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Constitutional Law - Public Aid to Parochial Schools - Agostini v. Felton

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CONSTITUTIONAL LAW—Public Aid to Parochial Schools. *Agostini v. Felton*, 521 U.S. 203 (1997).

INTRODUCTION

In 1978 six taxpayers alleged that the City of New York violated the Establishment Clause of the First Amendment by using federal tax dollars to support religion.[1] The money in question was provided under Title I of the Elementary and Secondary Education Act of 1965.[2] The federal funds were to be used by local education agencies to supplement the needs of educationally deprived children from low-income families, regardless of whether they attended public or private schools.[3] Eligible children were instructed in remedial reading, reading skills, remedial mathematics, and English as a second language, and were provided with guidance services.[4]

The New York City School Board had decided the most effective way to help private school students was to send the Title I teachers to the private schools during regular school hours.[5] Of the 302,382 students[6] eligible to receive the benefits of Title I funds in New York City, 13.2% attended private schools.[7] Of these private schools, 84% were Catholic and 8% were Hebrew day schools.[8] The plaintiffs complained that the program, as administered by the City of New York, violated the Establishment Clause because public school employees were conducting remedial and counseling programs for students on parochial school premises, thus impermissibly supporting religion.[9]

The district court granted the City's motion for summary judgment and

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1. Aguilar v. Felton, 473 U.S. 402, 407 (1997).

2. 20 U.S.C. § 6301-6514 (1994). The funds provided under Title I are substantial. Congress authorized $7.4 billion for Title I programs for fiscal year 1995. 20 U.S.C. § 6302(a) (1994). The authorization increased by $750 million each year from 1996 to 1999. 20 U.S.C. § 6301(a)(2) (1994).

3. *Aguilar*, 473 U.S. at 404-05. Title I stipulates that eligible nonpublic school children must be able to participate on an equitable basis. 20 U.S.C § 6321(a)(1) (1994). For a decision regarding what constitutes an equitable program for Title I private school students, see Wheeler v. Barrera, 417 U.S. 402 (1974).

4. *Aguilar*, 473 U.S. at 406.

5. The Board initially tried transporting the private school students to public school sites after the regular school day ended, but this was unsuccessful because "[a]ttendance was poor, teachers and children were tired, and parents were concerned for the safety of their children." *Id.* After-school instruction on the private school premises was also unsatisfactory. Agostini v. Felton, 521 U.S. 203, 210-11 (1997).

6. The figures on record were for the 1981-82 school year. Respondent's Brief, Agostini v. Felton, 521 U.S. 203 (1997) (No. 96-552), 1997 WL 143798 at Joint Appendix Vol. I.

7. *Aguilar*, 473 U.S. at 406.

8. *Id.* In this case note, in keeping with Supreme Court terminology, the term parochial is used to refer to all religious schools, regardless of their affiliation.

9. *Id.* at 407.

dismissed the taxpayers' complaint.[10] The taxpayers appealed to the United States Court of Appeals for the Second Circuit. Judge Friendly wrote for a unanimous panel, and reversed the district court, holding that the "Establishment Clause constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise."[11]

The Supreme Court granted certiorari and affirmed the Second Circuit in *Aguilar v. Felton*.[12] The district court, on remand, permanently enjoined the City from sending public school teachers into parochial schools under the Title I program.[13] To comply with this injunction, the City had to serve qualifying parochial students in other ways. The City provided Title I services in public schools, in leased neutral sites, by computer assisted instruction, and in vans outfitted as classrooms, parked near, but not on, the parochial school grounds.[14]

This situation continued for ten years. Then, in 1995, the New York City Board of Education and a new group of parochial school parents[15] (hereinafter petitioners) filed a motion in district court seeking relief from the permanent injunction under Federal Rule of Civil Procedure 60(b)(5).[16] Petitioners argued that three factual or legal changes had taken place since *Aguilar* that made lawful what the injunction prevented.[17] The petitioners first alleged that the exorbitant cost of compliance with *Aguilar* constituted a "significant factual development."[18] They also claimed two legal developments.[19] First, five Justices, writing in *Board of Education of Kiryas Joel Village School District v. Grumet*,[20] had expressed the view that *Aguilar*

10. *Id.* The District Court for the Southern District of New York affirmed the constitutionality of the Title I program in an identical challenge in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (known as PEARL). The summary judgment was based on the record established in PEARL.

11. Felton v. Secretary, United States Dept. of Educ., 739 F.2d 48, 49-50 (2d Cir. 1984).

12. *Aguilar*, 473 U.S. at 408.

13. *Agostini*, 521 U.S. at 208.

14. *Id.* at 213. Between the 1986-87 and 1993-94 school years, the additional cost of these "*Aguilar*" alternatives in New York City amounted to $7.9 million. *Id.*

15. Because a new group of parents was involved, the case, formerly *Aguilar v. Felton*, became *Agostini v. Felton*. *Id.* at 214.

16. *Id.* Federal Rule of Civil Procedure 60(b)(5) provides that the court may relieve a party from a final judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application.*" (emphasis added). The Court has held that a 60(b)(5) motion may be granted when the party seeking relief can show "a significant change in either factual conditions or in law." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

17. *Agostini*, 521 U.S. at 215.

