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Agostini v. Felton: Redefining the Establishment of Religion Through a Modification of the Lemon Test

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Agostini v. Felton: Redefining the Establishment of Religion Through a Modification of the *Lemon* Test

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

I. INTRODUCTION

The Establishment Clause requires that government must maintain neutrality toward religion.[2] Neutrality is difficult, however, where education is involved. This difficulty arises when the government passes laws affecting *all* school children because such laws will inevitably affect school children who attend parochial schools. One such difficulty is the ability of the states to comply with Congressional educational mandates requiring equal treatment to all school children without offending the Constitution.

Even though there is no fundamental right to an education,[3] public policy strongly favors education.[4] In 1923, the Supreme Court noted, "American people

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1. U.S. CONST. amend. I.

2. Although courts continue to debate the meaning of neutrality, the Supreme Court delineated the minimal threshold of what the Establishment Clause requires:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

3. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

4. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (finding that it is unreasonable to expect a child to have a successful life without the opportunity to be educated); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society.").

have always regarded education and acquisition of knowledge as matters of supreme importance."[5] Even so, there has been great debate over who should provide education.[6] All parents must send their school-age children to either a public or a private school.[7] But important questions arise over how much governmental involvement is allowed in providing for students in parochial schools without offending the Establishment Clause.[8] In the recent *Agostini v. Felton*[9] decision, the Court decided to address this issue.[10]

This Note will examine the facts surrounding the *Agostini* decision, the reasoning of the decision, and the impact the decision will have on the litigation and debate of future similar issues. In Part II the historical background of *Agostini* is discussed.[11] Part III contains a detailed explanation of the factual development of the *Agostini* litigation.[12] Part IV analyzes the majority and dissenting opinions.[13] Part V explores *Agostini's* probable impact.[14] The Note concludes with a brief summary in Part VI.[15]

II. HISTORICAL BACKGROUND

Constitutional problems often arise when government aid is offered, either directly or indirectly, to parochial schools.[16] Modern judicial history is replete with litigation of such problems.

In *Everson v. Board of Education*,[17] the Court found a New Jersey statute providing for the reimbursement of bus fares expended on students attending

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5. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that parents' acknowledgment of a duty to educate their children is evidenced by the existence of compulsory education laws in almost every state in the country).

6. *See* William Bently Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 261-62 (1997).

7. *See id.* at 262; *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that parents could discharge their duty under compulsory education laws by sending their children to a parochial school instead of a public school if the parochial school met the educational requirements imposed by the state).

8. In 1987, Justice Brennan observed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause." Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

9. 117 S. Ct. 1997 (1997).

10. However, some important issues were left unresolved and only future litigation will further clarify these issues. This Note will address these issues, including the constitutionality of voucher programs, the new role of the *Lemon* Test in Establishment Clause cases, and the use of Rule 60(b) as an appropriate vehicle to seek readjudication.

11. *See infra* notes 16-62 and accompanying text.

12. *See infra* notes 63-91 and accompanying text.

13. *See infra* notes 92-201 and accompanying text.

14. *See infra* notes 202-59 and accompanying text.

15. *See infra* notes 260-63 and accompanying text.

16. *See, e.g., Developments in the Law--Religion and the State*, 100 HARV. L. REV. 1606, 1675-1702 (1987) (examining constitutional issues arising out of state aid to religious activities).

17. 330 U.S. 1 (1947).

parochial schools constitutional.[18] The *Everson* Court concluded that because the statute involved was generally applicable and supported by a valid state interest of keeping children in school, the statute did not violate the Establishment Clause.[19] Moreover, in *Board of Education v. Allen*,[20] the Court held a New York law providing for the loaning of textbooks to parochial school students to be constitutional because "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[21]

The 1971 landmark decision of *Lemon v. Kurtzman*[22] established a three-pronged test to be used in deciding Establishment Clause cases.[23] Applying its newly-created test, the *Lemon* Court found state supplements to the salaries of parochial school teachers unconstitutional.[24]

In 1973, the Court ruled in two cases, *Committee for Public Education and Religious Liberty v. Nyquist*[25] and *Sloan v. Lemon*,[26] that it is impermissible for a state to reimburse parents who send their children to private schools.[27]

Following the 1973 decisions denying benefits to parents of private school children, the Court issued a series of decisions allowing state support for certain programs in religious schools. In *Meek v. Pittenger*,[28] the Court found no constitutional violation in allowing states to lend textbooks to parochial schools.[29] This decision, however, was not extended to other educational materials.[30] In *Roemer v. Board of Public Works*,[31] the Court found a program providing state grants to private and religious schools constitutional.[32] In *Committee for Public Education v. Regan*,[33] the Court held that there was no constitutional problem with

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18. *See id.* at 17.
19. *See id.*
20. 392 U.S. 236 (1968).
21. *See id.* at 243-44.
22. 403 U.S. 602 (1971).
23. "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.* at 612-13 (citation omitted) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)). Even though these three standards appear straightforward, the "*Lemon* Test" has been the subject of an on-going debate and remains controversial. *See infra* notes 227-39 and accompanying text.
24. *See Lemon*, 403 U.S. at 625.
25. 413 U.S. 756 (1973).
26. 413 U.S. 825 (1973).
27. *See Nyquist*, 413 U.S. at 780-81; *Sloan*, 413 U.S. at 828.
28. 421 U.S. 349 (1975).
29. *See id.* at 362.
30. *See id.*
31. 426 U.S. 736 (1976).
32. *See id.* at 766-67.
33. 444 U.S. 646 (1980).

a state reimbursing a parochial school for the cost of giving a standardized test.[34] Finally, in *Mueller v. Allen*,[35] the Court upheld a law allowing for a state income tax deduction for amounts paid for tuition, books, and transportation of school children.[36]

Following this stint of approving state programs aiding parochial schools, the Court swung back to the other side and began invalidating these types of state programs. In *School District of Grand Rapids v. Ball*,[37] the school district initiated programs whereby public school teachers provided instruction in leased classrooms on both public and private school campuses; most of the private school campuses were parochial.[38] The *Ball* Court held that the challenged programs violated the Establishment Clause.[39] The Court reasoned that the programs violated *Lemon*'s second prong because they advanced religion by providing aid to parochial schools.[40] In *Aguilar v. Felton*,[41] a companion case to *Ball*, taxpayers challenged the use of government funds for private schools.[42] The *Aguilar* Court held that the use of Title I funds to pay the salaries of government employees providing services on the campuses of private parochial schools violated the Establishment Clause.[43] The Court reasoned that this activity violated the excessive entanglement prong of the *Lemon* Test.[44] In *Board of Education v. Grumet*,[45] a state statute created a separate school district to serve a religious community.[46] The *Grumet* Court held that the use of public funds to finance a parochial school district was unconstitutional.[47]

In 1993, the Court upheld one state program that provided support to a parochial school. In *Zobrest v. Catalina Foothills School District*,[48] the Court held that the state did not violate the Establishment Clause by providing a sign-interpreter to a deaf student attending a parochial school.[49]

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34. *See id.* at 662.
35. 463 U.S. 388 (1983).
36. *See id.* at 402-04.
37. 473 U.S. 373 (1985), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997, 2003 (1997).
38. *See id.* at 375. The *Ball* Court examined two programs, the Shared Time program and the Community Education program. *See id.* at 375-76. In the Shared Time program public school teachers offered classes to students on both public and parochial campuses during the school day. *See id.* In the Community Education program, public school teachers offered instruction to both children and adults after school hours. *See id.*
39. *See id.* at 397.
40. *See id.*
41. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).
42. *See id.* at 407.
43. *See id.* at 413-14.
44. *See id.* at 413.
45. 512 U.S. 687 (1994).
46. *See id.* at 690.
47. *See id.*
48. 509 U.S. 1 (1993).
49. *See id.* at 14.

