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ARTICLES

BASIC ESTABLISHMENT CLAUSE ANALYSIS

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I. INTRODUCTION

The establishment clause,[1] wrote Hugo Black in his majority opinion in *Everson v. Board of Education*,[2] "was intended to erect 'a wall of separation between church and State.' "[3] The Supreme Court has bombarded Jefferson's wall of separation in recent years, and some Justices have even threatened to dismantle it.[4] But the Court continues to scrutinize with some care government action that aids religion or entangles government and religion and to strike down such action with surprising frequency.

How does the establishment clause work? This article describes the basic structure of establishment clause analysis. The purpose is to help law students, lawyers, and judges understand and apply the diverse strands of Supreme Court law in this complex and often controversial field.[5]

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1. U.S. CONST. amend. I. The clause provides, "Congress shall make no law respecting an establishment of religion . . . ."

2. 330 U.S. 1 (1947).

3. *Id.* at 16 (quoting Thomas Jefferson).

4. Justice Rehnquist, for example, wrote:

> There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*. . . . The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

Wallace v. Jaffree, 472 U.S. 38, 106-07 (1985) (Rehnquist, J., dissenting).

5. Guidance may be especially helpful since, as Justice Rehnquist put it, "[T]he Establishment Clause presents especially difficult questions of interpretation and application."

The legal analysis developed by the Supreme Court in its effort to enforce the establishment clause may be summarized as follows.[6]

Establishment Clause; Basic Analysis

I. Preliminary questions
   A. Does the ocurt have jurisdiction?
   B. Is the claim justiciable?
   C. Was the harm caused by government action?
II. On the merits: Did the government violate the establishment clause?
   A. Applicability: Did the government aid or become entangled with religion?
   B. Compliance: Did the government action constitute an unconstitutional "law respecting an establishment of religion"?
      1. Facially discriminatory aid
         a. Did the government facially discriminate among religious groups?
         b. If so, the action is unconstitutional unless strict scrutiny is met (presumption of unconstitutionality; government has burden of proof)
            1) Does the government action further a compelling interest?
               a) Compelling interest? and
               b) Substantially effective means? and
            2) Is the government action necessary (the least onerous alternative)?
      2. Nondiscriminatory aid: The action is unconstitutional unless the *Lemon* three-prong test is met (presumption of unconstitutionality; government has burden of proof)
         a. Secular purpose? and
         b. Primary secular effect? and
         c. No excessive entanglement?
      3. Unique historical evidence: the action is constitu-

Mueller v. Allen, 463 U.S. 388, 392 (1983). "It is not at all easy, however," Rehnquist continued, "to apply this Court's various decisions construing the Clause . . . . '[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.' " *Id.* at 393 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

6. This analysis reflects establishment clause law at the time of this writing. The law could change soon, however, since Rehnquist, Scalia, Kennedy, and White are prepared to adopt a different approach. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3134-50 (1989).

tional if there is clear historical proof that the Framers did not intend to prohibit the aid.

III. Remedies

Let us translate this outline into prose. A claimant seeking redress for an alleged violation of the establishment clause must initially meet three preliminary requirements.[7] First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. Third, the conduct giving rise to the claim must be government action. Failure to satisfy any of these requirements normally results in dismissal without reaching the merits of the establishment clause claim.

If claimant satisfies the preliminary requirements, the court will proceed to the merits of the claim. On the merits, the analysis has two components.[8] First, one must determine whether the establishment clause is applicable, i.e., whether the government aided or became entangled with religion.[9]

Second, if the establishment clause is applicable, one must determine whether the government complied with the Supreme Court's establishment clause rules. The Court has developed three separate rules for enforcing the clause. First, if the aid is facially discriminatory, it is unconstitutional unless the government satisfies strict scrutiny by proving that the aid is necessary for furthering a compelling government interest.[10] Second, if the aid is facially nondiscriminatory, it is unconstitutional unless the *Lemon* three-prong test is

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7. These are standard preliminary requirements that apply throughout constitutional law.

8. The two-part structure of the analysis is the same for all constitutional limits. *See* Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775 (1988). In applying any constitutional restriction on government action, one should ask first whether the limit is applicable—*e.g.*, is this the kind of government action that is subject to this limit?—and second whether the government complied with the rules the Supreme Court has developed for enforcing the limit. In short, the analysis on the merits of any constitutional limit focuses on two questions: (1) applicability and (2) compliance. *Id.* at 782-85.

