AGOSTINI V. FELTON: SANCTIONING A TREND IN THE ACCOMMODATION OF EDUCATIONAL SERVICES FOR UNDERPRIVILEGED AND DISABLED CHILDREN

The Religion Clauses of the First Amendment embody one of the most fundamental, yet paradoxical, American principles.[1] The Free Exercise Clause mandates that each citizen enjoy the right to exercise his religion freely.[2] In furthering that right, the Establishment Clause prohibits any state from creating an establishment of religion or endorsing a particular religion.[3] Thus, the Religion Clauses have managed to maintain some harmony between church and state in guaranteeing the freedom to exercise religion and prohibiting governmental establishment of religion.[4] The multiple meanings assigned to the clauses, however, have not worked to sustain that harmony.[5]

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[1] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 1155 (2d ed. 1988). Tribe explains that, with respect to religion, the Constitution's most important guarantees can be found in the opening phrase of the First Amendment, which states, "'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'" *Id.* (quoting U.S. CONST. amend. I). Tribe further notes that the purpose of the Religion Clauses "'was to state an objective, not to write a statute.'" *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (holding that tax exemptions for religious groups do not create an establishment of religion, rather, they guarantee the free exercise of religion)).

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

[3] *See id.*

[4] *See* TRIBE, *supra* note 1, at 1156-57. Tribe explains that, to the framers, the Religion Clauses were meant to work together for two goals. *See id.* First, the Free Exercise Clause was to maintain a separation between church and state, thereby ensuring that the government did not intrude upon individual religious liberty. *See id.* at 1157. Second, the Establishment Clause was to ensure that church and state never united because the result would be a degradation of religion and a destruction of government. *See id.* Tribe further notes that doctrines developing under one of the clauses could often be ascribed to the other clause. *See id.* Although the framers maintained harmonious goals for the clauses, Tribe explains that tension does exist. *See id.* However, despite the tension, Tribe notes that the Supreme Court has consistently refused to maintain a strictly neutral position, recognizing that such pure neutrality would clash with the idea of the Free Exercise Clause. *See id.* at 1189. Thus, the Supreme Court will not refuse to grant all religious accommodations. *See id.* at 1276.

[5] *See* Andrew A. Adams, Note, *Cleveland, School Choice, and "Laws Respecting an Establishment of Religion,"* 2 TEX. REV. L. & POL. 165, 172-73 (1997). Adams analyzes the multiplicity of meanings ascribed to the Religion Clauses of the First Amend-

Supporters of religious accommodations adopt a "non-preferentialist" view of the Religion Clauses.[6] "Non-preferentialists" maintain that, although the framers of the Religion Clauses prohibited the government from favoring one religion, they did not intend to prohibit the government from aiding all religions equally.[7] Others adopt a separationist view that the Religion Clauses require distinct separation of church and state, thereby censoring all government aid to religion.[8] Those who are neither "separationists" nor "non-preferentialists" adopt a neutral position that urges the government to reject laws that both inhibit and prohibit religion.[9] The neutrality position, however, is subject to varying interpretations.[10]

The vague language of the Religion Clauses[11] has led to much ambiguity in the Supreme Court's interpretation and application of

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ment and focuses on three particular meanings. *See id.* First, many scholars take the "non-preferentialist" view that the Religion Clauses were not meant to proscribe aid to all religions in an absolute fashion. *See id.* at 172. Rather, the framers meant for the Clauses to prohibit aid to any one particular religion. *See id.* at 172-73. This "non-preferentialist" view would enable the state to aid religion generally but not make accommodations for particular groups. *See id.* at 173. Second, other scholars take the "separationist" view, which mandates a strict separation between church and state and vehemently proscribes any state aid to religious groups. *See id.* Third, there is the neutrality approach, which has been adopted by the Supreme Court and is prevalent in Establishment Clause jurisprudence. *See id.* The neutrality position prohibits laws that both aid and inhibit religion. *See id.* However, this neutrality position leaves the Court with the opportunity to declare that a law has a neutral goal and thereby allow it to accommodate religion. *See id.*

[6] *See* Douglas Laycock, *"Non-Preferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 875-78 (1985/1986) (discussing and refuting the theory that the intent of the framers of the Religion Clauses was to permit government aid to religion so long as it was distributed evenhandedly).

[7] *See id.* at 878. Laycock refutes the "non-preferentialist" theory and explains that the First Congress rejected drafts of the Religion Clauses that allowed non-preferential aid. *See id.*

[8] *See* John W. Huleatt, Comment, *Accommodation or Endorsement?* Stark v. Independent Sch. Dist.: *Caught in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN'S L. REV. 657, 659 (1998) (explaining that most historians adopt either a separationist or a nonpreferentialist view in deciphering the Religion Clauses).

[9] *See* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 313-14 (1987)) (explaining the "allure of neutrality"); *see also* Adams, *supra* note 5, at 173.

[10] *See* Smith, *supra* note 9, at 314 (explaining that, although the Court has been committed to neutrality, it is not clear what the neutrality position entails).

[11] *See* U.S. CONST. amend. I. The Establishment and the Free Exercise Clauses have been summarized as requiring "that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." School Dist. of Abington v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). The First Amendment has been made applicable to the states through the Fourteenth Amendment's due process guarantee. *See* Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (stating that the Establishment Clause is applied to the states to prohibit any

the Establishment Clause.[12] In particular, the Court recently abandoned a long-standing Establishment Clause presumption — that the mere presence of state-paid employees in parochial schools amounts to an impermissible entanglement of church and state.[13] Although

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state from establishing a religion or prohibiting the free exercise of religion). The Court has been criticized for failing "to read the establishment clause as embodying a principle of religious liberty." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314 (1986). Paulsen explains that this failure resulted in tension that mandated the strict separation of church and state in order to prevent the establishment of religion, yet also mandated a certain allowance for religious accommodations to ensure individual religious liberty. *See id.*

[12] *See* Rosanne R. Pisem, *The Second Circuit and the Establishment Clause: Shoring Up a Crumbling Wall*, 51 BROOK. L. REV. 642, 645-46 (1985); *see also Public Funding of Special Education in Parochial Schools*, 111 HARV. L. REV. 279, 279 (1997) [hereinafter *Public Funding*] (noting that the Court's failure to manage the standards of the Establishment Clause has led to the Court's notoriously inconsistent holdings). Pisem observes that it was this very ambiguity that resulted in the Court's focus on neutrality as a determinative factor of entanglement between church and state. *See* Pisem, *supra*, at 646. Pisem explains that the Court has encountered inherent difficulties in interpreting the Establishment Clause because the First Amendment also protects individuals' free exercise of religion. *See id.* at 645. Thus, while the state shall not endorse religion, the state further may not infringe on an individual's right to exercise his or her own religion. *See id.* at 645; *see also* Paulsen, *supra* note 11, at 314 ("[T]he Court's failure to read the establishment clause as embodying a principle of religious liberty has led to a doctrinal collision with contemporary understanding of the free exercise clause."). Paulsen comments that, as a result, the Establishment and Free Exercise Clauses have become two competing principles rather than a manifestation of one underlying principle. *See id.*

Further, Pisem particularly notes that the issue of state aid to parochial schools has been "a frequent source of litigation in the federal courts over the past few decades." Pisem, *supra*, at 645. However, rather than completely denying any religious accommodations, the Court has compiled various tests to determine the constitutionality of state aid to parochial institutions. *See id.* at 647-48. Thus, the struggle continues as to whether or not state aid to religious institutions constitutes an impermissible establishment of religion.

[13] *See Supreme Court Update*, FED. LAW., Aug. 1997, at 31 (noting that the Court no longer presumes that the mere presence of public employees in parochial schools would inculcate religion). Further, post-*Aguilar* decisions reflect the Court's abandonment of the presumption that the placement of public employees on parochial school grounds results in the appearance of an impermissible union of church and state, thereby unconstitutionally establishing religion. *See id.*; *see also* Lisa H. Thurau, *Apparent Changes in Justices, Not Law*, N.Y. L.J., July 25, 1997, at 2. According to Thurau, it was the change in the Court's composition that resulted in the inconsistent Establishment Clause rulings, rather than the actual inconsistent decisions of *Witters*, *Zobrest*, and *Aguilar*. *See id.* Thurau further explains that the same Justices who decided *Aguilar* and *Grand Rapids* decided *Witters*. *See id.* Thus, she comments that the Justices did not intend to change the law in *Witters* and *Zobrest*, which they had just established the year before in *Aguilar* and *Grand Rapids*. *See id.* Thurau implies that if Justice O'Connor had joined the majority opinion in *Zobrest*, rather than Justice White, her theory that the law had been changed may hold water. *See id.* Instead, Justice White joined the majority in *Zobrest* and Justice O'Connor wrote for the majority in *Agostini*. *See id.* Thurau concludes that the Court's overturning of *Agui-*

the Court has continually emphasized that the goal of the Establishment Clause remains the pursuit of government neutrality, the criteria the Court uses to assess possible entanglement of church and state have changed.[14]

The United States Supreme Court recently pronounced the new analysis in *Agostini v. Felton*.[15] In that case, the Court held that New

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lar is neither warranted by precedent nor the Constitution's effort to prohibit state funding for religious organizations. *See id.*

[14] *See* Adams, *supra* note 5, at 187. Adams offers a summary of the neutrality principle to which the Court and the Legislature strive to adhere. *See id.* at 187-88. Adams begins by noting that the ever-present factor in determining the neutrality of a state benefit is whether or not the religious institution received the benefit directly. *See id.* at 188. Adams notes that, over time, private choice became crucial to the determination of neutrality. *See id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) (indicating that, although private choice had always been a concern of the Court, it first became a key factor in the present case)). Adams explains that the *Nyquist* Court dismissed the rationale of private choice as a justification for state aid that ended up in religious institutions and held that it was more than a conduit for the state to accommodate religious institutions. *See id.* at 188-89.

Adams continues by explaining that the Court exhibited a strong concern for private choice in *Witters* by holding that state aid that landed in the hands of the religious institution by the independent choice of the aid recipient was constitutional. *See id.* at 189 (citing Witters v. Washington Dep't. of Servs. for the Blind, 474 U.S. 481, 487 (1986)). In *Witters*, Justice Marshall noted that aid that goes to the individual signifies that any of that aid subsequently given to a religious institution is the choice of the individual, not the state. *See Witters*, 474 U.S. at 486-87. Also, Justice Marshall clarified the legitimacy of private choice by explaining that it is a justification for state aid that eventually goes to religious institutions so long as the recipient has secular options to which he or she can apply the aid. *See id.* at 488.