It was in this milieu that the Court heard the *Agostini v. Felton* case. *Agostini* originated in Brooklyn, where the school board was having difficulty with a Congressional mandate that entitled all children to state-provided remedial classes, regardless of whether the students attended state schools.[50] In trying to comply with the Congressional mandate, Title I, the New York City Board of Education ("NY Board") found itself in court defending claims that it had violated the Establishment Clause.[51] "Congress enacted Title I of the Elementary and Secondary Education Act of 1965[52] [("Education Act")] to 'provid[e] full educational opportunity to every child regardless of economic background.'"[53] Title I funds were allocated by the federal government through States to local educational agencies, or "LEAs."[54] School boards, a typical form of LEA, found it economically difficult to comply with this Act, particularly when providing the mandated services to students in private schools.[55] The NY Board encountered these same problems.[56] In *Aguilar v. Felton*,[57] the Court held that New York could not comply with Title I by sending public school teachers onto the campuses of

50. *See* Agostini v. Felton, 117 S. Ct. 1997, 2003-04 (1997); Aguilar v. Felton, 473 U.S. 402, 406 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

51. *See Agostini*, 117 S. Ct. at 2005.

52. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301-6321). Although Title I was originally enacted as part of President Lyndon Johnson's Great Society, it has been repealed and reenacted in various forms since first being enacted in 1965. *See* Mark E. Chopko, *Religious Access to Public Programs and Environmental Funding*, 60 GEO. WASH. L. REV. 645, 659 (1992). In October of 1982, Chapter I of the Education Consolidation and Improvement Act of 1981 ("Chapter I") superseded Title I. *See* 20 U.S.C. §§ 3801-3808 (repealed 1988); *Aguilar*, 473 U.S. at 404 n.1. However, the provisions of Chapter I that related to private school children did not differ significantly from those in Title I. *See Aguilar*, 473 U.S. at 404 n.1. A new version of the program was enacted in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Amendments of 1988. *See* Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130. On July 1, 1995, Chapter I became known again as "Title I" by the Improving America's Schools Act of 1994. *See* Improving America's School Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518. Even though the 1994 Act significantly changed the program, the *Agostini* Court concluded that those changes did not materially affect the issues that had been decided in *Aguilar*. *See Agostini*, 117 S. Ct. at 2003 n.*. For purposes of this Note, the federally-funded program which provided remedial instruction and services to qualified elementary and secondary school children will be referred to as Title I. *See id.*

53. *Agostini*, 117 S. Ct. at 2003 (citation omitted) (quoting S. REP. NO. 89-146, at 5 (1965)).

54. *See* 20 U.S.C. §§ 6311, 6312; *Agostini*, 117 S. Ct. at 2003 (noting the additional steps LEAs had to take in implementing Title I in parochial schools).

55. *See Agostini*, 117 S. Ct. at 2004.

56. *See id.*

57. 473 U.S. 402 (1985).

parochial schools.[58] New York incurred great expense in complying with *Aguilar* and its ensuing injunction.[59] This led the NY Board, in *Agostini*, to seek reconsideration of the *Aguilar* ruling, arguing that *Aguilar* was no longer good law.[60] In *Agostini*, Justice O'Connor, writing for a five-to-four majority, held that *Aguilar* was no longer good law,[61] and the New York City Board of Education could comply with the Title I mandate by sending public school teachers onto the campuses of private schools.[62]

III. FACTUAL HISTORY

As part of President Johnson's Great Society program, Congress enacted Title I of the Education Act.[63] In order for a student to qualify for assistance pursuant to the Act, a student had to "reside[] within the attendance boundaries of a public school located in a low-income area," and had to be "failing, or[] at risk of failing, the State's student performance standards."[64] Title I funds could not be used to supplant regular classroom instruction, but merely to supplement instruction when needed.[65] These funds were provided to the states, which, in turn, dispersed the funds to LEAs.[66] LEAs were required to provide Title I services to secular and religious private school students as well as to public school students on an equitable basis.[67] Private schools, however, could only use Title I funds to meet students' needs and not the private schools' needs.[68] Public employees had to provide Title I services to private school children in a "secular, neutral, and nonideological"[69] fashion.[70] Moreover, Title I funds for private school children were to remain under the control of the public agency.[71] Although officials of private schools could be consulted regarding Title I services, the ultimate decision on how to use the funds rested solely in the hands of the public agency.[72]

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58. *See id.* at 426 (holding that sending public school teachers onto parochial school grounds created an "entanglement" of state and religion that violated the Establishment Clause).

59. *See Agostini*, 117 S. Ct. at 2005 (observing that additional costs incurred by New York after *Aguilar* averaged $15 million per year).

60. *See id.* at 2003.

61. *See id.* at 2017.

62. *See id.* at 2016.

63. *See supra* note 52.

64. *See Agostini*, 117 S. Ct. at 2003-04 (citing 20 U.S.C. §§ 6313(a)(2)(B), 6315(b)(1)(B)).

65. *See id.* at 2004 (citing 34 C.F.R. § 200.12(a) (1996)).

66. *See id.* at 2003 (citing 20 U.S.C. §§ 6311, 6312).

67. *See id.* at 2004 (citing 20 U.S.C. §§ 6312(c)(1)(F), 6321(a)(3)).

68. *See id.* (comparing 34 C.F.R. § 200.12(b) with 20 U.S.C. § 6314 which "allow[s] 'schoolwide' programs at public schools").

69. 20 U.S.C. § 6321(a)(2) (Supp. 1998).

70. *See Agostini*, 117 S. Ct. at 2004 (citing 20 U.S.C. § 6321(c)(2)).

71. *See id.* (citing 20 U.S.C. § 6321(c)(1)-(2)).

72. *See id.* at 2004-05 (citing 20 U.S.C. § 6321(b) and 34 C.F.R. § 200.11(b)(3)).

The NY Board first applied for Title I funds in 1966.[73] Almost immediately the dilemma arose of how to provide Title I services to private school students, thus prompting the NY Board to implement various plans.[74] The NY Board's first plan was to transport the private school students to public school campuses where Title I services were being offered after school.[75] This plan proved largely unsuccessful because of poor attendance, fatigue of teachers and students, and concern by parents for students' safety.[76]

With the failure of the first plan, an immediate need arose for another method of providing Title I services. Under the second plan, Title I services were offered on private school campuses after regular school hours.[77] This plan was the actual method of compliance that Congress intended when Title I was originally enacted.[78] However, this plan also proved largely unsuccessful.[79]

The third plan implemented by the NY Board ran into litigation before its educational effectiveness could truly be tested.[80] Under this plan, Title I services were offered on private school campuses during regular school hours.[81] Only public employees, however, could provide the Title I services.[82] Such services could be provided without deference to the wishes of the private school or the religious preferences of the public employee.[83] Numerous protective measures were instituted to ensure that there would be no inculcation of religion among the public employees providing the services: supervisors circulated amongst the private schools to check in on the public school teachers, and religious symbols were to be removed from any classroom where Title I services were provided.[84]

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73. *See id.* at 2004.

74. *See id.* (realizing that 10% of students qualifying for Title I services attended private schools and 90% of the private schools were parochial).

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.* (citing Wheeler v. Barrera, 417 U.S. 402, 422 (1974)).

79. *See id.*

80. *See id.* at 2004-05.

81. *See id.* at 2004.

