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Under the Establishment Clause

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POLITICAL ENTANGLEMENT AS AN INDEPENDENT TEST OF CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE

INTRODUCTION

In *Lemon v. Kurtzman*, the Supreme Court formulated a three-pronged test to determine whether a statute violates the establishment clause of the first amendment. The first prong examines whether the statute has a secular purpose, while under the second prong the statute's primary effects must neither advance nor inhibit religion. The third prong has two parts. Under the first part, a statute must not foster excessive administrative entanglement between government and religion. A statute that fails to pass either of the first two
prongs or the first part of the third prong will be held unconstitutional. The second part of the third prong, the political entanglement test, examines whether the challenged statute has the potential for dividing an electorate or legislature along religious lines. Although the Court regards such division as dangerous because it may divert legislative attention away from other important issues, it has never


9. E.g., Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) ("If a statute violates any one prong, it must be struck down under the Establishment Clause."). With Lynh v. Donnelly, 52 U.S.L.W. 4317, 4332 (U.S. Mar. 5, 1984) ("[W]e have often found it useful to inquire whether the challenged law or conduct [violates one of the three prongs].") and Mueller v. Allen, 393 U.S. 702, 706 (1969) (three-pronged test "provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges") (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)). In Marsh v. Chambers, 433 U.S. 3330 (1983), the Court did not formally apply the test in holding constitutional the Nebraska Legislature's practice of employing a Presbyterian chaplain for 16 years to open its sessions with prayer. Id. at 3336-37. Instead, the Court focused on the practice's limited potential for leading to an actual establishment of religion, id. at 3335, 3337, and on legislative prayer's unbroken history of national acceptance. Id. at 3332-35. Justice Brennan, however, expressed his belief that the Court's failure to apply the test did not represent a "reshaping" of establishment clause doctrine, but rather an exception to accommodate legislative prayer. Id. at 3338 (Brennan, J., dissenting).

invali_da te a statute solely because it violated the political entangle-
ment test. Instead, the Court has viewed a statute’s potential for
fostering political division along religious lines as a “warning signal,”
triggering stricter scrutiny of the statute under the other three tests of
Lemon.

There is reason, however, to elevate the political entanglement test
to the level of the other tests of Lemon. Such an elevation would not
be based on the premise that political division along religious lines
diverts legislative attention away from other issues, but rather on the
premise that such division is not only a danger in its own right, but a
symptom of a greater danger: the fusion of governmental and reli-
gious functions.

Although the Court has never elevated the political entanglement test
to a fourth prong, the Court’s language in two recent decisions
permits an interpretation that regards political division along religious
lines as indicating that a fusion of governmental and religious func-

J., concurring); id. at 4326 (Brennan, J., dissenting); Decker v. O’Donnell, 661 F.2d
598, 616 n.34 (7th Cir. 1980); Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979);
L. Tribe, supra note 3, § 14-12, at 868; Note, A Departure from Benevolent Neutrality—
Benevolent Neutrality]; see Lynch v. Donnelly, 52 U.S.L.W. 4317, 4322 (U.S.
March 5, 1984).

797-98 (1973) (“While the prospect of [political] divisiveness may not alone warrant
the invalidation of state laws... it is certainly a ‘warning signal’ not to be ignored.”)
(citing Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)); accord Lynch v. Donnelly,
52 U.S.L.W. 4317, 4326-27 (U.S. March 5, 1984) (Brennan, J., dissenting); Meek v.
Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973)); L. Tribe, supra note 3, §
14-12, at 868.

13. L. Tribe, supra note 3, § 14-12, at 866; see Meek v. Pittenger, 421 U.S. 349,
756, 794-98 (1973); J. Nowak, supra note 2, at 1035; Pickrell & Horwich, “Religion
as an Engine of Civil Policy”: A Comment on the First Amendment Limitations on
the Church-State Partnership in the Social Welfare Field, 44 Law & Contemp.
Probs., Spring 1981, at 111, 121; Ripple, The Entanglement Test of the Religion

14. The Court has long regarded a fusion of governmental and religious functions
as a principal danger addressed by the establishment clause. See Larkin v. Grendel's
Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871) (“The structure of our govern-
ment has... rescued the temporal institutions from religious interference [and] has
secured religious liberty from the invasion of the civil authority.”).
tions may occur. In *Larkin v. Grendel's Den, Inc.*, the Court held that a statute giving churches veto power over applications for liquor licenses within a certain distance of the church excessively entangled religion with the affairs of government because the statute vested governmental authority in a religious body. The Court's use of entanglement analysis in this context suggests that the political entanglement test may go beyond scrutiny of a statute's potential divisiveness to determine if the statute represents a "fusion of governmental and religious functions." More recently, in *Lynch v. Donnelly*, the Court rejected the argument that a town's inclusion of a Nativity scene in its Christmas display created potential for fostering political division along religious lines. Finding that the practice had not engendered division before the lawsuit, the Court wrote that a litigant could not "by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement." This language implies that political division along religious lines, when not manufactured by parties to a lawsuit, may serve as evidence that political and religious functions have fused.

The Court did not state that such evidence would raise the political entanglement test to an independent fourth prong. This Note, however, argues that because such fusion enables politically powerful religious groups to exert excessive influence over the political process, the political entanglement test must be elevated to an independent test of constitutionality. Governmental programs providing financial aid to the secular functions of religious institutions often require annual appropriation battles before the legislature. When these battles divide legislators along religious lines, the religious institutions with the most political power are likely to receive the largest appropriations, to the detriment of less powerful groups.

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15. 103 S. Ct. 505 (1982).
16. Id. at 507, 509.
17. Id. at 511-12.
18. Id. at 512 (quoting School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
20. Id. at 4321-22.
21. Id. at 4321.
22. Id. (emphasis added).
23. This test, however, should in no way affect the ability of religious institutions to influence legislation in accordance with their ideological beliefs. See infra notes 119-34 and accompanying text.
24. See infra notes 113-14 and accompanying text.
25. See infra notes 78-79 and accompanying text. Such less powerful groups may also include secular institutions. See Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (government must act neutrally as between religion and nonreligion); School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (government may not favor religion over nonreligion).
In light of the resulting harm to these less powerful groups, the political entanglement test should be independently capable of striking down legislation that by its nature will lead to a fusion of governmental and religious functions. Furthermore, legislation not yet amounting to a fusion of these functions may hold such ominous potential for dividing political bodies according to their religious differences that fusion inevitably will result. The political entanglement test should be capable of striking down such legislation even if it passes scrutiny under the other prongs of the Court’s establishment clause test.

