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ACCOMMODATION OR ENDORSEMENT?

STARK V. INDEPENDENT SCHOOL DISTRICT: CAUGHT IN THE TANGLE OF ESTABLISHMENT CLAUSE CHAOS

"Congress shall make no law respecting an establishment of religion ...."1

The simple language of the Establishment Clause of the First Amendment belies the complexity of an area of law which Justice Scalia has described as "embarrassing."2 To say that the Court has had difficulty identifying and applying the precise principles of the Establishment Clause would be an understatement.3 Recent cases indicate the Court is moving from a strict separation of church and state to a more accommodationist approach.4 However, these recent developments have done little to assist lower courts seeking guidance from the confounding array of Establishment Clause cases. Lower courts, left with no clear analytical approach, are relegated to searching for factually similar precedent upon which to analogize the case before them regardless of the rationale.5

Recently, in Stark v. Independent School District,6 the

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1 U.S. CONST. amend. I.
2 Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting); see also Bernard James, High Court Takes Confusing Path, NAT'L L.J., Aug. 15, 1994, at C4, C5 (stating that "Grumet throws establishment clause doctrine further into disarray. [T]he establishment clause console is now so cluttered with options that the court must confront the real possibility that it has relinquished its institutional responsibility to provide a clear user's manual" (referring to the Court's decision in Board of Education v. Grumet, 512 U.S. 687 (1994)).
3 See Mueller v. Allen, 463 U.S. 388, 392-93 (1983) (recognizing that "the Establishment Clause presents especially difficult questions of interpretation and application").
4 See infra notes 111-131 and accompanying text (discussing cases in which the Court upheld the constitutionality of providing neutrally available state-aid to sectarian schools).
6 123 F.3d 1068 (8th Cir. 1997), petition for cert. filed, No. 97-1381 (U.S. Feb. 23, 1998).
United States Court of Appeals for the Eighth Circuit faced an Establishment Clause challenge. In *Stark*, Minnesota citizens, who had standing based on their status as taxpayers, filed suit against the district seeking a declaratory judgment that the creation and operation of a public school in the town of Vesta, Minnesota, violated the Establishment Clauses of the United States and the Minnesota constitutions. The petitioners also sought an injunction prohibiting the district from operating the Vesta school in conformance with the religious beliefs of the Brethren Church, a religious group that originated in Ireland in the 1820s. The district court agreed with the petitioners' arguments regarding the creation and operation of the school. On appeal, the Eighth Circuit reversed and remanded with directions to dismiss the complaint, in effect holding that a public school ostensibly created to accommodate an insular religious group is constitutional.

The court of appeals in *Stark* erred in its application of current constitutional principles. The *Stark* opinion represents another example of the Supreme Court's "doctrinal gridlock" in the area of Establishment Clause precedent. The *Stark* court's decision reflects the legal quagmire that Establishment Clause ju-
riprudence has become. In attempting to reconcile the facts of Stark with the current law, the court of appeals failed to appreciate the practical reality of what the creation of the Vesta school was: a state endorsement of religion.

Part I of this Comment discusses the historical underpinnings of Establishment Clause jurisprudence. Part II reviews the development of the relevant Supreme Court authority. Part III examines the facts of Stark. Part IV explores the Stark court's analysis and exposes its failure to appreciate the message of endorsement sent by the creation of the Vesta School.

I. HISTORICAL BACKGROUND

Most constitutional historians would concur that the framers intended to prohibit the federal government from creating a state-instituted religion.\(^8\) Beyond this central principle, however, opinions differ. Although many differing interpretations exist, most historians and legal scholars generally take one of two views: separationism or nonpreferentialism.\(^6\) Separationists hold that the Constitution mandates strict separation of church and state,\(^6\) and prohibits any state aid to religion.\(^1\) Conversely, nonpreferentialists interpret the Establishment Clause and the framers' intent as prohibiting only the establishment of a national religion or the promotion of one religious ideology over others.\(^8\) Under this view, aid may flow to religious interests as long as the government remains neutral in rendering it.\(^9\)


\(^1\) Id.; see also ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 22-26 (1990) (discussing the views of the enlightened separationists).

\(^9\) See id.; see also ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 19 (1982).

In interpreting the litany of Establishment Clause cases, it is important to consider the clause's historical roots. Although this history may provide only limited insight into the application of the clause today, it does give some context to the Court's earlier insistence on separationism. The two principle figures upon whom the Supreme Court has relied in espousing a separationist interpretation in its Establishment Clause decisions are James Madison and Thomas Jefferson.\(^\text{20}\)

Although James Madison was only one of many framers instrumental in the adoption and ratification of the Establishment Clause\(^\text{21}\) and Thomas Jefferson was not even a participant,\(^\text{22}\) the Court's reference to these two men as Establishment Clause patriarchs\(^\text{23}\) warrants some discussion of their contributions. The following sections give a cursory review of the documents the Court has relied on, particularly in its earlier Establishment Clause decisions. While some legislative history exists regarding the adoption of the First Amendment, it sheds little light on the intent of the framers and will be omitted, for purposes of this Comment.\(^\text{24}\)

\(^{20}\) See Joiner, supra note 15, at 508; see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 503 (1982) (Brennan, J., dissenting) (observing that "Madison and Jefferson played ... leading roles in the events leading to the adoption of the First Amendment").


\(^{22}\) See Joiner, supra note 15 at 560 (discussing the Court's unabashed misinterpretation of Jefferson's works); see also Stuart W. Bowen, Jr., Comment, Is a Lemon a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence, 22 ST. MARY'S L.J. 129, 137 (1990) (explaining that Jefferson was in Paris during the drafting of the Establishment Clause).

\(^{23}\) See Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947) (discussing the key role that Madison and Jefferson played in the drafting and adoption of the Establishment Clause). But see Bowen, supra note 22 (pointing to the Court's "excessive reliance on Madison and Jefferson [in Establishment Clause jurisprudence] to the exclusion of other framers" as unjustified and a reason for recurring problems in interpreting the Clause).

\(^{24}\) See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CON-
A. Historical Underpinnings of the Establishment Clause

Madison's 1785 "Memorial and Remonstrance" against religious assessments was a declaration against a bill authorizing a tax to be levied on Virginia citizens in support of Christian teachers. The bill sought to promote "the general diffusion of Christian knowledge [which] hath a natural tendency to correct the morals of men." In protesting the adoption of the bill, Madison emphatically advocated for the principle of religious equality. Foremost among Madison's arguments was the preservation of free exercise of religious conscience. Madison wrote, "[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him." Madison was concerned with the tyrannical history of religious establishment, warning: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"

Madison's Remonstrance reflected the ideals held by most citizens of post-revolutionary America. Madison seemed determined to protect America from experiencing the damaging effects of ecclesiastical establishments, such as the Church of
England under which many Americans had suffered.34

B. Jefferson’s Danbury Letter to the Baptist Association

The metaphor of the “wall” to symbolize church-state relations is probably the one contribution for which Jefferson is most noted in the area of Establishment Clause jurisprudence. President Jefferson’s letter to the Danbury Baptist Association in 180235 contained this famous and often cited depiction of church-state relations. In it he denied the Association’s request for a day of prayer and thanksgiving in honor of the new nation,36 stating:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.37

The letter does not give further explanation or discussion of what the wall is or what its limits are,38 and although the metaphor has received significant attention in Establishment Clause jurisprudence, its application to the law has proved limited.39

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34 See id. at 16-17 (discussing the draconian penalties imposed on colonists who failed to honor their church duties). For example, those who were not members of the establishment, particularly Catholics, were commonly denied the right to vote and hold public office, could not serve as witnesses, and may have been subject to indictment and conviction for refusing to swear allegiance to and receive the sacraments from the Church of England. See id.

35 See THOMAS JEFFERSON, Letter to the Danbury Baptist Association, in THE WRITINGS OF THOMAS JEFFERSON 281 (Thomas Jefferson Memorial Association 1903) [hereinafter JEFFERSON].

