RECENT DEVELOPMENT

THE SUPREME COURT'S SHIFTING TOLERANCE FOR PUBLIC AID TO PAROCHIAL SCHOOLS AND THE IMPLICATIONS FOR EDUCATIONAL CHOICE: *Agostini v. Felton,* 117 S. Ct. 1997 (1997).

In recent years, the United States Supreme Court's Establishment Clause[1] jurisprudence regarding public aid to parochial schools has revealed an increasing willingness by the Court to uphold such aid as long as it meets certain criteria.[2] Last Term, in *Agostini v. Felton,*[3] the Court disposed of another significant obstacle to this type of aid when it expressly overruled *Aguilar v. Felton,*[4] the most prominent decision in a line of cases applying the infamous "*Lemon* test"[5] to invalidate state programs providing aid to parochial schools. In the process of abandoning *Aguilar,* the Court discarded unfounded assumptions concerning the likelihood of government-sponsored indoctrination and supposed symbolic unions between States and sectarian schools. More importantly, the *Agostini* Court eliminated the *Lemon* test's "entanglement" prong as an

1. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

2. *See, e.g.,* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding state provision of a publicly funded sign-language interpreter to a deaf student in a parochial school because the state program provided benefits neutrally to a broad class of citizens and did not distinguish between public and parochial schools); Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) (upholding use of a state-issued vocational tuition voucher at a Christian college for religious training because vouchers were made generally available without regard to the religious nature of the recipient and provided no incentive to undertake religious education).

3. 117 S. Ct. 1997 (1997).

4. 473 U.S. 402 (1985) (striking down a state program providing on-premises remedial instruction to needy parochial-school students as an "excessive entanglement" between the state and the private school).

5. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (striking down payments by Rhode Island to parochial-school teachers to supplement their instruction of secular subjects). In what has come to be known as the *Lemon* test, the decision set out three criteria by which statutes would be scrutinized under the Establishment Clause: "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. The state program at issue in *Lemon* was found to have the effect of inhibiting religion by requiring pervasive monitoring by the government of the teachers' conduct, thereby violating the "entanglement" prong of the test. *See id.* at 614.

independent criterion of establishment analysis, thus blurring the Court's primary distinction between impermissible state aid to parochial schools and permissible state aid to other religiously affiliated institutions.

Consequently, the Supreme Court's decision in *Agostini* was a victory for the equal access of religious citizens, particularly parochial-school students, to generally available government benefits. Construed most broadly, the *Agostini* decision signals the Court's willingness to uphold the constitutional validity of school-choice voucher programs that include parochial schools. At the very least, the Court's decision evidences a new tolerance for more direct forms of government aid flowing to sectarian education at the elementary and secondary levels.

Congress enacted Title I of the Elementary and Secondary Education Act of 1965[6] ("Title I"), in part, to provide remedial education and counseling to needy students at risk of failing state student performance standards.[7] Since 1966, the Board of Education of the City of New York ("the Board"), a recipient of Title I funds,[8] has sought to provide these services to eligible parochial-school students on parochial-school premises during

6. Pub. L. No. 89-10, 79 Stat. 27 (codified as modified at scattered sections of 7 U.S.C. 8 U.S.C., 10 U.S.C., 15 U.S.C., 20 U.S.C., 25 U.S.C., 29 U.S.C., 42 U.S.C. (1994), and 5 U.S.C.A. (1994 & West Supp. 1998)). Title I has been re-enacted several times, most recently in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at scattered sections of 20 U.S.C.A. (1994 & West. Supp. 1998)). The Title I provisions at issue in *Aguilar* and *Agostini* do not differ meaningfully for purposes of the latter decision; thus, the *Agostini* Court refers only to current Title I provisions. *See Agostini,* 117 S. Ct. at 2004 n.1.

7. *See* 20 U.S.C. § 6315(c)(1)(A) (1994) (requiring that funds be used to help eligible children meet state student performance standards); 20 U.S.C. § 6315(c)(1)(E)(i) (1994) (allowing funds to be used for "counseling, mentoring, and other pupil services"). An eligible student is defined as one who both resides within the attendance boundaries of a public school located in a low-income area and is at risk of failing the State's student performance standards. *See* 20 U.S.C. §§ 6313(a)(2)(B), 6315(b)(1)(B) (1994).