18. *Id.* at 215-16.

19. *Id.* at 216.

20. 512 U.S. 687 (1994).

should be overruled.[21] Second, the petitioners argued that decisions in other recent Establishment Clause cases had undermined *Aguilar*.[22]

The district court denied the petitioners' Rule 60(b)(5) motion, holding that although *Aguilar's* demise might be imminent, it had not yet occurred.[23] The Second Circuit upheld the district court's decision.[24] The Supreme Court granted certiorari to decide whether petioners were entitled to relief from the permanent injunction.[25]

The Supreme Court quickly disposed of petitioners' first two arguments. The cost of implementing *Aguilar* was great, but that cost had been predicted and did not constitute a change in the factual situation.[26] Although five Justices had indicated *Aguilar* should be overruled, that was not a sufficient change in law because the propriety of *Aguilar* was not under consideration when this view was expressed as dicta in *Kiryas Joel*.[27] Five members of the Court, however, embraced the third argument that recent Establishment Clause cases had eroded *Aguilar*.[28] The Court therefore ordered that the permanent injunction be lifted, overruling its earlier decision in *Aguilar*.[29] The Court held that the Establishment Clause is not violated when publicly funded teachers and counselors supplement the education of parochial school students on parochial school premises under the Title I program.[30]

This case note traces the Supreme Court's decisions in cases involving public aid to parochial schools. It also examines the reasoning on which the *Agostini* Court based its decision. The Analysis section explores the reasons *Agostini,* though significant in its effect on delivery of Title I and other similar services, is not in accord with precedent. The case note concludes with a discussion of how *Agostini* may have confused, rather than clarified, the predominant Establishment Clause test.

BACKGROUND

Two clauses of the United States Constitution's First Amendment ad-

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21. *Kiryas Joel*, 512 U.S. at 717-18 (O'Connor, J., concurring), 731 (Kennedy, J., concurring), 750 (Scalia, J., dissenting).
22. *Agostini*, 521 U.S. at 216.
23. *Id.* at 214.
24. *Id.*
25. *Id.*
26. *Id.* at 216.
27. *Id.* at 217.
28. *Id.* at 237.
29. *Id.* at 240.
30. *Id.* at 234-35.

dress religion.[31] The first, the Establishment Clause, prohibits government sponsorship of religion and forbids the government from aiding or formally establishing a religion.[32] The second clause, the Free Exercise Clause, "prohibits the government from denying benefits to, or imposing burdens on persons because of their religious beliefs."[33]

The inherent conflict between these two provisions is at the heart of most parochial school aid cases. Programs that benefit church-related schools at public expense may offend the Establishment Clause because the government is thereby supporting institutions that advance religion.[34] At the same time, parochial school students must not be unduly burdened by being denied benefits because of their religion, a violation of the Free Exercise Clause. The following cases demonstrate how the Supreme Court has tried to reconcile these competing interests. The cases are grouped in three categories. The early cases articulate the Court's initial standard. The next set of cases, in which church and state are strictly separated, introduce and apply the three-part *Lemon* test that the Court has relied on for many years to decide Establishment Clause cases. The third group demonstrates the Court's recent trend to adopt a more neutral (i.e., a more tolerant) position toward public aid to parochial schools. The Court decided *Aguilar v. Felton* during the time when it mandated strict separation between church and state. Given the recent trend toward neutrality, the reversal of *Aguilar* in *Agostini v. Felton* was not surprising.

The Early Cases

In *Everson v. Board of Education*,[35] the Supreme Court's first case dealing with public aid to parochial school students, the Court explained its interpretation of the Establishment Clause:

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31. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I.

32. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.3 (2d ed. 1992).

33. *Id.* § 21.6.

34. James Madison, in protest to a proposed Virginia law assessing taxes for religious education, wrote:

> 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? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 65-66 (1947). Madison's *Memorial and Remonstrance*, considered to embody the rationale for the Establishment Clause, is appended to the Court's opinion.

35. *Id.*

> 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.[36]

Although this sounded like a policy of strict separation, the *Everson* Court allowed a local government to reimburse parents of parochial students for costs of transporting their children to school. The Court deferred to lawmakers, stating "[w]e must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power."[37] Since the reimbursement did nothing more than "provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," it did not breach the wall of separation between church and state.[38] Thus, a legitimate secular purpose (getting children to school) and neutral application (all parents could get the reimbursement regardless of whether their children attended public or nonprofit private schools) became the standard for permissible aid to parochial schools.

Although children were "undoubtedly helped to get to church schools" by the payments, the Court held that transportation to school fell in the same category as police protection, fire protection, sewer connections, highways, and sidewalks.[39] The Court stated that cutting off these services is "obviously not the purpose of the First Amendment. That Amendment 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."[40]

In its next case involving aid to parochial schools, *Board of Education v. Allen*,[41] the Supreme Court held it permissible for the government to loan textbooks for secular subjects to religious school students. The Court considered the secular and religious components of education to be identifiable and separable. Thus, the religious aspects of the schools attended by the students were not aided by the textbook loans.[42] The loan program met the *Everson* requirements because it had the secular purpose of enhancing edu-

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36. *Id.* at 15-16.
37. *Id.* at 16.
38. *Id.* at 18.
39. *Id.*
40. *Id.*
41. 392 U.S. 236 (1968).
42. The textbooks had to be those in use in the public schools. *Id.* at 239.

cation and was neutrally applied to all students regardless of religion. Additionally, as in *Everson*, the aid went directly to the students (or their parents), not to the parochial schools.

