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The Establishment Clause - The Expanding Definition of Excessive Entanglement: Gilfillan v. City of Philadelphia

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THE ESTABLISHMENT CLAUSE— THE EXPANDING DEFINITION OF EXCESSIVE ENTANGLEMENT: *GILFILLAN V. CITY OF PHILADELPHIA**

The establishment clause of the first amendment, made applicable to the states via the fourteenth amendment,[1] states that "Congress shall make no law respecting an establishment of religion . . . ."[2] This amendment was adopted as a guard against religious persecution, an evil perceived by the Founding Fathers to be intimately related to government sponsorship of particular religious sects.[3] The establishment clause, how-

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[1] School Dist. v. Schempp, 374 U.S. 203, 215-17 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[2] U.S. CONST. amend. I.

[3] *See* Engel v. Vitale, 370 U.S. 421, 429-32 (1962); Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947). *See generally* L. PFEFFER, CHURCH, STATE, AND FREEDOM 115-21 (rev. ed. 1967). The *Everson* opinion set forth the historical background of the establishment clause. Recognized in *Everson* was the "turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." 330 U.S. at 8-9. Particularly troublesome was the practice of taxing the citizenry in order to support government-sponsored churches. Such practices led to the belief "that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." *Id.* at 11. These considerations led the *Everson* Court to interpret broadly the establishment clause, *id.* at 15, and sweepingly state:

> The "establishment of religion" clause of the First Amendment means at least

ever, has been interpreted to proscribe more than the establishment of an official state religion. It has been broadly construed to preclude government aid to any or all religions as well as government preference of one religion over another.[4] Indeed, the state is prohibited from placing its "stamp of approval"[5] upon any religious activity and must do no more than maintain a "benevolent neutrality"[6] with respect to religious affairs. Recently, in *Gilfillan v. City of Philadelphia*,[7] the United States Court of Appeals for the Third Circuit held that various expenditures made by the City of Philadelphia in connection with Pope John Paul II's 1979 visit to that city violated the establishment clause.[8]

When Pope John Paul II announced his intention to visit Philadelphia, city officials decided to construct a large platform at Logan Circle for the Pope's use in conducting an outdoor Mass.[9] Shortly after the city announced its plans, the *Gilfillan* plaintiffs sought to enjoin it from paying for the platform on the ground that such action would violate the establishment clause. To ensure timely construction, the Archdiocese of

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> this: 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. . . . 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 may 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*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

Later cases have tempered the absolute statements of *Everson*, recognizing that not all legislative programs respecting aid to religious institutions are prohibited by the Constitution. *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975); Tilton v. Richardson, 403 U.S. 672, 677-79 (1971). In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Court stated that "[t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles," *id.* at 668, and pointed to *Everson* as illustrative of the "hazards of placing too much weight on a few words or phrases," *id.* at 670. More recently, the Supreme Court has acknowledged its intent "to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes." Committee For Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

[4] Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

[5] Engel v. Vitale, 370 U.S. 421, 429 (1962).

[6] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514-15 (1968).

[7] 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981).

[8] *Id.* at 928.

[9] *Id.* at 927. The Archdiocese did not request the city to construct the platform. Rather, the city volunteered to build the platform with city funds. N.Y. Times, Sept. 17, 1979, § 1, at 18, col. 1.

Philadelphia agreed to reimburse the city for the costs incurred should the city eventually be adjudged to have impermissibly paid for the platform.[10]

The city's design for the platform was approved by the archdiocese. The finished cylindrical platform was 28½-feet high and 144 feet in diameter. Atop this main platform stood a smaller 14-foot high pyramid-shaped platform, upon which an altar rested. Additionally, upon this pyramid rested an even smaller five-step platform which supported the throne to be used by the Pope.[11]

The platform cost the city approximately $310,000. This figure included such related expenses as $48,000 for shrubs and flowers, and $56,000 for sound equipment.[12] Subtracting the cost of reusable items, the cost was in excess of $204,000. The altar and Pope's chair were provided by the Archdiocese.[13] Moreover, twenty thousand reserve tickets to the Mass were available through the archdiocese. Archdiocesan "marshalls" handled the seating of reserve ticket holders on the day of the Mass.[14] City officials did not accompany the Pope on the platform during the Mass.