82. *See id.* Public school employees that would provide Title I services on private school campuses were given the following guidelines: they were accountable only to public school supervisors; they were to select the children who qualified for Title I services and were to only provide Title I services to those students; they were to only use their materials to provide Title I services; they were not allowed to "team teach" with the private school teachers; and they could not inculcate religion into their teaching nor could they participate in any of the private schools' religious activities. *See id.*

83. *See id.* at 2004.

84. *See id.* at 2004-05.

In 1978, six taxpayers brought suit to challenge the constitutionality of this third program.[85] In *Aguilar v. Felton*, these six taxpayers sued to enjoin the use of Title I funds to pay the salaries of public school teachers who provided remedial instruction to parochial school students on the campuses of the parochial schools.[86] The Court applied the *Lemon* Test to determine whether the Establishment Clause had been violated.[87] The *Aguilar* Court held that use of Title I funds in this manner violated the Establishment Clause and affirmed the lower court's issuance of an injunction.[88] The Court reasoned that the use of funds in this manner constituted excessive entanglement, thereby failing the third prong of the *Lemon* Test.[89]

With the third plan uprooted by the Court, the NY Board encountered substantial difficulties in complying with the *Aguilar* injunction.[90] These difficulties led to the *Agostini* litigation, where the Court was urged to reconsider its twelve-year-old *Aguilar* ruling.[91]

IV. ANALYSIS OF THE OPINIONS

A. Justice O'Connor's Majority Opinion

Justice O'Connor began the majority opinion with an examination of Title I and a history of the difficulties encountered by the City of New York in implementing a Title I program.[92] Title I required that an LEA, receiving Title I funds, provide remedial educational services to *all* school children,[93] including parochial school students.[94] The NY Board found it difficult to comply with the requirement because Title I services in private schools were much more restricted as compared to the same services provided in public schools.[95] Under the restrictions, New

85. *See* Aguilar v. Felton, 473 U.S. 402, 407 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

86. *See id.* at 404-06.

87. *See id.* at 412-13.

88. *See id.* at 414.

89. *See id.* at 413; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (setting forth a three-part test to determine Establishment Clause violations).

90. *See Agostini*, 117 S. Ct. at 2005.

91. *See id.* at 2005-06.

92. *See id.* at 2003-06.

93. *See* 20 U.S.C. §§ 6301-6303 (1994) (stating the rules applied in furthering disadvantaged children); S. REP. NO. 89-146, at 5 (1965).

94. *See Agostini*, 117 S. Ct. at 2004.

95. *See id.* Justice O'Connor succinctly outlined these restrictions at the beginning of the majority opinion:

> Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. Compare 34 C.F.R. § 200.12(b) with 20 U.S.C. § 6314 (allowing "school-wide" programs at public schools). In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons

York implemented various programs to provide remedial services to private school children with varying results.[96] The final attempted program led to litigation demanding injunctive relief and claiming that the program violated the Constitution's Establishment Clause.[97] This litigation culminated in a divided Court holding the program unconstitutional and issuing a permanent injunction.[98] After the injunction, the NY Board encountered even greater difficulties in implementing an effective Title I program.[99] In 1995, because of these newfound difficulties, the NY Board and a group of parents of parochial school students[100] filed for relief from the *Aguilar* injunction under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)").[101]

After outlining the history of the case, Justice O'Connor discussed whether Rule 60(b)[102] entitled the Board to relief from the *Aguilar* injunction.[103] Justice O'Connor noted that in *Rufo v. Inmates of Suffolk County Jail*,[104] the Court found

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independent of the private school and any religious institution. The Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school.

Id. (citations omitted) (quoting 20 U.S.C. § 6321(a)(2) and 34 C.F.R. § 200.12(a) (1996)).

96. *See id.* at 2004-05. The first two of these programs involved transporting children to public schools to receive after school Title I instruction and providing after school Title I services on private school campuses. *See id.* at 2004. Both of these programs proved largely unsuccessful, so the NY Board implemented a plan to provide the services on private school campuses during school hours. *See id.* It was this third plan that was evaluated in *Aguilar*. *See id.*

97. *See id.* at 2005; *see also* Aguilar v. Felton, 473 U.S. 402, 407 (1985).

98. *See Agostini*, 117 S. Ct. at 2005. In *Aguilar v. Felton*, the Court held by a 5-4 ruling that the "Title I program necessitated an 'excessive entanglement of church and state in the administration of [Title I] benefits.'" *See id.* (quoting *Aguilar*, 473 U.S. at 414). Subsequently, the NY Board was permanently enjoined "from using funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City." *See id.* (citing App. to Pet. for Cert., No. 96-553 at A25-26).

99. *See id.* In complying with *Aguilar* and its ensuing injunction, the NY Board incurred additional costs of approximately $15 million dollars annually. *See id.* These costs were incurred by the NY Board in "providing computer-aided instruction, leasing sites and mobile instruction units [(vans)], and transporting students to those sites." *See id.*

100. Hereinafter referred to collectively as the "Board."

101. *See Agostini*, 117 S. Ct. at 2006.

102. Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) 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).

103. *See Agostini*, 117 S. Ct. at 2006-07.

104. 502 U.S. 367 (1992).

a Rule 60(b) motion to be a proper vehicle to seek relief from an injunction when the moving party "can show 'a significant change either in factual conditions or in law.'"[105] The Board asserted that, under Rule 60(b)(5), changes in either the factual conditions or the law entitled them to relief from the *Aguilar* injunction.[106] First, the Board contended that the added costs of complying with the injunction constituted a significant factual change.[107] Second, the Board claimed that two legal developments constituted a significant change in law: (1) a majority of the justices believed that *Aguilar* should be overturned,[108] and (2) subsequent Establishment Clause decisions had, in effect, overturned *Aguilar*.[109] Justice O'Connor concluded that the added costs did not constitute a factual change under *Rufo* because the Board knew of the additional costs at the time *Aguilar* was decided.[110] Furthermore, Justice O'Connor concluded that the assertion of a majority of the justices that *Aguilar* should be overturned did not constitute a significant legal change that would afford the Board grounds for Rule 60(b) relief from the *Aguilar* injunction.[111] Thus, the only hope for relief was to show that subsequent Supreme Court decisions had, in effect, rendered *Aguilar* no longer good law.[112]

In the next section of the majority opinion, Justice O'Connor examined whether *Aguilar* had been undermined by subsequent Establishment Clause decisions.[113] In deciding this issue, Justice O'Connor examined the rationale of *Aguilar* and its companion case, *School District of Grand Rapids v. Ball*.[114]

In *Ball*, the Court evaluated a Michigan school district's Shared Time program that provided remedial instruction to students in private schools.[115] In evaluating the Shared Time program, the Court applied the three-pronged *Lemon* Test.[116] The *Ball* Court held that the Shared Time program failed the second prong because it had the effect of advancing religion.[117] The Court reasoned that "teachers--even

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105. *See Agostini*, 117 S. Ct. at 2006 (quoting *Rufo*, 502 U.S. at 384).

106. *See id.*

107. *See id.*

108. *See id.* at 2006-07 (citing Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994)).

109. *See id.* at 2007 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); and Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986)).

110. *See Agostini*, 117 S. Ct. at 2007.

111. *See id.*

112. *See id.*

113. *See id.* at 2008-17.

114. 473 U.S. 373 (1985), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

115. *See id.* at 375-76.

116. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). For a program to survive a constitutional challenge under the Establishment Clause through application of the *Lemon* Test, the program must have a secular purpose, a primarily secular effect (i.e., an effect that does not "advance" nor "inhibit" religion), and the program must not lead to "excessive government entanglement with religion." *See id.*

117. *See Ball*, 473 U.S. at 385.

those who were not employed by the private schools--might 'subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught],'" and this would impermissibly advance religion.[118] The *Ball* Court also found that the Shared Time program failed *Lemon's* second prong on two other grounds. First, the presence of public school teachers on parochial school campuses created a perception of a symbolic church and state union.[119] Second, the Court found that the financing of the program subsidized the parochial school's religious mission.[120] Because the Shared Time program could not satisfy the *Lemon* Test, it was found unconstitutional.[121]

In *Aguilar v. Felton*,[122] the Court evaluated a Title I program similar to the Shared Time program in *Ball* with the exception that, in *Aguilar*, the Board monitored the religious content of the classes conducted with Title I public funds in private schools.[123] The *Aguilar* Court concluded that the level of monitoring necessary to ensure that *Lemon*'s secular effect prong was satisfied would itself constitute excessive entanglement, thus failing *Lemon's* excessive entanglement prong.[124]

Justice O'Connor concluded her examination of *Ball* and *Aguilar* by outlining the assumptions upon which the decisions were made.[125] Justice O'Connor then delineated how the Court's subsequent decisions had undermined these assumptions.[126] Justice O'Connor concluded that since *Ball* and *Aguilar*, there has been a change in the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect."[127] This conclusion was based primarily on two post-*Aguilar* Supreme Court decisions.

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118. *See Agostini*, 117 S. Ct. at 2008 (alterations in original) (quoting *Ball*, 473 U.S. at 388).

119. *See Ball*, 473 U.S. at 391.

120. *See id.* at 385; *see also Agostini*, 117 S. Ct. at 2009.

121. *See Ball*, 473 U.S. at 397.

122. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

123. *See id.* at 409.

124. *See id.*; *see also Agostini*, 117 S. Ct. at 2009 (citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) and Meek v. Pittenger, 421 U.S. 349, 370 (1975)).

125. *Ball* was based on the first three assumptions, and *Aguilar* added the fourth assumption:

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

Agostini, 117 S. Ct. at 2010.

126. *See id.* at 2010-16.

127. *See id.* at 2010.

First, Justice O'Connor noted that the Court in *Zobrest v. Catalina Foothills School District*[128] "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[129] In *Zobrest*, a deaf student attempted to bring his state-employed sign-interpreter onto the campus of a Roman Catholic High School to interpret lectures.[130] The *Zobrest* Court held that this practice was not a constitutional violation.[131] Justice O'Connor stated that in *Zobrest* "[w]e refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by 'add[ing] to [or] subtract[ing] from' the lectures translated."[132] For this reason, Justice O'Connor concluded that "*Zobrest* therefore expressly rejected the notion--relied on in *Ball* and *Aguilar*–that, solely because of the presence on private school property, a public employee will be presumed to inculcate religion in the students."[133] Furthermore, Justice O'Connor noted that *Zobrest* rejected the assumption that having a state employee on the campus of a private school created a "symbolic link" between church and state.[134] Thus, *Zobrest* created a significant change in the law.[135]

Second, Justice O'Connor noted that in *Witters v. Washington Department of Services for the Blind*,[136] the Court "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid."[137] In *Witters*, a blind person attempted to use a state grant to obtain religious training from a Christian college.[138] The *Witters* Court held that the Establishment Clause did not prevent the state from awarding the grant to the student, even though the state knew it would be used to obtain religious training from a religious educational institution.[139] The Court reasoned that the grant money actually went to the student, who in turn made the individual choice to use the grant money to acquire training from a religious institution.[140]

Applying the reasoning in *Zobrest* and *Witters* to the Shared Time program in *Ball* and the Title I program in *Aguilar*, Justice O'Connor concluded that these programs would not, "as a matter of law, be deemed to have the effect of advancing

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128. 509 U.S. 1 (1993).
129. *See Agostini*, 117 S. Ct. at 2010.
130. *See Zobrest*, 509 U.S. at 4.
131. *See id.* at 13.
132. *See Agostini*, 117 S. Ct. at 2010-11 (alterations in original) (quoting *Zobrest*, 509 U.S. at 13).
133. *See id.* at 2011.
134. *See id.*
135. *See id.*
136. 474 U.S. 481 (1986).
137. *See Agostini*, 117 S. Ct. at 2011; *see Witters*, 474 U.S. at 487.
138. *See Witters*, 474 U.S. at 483.
139. *See id.* at 486-87.
140. *See id.* at 487.

religion through indoctrination."[141] Justice O'Connor then examined the new criteria established by *Zobrest* and *Witters* to be used in ascertaining whether a program impermissibly advances religion.[142] Justice O'Connor concluded that *Zobrest* and *Witters* stand for the proposition that in determining whether a program has an impermissible effect of advancing religion, the Court should first determine if the aid creates a "financial incentive to undertake religious indoctrination,"[143] and second, determine whether "the aid 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."[144] Justice O'Connor then applied these criteria to the Title I program in New York City and concluded that the program did not create an incentive to the beneficiaries to change religious beliefs nor was it allocated on a basis that favored or disfavored religion.[145] Thus, New York's program did not advance religion through indoctrination in violation of the Establishment Clause and *Lemon*'s second prong.[146]

Next, Justice O'Connor examined *Aguilar's* conclusion that monitoring of the Title I program constituted excessive entanglement between church and state, a violation of *Lemon*'s third prong.[147] Justice O'Connor asserted that the grounds relied on in *Aguilar* did not constitute excessive entanglement.[148] However, *Zobrest* nullified the *Aguilar* presumption that public employees will inculcate religion merely by being on a parochial school campus.[149] Furthermore, the reasoning that the Title I program would require administrative cooperation and might lead to political divisiveness was not enough to amount to *excessive* entanglement.[150] Thus, Justice O'Connor concluded that New York's Title I program did not violate any of the criteria used in evaluating Establishment Clause

141. *See Agostini*, 117 S. Ct. at 2012.
142. *See id.* at 2014.
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*; *see also* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (holding that a statute's "principal or primary effect must be one that neither advances nor inhibits religion").
147. *See Agostini*, 117 S. Ct. at 2014-16.
148. *See id.* at 2015. Justice O'Connor reiterated that *Aguilar*'s excessive entanglement finding was based on three grounds: "(i) the program would require 'pervasive monitoring by public authorities' to ensure that Title I employees did not inculcate religion; (ii) the program required 'administrative cooperation' between the Board and parochial schools; and (iii) the program might increase the dangers of 'political divisiveness.'" *See id.* (quoting Aguilar v. Felton, 473 U.S. 402, 413-14 (1985)).
149. *See id.* at 2016.
150. *See id.* at 2015.

cases.[151]

Next, Justice O'Connor addressed the issue of stare decisis, concluding that the doctrine did not prevent the Court from recognizing a change in the law.[152] Justice O'Connor reasoned that where there has been a significant change in law, stare decisis does not prevent the Court from overturning a previous ruling.[153] Thus, Justice O'Connor reasoned, because *Zobrest* and *Witters* significantly changed the law since the *Aguilar* decision, the Court was permitted to overturn *Aguilar*.[154]

Finally, Justice O'Connor concluded that the Establishment Clause law had significantly changed since the *Aguilar* decision.[155] Thus, a motion for relief from the *Aguilar* decision and its ensuing injunction pursuant to Rule 60(b) was appropriate.[156] However, Justice O'Connor made clear that even where a precedent appears to rely on law that has significantly changed, the Court of Appeals should, nevertheless, rely on the controlling precedent and leave it to the Supreme Court to overrule the prior decision.[157]

B. Justice Souter's Dissenting Opinion

Justice Souter, joined by Justice Stevens and Justice Ginsburg, and Justice Breyer as to Part II, authored a very critical dissenting opinion.[158] Justice Souter began with an examination of the Board's use of Rule 60(b) to seek rehearing of the twelve-year-old *Aguilar* ruling.[159] Adopting the reasoning of Justice Ginsburg,[160] Justice Souter concluded that the use of Rule 60(b) in this manner was erroneous.[161]

Next, Justice Souter analyzed the Court's decisions in *Aguilar* and *Ball*.[162] Justice Souter reiterated that in *Aguilar* and *Ball*, the Court held that there was a violation of the Establishment Clause where public school teachers provided services on the campuses of parochial schools during school hours.[163] Unlike the

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151. *See id.* at 2016. Justice O'Connor stated, "we have looked to 'the character and purposes of the institutions that are benefit[t]ed, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.' Similarly, we have assessed a law's 'effect' by examining the character of the institutions benefit[t]ed." *Id.* at 2015 (citations omitted) (quoting *Lemon*, 403 U.S. at 615).