The Separationist Cases

After *Everson* and *Allen*, the Court further developed its test for a secular purpose and neutral application. In a landmark Establishment Clause case, *Lemon v. Kurtzman*,[43] the Court explained that the Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[44]

To ensure this end the Court delineated a three-pronged test, gleaned from previous cases: "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."[45]

The Court applied this three-part *Lemon* test to invalidate two statutes. Both involved salary supplements to parochial school teachers for teaching secular subjects. The Court held that because the parochial schools involved substantial religious activity and purpose, too much supervision of the parochial teachers would be needed to ensure they were not inculcating religion during the secular classes at the public's expense. This pervasive supervision would result in excessive entanglement between church and state.[46] The Court distinguished teachers from the textbooks allowed in *Allen*, stating that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs."[47] A further difference was that the aid in *Lemon* flowed directly to the parochial schools rather than to the parents or students.[48]

The Court applied the *Lemon* test to invalidate a Pennsylvania statute in *Meek v. Pittenger*.[49] The Court held that instructional materials and equipment could not be loaned to parochial schools because the primary

43. 403 U.S. 602 (1971).
44. *Id.* at 612.
45. *Id.* at 612-13 (citations omitted).
46. The Court also expressed concern for the rights of the religious organizations whose records would need to be examined to determine the percentage of expenditures on secular subjects. "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Id.* at 620.
47. *Id.* at 619.
48. Additionally, both statutes had the potential to cause political divisiveness. The Court found the statutes excessively entangling on that ground. *Id.* at 622.
49. 421 U.S. 349 (1975).

effect would be to impermissibly advance religion.[50] The Court stated that "[i]t would simply ignore reality" to attempt to separate the religious from the secular when the aid flows to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[51] Where equipment such as film projectors could be used just as easily for religious purposes as secular, the aid violated the Establishment Clause.[52]

The *Meek* Court also invalidated an act which authorized the state of Pennsylvania to supply staff to nonpublic schools for various purposes.[53] Where the *Lemon* Court had guarded against the danger that teachers affiliated with the religious schools might inculcate religion at the public's expense, the *Meek* Court took that caution a step further. The Court held that "[t]he fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance."[54] Thus, the statute at issue in *Meek* also resulted in excessive entanglement of church and state because the teachers and counselors would require continual supervision.

The *Meek* decision was significant in *Aguilar v. Felton*,[55] the precursor to *Agostini*. The Court applied the *Lemon* test to decide whether New York City's program, which sent Title I teachers into the parochial schools, violated the Establishment Clause.[56] The program easily passed the first prong of the test because it had the secular purpose of helping disadvantaged children, regardless of religion, improve their academic performance.[57]

The Court did not examine at length in *Aguilar* the second "effect" prong of the *Lemon* test.[58] However, in a companion case decided the same day, *School District of the City of Grand Rapids v. Ball*,[59] the Court found

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50. *Id.* at 363.

51. *Id.* at 365-66. *Meek*, although contrary to *Allen*, did not overrule the earlier decision because the textbooks in *Allen* were loaned to the students, not to the schools.

52. *Id.* at 366.

53. The teachers and guidance counselors funded by the act were to provide remedial and accelerated instruction, counseling, testing, and speech and hearing services to students with special needs. *Id.* at 367.

54. *Id.* at 371.

55. 473 U.S. 402 (1985).

56. *Id.* at 412-13.

57. *Id.* at 409-10.

58. *Id.* at 409.

59. 473 U.S. 373 (1985). *Ball* involved two programs. In the first, Shared Time, public school employees taught supplemental classes in the parochial schools during the school day. *Id.* at 375. In the second program, Community Education, the parochial school teachers taught classes after the regular school day and were paid, during that time, by the public. *Id.* at 376-77. The *Ball* Court found both programs impermissible. *Id.* at 397. *Agostini* reversed *Ball* only as to the Shared Time program. Agostini

that public programs operating in religious schools might advance religion in three ways: by teachers inadvertently or intentionally inculcating particular religious tenets or beliefs, by providing a symbolic link between church and state, and by providing a subsidy to the school, inseparable from its primary religious mission.[60]

The Court's opinion in *Aguilar* focused on the third prong of the *Lemon* test, excessive entanglement. The New York Title I teachers received detailed instructions designed to emphasize the secular nature of the program.[61] A field supervisor attempted to pay at least one unannounced visit every month to each Title I teacher working at a parochial school to make sure the guidelines were being followed.[62] The Court held that "[t]he critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case."[63] The aid was provided in a "pervasively sectarian environment" and "ongoing inspection [was] required to ensure the absence of a religious message."[64] Entanglement was additionally held to exist because the religious school had to endure inspections by state agents, and frequent administrative contacts were necessary to implement the program.[65] The potential for political divisiveness among citizens vying for scarce funds could also cause excessive entanglement.[66] After *Aguilar*, Title I services had to be provided off the parochial school premises. In *Aguilar* and *Ball* the Court affirmed its reliance on the *Lemon* test.