Adams proceeds to analyze two other factors that compose the neutrality inquiry. *See* Adams, *supra* note 5, at 191-93. First, if the aid assists the institution in relieving it of a cost or duty that it would otherwise have to incur, then the aid is an unconstitutional, direct subsidy. *See id.* at 192. Second, although it does not appear that the Court will strike down an assistance program based solely upon the amount of the aid, the amount of the aid is apparently another factor considered by the Court. *See id.* at 193 (citing Meek v. Pittenger, 421 U.S. 349, 364-65 (1975) (invalidating a program that directly benefited a religious institution because of the "massive aid")).

Adams notes that, with *Agostini*, the Court's analysis has changed. *See id.* at 186-87. Adams explains that, in *Agostini*, Justice O'Connor stated that the financial assistance offered by the state did not create an incentive to endorse religion when the allocation of the aid was premised upon neutral criteria, neither favoring nor disfavoring indoctrination of religion. *See id.* at 187. Adams further notes that, rather than focus on the public versus non-public status of the institution, Justice O'Connor focused on the neutrality of the law and whether the law itself made such a distinction. *See id.* at 187. Adams thoughtfully concludes by noting that the Court has begun to move toward a neutrality approach primarily concerned with "whether the benefits are distributed on a religiously neutral basis." *Id.*

[15] 117 S. Ct. 1997 (1997). The *Agostini* Court revisited *Aguilar v. Felton*, which determined that public school teachers inevitably cause an entanglement of church and state whenever they are present on parochial school grounds. *See id.* at 2003

York's tutoring of special needs children within the walls of a religious school does not necessarily establish religion within the meaning of the Establishment Clause.[16] In a five-to-four opinion, Justice O'Connor reinstated New York's tutoring program,[17] which had been invalidated by the Court in *Aguilar v. Felton.*[18]

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 (Title I) in order to supplement the educational needs of low-income families by distributing financial assistance to certain statutorily defined categories of children.[19] New York City's implementation of this regime involved sending public tutors into private schools, the majority of which were religious institutions.[20] In 1978, six taxpayers sued the Board of Education of the City of New York (Board) in federal court, seeking to enjoin the in-school tutorial program as violative of the Establishment Clause.[21]

The United States District Court for the Eastern District of New York granted the Board's motion for summary judgment, concluding that Title I's provision of funds to disadvantaged children was a reasonable accommodation under the Establishment Clause.[22] The

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(citing Aguilar v. Felton, 473 U.S. 402 (1985)). In the majority opinion, Justice O'Connor explained that it was necessary to evaluate whether the Court's post-*Aguilar* decisions had eroded the *Aguilar* Court's holding. *See id.*

[16] *See id.*

[17] *See id.* at 2019 (instructing the District Court to vacate its order of September 26, 1985).

[18] 473 U.S. 402, 414 (1985).

[19] *See* Title I of the Elementary and Secondary Education Act of 1965 (Title I), Pub. L. No. 89-10, §§ 1001-14802, 79 Stat. 27 (1965) (codified at 20 U.S.C.A. §§ 6301-8962 (1994)). The Court explained that "Title I channels federal funds through the States to 'local educational agencies' (LEAs)." *Agostini,* 117 S. Ct. at 2003 (quoting 20 U.S.C. §§ 6311, 6312). The funds are then directed toward remedial education and counseling services for qualified students. *See id.* (citing 20 U.S.C. §§ 6315 (c)(1)(A), (E), 6314 (b)(1)(B)(i), (ii)). Title I was enacted to supplement the educational needs of low-income families and enable local educational agencies to improve their educational programs to cater to the needs of educationally deprived children. *See id.* at 2003-04. The statutory requirements set forth in the Act include the following: (1) the children enrolled in the program must be educationally deprived, (2) the children must live in an area of predominantly low-income families, and (3) the programs must not replace those existing without the funding. *See id.*

[20] *See Agostini,* 117 S. Ct. at 2004-05. The tutorial assistance was initially intended to benefit children whose special educational needs were not being satisfied during normal school hours. *See id.* More than 90% of the schools involved were private religious schools. *See id.* at 2004.

[21] *See* Felton v. Aguilar, 739 F.2d 48, 52 (2d Cir. 1984).

[22] *See id.* (noting that the district judge relied on the reasoning of the three-judge panel in National Coalition for Pub. Educ. & Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980)).

United States Court of Appeals reversed the judgment.[23] While the court acknowledged that the program had done much good (and caused little detectable harm), the panel concluded that reversal was compelled by existing precedent.[24] Specifically, the court cited *Meek v. Pittenger*,[25] which invalidated a similar educational assistance program.[26]

In *Aguilar v. Felton*,[27] the United States Supreme Court affirmed the Second Circuit's invalidation of the program.[28] The Court held that the Board's administration of Title I created an impermissible entanglement of church and state.[29] Reasoning that New York's policy of monitoring the content of classes was an ineffective safeguard against entanglement, the Court concluded that the program was unconstitutional.[30] When the case was finally remanded to the district court, the taxpayers won a permanent injunction against the program.[31]

Twelve years later the Board and a group of parochial school parents, different from those in *Aguilar* yet entitled to Title I services, filed a motion in the United States District Court for the Eastern District of New York requesting relief under Rule 60(b)(5) from the injunction issued in *Aguilar*.[32] The petitioners emphasized both the costs of compliance with *Aguilar* and the impact of the Court's intervening Establishment Clause cases.[33] The district court denied the

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[23] *See id.* at 72.

[24] *See id.* at 71-72.

[25] 421 U.S. 349 (1975).

[26] *See Aguilar*, 739 F.2d at 71-72 (citing *Meek*, 421 U.S. at 351-53 (discussing loans of instructional materials and equipment to parochial schools)).

[27] 473 U.S. 402 (1985).

[28] *See id.* at 414.

[29] *See id.* at 412-13.

[30] *See id.* at 413.

[31] *See* Agostini v. Felton, 117 S. Ct. 1997, 2003 (1997) (stating that, on remand, the district court entered a permanent injunction to reflect the Supreme Court's ruling in *Aguilar*).

[32] *See id.* The Federal Rules of Civil Procedure allow litigants to seek relief from any judgment that is no longer equitable. *See* FED. R. CIV. P. 60(b)(5).

[33] *See Agostini*, 117 S. Ct. at 2004-08. The petitioners requested relief from the permanent injunction entered by the district court in *Aguilar*. *See supra* notes 16-31 and accompanying text (detailing the procedural history from *Aguilar* to *Agostini*). Petitioners' argument implied that the Court was leaning toward reversing *Aguilar*, but needed the appropriate vehicle to do so. *See id.*

Petitioners in *Agostini* argued three changes in "factual and legal landscape" that supported their motion for relief. *See Agostini*, 117 S. Ct. at 2006. First, petitioners argued that the costs of complying with *Aguilar*'s mandates were extraordinary. *See id.* Thus, petitioners urged that this constituted a "significant factual development warranting modification of the injunction." *Id.* The Court did not

motion,[34] and the court of appeals affirmed.[35] Recognizing the erosion of *Aguilar* by subsequent cases, the United States Supreme Court granted the Board's petition for a writ of certiorari[36] and held that *Aguilar* is no longer good law.[37]

Although compelling justifications for aid to religious institutions exist, opponents to such state aid maintain that the Court's post-*Aguilar* decisions further confuse the issue.[38] The Court's confusion in determining the constitutional limits of government aid to parochial schools arises from a tension that exists at the core of the test established in *Lemon v. Kurtzman*.[39] This tension results from the

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dispute that the additional costs of complying with *Aguilar*'s mandate were exorbitant. *See id* at 2005. Instead, the Court noted that the number of private school children receiving education decreased by 35% because of the high costs of compliance. *See id* at 2005-06. The Court, however, rejected this proposed justification by explaining that the *Aguilar* Court was aware of the high costs of compliance with the rulings in *Aguilar* when it was decided. *See id.* at 2007. The Court, therefore, noted that the additional cost does not constitute a significant factual development warranting relief under the petitioners' request. *See id.*

Second, petitioners argued that five Justices in *Kiryas Joel* expressed the view that *Aguilar* should be overruled and this expression, as a legal development, warranted the relief they were seeking. *See id.* at 2006-07. The Court responded to the petitioners by noting that the expression of five Justices in *Kiryas Joel* does not justify a change in the Establishment Clause jurisprudence because *Aguilar* did not present the issue considered in *Kiryas Joel*. *See id.* at 2007. The Court, therefore, rejected this justification for relief and stated, "The views of five Justices . . . cannot be said to have effected a change in Establishment Clause law." *Id.*

Finally, in a continuous attempt to justify the change in the Establishment Clause jurisprudence, petitioners argued that *Aguilar* had been undermined by subsequent United States Supreme Court decisions. *See id.* After evaluating the rationale upon which *Aguilar* and *Ball* rested, the Court adopted this justification for the obvious changes in Establishment Clause jurisprudence. *See id.* at 2010.

The district court denied the petitioners' motion for relief and pronounced that "*Aguilar*'s demise had 'not yet occurred.'" *Id.* at 2006. On appeal, the Second Circuit affirmed the district court's denial of the petitioners' motion for relief. *See id.* The United States Supreme Court granted certiorari to clarify the effects of its post-*Aguilar* decisions on the Establishment Clause jurisprudence. *See* Agostini v. Felton, 117 S. Ct. 759 (1997).

[34] *See Agostini*, 117 S. Ct. at 2006.

[35] *See id.*

[36] *See* Agostini v. Felton, 117 S. Ct. 759 (1997).

[37] *See Agostini*, 117 S. Ct. at 2017 (explaining that continued adherence to *Aguilar* "would undoubtedly work a 'manifest injustice' . . . .").

[38] *See Public Funding, supra* note 12, at 279-82.

[39] 403 U.S. 602 (1971). In *Lemon*, the Court established the first synthesized test of constitutionality to determine when government aid violates the Establishment Clause. *See id.* at 612-13; *cf.* Pisem, *supra* note 12, at 686. Pisem observes that, if the legislature enacted a statute that aided religious institutions or denominations, it may be invalidated because it appeared to be endorsing religion or had the effect of endorsing or establishing religion. *See id.* However, if the legislature added a provision in the statute that called for the supervision of the administration of the aid to ensure that religion was not established, such supervision would create excessive en-

fact that government refusal to accommodate the needs of disadvantaged students, on Establishment Clause grounds, can be viewed as a denial of the free exercise of religion.[40]

In the 1971 case *Lemon v. Kurtzman*,[41] the United States Supreme Court considered the breadth of permissible government aid in light of the Establishment Clause.[42] *Lemon* addressed the constitutionality of Rhode Island and Pennsylvania statutes, both of which provided public funds to teachers as compensation for services rendered in parochial schools.[43] Emphasizing the importance of the government maintaining a neutral stance, the *Lemon* Court constructed a three-part test to determine when such governmental aid violates the Establishment Clause.[44] For a statute to survive the *Lemon* test, its purpose has to be secular, its effect can neither advance nor endorse religion, and its implementation cannot create entanglement between church and state.[45] Acknowledging that neither the purpose nor effect of the

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tanglement between church and state. *See id.* It is the entanglement prong of the *Lemon* test that has caused the most inconsistencies in the Court's interpretation of the Establishment Clause. *See id.* at 698. Pisem argues that the Court's abandonment of *Lemon*, over time, is obviously an attempt to provide clear guidance and more clarity in the Establishment Clause analysis. *See id.*

[40] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1207 (4th ed. 1991) (explaining that a denial of religious accommodation might violate the Free Exercise Clause — but that allowing the accommodation might violate the Establishment Clause).