36 See ANTIEAU, supra note 33, at 183.

37 See JEFFERSON, supra note 35, at 281-82.

38 See id.

C. Bill for Establishing Religious Freedom

Perhaps providing better insight into Jefferson’s intent is his proposal, co-authored with Madison, entitled “A Bill for Establishing Religious Freedom,” which one historian describes as “the most important document in American history, bar none.” The bill was introduced in the Virginia Legislature in 1779. It proved to be “too radical” a proposition for its time, and was not passed until 1786. In the interim, both Madison and Jefferson were involved in the fight to quell a tax which would have infringed on religious liberty. Indeed, it was this struggle that gave rise to Madison’s Remonstrance denouncing the tax, the success of which led to the bill’s passage on January 19, 1786.

The Virginia Bill for Establishing Religious Freedom recognized freedom as the basic underlying principle of the Establishment and Free Exercise Clauses. The bill reflected Madison and Jefferson’s attempt to curtail the rising domination of the Anglican faith within the State of Virginia by creating “an equal legal footing” among Virginia’s religious sects. Indeed, the proposed bill’s preamble reflected their concerns, stating “[w]hereas Almighty God hath created the mind free[, and manifested his supreme will that free it shall remain, by making it altogether in-

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42 See id. at 164, 166.
43 See id. at 164 (discussing the Virginia legislature’s bitter battle over the single tax assessment).
44 For more detailed historical account see id. at 166; see also ADAMS & EMMERICH, supra note 16, at 12.
45 See John W. Baker, Belief and Action: Limitations on Free Exercise of Religion, in JAMES MADISON ON RELIGIOUS LIBERTY 271, 273 (Robert S. Alley ed., 1985) (proposing that three justifications for religious freedom exist: (1) it relates to the concept of free speech, (2) it reflects the desire of American society to reject conclusory idealisms, and (3) it maintains the ideal of fairness to individuals); EDD DOERR & ALBERT J. MENENDEZ, RELIGIOUS LIBERTY AND STATE CONSTITUTIONS 12-13 (1993) (noting that by creating a bill of rights, early politicians sought to complete the Constitution’s advancement of democracy and freedom); see also id. at 13 (suggesting that because the majority of citizens and courts of this nation subscribe to Jefferson’s principle of the separation of church and state, the country has “achieve[d] the world’s highest levels of individual religious freedom, religious pluralism, and interfaith peace and harmony”).
46 ADAMS & EMMERICH, supra note 16, at 12.
susceptible of restraint)." The bill condemned forced assessments for religious propagation and prohibited government support for religious institutions.

While the documents and legislative history surrounding the Virginia Bill for Establishing Religious Freedom provide some insight as to circumstances when the wall of separation is crossed, a debate among scholars still exists. Some scholars maintain that the Establishment Clause is violated whenever government support flows to religious interests. Others argue that a violation of the Establishment Clause does not occur unless the aid favors sectarian interests. The history of Supreme Court cases reveals a Court seeking to balance the Establishment Clause somewhere between these divergent opinions.

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47 Id. at 110 (emphasis in original).
48 See id. at 110-11.
49 See Marvin K. Singleton, Colonial Virginia as First Amendment Matrix: Henry, Madison, and Assessment Establishment, in JAMES MADISON ON RELIGIOUS LIBERTY 157, 158 (Robert S. Alley ed., 1985) (noting that the Supreme Court often looks to Virginia history when interpreting “religion” in a constitutional context). See, e.g., Engel v. Vitale, 370 U.S. 421, 428 (1962) (observing that the Virginia act was one of the earliest pieces of legislation seeking to place all religious groups on an equal footing); Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947) (looking to the situation faced by colonial Virginia, at the time the state enacted the Virginia Bill of Religious Liberty, to analyze the constitutionality of a New Jersey statute).
51 See Weishaar, supra note 50, at 545. At one extreme are the “non-preferential accommodationists,” who maintain that state aid can flow to sectarian interests provided no particular religion is singled out for support. Id. (citations omitted). At the other end of the spectrum are the “strict separationists,” who argue that the wall of separation is breached whenever government support reaches religion. Id. (citations omitted).
II. THE COURT'S INTERPRETATION

A. The Lemon Seed

In the first modern Establishment Clause case,53 Everson v. Board of Education,54 the Supreme Court acknowledged Jefferson's "wall of separation."55 In Everson, despite holding that the State of New Jersey was not prohibited from compensating parents of both parochial and public school children for costs of city bus transportation to school,56 the Court adopted the principle of separationism.57 The Everson Court concluded "[t]he
‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.”58 The Court qualified what otherwise seemed a strict separationist view, however, by asserting that although the Establishment Clause “requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”59

Since Everson, several justices have criticized the “wall” analogy.60 Dissenting in Wallace v. Jaffree,61 Justice Rehnquist stated “[t]here is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in Everson.”62 Rehnquist continued his criticism, arguing that “[t]he ‘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.”63

An important contribution of the Everson decision was the Court’s reasoning which later became known as the “child benefit doctrine.”64 Government funds allocated to a school or organization with religious affiliations are considered to be aiding that institution and, accordingly, religion.65 However, if funding can

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59 Id. at 18.
60 See James M. Lewis & Michael L. Vild, Note, A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard, 65 NOTRE DAME L. REV. 671, 672 n.11 (1990); see also ADAMS & EMMERICH, supra note 16, at 23 (explaining that recent judicial decisions disclose hesitation towards applying the concept for a number of reasons, including the proposition that the phrase is merely a “literary comparison” while the words in the Amendment serve as a better analytical guide).
62 Id. at 106 (Rehnquist, J., dissenting).
63 Id. at 107.
64 Ralph D. Mawdsley, Emerging Legal Issues in Nonpublic Education, 83 EDUC. L. REP. 1, 3 (1998) (discussing the revival of the “child benefit theory” in the context of private education: “To make government assistance to religious schools constitutionally palatable, those advocating such assistance have pressed courts to consider parents and/or students, rather than the schools, as the primary recipients of the assistance.”)
65 See id. (noting that such a transfer of finances from the government to a religious institution would be considered a violation of the Lemon test).
be construed as being allocated specifically for the parents or students, and not for the religiously affiliated organization, the aid is deemed to benefit the child. The child benefit doctrine thus supports the conclusion of constitutionality in situations where government aid does not flow directly to the religious organization. Utilization of this doctrine in school-aid cases shifts the focus to the benefit received by students rather than the subsidiary benefit received by religious organizations with which the students are associated.

In 1963, the Court initiated a two-step analytical framework for Establishment Clause cases in \textit{School District v. Schempp}. The Court held that to survive an Establishment Clause challenge the government action must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." In \textit{Schempp}, the Court applied an analysis that first determines whether the benefit was to the child; if so, the Court's analysis ends because the First Amendment is deemed not to be implicated. If the challenged aid is found to benefit or affect a religion, then the "purpose and primary effect" test is triggered. Any direct "advancement or inhibition of religion" will not "withstand the strictures of the Establishment Clause." In \textit{Engel v. Vitale}, the Court used this test to strike down prayer in public schools.

\footnote{See \textit{id.}; see also \textit{Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993)} (expressing that the Establishment Clause is not violated where "government programs . . . neutrally provide benefits to a broad class of citizens defined without reference to religion").}

\footnote{\textit{Schempp}, 374 U.S. at 3 (permitting publicly funded sign-language interpreter to assist a deaf student attending a Roman Catholic school). \textit{But see Engel v. Vitale, 370 U.S. 421, 443 (1961) (Douglas, J., concurring) (considering that Everson does not comply with the First Amendment).}}

\footnote{\textit{Schempp}, 374 U.S. at 3 (permitting publicly funded sign-language interpreter to assist a deaf student attending a Roman Catholic school). \textit{But see Engel v. Vitale, 370 U.S. 421, 443 (1961) (Douglas, J., concurring) (considering that Everson does not comply with the First Amendment).}}


\footnote{\textit{Schempp, 374 U.S. at 222} ("The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.").}

\footnote{370 U.S. 421 (1962).}

\footnote{\textit{Id.} at 430 (finding that the First and Fourteenth Amendments prohibit fed-}
In Walz v. Tax Commission,75 decided in 1970, the Court added a third step to the analysis of Schempp, when they held that there must not be “excessive government entanglement with religion.” In approving a tax exemption for church property, the Walz Court went beyond considering the purpose and effect of the statute, and examined whether its application created excessive entanglement with religion.76 The Court reasoned that allowing the tax exemption would give rise to less entanglement than forcing religious organizations to pay taxes.77 The Walz Court, contradicting the strict separationist view, recognized that some interaction between church and state will occur, however, it relied on historical evidence to support the conclusion that providing a tax exemption is a neutral government act which does not violate the Establishment Clause.78

B. The Lemon Test

Two decades after Everson, in Lemon v. Kurtzman,80 the Court built on the framework of Schempp and Walz by formally instituting a test which became central to Establishment Clause jurisprudence.81 In Lemon, the Supreme Court struck down
Pennsylvania and Rhode Island statutes which granted state aid directly to parochial schools. Chief Justice Burger's majority opinion delineated the Lemon test, explaining: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.' The Court stated that this analysis sought to prevent "the 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.'"