The Recent Cases

The next three cases indicated that the Court had shifted from its position requiring separation to one of neutrality. The first of these cases was *Mueller v. Allen*.[67] The Court, in a five to four decision, upheld a Minnesota

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v. Felton, 521 U.S. 203, 235 (1997).

60. *Ball*, 473 U.S. at 385.

61. The teachers were told orally, and in writing, that they were accountable only to their public employer, that they were exclusively responsible for selecting the students they worked with, that the materials and equipment provided by the Title I program could not be used in regular parochial school classes, that they could not team-teach with the parochial school teachers, that they could not introduce any religious material into their classes or become involved in religious activities at the school, and that all religious symbols must be removed from the classrooms in which they worked. *Aguilar*, 473 U.S. at 407.

62. *Id.*

63. *Id.* at 412.

64. *Id.*

65. *Id.* at 413. The administrative contacts included scheduling, classroom assignments, discussion of problems that might arise, requests for additional services, and the dissemination of information about the program. The public and parochial teachers needed to meet to confer about individual student needs, problems, and results. *Id.*

66. *Id.* at 414.

67. 463 U.S. 388 (1983). Although this case preceded *Aguilar* and *Ball*, it heralded the pending change in doctrine. *Mueller* was distinguishable from *Aguilar* and *Ball* because it involved no excessive entanglement and did not directly aid the school.

statute permitting a state tax deduction for school expenses.[68] The Court found that the statute did not have the primary effect of advancing the sectarian aims of the nonpublic schools, although parochial school parents would, in fact, enjoy the bulk of the tax benefits.[69] The Court approved the statute because it was one of several deductions designed to equally distribute the tax burden,[70] because it was applied neutrally to both public and private school parents,[71] and because the benefit was channeled through the parents and did not reach the schools directly.[72] The *Mueller* decision did not overrule past decisions, but it showed a tendency to overlook substance where form was unobjectionable.[73]

In its next neutrality case, *Witters v. Washington Department of Services for the Blind*,[74] the Court unanimously permitted a Washington resident to receive a vocational rehabilitation grant even though the recipient planned to use the money to attend a private Christian college to prepare for a career as a pastor, missionary, or youth director.[75] The Court stated that "the establishment clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."[76] As in *Everson*, *Allen*, and *Mueller*, the Court distinguished this grant to a student from aid that flows directly to a school because "the decision to support religious education is made by the individual, not by the State."[77] Thus, the link between the state and the school was a "highly attenuated one" and did not "confer any message of state endorsement of religion."[78]

The third neutrality case was more controversial. In *Zobrest v. Catlina Foothills School District*,[79] the Court decided that a publicly paid sign-language interpreter could accompany a deaf student to a parochial high

68. The deduction was available to parents of public and nonprofit private school students. Expenses for tuition, textbooks, and transportation, up to a specified amount, could be deducted from the taxpayer's gross income. *Id.* at 391.

69. "The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses." *Id.* at 408-09 (Marshall, J., dissenting).

70. "Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference." *Id.* at 396.

71. *Id.* at 397.

72. *Id.* at 399.

73. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down public assistance that amounted to tuition grants because the statute applied only to parents of children in nonpublic schools. Although the *Mueller* statute primarily benefitted parents of children in parochial schools, as in *Nyquist*, the distinction was that the *Mueller* statute was written to include a broad class of beneficiaries. *Mueller*, 463 U.S. at 398.

74. 474 U.S. 481 (1986).

75. *Id.* at 483.

76. *Id.* at 486.

77. *Id.* at 488.

78. *Id.* at 488-89.

79. 509 U.S. 1 (1993).

school.[80] This was the first time the Court held that a publicly paid employee could perform her job in a classroom on parochial school premises. The Court followed the *Witters* premise that aid flowing through a neutral program to an individual and only thence to a religious institution would not violate the Establishment Clause.[81] The Court reasoned that the aid did not relieve the school of an expense it otherwise would have borne, because the school would not have provided a sign-language interpreter.[82] The Court distinguished a sign-language interpreter from a regular teacher or guidance counselor, finding that merely interpreting a religious message differed from actually teaching it.[83] The *Zobrest* Court found no difficulty with the excessive entanglement prong of the *Lemon* test because the circumscribed duties of an interpreter made monitoring to prevent inculcation unnecessary.[84]

With these three cases—*Mueller*, *Witters*, and *Zobrest*—the Court showed deference to state lawmakers and a willingness to take parochial aid programs at face value, rather than inquiring into their actual effects. The Court also gave its approval, albeit narrowly, to allowing a public employee on parochial school premises. This led the *Agostini* petitioners to believe the injunction under which they labored—which required public employees to deliver Title I services off parochial school premises—was no longer compelled by Establishment Clause jurisprudence.

THE PRINCIPAL CASE

In *Agostini v. Felton*, a five to four majority prevailed over vigorous dissent, both as to the substantive Establishment Clause issue and the novel use of Federal Rule of Civil Procedure 60(b)(5).

