, would risk throwing the baby out with the bathwater.

A close analysis of the Court's entanglement jurisprudence, compared against historical support for the various applications, suggests that entanglement jurisprudence ought to remain good law in at least two contexts. First, where it has protected religious groups from government interference with the autonomy, internal affairs, and administration. Second, where it prevents government from treating certain religious groups in a preferential way, including by granting monopoly power in the performance of public functions. These lines of cases find more historical support for the types of government actions the Establishment Clause was ratified to protect against. While the Court need not continue to root this form of analysis under an "entanglement" label, this jurisprudence should remain good law.

On the other hand, the Court's entanglement precedent is on far shakier historical ground in several contexts, including anti-sectarian skepticism of any sort of government aid to religious groups (and accompanying monitoring requirements to avoid religious use of funds), concerns about political divisiveness when government interacts with religious groups, and opposition to government classifications necessary to provide religious exemptions.

If the Court were to modify its entanglement analysis to disregard ahistorical applications and embrace the historical ones, the upshot is this: Many ways in which the Establishment Clause and Free Exercise Clause have seemed to be in tension would fade away. Instead, both Religion Clauses would work together harmoniously to prevent problematic government interference with religious groups or preferential treatment of some religions, while still allowing government to even-handedly partner

with and support religious groups. Such an interpretation could facilitate an increase in religious pluralism and human flourishing and a decrease in unnecessary cultural fights aimed at excluding religion from the public sphere.