9. Throughout the rest of this article, the phrase "aided religion" will be used as a shorthand for "aided or became entangled with religion."

10. *See infra* notes 28-36 and accompanying text. As the Court put it in *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989),

> Our decision in *Larson v. Valente* supplies the analytic framework for evaluating petitioners' contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*.

Id. at 2146-47 (citations omitted).

met,[11] i.e., unless the aid has a secular purpose, the primary effect of the aid is secular, and the aid does not result in excessive entanglement between government and religion.[12] Third, if there is clear historical evidence that the Framers intended not to prohibit the particular form of aid, the aid does not violate the establishment clause.[13] Compliance with the establishment clause requires that the government satisfy at least one of these three tests.

If the establishment clause is inapplicable or the government satisfies one of the three tests, the analysis ends. If, on the other hand, the establishment clause is applicable and its requirements are not met, one must proceed to the question of remedies.

The next section discusses each step of basic establishment clause analysis in more detail.

II. DISCUSSION

A. *Preliminary questions*

Before reaching the merits, an establishment clause claimant must satisfy the three standard preliminary requirements that apply throughout constitutional law, i.e., claimant must show that the government harmed him or her enough to create a justiciable claim that is within the jurisdiction of the court.

1. *Does the court have jurisdiction?*

Claimant must show that the court has jurisdiction over the claim. This requirement sometimes raises issues in establishment clause cases. This article will assume that jurisdiction is present in all relevant cases.

2. *Is the claim justiciable?*

To qualify for a decision on the merits, the claim must involve a justiciable controversy between adverse parties. Justiciability problems surface repeatedly in establishment clause cases. This article will not provide a detailed analysis of justiciability issues, but a few comments concerning taxpayer standing may be helpful.

In general, federal taxpayers do not have standing to challenge

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11. *Id.* The test received its classic formulation in Lemon v. Kurtzman, 403 U.S. 602 (1971).

12. *See infra* notes 37-84 and accompanying text.

13. *See infra* notes 85-88 and accompanying text.

the constitutionality of action by the federal government.[14] Federal taxpayers, however, do have standing to bring establishment clause claims if the *Flast v. Cohen* double-nexus test is met.[15] Under this test, federal taxpayers have standing if 1) they are challenging congressional action under the taxing and spending power[16] and 2) they allege that the action violates a constitutional restriction on the taxing and spending power.[17] In *Flast*, the Court held that the establishment clause is a limit on the taxing and spending power, so federal taxpayers may attack congressional spending programs that violate the clause.

3. *Was the harm caused by government action?*

The establishment clause, like most other constitutional limits, applies only to the government. When a person acting in a private capacity aids religion, he or she need not comply with the establishment clause. If the challenged aid is given by a *government official*, the government action requirement is met unless the conduct was unrelated to the official's government duties. If the aid was given by a *private person or entity*, the government action requirement is *not* met unless the government either compelled the conduct or encouraged it so substantially that the decision must be attributed to the government.[18]

If claimant does not satisfy the three preliminary requirements, the claim should be dismissed without reaching the merits of the establishment clause issues. If claimant satisfies the preliminary requirements, one may proceed to evaluate the establishment clause claim on the merits.

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14. Frothingham v. Mellon, 262 U.S. 447, 486 (1923).

15. Flast v. Cohen, 392 U.S. 83, 102-03 (1968), created an exception to the *Frothingham* general rule that federal taxpayers do not have standing.

16. U.S. CONST. art. I, § 8.

17. *Flast*, 392 U.S. at 102-03.

18. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982), where the Court stated:

> [C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. . . . [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Id. at 1004. A symbiotic relationship between the government and the private party in which the government profits from the private conduct may also satisfy the government action requirement, although the status of this rule is in doubt. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

B. *On the merits: Was the establishment clause violated?*

Analysis of establishment clause claims on the merits involves the same two-step inquiry that applies to all constitutional limits. One must determine first whether the establishment clause is applicable, i.e., whether the government action that harmed claimant was the kind of government action that is subject to the establishment clause. If so, one must determine second whether the government has complied with applicable establishment clause requirements.