[41] 403 U.S. 602 (1971).

[42] *See generally id.*

[43] *See id.* at 606. The *Lemon* Court scrutinized Rhode Island and Pennsylvania statutes that provided state aid to parochial schools. *See id.* The Rhode Island Salary Supplement Act authorized state officials directly to supplement the salaries of nonpublic school teachers by an amount not to exceed 15% of the teacher's salary. *See id.* at 607. At the date of the complaint, 250 teachers employed by Roman Catholic schools had applied for these benefits. *See id.* at 608. The Court affirmed the district court's holding that the Act had the impermissible effect of "giving 'significant aid to a religious enterprise.'" *Id.* at 609 (quoting DiCenso v. Robinson, 316 F. Supp. 112, 118 (D.R.I. 1970)). The Pennsylvania Nonpublic Elementary and Secondary Education Act authorized the Superintendent of Public Instruction directly to reimburse parochial schools for teachers' salaries, textbooks, and instructional materials. *See id.* at 609. The Act was originally financed by a tax on horse racing, but it later became funded through cigarette taxation. *See id.* at 610. The Court reversed the district court's holding that the Act did not violate the Establishment Clause. *See id.* at 611.

[44] *See id.* at 612-13.

[45] *See id.* Combining the criteria the Court used in prior holdings, the Court formulated the paramount analysis to be used in determining when government aid to parochial schools violates the Establishment Clause. *See id.* The Court stated, "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.'" *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The Court utilized this test to evaluate whether the programs at issue in *Lemon* offended "the three main

state statutes were to advance religion, the *Lemon* Court nevertheless declared that both the Rhode Island and the Pennsylvania acts created an unconstitutional entanglement of church and state because they inevitably warranted continued surveillance and control measures.[46]

Shortly thereafter, in *Meek v. Pittenger*,[47] the Supreme Court applied the *Lemon* test to a similar statute.[48] *Meek* addressed the constitutionality of Pennsylvania's statutorily mandated assistance to private schools, which included both in-school public auxiliary teachers and loans of educational materials.[49] The Supreme Court held that on-

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evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

Lemon obviously left unanswered the question of how states could provide aid to parochial schools without becoming totally entangled. *See* Raymond L. Robin, Note, Aguilar v. Felton: Lemon *Revisited — The Supreme Court's Tug-of-War with the Entanglement Doctrine*, 39 U. MIAMI L. REV. 957, 962 (1985) (explaining that a program requiring little or no state involvement would be constitutional). Critics have argued that the *Lemon* test is dead and that the Court will never again utilize it in analyzing Establishment Clause cases. *See* Joanne Kuhns, Comment, Board of Education of Kiryas Joel Village School District v. Grumet: *The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599, 1658 (1995). As Kuhns explains, courts will continue to use the components of the *Lemon* test to evaluate Establishment Clause issues, but the test, as a conglomerate, was given its final blow in *Kiryas Joel*. *See id.*

[46] *See Lemon*, 403 U.S. at 615. In invalidating the Rhode Island statute, the Court noted that the religious characteristics of the schools benefiting from this Act were of a substantial religious character, which inevitably resulted in an entanglement of church and state. *See id.* at 616. Further, although the teachers would undoubtedly use their best efforts to maintain a secular method of teaching, the Court observed a strong risk that the teachers would face great difficulties in trying to remain neutral. *See id.* at 618. Because teaching methods are unascertainable, the Court stated that "the potential for impermissible fostering of religion is present." *Id.* at 619. Thus, the state would require continuous surveillance of the teachers, thereby creating an impermissibly entangled relationship between church and state. *See id.*

Similarly, in invalidating the Pennsylvania statute, the Court emphasized that this statute allowed state aid directly to benefit nonpublic schools, thereby inevitably requiring surveillance and control measures. *See id.* at 621. Because the government had the power to audit the schools' financial records to assure that the aid was used for secular materials only, the Court held that this power created "an intimate and continuing relationship between church and state." *Id.* at 621-22.

[47] 421 U.S. 349 (1975).

[48] *See id.* at 363-73.

[49] *See id.* at 351-56. The issue before the *Meek* Court was "whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools [was] constitutional under the Establishment Clause of the First Amendment . . . ." *Id.* at 351. Two statutes were reviewed in *Meek*. *See id.* at 352-56. Act 194 authorized Pennsylvania to provide all parochial school children with auxiliary services, provided those services were secular and neutral, currently available to all public school children, and offered inside the parochial schools. *See id.* at 352-53. Services offered included counseling, testing, speech and hearing therapy, and teaching for excep-

site public teachers create a presumption of church-state entanglement and that loans of educational materials directly and substantially advance religion.[50] In an important opinion, Chief Justice Bur-

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tional, remedial, and disadvantaged children. *See id.* Act 195 authorized the State Secretary of Education to loan textbooks, instructional materials, and equipment to all parochial school children. *See id.* at 353-54. The instructional materials and equipment offered included maps, charts, films, projectors, and recorders. *See id.* at 354-55.

Justice Stewart announced that Pennsylvania's common purpose for Acts 194 and 195 was to "assur[e] that every schoolchild in the Commonwealth [would] equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools . . . ." *Id.* at 351-52. Despite this equitable intent, the plaintiffs requested an injunction prohibiting the state from disbursing any funds pursuant to Acts 194 and 195. *See id.* at 355-56.

[50] *See id.* at 366-68. In support of Act 194, the district court stated that the auxiliary services were offered directly to the children, rather than to the nonpublic schools. *See id.* at 368. Thus, the district court reasoned that no continuing supervision was required to assure that any member of the auxiliary services staff would not inculcate religion in his or her work. *See id.* In overruling the district court's approval of Act 194, the Court adhered to the appellants' argument that the Act created "an impermissible establishment of religion because the auxiliary services [were] provided on the premises of predominantly church-related schools." *Id.* Justice Stewart stated that the district court clearly erred in relying on the "good faith" of the auxiliary teachers. *See id.* at 369. The Court reasoned that the very presence of the teachers in nonpublic schools created a presumption of entanglement because the Act required the state to implement limitations and continuous surveillance measures on the teachers to assure they did not foster religion in their work. *See id.* at 370. The Court's analysis indicated that the presence of the state-employed auxiliary teachers was sufficient to create impermissible fostering of religion and, thus, Act 194 failed the *Lemon* test. *See id.* at 371-72. The Court stated that, regardless of the nature of the subject, "a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Id.* at 370.

In partially upholding Act 195, the Court agreed with the district court's comparison of the Act with the textbook loan program upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968). *See Meek*, 421 U.S. at 359. The *Allen* Court held that, upon request, New York loaned textbooks to the parents and children, not the nonpublic schools directly, and, therefore, the state was not fostering religious belief. *See id.* at 360 (citing *Allen*, 392 U.S. at 243-44 (1968)). Similarly, the *Meek* Court pronounced that, under Act 195, the state was required to loan the textbooks directly to parents and children, not to the school itself. *See id.* at 361. Further, the Court noted there was no indication that the state would loan religious books. *See id.* at 361-62. As the *Allen* Court stated, the loan "merely ma[de] available to all children the benefits of a general program to lend school books free of charge." *Allen*, 392 U.S. at 243.

Next, the Court agreed with the district court and invalidated the portion of Act 195 that authorized "the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth." *Meek*, 421 U.S. at 362-63. The Court reasoned that, although Act 195 had the legitimate secular purpose of extending the benefits of free educational aids to all children, the schools that benefited from this loan were predominantly religious. *See id.* at 363. Thus, the Court concluded, the direct loan to such schools by the state had the unconstitutional effect of advancing religion. *See id.* at 366.

ger expressed disagreement with the majority's use of the Establishment Clause to deny children equal educational opportunities — a notion which became a foundation of later Establishment Clause decisions.[51] Although the Court acknowledged Pennsylvania's legitimate secular purposes, the majority noted that these purposes do not validate the laws' unconstitutional effects of endorsing religion and creating church-state entanglement.[52]

In *School District of the City of Grand Rapids v. Ball*,[53] the Court, inspired by the idea of government neutrality, continued utilizing the *Lemon* test to resolve Establishment Clause conflicts.[54] In *Ball*, the Court analyzed the Shared Time Program and Community Education Program offered by Michigan that provided remedial aid and supplemental curriculum courses to parochial schools.[55] In administering its programs, Michigan attempted to maintain its own neutrality by offering the assistance to *all* schools in the state and by labeling participating students as "'part-time public school students.'"[56] Although the majority acknowledged Michigan's efforts to protect government neutrality, the Court found them unimpressive.[57] Reasoning

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[51] *See* William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 279 (1997) (noting that, in *Meek*, Chief Justice Burger acknowledged the relationship between free exercise of religion and equal protection and urged the Court also to recognize this relationship). Ball further explains that Chief Justice Burger urged the Court to "'eliminat[e] the denial of equal protection to children in church-sponsored schools, and take a more realistic step toward establishing a state religion . . . .'" *Id.* (quoting *Meek*, 421 U.S. at 387 (Burger, C.J., concurring in the judgment in part and dissenting in part)).

[52] *See Meek*, 421 U.S. at 362-63, 368.

[53] 473 U.S. 373 (1985).

[54] *See id.* at 380-81.

[55] *See id.* at 375-81. Taxpayers of the City of Grand Rapids brought suit against the school district alleging that its programs provided classes, at taxpayers' expense and in violation of the Establishment Clause, to children attending 41 private schools, 40 of which were religious. *See id.* at 379-80. Both programs were offered inside the nonpublic schools of Grand Rapids, Michigan. *See id.* at 375. The Shared Time Program offered remedial and enrichment classes during the school day, as a supplement to the nonpublic curriculum. *See id.* The Community Education program, however, was offered throughout the community, not solely inside the nonpublic schools. *See id.* at 376. This program offered classes such as Arts and Crafts, Spanish, Home Economics, and other similar classes outside of the curriculum. *See id.* Relying on the holding in *Meek*, the *Ball* Court noted that although the goal to provide an enhanced education for children was secular and legitimate, this goal did not preempt the government neutrality mandated by the Establishment Clause analysis. *See id.* at 386-87.

