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# Symbolic Union and the Establishment Clause

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# SYMBOLIC UNION AND THE ESTABLISHMENT CLAUSE

*Stark v. St. Cloud State University*[1]

In the modern era of establishment clause[2] jurisprudence, the Supreme Court has struggled to develop an analysis which is coherent in application and reasonably predictable in result. In the landmark decision *Everson v. Board of Education*,[3] the Court was faced with the issue of allegedly unconstitutional state aid to parochial schools.[4] In an effort to interpret the establishment clause and thereby discover the applicable principles, Justice Black stated:

> The "establishment of religion" clause of the First Amendment means at least 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*.[5]

Later, the Supreme Court formulated a two pronged analysis incorporating much of Black's interpretation.[6] The challenged state action or law violated the establishment clause unless it was secular in purpose and did not have the primary effect of either advancing or inhibiting religion.[7] The present establishment clause analysis includes these two prongs plus an additional test which prohibits state actions or laws that excessively entangle the church and state.[8] However, the statement of the analysis has not brought certainty in

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1. 802 F.2d 1046 (8th Cir. 1986).
2. U.S. CONST. amend. I.
3. 330 U.S. 1 (1947). *Everson* ushered in the modern era of establishment clause jurisprudence. The modern era is characterized by the increased willingness of the Court to review state action for establishment clause violations, and the great mental energy expended by members of the Court to discover the meaning of the clause and to develop legal principles for its application.
4. Frequently, as in *Stark*, the establishment clause controversy centers around state aid to, and involvement with, church sponsored educational institutions.
5. *Everson*, 330 U.S. at 15-16.
6. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).
7. *Id.*
8. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The three pronged analysis set forth in *Lemon* is often referred to as the *Lemon* test. For purposes of clarity, the three pronged analysis will be referred to as the *Lemon* analysis. Throughout this Note, the three prongs will be referred to, respectively, as the secular purpose test, the primary (or principal) effect test and the excessive entanglement test. A subpart of any of the three prongs will be referred to as an element.

application or result.[9] For instance, the primary effect test now has a significant new element which is not necessarily suggested by the statement of the test.[10] The importance of the *symbolic union* element in establishment clause jurisprudence is evidenced by its application in the Eighth Circuit Court of Appeals' decision in *Stark v. St. Cloud State University*.[11]

In *Stark*, the court struck down a state university policy allowing university students to fulfill their student teaching requirements at nonpublic schools as violative of the establishment clause. In so doing, the court illustrated the power of the symbolic union element of the primary effect test as a tool for federal review of state action.[12] Additionally, the decision shows how sensitive the result in establishment clause cases can be to subjective characterizations[13] of the facts of each case or minor factual variations between cases.[14] This Note will explore what possibility there is, if any, of formulating a similar policy that would pass constitutional muster.

St. Cloud State University (the University) adopted a policy which allowed students to fulfill their student teaching requirements at private or parochial schools selected by the university. The policy, as summarized by the court of appeals provided that:

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9. *See* Meek v. Pittenger, 421 U.S. 349 (1975). "These tests constitute a convenient, accurate distillation of this Court's efforts to evaluate [establishment clause challenges to government action]. . . . It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines." *Id.* at 358-59. "Although simple to state, the three-prong *Lemon* test presents difficult questions of interpretation and application." *Stark*, 802 F.2d at 1049. "[N]either affirmance nor reversal of any of these cases follows automatically from the spar[s]e language of the First Amendment, from its history, or from the cases of this Court construing it and . . . reasonable men can very easily and sensibly differ over the import of that language." Lemon v. Kurtzman, 403 U.S. 602, 662 (1970) (White, J., concurring and dissenting).

10. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390 (1985).

11. 802 F.2d 1046 (8th Cir. 1986).

12. For an explanation of symbolic union, see *infra* text accompanying note 41.

13. An example of this sensitivity is reflected in Lynch v. Donnelly, 465 U.S. 668 (1984). In *Lynch*, the issue was the constitutionality of displaying a municipal owned nativity scene on public property. The majority characterized the display of the crèche as part of the seasonal display which simply recognized the historical origins of the publicly recognized holiday. *Id.* at 680. The dissent, which garnered four votes, insisted the crèche had to be singled out for its religious significance and constituted state endorsement of Christianity. *Id.* at 705-06 (Brennan, J., dissenting).