152. *See id.* at 2016.

153. *See id.*

154. *See id.* at 2016-17.

155. *See id.* at 2017.

156. *See id.*

157. *See id.*

158. *See id.* at 2019-26 (Souter, J., dissenting).

159. *See id.* at 2019 (Souter, J., dissenting).

160. *See id.* at 2026-28 (Ginsburg, J., dissenting); *see also infra* notes 191-201 and accompanying text.

161. *See id.* at 2019 (Souter, J., dissenting).

162. *See id.* at 2019-22 (Souter, J., dissenting).

163. *See id.* at 2019 (Souter, J., dissenting).

majority, who believed *Aguilar* was wrongly decided and no longer good law, Justice Souter asserted that "*Aguilar* was a correct and sensible decision, and my only reservation about its opinion is that the emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence."[164] These tenets, according to Justice Souter, forbid government from directly subsidizing religion or acting in a way that may be viewed as endorsing religion.[165] Justice Souter stated that these two tenets were violated in *Aguilar* and *Ball*.[166] For this reason, the programs evaluated in *Aguilar* and *Ball* were correctly found to be in violation of the Establishment Clause.[167] Although programs providing Title I services to parochial school students off campus were not at issue in *Agostini* or *Aguilar*, Justice Souter concluded that these programs would be less likely to subsidize religion in violation of the Establishment Clause.[168]

After arguing that *Aguilar* and *Ball* were correctly decided, Justice Souter turned to the majority's contention that *Aguilar* and the part of *Ball* addressing the Shared Time program had been effectively overruled by subsequent Supreme Court decisions.[169] Justice Souter reasoned that the majority's reliance on *Zobrest v. Catalina Foothills School District*[170] was inappropriate because *Zobrest* was factually distinguishable from both *Aguilar* and *Ball*.[171] For this reason, Souter argued that it was impermissible for the majority to use *Zobrest* to support the conclusion that the main presumption erected by *Ball* and *Meek* had been abandoned.[172] In *Zobrest*, the aid of a sign language interpreter was provided to the student, whereas in *Aguilar* and *Ball*, the aid was provided directly to the

164. *See id.* at 2020 (Souter, J., dissenting). *But see id.* at 2016 (holding that *Aguilar* and *Ball* were no longer good law).

165. *See id.* at 2020 (Souter, J., dissenting).

166. *See id.* at 2021 (Souter, J., dissenting). According to Souter, the aid in *Ball* and *Aguilar* directly subsidized religion because it "flowed directly to the [religious] schools in the form of classes and programs." *See id.* (Souter, J., dissenting). Furthermore, Justice Souter reasoned that placing public school teachers and private school teachers on private school campuses could reasonably be viewed as government endorsement of religion. *See id.* at 2022 (Souter, J., dissenting).

167. *See id.* at 2021 (Souter, J., dissenting).

168. *See id.* at 2022 (Souter, J., dissenting).

169. *See id.* at 2022-25 (Souter, J., dissenting).

170. 509 U.S. 1 (1993).

171. *See Agostini*, 117 S. Ct. at 2022 (Souter, J., dissenting).

172. *See id.* (Souter, J., dissenting). The presumption was that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *See id.* at 2010. Justice Souter responded, "*Zobrest* . . . is no such sanction for overruling *Aguilar* or any portion of *Ball*." *Id.* at 2023 (Souter, J., dissenting).

schools.[173] Justice Souter concluded that the *Zobrest* Court held that a public employee's presence on a parochial school campus does not violate the Establishment Clause only when the circumstances match those in *Zobrest*.[174] Justice Souter asserted that the majority's finding that a public employee on the campus of a religious school will not inculcate religion cannot rely on *Zobrest* and, thus, this finding itself creates "fresh law."[175] As to the issue of the "symbolic link" created by having public employees on private school campuses, Justice Souter reasoned that:

> *Zobrest* did not, implicitly or otherwise, repudiate the view that the involvement of public teachers in the instruction provided within sectarian schools looks like a partnership or union and implies approval of the sectarian aim. On the subject of symbolic unions and the strength of their implications, the lesson of *Zobrest* is merely less is less.[176]

Thus, Justice Souter argued, the majority's conclusion that there had been a significant change in law, entitling the Board to relief from the *Aguilar* decision under Rule 60(b), was inappropriate because *Zobrest* did not have the capacity to change a law to which it did not apply.[177]

Justice Souter then took issue with the majority's treatment of the second assumption upon which *Ball* was decided: "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making."[178] Justice Souter concluded that the majority misused *Witters v. Washington Department of Services for the Blind*[179] and *Zobrest* to hold that this rule had been abandoned.[180] In *Witters*, as in *Zobrest*, the aid was provided to an individual student who in turn decided where to use the aid.[181] As such, the aid was not a direct aid to religion; whereas the aid in both *Ball* and *Aguilar* went directly to the religious educational institution.[182] Justice Souter also disagreed with the majority's contention that *Aguilar* and *Ball* did not adequately consider that "aid allocated under neutral, secular criteria is less likely to have the effect of advancing

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173. *See id.* (Souter, J., dissenting).
174. *See id.* (Souter, J., dissenting). In her majority opinion, Justice O'Connor took direct issue with this contention: "it was *Zobrest*--and not this case--that created 'fresh law.' Our refusal to limit *Zobrest* to its facts despite its rationale does not, in our view, amount to a 'misreading' of precedent." *See id.* at 2011.
175. *See id.* at 2023 (Souter, J., dissenting).
176. *Id.* at 2023 (Souter, J., dissenting).
177. *See id.* at 2023 (Souter, J., dissenting).
178. *See id.* at 2010.
179. 474 U.S. 481 (1986).
180. *See Agostini*, 117 S. Ct. at 2023-24 (Souter, J., dissenting).
181. *See id.* at 2024 (Souter, J., dissenting).
182. *See id.* (Souter, J., dissenting).

religion."[183] Justice Souter further reasoned that "[i]f a scheme of government aid results in support for religion in some substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless or the holdings in *Aguilar* and *Ball* inapposite."[184] Thus, Justice Souter concluded that even where aid is provided on a neutral basis, it may still run afoul of the Establishment Clause.[185]

Justice Souter concluded his opinion with an examination of the issue of precedent.[186] Justice Souter was critical of the majority's view that stare decisis was not an obstacle because *Aguilar* and *Ball* were limited by *Witters* and *Zobrest* "to the point of abandoned doctrine."[187] Justice Souter asserted that since the *Aguilar* decision, the law had not been abandoned and had, in fact, remained unchanged.[188] Justice Souter further asserted that since *Aguilar*, the facts surrounding the Title I program in New York had remained unchanged.[189] Because the law and the facts had remained unchanged, Justice Souter concluded, the doctrine of stare decisis required that the *Aguilar* decision be left intact.[190]

C. *Justice Ginsburg's Dissenting Opinion*

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, wrote a separate dissenting opinion to examine the use of Rule 60(b) to rehear the *Aguilar* issue.[191] Justice Ginsburg was suspicious of this new use of Rule 60(b)[192] to seek

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183. *See id.* at 2025 (Souter, J., dissenting).
184. *Id.* (Souter, J., dissenting).
185. *See id.* (Souter, J., dissenting).
186. *See id.* at 2025-26 (Souter, J., dissenting).
187. *See id.* at 2025 (Souter, J., dissenting).
188. *See id.* (Souter, J., dissenting). Justice Souter reasoned:

> [N]o case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between direct and substantial aid and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of a portion of a religious school's teaching responsibility is not direct subsidization.

