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COLORADO CHRISTIAN UNIVERSITY V. WEAVER: THE TENTH CIRCUIT'S IMPROPER REDEFINITION OF "EXCESSIVE ENTANGLEMENT"

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The relationship between government and religion stands as one of the most contentious issues in America.[1] Religion in publicly-funded schools has been described as "one of the most controversial issues in American education."[2] The First Amendment's Establishment Clause operates as the vehicle for

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1. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1668–70 (2006). Government and religion have tangled in courts over issues ranging from the posting of the Ten Commandments in courthouses to prayer in public schools. *See id.* at 1668–69; *see also* Engel v. Vitale, 370 U.S. 421, 422–25 (1962). The proper role of religion as it pertains to government in America has been debated since our nation's inception. *See* Roger Finke & Rodney Stark, *The Churching of America*, *in* RELIGION: NORTHERN AMERICAN STYLE 43, 47–49, (Thomas E. Dowdy & Patrick H. McNamara eds., 1997). *See generally* CLIFTON E. OLMSTEAD, HISTORY OF RELIGION IN THE UNITED STATES 2–3 (1960) (discussing the "constant competition" between church and state); Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 6–24 (2008) (detailing religious beliefs of our nation's principal founders). In fact, colonial rebellion found its roots in the oppression of religious freedom imposed by England and its national church, the Church of England. *Id.* at 58–60. Today, we are "increasingly, a nation divided by God," who "vote as we pray, or don't pray." Garnett, *supra*, at 1677 (internal citations omitted).

2. *See* SUSAN D. LOONEY, EDUCATION AND THE LEGAL SYSTEM: A GUIDE TO UNDERSTANDING THE LAW 53 (2004); *see also* George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 61–62 ("Nowhere is the role of religion as controversial as in public education."); Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & POL. 329, 329–30 (2002) (stating that prayer in schools was the subject of "[t]wo of the twentieth century's most controversial Supreme Court decisions"); Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 509 (1996) (describing public aid to parochial schools as the most important issue in church-state relations). Religion in schools has taken many forms, including religious observances, the debate over teaching evolution or creationism, reciting the Pledge of Allegiance, public aid to parochial schools, and government scholarship moneys directed to religiously affiliated universities. *See, e.g.*, Daniel L. Dreisbach, Everson *and the Command of History: The Supreme Court, Lessons of History, and Church-State Debate in America*, *in* EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 23–44 (Jo Renee Formicola & Hubert Morken eds., 1997) (discussing the importance and aftermath of the Supreme Court's decision regarding indirect aid to private schools in *Everson v. Board of Education*); MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 61–94 (3d ed. 2004) (discussing limits on the states' power to control public schools); David H. McClamrock, Note, *The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education*, 17 J.C. & U.L. 381, 381–83 (1991) (discussing government funding at religious institutions).

courts to effect the separation of church and state.[3] As higher education costs continue to increase, students in private and public universities alike rely on state-funded scholarships to meet tuition needs.[4] The Establishment Clause, however, is an obstacle for many students attending private universities, as it can severely restrict state funding for religious education.[5] When interpreting the Clause, some states use a blanket-rule approach based on the institution's degree of religiosity to either permit or deny funding, while other states weigh certain criteria to make a determination.[6]

To remedy this discrepancy, states need a uniform standard to gauge each institution's level of involvement in advancing or inhibiting religion in order to avoid an Establishment Clause violation. An inquiry into a particular institution's religious affiliation is necessary to achieve this legitimate state objective. Such an inquiry serves to assure neutrality with respect to government action toward religion.[7] The United States Court of Appeals for

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3. *See* Everson v. Bd. of Educ., 330 U.S. 1, 3, 15–16 (1947). The Supreme Court listed the following parameters of the Establishment Clause:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id.; *see also* Van Orden v. Perry, 545 U.S. 677, 681 (2005) (considering whether a Ten Commandments monument on the Texas State Capitol grounds violated the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971) (considering whether public funds to parochial schools violated the Establishment Clause).

4. *See* Commonfund, 2008 Higher Education Price Index Update, http://www.commonfund.org/Commonfund/CF+Institute/CI_About_HEPI.htm (follow "HEPI 2008 Table" hyperlink) (last visited Aug. 4, 2009); National Center for Education Statistics, Fast Facts, http://nces.ed.gov/fastfacts/display.asp?id=76 (last visited Aug. 4, 2009).

5. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772–74 (1973) (describing the three-part test that the Establishment Clause requires); *see also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (finding that the Fourteenth Amendment renders the First Amendment applicable to the states).

6. *Compare* FLA. STAT. ANN. §§ 1009.992(13), 1011.51 (West 2008) (excluding outright institutions deemed "pervasively sectarian" from state scholarship and endowment eligibility), *with* Cal. Statewide Cmtys. Dev. Auth. v. Purchase Agreement, 152 P.3d 1070, 1079 (Cal. 2007) (holding that California courts should "examine the substance of the education" provided by religious schools rather than their characterization as "pervasively sectarian"), Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682, 689–91 (Va. 2000) (explaining that although one department of an institution was pervasively sectarian, its participation in the bond program did not violate the Establishment Clause), *and* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (holding that the tax credit does not violate either the state or federal constitution).

7. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (stating that a relevant question in determining state sponsorship of religion is whether an outside observer, familiar with

the Tenth Circuit's recent decision in *Colorado Christian University v. Weaver* threatens to eliminate this type of inquiry, holding that these inquiries constitute an impermissible degree of involvement with religion.[8] By eliminating this inquiry, however, a state also loses its assurance of neutrality.

This Note focuses on the inquiry the state of Colorado used in evaluating whether an institution of higher education was "pervasively sectarian," and the Tenth Circuit's determination that such inquiry was excessive government entanglement with religion.[9] The concept of "excessive entanglement" was crafted as a tool that courts could use to analyze Establishment Clause issues, and as a guide that states could use to avoid Establishment Clause violations.[10] The extension of that concept to include the "pervasively sectarian" inquiry ignores precedent and leaves states without an effective guide with which to judge their compliance with the Establishment Clause.[11]

The Establishment Clause prohibits Congress from making laws respecting the establishment of religion.[12] It has been applied to the states through the Fourteenth Amendment,[13] and has been interpreted to mean that no state shall act to advance or prevent an establishment of religion.[14] The Supreme Court created a three-pronged test, commonly known as the *Lemon* test, for use in determining whether government action is proper under the Establishment Clause.[15] Government action is permissible if it: (1) reflects a secular purpose; (2) has the primary effect of "neither advance[ing] nor inhibit[ing] religion"; and (3) does not result in excessive entanglement with religion.[16]

The *Lemon* test was developed in response to a variety of challenged state government aid programs that benefitted religiously affiliated schools and the

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the statute at issue, would perceive the religious activity as state-sponsored); *Everson*, 330 U.S. at 14 (describing the difficulty in state courts' efforts to separate religion and government in determining whether tax legislation has the effect of aiding religion or the general public).

8. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261–62 (10th Cir. 2008); *see also Court Ruling is Victory for Religious Colleges*, USATODAY.com, Jul. 24, 2008, http://www.usatoday.com/news/education/2008-07-24-religious-colleges_N.htm ("The bottom line is that taxpayers will now end up having to pay for religious indoctrination . . . .").

9. *Colo. Christian Univ.*, 534 F.3d at 1250 (describing the criteria used in that inquiry as being an "intrusive scrutiny of religious belief and practice").

10. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971) (explaining that the concept of "excessive entanglement" indicates a nexus between church and state as well as an impermissible level of involvement between the two); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674–75 (1970) (describing the test for determining if there is excessive entanglement as "inescapably one of degree").

11. *Colo. Christian Univ.*, 534 F.3d at 1253 (framing the question as whether or not the state may choose to "exclude pervasively sectarian institutions . . . even when not required to").

12. *See* U.S. CONST. amend. I.

13. *See, e.g.*, Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 215–16 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

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

15. *Id.* at 612–13.

16. *Id.*

students attending them.[17] Often, these decisions hinged on the application of the test's excessive entanglement prong.[18] Excessive entanglement is frequently found in circumstances in which schools are subjected to extensive government oversight.[19] In response to the states' need for a finer standard with regard to this prong, the Supreme Court has held that providing direct aid to "pervasively sectarian" institutions is tantamount to excessive government entanglement with religion.[20] The term "pervasively sectarian" has been authoritatively defined to include instances where an institution is "so permeated by religion that the secular side cannot be separated from the sectarian."[21] In assigning this label, the state inquires into an institution's educational and religious purposes, objectives, and functions to determine the degree to which religion permeates the institution.[22]

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17. *Id.* at 606–07 (describing Pennsylvania and Rhode Island aid programs that reimburse teachers' salaries and the cost of textbooks and other materials at religiously affiliated schools); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 238–39 (1968) (considering a New York aid program that required school districts to loan textbooks to students attending parochial schools); Everson v. Bd. of Educ., 330 U.S. 1, 3–5 (1947) (considering a New Jersey program that provided transportation for students attending parochial schools).

18. *See Lemon*, 403 U.S. at 619–22 (determining that the degree of surveillance required to administer the Pennsylvania and Rhode Island reimbursement aid programs created an excessively entangled relationship between government and religion); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 670 (1970) (stating that the purpose of the religion clauses of the First Amendment is to create "boundaries to avoid excessive entanglement").

19. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 240–41, 243 (1977) ("Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement.").