Opposing only the construction of the platform used for the Mass, the plaintiffs did not challenge the city's construction of a platform used by city and church officials to greet the Pope at the airport upon his arrival, the expenditures for police protection, or the Pope's use of Logan Circle, a public area, as a site for the Mass.[15] The district court held that the city's expenditure violated the establishment clause and ordered the city to obtain reimbursement pursuant to its agreement with the archdiocese.[16]

On appeal, the Third Circuit affirmed.[17] Writing for a divided panel, Judge Rosenn[18] reviewed the district court's application of the three-pronged establishment clause inquiry[19] and determined that the city's expenditure failed all aspects of the test.[20] The court noted that the expenditure displayed a nonsecular legislative purpose,[21] had an effect which

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[10] 637 F.2d at 927.

[11] *Id.*

[12] *See* table of costs appended to the district court's opinion, 480 F. Supp. 1161, 1170-71 (E.D. Pa. 1979).

[13] 480 F. Supp. at 1162 n.1.

[14] 637 F.2d at 932.

[15] *Id.* at 928.

[16] 480 F. Supp. at 1166-69.

[17] 637 F.2d at 928.

[18] Judge Rosenn was joined in his opinion by Judge Garth. Judge Aldisert dissented.

[19] 637 F.2d at 929-34.

[20] *Id.*

[21] *Id.* at 929-30.

primarily advanced religion,[22] and fostered excessive government entanglement with religion.[23]

The *Gilfillan* court found an excessive entanglement arising from the joint participation between the city and the archdiocese in planning the construction of the platform.[24] Judge Rosenn observed that the city officials responsible for preparations had counterparts in the archdiocese, and that while the city alone designed the platform, the archdiocese approved the design. Furthermore, the archdiocese assumed government functions by handling the sale of reserve tickets and by handling seating access. Such joint preparation efforts, according to Judge Rosenn, amounted to an impermissible entanglement of government and religious authorities.[25] The *Gilfillan* court also affirmed the district court's alternative finding of entanglement based on the political divisiveness caused by the expenditure.[26] This divisiveness was found to be evidenced by the fact that three separate parties had sought to enjoin the construction of the platform.[27]

Judge Aldisert dissented, arguing that since the Pope was a visiting head of a secular state, namely, Vatican City, the expenditure's purpose and effect were primarily secular.[28] Addressing the question of excessive entanglement, Judge Aldisert asserted that the contacts between the city and the archdiocese were not proven to have increased due to the construction of the platform. He further stated that it should not have been surprising that the archdiocese worked with the city, given the safety concerns regarding the Pope's visit.[29] Judge Aldisert also noted that the political divisiveness of the city's expenditure was diminished by its one-time nature, and further added that the number of plaintiffs in an action should not be a measure of political divisiveness.[30]

It is submitted that the entanglement test has become overly broad, a trend both reflected and furthered by *Gilfillan*. Indeed, the ease with which a statute may be struck down under *Gilfillan's* expanded entangle-

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[22] *Id.* at 930-31.
[23] *Id.* at 931-32.
[24] *Id.*
[25] *Id.* at 932.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 935-38 (Aldisert, J., dissenting).
[29] *Id.* at 940 (Aldisert, J., dissenting).
[30] *Id.* (Aldisert, J., dissenting). The *Gilfillan* dissent argued that the majority's holding required the city to become entangled with religion. Judge Aldisert reasoned that since the plaintiffs conceded that the platform constructed at the airport for the Pope did not violate the establishment clause even though the Pope pronounced a blessing from it, the plaintiffs were urging that the city or a court engage in making distinctions based on the religious context of the various events in question. Such determinations would impermissibly embroil the city in evaluations of religious matters. *Id.* at 940-41 (Aldisert, J., dissenting).

ment inquiry may edge the establishment clause doctrine closer to a constitutionally intolerable hostility towards religion.