I. The Lemon Test: The Three Independent Prongs

In Lemon v. Kurtzman, the Supreme Court announced that legislation does not violate the establishment clause if it has a secular legislative purpose, primary effects that neither inhibit nor advance religion, and does not foster excessive administrative or political entanglement between government and religion. Through the secular purpose test, the Court seeks to determine whether the legislature intended the challenged enactment to inhibit or advance religion. A judicial finding of either purpose can invalidate the statute. Most statutes pass this test because lawmakers have become skillful at

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writing a secular purpose into their enactments\textsuperscript{31} and the Court rarely questions the stated purpose.\textsuperscript{32}

The primary effect test looks beyond the legislature's intent to ascertain whether the law's immediate effects either inhibit or advance religion.\textsuperscript{33} The Court's scrutiny of a law's effects continues beyond the finding of a primary secular effect to determine if the law also has a primary effect that advances or inhibits religion.\textsuperscript{34} The test, however, does not distinguish between "primary" and "secondary" effects, but between those that are direct and immediate, as opposed to ones that are remote and incidental.\textsuperscript{35} For example, governmental funding of a religious institution's religious function aids religion directly,\textsuperscript{36} whereas funding of such an institution's secular function may only indirectly aid religion if the government can fund that function without creating the danger that the appropriated funds will be used for religious purposes.\textsuperscript{37} In deciding whether this danger exists, the Court examines the degree to which religion permeates the benefited institution\textsuperscript{38} and the severability of its secular and religious func-

\textsuperscript{31} R. Miller \& R. Flowers, supra note 7, at 302; Aid to Religion, supra note 8, at 1179.


\textsuperscript{38} R. Miller \& R. Flowers, supra note 7, at 302; see Meek v. Pittenger, 421 U.S. 349, 363 (1975) (unconstitutional primary effect of advancing religion found because of "predominantly religious character" of benefited parochial schools); Hunt v. McNair, 413 U.S. 734, 743 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious
tions. If the Court finds that government can directly aid the institution's secular function without risking direct aid to its religious function, the challenged program will pass the primary effect test. Thus, the primary effect test does not prohibit aid to an institution's religious function provided that the aid is indirect.

Even if a statute passes scrutiny under the purpose and effect tests, it will fall if the Court finds a potential for fostering excessive administrative entanglement between government and religion. The Court has found such potential when the challenged program requires governmental surveillance of a religious institution's activities or monitoring of its records to ensure that it does not use public money for religious purposes. The administrative entanglement test is therefore closely related to the primary effect test. The governmental watchdogging constitutionally required to ensure that public funds do not

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39. R. Miller & R. Flowers, supra note 7, at 302; L. Tribe, supra note 3, § 14-9, at 840-41; Aid to Religion, supra note 8, at 1182-83. The Court has reasoned that if no clear boundary exists between a religiously permeated institution's secular and religious functions, direct aid to the one may ultimately directly aid the other. Meek v. Pittenger, 421 U.S. 349, 365-66 (1975); see Hunt v. McNair, 413 U.S. 734, 743 (1973).

40. See, e.g., Roemer v. Board of Pub. Works, 426 U.S. 736, 755, 759 (1976) (plurality opinion); Hunt v. McNair, 413 U.S. 734, 743-44 (1973); Tilton v. Richardson, 403 U.S. 672, 680-83 (1971) (plurality opinion); see also Pickrell & Horwich, supra note 13, at 117 (aid to religion is only indirect if activity funded is strictly secular).

41. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Tilton v. Richardson, 403 U.S. 672, 679 (1971) (plurality opinion); see, e.g., Mueller v. Allen, 103 S. Ct. 3062, 3069-71 (1983) (tax deductions to parents with expenses incurred in educating their children held constitutional even though deductions indirectly aided sectarian schools); Board of Educ. v. Allen, 392 U.S. 236, 244 (1968) (state loans of school books to parochial school students held constitutional even though loans encouraged students to attend parochial schools); Everson v. Board of Educ., 330 U.S. 1, 17 (1947) (state reimbursement of bus fares to parents of students attending sectarian schools held constitutional even though parents encouraged to send children to those schools).


directly advance religion may itself be so excessive as to violate the establishment clause. This test rests on the premise that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Consequently, the test seeks to insulate religion from the corrupting or secularizing influence of government.

The Court has recognized, however, that the complexities of modern society inevitably produce some entanglement between church and state. For example, in deciding whether a state could constitutionally exempt church property from taxation, the Court noted that both exemption and taxation fostered some degree of church-state contact. In deciding whether such contact reaches an "excessive" level in any given case, the Court examines the character and purposes of the benefited institution, the resulting relationship between government and religion, and the nature of the aid that the state provides.

The Court has stated that the secular purpose, primary effect and administrative entanglement prongs are independent tests of constitutionality. The political entanglement test, however, has never risen to the prominence of the other prongs. Whether the political entanglement test may stand as an independent fourth prong can be determined by examining its doctrinal underpinnings and application.

46. Roemer v. Board of Pub. Works, 426 U.S. 736, 772 (1976) (Brennan, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 621 (1971); id. at 634 (Douglas, J., concurring); see Wolman v. Walter, 433 U.S. 229, 266 & n.7 (1977) (Stevens, J., concurring in part and dissenting in part); L. Tribe, supra note 3, § 14-12, at 866; cf. Kurland, supra note 7, at 11-13 (discussing the theory that church-state separation protects the church from the corrupting influence of the state); Note, The Constitutionality of Tax Relief for Parents of Children Attending Public and Nonpublic Schools, 67 Minn. L. Rev. 793, 821 (1983) (legislation primarily aiding sectarian schools tends to secularize school) [hereinafter cited as Tax Relief].
50. See supra note 7.
II. THE POLITICAL ENTANGLEMENT TEST

A. The Doctrinal Underpinnings

Through the political entanglement test the Court has sought to identify legislation that holds potential for dividing legislators or members of the voting public according to their religious differences. In applying the test, the Court has regarded legislation providing financial aid to religious institutions as holding such potential. When a statute's implementation requires annual appropriation battles before the legislature, partisans of the aid inevitably will champion their cause and promote political action to achieve their goals. Opponents of the aid, "whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail." Candidates will declare their intentions on the issues, and voters will be forced to choose. Many candidates and voters will find their votes aligned with their faith, and political division will occur along religious lines.

When the Court in Lemon wrote that the first amendment sought to guard against such division, it was not espousing new doctrine. Justices had previously argued that political division resulting from a


53. See, e.g., Meek v. Pittenger, 421 U.S. 349, 365 & n.15 (1975) (loans of instructional materials to predominantly church-related nonpublic schools); id. at 367, 372 (provision of auxiliary services by public school teachers and counselors to nonpublic school children on nonpublic school premises); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774, 794-98 (1973) (direct grants for maintenance and repair to predominantly church-related nonpublic schools); id. at 780, 789, 794-98 (tuition reimbursements and tax benefits to parents of children attending nonpublic schools); Lemon v. Kurtzman, 403 U.S. 602, 606-07, 622-23 (1971) (salary supplements to teachers of secular subjects at church-related elementary and secondary schools; reimbursements to such schools for actual expenditures for teachers' salaries, textbooks and instructional materials).


legislature's consideration of religious issues is dangerous.\textsuperscript{57} Although many Justices have agreed that such division is a danger, there has been no consensus among courts or commentators regarding why it is dangerous.\textsuperscript{58} Some critics of the political entanglement test have assumed that the Court's fear of such division stems from a belief that it engenders religious strife in the community.\textsuperscript{59} They urge abandonment of the test on the ground that judicial removal of religiously divisive issues from legislative purview will at best have no effect on religious strife, and at worst will aggravate it.\textsuperscript{60} This reasoning is flawed because it ignores the foundation on which the Court has based the political entanglement test.