1. *Applicability: Did the government aid or become entangled with religion?*

The establishment clause applies only to government action that aids religion or entangles the government and religion.[19] In most cases, the Court does not discuss this component of establishment clause analysis in detail. The Justices know that government aid to and/or entanglement with religion raises establishment clause problems, and they often proceed directly to the question whether the government conduct can be squared with the tests the Court has developed for enforcing the clause.

On several occasions, however, the Court has plainly stated that the establishment clause restricts government aid to religion. In *Everson*,[20] for example, the Court stated, "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[21]

Similarly, the Court has stated that the establishment clause restricts entanglement between the government and religion. *Everson*, for example, states, "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."[22] As the Court later put it in *Lemon*, "[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."[23]

If the government action that harmed claimant does not involve aid to religion or entanglement between government and religion, the

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19. The Court has identified "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'r, 397 U.S. 664, 668 (1970)).

20. Everson v. Board of Educ., 330 U.S. 1 (1947).

21. *Id.* at 15. The *Everson* opinion went on to list other examples of government action prohibited by the establishment clause.

22. *Id.* at 16.

23. *Lemon*, 403 U.S. at 614.

establishment clause does not apply and the establishment clause analysis ends. If, on the other hand, the challenged government action does aid religion or entangle the government and religion, the analysis proceeds to the question of compliance.

2. *Compliance: Does the government action satisfy one or more of the three tests the Supreme Court has adopted for enforcing the establishment clause?*

If claimant was harmed by government action that aids religion or entangles the government with religion, the establishment clause applies, and the next issue is whether the government complied with the rules developed by the Supreme Court for enforcing the clause.

The Supreme Court has adopted three different analytical tests for determining whether government action of this kind complies with the establishment clause. First, government action that facially discriminates among religious groups, favoring some over others, is unconstitutional unless strict scrutiny is satisfied, i.e., unless the government proves that its action is necessary to further a compelling interest.[24] Second, facially nondiscriminatory government aid to religion is unconstitutional unless the government satisfies the *Lemon* three-prong test,[25] i.e., unless the government action has a secular purpose, a primary secular effect, and does not result in excessive entanglement between the government and religion. Third, if historical evidence demonstrates unequivocally that the Framers did not intend the establishment clause to prohibit the government action, then the government action is constitutional.[26]

The next three sections discuss each of these three tests separately. The greatest emphasis will be given to the *Lemon* three-prong test, since that is the test the Court has used in all but two recent cases.[27]

a. *Strict scrutiny of facially discriminatory aid to religion under Larson v. Valente*

If the challenged government action facially discriminates

24. Larson v. Valente, 456 U.S. 228, 246, 255 (1982). *See infra* notes 32-36 and accompanying text.

25. *Lemon*, 403 U.S. 602 (1971). *See infra* notes 37-84 and accompanying text.

26. Marsh v. Chambers, 463 U.S. 783 (1983). *See infra* notes 85-88 and accompanying text.

27. The two exceptions are *Marsh*, 463 U.S. 783 (1983), and *Larson*, 456 U.S. 228 (1982).

among religious denominations, favoring some over others, strict scrutiny is applicable, and the government action violates the establishment clause unless the government proves that its conduct is necessary to further a compelling interest.[28]

Application of this test proceeds in two steps. First, one must determine whether the government facially discriminated among religious entities. Second, one must determine whether strict scrutiny is met.

1) *Discrimination among religious groups?*

The threshold question is whether the government facially discriminated in favor of some religious entities over others.[29] Government discrimination may take three forms: facial, in effect, or in effect and purpose. *Larson* involved facial discrimination, but the opinion did not make clear whether strict establishment clause scrutiny would also apply to nonfacial discrimination. This issue was apparently resolved by *Hernandez*,[30] which states:

> *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*.[31]

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28. The landmark case on this issue is Larson v. Valente, 456 U.S. 228 (1982). *Larson* involved a Minnesota law imposing registration and reporting requirements on charitable solicitors, but exempting religious institutions that receive more than 50% of their financial support from member contributions. Justice Brennan's opinion for the Court held that this law discriminated on its face in favor of established denominations and against cults such as the Moonies, that strict scrutiny was therefore applicable, and that Minnesota failed to satisfy strict scrutiny because its law was not sufficiently effective in furthering the government's interests.