20. *See* Hunt v. McNair, 413 U.S. 734, 746 (1973). The Court reasoned that "the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Id.* The Court, in *Roemer v. Board of Public Works,* further explained that the need for close monitoring increases with the degree to which an institution is sectarian, because pervasively sectarian institutions necessarily are fraught with excessive entanglement problems. 426 U.S. 736, 762 (1976) (noting that the opposite is true for secular activities and institutions).

21. *Roemer*, 426 U.S. at 759. The Colorado Supreme Court has characterized pervasively sectarian schools as

> those "[w]here religious indoctrination is [] a substantial purpose," those "whose educational function is not clearly separable from its religious mission," and those "whose religious mission predominates over its secular educational role. By contrast, it described sectarian schools whose students could constitutionally receive tuition assistance as those whose "secular function can readily be severed from its sectarian activity."

Colo. Christian Univ. v. Baker, No. 04-cv-02512-MSK-BNB, 2007 WL 1489801, at *6 (D. Colo. May 18, 2007) (quoting Ams. United for Separation of Church and State Fund, Inc. v. Colorado, 648 P.2d 1072, 1080–82 (Colo. 1982)) (alterations in original).

22. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 384–85 (1985) (finding that the character of religious schools receiving aid was pervasively sectarian); *Hunt*, 413 U.S. at 743–44; Tilton v. Richardson, 403 U.S. 672, 686–87 (1971) (weighing evidence provided by school that theology courses did not indoctrinate students in determining whether religion permeated the institution); Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261–62 (10th Cir. 2008)

The Supreme Court has since refined its Establishment Clause jurisprudence, holding that a state may provide aid in the form of educational materials for students attending pervasively sectarian institutions.[23] This holding, however, has left some ambiguity[24] with respect to what level of government support is required and what is merely permitted.[25] In other words, although a state is not prohibited from including pervasively sectarian institutions in its scholarship programs, it is unclear whether a state may actively choose to exclude them.[26] Some circuit courts have joined this debate, questioning the constitutionality of the "pervasively sectarian" distinction.[27] This trend began with the Supreme Court holding that the Establishment Clause does not require pervasively sectarian schools to be excluded from otherwise permissible aid programs.[28]

(considering state higher education commission's inquiry as to degree of sectarian character of university for the purpose of determining qualification under state scholarship statute).

23. *See* Mitchell v. Helms, 530 U.S. 793, 801–03, 829 (2000) (discussing a program that provided funds for educational materials through a lending system).

24. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

25. *See* Locke v. Davey, 540 U.S. 712, 718–21 (2004). The "play in the joints" referenced are those "state actions [that are] permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718–19; *see also* David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1355 (2003) (hypothesizing that a religious organization could receive government funding without violating the Establishment Clause but could also refuse to disclose financial records pursuant to the protections of the Free Exercise Clause). The Court described these clauses as "frequently in tension," and reiterated that the state of interplay under Establishment Clause jurisprudence is "the [impermissible] link between government funds and religious training [that] is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 718–19. It then presented the issue of whether the state of Washington, pursuant to its constitution's prohibitions on even indirect funding of religious and ministerial instruction, could deny the scholarship without violating the Free Exercise Clause, despite being able to grant the funds under the Establishment Clause. *Id.* The Court reasoned that because this form of religious discrimination was "of a far milder kind" than had previously been at issue, it was not presumptively unconstitutional and should be examined under the rational basis test. *Id.* at 720–21 & n.3; *see also infra* note 167. *But cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 526–27, 546–47 (1993) (applying strict scrutiny to a non-neutral statute that imposed criminal sanctions on practice of religion through animal sacrifice).

26. *See Colo. Christian Univ.*, 534 F.3d at 1253. ("It is therefore undisputed that federal law does not *require* Colorado to discriminate against Colorado Christian University in its funding programs. Rather, the parties' dispute centers on whether the State may nonetheless choose to exclude pervasively sectarian institutions, as defined by Colorado law, even when not required to. We conclude that it may not.").

27. *See* Ams. United for Separation of Church and State v. Fellowship Ministries, Inc., 509 F.3d 406, 414 n.2, 424–25 (8th Cir. 2007); Johnson v. Econ. Dev. Corp. of Oakland, 241 F.3d 501, 510 n.2 (6th Cir. 2001); Columbia Union Coll. v. S.F. Unified Sch. Dist., 46 F.3d 1449, 1461 (9th Cir. 1995).

28. *See Mitchell*, 530 U.S. at 829. The Court stated:

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. . . . In addition, and related, the application of the "pervasively sectarian" factor collides with

The most recent consideration given to this question involved Colorado statutes providing scholarships only to students attending accredited institutions of higher education that were deemed not pervasively sectarian.[29] Colorado Christian University (CCU) was deemed ineligible to participate in the program following the state's determination that it was pervasively sectarian.[30] CCU challenged the statutes' constitutionality under the First Amendment's Religion Clauses.[31] The district court ruled against the school and upheld the statutes.[32] On appeal, the United States Court of Appeals for the Tenth Circuit reversed, finding that the relevant portions of the statutes were unconstitutional, and that the Commission's inquiry into whether CCU was pervasively sectarian was, in itself, excessive government entanglement with religion.[33] The Tenth Circuit's holding, however, departs from the logic of its predecessors and is without the necessary clarification to guide states in their efforts to abide by the Establishment Clause.

This Note addresses the *Lemon* test's "excessive entanglement" prong in the context of the Tenth Circuit's declaration that the "pervasively sectarian" test, as applied in *Colorado Christian University v. Weaver*, is unconstitutional. This Note begins by tracing the development of Establishment Clause jurisprudence, with exclusive regard to government aid to schools and the development of the "pervasively sectarian" distinction. Second, this Note examines the "excessive entanglement" prong of the *Lemon* test. Third, this Note analyzes the development under the Supreme Court's plurality opinion in *Mitchell v. Helms*, which called into question the "pervasively sectarian" distinction. Lastly, this Note discusses the ramifications of disregarding precedent and declaring the "pervasively sectarian" inquiry used by the state of Colorado to be excessive entanglement. This Note argues that, despite a great

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> our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. . . . Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.

Id. at 828.

29. *Colo. Christian Univ.*, 534 F.3d at 1250.

30. *Id.* at 1252–53.

31. *Id.* at 1253. The university also challenged the action under the Equal Protection Clause of the Fourteenth Amendment. *Id.* That challenge, however, is not relevant to this Note.

32. *See* Colo. Christian Univ. v. Baker, No. 04-cv-02512-MSK-BNB, 2007 WL 1489801, at *15 (D. Colo. May 18, 2007). CCU did not challenge the commission's finding that it was pervasively sectarian based on the statutory test. *Id.* at *2. CCU specifically contended that exclusion of pervasively sectarian institutions from the scholarship programs violated the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. *Id.* at *1. The court reasoned that because the statute was narrowly tailored to accomplish the state's compelling interest in complying with Colorado's constitutional establishment requirements, Colorado was entitled to summary judgment. *Id.* at *14–15; *see also infra* note 167 (discussing district court's holding).

33. *Colo. Christian Univ.*, 534 F.3d at 1261.

need, this approach lacks a standard and leaves states with no way to gauge their compliance with the Establishment Clause.

I. THE TURBID DEVELOPMENT OF ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Initial Interpretations through Lemon v. Kurtzman

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ."[34] Original sources help shed light on its meaning and the purpose it was meant to serve.[35] Thomas Jefferson wrote that the clause "thus buil[t] a wall of separation between Church and State."[36] James Madison stressed the principle that "equality of *all* religious sects [is] in the eve of the Constitution."[37] Insightful as they are, these maxims have done little to quell controversy.[38] The Supreme Court has since strived to reconcile two extremes of interpretation: absolute separation of government from religion and absolute government neutrality toward religion.[39] The result is the widely agreed upon principle of neutral treatment of religions, without the advancement or inhibition thereof.[40] The application of this doctrine, however, has been the source of an evolving body of confusing and contradictory jurisprudence.[41]

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34. U.S. CONST. amend. I.

35. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 879–99 (1987) (detailing and analyzing text of drafts of the Clause and Congressional debates); *see also* Lee v. Weisman, 505 U.S. 577, 609–31 (1992) (Souter, J., concurring) (detailing the Establishment Clause's textual development); Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 896–99, 910 (analyzing the historical basis for the Supreme Court's interpretation of the Establishment Clause); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398–412 (2002) (analyzing ideas of debates over separation of church and state during the nation's founding); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 588–604 (2006) (analyzing the original meaning of the Establishment Clause).

36. *See* WRITINGS OF THOMAS JEFFERSON 281–82 (Andrew A. Lipscomb ed., 1903).

37. *See* Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 105 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison continued to lament the "corrupting influence" of a "coalition between [Government and] Religion," noting that "the danger cannot be too carefully guarded [against]." *Id.*

38. *See infra* note 41 (discussing cases addressing the controversial issues arising out of the Establishment Clause).

39. *See* McClamrock, *supra* note 2, at 383–86 (arguing that neither extreme is a proper interpretation).

40. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (stating that the Establishment Clause commands that there be "no law *respecting* an establishment of religion").