[56] *Id.* at 378 (quoting Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1071, 1076 (W.D. Mich. 1982)).

[57] *See id.* at 380-81. The Court affirmed the district court's decision in holding that "although the purpose of the programs was secular, their effect was 'distinctly impermissible.'" *Id.* at 380. The district court noted that both programs labeled

that the assistance had the effect of promoting religion, the Court held that such programs violate the Establishment Clause.[58]

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their participating students as "'part-time public school students.'" however, "[t]here [was] no evidence that any public school student ha[d] ever attended a Shared Time or Community Education class in a nonpublic school." *Id.* at 378. Further, the district court found that the classes offered by these programs, under a public school facade, were just as religiously segregated as were the schools at which they were offered. *See id.* at 378-79. Therefore, despite efforts to free classrooms of religious symbols and doctrine, the Court's holding demonstrates that the presence of teachers inside parochial schools created a symbolic union of church and state. *See* Thomas F. Guernsey & M. Grey Sweeney, *The Church, the State, and the EHA: Educating the Handicapped in Light of the Establishment Clause*, 73 MARQ. L. REV. 259, 274 (1989) (explaining the invalidation of the Shared Time and Community Education programs). Moreover, the presence of these teachers freed the parochial schools from the financial burden of teaching the classes that these programs offered. *See id.* at 276.

[58] *See Ball*, 473 U.S. at 385. The Court reasoned that the public school programs in the parochial school systems unconstitutionally promoted religion in three particular ways. *See id.* First, relying on *Meek*, the Court acknowledged that teachers may generally act in good faith, however, the Court noted they may inadvertently "inculcat[e] particular religious tenets or beliefs" into their teachings. *Id.* The Court found that the teachers hired for the Community Education program were virtually all full-time religious school teachers and some of the Shared Time teachers were previously employed by religious schools. *See id.* at 387. Thus, the Court stated that the risk of the conveyance of a religious message was so substantial because "[t]eachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach . . . ." *Id.* at 388. The threat of indoctrination, therefore, resulted from the mere presence of the public school teachers and nonpublic teachers paid by the state, teaching inside the parochial schools. *See* Guernsey & Sweeney, *supra* note 57, at 274.

Second, the Court found that the result of state funded programs in nonpublic schools may be perceived as a union of church and state as well as an endorsement of religion. *See Ball*, 473 U.S. at 385. The Court seemed primarily concerned with how children, "in their formative years" and "of tender years" may perceive this union of church and state. *See id.* at 390. The Court further noted that the children would not be capable of deciphering the difference between the religious school classes and the nonpublic school classes. *See id.* at 391. The Court then quoted the Second Circuit in *Aguilar* in reasoning that under the Act, the public school teachers appear as a "'regular adjunct of the religious school. They pace the same halls, use classrooms in the same buildings, teach the same students . . . .'" *Id.* at 392 (quoting Felton v. Aguilar, 739 F.2d 48, 67-68 (1984)). Thus, the Court concluded that the appearance of a union between church and state "is an impermissible effect under the Establishment Clause." *Id.*

The third and final reason the Court ruled these programs unconstitutional was that they offered "direct aid" to the religious school, rather than to the students, thereby creating a "'direct and substantial advancement of the sectarian enterprise.'" *Id.* at 393-94 (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977)). The Court further noted that not only were instructional materials provided by the state to nonpublic schools but instructional services by state-hired teachers were also provided inside the parochial school building. *See id.* at 396. Thus, the Court decided, "no meaningful distinction can be made between aid to the student and aid to the school . . . ." *Id.* Further, the Court acknowledged that the programs effectively subsidized parochial schools. *See id.* at 395. The nonpublic schools were able to channel their financial resources toward other religious purposes because classes they

On the same day the Court decided *Ball*, it rendered a landmark decision in the companion case *Aguilar v. Felton*.[59] In *Aguilar*, the Court determined that New York City's implementation of the Elementary and Secondary Education Act of 1965[60] created an excessive entanglement of church and state and therefore violated the Establishment Clause.[61] The Court explained that, under Title I, New York used federal funds to support publicly employed teachers who taught remedial classes to parochial school students inside parochial schools.[62]

The majority reasoned that if this direct federal aid to parochial institutions does not advance religion, the administration of that aid undoubtedly causes an impermissible entanglement of church and state.[63] Although the Court expressed concerns for each individual's freedom of religion,[64] the *Aguilar* holding rests on findings of excessive entanglement.[65]

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already would have offered were instead subsidized by the state. *See id.* at 397. Therefore, the Court concluded that states must be conscious that their aid does not relieve nonpublic schools of the "educational duties that it would have otherwise funded itself, thus freeing parochial school money for religious purposes." Guernsey & Sweeney, *supra* note 57, at 276.

[59] 473 U.S. 402 (1985).

[60] *See supra* note 19. The Court noted that since 1966, New York had provided educational services under Title I to parochial students on parochial school grounds. *See Aguilar*, 473 U.S. at 406. It was not until 1978, when six taxpayers commenced suit against the City of New York, that the Court determined that such activity under Title I constituted a direct violation of the profound principles of the Establishment Clause. *See id.* at 407, 408-09.

[61] *See Aguilar*, 473 U.S. at 414.

[62] *See id.* at 404. The programs that public school teachers administered included "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services." *Id.* at 406.

[63] *See id.* at 409.

[64] *See* Robin, *supra* note 45, at 968. Robin indicates that the *Aguilar* Court addressed the issue of free exercise of religion as a part of the traditional entanglement analysis. *See id.* Robin infers that *Aguilar* was a victory for those in favor of a strict entanglement analysis. *See id.* at 969.

[65] *See Aguilar*, 473 U.S. at 412-13. In explaining that the state and church should avoid entanglement, the Court voiced two concerns. *See id.* at 409. First, the Court noted that when entanglement arises, although involvement may be disguised as secular, the religious freedom of non-adherents of that denomination is affected. *See id.* at 409-10. Furthermore, the Court noted, when entanglement exists, the religious freedom of the adherents of the particular denomination is limited by the government's involvement. *See id.* at 410. However, the Court's decision primarily rests on the prohibited *appearance* of entanglement in accordance with the Establishment Clause, rather than the *effects* the entanglement might have on religious freedom. *See id.* at 412. The Court noted that, under the program, the teachers provide aid in a parochial environment and therefore, the program would require permanent state surveillance in the parochial schools receiving the aid "to ensure the absence of a religious message." *Id.* at 412. The Court determined that this con-

stant state presence inside the parochial schools "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.* at 413.

The Court continued to find even more church and state entanglement problems. *See id.* at 413. The Court found that the program's initiative would result in requiring the personnel of the public and parochial school systems to work together and confront issues such as scheduling, assignments, advertisement of the program, and other issues that accompany the implementation of the program. *See id.* Moreover, the Court noted, the program would require frequent contacts between the remedial teachers and the parochial teachers in order to share communications regarding the status of an individual child's growth. *See id.* The Court stated that these contacts produce "'a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.'" *Id.* at 414 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

As part of its reasoning, the Court analyzed the nature of the schools at issue. *See id.* at 411-12. The Court noted that the schools receiving funds were affiliated with a church and required regular attendance and religious exercise. *See id.* at 412. The Court further perceived that the Catholic schools constituted the vast majority of the aided institutions and were under the supervision and control of the local parish. *See id.* Thus, the Court held that the elements of entanglement were present in this case. *See id.*

Justice Powell raised two additional reasons why precedent warranted the invalidation of the programs at issue in *Aguilar*. *See id.* at 415 (Powell, J., concurring). First, the Justice notably remarked that such aid to parochial schools would raise political divisiveness between taxpayers receiving the benefits of the program and the non-recipient sectarian groups. *See id.* at 416-17 (Powell, J., concurring). Thus, the Justice concluded, such government involvement in religious life would inevitably place a strain on the political system. *See id.* at 417 (Powell, J., concurring). Second, Justice Powell affirmed the majority's point that the state subsidy relieved the schools of a duty to provide the necessary remedial education. *See id.*

In dissent, Chief Justice Burger criticized the majority for ignoring the religious liberty of every individual as well as the educational needs of low-income families. *See id.* at 419. (Burger, C.J., dissenting). Chief Justice Burger commented on the Court's obsession with the appearance of entanglement. *See id.* Chief Justice Burger explained that the majority failed to address whether Title I posed a threat to religious liberty by establishing a state religion. *See id.* Instead, the Chief Justice continued, the Court obsessed over the criteria of the *Lemon* test. *See id.* In conclusion, Chief Justice Burger stated that "[f]ederal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps" toward establishing religion. *Id.*

Justice O'Connor wrote a profound separate dissenting opinion in which Justice Rehnquist joined as to Parts II and III. *See id.* at 421-31 (O'Connor, J., dissenting). Justice O'Connor criticized the majority for greatly exaggerating the supervision that the program required to assure that the teachers would not inculcate religion. *See id.* at 421 (O'Connor, J., dissenting). The Justice first focused on the purpose and the history of the Act and further criticized the majority for ignoring the effects of the program. *See id.* at 422-23 (O'Connor, J., dissenting). Justice O'Connor explained that the Title I program had been in use for 19 years and had an unblemished record. *See id.* at 424-25 (O'Connor, J., dissenting). The Justice credited the teachers who had consistently visited several different schools each week and managed to avoid influence of the sectarian surroundings in which they taught. *See id.* at 425 (O'Connor, J., dissenting).

The Justice noted that, rather than endorse religion, the teachers of the program have fulfilled the intent of Congress: They have enabled impoverished school-

The Establishment Clause continued to present the Court with complex interpretative questions regarding the boundaries of federal financial assistance through the states.[66] In *Witters v. Washington Department of Services for the Blind*,[67] the Court evaluated the neutrality of state aid administered by the Washington Commission for the Blind (Commission).[68] Pursuant to a state statute, the Commission provided vocational rehabilitation assistance to visually handicapped persons.[69] The petitioner applied to the Commission for financial assistance while he pursued his religious vocation.[70] The Commission denied Witters the aid that he requested, reasoning that utilization of state funds to assist individuals in pursuit of a religious degree was unconstitutional.[71] However, emphasizing the fact that the aid went to private individuals who retained the freedom to choose secular or

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children to overcome learning deficiencies, improve their test scores, and obtain a thorough education with all of its benefits. *See id.* However, Justice O'Connor did acknowledge the possibility of the program's effect of relieving the parochial schools of their duty to teach secular subjects. *See id.* The Justice quickly dismissed this fear by reiterating the statutory requirement that Title I funds be used "only to provide services that otherwise would not be available to the participating students." *Id.*

The Justice concluded by noting that, in 19 years, there had been no incidents of religious indoctrination and, thus, the majority greatly exaggerated the fear that teachers would inculcate religion and the degree of state supervision required to prevent the same. *See id.* at 428 (O'Connor, J., dissenting). Such reasoning, the Justice noted, would "require us to close our public schools, for there is always some chance that a public schoolteacher will bring religion into the classroom, regardless of its location." *Id.* at 429 (O'Connor, J., dissenting). Acknowledging the Court's determination that Title I could be administered in portable classrooms outside of the parochial school building, Justice O'Connor expressed sympathy for the children in cities where it was not economically feasible to provide such facilities. *See id.* at 430-31 (O'Connor, J., dissenting). The Justice stated that the majority had "deprive[d] them of a program that offers a meaningful chance at success in life . . . ." *Id.* at 431 (O'Connor, J., dissenting).