For several years, it was not entirely clear whether the *Larson* strict scrutiny test would survive as a component of establishment clause law. *Larson* was a 5-4 decision. Rehnquist, White, O'Connor, and Burger dissented. After Scalia replaced Burger and Kennedy replaced Powell, it appeared that the vote might go the other way. *Larson* held in the alternative that the *Lemon* test was not satisfied, so it was possible to argue that the entire strict scrutiny discussion was dictum. In Hernandez v. Commissioner, 109 S. Ct. 2136, 2146 (1989), however, the Court reaffirmed the *Larson* test, so strict scrutiny remains applicable to facially discriminatory government aid to religion.

29. *Hernandez*, 109 S. Ct. 2136 (1989). Facial discrimination is discrimination on the face—that is, in the words—of the statute, regulation, or court decision controlling the government action.

30. 109 S. Ct. 2136 (1989).

31. *Id.* at 2146 (citations omitted).

2) *Is strict scrutiny satisfied?*

If the government did discriminate among religious denominations in a way sufficient to trigger strict scrutiny, then the government conduct violates the establishment clause unless it is necessary to further a compelling interest. This is the same strict scrutiny test that is used in equal protection, free speech, privacy, and free exercise cases. It is commonly viewed as a two-prong test, but it actually involves three components: (1) the government must have a compelling interest; (2) the conduct must further that interest, i.e., it must be a substantially effective means for advancing that interest; and (3) the conduct must be necessary, i.e., the least onerous alternative for furthering that interest.[32] The first two components are commonly grouped together in the first prong of strict scrutiny.

a) *Does the aid further a compelling interest?*

(1) *Compelling interest?*

If strict scrutiny is applicable, the government must prove that the aid program is actually intended to further a very strong, permissible, secular purpose.[33] First, the interest relied upon by the government must be permissible. In this context, this means especially that there must be a purpose other than furthering religion. Second, the interest relied upon must have been one of the government's actual purposes in giving the aid. Third, the interest must be very strong.

(2) *Substantially effective means?*

Next, the aid program must "further" the government's compelling interest in a substantially effective manner.[34] If the program is not a substantially effective means for furthering the interest, there is no compelling justification for the discrimination. If the program is only remotely or speculatively effective, it is unconstitutional.

b) *Is the aid necessary?*

Finally, the government must show that the discriminatory aid program is necessary (the least onerous alternative) to further the

32. *See* Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449, 453-55 (1988).

33. *Id.* at 450.

34. *Id.*

compelling interest.[35] If less onerous alternatives, such as nondiscriminatory aid, are available, there is no compelling need to discriminate. Of course, the alternatives must be substantially effective or the government need not use them. In fact, cases in other areas suggest that the government is not required to use alternatives unless they are equally effective.[36]

b. *The Lemon three-prong test*

In nearly all cases decided since *Lemon v. Kurtzman*,[37] the Court has applied the test developed in that case to determine whether government aid to or entanglement with religion violated the establishment clause. The *Lemon* three-prong test requires the government to prove that its challenged action (1) has a secular purpose, (2) has a primary secular effect, and (3) does not excessively entangle the government with religion.

If the government fails to satisfy any of these three prongs, its conduct violates the establishment clause. Therefore it is necessary to discuss each prong separately.

1) *Secular purpose*

To satisfy the *Lemon* test, the government must prove that its challenged conduct was undertaken to further a secular purpose.[38] To meet this test, the government must articulate what secular purpose it claims it was pursuing. The purpose must be legitimate, i.e., constitutionally permissible. It must be secular, i.e., something other than to advance or endorse religion.[39] And it must have been an *actual* purpose, i.e., one that the government officials really had in mind, rather than a speculative purpose suggested after the fact by a government lawyer.[40] A secular purpose that is a sham or pretext will not satisfy this test.[41]

There is some dispute whether the secular purpose test is a

35. *Id.* at 451.

36. *Id.* at 471, 478.

37. 403 U.S. 602 (1971).

38. "First, the statute must have a secular legislative purpose . . . ." *Id.* at 612.