1. The Secular Purpose Prong:

The fact that the Court has spent little time analyzing the secular purpose prong suggests that this prong carries the least...
weight of the three. The Court appears hesitant to find an unconstitutional motive under this first prong; it has generally deferred to any claimed legislative purpose. In instances where the Court has found that a state's purported secular purpose in enacting a statute is a "sham," however, it has demonstrated a willingness to strike it down as a violation of the Establishment Clause.

2. The Primary Effects Prong:

The primary effects prong ensures that governmental aid programs assume a neutral position towards religion. The Court has based its application of this requirement on a "fact-intensive and case-specific analysis" and it has recognized that "the [Establishment] Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the

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65 See School Dist. v. Ball, 473 U.S. 373, 383 (1985), partially overruled on other grounds by Agostini v. Felton, 117 S. Ct. 1997 (1997) (noting that "[a]s has often been true in school aid cases, there is no dispute as to the first test"); Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (noting that "[u]nder our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the Lemon framework"); see also David Futterman, Note, School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools, 81 GEO. L.J. 711, 726 (1993) (stating that "no law providing public aid to religious schools has been invalidated on the secular purpose prong of Lemon") (citations omitted).
66 See Mueller, 463 U.S. at 394 (cataloging many viable reasons for spending public money on education, and stating that the Court is hesitant to impute "unconstitutional motives to the States"). Although Mueller addressed a state statute, it seems probable that the same deference would be given to a state school board. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (stating that the purpose prong may be satisfied by "a statute that is motivated in part by a religious purpose"); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (holding that a statute fails the "secular purpose" requirement only if "the statute or activity [is] motivated wholly by religious considerations"); Wolman v. Walter, 433 U.S. 229, 236 (1977) (finding a legitimate legislative interest in protecting and educating children via aid to private schools).
67 Jaffree, 472 U.S. at 75 (stating that this prong reminds the legislature that it must not act to endorse a particular religion, and that the Court is capable of recognizing a "sham secular purpose").
68 See Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (stating that the government must remain neutral and refrain from advancing or inhibiting religion in seeking to assist the underprivileged); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1969) (noting "the basic purpose . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited").
beliefs of a particular religious faith.”91 The Court has not applied the effects prong coherently,92 causing critics to describe its utilization as unclear and inconsistent.93 In spite of this, it seems fairly certain that direct financing or patronizing of religious activity, as well as symbolic support of religion created by a close relationship with the government, will generally raise the specter of a violation.

3. The Entanglement Prong:

Although the Court has shed more heat than light on the question of when entanglement is excessive,94 it is clear that to survive this prong governmental legislation or programs must meet two considerations. First, the Court will be concerned with any long term administrative relationship between state and religious organizations.95 Second, the Court will consider the prob-

91 Ball, 473 U.S. at 385 (citations omitted) (finding a violation of the primary effects prong by a government program that funded the teaching of secular subjects in religious schools).

92 See Wolman, 433 U.S. at 255 (holding that states may provide “books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services” to non-public school children, but are prohibited from supplying “instructional materials and equipment and field trip services”); Meek v. Pittenger, 421 U.S. 349, 361, 372 (1975) (holding that states cannot lend instructional materials such as maps, magazines, transparencies, tape recorders and laboratory materials to parochial schools despite the holding in Board of Education v. Allen, 392 U.S. 236 (1968), that lending books was permissible); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (holding that states may not reimburse parochial schools for the costs of parochial teachers administering state-required tests); cf. Mueller v. Allen 463 U.S. 388, 402-03 (1983) (upholding tax deductions to parents of parochial students); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 481-82 (1980) (holding that states may subsidize parochial schools for costs of administering state-prepared exams); Nyquist, 413 U.S. at 756 (rejecting tuition rebates and tax deductions).


94 See Peter J. Weishaar, Comment, School Choice Vouchers and the Establishment Clause, 58 ALB. L. REV. 543, 568 (1994) (noting that the Supreme Court offers “little guidance” in evaluating this prong).

95 See Lemon, 403 U.S. at 615. Administrative entanglements occur when the state would require “a comprehensive, discriminating, and continuing state surveillance” to ensure neutrality. Id. at 619.
ability that the relationship will cause political divisiveness among religious groups.\footnote{See id. at 622. Government's involvement becomes politically divisive if it risks causing strife and strain among religious sects. See id.} As with the primary effects prong, the entanglement aspect of the \textit{Lemon} test has been roundly criticized for its incoherence and misapplication.\footnote{See Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (noting that the entanglement prong is responsible for the inconsistencies of Establishment Clause decisions); see also David E. Steinberg, \textit{Alternatives to Entanglement}, 80 Ky. L.J. 691, 707 (1991) (stating that “[t]he Court should either develop a consistent, principled, and predictable law of excessive entanglement or abandon the entanglement doctrine altogether”).} The Court itself admits that the application of this test is an “elusive inquiry,”\footnote{Mueller v. Allen, 463 U.S. 388, 403 (1983) (noting that the interpretation of this prong has differed from case to case).} and recently has called the import of the entanglement prong into question by ignoring it completely.\footnote{See, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (omitting discussion of excessive entanglement in the majority opinion); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 489 n.5 (1986) (expressly “declining to address the ‘entanglement prong’ at this time”); cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (criticizing the \textit{Lemon} test and noting the many occasions where the Court has declined to use it).}

Although the \textit{Lemon} test has proven functional in numerous cases,\footnote{See, e.g., Lamb's Chapel, 508 U.S. at 395-97; Witters, 474 U.S. at 485-89; Aguilar, 473 U.S. at 410-14; Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-94 (1973).} many critics have charged that it is often either misapplied or used selectively depending on the particular needs of the court applying it.\footnote{See Jay Alan Sekulow et al., \textit{Proposed Guidelines for Student Religious Speech and Observance in Public Schools}, 46 MERCER L. REV. 1017, 1059-71 (1995) (explaining the \textit{Lemon} test and its misuse, and noting that the “Court has ignored the \textit{Lemon} test in number of recent cases and relegated its three prongs to the status of ‘useful guideposts’ in others”); see also Carole F. Kagan, \textit{Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause}, 22 N. Ky. L. Rev. 621, 634 (1995) (finding the “nonapplication, malapplication and misapplication of \textit{Lemon}” to be the cause of the Court’s confusing and irreconcilable Establishment Clause decisions); Russell, \textit{supra} note 81, at 660 n.53 (cataloging Supreme Court Justices who have criticized \textit{Lemon} and its application); Laura Underkuffler-Freund, \textit{The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory}, 36 WM. & MARY L. REV. 837, 858-73 (1995) (describing problems with the \textit{Lemon} test). Justice Scalia has observed: When we wish to strike down a practice [\textit{Lemon}] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts.” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might}
raised some doubt as to the continued viability of the three-part test for Establishment Clause violations.