The Majority Opinion

The Court had to determine whether its more recent decisions, such as *Witters* and *Zobrest*, had so undermined the rationale of *Aguilar* that it was no longer good law. Justice O'Connor, writing for the majority, described *Aguilar* and its companion case, *Ball*, as based on the following assumptions:

(i) any public employee who works on the premises of a religious

80. The interpreter was provided to the student at a public high school under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400 (1994).
81. *Zobrest*, 509 U.S. at 10.
82. *Id.* at 10-12.
83. *Id.* at 13.
84. *Id.*

> school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches the schools as a consequence of private decision-making. Additionally in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.[85]

The Court found that *Zobrest* had invalidated the first two presumptions. The publicly paid sign-language interpreter was allowed to accompany James Zobrest to his religious school without fear that the interpreter would inculcate religion or create a symbolic union between church and state. The Court held that "we have abandoned the presumption erected in *Meek* and *Ball* 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."[86]

As for the third assumption, that New York's Title I program impermissibly finances religious indoctrination, the Court looked to the *Witters* decision and concluded: "[W]e have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of the school is invalid."[87] The Court also analogized eligibility for Title I with eligibility for the Individuals with Disabilities Education Act: neither program depends on the student's religion or school, and both are based on neutral criteria. The Court stated that "[i]n all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA."[88]

In light of these changed assumptions, the Court considered whether New York's Title I program impermissibly promoted religion. The Court examined the criteria by which students became eligible for New York's program and concluded that the students were not selected on the basis of religion.[89] The Court then tested the program for impermissible government

85. Agostini v. Felton, 521 U.S. 203, 222 (1997).
86. *Id.* at 223.
87. *Id.* at 225.
88. *Id.* at 228.
89. *Id.* at 232.

promotion of religion, applying the factors listed in *Ball*.[90]

The Court noted that the sign-language interpreter in *Zobrest* was not presumed to depart from her duties and begin to inculcate religion.[91] There was no report of a Title I teacher, in the years before *Aguilar*, ever attempting to inculcate religion while teaching on parochial school premises.[92] Therefore, the Court concluded that state-supported indoctrination by teachers was not a problem.[93] The Court disposed of the second factor, symbolic union, by referring to *Zobrest*. If a sign-language interpreter on parochial school premises did not create a symbolic union of church and state, then neither would Title I teachers.[94] As for the third factor, subsidy, the Court pointed out that Title I services are by law supplemental, and thus do not relieve the parochial schools of an expense they would otherwise bear.[95] Furthermore, under *Aguilar*, the same services, when provided off the parochial school grounds, did not impermissibly subsidize the religious functions of the parochial school. Therefore, merely moving the same instruction from a van into the school would not change the analysis or the conclusion on the question of subsidization.[96]

Finally, the Court looked at the third prong of the *Lemon* test, excessive entanglement.[97] The Court listed the three grounds on which the finding of excessive entanglement rested in *Aguilar*: pervasive monitoring, administrative cooperation, and political divisiveness.[98] The Court held that because "we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required."[99] The Court also disposed of the other two grounds: "Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an 'excessive' entanglement. They are present no matter where Title I services are offered . . . ."[100]

The Court summarized its findings that New York's Title I program did not violate any of the three criteria used to evaluate whether government

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90. *Id.* at 226-28. The three *Ball* factors are: (1) state-supported indoctrination by teachers, (2) symbolic union between church and state, and (3) subsidy of the religious function of the school. *Id.* at 219-20.
91. *Id.* at 226.
92. *Id.* at 226-27.
93. *Id.* at 226.
94. *Id.* at 227-28.
95. *Id.* at 228.
96. *Id.* at 230.
97. *Id.* at 232.
98. *Id.* at 233.
99. *Id.* at 234.
100. *Id.* at 233-34.

aid advances religion: "[I]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[101] The Court remanded the case to the district court with instructions to vacate the 1985 permanent injunction.[102]

Justice Souter's Dissent

Justice Souter, joined by Justices Stevens and Ginsburg, and in part by Justice Breyer, dissented from the majority opinion on the Establishment Clause question. Justice Souter reiterated the fundamental reasons for the rule against governmental support of religion:

> The rule expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion.[103]

Justice Souter noted that "[g]overnmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those of less favored views."[104]

Justice Souter objected to New York's Title I program, as implemented before *Aguilar,* on several grounds. First, "the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide," even though the programs are "termed 'supplemental.'"[105] Second, unlike the interpreter in *Zobrest*, "the public employees carrying out the programs had broad responsibilities involving the exercise of considerable discretion."[106] Third, "the participation by religious school children was extensive," as opposed to *Witters*, in which only one student applied his grant to a religious school.[107] Fourth, "aid under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice."[108]

The dissenters objected most vigorously to the fact that New York's Title I program assumed a responsibility that belonged to the school:

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101. *Id.* at 234.
102. *Id.* at 240.
103. *Id.* at 243 (Souter, J., dissenting).
104. *Id.*
105. *Id.* at 244 (Souter, J., dissenting).
106. *Id.*
107. *Id.* at 245 (Souter, J., dissenting).
108. *Id.*

> The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.[109]