14. For an example of how the result may differ because of a small difference in facts, see McCollum v. Board of Educ., 333 U.S. 203 (1948), and Zorach v. Clauson, 343 U.S. 306 (1952). These cases involved "release time" programs in which public school students were released from their regular classes to spend time in religious study. The only fundamental difference between the two was that in the former program, which was struck down, the religion classes were held on the school grounds, while in the latter program, which was upheld, the classes were off the school grounds. *McCollum*, 333 U.S. at 205; *Zorach*, 343 U.S. at 308. If this was a major difference, its significance escaped Justice Black, who wrote the majority opinion in *McCollum* and dissented in *Zorach*.

> [P]rivate and parochial schools can become student teacher sites if they meet the criteria of public schools. A student can, at his or her option, be placed at a private or parochial school selected by the University to participate in its student teaching program. . . . [T]he University must advise those students placed at parochial schools that the student's participation in any religious aspect of the school is exclusively between the parochial school's personnel and the student teacher. Further, the University will provide accommodation for any of its student teaching supervisors who, based on religious grounds, object to on-site visits to a private or parochial school."[15]

This policy was challenged as violative of the establishment clause.[16] Such a challenge invokes the now familiar three prong analysis of *Lemon v. Kurtzman*,[17] which provides that in order for a state policy or program to survive an establishment clause challenge it must: 1) have a secular purpose; 2) not have the primary or principle effect of establishing religion; and 3) not excessively entangle the state with the church.[18]

The first prong of the *Lemon* analysis seldom poses a substantial barrier to a state program or policy.[19] In *Stark*, however, it was with some difficulty that the court found the stated purpose to be secular. The University stated that the purpose of including the parochial schools in its student teaching program was to increase the number of available student teaching sites.[20] Although the court found this to be a secular purpose, they doubted whether the stated purpose actually motivated the adoption of the policy.[21] The shadows of doubt were cast by the fact that numerous public school sites were available in the area.[22] In ultimately holding that there was a secular motivation for the policy, the decision illustrates the ease with which the secular purpose test may be satisfied.

The primary or principal effect test is the most important part of the *Lemon* analysis. Its importance is explained by the close similarity between

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15. *Stark*, 802 F.2d at 1047-48.
16. *Id.* at 1048.
17. 403 U.S. 602 (1971).
18. *Id.* at 612-13.
19. As long as there is a single secular motive for the policy or legislation, it should clear the secular purpose hurdle. "The Court has invalidated . . . governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious consideration." Lynch v. Donnelly, 465 U.S. 668, 680 (1984). Justice Scalia has noted that in the myriad of establishment clause cases decided by the Court, only four laws have been invalidated "for lack of a secular purpose." Edwards v. Aguillard, 107 S. Ct. 2573, 2593 (1987) (Scalia, J., dissenting). The cases were: Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968).
20. *Stark*, 802 F.2d at 1049.
21. *Id.*
22. *Id.* The court was very likely influenced by the fact that the parochial schools first approached the University requesting to become student teaching sites, with the formal policy following. *Id.* at 1047.

the test and the Supreme Court's interpretation of the meaning of the establishment clause. Justice Black's interpretation in *Everson v. Board of Education* prominently featured prohibitions against setting up a state church, aiding one or all religions, and taxing in support of religion.[23] Justice Brennan in *Abington School Dist. v. Schempp*[24] stated that the establishment clause prohibition "was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage worship or belief."[25] State policies which "foster or discourage worship or belief" also would necessarily have the effect of advancing or inhibiting religion. Therefore, merely stating the primary effect test is to capture the central meaning of the establishment clause as interpreted by the Supreme Court.

The primary effect test was decisive in *Stark*. The University policy failed to satisfy the test because it "impermissibly advance[d] religion by creating a perception that the state endorse[d] the institutions' religious mission."[26] The student teaching program was said to foster an appearance of church and state union that "tends to destroy government and degrade religion."[27] The court was especially concerned about the effect of the state sponsored student teacher acting in the pervasively sectarian environment on the minds of impressionable children attending the parochial schools.[28] "By creating the perception in the minds of the parochial school students that the state supports the religious school and its message, the state thereby promotes the religious mission" of the school.[29]

The creation of a *perception* about church-state relations is not the first thing which comes to mind when considering impermissible advancement of religion. Typically, one might expect advancement of religion to take the form of a tax[30] or special use of public institutions[31] or personnel[32] for religious

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23. *See supra* note 5 and accompanying text.