To effectuate the right to freely exercise one's religious beliefs, the constitutional protection against support of religious activity has been tempered by the proscription against government hostility towards religion.[31] In fact, the United States Supreme Court has noted that "[w]e are a religious people whose institutions presuppose a Supreme Being."[32] Total separation of church and state, the Supreme Court has further observed, is not required by the first amendment.[33] There exists, however, a zone between the prohibitions against support of religious activity and hostility towards religion in which concerted action between government and religious authority is permissible.[34] Defining the parameters of this zone has been a most difficult task for American courts because the line between neutrality towards religion and support of religion is often unclear.[35] The search for meaningful criteria with which to implement this constitutionally mandated neutrality has led the Supreme Court to formulate a three-part test to be employed when determining whether any particular government activity violates the establishment clause.

The three-part test dictates that in order for a statute to be considered nonviolative of the establishment clause (1) it must have a secular

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[31] Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947); *see* Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970). In *Everson*, the Court stated that while the first amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers, it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. at 18. To illustrate its point, the Court said that the first amendment does not require that public services such as police and fire protection, connections for sewage disposal, and highways and sidewalks be withheld from church schools. *Id.* at 17-18. Indeed, the Court's final holding was that it was constitutionally permissible for a state to pay the bus fares of parochial school children, insofar as this was part of a program to pay the bus fares of all school children. *Id.* The *Walz* Court remarked that:

> The course of constitutional neutrality in this area cannot be an absolutely straight line . . . . The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short 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.

397 U.S. at 669.

[32] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[33] Committee For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

[34] Walz v. Tax Comm'n., 397 U.S. 664, 669 (1970); Zorach v. Clauson, 343 U.S. 306, 312-14 (1952).

[35] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968). In *Lemon*, the Court remarked, "[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612.

legislative purpose; (2) its principal or primary effect must not advance or inhibit religion; and (3) it must not lead to excessive entanglement between government and religion.[36] The establishment clause is violated if any of these parts is not met.[37] The often perplexing questions confronting a tribunal attempting to determine a statute's purpose, effect on religion, and degree of entanglement with religion it may foster renders application of these criteria problematic.[38]

The entanglement test was first introduced by the Supreme Court as an independent criterion for determining establishment clause violations in *Walz v. Tax Commission.*[39] The *Walz* Court was presented with a question concerning the propriety of a property tax exemption for religious organizations. It held that an inquiry should be made "whether [government] involvement [with religion] is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[40] Avoiding such involvement, according to *Walz,* furthered the aim of "insulation and separation between church and state."[41] The Court upheld the exemption, holding that it created only a minimal degree of involvement with religion.[42] Indeed, *Walz* noted that the elimination of the exemption would expand government involvement with religion through tax evaluations, tax liens, and tax foreclosures.[43]

The entanglement test, however, has not escaped critical comment. Justice Brennan's concurring opinion in *Walz* cautioned that there are many forms of government-religion interaction which should not be held violative of the establishment clause.[44] Another Supreme Court Justice has characterized the test as "insolubly paradoxical."[45] Notwithstanding such criticism, the entanglement test has become firmly established.[46]

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[36] Meek v. Pittenger, 421 U.S. 349, 358 (1975); Committee For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[37] *See* Lemon v. Kurtzman, 403 U.S. 602, 613-14 (1971).

[38] *See* Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1970); Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968).

[39] 397 U.S. 664 (1970).

[40] *Id.* at 675.

[41] *Id.*

[42] *Id.* at 676.

[43] *Id.* at 674.

[44] *Id.* at 681 (Brennan, J., concurring).

[45] Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 768 (1976) (White, J., concurring).