The majority had stated that on-premises instruction did not subsidize the religious school because the same instruction off-premises was not a subsidy. The dissent responded in two ways. First, the off-premises instruction did subsidize the basic function of the parochial school and should not have been allowed.[110] Second,

> The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cut-backs in basic teaching within the schools to offset the outside instruction.[111]

Zobrest could not be relied upon to change basic presumptions, argued the dissent, because it was a narrow holding, "hinged expressly on the nature of the employee's job."[112] The *Zobrest* Court viewed the interpreter more as a hearing aid device than a teacher, and allowed the interpreter on parochial school premises only because of these limited circumstances. As for the impermissible symbolic link between church and state, *Zobrest* did not repudiate it, but taught the lesson that "less is less."[113]

The Rule 60(b)(5) Issue

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, addressed the novel use of Rule 60(b)(5) to revisit *Aguilar*.[114] Rulings on Rule 60(b)(5) are reviewed for an abuse of discretion.[115] The only question the Supreme Court should have considered was whether "the District Court abuse[d] its discretion when it concluded that neither the facts nor the law

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109. *Id.* at 245-46 (Souter, J., dissenting).

110. *Id.* at 246 (Souter, J., dissenting). The provision of off-premise services after *Aguilar* was challenged in *Committee for Public Education and Religious Liberty v. Secretary, United States Department of Education*, 942 F. Supp. 842 (E.D.N.Y. 1996) (PEARL II). The district court held that the services, as provided off the premises of the parochial schools, did not violate the Establishment Clause.

111. *Agostini*, 521 U.S. at 247 (Souter, J., dissenting).

112. *Id.* at 248 (Souter, J., dissenting).

113. *Id.* at 250 (Souter, J., dissenting).

114. *Id.* at 255 (Souter, J., dissenting).

115. *Id.* at 256 (Ginsburg, J., dissenting).

had so changed as to warrant alteration of the injunction."[116]

The majority conceded that the district court had acted properly when it rejected the petitioners' motion:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent . . . . The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.[117]

However, it would be unfair, the majority reasoned, to subject the petitioners to a permanent injunction from which there would be no relief unless Rule 60(b)(5) was applied.[118] The majority disavowed any danger that the use of Rule 60(b)(5) in this situation would lead to a flood of cases based on a claim that the law has changed: "Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue."[119]

Justice Ginsburg disagreed, believing that a more legitimate approach would have been to wait for a new case to come before the court (at least two suitable cases were pending at the time) through which the *Aguilar* ruling could properly be reexamined.[120] The dissenters implied that the majority's distortion of Rule 60(b)(5) was an exercise in impatient, agenda-driven activism that undermined the Court's institutional integrity.[121]

ANALYSIS

The basic question posed by *Agostini* was whether recent cases, especially *Zobrest* and *Witters*, had so changed Establishment Clause law that *Aguilar* was essentially overruled. One of these cases, *Zobrest*, was stretched almost beyond recognition to cover the facts in *Agostini*, giving credence to the dissent's charge of judicial activism. By applying the *Zobrest* decision more broadly than warranted, the Court reversed a clear and

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116. *Id.* at 257 (Ginsburg, J., dissinting).
117. *Id.* at 237-38.
118. *Id.* at 240.
119. *Id.* at 239.
120. *Id.* at 259-60. (Ginsburg, J., dissenting). Although the dissent makes a powerful argument that the majority was using Rule 60(b)(5) in an unprecedented and unwarranted manner, the practical consequence of waiting for another vehicle to overrule *Aguilar* would only have been that New York City would have had to wait until that other case had been decided, at which point, the dissenters presumably would concede that Rule 60(b)(5) would then be appropriate.
121. *Id.* at 260 (Ginsburg, J., dissenting).

long-standing standard for analyzing government-sponsored indoctrination of religion. In addition, *Agostini* failed to clearly articulate the Court's position in regard to the *Lemon* test, resulting in a variety of interpretations by the lower courts.

The Misapplication of Zobrest

Before *Zobrest*, the Court had drawn a definite line between publicly paid employees and parochial schools to guard against government-sponsored indoctrination.[122] That line was the boundary of the parochial school property. *Aguilar* itself most clearly shows the strength of this line—because instruction by publicly paid teachers was provided in a "pervasively sectarian atmosphere," the danger of state indoctrination existed.[123] The City of New York was enjoined, not from providing the instruction, but from providing the instruction on the parochial school premises.[124]

The *Agostini* Court maintained its position that "government inculcation of religious beliefs has the impermissible effect of advancing religion."[125] However, the Court incorrectly relied on *Zobrest* to support the proposition that "we have abandoned the presumption erected in *Meek* and *Ball* 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."[126] Because the *Zobrest* sign-language interpreter was allowed to cross the parochial school boundary line, the *Agostini* Title I teachers and counselors were allowed to follow. This reliance on *Zobrest* was incorrect because, as Justice Souter pointed out in his dissent, *Zobrest* is "no such sanction for overruling *Aguilar* or any portion of *Ball*."[127]

The Court held in *Agostini*, "it was *Zobrest*—and not this litigation—that created 'fresh law.'"[128] However, the clear language of *Zobrest* makes this assertion inexplicable. The *Zobrest* Court expressly stated that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."[129] The Court noted that "ethical guidelines

122. The danger of government-sponsored indoctrination when public school teachers work in parochial schools was described in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 388 (1985): "Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." *Id.*

123. Aguilar v. Felton, 473 U.S. 402, 412 (1997).

124. *Id.*

125. *Agostini*, 521 U.S. at 223.