Together the political and administrative entanglement tests seek to prevent "a fusion of governmental and religious functions,"\textsuperscript{61} and

\begin{itemize}
\item \textsuperscript{56} Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).
\item \textsuperscript{58} Compare Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting) (creates sectarian strife) and Kirby, Everson to Meek and Roemer: From Separation to Detente in Church-State Relations, 55 N.C.L. Rev. 563, 568-69 (1977) (same) with Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) (diverts legislative attention from other issues) and Everson v. Board of Educ., 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting) (allows dominating group to achieve dominant benefit) and L. Tribe, supra note 3, § 14-12, at 569 (allows use of politics for religious ends) and Note, The Establishment Clause, Secondary Religious Effects, and Humanistic Education, 91 Yale L. J. 1196, 1202-03 (1982) (threatens viability of political system) [hereinafter cited as Humanistic Education].
\item \textsuperscript{59} See, e.g., J. Nowak, supra note 2, at 1048; Hitchcock, The Supreme Court and Religion: Historical Overview and Future Prognosis, 24 St. Louis U.L.J. 133, 203 (1980) [hereinafter cited as Hitchcock I]; Weber, School Aid and Political Divisions, 38 Jurist 203, 204-05 (1978).
\item \textsuperscript{60} See, e.g., W. Berns, The First Amendment and the Future of American Democracy 71-72 (1976) (aggravates); J. Nowak, supra note 2, at 1048 (merely shifts focus of debate); Fink, The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values, 27 Cath. U.L. Rev. 207, 250 (1978) (aggravates); Schotten, supra note 8, at 224 (same); Schwartz, No Imposition of Religion: The Establishment Clause Value, 77 Yale L.J. 711 (1968) (merely alters source of controversy); Weber, supra note 59, at 208 (aggravates); Recent Statute, Constitutionality of Federal Financial Aid to Church-Related Colleges, 77 Harv. L. Rev. 1353, 1357 (1964) (same).
\end{itemize}
thus, are opposite sides of the same coin. The administrative strand seeks to protect religion by insulating it from excessive governmental intrusion or regulation.\textsuperscript{62} The political strand guards against religious institutions' interference with the political process.\textsuperscript{63} The Court's concern, therefore, is not that political division along religious lines will foster religious strife, for such strife is inevitable in our pluralistic society.\textsuperscript{64} Instead, the Court has based the political entanglement test on the premise that political division along religious lines results in a dangerous interference by religion with the affairs of government.\textsuperscript{65}

Consistent with this premise, the Court seeks to prevent such division,\textsuperscript{66} but the question remains why the Court regards religious inter-
ference with the political process as a danger. One view is that such interference threatens the healthy operation of government. Religious infiltration into the political process could lead to an excessive legislative focus on religious issues to the exclusion of "other issues of great urgency." This focus "could divert attention from the myriad issues and problems that confront every level of government." Under this view, therefore, religious entanglement with governmental affairs is dangerous because it is bad for government. This analysis is problematic because it assumes that issues affecting religion somehow consume more time and energy than other vexing subjects of legislative concern, that religious issues are less important than other issues, or that religious issues are evil or corrupting. The establishment clause, however, is neither a declaration of hostility to religion nor the guardian of government. Instead, along with the free exercise clause, it protects religious freedom.

A better view, therefore, is that religious interference with the political process is dangerous because it threatens the rights of the members of religious groups lacking political power.


69. Id.


arises not because religious interference is in and of itself evil, but because such interference allows religious groups constituting a majority or those with superior resources to exert excessive influence over the political process.\(^7\) When an issue of public aid to religious institutions is before the legislature, the religious groups with the power to employ the political machinery in furtherance of their own interests are likely to receive the largest slice of the economic pie.\(^7\) Although the American system is a democracy, in which the will of the majority generally prevails, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy [and] to place them beyond the reach of majorities . . . .\(^7\) Consequently, political division along religious lines should be avoided because it indicates that religious interests have interfered with the legislative process, and such interference creates the danger that religious interests with political strength will control the government's purse strings.\(^7\)

The resulting injury to less powerful groups can take two forms. First, when a legislature excessively influenced by a religious faction appropriates substantial financial aid for that faction, religious groups
which lack power will be economically disadvantaged; they will have fewer resources to advance their religious beliefs and achieve their goals.\(^7\) Second, less powerful groups may perceive a symbolic governmental identification with the particular faith or faiths aided.\(^8\) The political entanglement test, therefore, does not guard against injury to the political system, but against politically powerful religious groups' use of that system to their own economic and symbolic advantage.

**B. The Application**

The Supreme Court has stated that "there is no single constitutional caliper that can be used to measure the precise degree" to which any one prong of the Lemon test is applicable to the governmental action under scrutiny.\(^6\) Nevertheless, the Court has consistently regarded the purpose, effect and administrative entanglement tests as separate and independent tests of constitutionality.\(^7\) The Court’s position on the role of the political entanglement test is not as clear.\(^8\) Although the


\(^8\) See L. Tribe, supra note 3, § 14-12, at 868; Lynch v. Donnelly, 52 U.S.L.W. 4317, 4323 (U.S. Mar. 5, 1984) (O'Connor, J., concurring); cf. id. at 4322 (O'Connor, J., concurring) (endorsement of particular religion "sends a message to nonadherents that they are outsiders"); Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 511 (1982) ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.").


\(^8\) See supra note 7 and accompanying text.

\(^8\) See J. Nowak, supra note 2, at 1034-35; Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 683 (1980) [hereinafter cited as Choper I]; Kirby, Everson to Meek and Roemer: From Separation to Detente in Church-State Relations, 55 N.C.L. Rev. 563, 569 (1977). In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court indicated that a statute's potential for fostering political division along religious lines may not alone warrant the statute's invalidation. Id. at 797-98. The Court has not stated, however, that such potential can never be the sole basis for a statute's invalidation. Decker v. O'Donnell, 661 F. 2d 598, 616 n.34 (1980); see Lynch v. Donnelly, 52 U.S.L.W. 4317, 4323 (U.S. Mar. 5, 1984). Several lower federal courts, however, have interpreted the Court's language in Nyquist, 413 U.S. at 797-98, to preclude use of the political entanglement test as an independent test of constitutionality. See, e.g., Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979); Cromwell Property Owners Ass'n v. Toffolon, 495 F. Supp. 915, 925 (D. Conn. 1979); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1039 (D. Neb. 1979), aff'd, 636 F.2d 206 (8th Cir. 1980), vacated on other grounds, 452 U.S. 911 (1981); Americans United
Court has not stated that the test can never function independently,\[^{83}\] the Court has never used the test as the sole basis for striking down a law.\[^{84}\]

The vast majority of the Court's cases decided under the establishment clause since the creation of the political entanglement test have called into question the constitutionality of public programs providing aid to religiously affiliated educational institutions.\[^{85}\] Unfortunately, the Court's application of the test in these cases has often appeared inconsistent.\[^{86}\] Nevertheless, several recurring factors have played a

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\[^{83}\] Decker v. O'Donnell, 661 F.2d 598, 616 n.34 (1980); see J. Nowak, supra note 2, at 1035. See supra note 82.

\[^{84}\] See supra note 11.