[46] *See, e.g.,* Committee For Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980) (aid to nonpublic schools); Walz v. Tax Comm'n, 397 U.S. 664, 675, (1970) (property tax exemptions for religious organizations); Surinach v. Pesquera de Busquets, 604 F.2d 73, 78 (1st Cir. 1979) (government subpoena of parochial school records); Bogen v. Doty, 598 F.2d 1110, 1113 (8th Cir. 1979) (prayer by guest clergyman at public county board meeting);

Subsequent to *Walz*, the Supreme Court established additional criteria to be applied in assessing the constitutional propriety of involvements between church and state in entanglement cases, thus encouraging a broader application of the entanglement standard. One year after *Walz*, the Supreme Court, in *Lemon v. Kurtzman*[47] set forth three factors for determining whether government had become excessively entangled with religion. The *Lemon* Court stated, "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[48] At issue in *Lemon* were Rhode Island and Pennsylvania statutes which provided aid to parochial schools in the form of salary supplements to teachers of secular subjects.[49] Applying its newly promulgated factors to the facts presented, the *Lemon* Court found that the "character of the institutions benefitted" were substantially religious, and therefore gave "rise to entangling church-state relationships."[50] The "nature of the aid" being salary supplements to teachers with a duty to advance the religious mission of the school provided a further motive for striking the legislation in question.[51] Finally, the "resulting relationship" was found to be an enduring one, contemplating continued state surveillance of schools receiving aid to ensure that only secular subjects were taught by teachers receiving such aid.[52]

It is submitted that the additional entanglement criteria enunciated in *Lemon* essentially reiterate existing aspects of the three-part test. The resulting relationship factor merely summarizes the entire entanglement test as promulgated by *Walz*.[53] Analyzing the purpose of the institutions aided and the form of the aid given is a reapplication of the primary-effect test. Under the primary-effect test, a government program may have the effect of impermissibly advancing religion if the aided institu-

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Cummins v. Parker Seal Co., 516 F.2d 544, 553 (6th Cir. 1975), *vacated and remanded*, 433 U.S. 903 (1977) (Civil Rights Act of 1964 and regulation thereunder mandating reasonable accommodation of religion); Allen v. Morton, 495 F.2d 65, 68 (D.C. Cir. 1973) (government sponsorship of civic Christmas pageant); EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1310 (N.D. Cal. 1979) (investigation of alleged employment discrimination by religious organization); Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338, 342 (1976), *cert. denied*, 434 U.S. 876 (1977) (erection of latin cross as war memorial in public park).

[47] 403 U.S. 602 (1971).

[48] *Id.* at 615.

[49] *Id.* at 607-10. The Pennsylvania statute also included a program of reimbursement for textbooks and instructional materials. *Id.* at 609.

[50] *Id.* at 616.

[51] *Id.* at 616-17.

[52] *Id.* at 619.

[53] Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).

tion is pervasively sectarian.[54] Thus, the nature of the aided institution is scrutinized under both the effect test and the entanglement test's "character of the institution" factor. The form of the aid factor as employed in *Lemon* duplicates the effect test because a key question raised by this criterion concerned "the potential for impermissible fostering of religion."[55] Whether religion is "impermissibly fostered," it is suggested, is essentially the same inquiry mandated by the effect test, one which seeks to determine if religion is impermissibly advanced.[56] Justice White's concurrence in *Lemon* characterized the majority's reasoning as a "curious and mystifying blend."[57] Indeed, the further proliferation of entanglement criteria in *Lemon,* it is suggested, has served only to obscure the meaning of the entanglement standard, as well as other aspects of the three-pronged test. Moreover, by duplicating in the entanglement test determinations already made in other components of the three-part establishment clause inquiry, a situation is created where violations of one test will invariably become violations of another. This will cloud the meaning of each criterion.[58] The potential confusion engendered by this overlapping approach is reflected by *Gilfillan.* The *Gilfillan* court found excessive entanglement to exist despite the absence of an enduring administrative involvement, mandating continuing scrutiny of the religious entity in question.[59] Indeed, *Gilfillan's* broad interpretation of the entanglement test is evidenced by its failure to address adequately the problem of whether the one-time expenditure by Philadelphia ever rose to the degree of entanglement considered excessive by *Walz* and its progeny.[60] Contacts

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[54] Meek v. Pittenger, 421 U.S. 349, 365-66 (1975); Hunt v. McNair, 413 U.S. 734, 743 (1973); *see* Tilton v. Richardson, 403 U.S. 672, 680-87 (1971).