Id. (Souter, J., dissenting).
189. *See id.* (Souter, J., dissenting).
190. *See id.* at 2025-26 (Souter, J., dissenting).
191. *See id.* at 2026 (Ginsburg, J., dissenting).
192. At oral argument, Justice Ginsburg questioned Acting Solicitor General Walter Dellinger about the use of Rule 60(b) as a vehicle to seek rehearing of the *Aguilar* issue:

> Q: I do not know of any use, ever, of 60(b) such as we see here, essentially to gain rehearing by this Court, so if you could spend just a couple of moments–
> A: [W]e do not know of another instance in which Rule 60(b) has been used in this way.

rehearing, and would have limited the Board to the use of United States Supreme Court Rule 44.[193] Justice Ginsburg proceeded to outline the appropriate use of Rule 60(b).[194] Rule 60(b) is a tool to be used by trial courts where a party is seeking modification of a final judgment where there has been either a change in the law or in the facts since the final judgment.[195] Rule 60(b) motions are reviewed by appellate courts only for abuse of discretion.[196] Furthermore, Justice Ginsburg stated that "[a]s we recognized in our unanimous opinion in *Browder*, 'an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.'"[197] Thus, Justice Ginsburg concluded that it was inappropriate for the Court to hear "relitigation of the legal or factual claims underlying the original judgment" by use of a Rule 60(b) motion.[198] Justice Ginsburg also criticized the majority's contention that it was not deciding whether *Aguilar should be* overruled, but whether it had been frustrated to the extent that it was no longer good law.[199]

Justice Ginsburg also argued that *Agostini* was not the appropriate vehicle to decide whether the Court had abandoned the jurisprudential grounds upon which *Aguilar* was based.[200] She would have preferred to wait for another case to make its way to the Supreme Court, being appealed on its merits rather than relying on Rule 60(b).[201]

See Oral Argument at 11, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552 and 96-553).

193. *See Agostini*, 117 S. Ct. at 2026 (Ginsburg, J., dissenting). United States Supreme Court Rule 44 provides, in relevant part:

> 1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. . . . The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay. . . . A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

SUP. CT. R. 44.

194. *See Agostini*, 117 S. Ct. at 2026-27 (Ginsburg, J., dissenting).

195. *See id.* (Ginsburg, J., dissenting) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S 367, 384 (1992)).

196. *See id.* at 2027 (Ginsburg, J., dissenting).

197. *Id.* (Ginsburg, J., dissenting) (quoting Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257, 263 n.7 (1978)).

198. *See id.* at 2027 (Ginsburg, J., dissenting). It was for this reason that Justice Ginsburg determined that the only issue the Court should have heard regarding the modification of the *Aguilar* injunction should have been whether "the District Court abuse[d] its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction." *See id.* (Ginsburg, J., dissenting).

199. *See id.* at 2028 (Ginsburg, J., dissenting). Justice Ginsburg reasoned that "nothing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law." *Id.* (Ginsburg, J., dissenting).

200. *See id.* at 2028 (Ginsburg, J., dissenting).

201. *See id.* at 2027-28 (Ginsburg, J., dissenting). Justice Ginsburg said that it would be more appropriate to wait for Committee for Public Education & Religious Liberty v. Secretary, U.S. Department of Education, 942 F. Supp. 842 (E.D.N.Y. 1996) (PEARL II), or Helms v. Cody, 856 F. Supp. 1102 (E.D. La. 1994), to make their way on appeal to the Supreme Court. *See id.* at 2028.

V. IMPACT

A. Immediate Impact: Public School Teachers in Parochial Schools

Effective immediately, upon the Court's rendering of the *Agostini* decision, public school teachers were permitted to provide Title I services on parochial school campuses.[202] In July 1997, the United States Department of Education set out guidelines for how LEAs ought to relate to the *Agostini* decision.[203] These guidelines, published in a question and answer format,[204] addressed some important questions and gave specific recommendations to LEAs. The Department of Education, under these guidelines, strongly urged schools to implement the safeguards that New York used, even though the *Agostini* Court did not expressly rule that this was necessary.[205] The Department further urged teachers to provide Title I services in areas free of religious symbols.[206] If the private school chose not to make space available for Title I services, the Title I services must be provided at another location.[207] Furthermore, no school-wide programs can be offered in private schools.[208] As to the scope of *Agostini*, the guidelines stated, "[T]he implication of the Court's ruling is that there is no constitutional bar to public school employees providing educational services in private schools under other

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Justice Ginsburg reasoned that waiting would be the appropriate course to take because "maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non-agenda-setting character of this Court, and avoidance of invitations to reconsider old cases based on 'speculat[ions] on chances from changes in [the Court's membership].'" *See id.* (Ginsburg, J., dissenting) (quoting Illinois v. Illinois Cent. R.R. Co., 184 U.S. 77, 92 (1902)). Justice Ginsburg also noted that the only remaining member of the *Aguilar* majority was Justice Stevens. *See id.* at 2026 (Ginsburg, J., dissenting).

202. *See Agostini*, 117 S. Ct. 2016 (overturning the *Aguilar* decision that prohibited public school teachers from providing Title I services on parochial school campuses).

203. *See* U.S. Department of Education, *Guidance on the Supreme Court's Decision in* Agostini v. Felton *and Title I (Part A) of the Elementary and Secondary Education Act* (visited Sept. 30, 1998) <http://www.ed.gov/legislation/ESEA/feltguid.html>.

204. The guidelines, in the format of twenty-five questions and answers, addressed the following issues that would affect LEAs after *Agostini*: locations and types of services, contacts and activities in private schools, use and disposal of mobile vans, capital expense funds, "off-the-top" requirements, school-wide programs, new private school children, and other federal programs. *See id.*

205. *See id.* at Question 3.

206. *See id.* at Question 9.

207. *See id.* at Question 12.

208. *See id.* at Question 23 (reasoning that the private school students and not the private schools are entitled to Title I services).

Federal programs under similar circumstances."[209] The guidelines also addressed *Agostini*'s implication to programs in other states.[210]

B. Future Impact

Perhaps the most significant future impact of *Agostini* will be the role it plays in the ongoing debate over private school vouchers.[211] Vouchers allow parents to pay parochial school tuition with public money, affording more parents the choice of whether to send their children to private schools.[212] These programs are seen by some as the most controversial educational issue regarding church-state relations.[213] Because courts have often been hostile to the use of public funds to finance private education,[214] voucher proponents faced an uphill battle when arguing that voucher programs did not offend the Establishment Clause. However, with *Agostini's* relaxing of the *Lemon* Test, proponents of voucher programs have new hope that the programs will be found not to be in conflict with the Establishment Clause.[215] These proponents urge that vouchers can pass the new *Lemon* scrutiny.[216] It should be noted that the *Agostini* Court relied primarily on the same two cases to uphold the constitutionality of New York's Title I program that voucher proponents have

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209. *See id.* at Question 25.