41. *See* Mitchell v. Helms, 530 U.S. 793, 816 (2000) (establishing the rule that "neutrally available" aid passing through the hands of private citizens who freely direct it to religious institutions does not violate the Establishment Clause); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89, 798 (1973) (establishing the rule that the Establishment Clause dictates that the primary effect of laws must neither advance nor inhibit

As such, the Court has been faced with a need to devise workable tests for governments that provide aid to religious institutions or to students attending those institutions, in order to evaluate the dictates of the Establishment Clause.[42] The first test originated in *School District of Abingdon v. Schempp*, reasoning that the Establishment Clause cannot require an absolute separation of church and state.[43] The Court set forth a test for determining impermissible government aid: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[44]

This test, however, proved to be inadequate as the Supreme Court began to hear increasingly complex issues.[45] In *Walz v. Tax Commission of New York*, the Court recognized that some room for the accommodation of neutrally-granted government aid may exist without advancing or inhibiting religion.[46] The Court considered a city property tax exemption that extended to religious organizations for properties used exclusively for worship.[47] The Court held

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religion); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (establishing the rule that the Establishment Clause mandates that no law result in "excessive government entanglement with religion"); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (establishing the rule that the Establishment Clause requires that no tax can support an institution's religious activities); Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1253 (10th Cir. 2008) (establishing the rule that state aid may be directed to pervasively sectarian institutions under the Establishment Clause).

42. *See, e.g.*, *Lemon*, 403 U.S. at 615 (briefly describing the three-prong test for determining excessive entanglement); *Walz*, 397 U.S. at 674–75 (devising the test of whether a law results in "excessive government entanglement with religion"); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963) (devising a test analyzing whether a law has a secular legislative purpose and whether the primary effect of the law advances or inhibits religion).

43. *Schempp*, 374 U.S. at 222.

44. *Id.* at 220–22 (internal citations omitted). The Court distinguished the separation required under the Establishment Clause of the state and an actual establishment of religion with that of the state and all aspects of a church. *Id.* at 219–22. To this extent, complete separation is required between an establishment and the state; however, only "concert or union or dependency" is prohibited between a church and the state. *Id.* at 219–20 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)); *see also* Douglas C. Shimonek, *Using the* Lemon *Test as Camouflage: Avoiding the Establishment Clause*, 16 WM. MITCHELL L. REV. 835, 841–42 (1990) (describing "[s]ecular [l]egislative [p]urpose" as referring to the motive behind a law, which must be secular, although not necessarily wholly unrelated to religion, and "[p]rimary [e]ffect" as referring to the government itself advancing religion through its own actions).

45. *See, e.g.*, *Walz*, 397 U.S. at 666–67 (considering whether a New York law creating a tax exemption for churches violated the Establishment Clause).

46. *Id.* at 669. The Supreme Court extracted from the First Amendment's Religion Clauses the general principle that neither a governmentally established religion nor governmental interference with religion is permissible. *Id.* Chief Justice Burger wrote that "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* The Court went on to explain that the very existence of the Religion Clauses is proof of constant state involvement with religion and that absolute separation is impossible. *Id.* at 670. The Supreme Court's analysis of the Religion Clauses, therefore, establishes a gauge by which governments may avoid excessive entanglement. *Id.* at 668–70; *see also Lemon*, 403 U.S. at 614–15; *Zorach*, 343 U.S. at 312.

47. *Walz*, 397 U.S. at 666–67.

that the exemption neither advanced nor inhibited religion.[48] The Court determined that judgments of this sort must turn on the degree of government entanglement with religion.[49] A "minimal and remote" degree of entanglement would be permissible, whereas an "excessive" degree would render the aid impermissible.[50]

The Supreme Court settled on a uniform Establishment Clause test in *Lemon v. Kurtzman*.[51] At issue were two state programs granting aid to nonpublic schools.[52] One program, under a Rhode Island statute, provided supplemental salaries for teachers in nonpublic elementary schools who taught secular subjects.[53] The other program, under a Pennsylvania statute, provided reimbursement for school supplies used in the teaching of secular subjects in nonpublic schools.[54] Relying on "cumulative criteria developed . . . over many years,"[55] the Court combined its previous tests into a single, three-prong test for use in Establishment Clause cases.[56] With regard to the third prong—excessive entanglement—the Court explained that it was necessary to examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[57]

In applying the test, the Court found that both aid programs at issue were impermissible.[58] Relying on the schools' substantial religious character, the Court determined that the resulting relationship would be excessively

48. *Id.* at 672–73 (reasoning that the tax exemption applied to a wide variety of properties, including those owned by non-religious nonprofits as well as churches, all of which benefit the community and are in the public interest).

49. *Id.* at 674.

50. *Id.* at 674–76.

51. *Lemon*, 403 U.S. at 615.

52. *Id.* at 606.

53. *Id.* at 607.

54. *Id.* at 609–10.

55. *Id.* at 612; *see also Walz*, 397 U.S. at 674–75 (developing a result-based test analyzing whether a law results in "excessive government entanglement with religion"); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963) (devising a test that analyzes whether a law has a secular legislative purpose and whether the primary effect of the law advances or inhibits religion).

56. *Lemon*, 403 U.S. at 615. Additionally, the Court explained the proper application of the prongs of the *Lemon* test. *Id.* at 612–13. Examining the statutory language and legislative intent of both statutes to determine the purpose, the Court concluded that both were permissibly secular. *Id.* at 613. The Court explained that the statutory provisions, which operated as legislative precautions against offending the Religion Clauses, would be relevant in determining primary effect. *Id.* at 613–14. The Court refrained from actually applying these factors in light of the statutes' violation of the excessive entanglement prong. *Id.*; *see also Walz*, 397 U.S. at 667–68 (explaining that the three main evils protected against by the Establishment Clause are sponsorship, financial support, and active involvement in religious activity).

57. *Lemon*, 403 U.S. at 615.

58. *Id.* at 617–22.

entangled,[59] requiring continued state surveillance of the teachers to ensure that no indoctrination occurred.[60] The Court further determined that the required auditing of expenditures for secular and religious education was itself excessively entangling.[61]

Moreover, the Pennsylvania statutory scheme provided that the aid was to be dispersed directly to the religious schools.[62] The Court reasoned that this characteristic distinguished it from other permissible aid programs, in that direct money subsidies historically indicate an excessively entangled church-state relationship.[63] This distinction became a workable standard that anchored Supreme Court Establishment Clause jurisprudence.[64]

B. Burgeoning School Aid Cases and Early Attempts to Create a Standard

Establishment Clause jurisprudence, beginning with the *Lemon* decision, revolved around a set of fairly consistent principles.[65] The Supreme Court then began to distinguish aid directed toward students from aid directed at schools, with the distinction becoming largely outcome determinative.[66]

1. Impermissible Direct-to-School Aid Programs

The distinction regarding where public aid was directed arose out of *Committee for Public Education and Religious Liberty v. Nyquist*.[67] In

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59. *Id.* at 615–16 (finding that the church schools were located close to the parish churches, that there were religiously oriented extracurricular activities, and that two-thirds of the teachers were nuns who strove to provide "an atmosphere in which religious instruction . . . [was] natural").

60. *Id.* at 620–22. The Pennsylvania program required government surveillance to ensure teachers did not espouse ideology in the classroom. *Id.* It similarly required the state to distinguish costs of secular versus religious instruction for purposes of reimbursement. *Id.* at 620–21.

61. *Id.* at 620 ("This kind of state inspection and evaluation of . . . religious content . . . is fraught with the sort of entanglement that the Constitution forbids. It is . . . pregnant with dangers of excessive government direction of church schools and hence of churches. . . . [W]e cannot ignore . . . the danger that pervasive . . . governmental power will ultimately intrude on religion and thus conflict with the [Establishment Clause].").

62. *Id.* at 621.

63. *Id.*

64. *Id.* at 621–22.

65. *Id.* at 612–13 (establishing the three-pronged test as the principal means of resolving Establishment Clause questions); *see, e.g.*, Wolman v. Walter, 433 U.S. 229, 250–51 (1977) (relying on the *Lemon* test and, in particular, the primary effect prong); Sloan v. Lemon, 413 U.S. 825, 832 (1973) (relying on the *Lemon* test and the law's primary effect of advancing religion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–91 (1973) (relying on the *Lemon* test and examining the direct-subsidy character of the aid in question).

66. *See* discussion *infra* Part I.B.1–2.

67. *See Nyquist*, 413 U.S. at 770–72; *see also* McClamrock, *supra* note 2, at 394–97 (tracing the development of the Supreme Court's analytical emphasis on individual and institutional benefit).

Nyquist, the Court struck down portions of a New York statute that directed aid to sectarian schools for maintenance and repair, and that also provided tuition reimbursement to parents sending their children to those schools.[68] The Court found that, due to their direct-subsidy character and incentive to attend religious schools, the provisions had the effect of advancing religion in violation of the second prong of the *Lemon* test.[69]

Similarly, in *Wolman v. Walter*, the Court struck down a statute providing public expenditures for either nonpublic schools or the parents of students in those schools, on the grounds that a portion of the aid supported the religious aspects of the schools.[70] The Court considered the fact that the public officials administering the program were permitted statutorily to perform their functions on the school grounds.[71] It ultimately concluded that the statute had the primary effect of supporting religious institutions, which violated the second prong of the *Lemon* test.[72]

2. Permissible Direct-to-Student Aid Programs

Not all cases involving aid to nonpublic schools or their students result in violations of the Establishment Clause.[73] As *Mueller v. Allen* demonstrates, programs that benefit religiously affiliated institutions do not necessarily violate the Establishment Clause.[74] In *Mueller*, the Supreme Court upheld a state statute that permitted tax deductions for the costs of textbooks and other

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68. *Nyquist*, 413 U.S. at 762–64, 794. To have received aid for maintenance and repair, a nonpublic, nonprofit school must have qualified under the statute by serving a large proportion of students from low-income families. *Id.* at 762–63. Qualifying schools received a predefined grant amount per pupil per year. *Id.* at 763. The tuition reimbursement was provided to parents earning less than $5,000 in taxable income, with a reimbursement cap of fifty percent of the total tuition bill. *Id.* at 764. Parents who did not qualify for tuition reimbursement were granted aid in the form of tax credits per child attending a qualifying school. *Id.* at 765–66.