[55] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[56] *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 665 (1980) (Blackmun, J., dissenting), where the dissent analyzed the form of the aid in deciding whether the statute in question had the effect of advancing religion or fostering excessive government entanglement with religion.

[57] Lemon v. Kurtzman, 403 U.S. 602, 666 (1971) (White, J., concurring).

[58] *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 769 (1976) (White, J., concurring). Justice White argued in his concurring opinion that:

> In affirming the District Court's conclusion that the legislation here does not create an "excessive entanglement" of church and state, the plurality emphasizes with approval that "the District Court gave dominant importance to the character of the aided institutions . . . ." Yet [this is] the same [factor] upon which the plurality focuses in concluding that the Maryland legislation satisfies the second part of the *Lemon* I test: that on the record the "appellee colleges are not 'pervasively sectarian' . . . ."
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> I see no reason to indulge in the redundant exercise of evaluating the same facts and findings under a different label.

Id. at 769 (White, J., concurring).

[59] Gilfillan v. City of Philadelphia, 637 F.2d 924, 930-31 (3d Cir. 1980).

[60] Judge Rosenn briefly acknowledged that the short-term nature of the city's expenditure

between church and state which have been held to be excessive entanglements have been of an enduring, recurring nature, necessitating continuing surveillance of a religious organization.[61] Clearly, the expenditure in *Gilfillan* was not recurring, and did not give rise to an enduring relation-

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factually distinguished *Gilfillan* from the long-term aid questioned in *Lemon*. *Id.* at 932. He asserted, however, that there was no reason to believe that the short-term involvement in *Gilfillan* could not result in excessive entanglement. *Id.* The notable absence in *Gilfillan* of a recurring, continuous involvement of the type which formed the gravamen of the Supreme Court's discussion of entanglement in *Walz* and *Lemon*, however, suggests that *Gilfillan's* application of the entanglement and divisiveness standards may be questionable. The entanglement and divisiveness inquiries, it is submitted, contemplate the existence of enduring administrative involvements entailing scrutiny and surveillance of a religious entity. Furthermore, to find divisiveness, it must be determined that there exists the potential for internecine political discord along religious lines. *See* Meek v. Pittenger, 421 U.S. 349, 372 (1975). *Meek* is indicative of the factual context typically implicating the consideration of the entanglement and divisiveness criteria. *Meek* involved the propriety of a Pennsylvania program which provided to qualifying nonpublic elementary and secondary schools textbooks and certain auxiliary services including counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial or educationally disadvantaged students. *Id.* at 351-54. In striking down all but the textbook loan provision, the Court not only emphasized the unacceptable administrative entanglement which would result if the plan were implemented, but also recognized that the enduring nature of the program guaranteed repeated confrontation between opponents and proponents of the legislation, thereby creating the potential for political divisiveness. *Id.* at 372. The Court then concluded:

> This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."

Id.

In *Gilfillan*, it is suggested, there existed no potentially enduring or long-term administrative involvements compelling a constitutionally intolerable entanglement or surveillance of the religious entity in question. Additionally, the possibility of an annually repeated, politically divisive confrontation between opponents and proponents of the expenditure rising to the level of that contemplated in *Meek* did not exist.