C. A Court Without a Standard

Although in recent years the Court had opportunities to clarify Establishment Clause jurisprudence, it has declined to do so.\(^\text{102}\) It seems apparent that although *Lemon* has not been explicitly overruled, it may suffer death by disuse. For example, recently in *Board of Education v. Grumet*,\(^\text{103}\) the Court’s opinion did not rely on *Lemon*, mentioning it only twice in “see also” cites. In a concurring opinion, Justice O’Connor appreciated this and urged the Court to be “freed from the *Lemon* test’s rigid influence.”\(^\text{104}\) In *Grumet*, the New York State legislature created a separate school district for a group of Satmar Hasidic Jews. The statute empowered a locally elected school board to open a school, hire teachers, and collect taxes.\(^\text{105}\) By a 6-3 vote the Court held that the institution of the Kiryas Joel Village School District violated the Establishment Clause.\(^\text{106}\) The majority emphasized two problems with the creation of the district. First, the boundary lines of the district were drawn using the residences of the Hasidism as a criteria.\(^\text{107}\) Second, the Court found that the creation of the district particularly favored the Satmars, and there were no assurances that similarly situated groups would receive the same treatment.\(^\text{108}\) The Court held that accommodation here had gone too far, and found that the special treatment


\(^{102}\) See *Zobrest*, 509 U.S. at 1; *Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Board of Educ. v. Grumet*, 512 U.S. 687 (1994). The Court did not directly apply the *Lemon* test or provide a new standard in any of these cases. But see *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (declining to use the *Lemon* test and suggesting a coercion test, stating “the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so’ ”) (alterations in original) (citations omitted).

\(^{103}\) 512 U.S. 687 (1994).

\(^{104}\) Id. at 721 (O’Connor, J., concurring) (suggesting that the broad *Lemon* test be replaced with several narrower tests, that could be applied to different categories of the Establishment Clause).

\(^{105}\) See id. at 693

\(^{106}\) See id. at 688-89.

\(^{107}\) See id. at 701-02.

\(^{108}\) See id. at 704-05.
of the Satmars over other religious groups amounted to "a purposeful and forbidden 'fusion of governmental and religious functions.'" Justice O'Connor, concurring in part, reasoned that a more neutrally drafted statute might achieve the desired ends without violating the Establishment Clause.

The Court's most recent pronouncement on the Establishment Clause came in *Agostini v. Felton*. In *Agostini*, the Court overruled *Aguilar v. Felton*, as well as portions of *School District v. Ball*, and held that the rationale in those cases had been undermined by the subsequent decisions of *Witters v. Washington Department of Services for Blind* and *Zobrest v. Catalina Foothills School District*, as well as other cases.

In *Witters*, the Court found that state assistance to a blind student at a religious college did not violate the Establishment Clause because it did not have the effect of advancing religion.

The Court noted that although a religious institution ultimately received the funds, this receipt is "only as a result of the genuinely independent and private choices of aid recipients." Since the program was neutrally available, the Court concluded that it provided no incentive for students to seek religious education.

In *Zobrest*, the Court held that the Establishment Clause did

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110 *See id.* at 717 (O'Connor, J., concurring) ("A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group.").
112 473 U.S. 402, 413-14 (1985) (holding that a New York City program which provided public school teachers to parochial schools for remedial education of underprivileged children violated the Establishment Clause).
113 473 U.S. 373, 412-14 (1985) (holding that the Shared Time program, which provided remedial classes to parochial school students at the public's expense, offends the Constitution). In *Agostini*, the Court specifically noted that it no longer relies on the rule pronounced in *Ball* that "all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 117 S. Ct. at 2011.
116 *See e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that a university program that funds student activities on a religion-neutral basis does not violate the Establishment Clause where religious organizations are involved).
117 *See Witters*, 474 U.S. at 489.
118 *Id.* at 487. The Court noted that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Id.* at 488-89 (citation omitted).
119 *See id.* at 488.
not bar individuals from receiving benefits from general welfare programs merely because they attended parochial schools.\textsuperscript{125} In a 5-4 opinion, the Court reversed a federal district court order which denied a deaf student's request to have the school district provide him with a sign-language interpreter.\textsuperscript{121} The interpreter was assigned to the student under the Individuals with Disabilities Education Act ("IDEA"),\textsuperscript{122} which requires disabled students have access to a "free appropriate public education."\textsuperscript{123} The student had used the interpreter while attending grades six through eight in public school.\textsuperscript{124} When his parents sent him to a Catholic high school, however, the school district denied his request for the interpreter's continued assistance.\textsuperscript{125} In reversing the district court's decision, the Supreme Court reasoned that "any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents.' "\textsuperscript{126} Applying the child benefit doctrine,\textsuperscript{127} the Court found the aid was directed to the disabled child and not the religious high school.\textsuperscript{128} Thus, the Court concluded that any benefit that the school received was merely incidental.\textsuperscript{129}

In \textit{Agostini}, the Supreme Court relied on \textit{Witters}, \textit{Zobrest}

\textsuperscript{125} \textit{Zobrest}, 509 U.S. at 3.
\textsuperscript{121} See id. at 2, 4-6.
\textsuperscript{123} 20 U.S.C. § 1400(c).
\textsuperscript{124} See \textit{Zobrest}, 509 U.S. at 4.
\textsuperscript{125} See id. The request was referred to the county attorney who concluded that a government provided interpreter used in a Roman Catholic high school would offend the Constitution. The Arizona State Attorney General agreed. See id.
\textsuperscript{126} \textit{Id.} at 12 (quoting \textit{Mueller v. Allen}, 463 U.S. 388, 400 (1983)); see also \textit{Witters}, 474 U.S. at 487, 489 (noting that when a religious school received aid through an individual's private choice there was no Establishment Clause violation).
\textsuperscript{127} See \textit{Zobrest}, 509 U.S. at 12 (stating that "[d]isabled children . . . are the primary beneficiaries of the IDEA"); see also supra notes 64-67 and accompanying text (discussing the child benefit doctrine).
\textsuperscript{128} See \textit{Zobrest}, 509 U.S. at 12.
\textsuperscript{129} See id. (stating "to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries"); see also \textit{Witters}, 474 U.S. at 487 (finding no indication that state assistance to a blind student at a religious college would fund religious instruction when the funds were available to all similarly impaired people and flowed to the sectarian institution only by private choice of the recipient); \textit{Mueller}, 463 U.S. at 388 (declining to engage in an "empirical inquiry" to quantify the benefits to religious institutions in upholding a Minnesota statute which permitted tax deductions for parents of school children to utilize for specified educational expenses, including sectarian school tuition).
and other post-*Aguilar* decisions to hold that remedial instruction provided on sectarian school premises by public employees under Title I of the 1965 Elementary and Secondary Education Act was constitutional. The Act provided federal funding for remedial instruction for disadvantaged pupils in both private and public schools without reference to their religion. Moreover, portions of the Act were designed to safeguard the secular and supplemental nature of the funded services.

After *Agostini*, it can no longer be presumed that direct aid to sectarian schools is unconstitutional. The presence of public school teachers in parochial school classrooms does not necessarily create the impermissible impression of a “symbolic union” of church and state. The Court determined that the Title I remedial instruction in *Agostini* was “indistinguishable” from the *IDEA* provision supplying sign language interpreters to sectar-

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120 See *Agostini v. Felton*, 117 S. Ct. 1997, 2010-11 (1997) (stating that the criteria used to decide whether aid to sectarian institutions violates the Establishment Clause has changed since *Aguilar*). While the *Agostini* Court relied largely on *Zobrest* and *Witters* to overrule *Aguilar*, five justices had called for its reversal in *Board of Education v. Grumet*, 512 U.S. 687, 718, 731, 750 (1994). See *Agostini*, 117 S. Ct. at 2007. See also Joseph W. Bellacosa, *A Shared Spirit of Justice*, 37 CATH. LAW. 269, 280 n.32 (1997) (“The *Agostini* Court determined that *Aguilar* was not consistent with subsequent establishment clause decisions and declared that *Agular* was no longer good law.”).

121 See *Agostini*, 117 S. Ct. at 2016 (holding that “a federally funded program providing... instruction to disadvantaged children... is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees”).

122 See id. at 2004 (asserting “Title I funds must be made available to all eligible children, regardless of whether they attend public schools”).

123 See id. at 2004-05 (listing Title I safeguards, which included instructions to teachers stressing the program’s secular purpose, removal of all religious symbols from Title I classrooms, and unannounced inspections by field supervisors).