69. *Id.* at 789–94. The tuition reimbursement provision of the statute provided a greater incentive for low-income families to send their children to nonpublic schools, because the reimbursement was not proportionate to income. *Id.* at 790–91. Additionally, the reimbursement was not reduced by any deductions already enjoyed by the taxpayer for charitable contributions to religious institutions. *Id.* at 790.

70. Wolman v. Walter, 433 U.S. 229, 248–51 (1977).

71. *Id.* at 248–49. The performance of the public officials' duties on the grounds of religious schools contributed to the impression of inseparability of the secular and sectarian. *Id.* at 250.

72. *Id.* at 250.

73. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (permitting a school district to provide a sign-language interpreter for a deaf student at a Catholic high school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 482 (1986) (allowing a state to extend assistance under a vocational rehabilitation program to a blind student studying at a Christian college); Mueller v. Allen, 463 U.S. 388, 390–91 (1983) (permitting Minnesota taxpayers to deduct expenses incurred in providing education to their children).

74. *Mueller*, 463 U.S. at 390–92.

required school supplies.[75] The Court reasoned that the deduction did not have the effect of advancing religion,[76] and it went on to state that "[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[77] Thus, students and their parents were permitted to direct the public aid wherever they chose, making the government's role permissibly neutral.[78]

The principle of neutrality articulated in *Mueller* proved critical in successive cases, including *Zobrest v. Catalina Foothills School District.*[79] In *Zobrest*, the Court held that a program under the Individuals with Disabilities Act (IDEA) that disbursed funds to provide an interpreter for a deaf student attending a Catholic high school was permissible.[80] The IDEA funds were available to a broad class of citizens, regardless of whether religious institutions would receive an indirect benefit.[81] Thus, the Court reasoned, the aid was neutral and, therefore, satisfied the effect prong of the *Lemon* test.[82]

These cases illustrate the predominant factors once used by the Supreme Court in considering Establishment Clause issues that arise from dispersing aid to schools.[83] Additionally, they represent a fairly consistent, although inchoate, span of jurisprudence.[84] Although the underlying principles have since evolved, they remain highly relevant.

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75. *Id.* at 391. The tax deduction was available to parents regardless of whether their children attended public or nonpublic schools. *Id.* at 395–96. The Court noted that other available tax deductions included those for medical expenses and charitable contributions, which reflected the legislature's broad discretion to distribute the tax burden. *Id.* at 396.

76. *Id.* at 396–97.

77. *Id.* at 400.

78. *Id.* at 390–92, 400.

79. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8–11 (1993).

80. *Id.* at 12–14. IDEA distributes aid to any "disabled" child, as defined under the statute, without regard to the nature of the school attended. *Id.* at 10. Zobrest had received aid for an interpreter throughout his years at a public middle school, and sought to continue receipt of that aid upon his transfer to a Roman Catholic high school. *Id.* at 3–4.

81. *Id.* at 10.

82. *Id.* at 13–14. The principles of aid neutrality and private choice played a substantial role in upholding the voucher program in *Zelmon v. Simmons-Harris*, despite the fact that most participating parents chose to send their children to religious schools. 536 U.S. 639, 653–54 (2002). The Court reasoned that the program was permissible because it was part of a wide-reaching undertaking to provide aid to children in a substandard school district, because no reference to religion was made within the statute, and because there were no financial incentives to attend parochial schools. *Id.*

83. *See* discussion *supra* Part I.B.1–2.

84. *Id.*

C. Finding its Niche: The Court Continues to Shift Emphasis

In its application of the *Lemon* test, the Court consistently failed to find evidence of excessive government entanglement with religious affairs; instead, the Court relied on evidence of the advancement of religion.[85] However, the Court soon shifted its analytical focus and began to evaluate issues on the basis of the *Lemon* test's third prong—the prohibition of excessive government entanglement with religious affairs.[86] Government relationships with some religious institutions may broadcast an image of sponsorship, which further led courts to specifically consider the nature of a school's degree of religiosity.[87]

1. Excessive Entanglement Becomes the Focal Point of Aid-to-Schools Analysis

In *New York v. Cathedral Academy*, the Court considered a statute that authorized reimbursement to nonpublic schools for both record keeping and state-mandated testing services.[88] Reasoning that "this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the [Establishment Clause],"[89] the Court held that the statute resulted in excessive entanglement.[90] The Court relied on the fact that the state and the religious institution would likely be forced to litigate, at least once, over which school functions were religious in character.[91] Additionally, the services funded by the aid created an inherent risk of religious indoctrination[92] because the teachers rendering the required services were under the authority of the sponsoring church.[93]

In understanding the application of this prong—described as necessarily one of degrees[94]—it is equally helpful to examine the Court's descriptions of what is not excessive entanglement. In *Roemer v. Board of Public Works*, the Court held that a state program offering annual grants to private colleges and

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85. *See* Wolman v. Walter, 433 U.S. 229, 250–51 (1977) (finding advancement of religion); Sloan v. Lemon, 413 U.S. 825, 830–32 (1973) (finding advancement of religion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) (finding advancement of religion).

86. *See* discussion *infra* Part I.C.1.

87. *See* discussion *infra* Part I.C.2 (examining "pervasively sectarian" distinction).

88. New York v. Cathedral Acad., 434 U.S. 123, 126–27 (1977).

89. *Id.* at 132.

90. *Id.* at 133. The Court also found that the statute violated the effect prong of the *Lemon* test. *Id.*

91. *Id.*

92. *Id.* at 131.

93. *Id.*

94. *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 766 (1976) ("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. The relevant factors we have identified are to be considered 'cumulatively' in judging the degree of entanglement.").

universities would not result in such entanglement.[95] It reasoned that the annual nature of the grants, in addition to the possibility of audits to verify that the funds were used for sectarian functions, did not warrant a characterization as excessive.[96]

Similarly, in *Bowen v. Kendrick*, the Court refused to characterize certain government monitoring as excessive entanglement.[97] In *Bowen*, the government was required to oversee grants extended to, among other groups, religious institutions that provided counseling services on teenage sexuality.[98] The Court characterized the monitoring as "less intensive" because the government would not entangle itself in the day-to-day functions of the religiously affiliated grantees.[99] The statute simply required review of the grantees' proposed educational materials to ensure that they were of a secular nature, with some additional review possibly taking place on the institutions' premises.[100] The Court considered the meaning of excessive entanglement, describing "extensive and permanent on-site monitoring" and intruding unduly in the day-to-day operation of religiously affiliated institutions as examples of an excessively entangled relationship.[101]

2. Funding to a "Pervasively Sectarian" Institution is Deemed Excessive Entanglement Per Se

As the use of *Lemon*'s third prong grew increasingly prevalent, the Supreme Court also began classifying schools by the degree and extent of their religious functions.[102] The threshold degree of religious function, which requires an institution to be "so permeated by religion that the secular side cannot be

95. *Id.* at 763–64. Institutions eligible for the annual grants must also have offered non-religious degrees in addition to any seminarian or theological degrees. *Id.* at 740. The grants were based upon the number of enrolled, full-time students, excluding those pursuing seminarian or theological degrees. *Id.* Thus, the statutory provisions were themselves precautions against the advancement of religion in the recipient schools. *Id.* at 740–41. Audits were conducted at the discretion of the Council of Higher Education upon receipt of a report submitted by the recipient institution identifying nonsectarian expenditures of the aid. *Id.* at 741–42.

96. *Id.* at 763–64.

97. Bowen v. Kendrick, 487 U.S. 589, 615–16 (1988).

98. *Id.* at 593–97.

99. *Id.* at 615–17. Although the organizations were not substantially focused on religious missions, they were, no doubt, religious organizations. *Id.* at 597. The Court addressed this fact by examining the statute's goal of recruiting a variety of organizations to help teenagers understand sexuality. *Id.* at 604–05. The Court reasoned that the goal was a secular one, and could not be invalidated simply because some of its approaches coincided with those of the religious organizations. *Id.* at 605.

100. *Id.* at 616–17.

101. *Id.*

102. *See* Hunt v. McNair, 413 U.S. 734, 746 (1973); Tilton v. Richardson, 403 U.S. 672, 680–81 (1971).

separated from the sectarian,"[103] served as a standard upon which courts could rely in utilizing the inchoate *Lemon* test.[104] The threshold classification of "pervasively sectarian" became synonymous with impermissibility under the Establishment Clause.[105]

The effect of being classified as a pervasively sectarian institution almost certainly prevented receipt of public funds, either directly or indirectly.[106] In several opinions, the Supreme Court reasoned that the extension of aid to a pervasively sectarian institution violated the second prong of the *Lemon* test.[107] If the institutions' secular and sectarian activities were inseparable, the aid necessarily had the effect of advancing religion.[108] In *Tilton v. Richardson*, however, the Court explicitly linked the third prong of the *Lemon* test to the pervasively sectarian classification.[109] The Court explained that certain aid programs required continued involvement with the aid recipient, and if this recipient was pervasively sectarian, such involvement would constitute excessive government entanglement with religion.[110]

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103. Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 759 (1976) (citations omitted) (internal quotation marks omitted).