[66] *See infra* notes 67-73 and accompanying text.

[67] 474 U.S. 481 (1986).

[68] *See id.* at 484-89 (1986). The question before the Court in *Witters* was whether the extension of aid directly to the petitioner was a permissive, neutral subsidy or if such aid served as a direct subsidy for petitioner's religious vocation. *See id.* at 488. The petitioner, Larry Witters, suffered from a progressive eye condition, yet he sought to become a pastor, missionary, or youth director. *See id.* at 483. Witters instituted a claim in state court seeking review of a state administrative decision that had denied financial assistance on state constitutional grounds. *See id.* at 484. The administrative ruling was affirmed by the Washington Supreme Court, although the court based the holding on the Establishment Clause of the Federal Constitution. *See id.* Utilizing the *Lemon* test, the Washington court held that, although the financial assistance had a secular purpose, it had the primary effect of advancing religion. *See id.* at 485. Shortly thereafter, the United States Supreme Court granted certiorari and reversed. *See id.*

[69] *See id.* at 483.

[70] *See id.*

[71] *See id.*

religious education, the Court found no Establishment Clause violation.[72] The Court held that the purpose of the program at issue was secular and did not constitute a direct, religion-endorsing subsidy.[73]

Six years later, in *Zobrest v. Catalina Foothills School District*,[74] the Court again upheld a state program that accommodated parochial school children.[75] The petitioner in *Zobrest* was a deaf child attending

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[72] *See id.* at 486-88. First, the Court noted that the vocational assistance under the Washington program was paid directly to the student, rather than the institution at which he or she was studying. *See id.* at 488. Thus, any money given to the institution was the result of an individual choice by the beneficiary of the assistance, not the state directly. *See id.* Further, the Court opined that the aid recipients had ample opportunity to spend the money on a secular education, however, that choice belonged solely to the recipient. *See id.* Moreover, the Court noted that the goal of the Washington program was not to support sectarian institutions; further, no evidence existed to suggest that, if Witters received the aid, the money would flow directly to a religious institution. *See id.*

[73] *See Witters*, 474 U.S. at 485, 489. As the Washington courts had done, the Court applied the *Lemon* test. *See id.* at 485. First, the Court noted that the purpose of Washington's program was indeed secular, as all parties had already conceded. *See id.* The Court explained that the program was "designed to promote the well-being of the visually handicapped . . . ." *Id.* Second, the Court compared the program to the situation in which a state issues a paycheck to one of its employees who later donates the money to a religious institution. *See id.* at 486-87. The Court reasoned that the Establishment Clause is not violated every time money issued by a state finds its way into the hands of a religious institution. *See id.* at 486. The Court characterized the Washington program as a permissible transfer of financial assistance funds, rather than an impermissible "'direct subsidy to the religious school' from the State." *Id.* at 487 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985)). The Court reasoned that "the fact that aid [went] to individuals mean[t] that the decision to support religious education [was] made by the individual, not by the State." *Id.* at 488. The Court concluded by noting that Witters had chosen to use neutral state aid to help him in his religious vocation and that this choice did not "confer any message of state endorsement of religion." *Id.* at 489.

[74] 509 U.S. 1 (1993).

[75] *See id.* at 13. Zobrest was a deaf child who had attended a public school that provided him with a sign-language interpreter. *See id.* at 4. However, his parents later chose to send him to a parochial school for religious reasons. *See id.* The school district denied his request that the state provide him with an interpreter in the parochial school based on a potential Establishment Clause violation. *See id.* Because this case was a continuing controversy, Zobrest's parents commenced suit against the school district and sought reimbursement for the money they expended on an interpreter for Zobrest. *See id.* at 4 n.3.

The district court denied Zobrest's request and held that "'[t]he interpreter would act as a conduit for the religious inculcation . . . thereby, promoting . . . religious development at government expense.'" *Id.* at 5 (internal citation omitted). The court of appeals, although divided, affirmed and applied the *Lemon* test. *See id.* (citing *Zobrest*, 963 F.2d 1190 (9th Cir. 1992)). The court held that the Individuals with Disabilities Education Act (IDEA) undoubtedly had the secular purpose of providing aid to handicapped children. *See id.* (citing *Zobrest*, 963 F.2d at 1193). The court further noted, however, that application of the IDEA in this case would have created an appearance that the government was a joint sponsor of the parochial school's activities. *See id.* (citing *Zobrest*, 963 F.2d at 1194-95). Interest-

a parochial school who requested a sign language interpreter in accordance with the Individuals with Disabilities Education Act (IDEA).[76] In denying petitioner's request, the lower courts held that application of the IDEA created the appearance that the state sponsored parochial school activities.[77] The Court, however, reasoned that the crux of the program at issue[78] provided neutral benefits to the widespread population without referencing religion.[79] In uphold-

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ingly, the dissent argued that because the program conferred a benefit upon the entire population, rather than solely those attending parochial schools, it was inconceivable to argue that such assistance would appear as if the government was endorsing religion. *See id.* (citing *Zobrest*, 963 F.2d at 1199 (Tang, J., dissenting)). After granting certiorari, the United States Supreme Court reversed. *See id.* at 6.

[76] *See id.* at 3 (citing 20 U.S.C. §§ 1400-27 (West 1991)); *see also supra* note 75.

[77] *See supra* note 75.

[78] *See Zobrest*, 509 U.S. at 10. The IDEA is a government program that afforded benefits to qualifying disabled children, neutrally, without regard to the institution at which the child studies. *See id.* The program allows parents to choose where to send their child, without fear of losing the benefits of the IDEA. *See id.* Thus, a government-paid interpreter's presence in a parochial school would only be the result of a parent's individual choice, rather than a direct government subsidy. *See id.*

[79] *See id.* The Court began by noting that the mere fact that a government program neutrally provided aid to a student who happened to attend a parochial school did not automatically warrant an Establishment Clause challenge. *See id.* at 9-10. The Court focused on the striking similarities between its earlier decision in *Witters* and the issue in *Zobrest*. *See id.* at 10 (citing Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 487-89 (1986)). The Court reasoned that, as in *Witters*, any government aid conveyed to a parochial school was the result of a parent's individual choice, thereby defeating any insinuation that an appearance of government endorsement of religion would be present. *See id.*

The respondent, however, argued that a sign-language interpreter placed in a parochial school and funded by the state was similar to a state-purchased tape recorder placed in a sectarian school. *See id.* at 11 (citing Meek v. Pittenger, 421 U.S. 349, 372 (1975)). Thus, the respondent contended that because the Court prohibited the government from providing educational equipment to sectarian schools in *Meek* and *Ball*, the government should have prohibited the state from providing a state funded interpreter in parochial schools. *See id.* The Court noted that the respondent mistakenly relied upon *Meek* and *Ball*. *See id.* at 12. The Court reasoned that in those prior decisions, the Court struck down programs in which the state's assistance would have relieved the parochial schools of their own expenses and duties. *See id.* However, in *Zobrest*, the Court explained, providing petitioner with a sign language interpreter would not relieve the parochial school of any expense that it otherwise would have incurred in educating its students. *See id.* Moreover, the Court concluded that the children were the direct beneficiaries of IDEA whereas the schools were "incidental beneficiaries." *See id.*

Next, the Court looked to the record to find any evidence that would indicate that the interpreter would do anything more than interpret. *See id.* at 13. The Court distinguished *Meek*, wherein the state program also provided "auxiliary services," which included guidance counseling. *See id.* The Court reasoned that "the task of a sign-language interpreter seem[ed] . . . quite different from that of a . . . guidance counselor." *Id.* The Court further explained that the sign language interpreter had ethical guidelines and was required to transmit everything verbatim. *See id.* Thus, the Court concluded that the fear that a sign language interpreter would inculcate

ing the application of the IDEA, the Court held that the Establishment Clause does not create an absolute bar to a state program that places public employees on parochial school grounds.[80]

Finally, after many years of interpretation and application battles with the Establishment Clause, the Court's decision in *Board of Education of Kiryas Joel Village School District v. Grumet*[81] suggested the abandonment of the *Lemon* test and questioned the Court's prior ruling in *Aguilar*.[82] In *Kiryas Joel*, New York passed a statute that authorized the Village of Kiryas Joel to create its own school district.[83] This separate school district provided for the special needs of a particular religious group.[84] The Court reasoned that the legislature failed to exercise

religion into his or her teachings was unfounded and, as such, the teacher would neither "add to nor subtract from that environment . . . ." *Id.*

[80] *See id.*

[81] 512 U.S. 687 (1994).

[82] *See id.* at 716-17 (O'Connor, J., concurring); *see also* Deidre M. Glasser, Note, *The Curious Case of* Kiryas Joel, 63 U. CIN. L. REV. 1947, 1953 (1995) (arguing that the Court has begun to show reluctance toward any strict adherence to the *Lemon* test). Rather than apply *Lemon*, the Court in *Kiryas* reasoned according to the more recent precedent of *Zobrest*. *See id.* at 1953 n.38 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3-5 (1993)). Glasser explains that the Court has struggled to define and apply the Establishment Clause in many circumstances. *See id.* at 1957. Glasser states that the Court observed that, at times, the "technical and artificial application of *Lemon*" could lead to inconsistent rulings. *Id.* Glasser explains, however, until the Court established new governing principles, an Establishment Clause analysis must at least begin with the *Lemon* test. *See id.*

In analyzing Justice O'Connor's concurrence in *Kiryas Joel*, Glasser explains that the legislature's failure to create a generally applicable statute denied assurance that accommodations would be made for a similar group in the future. *See id.* at 1965. Justice O'Connor noted that the legislative process creates skepticism that another group with similar requests would be accommodated because the legislature had "no obligation to respond to any group's requests" as does the judicial system. *Kiryas Joel*, 512 U.S. at 716 (O'Connor, J., concurring). The Justice reasoned that *Aguilar* called for the end of publicly funded classes on parochial school grounds. *See id.* at 717 (O'Connor, J., concurring). Justice O'Connor addressed the conflict that "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Id.* The Justice reasoned that if the government were to provide the on-site education requested in *Kiryas Joel*, then the government should have similarly accommodated the petitioners in *Aguilar*. *See id.* Thus, Justice O'Connor's concurrence called for the Court's overturning of *Aguilar* because it was "the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here." *Id.*

[83] *See Kiryas Joel*, 509 U.S. at 690 (citing 1989 N.Y. Laws 748).