126. *Id.*

127. *Id.* at 248 (Souter, J., dissenting).

128. *Id.* at 225.

129. Zobrest v. Catlina Foothills School Dist., 509 U.S. 1, 13 (1993).

require interpreters to 'transmit everything that is said in exactly the same way it was intended.'"[130] The Court believed that the signer would "neither add to nor subtract from" the parochial school instruction, and for that reason, "provision of such assistance is not barred by the Establishment Clause."[131] The presumption that the *Zobrest* sign-language interpreter would not inculcate religion was thus misapplied to the *Agostini* Title I teachers and counselors. The Court failed to recognize the restricted nature of the *Zobrest* holding.

The *Agostini* Court relied on questionable logic when it gave a second reason that public school teachers should not be presumed to inculcate religion. The Court stated that "no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students."[132] The *Ball* Court thoroughly addressed this subject:

> When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself. The students are presumably attending religious schools precisely in order to receive religious instruction. . . . Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.[133]

The *Agostini* Court thus partly based its assumption that public school teachers and counselors would not inculcate religion on the premise that they had not done so in the past (during the pre-*Aguilar* years) when it is clear that the reporting of such incidents would be unlikely. The Court compounded this error by dropping the requirement of monitoring the teachers and counselors. The Court stated that "since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive

130. *Id.*
131. *Id.*
132. *Agostini*, 521 U.S. at 226-27.
133. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 388-89 (1985).

monitoring of Title I teachers is required."[134] Thus, based on a faulty interpretation of *Zobrest* and unjustified reliance on the lack of reported incidents of inculcation, the Court made a drastic change in years of Establishment Clause jurisprudence.

The possibility of government-sponsored indoctrination is reason enough to retain the ban keeping public school teachers off parochial school premises. Judge Friendly outlined the consequences of lifting the ban:

> Any breach of the principle of *Meek* that the line is to be drawn at sending public school teachers and other professionals into religious schools could have consequences going far beyond the program at issue here. We see no principled basis for limiting the position urged by the appellees to remedial instruction or clinical and guidance services. One can readily think of other subjects—ranging from chemistry, physics, and mathematics to physical education and arts and crafts—where it would be easy to devise courses free of any obvious religious features as the types of instruction here involved, and whose delegation to public school teachers would not significantly affect the religious mission of the schools in the areas which they reserved for their own teachers.[135]

Agostini is a perfect example of Judge Friendly's prediction that once the line was breached, principled distinctions would be difficult to draw.[136] *Zobrest*, a limited breach, led to the total breach in *Agostini*. A better approach would have been to retain the presumption that the danger of government-sponsored indoctrination exists whenever public teachers and counselors perform their duties on the premises of parochial schools, no matter the degree of supervision.[137]

Many pragmatic concerns may have influenced the outcome of *Agostini*. First was the Court's desire to comply with Congress' effort to alleviate the cycle of poverty by helping disadvantaged children academically. Con-

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134. *Agostini*, 521 U.S. at 234.

135. Felton v. Secretary, United States Dept. of Educ., 739 F.2d 48, 66-67 (2d Cir. 1984).

136. *Id.*

137. *Zobrest*, if the standard was strictly applied, should have been decided differently. In fact, in 1997 Congress amended the Indviduals with Disabilities Education Act to address situations such as that in *Zobrest*. The Act now

> does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C.A § 1412(a)(10)(C)(i)(West Supp. 1998).

gress specifically provided that parochial school students should share in the federal aid.[138] Second, the cost of providing services to the parochial school students off the premises of their schools was high. Approximately $15 million annually was spent on providing the computer-aided instruction, the leased sites, and the mobile instructional units that were required after *Aguilar*.[139] This money came "off the top" of the City's grant, reducing the amount of services that could be provided to all the students in the program, at all participating schools.[140] Third, the practical experience of nineteen years showed no incidents of religious indoctrination by "dedicated public school teachers."[141] Although not discussed in the context of *Agostini*, a fourth pragmatic reason for providing aid to parochial schools is that the parochial schools remove a burden from the public schools. In *Lemon*, the Court noted that "[t]axpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents."[142] A final reason that aid to the parochial schools is a popular choice is the current perception that public schools, especially in inner cities, are not doing an adequate job. One theory is that support of the parochial schools may spur competition and lead to improvement of the public schools.[143]

These concerns are all valid. Additionally, the image of a student trudging across the street to receive remedial instruction in a van parked a few feet from the parochial school premises offends common sense.[144] However, the pragmatic concerns do not outweigh the constitutional imperative that "Congress shall make no law respecting an establishment of religion."[145] As one scholar noted, "[t]he major church-state issue today is the desirability and constitutionality of governmental aid to private, and particularly parochial, schools. On this issue it is normally helpful if the two questions—desirability and constitutionality—are kept separate."[146] In *Agostini*, it seems that the desirability of efficiently delivering worthwhile services outweighed concerns about the constitutionality of the delivery.