39. "In recent years, we have paid particularly close attention to whether the challenged governmental practice . . . has the purpose . . . of 'endorsing' religion." County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989).

40. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987).

41. "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87.

sole-purpose test or a primary-purpose test. *Lynch v. Donnelly*[42] states that the Court will find violations of prong one "only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."[43] In *Edwards v. Aguilard*,[44] however, the Court suggested several times that the relevant question is whether the "preeminent purpose" or "primary purpose" of the government action is religious.[45] It remains to be seen whether the sole-purpose or primary-purpose test will prevail.

The secular purpose test, prong one of the *Lemon* three-prong test, is normally quite easy to meet.[46] It has, however, been fatal in some of the Court's most controversial establishment clause cases. In retrospect, it probably accounts for the constitutional ban on public school prayer adopted in *Engel v. Vitale*.[47] It was fatal to public school Bible reading and recitation of the Lord's Prayer.[48] And it also brought down Louisiana's equal-time-for-creation-science statute,[49] a Kentucky law requiring the posting of the Ten Commandments in public school classrooms,[50] and Tennessee's version of the Scopes "monkey law" prohibiting the teaching of evolution.[51]

2) *Primary secular effect*

Prong two of the *Lemon* three-prong test requires that the challenged government action have a primary secular effect, i.e., that the conduct not have the primary effect of advancing religion.[52] This test

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42. 465 U.S. 668 (1984).
43. *Id.* at 680.
44. 482 U.S. 578 (1987).
45. *Id.* at 590, 591, 593.
46. *E.g.*, Mueller v. Allen, 463 U.S. 388, 394-95 (1983), which states:
> Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. . . . This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.

47. 370 U.S. 421 (1962). When *Engel* was decided, the secular purpose test had not yet been formally promulgated.
48. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
49. Edwards v. Aguillard, 482 U.S. 578 (1987).
50. Stone v. Graham, 449 U.S. 39 (1980).
51. Epperson v. Arkansas, 393 U.S. 97 (1968).
52. "Second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). "In recent years, we have paid particularly close attention to whether the challenged governmental practice . . . has the . . . effect of 'endorsing' religion . . . ." County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989).

is more difficult to satisfy,[53] has been the most critical of the three prongs, and accounts for many holdings that government action violates the establishment clause.[54]

Prong two requires the court to determine whether the primary effect of the government's conduct is secular or religious. This is a very subjective judgment, and even the Supreme Court's decisions have been far from consistent. The test is sufficiently vague to permit the Justices to reach whatever result they favor. The Justices have, however, identified several factors that should be considered in evaluating the primary effect of the government's conduct.[55] The ensuing sections will discuss these factors.

a) *How broad is the class of beneficiaries?*

The first factor focuses on the scope of the class of potential beneficiaries of the government action. If the class is broad and includes both nonreligious and religious beneficiaries, the Court is more likely to find that the primary effect is secular.[56] As the Court has put it, "[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[57] If the class is narrow and limited to persons or entities with religious affiliations, the Court is more likely to find that the primary effect is religious.[58]

b) *Channeling of benefits: direct vs. indirect aid*

Another important factor in determining whether the primary effect is secular or religious is whether the government benefits are channeled directly to religious institutions or indirectly to those institutions through other individuals or entities who make independent decisions. If the aid is direct, the Court is more likely to find an establishment clause violation. If the aid is indirect, a violation is less likely.

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53. *E.g.*, Bowen v. Kendrick, 108 S. Ct. 2562, 2571 (1988) ("As usual in Establishment Clause cases, . . . the more difficult question is whether the primary effect of the challenged statute is impermissible.").

54. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

55. The first two factors are more significant in cases involving financial aid to religious institutions than in cases involving the intrusion of religion into government.

56. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (tax deductions for educational expenses are constitutional in part because the deductions are available to all parents).

57. *Id.* at 398-99.

58. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (tuition rebates and tax deductions violated the establishment clause in part because they were limited to parents of parochial school students).