\[^{86}\] Compare Lynch v. Donnelly, 52 U.S.L.W. 4317, 4321 (U.S. Mar. 5, 1984) (inquiry into political division along religious lines appropriate only when program involves direct grants to religious institutions) with Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796-97 (1973) (tax benefits to parents of children attending nonpublic schools found to create potential for fostering political division along religious lines) and Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661 n.8 (1980) (direct reimbursements to nonpublic schools for expenses incurred in performing state-mandated testing requirements found not to hold potential for excessive political division along religious lines) and Wolman v. Walter, 433 U.S. 229, 244-48 (1977) (political divisiveness not addressed in holding constitutional a program providing therapeutic, guidance and remedial services for nonpublic school students off nonpublic school grounds) and Roemer v. Board of Pub. Works, 426 U.S. 736, 763 (1976) (plurality opinion) (annual nature of grants not controlling in entanglement analysis) and Meek v. Pittenger, 421 U.S. 349, 365 n.15 (1975) (direct loans of instructional materials to nonpublic schools found to hold...
role in the Court's determination of whether the challenged statute has potential for fostering political division along religious lines.\textsuperscript{87} In its consideration of these factors, the Court examines the challenged program's potential for fostering such division\textsuperscript{88} rather than any actual division which may have already occurred.\textsuperscript{89} The Court has focused on the nature of the challenged program to determine if it is the type of program that will foster political division along religious lines.\textsuperscript{90} The Court has correctly refused to rely on evidence of actual division\textsuperscript{91} because such an examination would encourage opponents of a program to manufacture controversy, hoping that the division created would be sufficient for the Court to find a constitutional violation.\textsuperscript{92} Under such an establishment clause test, a program's fate could be determined by a small but highly vocal minority rather than by a court's reasoned analysis of the issues.\textsuperscript{93} Constitutional inquiry, there-

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potential for fostering excessive political division along religious lines) and \textit{id.} at 372 (provision of auxiliary services, including remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services, to nonpublic school students on nonpublic school premises found to hold potential for fostering excessive political division along religious lines) and Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) (potential for political division along religious lines aggravated by need for annual appropriations).

\textsuperscript{87} See infra notes 95-118 and accompanying text.

\textsuperscript{88} Americans United for Separation of Church & State v. School Dist., 718 F.2d 1389, 1400-01 (6th Cir. 1983); Decker v. O'Donnell, 661 F.2d 598, 617 n.35 (7th Cir. 1980); see Meek v. Pittenger, 421 U.S. 349, 372 (1975) (challenged statute created "serious potential for divisive conflict"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (danger of "continuing political strife over aid to religion"); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (state programs at issue have "divisive political potential"); Ripple, \textit{supra} note 13, at 1200-01 (church-state contacts "which might cause religiously-based disputes are forbidden").

\textsuperscript{89} Decker v. O'Donnell, 661 F.2d 598, 617 n.35 (7th Cir. 1980); see Lynch v. Donnelly, 52 U.S.L.W. 4317, 4323 (U.S. Mar. 5, 1984) (O'Connor, J., concurring). In Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court did not inquire into actual political division along religious lines, although Justice Brennan in dissent noted that the challenged practice had already fostered religious division in the legislature. \textit{Id.} at 3339-40 (Brennan, J., dissenting).


\textsuperscript{92} Cf. Schwarz, \textit{supra} note 60, at 711 (actual strife may be irrational); Weber, \textit{supra} note 59, at 208 ("declaring legislation unconstitutional on the basis of potential political divisiveness" encourages opposing groups to initiate conflict).

fore, must focus on the character of a governmental program rather than on the public's possibly irrational reaction to it.94

The first factor of the analysis is the character of the benefited institution.95 Under this factor, the Court seeks to determine whether religion permeates the institution's atmosphere.96 When its functions are solely religious, as is the case with most churches,97 for example, it is said to have a pervasively religious character.98 When an institution carries on both religious and secular functions—for example, a parochial school or a religiously affiliated college—determination of whether the institution is pervasively religious depends on the severability of its functions.99 An institution whose secular function contains a high degree of proselytizing or religious indoctrination is considered more pervasively religious than an institution whose functions are clearly distinct.100 Conversely, public aid to an institution not pervasively religious is not likely to foster an excessive degree of political division along religious lines because controversy over the aid is likely to involve the quality of the institution's secular function rather than its religious character.101 The Court has concluded that contro-

(same) (quoting id. at 4323 (O'Connor, J., concurring)); Cohen v. California, 403 U.S. 15, 20 (1971) ("fighting words" doctrine requires examination of the words themselves to see if they provoke violent reaction); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (No words are forbidden except those that tend to cause violent acts. The test does not turn on "what a particular addressee thinks . . . [but] what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . .") (quoting State v. Chaplinsky, 91 N.H. 310, 320, 18 A.2d 754, 762 (1941), aff'd, 315 U.S. 568 (1942); J. Nowak, supra note 2, at 954-55 (no need to prove actual violence under fighting words doctrine; a danger is enough).


versy over aid to religiously affiliated colleges, for example, is likely to center on their "fiscal responsibility and educational requirements" because the primary goal of most of these colleges "is to provide their students with a secular education." Conversely, programs aiding parochial schools are more likely to engender political division along religious lines because their curricula "involve substantial religious activity and purpose." The Court assumes, therefore, that parochial schools are pervasively religious while religiously affiliated colleges are not. This assumption has led to the Court's conclusion that governmental programs aiding parochial schools are more likely to engender political division along religious lines than programs aiding the colleges.

The second factor involves the breadth of the class benefited by public aid. When a governmental program aids religious institutions only because they are part of a broader group of recipients who are being aided without regard to their religious affiliation, the risk of entanglement is diminished. This is because the public will not perceive a symbolic identification by the government with the benefited religions. Thus, the program is not likely to engender political division along religious lines. When the benefited class is largely

103. Tilton v. Richardson, 403 U.S. 672, 687 (1971) (plurality opinion); see Hunt v. McNair, 413 U.S. 734, 746 (1973).
108. See Wolman v. Walter, 433 U.S. 229, 243 n.11 (1977); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, 518 n.6 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979); Tax Relief, supra note 46 at 821; see also L. Tribe, supra note 3, § 14-12, at 868 (narrowness of benefited class increases public perception of governmental symbolic identification with religion).
religiously affiliated, however, the potential for political division increases because the public will likely perceive a governmental identification with religion in general or with the particular religion aided.\textsuperscript{109} This factor has played a significant role in the Court's determination that governmental programs that aid both religiously affiliated and secular colleges will not likely foster excessive political division along religious lines.\textsuperscript{110} By contrast, the institutions benefited by most programs aiding parochial schools are typically as much as seventy-five percent church-related.\textsuperscript{111} Consequently, aid to such institutions is likely to foster political division along religious lines.\textsuperscript{112}

The third factor is whether the nature of the program requires the legislature to consider the issue of aid to religious institutions annually or whether the consideration is a one-time occurrence.\textsuperscript{113} The latter situation is less likely to divide voters than the annual appropriation battles necessary to fund many of the programs the Court has considered.\textsuperscript{114}

The fourth factor is the directness of the aid received by the religious institution.\textsuperscript{115} The Court has concluded that a program providing aid directly to a parochial school is more likely to foster political division along religious lines than a program under which aid flows directly to the school's students or their parents.\textsuperscript{116} In \textit{Lynch v. Don-}