24. 374 U.S. 203 (1963).

25. *Id.* at 234 (Brennan, J., concurring).

26. *Stark*, 802 F.2d at 1050 (citing Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389-92 (1985)).

27. *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

28. *Id.* at 1051; *see also* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390 (1983) (cited by *Stark*). Whether the alleged church-state involvement occurs in a situation involving children or adults will significantly affect the outcome of the case. In Tilton v. Richardson, 403 U.S. 672 (1971), the Court upheld a federal statute granting funding for buildings on college campuses which included schools with a religious association. The Court felt that "[t]he skepticism of the college student" would reduce the chance of any effective religious indoctrination or creation of the perception that the state supported the religious mission of the school. *Tilton*, 403 U.S. at 686.

29. *Stark*, 802 F.2d at 1051.

30. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947). Justice Black interpreted the establishment clause to preclude a tax in support of religion. *See supra* text accompanying note 5.

31. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962). In *Engel*, the Court invalidated the practice of reading a nondenominational prayer at the opening of the day in public schools. The Court held, among other things, that this practice had the effect of

purposes. The court in *Stark* did not make its decision based on the existence of one of these impermissible substantive relationships, but rather the perception that such a substantive relationship existed.

The *Stark* court relied heavily on the decision of the Supreme Court in *Grand Rapids School Dist. v. Ball.*[33] In *Ball*, the school district created two programs for the education, at public expense, of nonpublic school students in rooms on the campuses of the nonpublic schools.[34] One program involved classes during the regular school day taught by full-time public employees. The part time employee almost always was a full-time teacher at the sectarian school where the class was held.[35] The school district took precautions to separate these state sponsored classes from those given by the sectarian school. The rooms leased by the school district were stripped of any religious symbols although the hallways giving access to the room could bear religious artifacts and symbols.[36] While the state funded class was conducted, the teacher was required to post a sign giving notice of the exclusive public control of the classroom.[37] These programs were found to be constitutionally infirm under the establishment clause. The risk that the full time parochial school employee would infuse a religious message into the after hours class was believed to be too great, and it was feared that the full time public employees might succumb to the pressure to inculcate religion presented by the "environment" of the pervasively sectarian school.[38] Secondly, the Court found the "provision of secular, state-provided instruction in the religious school buildings" caused a "symbolic union" between church and state which conveyed a message of state support for religion.[39] Lastly, the programs subsidized religion by assuming the parochial school's secular functions, freeing parochial schools' resources for religious functions.[40]

The second finding is the most relevant to the decision in *Stark*. In *Ball*, Justice Brennan articulated fully for the first time the symbolic union element of the primary effect test. Brennan explained:

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placing the "power, prestige and financial support of government . . . behind a particular religious belief." *Id.* at 431. By using the public institution (here a school) to require the reading of a certain prayer, religion was impermissibly advanced.

32. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975). In *Meek*, counseling, testing and other auxiliary services were provided by the state on parochial school grounds. These programs involved the presence of publicly supported teachers. The use of these personnel to foster religion, or even the potential for such "impermissible fostering of religion," was held unconstitutional. *Id.* at 372.

33. 473 U.S. 373 (1985).

34. *Id.* at 375.

35. *Id.* at 375-78.

36. *Id.* at 378.

37. *Id.*

38. *Id.* at 397. Forty of the forty-one schools involved in the programs were found to be "pervasively sectarian." *Id.* at 384-85. For an explanation of the pervasively sectarian finding, see *infra* note 72.

39. *Ball*, 473 U.S. at 397.