[84] *See id.* at 692. The Village of Kiryas Joel (Village) consisted of practitioners of a strict form of Judaism known as Satmar Hasidim. *See id.* at 690. The residents were a very distinctive group and had a need for special educational conditions because of their strict religious beliefs. *See id.* The distinctive Village, which fell within the zoned area of the Woodbury Central School District, was formed after the Satmars petitioned the Town Board of Monroe. *See id.* at 691. The children of the Village were educated at private religious schools; however, as the Satmars argued, these schools did not offer any special services to handicapped children. *See id.* at 692.

the sound principle of government neutrality in enacting the statute.[85] The Court therefore concluded that the Legislature had stretched the limits of permissible religious accommodation, established in *Witters* and *Zobrest*, by creating a special school district for a particular religious group.[86]

Thus, in 1984, Monroe Woodbury Central School District began providing such services until the Court rendered the decision in *Aguilar*, thereby invalidating such aid to parochial schools. *See id.* Following *Aguilar*, children of the Village were forced to attend public schools to obtain the special help they required. *See id.* However, the parents withdrew most of the children, fearing their overexposure to multicultural differences. *See id.* By 1989, only one child from the Village attended Monroe-Woodbury's public schools. *See id.* at 693.

As a result, New York passed a statute that provided that the Village constituted its own special school district. *See id.* (citing 1989 N.Y. Laws 748). The statute empowered a board of education, elected by the residents, to open and close schools, hire and fire teachers, prescribe and issue textbooks, establish rules of discipline, and raise property taxes to supply money for the operation of the schools. *See id.* (citing N.Y. EDUC. LAW § 1709 (McKinney 1988)). Governor Cuomo justified the new bill as a method of solving the unique problem associated with providing the Village children with the special education they needed. *See id.* Consequently, the Kiryas Joel Village School District only operated special programs for the handicapped children that were originally deprived of such services. *See id.* at 694.

Before the new school district came into existence, respondents commenced this action and challenged chapter 748 of the New York statutes as an unconstitutional establishment of religion. *See id.* The trial court held that the statute indeed failed all three prongs of the *Lemon* test and therefore, constituted an improper endorsement of religion. *See id.* at 695 (citing Grumet v. New York State Ed. Dept., 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992)). The court of appeals affirmed, holding that "the statute's primary effect was an impermissible advancement of religious belief." *Id.* at 695 (citing New York State Ed. Dept. v. Grumet, 592 N.Y.S.2d 123 (N.Y. App. Div. 1992)).

[85] *See id.* at 703. Upon granting certiorari, the Court reasoned that the New York Legislature did not exercise government neutrality. *See id.* Moreover, the Court stated that the Legislature could have accommodated the Satmar parents in a constitutional manner, without implicating the Establishment Clause. *See id.* at 702. The Court noted that the New York Legislature knew that the Village was comprised exclusively of Satmars when it created the village school district and thereby divided school districts rather than consolidated them. *See id.* at 700. The Court further explained that the Legislature offered no clear indication that other special groups would get the same treatment in the future, if similar circumstances arose. *See id.* at 703.

[86] *See id.* at 710. The Court held that the New York statute failed the test of neutrality because it delegated a power that "'rank[ed] at the very apex of the function of a State . . . .'" *Id.* at 709-10 (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)). Further, the Court continued, the legislature delegated the power to a group defined according to their religious beliefs. *See id.* at 710. This, the Court concluded, "cross[ed] the line from permissible accommodation to impermissible establishment." *Id.* As Justice O'Connor noted in her concurrence, the state can accommodate religious needs so long as it does so through neutrally administered laws. *See id.* at 714 (O'Connor, J., concurring).

In recognizing the effects of the Court's recent decisions[87] on Establishment Clause jurisprudence, the United States Supreme Court revisited *Aguilar v. Felton*[88] in *Agostini v. Felton*,[89] when the petitioners brought a motion requesting relief from the permanent injunction issued in *Aguilar*.[90] Because the Court's post-*Aguilar* decisions seriously affected Establishment Clause jurisprudence, the Court concluded that the petitioners in *Agostini* were entitled to relief from the final judgment.[91]

Writing for the majority, Justice O'Connor meticulously reviewed *Aguilar*, and its companion case *Ball*, to determine if the Court's subsequent decisions regarding the Establishment Clause had undermined *Aguilar's* holding.[92] The Justice began by noting the similarity of the issues in *Ball* to those in *Aguilar*[93] and extracted one

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[87] *See* Agostini v. Felton, 117 S. Ct. 1997, 2008-14 (1997) (discussing recent Establishment Clause decisions). Recognizing the dismissal of two primary presumptions in *Ball*, the Court reasoned that two aspects of the approach to assess whether government advanced religion had changed. *See id.* at 2010. First, in *Zobrest*, the Court held that the presence of public employees on parochial grounds would neither instantly symbolize a union between church and state, nor would it inevitably inculcate religion. *See id* at 2010-11 (citing Zobrest v. Catalina Foothills Sch. Dist., 501 U.S. 1, 13 (1993)). The Court reasoned that no evidence existed to support the presumption that a New York City public school teacher even attempted to foster religion while on parochial school grounds. *See id.* at 2011.

Second, the Court stated that, in *Witters*, it rejected the other *Ball* presumption. *See id.* at 2011 (citing Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 487 (1986)). The *Witters* Court dismissed the presumption that all government financial assistance is necessarily invalid. *Witters*, 474 U.S. at 487. The *Agostini* Court stated that *Witters* and *Zobrest* revealed that New York City's Title I program would not "be deemed to have the effect of advancing religion . . . ." *Agostini*, 117 S. Ct. at 2012.

[88] 473 U.S. 402 (1985).

[89] 117 S. Ct. 1997 (1997).

[90] *See id.* at 2003; *see also supra* notes 31-37 and accompanying text.

[91] *See Agostini*, 117 S. Ct. at 2018 (citing FED. R. CIV. P. 60(b)(5)). Under this Federal Rule, a court may relieve a party from a final judgment, order, or proceeding 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." FED. R. CIV. P. 60(b)(5).

[92] *See Agostini*, 117 S. Ct. at 2008-10.

[93] *See id.* The Court noted that the Shared Time Program at issue in *Ball* and the Title I program in *Aguilar* closely resembled each other. *See id.* at 2009. The Court explained that the Shared Time Program "provided remedial and 'enrichment' classes, at public expense, to students attending nonpublic schools." *Id.* at 2008. The Court found that the Shared Time Program violated the Establishment Clause in three ways: (1) the auxiliary services, although secular themselves, were based in an atmosphere which fostered advancement of religious beliefs; (2) public school teachers on parochial grounds created a perception of a symbolic union between church and state; and (3) the state loan for instructional equipment and materials

distinguishing factor — New York's implementation of a relatively comprehensive system of monitoring the religious content of the public assistance, as contrasted against Michigan's relatively superficial efforts.[94]

Justice O'Connor discussed the effect of post-*Aguilar* decisions on the guidelines the Court utilizes in determining whether government aid violates the Establishment Clause.[95] The majority then applied the Court's new Establishment Clause analysis to *Aguilar*'s Title I program and concluded that because the educational services were offered to all children, regardless of their religious affiliation, the program neither favored nor disfavored religion.[96] Moreover, the Justice noted that Title I does not pressure children in need of the services to change their religious affiliation simply to become a recipient.[97]

Justice O'Connor then confronted the entanglement determination in *Aguilar*.[98] The Justice stated that, although entanglement is

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advanced and fostered religious beliefs. *See id* at 2008-09.

[94] *See id.* at 2009. The Court noted that, although the programs were similar, *Aguilar*'s program had one distinguishing factor: there was a system for monitoring the religious content of the public assistance. *See id.* The Court further noted that, although the state would monitor teachers to assure they were not fostering religious beliefs, the level of monitoring to assure this secular exclusivity would eventually result in "excessive entanglement." *See id.*

[95] *See id.* at 2010. Justice O'Connor explained that the post-*Aguilar* decisions had not altered the "general principles [the Court] use[s] to evaluate whether government aid violates the Establishment Clause . . . ." *Id.* The Justice explained that what had been affected, however, was the approach the Court used to assess indoctrination. *See id.* Continuing, Justice O'Connor noted that, in *Zobrest* and *Witters*, the Court examined the aid programs to determine whether the advancement of religion, if any, could be attributed to the state. *See id.* at 2011-12. In retrospect of these post-*Aguilar* decisions, Justice O'Connor stated that it is not likely that aid advances religion where "[it] is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 2014. The majority stated that *Zobrest*, not *Agostini*, created this fresh law. *See id.* at 2011.

[96] *See id.* at 2014. Because the Court had recently sustained programs that provided aid to all children regardless of where they attended school, the Court recounted who was eligible for Title I services in *Aguilar*. *See id.* The Court concluded that Title I services were available to all children who met the requirements of the Act, regardless of their religious beliefs or affiliations. *See id.* Further, the Court determined that the program does not proffer any incentive for potential aid beneficiaries to alter their religious beliefs or practices in order to be eligible for the program's services. *See id.*

[97] *See id.*

[98] *See Agostini*, 117 S. Ct. at 2014-15. The *Aguilar* Court had concluded that the Title I program resulted in an "excessive entanglement between church and state." *Id.* at 2015. Justice O'Connor explained the factors the Court used to assess whether an entanglement is "excessive" and commented that they are similar to those used to assess "effects" of advancing religion. *See id.* The factors, the Justice stated, are the

inevitable, the Title I program in *Aguilar* satisfied the criteria used to assess entanglement.[99] The majority held that the Title I program in *Aguilar* was not invalid under the Establishment Clause since it provided remedial education to recipients not premised upon their religion.[100] The Court further held that the program did not endorse religion because such remedial help neither results in indoctrination nor creates entanglement between church and state.[101] In sum, given the significant changes in Establishment Clause jurisprudence, Justice O'Connor concluded that *Aguilar* and *Ball* are no longer good law.[102]

The Court next opined that this holding is not contrary to the doctrine of stare decisis.[103] Justice O'Connor commented that the

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following: "'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).