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\item \textsuperscript{109} See \textit{supra} note 108.
\item \textsuperscript{112} See \textit{Meek v. Pittenger}, 421 U.S. 349, 364-65 \& n.15 (1975) (program aiding non-public schools, 75\% of which were church-related, found to foster political divisiveness); \textit{Tilton v. Richardson}, 403 U.S. 672, 682 (1971) (plurality opinion) (diversity of recipient colleges reduces potential for political division along religious lines); \textit{Lemon v. Kurtzman}, 403 U.S. 602, 623 (1971) (program benefiting relatively few religious groups likely to foster political division along religious lines).
\item \textsuperscript{114} Compare \textit{Lemon v. Kurtzman}, 403 U.S. 602, 623 (1971) (potential for political divisiveness aggravated by annual appropriation battles) \textit{with} \textit{Tilton v. Richardson}, 403 U.S. 672, 688 (1971) (plurality opinion) (one-time nature of grant reduces potential for political divisiveness).
nelly, the Court indicated that scrutiny of a program's potential for fostering political division along religious lines is appropriate only when the program provides direct grants to a religious institution. This final factor illustrates a distinction the Court has implicitly drawn between religious institutions as ideological interest groups and

provided to students of nonpublic schools not likely to foster political controversy along religious lines. A possible explanation for the Court's conclusion is that programs aiding children are not likely to be perceived as aid to religion. Cf. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983) (tax deductions for parents incurring educational expenses for their children primarily benefit parents whose children attend parochial schools; the schools benefit only because of parents' decision, thus there is no "imprimatur of State approval" on religion) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)); L. Tribe, supra note 3, § 14-12, at 868-69 (political entanglement test based on concern that aid to religion will be perceived as a symbolic governmental identification with benefited religion).

118. Id. at 4321; accord Mueller v. Allen, 103 S. Ct. 3062, 3071 n.11 (1983). This factor recently emerged in Mueller, 103 S. Ct. at 3071 n.11. Mueller involved an establishment clause challenge to a Minnesota law allowing a state income tax deduction for parents with expenses incurred in educating their children, even if the children attended religiously affiliated schools. Id. at 3063-64. The law allowed a maximum deduction of $500 per dependent in grades kindergarten through six and $700 per dependent in grades seven through twelve, and only actual expenditures for tuition, textbooks and transportation were deductible. Id. at 3065. Although the dissent noted that the vast majority of taxpayers benefited by the law were parents whose children attended nonpublic schools, id. at 3074 (Marshall, J., dissenting), the Court refused to consider a state "Revenue Analysis" reaching the same conclusion. Id. at 3070 & n.9. On the question of political divisiveness, the Court wrote:

No party to this litigation has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the Lemon test, whether the Minnesota statute partakes of the "divisive political potential" condemned in Lemon. . . . Since this aspect of the "entanglement" inquiry originated with Lemon . . . , and the Court's opinion there took pains to distinguish both [Everson v. Board of Educ., 330 U.S. 1 (1947) and Board of Educ. v. Allen, 392 U.S. 236 (1968)], the Court in Lemon must have been referring to a phenomenon which, although present in that case, would have been absent in the two cases it distinguished.

The Court's language in Lemon . . . respecting political divisiveness was made in the context of [state] statutes which provided for either direct payment of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in the light of the treatment of the point in later cases . . . the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

Id. at 3071 n.11.

The Court's conclusion conflicts with earlier cases and suffers from serious doctrinal flaws. In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court found that tax benefits conferred on parents of children attending sectarian elementary and secondary schools carried grave potential for fostering political division along religious lines, id. at 794, because "pressure for frequent enlargement of the relief [was] predictable." Id. at 797. In Meek v. Pittenger, 421
as self-interest groups.\textsuperscript{119} As ideological interest groups, religious institutions seek the enactment of laws that reflect those institutions' concepts of morality.\textsuperscript{120} Through their lobbying efforts on matters such as birth control, abortion, divorce, gambling and nuclear disarma-

U.S. 349 (1975), the Court found that provision of auxiliary services (remedial and accelerated instruction, guidance counseling and testing, speech and hearing services) to nonpublic school students by public school teachers and counselors created "serious potential for divisive conflict over the issue of aid to religion . . . ." \textit{Id.} at 372. Additionally, in 1973, the Court summarily affirmed a district court decision invalidating a system of tax credits for parents of children attending nonpublic schools. Kosydar v. Wolman, 353 F. Supp. 744, 767 (S.D. Ohio 1972), \textit{aff'd mem. sub nom.} Grit v. Wolman, 413 U.S. 901 (1973). The district court had found that the challenged program held potential for fostering political division along religious lines. \textit{Kosydar}, 353 F. Supp. at 766. Thus, the Supreme Court has three times either held, or affirmed a decision holding, that programs providing aid to nonpublic school students or their parents, rather than the schools themselves, violated the political entanglement test. As Justice Brennan noted in his dissenting opinion in \textit{Lynch}, "[i]t seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results." 52 U.S.L.W. at 4326 n.4 (Brennan, J., dissenting).

Furthermore, the Court's reliance on \textit{Allen}, 392 U.S. 236, and \textit{Everson}, 330 U.S. 1, to reach its conclusion is misguided. \textit{See Lynch}, 52 U.S.L.W. at 4327 n.9 (Brennan, J., dissenting). \textit{Everson} upheld reimbursements to all parents of expenses incurred in transporting their children to and from schools. 330 U.S. at 18. \textit{Allen} upheld public loans of textbooks to nonpublic school students. 392 U.S. at 248-49. Although both cases involved aid to nonpublic school students or their parents, rather than the schools themselves, both cases were decided before the political entanglement test was an element of the Court's establishment clause analysis. \textit{See Meek v. Pittenger}, 421 U.S. 349, 378 (1975) (Brennan, J., dissenting).

Even if the Court had been correct in its analysis of its prior holdings, it would be unwise to place so much weight on a single factor in determining whether a program holds potential for fostering political division along religious lines. In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), for example, in which the Court found that a program aiding the parents of children attending parochial schools held potential for political divisiveness, the Court placed considerable weight on the annual appropriation battles necessary to administer the program. \textit{Id.} at 796-97. The Court noted that "pressure for frequent enlargement of the relief is predictable." \textit{Id.} at 797. Furthermore, when the class benefited is narrow, \textit{see supra} notes 106-12 and accompanying text, as four Justices agreed that it was in \textit{Mueller}, 103 S. Ct. at 3072 (Marshall, J., dissenting), it is likely that members of religious groups not within that class will pressure the legislature to provide tax benefits for expenses incurred in providing other types of religious education. \textit{Cf. Lynch}, 52 U.S.L.W. at 4326 (Brennan, J., dissenting) (public display of one group's religious symbol encourages other groups to seek similar display of their symbols).

\textsuperscript{119} \textit{See Committee for Pub. Educ. & Religious Liberty v. Nyquist}, 413 U.S. 756, 796 n.54 (1973) (contrasting political division along religious lines and the normal political diversity expected in a democratic society); Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) (must be expected that members of religious groups take strong positions on public issues) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970)); L. Pfeffer, \textit{supra} note 55, at 62-63 (Court has limited religious institutions' role as self-interest group but not as ideological interest group); L. Tribe, \textit{supra} note 3, § 14-12, at 867-69 (same); \textit{Benevolent Neutrality}, \textit{supra} note 11, at 759 n.129 (Court did not seek to suppress political activities of religious groups on all issues).
ment, religious institutions seek "to shape the culture of the community according to their own [values]." Opponents of the political entanglement test focus their attack on the stifling effect the test may have on debate over such ideological issues. This attack is an overreaction, for courts have consistently rejected political entanglement challenges to legislation affecting issues that are purely of an ideological nature. Indeed, in applying the political entanglement test, the Court has been most careful to include language encouraging lobbying on such issues. It has been recognized that application of the test to ideological issues would, even if desirable, be highly

120. See L. Pfeffer, supra note 55, at 61; M. Stedman, Religion and Politics in America 84 (1964).


122. L. Pfeffer, supra note 55, at 61; see M. Howe, The Garden and the Wilderness 62 (1965); P. Kauper, Religion and the Constitution 83-85 (1964); M. Stedman, supra note 120, at 84.