[61] *See* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970); *see, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 670 (1980) (Blackmun, J., dissenting); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Tilton v. Richardson, 403 U.S. 672, 688 (1971); Lemon v. Kurtzman, 403 U.S. 602, 619-20 (1971). In *Tilton*, the Court upheld one-time federal construction grants to church-related colleges, striking only the part of the statute which removed after 20 years the restriction that any structure built with federal funds be used for only a secular purpose. 403 U.S. at 683. The *Tilton* Court found no excessive entanglements due to the one-time nature of the grant, and the lessened need to monitor college level institutions of learning. *Id.* at 685-88; *see* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 763 (1976). In Committee for Pub. Educ. & Religious Liberty v. Regan, the Court upheld a state plan to reimburse private schools for costs incurred in administering state-mandated standardized tests. The *Regan* Court found no excessive entanglements because the routine manner in which the reimbursement plan was administered did not entail continued surveillance of the private schools. 444 U.S. at 659-60.

ship between church and state which would require surveillance and constant scrutiny by the city.[62] *Gilfillan's* reliance upon *Allen v. Morton*[63] as support for its determination that collaboration between the city and the archdiocese led to excessive entanglement appears misplaced.[64] In *Morton,* excessive entanglement was found to exist because government officials played an active role in managing an annually held Christmas pageant supported by federal funds.[65] *Gilfillan* failed to recognize that in *Morton* the questionable involvement by the government officials was recurring and the funds were appropriated annually,[66] thus giving rise to the type of entanglement and potential divisiveness proscribed by *Lemon.* Additionally, the *Morton* court stated that permissible involvement *could* entail government aid in the form of labor and equipment for "the construction and disassembly of the noncreche aspects of the pageant."[67] *Gilfillan* appears to indicate, however, that joint preparation of a *single* event by church and state can result in excessive entanglement. It is submitted that this result is not contemplated by the entanglement test. While a single expenditure by government could violate the establishment clause,[68] the entanglement test seeks only to prohibit enduring rela-

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[62] *See* note 60 and accompanying text *supra. See also* note 64 and accompanying text *infra.*

[63] 495 F.2d 65 (D.C. Cir. 1973).

[64] In *Morton,* the District of Columbia Circuit determined that participation in an annually held Christmas pageant was constitutionally impermissible in that: (1) various government officials played an active role in the management and organization of the pageant, actually occupying two of the five positions on the pageant's Executive Committee, and (2) the government "cosponsored" the pageant by providing labor and assistance in assembling, dismantling, and restoring of the pageant area. *Id.* at 70. The Christmas Pageant of Peace, Inc., however, bore the cost of the electricity used to light a creche which was part of the display. *Id.*

Notably, the *Morton* court, in its discussion of excessive entanglement acknowledged that the government's involvement in the pageant amounted to "considerably less than the constant surveillance and interference discussed in *Lemon.*" *Id.* at 75. Further, the court observed that, "the involvement we consider here today is novel in terms of Supreme Court precedent and thus does not fit well in the pigeonholes of past decisions." *Id.* Nevertheless, the *Morton* court held that the government's involvement resulted in excessive entanglement. *Id.* The court reasoned that its application of the entanglement standard was based upon the principle that government involvement with religion should be kept to a "necessary minimum." *Id.* In *Gilfillan,* however, there were no annual, recurring involvements. Similarly, absent in *Gilfillan* was the awkwardness of government personnel functioning visibly as cosponsors of a clearly nonsecular function. In light of *Morton's* candid acknowledgement that its application of the entanglement test was precedentially uncertain, it is submitted that *Gilfillan's* application of that test under facts displaying an even more tenuous basis for entanglement is similarly questionable.

[65] *Id.* at 70.

[66] *Id.* at 69.

[67] *Id.* at 75.

[68] *See* Walz v. Tax Comm'n, 397 U.S. 664, 689-90 (1970) (Brennan, J., concurring). *See also* Anderson v. Salt Lake City Corp., 475 F.2d 29, 30 (10th Cir.), *cert. denied,* 414 U.S. 879

tionships between church and state.