104. *Id.* at 758–59.

105. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985). The Court explained its reliance on the "pervasively sectarian" distinction as it applies to the Establishment Clause:

> Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Id.; *see also Hunt*, 413 U.S. at 743–44; Steele v. Indus. Dev. Bd., 301 F.3d 401, 407–09 (6th Cir. 2002).

106. *See, e.g.*, *Roemer*, 426 U.S. at 758–60; *Tilton*, 403 U.S. at 687–88.

107. *See, e.g.*, *Roemer*, 426 U.S. at 757–59; *Tilton*, 403 U.S. at 687–89.

108. *See Roemer*, 426 U.S. at 758–60. The *Roemer* Court noted, however, that if a pervasively sectarian institution's secular activities could be separated from its sectarian activities, then they alone could be permissibly funded. *Id.* at 755; *see also* Hunt v. McNair, 413 U.S. 734, 742–45 (1973).

109. *Tilton*, 403 U.S. at 687–89. The Court explained:

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.

Id. at 687.

110. *Id.* at 687–88.

Continuing to demonstrate the weight it gave to the distinction between sectarian and secular institutions, the Court in *Roemer* explicitly considered whether the schools were pervasively sectarian, and ultimately concluded that they were not.[111] The Court also noted in *Bowen* that the religiously affiliated organizations being funded to provide counseling services were not pervasively sectarian.[112] Although the funding was ultimately upheld in both cases,[113] the most compelling line of analysis is the Court's willingness to examine the religious nature of the institutions.[114]

D. More Questions Than Answers: The State of the Law Following Mitchell v. Helms *and* Locke v. Davey

Approximately ten years after *Bowen*, Supreme Court jurisprudence abruptly changed course.[115] For the first time, the Court recognized that it had abandoned previous standards and confirmed its allegiance to neutrality as the principle mode of analysis.[116] Reasoning that although the general principles considered in Establishment Clause cases remained relevant, the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had changed.[117] The Court thus eliminated the informal standard that direct subsidies necessarily had the effect of advancing religion in violation of the second prong of the *Lemon* test.[118] Instead, the Court considered the manner in which the beneficiaries were identified and the lack

111. *Roemer*, 426 U.S. at 757–60.

112. Bowen v. Kendrick, 487 U.S. 589, 615–17 (1988). Oddly, the Court did not provide an explanation for its determination that the funded organizations were not pervasively sectarian. *Id.*

113. *See* discussion *supra* Part I.C.1.

114. *See Roemer*, 426 U.S. at 755–60.

115. *See* Agostini v. Felton, 521 U.S. 203, 223 (1997) (explaining that the Court's understanding of the criteria used to determine whether aid to religion has an impermissible effect has changed because it abandoned the presumption that public teachers placed in parochial schools will necessarily have the effect of advancing religion); *see also* Mitchell v. Helms, 530 U.S. 793, 829–36 (2000); *infra* notes 120–125 and accompanying text.

116. *See Mitchell*, 530 U.S. at 829–30 (holding that neutrally available aid in any form is permissible under the Establishment Clause); *Agostini*, 521 U.S. at 223 (stating that the Court had a new understanding of "whether aid to religion has an impermissible effect").

117. *Agostini*, 521 U.S. at 223. The Court explained that it had abandoned the presumption that public school teachers placed in parochial schools will necessarily have the effect of advancing religion. *Id.* at 223–24; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (abandoning the ban on placing a public employee in a sectarian school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986) (concluding that government aid that directly assists the secular educational function of a sectarian school is not invalid per se); Nat'l Coal. for Pub. Ed. & Religious Liberty v. Harris, 489 F. Supp. 1248, 1267–68 (S.D.N.Y. 1980) (finding that no evidence of any attempt to advance religion by a public official on the premises of a sectarian school existed).

118. *See Agostini*, 521 U.S. at 225–26.

of incentive for parents to change their religious practices or beliefs as a result of the aid.[119]

Because the "pervasively sectarian" distinction held a place in the Establishment Clause lexicon, the Supreme Court in *Mitchell v. Helms* was faced with the task of squaring it with the new standard of neutrality.[120] The plurality in *Mitchell* overruled *Wolman v. Walter*,[121] holding that neutrally available aid, in any form, is permissible under the Establishment Clause.[122] In his opinion, Justice Thomas reasoned that even if aid is provided to a sectarian school, as long as it passed through the hands of private individuals who freely forwarded it to that institution, the aid is not government advancement of religion.[123] Casting doubt onto the distinction, Justice Thomas further explained that the Establishment Clause does not "require[] the exclusion of pervasively sectarian schools from otherwise permissible aid programs,"[124] confirming the Court's new focus on neutrality and private choice.[125]

Less than four years later, the Court displayed further adherence to the neutrality standard in *Locke v. Davey*.[126] In *Locke*, the Court considered a state

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119. *See id.* at 230–32. Here, the aid was equally available to sectarian and secular institutions on a nondiscriminatory basis that neither favored nor disfavored religion. *Id.* at 209–10. *Cf. Zobrest*, 509 U.S. at 10 (upholding aid program because there was no financial incentive for parents to send their disabled children to a religious school); *Witters*, 474 U.S. at 488 (upholding aid program because no financial incentive was created to attend religious schools).

120. *Mitchell*, 530 U.S. at 829–36.

121. *Id.* at 808. Finding that the aid program neither resulted in religious indoctrination nor granted aid with a bias toward or against religion, the Court "acknowledge[d that] . . . *Wolman* [is an] anomal[y] in [Supreme Court] case law." *Id.*

122. *Id.* at 829–35.

123. *Id.* at 817–20 (reasoning that the direct-indirect distinction between aid programs is an arbitrary distinction, and that what is of constitutional concern is whether the use of aid for indoctrination can be directly attributed to the government).

124. *Id.* at 829. The Court left unresolved the issue of whether a state could exclude pervasively sectarian institutions. *But see* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1250 (10th Cir. 2008) (holding that Colorado could not exclude pervasively sectarian institutions from state scholarship programs).

125. *Mitchell*, 530 U.S. at 829. Justice Thomas indicated further change in *Mitchell* by noting that the excessive entanglement prong of the *Lemon* test was to be combined with the effect prong. *Id.* at 807–08. Thus, excessive entanglement would be an element considered when determining whether the effect of a statute was to either advance or inhibit religion. *Id.*; *see also* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 170 (2004) (interpreting case law as holding that as long as there is substantial secular content in the funded program, it is of no consequence how religious the individual's choice is).

126. Locke v. Davey, 540 U.S. 712, 715 (2004) (holding that even students attending schools with a substantial religious character could receive aid as long as they did not pursue theological or devotional degrees). *Cf.* McClamrock, *supra* note 2, at 383 (arguing that although Establishment Clause jurisprudence has been at times inconsistent, the Supreme Court has consistently relied on two principles of interpretation: (1) neutrality toward religion and (2) separation of church and state). *But see* Laycock, *supra* note 125, at 168–69 (arguing that the

statutory scheme that granted scholarships to students attending eligible universities, but excluded students majoring in devotional or theological fields.[127] The Court upheld the program, reasoning that the state has a legitimate and historically recognized interest in not funding the ministry.[128] The case highlighted the "play in the joints" regarding what a state may permissibly prohibit under the Establishment Clause, despite not being required to do so.[129] The decision is significant because, for the first time, the Supreme Court explicitly stated that religious discrimination is permissible in some circumstances.[130] Notably, the Court observed that the university at which the student intended to study had a substantial religious character.[131] The Court did not employ the term "pervasively sectarian" and upheld the program, despite the result of permitting indirect funding to go to a substantially religious school.[132] Thus, *Locke v. Davey* highlights the disfavor of the "pervasively sectarian" distinction and its dwindling significance with respect to the permissibility of public aid.[133] Nonetheless, the case demonstrates the need to examine the degree to which religion permeates facets of a university's academic culture to ensure that public funding is permissibly applied.[134]

Despite its disfavor, the "pervasively sectarian" distinction, as interpreted by the United States Court of Appeals for the Sixth Circuit, remains a relevant tool in analyzing programs that direct public aid to religiously affiliated schools.[135] The Tenth Circuit, however, considers the distinction

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theological instruction should have been funded because the aid would have been the result of the private individual's choice).

127. *Locke*, 540 U.S. at 715. Colleges and universities offering devotional or theological degrees were not excluded from the program; instead, only the students pursuing those degrees were excluded. *Id.* at 715–16. Students could permissibly pursue non-devotional degrees at institutions that did, nonetheless, offer those degrees. *Id.*

128. *Id.* at 715, 722.

129. *Id.* at 718–19 (internal quotation marks omitted).

130. *Id.* The state of Free Exercise law following the decision creates a distinction between the levels of scrutiny to be used in those claims. *See supra* note 25. Rather than analyzing a statute as presumptively unconstitutional and applying strict scrutiny, when a statute creates a benefit based upon religious practice but does not require an all-or-nothing choice between freely practicing one's religion and receiving a benefit, rational basis is the proper test. *See infra* note 167. As subsequently interpreted, aid may be precluded without violating the First Amendment's Religion Clauses, and a definite line may be drawn as to what exactly may be precluded. *See* Bush v. Holmes, 886 So.2d 340, 360–61 (Fla. Dist. Ct. App. 2004); *see also* Laycock, *supra* note 125, at 213–18 (analyzing the significance of *Locke v. Davey* and concluding that the scholarships should have been permitted to fund theological instruction).