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138. Aguilar v. Felton, 473 U.S. 402, 422 (1997) (O'Connor, J., dissenting).
139. *Agostini*, 521 U.S. at 213.
140. *Id.*
141. *Aguilar*, 473 U.S. at 427-28 (O'Connor, J. dissenting).
142. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).
143. The Wisconsin Supreme Court, for instance, has permitted the Wisconsin legislature's plan to issue vouchers. The voucher amount will equal the per pupil expenditure of Milwaukee's public schools. Parents may use the vouchers to pay tuition at private schools, including parochial schools. *See* Jackson v. Benson, 578 N.W. 2d 602, 610-11 (1998), *cert. denied*, 119 S. Ct. 466 (1998).
144. Perhaps Congress could devise a constitutional alternative to its present method for funneling aid to parochial school students. For example, parents could receive vouchers to be redeemed at privately owned, commercial tutoring services.
145. U.S. CONST. amend. I.
146. DALLIN H. OAKS, THE WALL BETWEEN CHURCH AND STATE 5 (1963).

Lemon's *Excessive Entanglement Prong*

Not only did the Court make unwarranted changes in its criteria for assessing what constitutes government-sponsored indoctrination, it left its current position in regard to the *Lemon* test in a state of confusion. The Court stated that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided."[147] This seemed to imply that the *Lemon* test was alive and well, since it had been applied in *Aguilar*. The Court then explained "[w]hat has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."[148]

Although government indoctrination of religious beliefs is still impermissible, two changes have taken place in what is considered to constitute indoctrination. First, as discussed in the previous section, placement of public employees on parochial school premises no longer inevitably results in state-sponsored indoctrination or symbolic union.[149] Second, not all government assistance that directly aids the educational function of religious schools is necessarily invalid.[150] These two changes, results of the Court's interpretation of *Zobrest* and *Witters*, modify the analysis of the second "effects" prong of the *Lemon* test.

The Court hinted that the third prong of *Lemon*, "excessive entanglement," should be combined with the "effects" prong when it stated "[i]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."[151] The Court gave other clues about the status of the entanglement prong, stating that "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion . . . . The pre-*Aguilar* Title I program does not result in an 'excessive' entanglement that advances or inhibits religion."[152] These clues implied that the Court had adopted a new excessive entanglement test. The new test does not ask whether excessive entanglement exists, but asks whether excessive entanglement that advances or inhibits religion exists. This inquiry is made under the second "effects" prong of the *Lemon* test, not a separate third prong.

The Court's statements in *Agostini* regarding the *Lemon* test have re-

147. Agostini v. Felton, 521 U.S. 203, 222 (1997).
148. *Id.* at 223.
149. *Id.*
150. *Id.* at 225.
151. *Id.* at 233.
152. *Id.*

sulted in a flurry of contradictory interpretations by the lower courts. Some maintain that *Lemon* lives on in its original tripartite condition.[153] Others admit that *Agostini's* meaning is elusive.[154] Still others now consider *Lemon* to be a two-part test.[155] Without a clear statement from the Court, "excessive entanglement" as a separate prong cannot be considered dropped from Establishment Clause analysis.

CONCLUSION

Although not clear about the future of entanglement as a separate prong, *Agostini* may still be applied when courts are faced with determining the constitutionality of legislation that sends public school teachers into parochial schools. The assertion that the presence of public employees on parochial school grounds does not necessarily result in government indoctrination is not based on the precedent established in *Zobrest* and is not supported merely by the fact that no incidents of indoctrination have been reported. Thus, *Agostini*, although a pragmatic decision that streamlined the delivery of Title I services, is not constitutionally sound. The Court did not clearly state its position regarding the excessive entanglement prong of the *Lemon* test, resulting in differing interpretations by the lower courts. Establishment Clause jurisprudence, therefore, has lost much and gained little from *Agostini*.

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153. *See* Freiler v. Tangipahoa Parish Bd. of Educ., 975 F. Supp. 819, 826 (E.D. La. 1997) (stating that *Agostini* clearly retained the three prongs of *Lemon)*; Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (applying the three-part test).

154. *See* Foley v. Special Sch. Dist. of St. Louis County, 153 F.3d 863, 838 n.9 (8th Cir. 1998) (recognizing that the Court had merged the effects and entanglement prongs, but noting "[i]t is unclear, however, whether the Court would engage in the same consolidated analysis outside of the context of government aid to students attending parochial schools."); Matthew J. v. Massachusetts Dept. of Educ., 989 F. Supp. 380, 392 (D. Mass. 1998) (agreeing with the Supreme Court that Establishment Clause jurisprudence is in "somewhat of a flux").

155. *See* Peck v. Lansing Sch. Dist., 148 F.3d 619, 638 (6th Cir. 1998) (the third prong of *Lemon* has been incorporated into the second prong, but all the *Lemon* criteria remain viable considerations); Helms v. Picard, 151 F.3d 347, 358-59 (5th Cir. 1998) (recognizing that *Agostini* treated the entanglement prong as an aspect of the effects prong).