40. *Id.*

> Government promotes religion as effectively . . . [as direct funding] . . . when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations . . . . If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. . . . It follows that an important concern of the effect test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.[41]

The court in *Stark* found a forbidden symbolic union in the University's policy. Worse than the situation in *Ball*, where state and parochial school teachers were merely in the same building at the same time, this program had state sponsored student teachers and parochial school teachers jointly teaching the same class.[42] Further, the University's policy left participation by the student teacher in any religious events at the school completely to the discretion of the individual student teacher and the parochial school's personnel.[43] Finally, as in *Ball*, there was the danger that the state sponsored teacher would inadvertently or otherwise "inject religious tenets into their teaching."[44] Therefore, the court concluded that the policy suggested state endorsement of the schools' religious message.[45]

The court of appeals expressly disavowed addressing any of the other grounds on which the district court based its decision.[46] In addition to an im-

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41. *Id.* at 389-90. It is difficult to understand how the symbolic union element of the primary effect test clarifies the establishment clause analysis. The finding of a symbolic union depends ultimately on the judges' perceptions of others' perceptions of the message communicated by the challenged state program. These *others* are not named in the lawsuit, nor in any way identified. Such a vague element increases the power of the court to decide the fate of state programs based upon the judges' predilections about what constitutes good policy, without any evidence of injury to the complaining party. *See id.* at 401 (Rehnquist, J., dissenting) (noting in a related matter the lack of evidence as to any state sponsorship of religion).

42. *Stark*, 802 F.2d at 1051. The court was also concerned that the dominant, supervisory role of the parochial school teacher over the student teacher gave the perception that the state was "actively seeking" the approval of religion. *Id.* at 1051 n.9. Keeping in mind that we are talking about the perception of children, it strains credulity to suggest that any but a very few contemplated the symbolic roles of their teacher as representing religion and the student teacher as representing the state. If there were any that grasped the symbolism, they were probably intelligent enough to come to their own conclusions about the proper constitutional relation between church and state without succumbing to indoctrination by the parochial teacher or the Supreme Court.

43. *Id.* at 1052.

44. *Id.* Recall in *Ball*, the majority separated the danger of state sponsored teachers inculcating religion from the symbolic union element of the primary effect test. *See supra* text accompanying notes 37-39. In *Stark*, the court expressly considered this danger with respect to the perception of state endorsement of religion. *Stark*, 802 F.2d at 1052 n.10.

45. *Stark*, 802 F.2d at 1052 & n.10.

46. *Id.* The court of appeals affirmed the decision of the district court. The district court's opinion is reported at 604 F. Supp. 1555 (D. Minn. 1985).

permissible state endorsement of religion, the district court found that the University's policy had also advanced religion by:

1) "making it likely that the University students would inculcate religious beliefs"; 2) failing to "limit the parochial schools' use of state funds"; and 3) causing excessive entanglement between church and state.[47]

The decision of the court of appeals is based solely upon the second prong (primary effect test) of the *Lemon* analysis.[48] Of the three ways in which religion may be advanced under the primary effect test as articulated in *Grand Rapids v. Ball*,[49] the court did not rely upon the danger of state sponsored teachers inculcating religion, as an element separate from symbolic union, nor did it find the state was providing a subsidy by assuming secular functions of the parochial school.[50] The court based its decision solely upon the symbolic union element.

Although the court of appeals did not consider the third prong of the *Lemon* test, the district court found the policy also had the effect of causing excessive church-state entanglement.[51] The excessive entanglement test was first articulated as a separate prong of the establishment clause analysis in *Lemon v. Kurtzman*.[52] The test scrutinizes the degree of entanglement of religion with the state necessitated by the challenged state program, with "[t]he objective . . . to prevent, as far as possible the intrusion of either into the precincts of the other."[53] The district court found the weekly on-site visits by the student's University supervisor and the lack of control over the University student's participation in religious events of the school to be evidence of excessive entanglement.[54] Interestingly, the court of appeals considered these same facts to be evidence of the program's having created a symbolic union which violated the establishment clause because it had the primary effect of advancing religion.[55] The excessive entanglement test did not add anything to the establishment clause analysis of the University's program.[56] The court also

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47. *Stark*, 802 F.2d at 1052 n.11.

48. *See supra* note 3.

49. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 397 (1985).

50. The dissent, in *Stark*, saw one of the issues as whether the state was subsidizing the religious mission of the schools. *See Stark*, 802 F.2d at 1053 (Bowman, J., dissenting). The majority, however, made only a passing reference to state subsidy as the basis for its holding. *Id.* at 1050.