131. *Locke*, 540 U.S. at 724–25.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* Steele v. Indus. Dev. Bd. of Nashville, 301 F.3d 401, 403 (6th Cir. 2002); Johnson v. Econ. Dev. Corp. of Oakland, 241 F.3d 501, 510 (6th Cir. 2001). The Sixth Circuit described its understanding of the role of precedent in interpreting the Establishment Clause and the

irrelevant.[136] The Tenth Circuit has instead focused upon the secular purposes and neutrality of aid programs,[137] going so far as to hold the secular-sectarian distinction unconstitutional.[138] Most significantly, the Tenth Circuit has deemed the inquiry used to make the "pervasively sectarian" distinction an excessively entangling tool.[139] In effect, the court considers the inquiry an inhibition of religion and has expanded the definition of excessive entanglement to preclude states from examining the religious character of institutions as a condition of receiving state aid.[140]

II. ENTER COLORADO CHRISTIAN UNIVERSITY: TESTING THE WATERS AFTER *LOCKE*

A. CCU Claims Eligibility for the Receipt of State Scholarship Monies

Colorado, in addition to subsidizing education at public institutions of higher education, offers scholarships to in-state students attending eligible private institutions within the state.[141] The relevant authorizing statutes define scholarship eligibility as attendance at any institution of higher education, excluding those deemed pervasively sectarian by the state.[142] A college or university will not be deemed pervasively sectarian if it demonstrates that:

> (a) The faculty and students are not exclusively of one religious persuasion. (b) There is no required attendance at religious convocations or services. (c) There is a strong commitment to principles of academic freedom. (d) There are no required courses in religion or theology that tend to indoctrinate or proselytize. (e) The governing board does not reflect nor is the membership limited to

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pervasively sectarian distinction with regard to aid to institutions. *Johnson*, 241 F.3d at 510 n.2. Judge Clay stated that it was Justice O'Connor's concurring opinion in *Mitchell*—which did not abolish the "pervasively sectarian" distinction—that bound the Court. *Id.* He wrote that pursuant to the principle that when the Supreme Court issues a plurality opinion, the "holding of [the] Court is that of those Members who concurred in [the] judgment on [the] narrowest grounds." *Id.* (citing Simmons-Harris v. Zelman, 234 F.3d 945, 957 (6th Cir. 2000)).

136. *See* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261 (10th Cir. 2008).

137. *Id.* at 1259–60.

138. *Id.* at 1268–69 (holding the pervasively sectarian distinction unconstitutional on the basis that it was discrimination among religions).

139. *Id.* at 1261.

140. *Id.* at 1261–62.

141. *See* COLO. REV. STAT. §§ 23-3.3-102, 23-3.3-701, 23-3.5-101, 23-3.7-101, 23-18-102 (2008); *Colo. Christian Univ.*, 534 F.3d at 1250. Eligible institutions under the statute were defined as "any accredited college in the state—public or private, secular or religious—other than those the state deems 'pervasively sectarian.'" *Id.*

142. *See* COLO. REV. STAT. §§ 23-3.3-102, 23-3.3-701, 23-3.5-101, 23-3.7-101, 23-18-102 (2008); *Colo. Christian Univ.*, 534 F.3d at 1250.

> persons of any particular religion. (f) Funds do not come primarily or predominantly from sources advocating a particular religion.[143]

Colorado Christian University (CCU) is located in Lakewood, Colorado.[144] It is a private, accredited university[145] that purports to provide education "framed by a Christian world view."[146] According to university data, ninety-nine percent of its two thousand students adhere to the Christian faith in one of its many denominations.[147]

All students are required to sign a "Lifestyle Covenant Agreement"—a promise to model their conduct on "the example of Jesus Christ and the teachings of the Bible."[148] Non-adult undergraduate students must attend a weekly chapel service or face remedial consequences.[149] CCU requires twenty-six courses for undergraduate students, four of which are either theology- or Biblical-based.[150]

Unlike students, faculty and trustees of the University are required to sign a statement that affirms their belief in the University's religious creed, including, in part: "[T]he Bible as the infallible Word of God, the existence of God in the Father, Son and Holy Spirit, the divinity of Jesus Christ, and principles of salvation, present ministry, resurrection, and the spiritual unity of believers in

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143. COLO. REV. STAT. § 23-3.5-105(1) (2008). It was unclear how many of the factors needed to be violated before an institution was deemed pervasively sectarian. *See Colo. Christian Univ.*, 534 F.3d at 1251 (noting that the record was confusing on this point). The Colorado Commission on Higher Education's financial aid officer testified that failing four of the six elements would classify an institution as pervasively sectarian; however, the chief financial officer testified that only failing all six would result in the classification. *Id.*

144. *Id.* at 1252.

145. *Id.* CCU is accredited by the North Central Association of Colleges and Schools (NCACS), a nongovernmental regional accreditation agency. Regional accreditation applies to an institution as a whole. *See* WILLIAM A. KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION 1530–34. *See generally* CREATING THE COUNCIL FOR HIGHER EDUCATION ACCREDITATION (Harland Bloland ed., 2001) (explaining the origins of the NCACS and other Regional Accrediting Associations). Colleges and universities voluntarily seek accreditation due to public reliance on those agencies' decisions whether to grant accreditation. *See* KAPLIN & LEE, *supra*, at 1531–32. Some states, including Colorado, include accreditation as a requisite credential for being included in funding programs. *Id.*; *see also Colo. Christian Univ.*, 534 F.3d at 1250. Accreditation agencies, however, may not properly monitor important aspects of institutions in which a state may have an interest, including nondiscrimination and academic freedom. KAPLIN & LEE, *supra*, at 1532–34. An accreditation agency may not fulfill the necessary role in evaluating whether a university is so permeated with religion that providing state funding would violate the Establishment Clause. *See infra* note 218. Thus, states must be permitted to make the necessary inquiries into an institution's religious character.

146. *Colo. Christian Univ.*, 534 F.3d at 1252 (internal quotation marks and citations omitted).

147. *Id.*

148. *Id.* (internal quotation marks and citations omitted).

149. *Id.* Students who miss chapel service must pay a fine, watch a recording of the service, or attend classes that meet the chapel requirement. *Id.*

150. *Id.*

our Lord Jesus Christ."[151] The statement explains itself as an adherence to a "broad, historic evangelical faith," and the framework within which students and faculty engage in study and academic discourse.[152]

CCU submitted its application to participate in Colorado's scholarship programs in September 2003, claiming that it met the criteria listed in the scholarships' enabling statutes.[153] The Colorado Commission on Higher Education's Financial Aid Officer responded to CCU's application in February 2004.[154] She requested syllabi for the theology courses offered by CCU and inquired into the religious beliefs of the faculty, students, and trustees.[155] Although they found the inquiry "patently unconstitutional," CCU complied with the request.[156]

The Commission reviewed the requested information and concluded that: (1) the theology courses did tend to indoctrinate or proselytize; (2) CCU's board of trustees did reflect or was limited to a single religion; and (3) CCU did require attendance at religious convocations or services.[157]

Following the determination, and after a meeting with the Commission, CCU filed a lawsuit in the United States District Court for the District of Colorado.[158] In that suit, CCU alleged that the state of Colorado had violated the Establishment, Free Exercise, and Equal Protection Clauses.[159] The district court granted summary judgment for the state of Colorado.[160] CCU appealed the decision and asserted that Colorado's use of the "pervasively sectarian" distinction violated the U.S. Constitution.[161]

B. The Tenth Circuit Strikes Down the "Pervasively Sectarian" Test

On appeal, the Tenth Circuit reversed and remanded, with instructions to the district court to enter summary judgment in favor of CCU.[162] The court held

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151. *Id.* (internal quotation marks and citations omitted).

152. *Id.* The statement's premise is that the pursuit of knowledge is an inquiry into God's revelation of knowledge using all academic disciplines. *Id.* Although the university has adopted the "1940 Statement of Principles of Academic Freedom of the American Association of University Professors," it is subject to the statement of faith. *Id.*

153. *Id.*; COLO. REV. STAT. § 23-3.5-105(1) (2008) (listing the criteria necessary to avoid being labeled pervasively sectarian).

154. *Colo. Christian Univ.*, 534 F.3d at 1252.

155. *Id.* at 1252–53.

156. *Id.* at 1253 (internal quotation marks and citations omitted).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1250. The state of Colorado announced that it would not appeal the Tenth Circuit's decision. Press Release, Colorado Commission on Higher Education, No CCHE Appeal of Court Decision for Colorado Christian U (Aug. 1, 2008) (on file with author), *available at*

that the state of Colorado may not choose to exclude pervasively sectarian institutions—as defined by state law—even though such action is not required by the U.S. Constitution.[163] The court struck down the "pervasively sectarian" distinction as unconstitutional discrimination among religions.[164] The court also found the inquiry into the school's "religious views" overly intrusive, constituting "excessive entanglement."[165]

In so holding, the court clarified its application of the Supreme Court's decision in *Locke v. Davey*.[166] The Tenth Circuit construed *Locke* as precluding the states' ability to freely discriminate in the funding of religious institutions.[167] This clarification affirmed the principles espoused and relied upon by the Supreme Court to determine the permissibility of state aid, including neutrality of funding and the free choice of individuals.[168]

At issue in this Note is the Tenth Circuit's striking down of the "pervasively sectarian" inquiry, which it characterized as a set of impermissible, intrusive

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http://www.ago.state.co.us/press_releases/CCU%20Decision.pdf. Thus, the question, as presented in *Colorado Christian University*, will not enjoy further review.