210. *See, e.g.*, Mary Maushard, *Ruling Helps Parochial Pupils in Md*, BALTIMORE SUN, June 27, 1997, at 1B (discussing the impact of the *Agostini* ruling for Maryland schools); David G. Savage, *Justices Lower a Church-State Barrier; Court: Action Reverses 1985 Decision that Barred Teachers Paid by Taxpayers from Tutoring Pupils Enrolled in Parochial Schools on School Grounds*, L.A. TIMES, June 24, 1997, at A10 (discussing the impact of the *Agostini* ruling for the Los Angeles Unified School District, California's largest school system).

211. *See* Ball, *supra* note 6, at 261-62; *see also* Clint Bolick, *Pacific Vouchers: If They Work Here . . .*, WALL ST. J., June 10, 1997, at A18 (examining a school choice program in the Mariana Islands).

212. *See* Frank R. Kemerer, *The Constitutionality of School Vouchers*, 101 ED. L. REP. 17, 17 (1995).

213. *See* Edward Felsenthal, *High Court Rules Public Teachers Can Work in Religious Schools*, WALL ST. J., June 24, 1997, at B8.

214. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (holding impermissible a law allowing tax credits to parents with children attending nonpublic schools); Sloan v. Lemon, 413 U.S. 825, 834 (1973) (holding tuition reimbursements to parents of parochial school children to be a violation of the Establishment Clause). *But see* Mueller v. Allen, 463 U.S. 388, 403-04 (1983) (upholding a law allowing for a state income tax deduction for amounts paid for tuition, books, and transportation of school children).

215. *See, e.g.*, Art Moore, *Justices Void Ruling on Remedial Teachers*, CHRISTIANITY TODAY, Aug. 11, 1997, at 53; *see also* Peter Applebome, *Parochial Schools Ruling Heartens Voucher Backers: Court Seen as Receptive to School Aid Plan*, N.Y. TIMES, June 25, 1997, at B5; Linda Greenhouse, *Court Eases Curb on Aid to Schools with Church Ties: Upends Precedent*, N.Y. TIMES, June 24, 1997, at A1; Tamara Henry and Lori Sharn, *Schools Decision Could Affect Rulings on Vouchers*, USA TODAY, June 24, 1997, at 3A.

216. *See* Michael E. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs, the Camel's Nose of State Labor-Law Application to their Relations with Lay Faculty Members, and the First Amendment's Tether*, 6 CORNELL J.L. & PUB. POL'Y 553, 600-01 (1997).

been relying on to argue the constitutionality of voucher programs.[217]

Although the Clinton Administration strongly supported the decision reached by the *Agostini* Court,[218] it is unlikely that voucher proponents will find such support in their debate. Richard W. Riley, U.S. Secretary of Education, has outlined the position of the Administration in two pointed speeches.[219] In a speech before the National Press Club in Washington, D.C., Riley stated, "Vouchers are wrong.... Vouchers undermine a 200-year American commitment to the common school."[220] At the National School Boards Association 24th Annual Federal Relations Conference in Washington, D.C., Riley asserted, "Vouchers provide no accountability, and they would drain money from public schools at the worst possible time--when our classrooms are bulging with record numbers of students .... Vouchers are a bad idea."[221]

But voucher proponents will likely find a political ally in the Republican National Committee ("RNC"). In an RNC Press Release, Chairman Jim Nicholson stated, "I challenge Bill Clinton to open the school doors of America, to help parents choose the best schools for their children .... [I]t's time to achieve a civil rights victory for 1997 by supporting school choice."[222] On October 10, 1997, the Republican-controlled House of Representatives passed a bill that would allow for the institution of a voucher program in the District of Columbia.[223] Thus, while the Clinton Administration is not a likely ally to voucher proponents, the Republican controlled legislature would likely be more supportive.[224] And the only branch of government that has yet to take a stand on the voucher issue--the judiciary --seems to be leaning toward approval.[225]

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217. *See* Agostini v. Felton, 117 S. Ct. 1997, 2014-16 (1997) (relying on *Witters* and *Zobrest* to find that New York's Title I program did not run afoul of the Establishment Clause); *see also* Kemerer, *supra* note 212, at 21-23 (observing that *Witters* and *Zobrest* make it likely that voucher programs will be found constitutional).

218. *See* Brief for Petitioner at *9-*14, 1997 WL 97077, Agostini v. Felton, 117 S. Ct. 1997 (1997) (No. 96-552, 96-553).

219. *See* Richard W. Riley, *What Really Matters in American Education, Remarks at the National Press Club (Sept. 23, 1997)* (visited Sept. 30, 1998) <http://www.ed.gov/Speeches/09-1997/970923.html> [hereinafter *What Really Matters in American Education*]; Richard W. Riley, *Remarks at the National School Boards Association 24th Annual Federal Relations Network Conference (Jan. 27, 1997)* (visited Sept. 29, 1998) <http://www.ed.gov/Speeches/01-1997/nsba.html> [hereinafter *Remarks at the National School Boards Association*].

220. *What Really Matters in American Education, supra* note 219.

221. *Remarks at the National School Boards Association, supra* note 219.

222. *RNC News Release (Sept. 25, 1997)* (visited Dec. 16, 1997) <http://www.rnc.org>.

223. *See* H.R. 2607, 105th Cong. (1997).

224. *See RNC News Release, supra* note 222.

225. *See* Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997) (extending *Zobrest* and *Witters* to find that government aid that goes directly to a parochial school does not offend the Establishment Clause).

There are currently voucher programs working their way through court systems that may soon provide the High Court with the opportunity to take a stand on the constitutionality of vouchers.[226]

In *Campbell v. Manchester Board of School Directors*,[227] a parent who was forced by a compulsory education statute to send his son to a parochial school because his town did not have a public school, requested reimbursement from the state for this expense.[228] The Vermont Supreme Court held that such a reimbursement program did not violate the Establishment Clause.[229] Relying on *Mueller v. Allen*[230] and *Witters v. Washington Department of Services for the Blind*,[231] the *Campbell* court concluded that the Vermont reimbursement program satisfied the *Lemon* Test because it had a secular effect, did not advance religion, and Vermont had taken adequate measures to limit entanglement into religion.[232]

In 1995, the Milwaukee school system extended a voucher program to parochial schools.[233] The Wisconsin Supreme Court was unable to reach a decision as to the constitutionality of the program (the justices split 3-3) and was forced to leave it to the lower courts to resolve the issue.[234] However, the Wisconsin Supreme Court subsequently ruled, in *Jackson v. Benson*, that the school choice program did not violate the Establishment Clause or the Wisconsin Constitution.[235] Thus, school choice programs are currently constitutional in Wisconsin.

A voucher program in Cleveland has also encountered judicial challenges, but the issue is far from being permanently resolved.[236] In *Simmons-Harris v. Goff*, a unanimous Ohio Court of Appeals struck down Cleveland's one-year-old voucher program.[237] The court reasoned that the program violated both state and federal

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226. The Supreme Court has yet to hear a case involving the constitutionality of vouchers. Conversely, the controversy is in full swing in state courts. *See, e.g.*, Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. 1997) (funding scholarship program violates the Establishment Clause); Campbell v. Manchester Bd. of Sch. Dirs., 641 A.2d 352 (Vt. 1994).