124 See William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 263 (1997) (asserting that opponents of direct aid to sectarian schools are now resorting to state constitutional challenges because the Constitution of the United States no longer bars such aid). Prior to *Agostini*, assistance programs were more likely to be upheld if the aid was given to students and their parents, rather than directly to the school. Ensuring that the aid would be used for secular purposes was considered easier if the parents and the child, rather than the school, were given control of the money or materials being provided. See id. at 269 (contrasting cases involving school subsidies with those involving direct aid to individuals, and noting that the latter decisions have held that individual aid does not violate the Establishment Clause).

125 See *Agostini*, 117 S. Ct. at 2010 (stating “we have abandoned the presumption... that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion”).
ian schools approved in Zobrest and found no reason to believe that the safeguards prohibiting state-sponsored inculcation of religion would cause an excessive entanglement. Justice O'Connor, writing for the majority, did not rely on Lemon's three-prong test; instead O'Connor focused on the factors used to determine both "effect" and excessive "entanglement," and reasoned that the two requirements were coterminous. In analyzing the constitutionality of Stark, it is important to note the fundamental difference between the supplemental education allowed in Agostini and the basic elementary school education at issue in Stark.

D. Alternative Inquiries

In addition to the Lemon test, the Court has offered alternative inquiries upon which it has analyzed Establishment Clause cases. These inquiries include the endorsement test, the coercion test and the traditional strict scrutiny analysis.

1. The Endorsement Test

Justice O'Connor advanced the endorsement test as an alternative to Lemon in her concurrence in Lynch v. Donnelly. At issue in Lynch was a nativity scene erected by the city of Pawtucket, Rhode Island. Justice O'Connor declared that the nativity scene, while a symbol of a traditional Christian holiday, was part of a secular display and thus was not an endorsement of religion. O'Connor sought to alter the Lemon test, suggesting that Establishment Clause scrutiny should focus on whether the message that the government action conveys is one of prefer-

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136 See id. at 2012.
137 See id. at 2015-16 (concluding that periodic monitoring by supervisors and cooperation between public employees and sectarian schools were not sufficient to constitute excessive entanglement).
138 See id. at 2015 (recognizing that entanglement is significant "as an aspect of the inquiry into a statute's effect"). The factors that Justice O'Connor considered relevant to both the entanglement and effect inquiries included the nature of the institution, the nature of the aid and the nature of the relationship between the institution and the State which resulted from the aid. See id.
140 Id. at 671. The Christmas display was built in cooperation with the Pawtucket downtown merchants' association. See id.
141 See id. at 692. ("The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion.").
ence for or approval of religion. Under the endorsement test, the Court would first determine "whether [the] government's actual purpose is to endorse or disapprove of religion." Second, the Court would use a modified effect prong of Lemon to inquire "whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement." Subsequently, Justice O'Connor questioned the usefulness of Lemon's entanglement prong in Aguilar.

Under the endorsement test, government actions may inhibit or advance religion so long as no message of endorsement or disapproval is attached. The test shifts the focus to the message the government action is communicating about religion rather than the effect of this government action upon religion. O'Connor's endorsement test was adopted in Allegheny County v. Greater Pittsburgh ACLU; however, the Court has yet to indicate that the endorsement test will be applied in school-aid cases.

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142 See id. at 688 ("Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."). Justice O'Connor continued questioning the Lemon test, stating "it has never been entirely clear... how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause." Id. at 688-89.

143 Id. at 690. In utilizing the purpose prong of the Lemon test, Justice O'Connor would look to see if a challenged program had a secular purpose that (1) was more important than any religious purpose, and (2) was not pretextual. See id. at 690-91.

144 Id. at 690.

145 See Aguilar v. Felton, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) ("I question the utility of entanglement as a separate Establishment Clause standard in most cases.").


147 See Lynch, 465 U.S. at 690 (O'Connor, J., concurring). In upholding the city of Pawtucket's nativity scene display, O'Connor suggested that the Court's analysis should have centered on the message the city sought to convey and what message the "audience" received. See id.

148 492 U.S. 573, 597 (1989). Justice Blackmun, writing for the majority, held that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs." Id.
2. The Coercion Test

First suggested by Justice Kennedy in *Allegheny County*, the coercion test, which focuses on the extent to which the government coerces citizens into supporting or rejecting religion, provides another means of evaluating potentially unconstitutional unions of church and state. Subsequently, in *Lee v. Weisman*, Kennedy resorted to this test to strike down an invocation and convocation at a middle school graduation. Justice Kennedy appears to be the main proponent of this test and its application may be limited.

3. Strict Scrutiny Analysis

In *Larson v. Valente*, the Court developed yet another alternative inquiry that may be relevant in *Stark*. The *Larson* Court did not apply the *Lemon* test, declaring that it was only “intended to apply to laws affording a uniform benefit to all religions.” When governmental action discriminates by granting a denominational preference, it must have a secular purpose and

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149 *Allegheny County*, the ACLU brought an Establishment Clause challenge, claiming two holiday displays in Pittsburgh created a state endorsement of religion. See id. at 573. A divided Court permitted one of the displays on the grounds that it did not constitute an endorsement of religion; the other display, a crèche, was held to violate the Establishment Clause. See id. at 613, 616.

150 *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (asserting that coercion is of greater concern when it is done in a public educational setting).


152 See id. at 592-93 (reasoning that students had no choice but to attend the graduation ceremonies and were coerced into participating in its religious aspects). The Court rejected the school district's argument that because the students had the option of not attending, the district's action was not coercive. The Court considered such reasoning "formalistic in the extreme." *Id.* The Court found that the situation more accurately reflected an absence of choice based on the significance of the ceremony. See id.

153 See *Stick*, supra note 52, at 455 (noting that Justice O'Connor criticized the coercion test as a simple restatement of the Free Exercise Clause of the First Amendment). See also *Lee v. Weisman*, 505 U.S. at 644 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., dissenting) (criticizing Kennedy's "psycho-coercion test" and advocating ceremonial deism). It seems, however, that Justice Scalia, and the other dissenters in *Lee*, would likely adopt the coercion test if there was a legitimate penalty for non-compliance with the religious activity challenged.

154 456 U.S. 228 (1982).

155 See id. at 252. While not relying on the *Lemon* test, the Court concluded it would have reached the same result, stating "although application of the *Lemon* tests is not necessary . . . , those tests do reflect the same concerns that warranted the application of strict scrutiny." *Id.*
meet strict scrutiny as applied in Equal Protection jurisprudence. The statute must be narrowly tailored to meet a compelling governmental interest. The application of this test is usually limited to government action which "facially differentiates among religions." Thus, if a group is granted a denominational preference, strict scrutiny will apply. "Whether all religions together constitute a suspect class for purposes of the Equal Protection Clause[, however,] is a far more complex question that the courts have not previously addressed." It can be argued that strict scrutiny should be triggered in cases such as Stark, where one religious group is granted a benefit that cannot be guaranteed to other such religious groups. In earlier cases, however, the Supreme Court has declined to pursue this type of inquiry.

D. Modification of Curriculum

Another Establishment Clause issue relevant to Stark is that of tailoring a school's curriculum. In Epperson v. Arkansas, the Court held that a state may not eliminate particular ideas from a curriculum simply because they conflict with religious tenets. At issue in Epperson was a state statute prohibit-

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156 See id. at 246. The Larsen Court struck down a Minnesota law which imposed public reporting requirements on religious organizations only when contributions came from members. See id. at 255. The Court concluded that the law was not sufficiently narrowly tailored. See id.

157 See id. at 247.

158 Hernandez v. Commissioner, 490 U.S. 680, 695 (1989); see also Larson, 456 U.S. at 245-46 (reiterating the Constitution's prohibition of denominational preferences and requirement that all religions be treated similarly).

159 See, e.g., Larson, 456 U.S. at 246 (state laws granting denominational preference require strict scrutiny). This is particularly true where more moderate means are available to achieve the same objective.