[99] *See id.* at 2015. The *Agostini* Court recalled the grounds upon which the "excessive entanglement" finding in *Aguilar* rested: (1) the program required monitoring to ensure employees did not foster religion, (2) the program required cooperation between the Board and parochial schools, and (3) the program would increase "political divisiveness." *See id.* In view of the new Establishment Clause considerations, the Court determined that the second and third grounds upon which *Aguilar*'s excessive entanglement holding rested were insufficient. *See id.* In conclusion, Justice O'Connor opined that *Aguilar*'s Title I program satisfies all of the criteria used to detect Establishment Clause violations. *See id.*

[100] *See id.* at 2016. The majority noted that Title I satisfied the "three primary criteria [the Court] . . . use[d] to evaluate whether government aid has the effect of advancing religion . . . ." *Id.* The Court held that Title I: (1) did not result in indoctrination, (2) did not define recipients of the aid by their religion, and (3) did not create an excessive entanglement between church and state. *See id.* Justice O'Connor explained that the program provided remedial education to disadvantaged children on a neutral basis and, therefore, did not violate the Establishment Clause. *See id.*

[101] *See id.* ("The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.").

[102] *See id.* The Court noted that Establishment Clause jurisprudence had changed so significantly since *Ball* and *Aguilar* that the decision to overrule these cases "rests on far more than 'a present doctrinal disposition to come out differently from the Court of [1985].'" *Id.* at 2017 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992)) (alteration in original). The Court concluded by stating that *Aguilar* and *Ball* are indeed now inconsistent with current Establishment Clause jurisprudence. *See id.*

[103] *See id.* at 2016. The Court explained that the doctrine of stare decisis does not preclude the Court from overruling *Aguilar* because the doctrine is not an "'inexorable command.'" *See id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)). Rather, the doctrine has a "'limited application in the field of constitutional law'" and is a policy judgment, which is at its weakest when interpreting the Constitution. *Id.* (quoting St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone, J., Cardozo, J., concurring)).

Court would have undoubtedly decided *Aguilar* differently under today's Establishment Clause jurisprudence.[104] The Justice further noted that the Court's decision to overrule *Aguilar* was not restrained by the law of the case doctrine.[105] The Court concluded that adherence to *Aguilar* would work a "manifest injustice" in light of the recent Establishment Clause decisions and, thus, the court of appeals erred in invoking the law of the case doctrine.[106]

The Court proceeded to examine whether the post-*Aguilar* decisions warranted vacating the permanent injunction issued in *Aguilar*.[107] Justice O'Connor stated that the petitioners are entitled to this procedural relief despite the respondents' fears of the impact of such a result on judicial economy.[108] Although the trial court correctly denied the petitioners' motion, which was based upon Rule 60(b)(5) of the Rules of Federal Civil Procedure,[109] Justice O'Connor opined that

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[104] *See Agostini*, 117 S. Ct. at 2017.

[105] *See id.* The law of the case doctrine dictates that "a court should not reopen issues decided in earlier stages of the same litigation." *Id.* The Court explained that the doctrine does not apply when the Court determines that its earlier decisions on the issue are incorrect, in light of the changed area of law, and would work a manifest injustice. *See id.*

[106] *See id.* at 2017.

[107] *See id.* Petitioners sought relief under Rule 60(b)(5) of the Rules of Federal Procedure, asking the Court to lift the permanent injunction issued in *Aguilar*. *See id.* Justice O'Connor stated that the Court's general rule, even when overruling a case, is to "apply the rule of law [the Court] announce[s] in a case to the parties before [the Court]." *Id.* Recalling *Adarand*, the Court remarked, "[W]e did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time." *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995)). Although the trial court exercised its justified discretion in denying petitioner's Rule 60(b)(5) motion in the instant matter, such discretion must be refuted if the reviewing Court determines that it rests on grounds no longer sound in the particular area of law. *See id.*

[108] *See id.* at 2018. Respondents argued that granting such relief would create a plethora of litigation, thereby discounting the sound policy of enforcing judicial economy. *See id.* The respondents further argued that Rule 60(b)(5) relief should not be used as a vehicle for recognizing recent changes in the law. *See id.* The majority noted that the respondents merely focused on the harm that would result in the overruling of *Aguilar*, yet they failed to explain how applying Rule 60(b)(5) properly would undermine the Court's legitimacy. *See id.* As the Court indicated, overruling *Aguilar* does "no violence to the doctrine of stare decisis" when bona fide changes in the law are recognized. *Id.* In fact, the Court noted, there is no reason to wait for a better vehicle to evaluate the impact of post-*Aguilar* decisions on the Establishment Clause. *See id.* Justice O'Connor further proffered the notion that it would be inequitable for the City of New York to spend its money complying with the injunction in *Aguilar* when the money could be more wisely spent on offering disadvantaged children a chance to become educated by a program consistent with the Establishment Clause. *See id.* 2018-19.

[109] *See id.* at 2017. The Court noted that the trial court used its discretion prop-

significant changes in the law warranted a review of the binding precedent by the Supreme Court.[110] After a thorough review of *Aguilar* and its reasoning in light of recent Establishment Clause trends, the Court overruled *Aguilar*, thereby granting the *Agostini* petitioners relief under Rule 60(b)(5).[111]

Dissenting, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer,[112] disagreed with the majority's substantive interpretation of post-*Aguilar* decisions.[113] Furthermore, the dissent criticized the majority's lack of adherence to stare decisis.[114] Interpreting the majority's opinion as repudiating the line drawn in *Aguilar* and *Ball*, which indicated when direct state aid to religious institutions was permissible, Justice Souter disapproved of the Court's disregard of the "Establishment Clause's central prohibition against religious subsidies by the government."[115]

Justice Souter began by noting the historical reasons for the ban on government advancement of religion and the consequences of such entanglement.[116] The Justice continued that, in *Ball* and *Aguilar*, drawing a line between general and supplemental education was difficult, thereby rendering it impossible to determine which form of education taxpayers were supporting.[117] Further, the Justice stated

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erly in denying petitioner's Rule 60(b)(5) motion until the Supreme Court had a chance to "reinterpret[ ] the binding precedent." *See id.* The Court explained that it is the lower court's duty to follow the case law that directly controls the issue presented to the court and leave the job of determining the vitality of the precedents to the Supreme Court. *See id.*

[110] *See Agostini*, 117 S. Ct. at 2017.

[111] *See id.* at 2018-19.

[112] *See id.* at 2019 (Souter, J., dissenting).

[113] *See id.* Justice Souter criticized the Court's analysis of *Zobrest* and opined that "[t]he Court tries to press *Zobrest* into performing another service beyond its reach." *Id.* at 2023 (Souter, J., dissenting).

[114] *See id.* at 2019-25 (Souter, J., dissenting).

[115] *Id.* at 2019 (Souter, J., dissenting).

[116] *See Agostini*, 117 S. Ct. at 2019-22 (Souter, J., dissenting). Justice Souter explained that "the flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases . . . ." *Id.* at 2020 (Souter, J., dissenting). In reiterating the consequences of entanglement between church and state, the Justice noted that "[g]overnmental approval of religion tends to reinforce the religious message . . . and, by the same token, to carry a message of exclusion to those of less favored views." *Id.* The dissent further noted that it is easy to overlook the entanglement problem when governmental support is warranted, however, this is the very reason for having the Establishment Clause. *See id.* at 2021 (Souter, J., dissenting).

[117] *See id.* at 2021 (Souter, J., dissenting). Justice Souter explained that simply labeling some classes as remedial or supplemental does not distinguish the subject matter from the school's general curriculum. *See id.* Thus, the Justice continued, it is impossible to determine whether taxpayers' money is supporting remedial or doctrinal education in parochial schools. *See id.* Although the dissent conceded that aid

that, once a public school teacher enters a parochial school to teach secular subjects, there is nothing to prevent the teacher from inculcating religion.[118]

Justice Souter next explained that the Court's determination that *Aguilar* is no longer good law relies on a mistaken interpretation of precedent.[119] In addition, the dissent opined that the Court erroneously compares *Aguilar*'s Title I program with the educational programs in the Court's post-*Aguilar* decisions.[120] The dissent further

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offered outside of the parochial schools may facilitate the schools' concentration on their religious objectives, it noted that such supplemental education is less likely to become commingled with the general curriculum. *See id.*

[118] *See id.* at 2023 (Souter, J., dissenting).

[119] *See id.* at 2022-23 (Souter, J., dissenting). Justice Souter explained that the majority relied on *Zobrest* to abandon the principle that placing public employees in parochial schools results in a symbolic entanglement between church and state. *See id.* Justice Souter proclaimed that the majority incorrectly interpreted the holding in *Zobrest*, which determined that a school district providing a sign-language interpreter to a deaf student in a parochial school did not constitute a violation of the Establishment Clause. *See id.* (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993)). Conceding that the *Zobrest* Court noted that there is no "absolute bar to placing public employees in a sectarian school," the dissent explained that "rejection of such a per se rule was hinged expressly on the nature of the employee's job . . . ." *Id.* at 2023 (Souter, J., dissenting). The dissent analogized the sign language interpreter to a hearing aid, rather than a teacher, and noted there was no reason to believe an interpreter would inject his or her religious teachings into a secular education. *See id.* According to the dissent, the majority, however, equated the teacher with the signer and, rejecting *Aguilar* and *Ball*, stated that the mere presence of a public school teacher on parochial school grounds does not indicate he or she will deviate from assigned duties and teachings. *See id.* The dissent countered the majority by explaining that neither *Aguilar* nor *Ball* assumed the "mere presence" of a public employee on parochial school property signaled a union between church and state. *See id.* Justice Souter noted that *Ball* addressed the "mere presence" issue and held that a union between church and state is created only when a public school teacher is placed in the parochial school to teach throughout the school day. *See id.* The dissent further stated that *Zobrest* was not the proper vehicle to overrule *Aguilar*. *See id.*

[120] *See id.* at 2024 (Souter, J., dissenting). The dissent rejected the majority's comparison of *Aguilar* with *Witters* and *Zobrest*. *See id.* The Justice explained that *Aguilar* is distinguishable because *Witters* and *Zobrest* were based on a particular need of a particular student whereas *Aguilar's* program funded instruction in core subjects to thousands of public and nonpublic students, thereby causing excessive entanglement. *See id.* Further distinguishing *Aguilar*, Justice Souter noted that, under Title I, aid was directly distributed to religious schools, whereas in *Zobrest* and *Witters*, individual students applied for the aid and thus it could not be deemed a "systematic supplement." *See id.* Thus, according to the Justice, the Court's disregard of the role that student participation plays in the constitutionality of an aid program is inconsistent with the holding in *Witters*. *See id.* at 2024-25 (Souter, J., dissenting). Justice Souter stressed that the Court is "erod[ing] the distinction between 'direct and substantial' and 'indirect and incidental' [aid]." *Id.* at 2025 (Souter, J., dissenting).

urged that a facially neutral educational program does not preclude an Establishment Clause violation.[121]

Justice Souter's final issue in dissent was that of precedent.[122] The dissent criticized the majority's disregard of stare decisis.[123] The Justice proclaimed that there is no excuse for the Court's refusal to "adher[e] to its own prior decision in this very case."[124] Although administration of the *Aguilar* plan would have its disadvantages, the Justice declared, "[C]onstitutional lines have to be drawn .... [They] are the price of constitutional government."[125]

In a separate dissenting opinion, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, procedurally attacked the majority's opinion.[126] Justice Ginsburg proffered the idea that a proper application of the procedural rules would have led the majority to defer reconsideration of *Aguilar* until the issue presented itself in another

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[121] *See id.* at 2025 (Souter, J., dissenting). Justice Souter challenged the majority's reasoning that aid allocated neutrally (such as *Aguilar's* Title I program) will less likely have the effect of advancing religion. *See id.* Such a facially neutral program, the dissent pointed out, "does not render the Establishment Clause helpless ...." *Id.*

[122] *See Agostini*, 117 S. Ct. at 2025 (Souter, J., dissenting).