163. *Colo. Christian Univ.*, 534 F.3d at 1253.

164. *Id.* at 1258.

165. *Id.* at 1261.

166. *Id.* at 1254–55.

167. *Id.* The Tenth Circuit's interpretation of *Locke* stands in direct contrast to the district court's interpretation, which concluded that under *Locke*,

> [n]on-neutral statutes that do not: (i) impose criminal nor civil sanctions on any religious service or rite; (ii) do not deprive religious observers of "the right to participate in the political affairs of the community"; (iii) do not "require students to choose between their religious beliefs and receiving a government benefit"; and (iv) simply reflect a governmental decision "not to fund a distinct category of instruction," are not presumptively unconstitutional, and thus are subject only to rational basis scrutiny.

Colo. Christian Univ. v. Baker, No. 04-cv-02512-MSK-BNB, 2007 WL 1489801, at *5 (D. Colo. May 18, 2007) (citing Locke v. Davey, 540 U.S. 712, 720–21 (2004)). The district court found the case to be factually similar to *Locke*, in that CCU—as an uncontested pervasively sectarian institution—provided instruction similar to the theological instruction at issue in *Locke*, and that the aid scheme here did not force students to choose between religion and education. *Id.* at *5–6. The district court went on to apply the *Locke* analytical framework and found that Colorado had a legitimate interest in not funding religion, and that the scholarship statutes were reasonably related to that end, thus passing the rational basis review required by the Free Exercise claim. *Id.* at *8. The district court did, however, apply strict scrutiny to CCU's Establishment Clause claim per its interpretation of *Larson v. Valente*, which requires such scrutiny when examining statutes that differentiate among sectarian institutions. *Id.* at *13. The court found that Colorado's scholarship statutes passed that test as well, because Colorado's interest in not funding pervasively sectarian institutions was compelling, and the pervasively sectarian distinction served to advance that interest. *Id.* at *14–15. The court addressed the holding of *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982), which prohibited the exclusion of sectarian institutions from state funding, but refused to extend the holding of that case to pervasively sectarian institutions. *Id.* at *6–7.

168. *Colo. Christian Univ.*, 534 F.3d at 1254–55; *see also* Larson v. Valente, 456 U.S. 228, 246 (1982) (requiring a strict scrutiny analysis of government action that discriminates among religions).

judgments of religion by the state, in violation of the prohibition of excessive government entanglement with religion.[169] This characterization redefines the criteria for government entanglement to qualify as excessive, and ignores the necessity of examining the religious functions of a university to ensure public funding is constitutionally applied.[170] Additionally, the court does not provide an alternative, permissible method by which a state may determine whether its funding is in accordance with the Establishment Clause.[171] The holding necessarily requires the state to rely on determinations made by nongovernmental accreditation boards and universities' self-evaluations, without the ability to analyze those claims.[172]

III. THE TENTH CIRCUIT IMPROPERLY REDEFINED EXCESSIVE ENTANGLEMENT TO PROHIBIT THE EXAMINATION OF UNIVERSITIES' RELIGIOUS CHARACTER

The relevant prior law conveys a pattern of Establishment Clause interpretation[173] and provides an adequate guide for confronting school aid cases. The Supreme Court has demonstrated that states must have a way of determining compliance with the Clause—neither advancing nor inhibiting religion. Therefore, courts have never read the excessive entanglement prong to restrict a state's ability to adhere to the Clause, but rather as a tool for measuring aid and ensuring adherence to the Clause.[174]

In *Colorado Christian University v. Weaver*, the Tenth Circuit improperly expanded the concept of excessive entanglement to include Colorado's inquiry into universities' religious activities.[175] The court instead should have relied upon the principles espoused by the Supreme Court and simply held that the "pervasively sectarian" distinction is unconstitutional. Further, the decision raises the question of what constitutes a permissible inquiry into a school's religious affairs for the purpose of adhering to the Establishment Clause,[176] and sends the message that schools may assert any claim that is necessary to receive state funding, regardless of the degree to which they actually advance religion.

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169. *Colo. Christian Univ.*, 534 F.3d at 1261–66.

170. *Id.* No longer is physical presence of government through supervision, auditing, or other means necessary for excessive entanglement to be found. *Id.*

171. *Id.*

172. *See* discussion *infra* Part III.B.2.

173. *See* discussion *supra* Part I.D; *see also* McClamrock, *supra* note 2, at 383 (arguing that the Supreme Court has consistently relied on two principles of interpretation: (1) neutrality toward religion and (2) separation of church and state).

174. *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (discussing the requirements of the excessive entanglement prong).

175. *See Colo. Christian Univ.*, 534 F.3d at 1261–62 (evaluating CCU's religious education curriculum).

176. *Id.* at 1266. The court admits that a state may conceivably have an interest in prohibiting aid to a religious institution, but goes no further in explaining what that interest may entail or how to define its constitutionality. *Id.* at 1261.

A. Straying from Precedent

The Tenth Circuit's decision to strike down the "pervasively sectarian" distinction as unconstitutional is grounded in Supreme Court precedent.[177] Although the Sixth Circuit applied the same precedent differently,[178] the Supreme Court's distaste with the distinction is well documented.[179] In *Mitchell v. Helms*, Justice Thomas wrote for a plurality, asserting that the era during which the "pervasively sectarian" distinction was relevant or applicable had passed.[180] Although not expressly struck down, the Supreme Court has not employed the distinction or applied the underlying concepts in recent cases concerning government aid to religiously affiliated schools.[181] Instead, it has relied on other concepts, including the neutrality of available aid and the free choice of private individuals.[182] The Court has, however, consistently employed the concept of excessive entanglement as a means of gauging states' compliance with the Establishment Clause.[183]

In *Colorado Christian University*, the Commission's inquiry involved a one-time examination of certain religious characteristics of the school.[184] These facts are distinguishable from the facts analyzed by the Supreme Court in

177. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (stating that the pervasively sectarian inquiry is offensive and unnecessary); *see also* Klint Alexander, *The Road to Vouchers: The Supreme Court's Compliance and the Crumbling of the Wall of Separation Between Church and State in American Education*, 92 KY. L.J. 439, 481 (2004) (concluding that "the wall of separation between church and state" in governmental school aid cases has all but disappeared); *Court Ruling is Victory for Religious Colleges*, supra note 8 ("The ruling is the latest in a series of potentially fatal blows to three decades of legal doctrine that has distinguished between religiously connected colleges . . . .").

178. *See* Johnson v. Econ. Dev. Corp. of Oakland, 241 F.3d 501, 510 n.2 (6th Cir. 2001); *supra* note 135.

179. *See Mitchell*, 530 U.S. at 828; *Johnson*, 241 F.3d at 510 (detailing the current status of the pervasively sectarian distinction).

180. *Mitchell*, 530 U.S. at 828–29.

181. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 724–25 (2004) (relying instead on the religious character of the academic degree sought).

182. *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–89 (1986) (holding that a blind college student otherwise eligible for state educational funding may not be denied such funding simply because he would direct it to a religious school); *see also* McClamrock, *supra* note 2, at 382–83 (arguing that the Establishment Clause permits government funding of students attending pervasively sectarian schools following *Witters*); Megan E. Bovee, Robert C. Goettling & Paul F. Ritter, Comment, Witters v. Washington Department of Services for the Blind: *The Establishment Clause and Financial Aid to Students for Religious Education at Private Institutions*, 13 J.C. & U.L. 397, 397 (1987) (suggesting that a decision denying funds in *Witters* would have inhibited religion). The authors conclude that following *Witters*, there is a developing, cooperative relationship between state government and private institutions of higher education. *Id.* at 406.

183. *See* discussion *supra* Part I.C.1–2.

184. *See* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1261–62 (10th Cir. 2008) (discussing the commission's examination of syllabi from theology courses).

Agostini and *Bowen*, in that no "pervasive monitoring" was required.[185] In fact, the Court would classify pervasive monitoring as indicative of excessive entanglement.[186] Also, the Commission's review of CCU's class syllabi as evidence of the indoctrination of students[187] is similar to the federal government's review of educational materials to determine religiosity in *Bowen*.[188] However, the federal government's review at issue in *Bowen* was not deemed excessive,[189] whereas Colorado's was determined to be excessive entanglement.[190] The Tenth Circuit emphasized that the state would be forced to second-guess and make judgments about religious matters.[191] Although this is a legitimate concern, it must be considered in light of its one-time nature.

The court's decision in *Colorado Christian University* ignores the examples offered in *Agostini* and *Bowen*. The Tenth Circuit has reduced the degree of entanglement required in order to classify government involvement as excessive. Accordingly, the Tenth Circuit should have refrained from examining the "pervasively sectarian" inquiry, and instead strictly focused on allowing aid under the Colorado scholarship statutes to flow to CCU. Had the court in this case relied on the authoritative principles espoused by the Supreme Court, its decision would be firmly backed by precedent.[192] Instead, the Tenth Circuit's striking down of the pervasively sectarian inquiry improperly expanded the concept of excessive entanglement and will inhibit states from complying with the Establishment Clause.[193]

B. Denying States an Effective Gauge

Earlier Supreme Court cases concerning both permissible and impermissible forms of aid provide a standard, guide, or test for states to rely upon when

185. Agostini v. Felton, 521 U.S. 203, 234 (1997) (finding that pervasive monitoring of Title I teachers is not required); Bowen v. Kendrick, 487 U.S. 589, 616 (1988) (advancing less intensive monitoring methods for grants).