51. Stark v. St. Cloud Univ., 604 F. Supp. 1555, 1563 (D. Minn. 1985), *aff'd*, 802 F.2d 1046 (8th Cir. 1986).

52. 403 U.S. 602, 612-13 (1971).

53. *Id.* at 614. Chief Justice Burger wrote that the "substantial religious character" of the church-related schools gave rise to the prohibited entangling relationships. *Id.* at 616. If the state employed teachers were to be sufficiently policed so that they did not, inadvertently or otherwise, inculcate religion in their teaching, too much state involvement in the precinct of religion would be required. *See id.* at 619.

54. *Stark*, 604 F. Supp. at 1563.

55. *Stark*, 802 F.2d at 1051-52.

56. The excessive entanglement test failed to add to the analysis because the

demonstrates the "Catch 22" effect of the entanglement test by stating that had the University taken steps to police the student's involvement in the parochial school's activities, this too would constitute excessive entanglement.[57]

The Eighth Circuit was not unanimous in its conclusion regarding the University's student teacher placement policy. The dissent and the majority succeeded in arguing around each other, each making their points without squarely addressing the other's argument. The dissent never addressed the symbolic union finding which was decisive for the majority.[58]

The majority and dissenting opinions, examined in juxtaposition, show how sensitive the result in *Stark* was to each judge's characterization of the facts and issues. The majority characterized the issue in terms of the permissibility of aid flowing from the University to the parochial schools, with the University student being merely an instrument of the state.[59] The dissent, however, viewed the issue as whether the University could provide private school practice teaching sites as an aid to its students without impermissibly aiding the parochial schools selected as sites. Accordingly, the dissent found the Supreme Court opinions in *Witters v. Washington Dep't of Services for the Blind*[60] and *Mueller v. Allen*[61] to be most relevant.[62] In *Witters*, a visually impaired student studying to be a pastor, missionary or youth director at a Christian college was denied benefits under a state aid program for the blind.[63]

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same evidence which shows entanglement also shows a primary effect of advancing religion.

57. Justice White first explained the "Catch-22" effect in *Lemon*. In that case, the Court held that the state cannot finance secular instruction in parochial schools if religion is permitted to be taught in the same classroom, but if a promise not to teach religion is elicited and enforced then there is an excessive entanglement. Lemon v. Kurtzman, 403 U.S. 602, 668 (1970) (White, J., concurring and dissenting).

58. Judge Bowman, in the dissent, made the somewhat conclusory statement that "there is nothing in the challenged program to suggest state endorsement of any particular religious practice or belief or even to suggest a preference for religion over the absence of religion." *Stark*, 802 F.2d at 1053 (Bowman, J., dissenting). This author characterizes the statement as conclusory because the dissent failed to address the grounds for the majority's finding of symbolic union. Judge Bowman merely stated that the program made student teachers available to all schools, public or private, and therefore was neutral as to religion. *Id.*

59. The majority placed considerable importance on the fact that there were no restrictions on the students' involvement in any religious activities at the school. *Stark*, 802 F.2d at 1052. If the students were not assumed to be state actors, this conduct could not suggest the union of state and church.

60. 106 S. Ct. 748 (1986).

61. 463 U.S. 388 (1983). In *Mueller*, the Supreme Court upheld a state tax deduction for education expenses although a majority of those taking the deduction had children in sectarian schools. *Id.* at 401. Significantly, the Court noted that the state tax deduction, "by channelling whatever assistance it may provide to parochial schools through individual parents . . . reduced the Establishment Clause objections to which its action is subject." *Id.* at 399.

62. *Stark*, 802 F.2d at 1052-53 (Bowman, J., dissenting).

63. Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748, 750 (1986).