[123] *See id.* Justice Souter proffered the idea that "[t]he Court's dispensation from stare decisis is ... no more convincing than its reading of those cases." *Id.* To illustrate its disagreement with the rejection of stare decisis, the dissent noted that, since *Aguilar*, "no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine ...." *Id.*

[124] *Id.* at 2026 (Souter, J., dissenting). Justice Souter explained that even the high cost of compliance with *Aguilar* is no excuse for the majority's rejection of its own precedent. *See id.* at 2025 (Souter, J., dissenting). The Justice continued that such high costs of compliance were clear when the Court originally decided *Aguilar*. *See id.*

[125] *Id.* at 2026 (Souter, J., dissenting).

[126] *See id.* at 2026-28 (Ginsburg, J., dissenting). The Justice proclaimed that, in searching for a way to rehear a legal question decided by the Court 12 years ago, the majority improperly invoked Rule 60(b)(5) after realizing that there was no available method to directly attack *Aguilar's* holding. *See id.* at 2026 (Ginsburg, J., dissenting). As a vehicle for direct attack on prior adjudications, Justice Ginsburg explained that the Court's own Rule 44 does allow for rehearing but only "for petitions filed within 25 days of the entry of the judgment in question." *Id.* The dissent conceded that a Justice may increase or decrease this time period; however, the Court has faced no case that has "extended the time for rehearing years beyond publication of [the Court's] adjudication on the merits." *Id.* The Justice further explained that, pursuant to the Court's Rule 44.1, such a rehearing is granted only upon the order of a Justice who concurred in the prior judgment. *See id.* Justice Ginsburg noted that the *Agostini* "[p]etitioners have not been so bold (or so candid) as to style their plea as one for rehearing in th[e] Court" and Justice Stevens, the only remaining Justice of the *Aguilar* majority, had not ordered the Court to accept such a petition. *Id.* Thus, according to Justice Ginsburg, the majority resorted to an "unprecedented" use of Rule 60(b)(5) of the Federal Rules of Civil Procedure. *See id.* The Justice opined that such use will "remain aberrational." *See id.*

case.[127] Instead, the dissent continued, the majority improperly invoked Rule 60(b)(5) as a procedural vehicle to revisit *Aguilar* and determined that changes in the law warrant petitioners' relief.[128] Assuming, however, that the majority would not exceed the boundaries of the Court's appellate review power, Justice Ginsburg opined that the majority must have concluded that the district court abused its discretion in denying petitioners' relief under Rule 60(b)(5).[129] Because the lower courts were simply following the controlling precedent, Justice Ginsburg declared that there was no abuse of discretion — "Good or bad, [*Aguilar*] was in fact the law" and, thus, the district court was correct in its compliance.[130] Justice Ginsburg concluded by acknowledging that the Court could have awaited the arrival of an ideal case by which the Court could have determined *Aguilar's* fate.[131]

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[127] *See id.* at 2026 (Ginsburg, J., dissenting).

[128] *See Agostini*, 117 S. Ct. at 2027 (Ginsburg, J., dissenting). Justice Ginsburg explained that Rule 60(b)(5) grants relief from a final judgment when a party can show significant changes in either the facts or the law, rendering the continuation of the judgment inequitable. *See id.* at 2026 (Ginsburg, J., dissenting).

[129] *See id.* at 2027 (Ginsburg, J., dissenting). The Justice buttressed the dissent by noting that Rule 60(b)(5) does not permit re-litigation of the law or facts of the original judgment, rather, the proper and sole question available to the Court is the following: "Did the District Court abuse its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction?" *Id.* In order to arrive at its conclusion, the dissent observed, the Court must have answered this question in the affirmative because the majority conceded that there was "no significant change in factual conditions" and that "*Aguilar* had not been overruled, but remained the governing Establishment Clause law, until this very day." *Id.* However, the Justice continued, because the Establishment Clause law had not changed, the district court was bound to respect *Aguilar* as the Court's controlling precedent. *See id.* (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). The Justice reiterated that the Court's role in *Agostini* is limited to determining whether the District Court erred in denying petitioners relief under Rule 60(b)(5). *See id.* at 2028 (Ginsburg, J., dissenting). Thus, Justice Ginsburg stated that it is clear that "the District Court and the Court of Appeals had no choice but to follow *Aguilar*." *Id.* Therefore, according to the Justice, there was no error and the majority should have ended the Court's inquiry there. *See id.*

[130] *Id.* at 2028 (Ginsburg, J., dissenting).

[131] *See id.* According to Justice Ginsburg, the Court justified the use of Rule 60(b)(5) by describing its actions as not determining whether *Aguilar* should be overruled but whether or not its principles were already undermined by subsequent decisions. *See id.* The majority stated that there was no better vehicle than Rule 60(b). *See id.* at 2018. Further, the majority noted that the state aid was better spent on educating economically disadvantaged children rather than providing mobile homes in which teachers could provide these services. *See id.* However, Justice Ginsburg stated that the Court should have and could have awaited the arrival of another Title I case before creating a procedural error in deciding "whether *Aguilar* should remain the law of the land." *Id.* at 2028 (Ginsburg, J., dissenting).

With the ruling in *Agostini*, the Court has abandoned the demarcation caused by the Court's establishment of the *Lemon* test. The *Lemon* Court created a separationist attitude by which the constitutionality of Establishment Clause cases had been determined. Since *Lemon*, however, the Court has been faced with complex problems in determining when and how a state can accommodate certain religious needs and not others. In fact, the Court did not utilize *Lemon* in the *Agostini* analysis except to demonstrate that the Court disavowed the "excessive entanglement" prong as a separate analysis.[132] Instead, the Court undertook a somewhat fresh analysis which demonstrates the Court's current view on Establishment Clause jurisprudence.[133]

Moreover, *Agostini* signifies an *increased* willingness to accommodate those children in need of special educational services regardless of the denomination of the school which they attend.[134] For future

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[132] *See* Martha M. McCarthy, *The Road to* Agostini *and Beyond*, 124 EDUC. L. REP. 771, 783 (1998). McCarthy explains that the *Agostini* Court's references to *Lemon* were merely a condemnation of the previous paramount Establishment Clause analysis. *See id.* McCarthy further notes that *Agostini* displays the more relaxed attitude of the Court toward the *Lemon* test, thereby exhibiting more flexibility in the Court's Establishment Clause analysis. *See id.*

[133] *See* Allan G. Osborne Jr. & Charles J. Russo, *The Ghoul is Dead, Long Live the Ghoul:* Agostini v. Felton *and the Delivery of Title I Services in NonPublic Schools*, 119 EDUC. L. REP. 781, 794 (1997). Osborne and Russo comment that, when analyzed together, *Agostini*, *Zobrest*, and *Witters* demonstrate the Court's flexibility on First Amendment jurisprudence. *See id.* Moreover, Obsorne and Russo note that, with *Agostini*, the Court assumed that public school teachers would provide educational services and did not fear that they would inherently inculcate religious teachings into such services. *See id.* Therefore, Osborne and Russo further note, the constant state supervision that *Aguilar* called for is no longer necessary because the Court now assumes that teachers will do their jobs, nothing more and nothing less. *See id.*; *see also* Christian Chad Warpula, Note, *The Demise of Demarcation:* Agostini v. Felton *Unlocks the Parochial School Gate to State-Sponsored Educational Aid*, 33 WAKE FOREST L. REV. 465, 508 (1998). Warpula explains that, because the presumption that teachers would inherently inculcate religion no longer exists, there is no need for state supervision to ensure against that presumption. *See id.* Thus, as Warpula states, "[T]he *Agostini* Court has alleviated the 'Catch-22 paradox,'" which was responsible for so many of the Court's inconsistent Establishment Clause rulings. *Id.*

[134] *See* Warpula, *supra* note 133, at 508. Justices who have advocated state aid to parochial schools have justified their position by arguing that denying government aid to parochial schools would increase the tension between the right freely to exercise religion and the prohibition against the state establishment of religion. *See* Pisem, *supra* note 12, at 679-81. Even further, Pisem notes, some Justices have justified aid to parochial schools by claiming that parochial schools contribute to the "'wholesome diversity'" in America and something more than a mere "'expression[ ] of good will'" is necessary to recognize such contributions. *Id.* at 679-80 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 805 (1973) (Burger, C.J., concurring and dissenting in part)). Thus, as Warpula illustrates, the *Agostini* decision signifies not only a repudiation of strict separationism, but also an

Establishment Clause cases, the Court has announced a standard that will more readily accommodate statutes that can avoid entanglement between church and state.[135] Thus, the Court's more forthright approach in *Agostini* provides future courts with a stronger and more flexible basis on which to resolve conflicts between the state legislatures and parochial schools. Finally, the Court has rekindled the harmony of the Religion Clauses, as the framers had originally intended.

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inclination to rehabilitate the youth of our society. *See* Warpula, *supra* note 133, at 504.

[135] *See Agostini*, 117 S. Ct. at 2016. The Court has held that in order to determine if state aid violates the Establishment Clause, the aid must not "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* The Court seems to be demonstrating that, if government aid is administered neutrally and does not require excessive state surveillance, then the aid will not be found to violate the Establishment Clause. *See* Robert G. Neill, Agostini v. Felton*: The Gnat is Swallowed, the Camel Goes Free*, 24 J. CONTEMP. L. 192, 205 (1998).