(1) *Indirect aid*

Where the assistance to religion is channeled through individuals, the Court is more tolerant, because it considers the aid more attenuated and less likely to be viewed as a government endorsement of religion.[59] As the Court put it in *Mueller*,

> [B]y channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' . . . can be deemed to have been conferred on any particular religion, or on religion generally. . . . The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.[60]

(2) *Direct aid*

If the government aid flows directly to religious institutions, the Court is more likely to find that the primary effect is religious. The analysis is affected, however, by another critical factor, namely whether the religious institution is religion-pervaded or not.

(a) *Religion-pervaded institutions*

When the government gives direct aid to religion-pervaded institutions, the Court is very likely to find that the primary effect of the aid is religious. In cases of this kind, the Court requires assurances that there is no "substantial risk" that the aid will be used to further the institution's religious mission.[61] General assurances are not enough; the government must specifically prove that the aid is not furthering religion. This means that audit procedures must normally be adopted to insure that the aid is used solely for secular purposes. Absence of such audit procedures will normally result in a finding that the primary effect of the aid is religious.[62] Ironically, the presence of such audit procedures normally results in a finding that

59. *See, e.g.*, *Mueller*, 463 U.S. 388 (1983).
60. *Id.* at 399-400.
61. *E.g.*, Bowen v. Kendrick, 108 S. Ct. 2562, 2576 (1988).
62. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

there is excessive entanglement that violates prong three of the *Lemon* test.[63] This is a Catch-22 that will be discussed further below.[64]

(b) *Non-religion-pervaded institutions*

Direct aid to religious institutions that are not religion-pervaded is much more acceptable to the Court. In such cases, the "substantial risk" test apparently does not apply,[65] and the Court is content with generalized assurances that the aid will not be used to further the institution's religious mission. If such assurances are given, the Court will normally find that the primary effect of the aid is secular.

Cases involving government aid to church-related schools provide the classic illustration of the distinction between religion-pervaded and non-religion-pervaded institutions. Church-related grade schools, junior high schools, and high schools (so-called parochial schools) are presumed to be religion-pervaded, so direct financial aid is strictly limited.[66] In contrast, church-related colleges are normally not religion-pervaded, so direct financial aid is usually permitted.[67] However, if the particular college *is* religion-pervaded, the Court will presumably treat it like a parochial school and require specific assurances that the aid will not be used to further religion.

c) *"Any more than" test*

A third factor that plays an important role in determining whether government aid to religion has a primary secular effect is whether the aid is less significant than aid upheld in prior cases. As the Court put it when deciding that inclusion of a manger scene in a government Christmas display did not have a primary secular effect,

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63. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985). *Aguilar*, a companion to *Ball*, *supra* note 62, held that the audit procedures required by federal law permitted defendant to satisfy the primary secular effect test but caused it to violate the excessive entanglement test.

64. *See infra* notes 73-75 and accompanying text.

65. *Bowen*, 108 S. Ct. 2562 (1988). "Only in the context of aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination." *Id.* at 2576.

66. *See, e.g.*, *Aguilar*, 473 U.S. 402 (1985); *Ball*, 473 U.S. 373 (1985).

67. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (annual noncategorical grants); Hunt v. McNair, 413 U.S. 734 (1973) (one-time construction loan from fund generated by state-issued bonds); Tilton v. Richardson, 403 U.S. 672 (1971) (federal construction grants for facilities devoted to secular education). In all three cases, the Court upheld the aid to church-related colleges emphasizing that such colleges are less religion-pervaded than parochial schools.

"We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause."[68] Professor Van Alstyne has dubbed this mode of analysis "an '*any more than*' test."[69]

Ultimately, the question whether government aid to religion has a primary secular effect must be answered on the basis of the totality of the circumstances, but the Court's opinions make clear that the circumstances considered should include the three factors mentioned above, namely the scope of the beneficiary class, whether the aid goes directly or indirectly to religious institutions, and whether the aid is any more than that approved in earlier cases. If other factors appear relevant, they too should be weighed.