123. See, e.g., Gaffney, supra note 8, at 207-09; Hitchcock II, supra note 70, at 16-17; Hitchcock I, supra note 59, at 203; Weber, supra note 59, at 205.


125. See, e.g.,McRae v. Califano, 491 F. Supp. 630, 741 (E.D.N.Y.), rev'd on other grounds sub nom. Harris v. McRae, 448 U.S. 297 (1980); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1039 (D. Neb. 1979), aff'd, 636 F.2d 206 (8th Cir. 1980), vacated on other grounds, 452 U.S. 911 (1981); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1195 n.15 (N.D. Ohio 1979), modified on other grounds, 651 F.2d 1198 (6th Cir. 1981), cert. denied, 456 U.S. 999 (1982); see also Kosydar v. Wolman, 353 F. Supp. 744, 767 (S.D. Ohio 1972) ("Nothing that this Court has said ... should be construed as implying that advocacy by religious forces on the general political problems facing our society should be disallowed or even discouraged.").


impractical because there is rarely such an issue before the legislature on which religious groups do not diverge. Furthermore, the role of the political entanglement test is not to invalidate statutes because of how they were enacted, for that is the role of the secular purpose test. Instead, the political entanglement test scrutinizes religious institutions' opportunities to exert power over the political process during the annual appropriation battles necessary to implement challenged statutes.

The political entanglement test focuses on religious institutions as self-interest groups, rather than as ideological interest groups. While as ideological interest groups religious institutions seek governmental support of a point of view, as self-interest groups they seek governmental financing of their own functions. It is political division over appropriations to religious institutions that the Court considers a dangerous intrusion by religious interests into the political process. Despite its recognition that such intrusion is dangerous, however, the Court has never utilized the political entanglement test as an independent test of constitutionality. Certain governmental programs that pass scrutiny under the first three prongs of Lemon, however, may lead to results that the Court regards as establishment clause violations. For example, the implementation of a program providing aid to a religious institution's secular function may require annual appropriation battles in which controversy centers on religion. Although the program may not violate the primary effect test because the aid to religion is indirect, such battles would give

129. See supra notes 28-32 and accompanying text.
131. L. Pfeffer, supra note 55, at 62; see L. Tribe, supra note 3, § 14-12, at 867.
132. See L. Pfeffer, supra note 55, at 61; M. Stedman, supra note 120, at 84, 136.
133. See L. Pfeffer, supra note 55, at 62; M. Stedman, supra note 120, at 136; L. Tribe, supra note 3, § 14-12, at 867.
135. See supra note 11 and accompanying text.
136. See supra notes 95-105, 113-14 and accompanying text.
politically powerful groups opportunities to influence legislative decisions to such a degree that they would not be religiously neutral. The political entanglement test as a fourth prong would strike down these programs. It is therefore necessary to justify the political entanglement test as an independent test of constitutionality.

III. JUSTIFYING THE POLITICAL ENTANGLEMENT TEST AS A FOURTH PRONG

A. Historical Basis

At the political entanglement test’s inception, the Court wrote that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."138 The Court cited no historical support for its proposition. Critics of the political entanglement test charge that the Court failed to cite such support because none exists.139

The intent of the first amendment’s framers has created significant controversy.140 There exists a “seemingly irresistible impulse” to seek

In *Mueller*, 103 S. Ct. 3063, the Court held that a Minnesota statute providing for an income tax deduction for all parents with expenses incurred in educating their children did not violate any of the Lemon prongs. *Id.* at 3067, 3071 & n.11. The deduction could not exceed $700 per dependent. *Id.* at 3085. Although the Court refused to acknowledge its accuracy, a Minnesota Department of Revenue “Revenue Analysis” indicated that the prime beneficiaries of the deduction were parents of children attending nonpublic schools because public school students incurred minimal educational expenses. *Id.* at 3070 n.9; see *id.* at 3072 (Marshall, J., dissenting) (vast majority of parents of students in public schools not eligible for tax benefit). The Court did acknowledge that “financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children.” *Id.* at 3069. Because over ninety-five percent of the students attending nonpublic schools attended sectarian schools, *id.* at 3072 (Marshall, J., dissenting), these schools have a strong incentive to pressure the legislature for a higher ceiling on the deduction. *Cf.* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796-97 (1973) (noting predictability of pressure by sectarian schools to increase tax benefits to parents of children attending sectarian schools). Additionally, it is likely that parents of children attending public schools may seek tax benefits to defray costs in providing religious education for their children. *Cf.* Lynch v. Donnelly, 52 U.S.L.W. 4317, 4326 (U.S. Mar. 5, 1984) (Brennan, J., dissenting) (public display of one group’s religious symbol encourages other groups to seek similar display of their symbols).


support for analyses of the religion clauses from the first amendment’s legislative history. This impulse is misguided because a consensus on the amendment’s meaning among the framers and the ratifying states is not evident. Rather, the amendment’s history reflects several contradictory views on its purpose. Moreover, even if the framers had demonstrated a single and unambiguous intent, changes the nation has undergone in the last 200 years would seriously limit the value of its precise implementation.

Although the first amendment’s legislative history is not clear, an historical study of the period in which the amendment was enacted suggests at least three distinct theories on the value of church-state separation which may have influenced the framers. At the ideological extremes were Thomas Jefferson’s secular separatism and the radi-

140. R. Morgan, The Supreme Court and Religion 21 (1972); see, e.g., M. Howe, supra note 122, at 19 (tracing Religion Clauses to the “evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth”); J. Nowak, supra note 2, at 1029 (“no clear history” to first amendment); J. Whitehead, The Separation Illusion 88 (1977) (first amendment’s framers intended to “leave the states a free hand in religion—free to establish their churches, free to permit Bible reading and prayer in the schools”); Freund, supra note 138, at 1692 (first amendment sought to forestall “political division on religious lines”); Gaffney, supra note 8, at 216 (no “documentary evidence” framers sought to repress political division along religious lines); Kurland, supra note 7, at 13 (first amendment’s primary purpose “was to keep the national government out of religious matters”).


144. See Marsh v. Chambers, 103 S. Ct. 3330, 3348 (1983) (Brennan, J., dissenting) (Constitution not a static document); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (must apply generalities of Bill of Rights to twentieth century problems); Choper I, supra note 82, at 676 (framers’ intent may not be in accord with contemporary values); see, e.g., School Dist. v. Schempp, 374 U.S. 203, 238-39 (1963) (Brennan, J., dissenting) (change in structure of American education); id. at 240-41 (nation has become more religiously heterogeneous); Choper I, supra note 82, at 676 (same; further, public education virtually non-existent at ratification of Bill of Rights and increased governmental regulation of private institutions escalates church-state contacts); Kurland, supra note 7, at 9-11 (incorporation of religion clauses in fourteenth amendment changes their original meaning).