227. 641 A.2d 352 (Vt. 1994).

228. *See id.* at 354.

229. *See id.* at 361.

230. 463 U.S. 388 (1983).

231. 474 U.S. 481 (1986).

232. *See Campbell*, 641 A.2d at 358-61.

233. *See* Jackson v. Benson, 570 N.W.2d 407, 411 (Wis. Ct. App. 1997), *rev'd*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

234. *See* Wisconsin *ex rel.* Thompson v. Jackson, 546 N.W.2d 140, 142 (Wis. 1996); *see also* Nat Hentoff, *Public Funds for Religious Schools? Fail Kids Want Vouchers*, VILLAGE VOICE, Aug. 19, 1997, at 26.

235. *See* Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998); *see also* WIS. CONST. art 1, § 18. Although this case would have allowed the United States Supreme Court to resolve the voucher issue, the Court declined the opportunity. *See* Jackson v. Benson, 119 S. Ct. 466 (1998) (denying certiorari).

236. *See* Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. 1997).

237. *See id.* at *16.

constitutions by providing aid to religion.[238] However, the Ohio Supreme Court has stayed the Court of Appeals' decision, pending appeal.[239]

Another issue that will have to be addressed by voucher proponents involves the "application of state labor law to relations between lay faculty and religious choice schools employing them."[240] One commentator warns that although *Agostini* may increase the likelihood that a school choice or voucher program would not involve excessive entanglement, this same reasoning may prevent religious schools that participate in a school choice program "from subsequently successfully arguing that state labor-law application to them is too excessively entangling to be constitutionally permissible."[241]

C. Judicial Impact

1. The *Lemon* Test Revisited

Perhaps the most significant judicial impact of *Agostini* is the effect it has had on the *Lemon* Test.[242] The first prong of the test--secular purpose--has not been substantially altered by *Agostini*.[243] As for the second prong--secular effect--the Court asserted that mere governmental presence and neutral aid would not be enough to find a "secular effect."[244] But the Court made the most significant modification with regard to the third prong--excessive entanglement.[245] The fact that the excessive entanglement prong has been de-emphasized will have a profound impact on church-state litigation.[246] Because the Court is no longer likely to find excessive entanglement, "violations of the Establishment Clause may become as fleeting as findings of intentional discrimination under the Equal

238. *See id.* at *10.
239. *See* Simmons-Harris v. Goff, 681 N.E.2d 938 (Ohio 1997).
240. *See* Hartmann, *supra* note 216, at 601.
241. *See id.*; South Jersey Catholic Sch. Teachers Org. v. St. Theresa of the Infant Jesus Church Elem. Sch., 696 A.2d 709, 722-23 (N.J. 1997) (holding that although lay teachers had the right to organize and engage in collective bargaining, such bargaining ability was substantially limited by the First Amendment's Religion Clauses, and that collective bargaining did not violate the Establishment Clause or Free Exercise Clause).
242. *See* Hartmann, *supra* note 216, at 600-01.
243. *See* Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).
244. *See id.* at 2014.
245. *See id.* at 2016.
246. *See* Art Moore, *Justices Void Ruling on Remedial Teachers*, CHRISTIANITY TODAY, Aug. 11, 1997, at 53.

Protection Clause."[247]

It is important to recognize that the *Lemon* Test is not dead.[248] Indeed, the test has been modified, but it has not been discarded.[249] *Lemon* is still good law, although it may not be the best law.[250] *Lemon* has become a flexible tool that the Court uses when the situation is ripe.[251]

2. Federal Rule of Civil Procedure 60(b)

The *Agostini* dissenters registered great concern about the procedural mechanism involved in the case.[252] Justices Souter and Ginsburg both asserted that the merits of the *Aguilar* decision could not be reheard using a Rule 60(b) motion.[253]

Justice O'Connor responded in the majority opinion to the concerns and criticisms of the dissenters.[254] The dissenters' fear of a deluge of litigation using Rule 60(b) was unfounded, Justice O'Connor reasoned, because use of Rule 60(b) in this manner was limited to the facts of *Agostini*.[255] Justice O'Connor further

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247. *See* Bernard James, *States Prevail in First Amendment Cases*, NAT'L L.J., August 11, 1997, at B13.

248. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993); *see also* Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 882 (1993) (concluding that "*Lemon* lives, at least in spirit, at least for now."); Ira C. Lupu, Comment, *Which Old Witch?: A Comment on Professor Paulsen's Lemon Is Dead*, 43 CASE W. RES. L. REV. 883, 886 (1993) (predicting correctly that "*Lemon*'s three component requirements will survive, even if in a different form than that which prevailed in the 1970s"). *But cf.* Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 861-62 (1993) (concluding that the *Lemon* Test is dead because the Court failed to consistently apply it and the *Lemon* test has been replaced by the "coercion" test of *Lee v. Weisman*).

249. *See* James, *supra* note 247, at B13.

250. *See, e.g.*, Stark v. Independent Sch. Dist., 123 F.3d 1068, 1075 (8th Cir. 1997) (applying the relaxed standards of *Agostini* rather than the strict standards of *Lemon* in deciding an Establishment Clause issue). For the *Lemon* Test to be applied appropriately, it must be applied as interpreted and modified by *Agostini*. *See Agostini*, 117 S. Ct. at 2014-16.

251. Such use of the *Lemon* Test is not without criticism. Justice Scalia recently quipped:

> Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold the practice it forbids, we ignore it entirely . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel, 508 U.S. at 398-99 (Scalia, J., concurring) (citations omitted). Justice Scalia has also advocated the complete abandonment of the secular effect prong of the *Lemon* test. *See* Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting).

252. *See Agostini*, 117 S. Ct. at 2026-28 (Ginsburg, J., dissenting).

253. *See id.* at 2019 (Souter, J., dissenting) and 2026 (Ginsburg, J., dissenting).

254. *See id.* at 2018.

255. *See id.*

asserted that it was not necessary to wait for a "better vehicle" because this act of waiting would be unfair to the state of New York, which would be required to languish under the unjust *Aguilar* injunction in the meantime.[256]

Even with Justice O'Connor's defense of the use of Rule 60(b) in *Agostini*, an attempt to use Rule 60(b) to seek rehearing of the merits of a decision will likely fail.[257] Justice Ginsburg noted that even the majority would be unwilling to extend the use of Rule 60(b) beyond the facts outlined in *Agostini*.[258] Still, the willingness of the majority to rehear the *Aguilar* case creates uncertainty as to the proper use of Rule 60(b).[259]

VI. CONCLUSION

Establishment Clause jurisprudence has taken a sharp turn with *Agostini*'s modification of the *Lemon* Test. As a result, states will likely prevail in Establishment Clause cases where challenged statutes do not blatantly offend the Constitution.[260] School choice proponents also have a new tool to use in the on-going debate over the constitutionality of private school vouchers.[261] Although the *Agostini* Court did not address the issue of vouchers, the Court relied on the same cases to overrule *Aguilar* that school choice proponents are using to argue for the constitutionality of vouchers.[262] As for the procedural issue of the correct use of Rule 60(b) to seek rehearing of an adjudicated issue, such use will likely be inappropriate unless the facts closely parallel those of *Agostini*.[263]

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256. *See id.*
257. *See id.* at 2026 (Ginsburg, J., dissenting) (recognizing the limits of the *Agostini* holding).
258. *See id.* (Ginsburg, J., dissenting).
259. *See id.* at 2018.
260. *See supra* notes 211-17 and accompanying text.
261. *See supra* notes 211-41 and accompanying text.
262. *See supra* note 217 and accompanying text.
263. *See supra* notes 257-59 and accompanying text.