Gilfillan's questionable expansion of the entanglement test is further evidenced by its affirmation of the district court's finding of political divisiveness as an alternative basis for holding that the City of Philadelphia had become excessively entangled with religion.[69] Noting that political division along religious lines was a threat to the political process and an evil which the first amendment was intended to prevent, the *Lemon* Court stated that such political division constituted a "broader base of entanglement of yet a different character."[70] The potential for political divisiveness, however, is not a factor which by itself can serve as the basis for finding an establishment clause violation.[71] Indeed, in *Roemer v. Maryland Public Works Board*,[72] the Supreme Court, after carefully detailing the criteria to be examined in determining whether excessive entanglement exists, indicated that the impact of all factors, including divisiveness, must be assessed cumulatively.[73] A trend can be detected, however, to render this factor decisive in establishment clause disputes. In *Wolman v. Walter*,[74] Justices Brennan and Marshall stated that the potential for political divisiveness engendered by the Ohio aid-to-parochial-schools program in issue could alone invalidate the aid package.[75] Additionally, the means by which the *Gilfillan* court arrived at its determination of divisiveness appear debatable. Apparently, the *Gilfillan* panel based its finding of divisiveness on the fact that three separate groups brought suit

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(1973). *Anderson* concerned the propriety of the presence on city-county property of a granite monolith inscribed with the Ten Commandments, the Star of David, and other religious symbols. The expense of installation and maintenance of the monolith was incurred by the city and county. *Id.* at 30. The court held that the erection and maintenance of the monolith was not constitutionally proscribed, finding that the monolith was a secular monument which did not advance religion. *Id.* at 34. Since the entanglement test was not even discussed, it is submitted that a mere expenditure for religion should not compel the application of the entanglement test absent the presence of an enduring relationship between government and religious authority.

This Comment does not dispute *Gilfillan's* findings of a religious purpose and effect. While legitimate arguments may be raised concerning the Pope as a secular head of state, Gilfillan v. City of Philadelphia, 637 F.2d at 935-36 (Aldisert, J., dissenting), a Mass is a religious event, celebrated for a religious purpose. *See* N.Y. Times, Sept. 13, 1979, § 2, at 15, col. 4 (comment of Rev. William Helmick of Archdiocese of Boston, in regard to city expenditures for the Pope's visit to Boston).

[69] Gilfillan v. City of Philadelphia, 637 F.2d 924, 932 (3d Cir. 1980).

[70] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[71] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973); Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979).

[72] 426 U.S. 736 (1976).

[73] *Id.* at 766.

[74] 433 U.S. 229 (1977).

[75] *Id.* at 256 (Brennan, J., concurring in part and dissenting in part); *id.* at 259 (Marshall, J., concurring in part and dissenting in part).

to enjoin the city's expenditure for the platform.[76] It is submitted that a tribunal cannot accurately assess the degree of divisiveness created by government involvement with religion by merely examining the number of parties in the action. Although the existence of litigation regarding a particular matter may demonstrate controversy between the parties involved, it is suggested that the broad-based political discord identified by the Supreme Court as implicating constitutional considerations contemplates a deeper division than can be shown by the existence of litigation alone.[77]

CONCLUSION

The evolution and expansion of the entanglement test as a critical factor in establishment clause cases requires that the limits of its application be more precisely defined in order to avoid results approaching impermissible hostility towards religion. Yet, *Gilfillan* presents the possibility that even formerly permissible, routine contacts between church and state may be deemed constitutionally impermissible should the involvement become the subject of a dispute within the Third Circuit's broad interpretation of divisiveness. It is suggested, therefore, that the entanglement test serve only to limit government involvement with religion that is of an enduring nature, necessitating continued surveillance to a degree which casts government in the role of a watchdog over religious activity. It is hoped that *Gilfillan* does not further expand an already nebulous entanglement test.

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[76] Gilfillan v. City of Philadelphia, 637 F.2d 924, 932 (3d Cir. 1980).

[77] *See* Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979).