145. P. Kauper, supra note 122, at 48; see L. Tribe, supra note 3, § 14-3, at 816-17; Kurland, supra note 7, at 11.
cal protestant separatism most often associated with the Anabaptist Roger Williams.\textsuperscript{146} While both schools agreed on the principle of separatism,\textsuperscript{147} they differed on its rationale. Jefferson believed that the state would function properly only if protected from “ecclesiastical depredations and excursions.”\textsuperscript{148} Achievement of that protection required building “a wall of separation between Church and State.”\textsuperscript{149} Williams, however, believed that the church needed protection from the corrupting influence of the state.\textsuperscript{150} In contrast to Jefferson, whose separatist philosophy arose from political theory,\textsuperscript{151} Williams derived his separatism from theology.\textsuperscript{152} He viewed a church infiltrated or established by the state as a church corrupted.\textsuperscript{153}

James Madison advanced a third philosophy.\textsuperscript{154} He believed that individual religious freedom depended on the removal of religious matters from legislative cognizance.\textsuperscript{155} Governmental intervention in religion was likely to result “in a conformity to the creed of the

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\item \textsuperscript{146} L. Tribe, \textit{supra} note 3, § 14-3, at 816-17; see M. Howe, \textit{supra} note 122, at 8.
\item P. Kauper, \textit{supra} note 145, at 48; Kurland, \textit{supra} note 7, at 11.
\item \textsuperscript{147} See L. Tribe, \textit{supra} note 3, § 14-3, at 817.
\item \textsuperscript{148} M. Howe, \textit{supra} note 122, at 2; see Kurland, \textit{supra} note 7, at 11.
\item \textsuperscript{149} 16 Writings of Thomas Jefferson 282 (1903); see Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). The “wall of separation” metaphor originated with Williams. See M. Howe, \textit{supra} note 122, at 6. Williams wrote: “[W]hen they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness . . . .” \textit{Id.} at 5-6. In 1802, Jefferson adopted the metaphor in a reply to a public address at the Danbury Baptist Association of Connecticut. He wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church and State.” 16 Writings of Thomas Jefferson 281-82 (1903).
\item \textsuperscript{150} M. Howe, \textit{supra} note 122, at 6; P. Kurland, Religion and the Law 17 (1962); see P. Kauper, \textit{supra} note 145, at 48.
\item \textsuperscript{151} M. Howe, \textit{supra} note 122, at 7-8; see P. Kauper, \textit{supra} note 145, at 48.
\item \textsuperscript{152} M. Howe, \textit{supra} note 122, at 8. \textit{See generally} A. Stokes, Church and State in the United States 194-202 (1950) (discussing Williams’ theory of separation and its impact on religious freedom in America).
\item \textsuperscript{153} See M. Howe, \textit{supra} note 122, at 6; L. Tribe, \textit{supra} note 3, § 14-3, at 816 (quoting M. Howe, \textit{supra} note 131, at 6); Katz, \textit{Radiations From Church Tax Exemption}, 1980 Sup. Ct. Rev. 93, 97.
\item \textsuperscript{154} See L. Tribe, \textit{supra} note 3, § 14-3, at 816; Kurland, \textit{supra} note 7, at 11.
\item \textsuperscript{155} See J. Madison, \textit{Memorial and Remonstrance Against Religious Assessments}, in 2 Writings of James Madison 185 (G. Hunt ed. 1901) (“We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.”), \textit{reprinted in} Everson v. Board of Educ., 330 U.S. 1, 64-65 app. (1947) (Rutledge, J., dissenting); Kurland, \textit{supra} note 7, at 11.
\end{itemize}
majority and a single sect, if amounting to a majority.” Madison regarded accommodation of religious interests as well as the actual establishment of a particular religion as a danger to minority rights. The most dangerous accommodation, Madison argued, was public financial support of religious institutions.

In formulating the entanglement tests, the Court has drawn from all three of these philosophies. The administrative entanglement test reflects Williams’ belief that government infiltration into church affairs compromises the church’s mission. The Court’s two views on the danger of political division along religious lines embody, respectively, Jefferson’s desire to protect state from church and Madison’s concern for minority rights. The first view, that such division corrupts the political process by diverting attention from other issues, reflects Jefferson’s argument that government cannot function properly if infiltrated by religious interests. The second view, that such division leads to excessive influence over the political process by powerful religious groups, embraces Madison’s notion that removing religious matters from legislative cognizance best safeguards individual liberty.

156. Madison’s “Detached Memoranda,” 3 Wm. & Mary Q. 3d 561 (E. Fleet ed. 1946) [hereinafter cited as “Detached Memoranda”].


159. See A. Howard, Up Against the Wall: The Uneasy Theory of Church & State, in Church, State, and Politics 23 (J. Hensel ed. 1981) (tracing political entanglement test to Madison); L. Tribe, supra note 3, § 14-12, at 865-66 (tracing purpose and effect tests to Madison; political entanglement test to Jefferson; administrative entanglement test to Williams); Kurland, supra note 7, at 17 (tracing purpose and effect tests to Jefferson; administrative entanglement tests to Williams); see also Curry, supra note 74, passim (tracing political entanglement test to Madison).

160. L. Tribe, supra note 3, § 14-12, at 866; Kurland, supra note 7, at 11, 17. See supra notes 42-49 and accompanying text.

161. L. Tribe, supra note 3, § 14-12, at 866. See supra notes 147-51 and accompanying text.

162. Curry, supra note 74, passim. See supra notes 154-58 and accompanying text.

163. See supra notes 67-70 and accompanying text.
ing religious interests, the controlling faction would inevitably triumphant.165

The attempt by supporters and critics of the political entanglement test to find support for their views in the first amendment’s legislative history is likely a futile endeavor.166 An examination of the separatist philosophies that may have influenced the framers, however, reveals that the political entanglement test has an historical basis.167 Moreover, the political entanglement test also derives support from the Court’s view of the dangers against which the establishment clause protects.

B. Theoretical Basis for a Fourth Prong

A governmental program that passes scrutiny under the first three prongs of Lemon may nevertheless lead to legislative decisions that violate the establishment clause mandate that governmental decisions be religiously neutral.168 The political entanglement test as a fourth prong would reach these violations and thereby strike down the program. While the secular purpose test ensures that a legislature did not intend its enactment to advance or inhibit religion,169 and the primary effect test ensures that a law’s effects do not directly and immediately advance religion,170 the political entanglement test identifies laws that in the future may give politically powerful religious groups opportunities to exert excessive influence over governmental appropriation decisions.171 Just as the administrative entanglement test seeks to predict the future effect of church-state contact on religious institutions,172 the political entanglement test scrutinizes the future effect of such contact on legislative decisions.173 When a law by its nature creates a potential

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164. See supra notes 73-79 and accompanying text.
165. J. Madison, supra note 155, at 185 (“Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body.”), reprinted in Everson v. Board of Educ., 330 U.S. 1, 65 app. (1947) (Rutledge, J., dissenting).
166. See supra notes 140-41 and accompanying text.
167. See supra notes 145-58 and accompanying text.
168. See infra notes 177-79 and accompanying text.
169. See supra notes 28-32 and accompanying text.
170. See supra notes 33-41 and accompanying text.
172. See supra notes 42-49 and accompanying text.
173. See Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) (appropriations battles will force candidates to declare their positions on religious issues, and many “will
for dividing the legislature along religious lines, the law may lead to legislative decisions representing the "fusion of governmental and religious functions" that the Court condemned in Larkin v. Grendel's Den, Inc.. Such fusion would lead to legislative decisions that would not be religiously neutral, and hence, would violate the establishment clause.