The state supreme court ruled that the denial of the benefits was mandated by the establishment clause.[64] This decision was reversed by the United States Supreme Court.[65] Justice Marshall, writing for the majority, characterized the program as a payment to the student, who in turn made an independent choice to use the funds at a religious institution in pursuit of a religious vocation.[66] The vocational aid program was found to create no financial incentive for recipients "to undertake sectarian education."[67] The majority never refered to the holding of *Witters*, but it apparently distinguished that case by noting that the student's choice of practice teaching sites was not "purely private."[68] The University initially selected the eligible sites, and the student's placement at a parochial school was subject to final approval by the University.[69] There was nothing to indicate either of these limitations operated to channel students into the parochial school sites or were not motivated by secular consideration. The court found the program to have a secular purpose so there was no conclusive evidence that the decision to select a certain site favored one religion over another or religion over the absence of religion.[70] The students were never *required* to fulfill their requirements at a parochial school.[71] The oblique nature of the majority's rebuttal of the applicability of *Witters* suggests that the question of whether the aid flows directly to the student and indirectly to the school or directly to the school is insignificant. However, if the student is an independent actor, the majority would have to give further justification for the relevance of *Grand Rapids School Dist. v. Ball*, in which the teachers in the parochial schools, as state employees, were clearly agents of the state.

The dissent, while failing to consider the symbolic union basis for the majority's holding, addressed the issue of other forms of impermissible aid to the parochial schools.[72] The majority devoted almost no ink to any forms of

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64. *Id.*

65. *Id.* at 751.

66. "In this case, the fact that aid goes to individuals means that the decision . . . to support religious education is made by the individual, not by the State." *Id.* at 752.

67. *Id.*

68. *Stark*, 802 F.2d at 1051.

69. *Id.*

70. *See supra* text accompanying notes 19-22.

71. *See Stark*, 802 F.2d at 1047.

72. Generally, a court is more likely to find that a state program impermissibly aids the sectarian school or other religious institution if the institution is found to be pervasively sectarian. *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (Chief Justice Burger noted that the very nature of some religious institutions gives rise to impermissible entangling relationships between the church and state). Typically, in cases involving parochial schools, the court will consider statements in literature about the school suggesting that the religious mission of the school saturates all elements of the education, the amount of time devoted to religious instruction and other factors tending to show the pervasiveness of religion in all school functions. *See id.* at 615-18. The significance of finding such "pervasiveness of religion" is that the secular and religious aspects of a particular institution are so intertwined that no matter what seemingly secular function is aided by the state, it necessarily involves the government in the "essentially religious activities" of the institution. *See id.* at 657-58 (Brennan, J., con-

aid to the schools other than the creation of a symbolic union. However, the majority suggested that the program aided the parochial schools by giving them the opportunity to evaluate students placed there for future employment and by giving funds to the schools with "no strings attached."[73]

The dissent characterized the operation of the program as a transaction between the University and the parochial schools. The school took on the burden of training the student teacher, and in return the University made a "token" payment of $96.[74] The majority implicitly rejected the characterization offered by the dissent. The benefit of the payment was separated from the burden, shouldered by the schools, of turning the novice student teacher into a professional.[75] Separation of the burden and benefit in the text of the majority opinion would not be noteworthy except for the fact that the majority viewed the *burden* as another benefit to the school. By placing the significant responsibility of training the student teachers the state designated the parochial schools as "repositories of the state trust."[76] This designation communicated a message of state endorsement of the schools and their religious messages.[77]

The dissent and majority again passed like two ships in the night. The majority apparently rejected the transaction characterization of the program given by the dissent, but failed to give a principled argument. The significance of characterizing the interaction of the University and the parochial schools as a transaction is that although benefits are received by the schools, they are cancelled out by corresponding burdens taken on by the schools. The question of whether a religious institution may receive benefits from the state when it performs services for the state without violating the establishment clause has not been passed upon by the Supreme Court.

Whether the decision in *Stark* will be followed in other circuits, or ultimately by the Supreme Court, is difficult to predict because it depends not so much upon the large body of establishment clause precedents as it does on each court's characterization of the facts. Possibly the most important factual conclusion, which was almost completely ignored by both the majority and the dissent in *Stark*, is whether the student is a state actor. A university student is clearly not a state employee as were the public school teachers in *Grand Rapids v. Ball*. It is also true that the student attends a university subsidized by the state, but to state that fact is not to prove that a university student is a state actor in the same way as a state employee. Inasmuch as the student is an independent actor, the precedent of *Witters v. Washington Dep't of Services* seems to apply. However, it remains to be seen as to whether *Witters* opened

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curring). The significance of the pervasively sectarian finding in *Stark* is that even if the student teachers were solely involved in secular functions, religion could still be benefited. *Stark*, 802 F.2d at 1050.