186. *See Agostini*, 521 U.S. at 233; *Bowen*, 487 U.S. at 616.

187. *See Colo. Christian Univ.*, 534 F.3d at 1261–62.

188. *Bowen*, 487 U.S. at 616–18.

189. *Id.*

190. *Colo. Christian Univ.*, 534 F.3d at 1261–62.

191. *Id.* at 1263. The court relied on *New York v. Cathedral Academy* in making this assertion, stating that such litigation touches the core of the meaning of the Establishment Clause. *Id.* at 1262. However, *Cathedral Academy* involved an aid program that required the state and the religious institution to litigate over religious matters. *Id.* Here, the state was permitted to make determinations of religious matters without being forced to litigate their legitimacy in court. *Id.*

192. *See supra* note 179.

193. Courts have consistently adapted the concept of excessive entanglement to new circumstances and considered it in light of other conditions. *See* Agostini v. Felton, 521 U.S. 203, 222–23 (1997); *Bowen*, 487 U.S. at 616–17. However, they have adapted it in a manner consistent with its purpose, not as a means to eliminate state inquiry. *Id.*

exercising their discretion to dole out aid to religiously affiliated schools.[194] The Tenth Circuit's decision to strike down Colorado's "pervasively sectarian" inquiry leaves no workable standard upon which states and lower courts can rely. Further, it prohibits effective state inquiry or review, thus forcing states to rely upon accreditation credentials and schools' self-reporting of their religious character.[195] The decision improperly leaves states without a way to gauge their compliance with the Clause.

1. What is a Permissible Inquiry?

The Tenth Circuit classified the Commission's "pervasively sectarian" inquiry as excessive entanglement, and struck the inquiry in its entirety,[196] without suggesting alternative ways for the state to seek information.[197] States have a historically significant and constitutionally mandated interest in complying with the Establishment Clause.[198] Accordingly, states must have a way to gauge their compliance and make inquiries of religiously affiliated institutions to ensure that public funds are not advancing religion.

The Supreme Court has devised several ways to analyze compliance with the Clause.[199] *Lemon v. Kurtzman*, for example, provided the three-pronged *Lemon* test, which has been employed by courts for over three decades.[200] *Committee for Public Education and Religious Liberty v. Nyquist* also offers a material factor to be considered when examining aid programs: whether there is any resulting incentive to attend religious schools because of the nature of the aid.[201] *Bowen v. Kendrick* provides an additional factor strongly associated with a state's discretion to offer aid: whether a religious institution has an explicitly religious mission.[202] These cases demonstrate the Supreme Court's habit of elucidating factors and tests to which governments and lower courts can look for guidance.[203]

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194. *See, e.g.*, Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674–75 (1970) (examining the extent of government entanglement with religion); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968) (discussing the purpose and effect of a New York aid statute).

195. *See* THE HIGHER LEARNING COMMISSION, INSTITUTIONAL ACCREDITATION: AN OVERVIEW 1, *available at* http://ncahlc.org/download/overview07.pdf (discussing the process of educational accreditation from nongovernmental bodies).

196. *Colo. Christian Univ.*, 534 F.3d at 1250.

197. *Id.* at 1262–66.

198. *See* Locke v. Davey, 540 U.S. 712, 722 (2004).

199. *See* discussion *supra* Part I.C.1–2 (explaining the tests and analyses the Supreme Court has employed).

200. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 744–45, 748 (1976) (applying the *Lemon* test).

201. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785–87 (1973).

202. Bowen v. Kendrick, 487 U.S. 589, 609–10 (1988).

203. *See* discussion *supra* Part I.C.1–2 (explaining the tests and analyses the Supreme Court has employed).

The Tenth Circuit, however, declared the appropriate inquiry to be excessive entanglement without explaining where a line should be drawn in such inquiries.[204] The court merely mentioned the necessity that a state employ "neutral, objective criteria."[205] This holding provides little guidance for the state of Colorado, and other states within the Tenth Circuit's jurisdiction, to rely upon when drafting aid schemes.[206]

2. State Review is Precluded

Colorado has an undisputed interest in not advancing religion, which includes funding a student's study for the ministry.[207] An institution professing adherence to the Evangelical Christian faith[208] may raise concerns about the education it provides and its similarity to devotional or ministerial education.[209] In its holding in *Colorado Christian University*, the Tenth Circuit did not define what programs or institutions Colorado may permissibly fund.[210] Consequently, Colorado is left without guidance as to what it can constitutionally do to ensure that a religiously affiliated institution of higher education is reporting accurately on applications to the scholarship program.

CCU advertises itself to prospective students as a university that will strengthen their Christian faith and frame their academic experience within

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204. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008).

205. *Id.*

206. *See id.* (failing to provide the state with an alternative set of criteria).

207. *See* Locke v. Davey, 540 U.S. 712, 721–22 (2004) (explaining that the state's anti-establishment interest is nowhere more relevant than in situations concerning public funding of the ministry).

208. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 432 (Eleventh ed. 2003). The term "evangelical" is defined as:

> 1: of, relating to, or being in agreement with the Christian gospel esp. as it is presented in the four Gospels . . . 3: emphasizing salvation by faith in the atoning death of Jesus Christ through personal conversion, the authority of Scripture, and the importance of preaching as contrasted with ritual . . . 5: marked by militant or crusading zeal.

Id.; *see also* ANDY G. OLREE, THE CHOICE PRINCIPAL: THE BIBLICAL CASE FOR LEGAL TOLERATION vii (2006). The author describes Evangelical Christians as those who believe in the "supreme authority of the Bible in all human affairs" and who "spread the truth [found in Biblical scripture] to others because truth matters." *Id.* at vii–viii. The author goes on to assert that evangelicals are "call[ed] to political action" against abortion, euthanasia, homosexual marriage, and teenage pregnancy. *Id.* at viii. It is reasonable to suspect that CCU, which advertises itself as adhering to these values, uses the academic experience it offers to further these objectives. It is therefore necessary for Colorado to be permitted to make the necessary inquiry of CCU's religious functions to ensure the Establishment Clause is not violated by allowing public funds to be directed to CCU.

209. *See Locke*, 540 U.S. at 725 (holding that states have a legitimate interest in not funding devotional or ministerial education and may choose to abstain from doing so); *supra* notes 126–133 and accompanying text.

210. *Colo. Christian Univ.*, 534 F.3d at 1266 (explaining only that "neutral, objective criteria" must be used in determining whether an activity may be funded).

those bounds.[211] On its application for admission to Colorado's scholarship program, however, CCU reported that its courses do not indoctrinate or proselytize, and that its students are not limited to one religious faith.[212] There is a clear discrepancy between CCU's mission and its report to the Commission, and Colorado is left without a mechanism with which to investigate that discrepancy.[213] As such, the Tenth Circuit's holding sends an important policy message regarding a state's authority to control the funding of religiously affiliated institutions, particularly those of higher education.

Although the court noted otherwise, the holding sends the message that religiously affiliated institutions may decide for themselves whether they are eligible to receive state aid, either directly or indirectly.[214] CCU purports to embrace Evangelical Christianity and frame its education and academic discourse within those bounds.[215] Its faculty are required to sign a statement of adherence to the university's beliefs, and a sizeable demographic of its student body is required to attend chapel services.[216] These characteristics strongly imply that the offered education is religious in nature.[217] However, by barring Colorado's inquiry into the degree of this religiosity, the state is effectively required to rely upon non-government accreditation procedures and, most importantly, CCU's self-evaluation and responses on the scholarship application.[218] The message is sent that an institution may make the claims necessary to receive the benefits of government aid, as those claims are not subject to meaningful state review.

IV. CONCLUSION

Although Establishment Clause jurisprudence has proven to be an evolving body of law, its early evolution was deliberate, gradated, and gradual. It served as a useful guide for courts considering novel issues and providing logical standards upon which they could rely in the interim. The Tenth Circuit's holding in *Colorado Christian University v. Weaver*, however,

211. *Id.* at 1252; *see also supra* note 208.

212. *See Colo. Christian Univ.*, 534 F.3d at 1252.

213. *See* discussion *supra* Part II.A.

214. *Colo. Christian Univ.*, 534 F.3d at 1266.

215. *Id.* at 1252.

216. *Id.*

217. *See supra* notes 148–152, 208 and accompanying text.

218. *See* COLO. REV. STAT. §§ 23-3.3-101(3)(b), 23-3.5-102(3)(a)(II) (requiring an "institution of higher education" to be accredited); 23-3.7-102(3)(c), 23-18-102(9) (2008); *Colo. Christian Univ.*, 534 F.3d at 1250; *supra* note 145; *see also* THE HIGHER LEARNING COMMISSION, *supra* note 195, at 5–7. The Commission lists the criteria it uses as a basis for accreditation. *Id.* Criteria related to degree of religiosity, religious functions, or religious requirements are not listed. *Id.* Thus, the accreditation process does not take into account all interests of the state. The state must be permitted to supplement the accreditation inquiry to ensure any public aid directed to a college or university is not in violation of the Establishment Clause.

departs from the logic of its predecessors and, instead, leaves the law unclear. This uncertainty has serious ramifications for the states' ability to adhere to the Establishment Clause's requirement of neutrality toward religion and prohibition of religious sponsorship.