3) *No excessive entanglement*

The third prong of the *Lemon* test requires the Court to find that the challenged government conduct does not result in excessive entanglement between government and religion.[70] In recent years, the Court has tended to construe this test narrowly and to find excessive entanglement only when the challenged action results in "comprehensive, discriminating, and continuing state [or federal] surveillance."[71]

Like the primary secular effect test, the excessive entanglement test requires litigants and courts to consider a series of factors enumerated in Supreme Court opinions. Indeed, the factors are quite similar to those relevant to prong two, namely the nature of the institution, the nature of the aid, the relationship between the government and the beneficiary, and, in some cases, whether the aid causes political divisiveness among religious groups.[72]

a) *Nature of the institution*

In examining the nature of the institution receiving the government aid, the most important consideration is whether the institution

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68. Lynch v. Donnelly, 465 U.S. 668, 682 (1984).

69. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 783.

70. "Finally, the statute must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

71. Mueller v. Allen, 463 U.S. 388, 403 (1983) (quoting *Lemon*, 403 U.S. at 619). Justice Rehnquist's majority opinion referred to "the 'comprehensive, discriminating, and continuing state surveillance' necessary to run afoul of this standard . . . ."

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

is religion-pervaded or not.[73] If it is religion-pervaded, close monitoring is needed to insure that the aid does not have a primary religious effect, and such monitoring is likely to involve excessive entanglement.[74] This is the Catch-22 that has haunted establishment clause law and caused much criticism of the excessive entanglement test: "the very supervision of the aid to assure that it does not further religion renders the statute invalid."[75]

b) *Nature of the aid*

One must also consider whether the aid is structured in a way that gives rise to excessive entanglement.[76] Thus, for example, one-time grants are less likely to cause entanglement than continuing aid.[77] Similarly, paying for textbooks is less likely to cause entanglement than paying teachers' salaries.[78] And government assistance in administering standardized student tests is less likely to result in excessive entanglement than financial support for development of tests by parochial school personnel, since the latter tests require more careful monitoring.[79]

c) *Relationship between government and religious institution*

This is the central question in determining whether the excessive entanglement test is met. One must examine the relationship between the government and religion resulting from the challenged government action.[80] The totality of the circumstances should be inspected, and all entanglements should be identified and discussed.

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73. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 685-87 (1971).

74. *E.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).

75. Bowen v. Kendrick, 108 S. Ct. 2562, 2578 (1988).

76. *E.g.*, *Tilton*, 403 U.S. at 687-88.

77. *E.g.*, *Tilton*, 403 U.S. 672 (1971); *but cf.* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (holding that continuing grants are not always unconstitutional).

78. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

79. *Compare* Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980) (standardized tests) *with* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (tests prepared by teachers).

80. *See Lemon*, 403 U.S. at 614 (stressing that courts should examine "the cumulative impact of the entire relationship").

d) *Political divisiveness*

Beginning with *Lemon*,[81] the Court has repeatedly discussed whether the challenged aid to religion is likely to result in political competition between religious groups. The concept is that the government should not induce religious institutions to become rivals for places at the public trough.[82]

For a while it seemed as if the political divisiveness test might be a fourth prong of the *Lemon* test. Later cases, however, made it clear that political divisiveness is one factor to be considered in determining whether the excessive entanglement test is met.[83] Most recently, the Court has stated that the political divisiveness test "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[84]

To summarize, if the *Lemon* three-prong test is applicable, the government conduct violates the establishment clause unless it has a secular purpose and a primary secular effect and does not result in excessive entanglement between government and religion.

c. *The historical evidence test of Marsh v. Chambers*

In *Marsh v. Chambers*,[85] the Court upheld the Nebraska legislature's practice of opening each day with a prayer by a chaplain. The Court did not apply the *Lemon* test. Instead it stressed "the unambiguous and unbroken history of more than 200 years"[86] of legislative prayers approved by federal and local government from the Framers to the present. In light of the "unique" historical roots, going back to the First Congress that proposed the establishment clause, the Court concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause" in legislative prayer.[87]

If, in a particular case, there is a comparable history of acceptance going back to the Framers, the government may prevail under the *Marsh* test. But the language of *Marsh*, with its repeated stress on the "unique" evidence of approval beginning with the Framers

81. 403 U.S. at 622-24.

82. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622.

83. *E.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

84. Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983) (quoted with approval in Bowen v. Kendrick, 108 S. Ct. 2562, 2578 n.14 (1988)).

85. 463 U.S. 783 (1983).

86. *Id.* at 792.