73. *Stark*, 802 F.2d at 1050.
74. *Id.* at 1053.
75. *See id.* at 1050.
76. *Id.*
77. *Id.* at 1050-51.

other than the narrowest exception when state aid flows to religious institutions through private actors. Clearly, the parochial schools and the University in *Stark* had a relationship which was independent of the student.

The other important characterization involves *transactions* between the state and religious institutions. The implication of the majority opinion in *Stark* is that when state funds or other support flow to the religious institution, they must be characterized as *aid* even if the institution performs services in return. A future court may decide that where church and state interaction are involved the establishment clause does not allow a court to look at a net result, but must focus exclusively on the state funds and support.

It is difficult, if not impossible, to conceive of a student teaching program at a state university which used sectarian schools as teaching sites that could survive the *Lemon* analysis as performed in *Stark*. Consider the facets of the program which the Eighth Circuit found objectionable. First, and apparently most egregious, is the fact that the students made their own decision regarding participation in any religious activities at the school.[78] Additionally, the student and the parochial school teacher co-taught the class, and the university supervisor appeared regularly, interacting with both the teacher and the student.[79] These two facts tended to establish a symbolic union between the state and religion.[80] Finally, an underlying element in the decision is the concept that state involvement with pervasively sectarian institutions inherently creates a perception of state endorsement of the institution's religious message.[81] Therefore, while it is possible to prohibit the student's involvement in religious activities, any student teaching program will require close interaction between the parochial school teacher and the student. If this interaction must necessarily create a symbolic union, then pervasively sectarian schools can never be student teaching sites.[82]

The court's application of the symbolic union element has significance beyond the facts in *Stark*. The *Stark* decision illustrates the potential power the symbolic union element has in establishment clause cases as a tool for federal

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78. *See id.* at 1052. Participation in any religious activity would show the state has "affirmatively undertaken the instruction" of religious views associated with the activity. *Id.*

79. *Id.* at 1051.

80. *Id.*

81. *Id.* at 1050. "Given that the parochial schools serving as student teaching sites are pervasively sectarian, we are forced to conclude that the University's policy impermissibly advances religion . . . ." *Id.* This statement which appears early in the opinion is not an island unto itself. The remainder of the opinion explains and supports this statement, including prominent references to the facts.

82. It would, however, be foolish to make any absolute statements regarding the permissibility of utilizing pervasively sectarian schools as student teaching sites. The law is subject to sudden shifts and variations. *Compare* McCollum v. Board of Educ., 333 U.S. 203 (1948) *with* Zorach v. Clauson, 343 U.S. 306 (1952). For instance, no one can determine what effect the Court's doubting of the University's secular purpose may have had on the application of the other two prongs of the test.

review of state action. Its power stems from the fact that no proof of substantive aid need be made in order to invoke the symbolic union finding. Indeed, it does not require that there actually be any aid at all, but rather only that the challenged program is "sufficiently likely" to be perceived as a message of endorsement of religion.[83] It is difficult to predict just when an unspoken or unwritten message is communicated by the nature or operation of a state program.

The evolutionary nature of legal principles announced in caselaw seems patently obvious. A legal system which relies on precedent naturally invites change as new factual situations are confronted. Judges of the highest courts are free to ignore the caselaw principles they create. However, it is a written constitution being interpreted where establishment clause questions are involved. New legal principles created to aid constitutional interpretation cannot be justified on the basis of caselaw precedent, but must be squared with the Constitution itself.[84] Therefore, before the symbolic union element is accepted as the sole basis of an establishment clause decision, the courts should evaluate whether the first amendment requires that the state refrain from actions creating the *perception* that it endorses religion.

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83. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389-90 (1985). The significance of *Stark* is that unlike *Ball*, the decision was based solely on the symbolic union element. *See supra* text accompanying notes 46-50.

84. *See Ball*, 473 U.S. at 389-90. In *Ball*, Justice Brennan began his explanation of symbolic union with, "Our *cases* have recognized the Establishment Clause guards against more than direct, state-funded efforts [to indoctrinate religion]." *Id.* at 389 (emphasis added).