160 Christian Science Reading Room v. San Francisco, 784 F.2d 1010, 1012-13 (9th Cir. 1986).

161 See Grumet v. Board of Educ., 618 N.E.2d 94, 102 (N.Y. 1993) (Kaye, C.J., concurring) (finding that the statute failed the strict scrutiny test developed in Larson, since there were more moderate means available to provide educational services to the Satmar children), aff'd 512 U.S. 687 (1994). As stated by Chief Judge Kaye, "legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test." Id.

162 See Board of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (failing to address the strict scrutiny argument proffered by Chief Judge Kaye).

163 393 U.S. 97 (1968).

164 See id. at 107.
ing the teaching of the Darwinian theory of human evolution.\textsuperscript{165} The Court held that the statute violated the Establishment Clause because it failed the secular purpose requirement.\textsuperscript{168} The elimination of ideas from a course of study, driven only by religious beliefs, was found to violate the principle of neutrality.\textsuperscript{167} Justice Black, in a concurring opinion, sought to maintain the state's right to control its curriculum, reasoning that a state should be able to eliminate any particular subject matter from being taught in its schools without raising a First Amendment challenge.\textsuperscript{168} This reasoning seems sound, considering that if a state is not obligated to teach certain material, there should be no reason not to allow its elimination.\textsuperscript{169}

Deference to state educational authority and by extension to local school boards has two limitations.\textsuperscript{170} First, if the elimination of only one aspect of a particular subject matter is done for strictly religious reasons, then the state will be found to have furthered that religious viewpoint because opposing views have been eliminated.\textsuperscript{171} For example, in Epperson, the Court focused on the fact that the motivation for the exclusion of evolution from the curriculum was improper.\textsuperscript{172} Second, in the absence of any secular reason for adjusting the curriculum, there is no reason to defer to the state's action, and the principle of neutrality will be

\textsuperscript{165} See id. at 98. The "anti-evolution" statute was adopted by Arkansas in 1928 to prohibit teaching the theory that man evolved from lower species of life. See id. at 98-99. The Court, finding the law unconstitutional, stated that the Arkansas law was "a product of the upsurge of 'fundamentalist' religious fervor of the twenties." Id. at 98.

\textsuperscript{166} See Epperson, 393 U.S. at 107-09. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1272 (5th ed. 1995).

\textsuperscript{167} See Epperson, 393 U.S. at 109.

\textsuperscript{168} See id. at 112-14 (Black, J., concurring) (suggesting that Arkansas' decision to remove evolution from its curricula may have been motivated by a desire to avoid controversy for pedagogical, rather than religious, reasons).

\textsuperscript{169} See NOWAK & ROTUNDA, supra note 166, at 1272; see also Edwards v. Aguillard, 482 U.S. 578, 583 (1978) ("States and local school boards are generally afforded considerable discretion in operating public schools."); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1968) ("[T]he Court has repeatedly emphasized the need for affirming the... authority of the States and of school officials, consistent with constitutional safeguards, to prescribe and control... the schools."); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (holding that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," implying schools should be given great leeway in selecting curricula).

\textsuperscript{170} See NOWAK & ROTUNDA, supra note 166, at 1272.

\textsuperscript{171} See Epperson, 393 U.S. at 106.

\textsuperscript{172} See id. at 103, 107-09.
found to have been violated. More recently, in *Edwards v. Aguillard*, the Court was faced with an attempt by a state legislature to aid a specific religious viewpoint by granting equal time to the discussion of creation in the classroom. The Court again found this to be an invalid attempt at modification of the curriculum, determining that the purpose was clearly promotion of a religious viewpoint, and was therefore improper. The Court did note that legislatures and local school boards have authority to design curricula based on non-religious grounds. Notably, Justice Brennan made a distinction between grade school and college level programs. Concerned about the influence of a tailored curriculum on the minds of the young, he reasoned that colleges and universities should be granted greater authority to offer religion courses.

Against this jurisprudential backdrop, the Eighth Circuit recently vaulted over the limits of the Establishment Clause by embracing an excessively accommodationist approach in deciding to reverse a district court injunction against state aid to a religious school operating under the guise of a public school.

III. THE STARK FACTS

Independent School District No. 640 (the “district”) is a rural school district in southwestern Minnesota. The district had operated elementary schools in the towns of Wabasso and Vesta until 1984, when it closed and sold the Vesta school building. Following the closure, the Vesta children either traveled fourteen miles to attend the Wabasso school or were homeschooled.

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173 See id. at 109; see also NOWAK & ROTUNDA, supra note 166, at 1272 (noting that such an open attempt to aid religious views was presented in *Epperson*, leading to a breach of the principle of neutrality at the heart of the religion clauses).


175 See id. at 578.

176 See id. at 590-91.

177 See id. at 583-84.

178 See id. at 584 n.5.


180 See id. at 1078 (Murphy, J., dissenting) (explaining that the school was closed for economic reasons).

181 See id. at 1070; see also id. at 1078 (noting “[v]arious accommodations were
The Vesta elementary school building was sold to a member of the Brethren, a religious group whose practices include avoiding the use of technology, such as television, radio, video, film and computers. In 1992, the owner of the building, along with several resident Brethren families, wrote to the district superintendent proposing a reopening of the Vesta school as a multi-age classroom. They also requested that the charter of the school contain a clause prohibiting the use of technology antithetical to the Brethren’s beliefs. Ultimately, a three-year lease was signed by the district, the building owner and the Brethren. In return for the operation of the school as a “public” school, with the district providing the teachers and instructional materials, the Brethren agreed to pay all the other expenses necessarily involved in maintaining the school. The lease provided that the school would be open to any resident in the district, and explicitly stated that the parents of Brethren children would have the same right to comment on and provide input regarding classroom materials as other parents had, subject to the district’s final “sole discretion.” The lease also stated that the district would limit the use of objectionable technology, to the extent permissible by law, in the classrooms of the school. It was proposed that students who did not adhere to the Brethren’s views, which redacted counseling, health education, physical education and music instruction from the curriculum, could receive supplemental instruction by traveling to the

made at Wabasso to respect the religious beliefs of the Brethren, such as providing separate tables for their children at lunch and excusing them from activities that involved technological devices”).

See id. at 1070 (citing BRYAN RONALD WILSON, “THE BRETHREN” A RECENT SOCIOLOGICAL STUDY (1981)).

See Stark, 123 F.3d at 1070.

See id.

See id. at 1071 n.2. The fact that the Stark court found the lease evidence inconsequential because the person who signed the lease for the Brethren allegedly lacked the authority to do so, reveals its result-oriented approach. See id.; cf. id. at 1078-79 nn.8-9 (Murphy, J., dissenting) (finding that the inclusion of the Brethren on the lease was an indication of the religiously motivated establishment of the Vesta school).

The expenses included utilities and property taxes, maintaining the grounds, and providing for custodial services, as well as property and liability insurance related to the building. See id. at 1071.

Id.

See id.
neighboring Wabasso school. Also, hot lunches would not be provided by the Vesta school, since Brethren children’s religious beliefs required them to have lunch at home with their families.

During the approval process, members of the school board viewed the opening of the Vesta school as beneficial primarily for financial reasons, as well as pragmatic and pedagogical ones. Dr. Bates, the superintendent, stated that the principal advantages of reopening the Vesta school included reduced busing, reduced class size and alleviation of space shortages in Wabasso. He also noted that the operating costs of the Vesta school would be minimal. It was also believed that opening the Vesta school would provide additional educational benefits to those students who otherwise may have been home-schooled.

After public meetings, the school board approved the opening of the Vesta school. When the Vesta school finally opened only Brethren children attended, in spite of the fact that the school was intended to serve the entire community. The superintendent and the board members attested that the religious background of the parents or students was not discussed and was not relevant to their decision to open the school. The record, however, is absent of any evidence that the school district attempted to recruit non-Brethren students or mandated attendance at Vesta for those in the locale, despite it being ostensibly a public school. It appears that non-Brethren students simply chose to continue attendance at Wabasso.