8. Funds provided by Title I are channeled through the States to local education agencies (LEAs). *See* 20 U.S.C. §§ 6311, 6312 (1994). LEAs are required to provide this aid to eligible students attending both public and private schools within their jurisdictions, *see* 20 U.S.C. § 6312(c)(1)(F) (1994), though only public employees or persons independent of the private schools may provide the services. *See* 20 U.S.C. §§ 6321(c)(1), (2) (1994). Title I further requires that services provided to parochial-school students be "equitable in comparison to services and other benefits for public school children," though the services must be "secular, neutral, and nonideological." 20 U.S.C. §§ 6321(a)(1)-(3) (1994); *see also* 34 C.F.R. §§ 200.10(a), 200.11(b) (1996). LEAs are also prohibited from providing Title I services so as to supplant the level of services already provided by the parochial school. *See* 34 C.F.R. § 200.12(a) (1996). Unlike those services provided in public schools, Title I services in parochial schools must be provided only to eligible students rather than on a "school-wide" basis. *See* 34 C.F.R. § 200.12(b) (1996).

regular school hours.[9] The Board attempted to avoid potential Establishment Clause violations by assigning Title I teachers to parochial schools of their choice[10] and providing each teacher with a detailed list of instructions and rules meant to reinforce the secular goals of Title I.[11] In addition, the Board's program provided for monthly, unannounced visits by publicly employed supervisors who would monitor the instructors' compliance with these rules.[12]

Despite these efforts, the Supreme Court invalidated the Board's program in *Aguilar v. Felton*.[13] Applying the *Lemon* test, the Court held that the Board's system of monitoring the content of the Title I aid in order to ensure that it was not used for sectarian purposes required an "excessive entanglement of church and state."[14] The *Aguilar* Court concluded that the extensive monitoring required by this type of public aid to "pervasively sectarian"[15] schools infringed upon "those

9. Previously, the Board had implemented two other programs for providing Title I services. The first program entailed busing parochial-school students to public schools for after-school instruction. The second program entailed providing the after-school instruction on parochial-school premises. Both of these programs, however, were deemed by the Board to be unsuccessful in their provision of equitable services to the parochial-school students. *See Agostini*, 117 S. Ct. at 2004 (citing Wheeler v. Barrera, 417 U.S. 402, 422 (1974)).

10. *See* Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 53 (1984). In addition, assignments were made without regard to the religious affiliation of the Title I employee or the wishes of the parochial school. *See id.*

11. *See* Aguilar v. Felton, 473 U.S. 402, 406 (1985). Title I teachers were instructed that

> (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those students who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team-teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

Id. In addition, all religious symbols were removed from classrooms used for Title I purposes. *See id.* at 407.

12. *See id.*

13. 473 U.S. 402 (1971).

14. *Id.* at 409, 413-14.

15. According to the *Aguilar* Court, "pervasively sectarian" schools are schools that "receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denomination." *Id.* at 412. The Court has articulated other criteria of "pervasively sectarian" institutions in other cases, though these criteria ultimately describe parochial schools to the exclusion of other religiously affiliated institutions. Other criteria include whether these schools have as a "substantial purpose the inculcation of religious values . . . ," *see id.* at 411, and whether the state can identify and subsidize a separate secular function of such schools. *See* Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 765 (1976); *see also* Bruce E. Lowry, Jr., *The*

Establishment Clause values at the root of the prohibition of excessive entanglement."[16] The Court also listed "political divisiveness" and "administrative cooperation" between city employees and parochial-school employees as evils arising from such entanglement.[17] On remand, the district court permanently enjoined the Board from using Title I funds for any program that provided services on the premises of parochial schools.[18]

In response to this injunction, and in reliance on statements contained in Justice O'Connor's dissenting opinion in *Aguilar*,[19] the Board altered its program to provide Title I services at public schools, at leased sites, and in mobile instructional units parked just off the parochial-school premises.[20] This alternative and more complicated manners of providing Title I services created substantial costs that were deducted from the federal grants before Title I services were offered.[21] Thus, as Chief Justice Burger had predicted in his dissent, the costs incurred as a result of the *Aguilar* decision effectively deprived thousands of needy students of Title I benefits.[22]

A decade after the *Aguilar* decision, the Board and a group of parents of parochial-school students entitled to Title I services filed a motion in federal district court seeking relief from the post-*Aguilar* injunction.[23] The Board argued that intervening case law had so undermined the foundations of *Aguilar* that it was no longer good law,[24] entitling the Board to relief pursuant

New Discrimination in America: In Defense of the Religious Equality Amendment, 16 ST. LOUIS U. PUB. L. REV. 205, 215 (1996) ("Unfortunately, the Court has created an inconsistent and confusing analysis to determine if an institution is "pervasively sectarian.").

16. *See Aguilar*, 473 U.S. at 414.

17. *Id.*

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

19. *See Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting).