87. *Id.* at 791.

and "unbroken" ever since, suggests that successful invocations of *Marsh* will be rare. To date, *Marsh* has no progeny.[88]

If the establishment clause is inapplicable or the government has satisfied at least one of the tests developed by the Supreme Court for enforcing the clause, claimant loses on the merits, and the analysis ends.

If, on the other hand, the preliminary requirements are met and claimant prevails on the merits by proving that the establishment clause is applicable and the government did not comply with its requirements, claimant wins on the merits, and the final issue is what remedies are in order.

C. *Remedies*

In general, if the aid is found unconstitutional, it should be enjoined. If the aid program is unconstitutional on its face, the entire program should be enjoined. If the aid program is unconstitutional as applied, i.e., in specific cases, those specific violations should be enjoined.[89]

III. CONCLUSION

Basic establishment clause analysis proceeds in three steps. First, the preliminary requirements (jurisdiction, justiciability, and government action) must be met. Second, the merits of the establishment clause claim must be considered. One must determine whether the establishment clause is applicable, i.e., whether the government has aided religion or become entangled with religion. If so, one must determine whether the government has complied with the requirements of the establishment clause, i.e., whether the government has satisfied the *Larson* strict scrutiny test, the *Lemon* three-prong test, or the *Marsh* historical evidence test. If the establishment clause is applicable and the government has not complied with its requirements, claimant wins on the merits, and questions concerning remedies must be addressed. Hopefully, this analytical model will help law students, lawyers, and judges conduct establishment clause analyses in an orderly and accurate fashion.

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88. It is possible that *Marsh* will generate progeny. For instance, if anyone should challenge the Court's practice of opening its sessions with the invocation "God save this honorable Court," the Court will probably use the *Marsh* test to uphold the traditional invocation.

89. Bowen v. Kendrick, 108 S. Ct. 2562, 2579-81 (1988).

APPENDIX

On the basis of the foregoing discussion, it is possible to set forth the following, more detailed outline of basic establishment clause analysis.

Establishment Clause; Basic Analysis

I. Have the preliminary requirement been met?
   A. Does the court have jurisdiction?
   B. Is the claim justiciable?
   C. Was the harm caused by government action?
II. On the merits
   A. Applicability
      1. Aid to Religion?
      2. Entanglement between government and religion?
   B. Compliance
      1. The *Larson* strict scrutiny test for facially discriminatory aid
         a. Does the aid facially discriminate among religious groups?
         b. If so, is strict scrutiny satisfied?
            1) Does the government action further a compelling interest?
               a) Compelling interest?
                  (1) Permissible interest?
                  (2) Actual interest?
                  (3) Compelling (very strong) interest?
               b) Substantially effective means?
            2) Was the government action necessary? (the least onerous alternative)?
      2. The *Lemon* three-prong test for nondiscriminatory aid
         a. Secular purpose?
            1) If sole purpose is to further religion, not met.
            2) If there is a secular purpose, but the primary purpose is to further religion, perhaps not met; the law is unsettled.
         b. Primary secular effect? Relevant factors include:
            1) Scope of class of beneficiaries

2) Channeling of benefits
   a) Indirect aid, channeled through individuals, is more likely constitutional.
   b) Direct aid to religious institution is more likely unconstitutional.
      (1) Religion-pervaded institutions must show there is no "substantial risk" the aid will be used to further religion; monitoring may be required.
      (2) Non-religion-pervaded institutions need only give general assurances.
3) "Any more than" test: is the challenged aid more substantial than that approved in prior cases?

c. No excessive entanglement? Relevant factors include:
   1) Nature of beneficiary institution
      a) If religion-pervaded, excessive entanglement is more likely.
      b) If not religion-pervaded, excessive entanglement is less likely.
   2) Nature of aid
      For example, one-time aid is less likely to involve excessive entanglement.
   3) Relationship between government and religious institution; totality of circumstances; weigh all entanglements.
   4) Political divisiveness
      a) If the aid goes directly to religious institutions, political divisiveness is evidence of excessive entanglement.
      b) If the aid does not go directly to religious institutions, political divisiveness is not relevant.

3. The *Marsh* historical evidence test
   The aid is constitutional if there is strong historical evidence that the Framers thought the aid was permitted (and the aid has been continuously permitted ever since?).

III. Remedies