This result should not be surprising considering that the school was publicly perceived as being affiliated with the Brethren. For example, a local newspaper story recounted that the agreement to open the school, which appeared to be on tenuous legal footing, came about to allow the Brethren to avoid sending

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189 See id.
190 See id. Hot lunches were available at Wabasso, and the district stated that it would cater such lunches to students at Vesta if the need arose. See id. at 1071 n.3.
191 See id. at 1070.
192 See id.
193 See id.
194 See id.
195 See id.
196 See id. at 1071.
197 See id. at 1070-71.
198 See id. at 1073 (referring to the district court conclusion that the Vesta school was perceived in the community as a Brethren school).
their children to the Wabasso school, where technology and teaching methods objectionable to the Brethren were used.¹⁹⁹

Indeed, as Judge Murphy noted in his dissent, there were significant differences between the curricula offered at Vesta and Wabasso.²⁰⁰ The Vesta curriculum did not include the same access to educational technology, physical education, health education, music or art.²⁰¹ Consequently, to receive health, music or physical education instruction, a child attending the Vesta school needed to make a special request and travel thirty miles, round trip to Wabasso and back, during the school day.²⁰²

The Brethren were also involved in other ways in the reopening of the school. For example, members of the Brethren participated in the interviewing process to select the teacher.²³³ "It [was] undisputed that it was unprecedented to have non-

¹⁹⁹ See id. at 1078 (Murphy, J., dissenting). Justice Murphy recounted the news story:

The Wabasso Board of Education has reached an agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall . . . .

If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers, and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.

To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

Id. (quoting Vicki L. Gerdes, Agreement is Reached on Proposed School in Vesta, REDWOOD GAZETTE, June 17, 1993).

²⁰⁰ See Stark, 123 F.3d at 1079.

²⁰¹ Although district officials claimed that computer technology was available at Vesta, and the official curriculum adopted for the school called for at least one half-hour of computer training each week, such instruction had never been offered. See id. Technology, such as television, video players and movies, were never used at Vesta, although they were consistently available at Wabasso. See id. The health education offered at Vesta differed from that at Wabasso; for example, the drug awareness program employed at Wabasso was absent from Vesta's curriculum. See id. While there was an official requirement of thirty minutes of physical education with "specialists" each day, at the Vesta school the instruction was provided by a Brethren parent without state qualifications or formal training in physical education, while at Wabasso physical education was taught by a trained physical education teacher. See id. Finally, while music instruction was also required by the official curriculum, there was no showing that it was ever actually offered by the Vesta school. See id.

²³³ See id.
district employees present at such interviews." Additionally, the evidence showed that the perception of the Vesta school as a "Brethren" school even affected some applicants for the position. For example, one applicant thought it was relevant to note on her résumé that she had prior experience in religiously affiliated schools. Moreover, the nineteen children who enrolled in the Vesta school were those on a preliminary list provided by the Brethren to the superintendent. The segregation of the Vesta school population was not the result of geographic distribution. There were non-Brethren children residing in Vesta whose parents were forced to make the "choice" to send them to Wabasso fourteen miles away in order to receive a full education.

Writing for the Eighth Circuit, Judge Wollman concluded that the school district acted neutrally towards the citizens of the district. The court began its analysis with the Lemon test, and found a legitimate secular purpose of educating the district's children, citing the pedagogical and economic reasons stated above. The court noted that the decision to open the Vesta school was based on "secular reasons of space efficiency, savings in transportation costs, and the addition of a multi-age classroom and corresponding reduction in class sizes." The court also noted that the prevention of a loss of state funding to the district by forestalling home-schooling of the Brethren children constitutes a legitimate secular purpose. Relying primarily on the recent Supreme Court decision in Agostini, the Stark court concluded that the other two requirements of the Lemon test, no advancement or inhibition of religion and no ex-

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204 Id.
206 See Stark, 123 F.3d at 1079 (Murphy, J., dissenting).
207 See Stark, 938 F. Supp. at 552.
208 See Stark, 123 F.3d at 1077.
209 See supra notes 80-101 and accompanying text.
210 See Stark, 123 F.3d at 1073; see also supra notes 191-94 and accompanying text (discussing the reasons behind the Board's approval of the school).
211 Stark, 123 F.3d at 1073.
212 See id. (reasoning that since home-schooling reduced the amount of state aid flowing to the district, keeping those children in classrooms maintained funding "that benefits all students within the district"). Testimony estimated the state aid lost would amount to $3200 for each student withdrawn from school. See id. at 1070.
213 See supra notes 111-33 and accompanying text (discussing the facts and rationale behind the Supreme Court's holding in Agostini).
cessive entanglement, were satisfied.214 The majority found the Vesta school to be a legitimate accommodation of the Brethren's beliefs and rejected the contention that the school's curriculum was impermissibly changed to comport with the Brethren's religious scruples because it found that Vesta's curriculum was the same as that at the Wabasso school.215 The court also rejected the contention that the Vesta school was no different from the school in *Grumet*,216 and found instead that the establishment of the Vesta school complied with the principle of neutrality central to the *Grumet* Court's decision.217 Finally, although the court gave a nod to the endorsement test, it did not really apply it to the facts of the case.218

Judge Murphy, in a well-reasoned dissent, argued that the "establishment" of the "special school" in Vesta went beyond the limits of the First Amendment.219 He contended that the Vesta school violated the principle of neutrality and characterized it as an "unlawful fostering of religion."220

IV. ANALYSIS

A. Exceeding the Limits of Accommodation

Although recent decisions have defended religious organizations, and the Supreme Court's trend could certainly be characterized as moving from a separationist approach to accommodationist,221 one theme persists: accommodation is not a principle

214 Stark, 123 F.3d at 1074-75.
215 See id. at 1074.
216 See supra notes 103-10 and accompanying text (discussing the facts of *Grumet*).
217 See Stark, 123 F.3d at 1075-76. Arguably, *Grumet* is distinguishable but for a different reason. An issue in *Grumet* not present in *Stark* is that of delegation of a state's power based on religious criteria. In *Grumet* the religious group was actually granted control of a school district as a result of political gerrymandering. See supra notes 103-109 and accompanying text.
218 See Stark, 123 F.3d at 1077 (finding no violation of the endorsement test by simply reiterating that the district had acted neutrally and had "not made anyone's adherence to religion relevant to their standing"). But see supra notes 139-44 and accompanying text (describing "endorsement test" set forth by Justice O'Connor's concurrence in *Lynch v. Donnelly*). Under the endorsement test the Court views governmental action from the perspective of a "reasonable observer" to ensure prohibition of governmental sponsorship of a particular religion.
219 Stark, 123 F.3d at 1082.
220 Id. at 1075.
221 See generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neu-
The principle of a neutral state stands as an insurmountable barrier to excessive accommodation that would lead to the advancement or establishment of religion in violation of the First Amendment. The facts in Stark present a case that exceeds the limits of accommodation.

Unlike the litany of cases dealing with aid to private schools, this case involves a public school catering to a religious group under the guise of economic incentives. As evidenced by the interpretations of those in the neighborhood, the creation of the Vesta school created the unshakable perception of this "public" school as a "Brethren School." This fact, which goes directly to the inquiry developed in the "endorsement test," was ignored by the majority. Although the endorsement test has not traditionally been applied in non-communicative cases such as school-aid controversies, Stark presents an opportunity for the application of this test. Admittedly, any court trying to distill the array of Supreme Court decisions into a controlling test to apply faces a daunting challenge. But the Stark court could have avoided this minefield simply by categorizing the facts. The creation of the Vesta School clearly set forth state endorsement of a particular religion, and any outward attempt to comply with the limits of the law cannot hide the fact that Vesta was, in fact, a Brethren school.

The scenario presented by Stark is a clear violation of the Establishment Clause in a way not previously presented in the context of aid to parochial schools, where at least a defense of private choice can be raised. In Stark, it is not the choice of the students or their parents that directs the flow of state aid.