The Court has identified governmental neutrality as a principal religion clause value. Government must seek to achieve only secular goals. It must not favor any one religion over other religions, or religion over non-religion. The political entanglement test seeks to identify governmental programs that, by their very nature, will so involve religious interests with the political process that government will be unable to act neutrally. The test does not focus on the present purpose behind the legislature's enactment, which is scruti-
nized under the secular purpose test, but on powerful religious groups' future opportunities for directing more and more of government's limited funds to their secular functions. As a result, the Court has regarded governmental programs that require annual appropriation battles as far more likely to foster excessive political entanglement than laws requiring only one-time expenditures. Yearly quests for larger subsidies will enable religious groups with political strength to exert their power over the political process. Legislators, who must answer to their constituencies, will inevitably yield to political pressure, and future legislative decisions will not be religiously neutral. Consequently, groups with political power will likely receive the largest appropriations, and weaker groups, solely because they are weak, will be financially and symbolically disadvantaged.

In spite of this need to ensure governmental neutrality, it may be argued that if a law does not violate the primary effect test, any controversy surrounding the law's implementation will not be over religion. As applied by the Court, however, the primary effect test allows substantial aid to an institution's religious function provided that the aid is indirect and incidental to a secular legislative purpose. Aid directed to an institution's secular function relieves the institution's burden of financing that function.

180. See supra notes 28-32 and accompanying text.
182. See supra notes 113-14 and accompanying text.
185. See 1970 Term, supra note 173, at 173.
186. See L. Tribe, supra note 3, § 14-12, at 868 (emphasizing symbolic harm); Tax Relief, supra note 46, at 820 (“establishment clause protects against the political ascendancy of one religious sect over another”). See supra note 79 and accompanying text.
187. Cf. Choper I, supra note 82, at 684 (“[I]f a law serves genuinely secular purposes—or impairs no one’s religious liberty by coercing, compromising or influencing religious beliefs—there is no persuasive reason to hold it unconstitutional simply because its proponents and opponents were divided along religious lines.”); Note, Abortion Laws, Religious Beliefs and the First Amendment, 14 Val. U.L. Rev. 487, 513 (1980) (“[T]he question of whether political division along religious lines is a sufficient basis for overturning a statute is closely related to the question of whether a statute’s purpose can be rendered nonsecular by virtue of underlying religious motivation.”).
use money saved on secular items to finance its religious function.\textsuperscript{190} Thus, a governmental program permitting powerful religious groups to direct funds to their secular functions will put groups lacking power at a comparative disadvantage. The weaker groups ultimately will have fewer resources to support their religious functions than the powerful groups because the government will not be paying their bills.

When the benefited institution's character is pervasively religious,\textsuperscript{191} aid it receives is likely to be perceived as governmental sponsorship and symbolic governmental identification with a particular religion.\textsuperscript{192} Religious institutions not within the class benefited will apply political pressure for similar funding of their secular functions.\textsuperscript{193} Annual appropriation battles thus will inevitably lead to legislative decisions based on either legislators' religious preferences or legislators' responses to political power.\textsuperscript{194} Such decisions will be made in "conformity to the creed of the majority and a single sect, if amounting to a majority."\textsuperscript{195} Thus, a law that the legislature intended to serve a secular purpose, and that provides only indirect aid to religion, may in its implementation so entangle religious interests with the political process that legislative decisions will not be neutral. Because such a law would enable more powerful religions to grow at the expense of weaker religions, a check is necessary. The political entanglement test as a fourth prong provides this check.

Critics of the political entanglement test also argue, however, that the test is inconsistent with representative democracy.\textsuperscript{196} They contend that the test places an impermissible burden on religious institutions' rights to freedom of speech and participation in the political process.\textsuperscript{197} The first amendment, however, places a direct limit on

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\textbf{191.} See supra notes 33-41 and accompanying text.
\textbf{194.} See supra notes 183-85 and accompanying text.
\textbf{195.} "Detached Memoranda," supra note 156, at 561.
\textbf{197.} Benevolent Neutrality, supra note 11, at 758-59; see Toscano, supra note 196, at 194-96.
\end{flushright}
legislatures' power to enact laws "respecting an establishment of religion." The Court has construed this clause to proscribe legislative actions that are not religiously neutral. If a law by its nature will lead to non-neutral legislative decisions, then the law violates the establishment clause and is therefore beyond the legislature's power. Furthermore, because only religious self-interest issues are within the test's scope, the test will not interfere with religious groups' ability to affect legislation on ideological issues.

It may also be argued that pressure by religious institutions on the legislature for funding of their secular functions cannot violate the establishment clause because the Court has held constitutional even direct aid to those functions. This argument, however, ignores the Court's inquiry into the benefited institution's pervasion by religion in determining whether the challenged program holds potential for fostering excessive political division along religious lines. The more pervaded by religion, the more likely the controversy before the legislature will center on matters of religion, and hence, the more likely legislatures will divide along religious lines. Controversy surrounding appropriations to a church-affiliated hospital, for example, will more likely center on the quality of the medical treatment it provides than on its religious affiliation. Conversely, parochial school aid is more likely to foster controversy over the school's religious character than over its secular function. Thus, the inquiry turns not on the

198. See supra note 3.
199. See supra notes 177-79 and accompanying text.
201. See supra notes 119-34 and accompanying text.
203. See supra notes 95-105 and accompanying text.
204. See supra notes 95-105 and accompanying text.
207. See supra notes 104-05 and accompanying text.
nature of the function benefited, but on the nature of the controversy. When the controversy concerns the benefited institution's religious character, the legislature will inevitably make non-neutral decisions. The establishment clause demands religious neutrality in all legislative decisions. A law that does not heed this demand infringes the rights of the members of the disfavored religious groups. Because a law that passes scrutiny under the first three prongs of *Lemon* may lead in its implementation to non-neutral legislative decisions, the establishment clause demands that the political entanglement test be advanced to a fourth prong, independently capable of striking down that law.

**Conclusion**

The political entanglement test seeks to identify legislation that holds potential for fostering political division along religious lines. Such division leads to a fusion of governmental and religious functions, a danger recognized by both the Supreme Court and James Madison, author of the first amendment. Legislation providing financial aid to the secular functions of pervasively religious institutions creates this danger. The periodic appropriation battles necessary to administer such legislation will enable religious groups with political strength to exert excessive influence over legislative decisions. The dominant group will achieve the dominant benefit, and politically weak religious groups will be both financially and symbolically disadvantaged.

Legislative decisions made on the basis of religious rather than secular criteria violate the establishment clause mandate that the government act neutrally as among all religions and between religion and nonreligion. Governmental programs leading to nonneutral legislative decisions may pass scrutiny under the first three prongs of *Lemon*. The establishment clause demands, therefore, that the political entanglement test be elevated to a fourth and independent prong, capable of invalidating such programs.

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