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223 See Grumet, 512 U.S. at 705.
224 See supra notes 198-99 and accompanying text.
225 See, e.g., Witters, 474 U.S. at 493 (O'Connor, J., concurring) (describing the endorsement test as being satisfied when "no reasonable observer is likely to draw ... an inference that the state itself is endorsing a religious practice or belief"); supra notes 117-19 and accompanying text.
226 See, e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 n.2 (1995) (finding Justice O'Connor's endorsement test inapplicable to display of religious symbols with the context of that case); Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (refraining from applying the endorsement test in considering a state statute that gave private employees their Sabbath day off). But see id. at 711 (O'Connor, J., concurring) (asserting that "[i]n my view, the ... law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance").
rather, it is a direct catering to a religious institution by a state institution. An assertion of parental rights cannot aid the parents in Stark. The Brethren did not petition the school district for funding for their private school, rather they demanded the tailoring of the Vesta school, in terms of curriculum and structure, as a quid pro quo for the economic incentives they offered to the school district. The Vesta school was structured differently from other area public schools, as evidenced by the changes in curriculum. This restructuring to accommodate the Brethren's religious viewpoint sent a powerful message to the citizens of the surrounding area as well as the students of the school, and violated both the neutrality and endorsement restraints on government action.\(^{225}\)

The notion of equality proposed in Grumet cannot be ignored. Although the curriculum in Grumet did not reflect the religious beliefs of the Satmars, the Supreme Court pointed to the fact that the Satmars were granted control over a school board.\(^{227}\) In striking down the New York legislation granting such power to the Satmars, the Court highlighted the fact that there was no guarantee that other groups throughout the state would receive the same treatment.\(^{228}\)

Similarly, in Stark, the district singled out the Brethren for preferential treatment, with no guarantee that other groups throughout Minnesota would be given the same treatment. The fact that the district attempted to ensure that the Vesta school conformed to state educational laws cannot conceal the fact that the creation of the school gave the Brethren the imprimatur of state support. All children who reside in the United States are entitled to receive public education.\(^{229}\) The fact remains that the

\(^{225}\) The idea that the structure of an educational system sends an educational message is not new. See, e.g., Amy Gutmann, Democratic Education 113-14 (1987) (making a parallel argument pertaining to the inculcation of gender preference); Letty Cottin Pogrebin, Growing Up Free: Raising Your Child in the 80's 491 (1980) (same); James C. Farrell, Note, Johnny Can't Read or Write, But Just Watch Him Work: Assessing the Constitutionality of Mandatory High School Community Service Programs, 71 ST. JOHN'S L. REV. 795 (1997) (arguing that the structure of mandatory community service programs inculcates values in violation of First Amendment speech rights of students).

\(^{227}\) See Grumet, 512 U.S. at 698.

\(^{228}\) See id. at 726.

\(^{229}\) See, e.g., Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 469 (1988) (Marshall, J., dissenting) (stating education is "the very foundation of good citizenship," without which a child cannot reasonably be expected to succeed) (quoting
Brethren children were distinguished from others, in that they received this education entitlement in a particularized form because of their religious affiliation.

B. Unacceptable Curriculum Modifications

The Stark court’s conclusion that the curriculum changes only reflected religiously neutral exemptions failed to take into account the context in which these exemptions occurred, as well as the extent of the changes. The exemptions in Stark amounted to a full-scale adjustment of curriculum, unlike in Grumet, where the curriculum did not differ from the special education curriculum offered in other parts of the state. In Stark the curriculum was so fundamentally changed that requiring non-Brethren children to attend Vesta to receive such instruction was impractical. The district’s selective elimination of particular aspects of the curriculum not only coincided with a religious purpose, it was predominated by such a purpose. This symbiotic relationship between the Brethren and the government was also reflected in the granting of changes in the curriculum as a quid pro quo for the Brethren’s offering of economic assistance which the district gladly seized. The court’s claim that religion was not advanced by the creation of the Vesta school was not supported by the facts of the case. Similar to the open attempt to aid religious viewpoints struck down in Epperson, the school district in Stark “openly breached the principle of neutrality, which is the

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220 The Stark court’s reliance on Agostini is also misguided. Agostini dealt with supplemental education only. Stark, on the other hand, is concerned with basic elementary school education. To stretch the holding of Agostini to justify the Vesta school misses this key distinction.

221 A non-Brethren child would need to travel thirty miles round-trip each day to receive the equivalent to the instruction available at the Wabasso school. Avoiding additional travel to Wabasso would presumably be a major, if not the only, factor in a non-Brethren's decision to transfer to the Vesta school. Removing this incentive thus negates the allure of the Vesta school over the Wabasso school to non-Brethren families.

222 See Edwards v. Aguillard, 482 U.S. 578, 608 (1987) (Powell, J., concurring) (emphasizing that legislation is not invalid unless "its purpose is to advance a particular religious belief").

223 See supra notes 163-73 and accompanying text.
Moreover, there is no evidence of a secular purpose for the changes, a requirement unequivocally required by \textit{Epperson}. The court's claim that the exemptions would not cause excessive entanglement misses the mark. Not only are Brethren religious tenets clearly intertwined with the changes to the curriculum, thereby losing any claims to neutrality, but the state, by agreeing to these changes, is endorsing a religious curriculum as perceived by objective observers.

\textbf{C. The Role of the Public Education System}

The role of public schools in American society is an important consideration in the context of \textit{Stark}. As the current debate over school vouchers suggests, there may be many good reasons why religious groups, such as the Brethren, want to establish their own school programs. It seems reasonable, and perhaps even desirable, to allow citizens to run private sectarian schools, including schools that teach curricula which espouse a particular religious viewpoint. But religious endorsement, as demonstrated by an openly parochial school, is entirely different from the message of religious endorsement sent by an ostensibly public institution, such as the Vesta school. It may be true that in our pluralistic society, citizens will not be able to agree on the definition of what constitutes a "common school."\textsuperscript{225} Citizens across the United States vigorously disagree about the goals of public education. The inability to find a single favored educational solution, however, should not prohibit the courts from identifying substantive limits on what is permissible for public schools. Whether we are concerned about curriculum, structure, or political organization, the Constitution does not allow public schools to endorse a particular religious group, such as the Brethren.\textsuperscript{226}

The public school system is a conduit of the government and their messages are explicitly connected. A public school district, driven by religious viewpoint, implicitly endorses that viewpoint. Therefore, when a public school suggests that religious affiliation

\textsuperscript{224} NOWAK \& ROTUNDA, supra note 166 at § 17.5(d) (referring to \textit{Epperson}).


\textsuperscript{226} See Judith Lynn Failer, \textit{The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel}, 72 IND. L.J. 383 (1997) (concluding that when it comes to public education, enclave groups must be willing to receive their education on the public's terms).
is relevant to achieve political ends, that message is altogether different than when the same message is sent by a sectarian school structure unaffiliated with state control and funding. If private citizens or groups want to educate their children pursuant to a particular religious viewpoint, they are allowed to do so by sending their children to a parochial school.237 Public schools are funded directly by public monies, which accordingly signifies public approval. A distinction must be maintained between the use of public money to publicly endorse religion, in violation of the Establishment Clause, and the constitutionally protected right of private groups to endorse religion under the Free Exercise Clause. Private choices which further a group's religious beliefs should not be funded by the public. The courts should demand that education provided by the state remain religiously neutral.

Moreover, a public school should be representative of the larger community in which it is located. The social associations that result from the interaction of children of diverse backgrounds conveys a message of necessary political association with others. The Vesta school, by design, was strictly for members of a specific group, giving its students an improper impression of what it takes to interact and contribute as a member of a pluralistic society. The limited reality of who attends the Vesta school obscures the very real presence of others in the locality and sends a message that religious affiliation is relevant for political purposes.

CONCLUSION

The Stark court's characterization of the Vesta school as permissible accommodation represents an impermissible departure from Establishment Clause jurisprudence. The Vesta school is for all practical purposes, a "Brethren School" supported and run by the state. Such a result leaps beyond accommodation to impermissible endorsement. The Establishment Clause stands as a constant reminder that the state must avoid placing its imprimatur on a particular religion or on religion in general over non-religion. In attempting to strike the proper balance between

237 It is a well recognized right of parents under the Free Exercise Clause to send their children to religious schools if they can afford it. See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down Oregon statute requiring attendance at public schools).
religious accommodation in education and impermissible endorsement, the Court has been cautious. Although recent decisions demonstrate that the Supreme Court has moved towards a more accommodationist approach, the type of accommodation granted in *Stark* is unprecedented and signifies a constitutionally impermissible state endorsement of a particular religion.

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