20. *See Agostini*, 117 S. Ct. at 2005. Computer-aided instruction was also provided in response to the injunction, as such instruction did not require public employees to be physically present on parochial-school premises. *See id.*

21. The Board has spent an average of $15 million annually to provide these services since *Aguilar* was decided, totaling well over $100 million. *See id.*

22. *See Aguilar*, 473 U.S. at 419 (Burger, C.J., dissenting); *see also id.* at 430-31 (O'Connor, J., dissenting) (observing that costs of compliance would likely cause a decline in Title I services for 20,000 New York City students).

23. The Board filed motions for relief under Rule 60(b)(5) in October and December of 1995. *See Agostini*, 117 S. Ct. at 2006. District Judge Gleeson's Memorandum and Order are reproduced in the Appendix to Petition for Certiorari in No. 96-553.

24. *See Agostini*, 117 S. Ct. at 2007. Specifically, the Board argued that *Aguilar* had been sufficiently undermined by the opinions of five Justices in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1992), and by the Court's decisions in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), *Zobrest v.*

to Federal Rule of Civil Procedure 60(b)(5).[25] The Board asserted that the inordinately high cost of complying with the district court's injunction was a sufficient change in factual circumstances to warrant equitable relief.[26]

In an unpublished opinion,[27] the district court highlighted the significant changes in the Supreme Court's Establishment Clause jurisprudence since *Aguilar* and the calls for its reconsideration by five present Supreme Court Justices.[28] Nevertheless, the district court denied the Board's motion on the merits because *Aguilar* had not been expressly overruled.[29] The Court of Appeals for the Second Circuit affirmed the district court's opinion without additional comment.[30]

The United States Supreme Court reversed in a five-to-four decision.[31] Writing for the majority,[32] Justice O'Connor concluded that *Aguilar* had been eroded by subsequent case law and that the Board was thereby entitled to relief under Rule 60(b)(5).[33] Justice O'Connor emphasized that only the significant change in the directly controlling precedent, *Aguilar*, entitled the Board to Rule 60(b)(5) relief, not the high costs of compliance with the injunction or the remarks of five Justices in *Board of Education of Kiryas Joel Village School District v. Grumet*.[34]

Catalina Foothills School District, 509 U.S. 1 (1993), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). *See Agostini*, 117 S. Ct. at 2006-07.

25. "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application." F.R.C.P. 60(b)(5). According to a recent Court decision, Rule 60(b)(5) allows federal courts to grant equitable relief from a final ruling where the petitioner can demonstrate "a significant change either in factual conditions or in law." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

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

27. *See id.* (citing District Judge Gleeson's Memorandum and Order reproduced in Appendix to Petition for Certiorari in No. 96-553, at A20).

28. *See Kiryas Joel*, 512 U.S. at 717-18 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 731 (Kennedy, J., concurring in judgment); *id.* at 750 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist and Justice Thomas.

29. *See Agostini*, 117 S. Ct. at 2006 (citing App. to Pet. for Cert. in No. 96-553, at A20).

30. *See* Felton v. Secretary, U.S. Dep't of Educ., 101 F.3d 1394 (2nd Cir. 1996).

31. *See* Agostini v. Felton, 117 S. Ct. 1997 (1997).

32. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Justice O'Connor's opinion.

33. *See Agostini*, 117 S. Ct. at 2018.

34. *See id.* at 2007 (citing *Kiryas Joel*, 512 U.S. 687 (1994). Regarding the compliance costs, Justice O'Connor observed that the Court in *Aguilar* was well aware of the possibility of the additional costs its decision would incur and "[t]hat these predictions . . . turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5)." *Id.*

Thus, the Court focused its opinion on the extent to which intervening case law had undermined *Aguilar.*

Justice O'Connor began the Court's inquiry into the continued vitality of *Aguilar* by exploring the rationale and assumptions upon which *Aguilar* and its companion case, *School District of the City of Grand Rapids v. Ball,*[35] relied. Because the aid program struck down in *Ball* closely resembled the Title I program in *Aguilar* and because the reasoning underlying both decisions shared several assumptions, Justice O'Connor began her inquiry by recounting the holding of *Ball.*[36] According to Justice O'Connor, the Court's finding that the program in *Ball* had the "impermissible effect of advancing religion" rested on three assumptions—assumptions shared by the *Aguilar* decision. The Court stated these assumptions as follows:

> (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; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches the school as a consequence of private decisionmaking.[37]

Justice O'Connor next reviewed intervening case law and argued that the Court had discarded these assumptions. She held that the Court abandoned the first two assumptions in *Zobrest v. Catalina Foothills School District.*[38] First, the *Zobrest* Court expressly repudiated the presumption that, in the absence of evidence to the contrary, public employees engage in the inculcation of religion merely because of the sectarian nature of their work environment.[39] Second, the *Zobrest* decision implicitly rejected the conception of a "symbolic link" between government and a parochial school based solely on the presence

35. 473 U.S. 373 (1985).

36. *See Agostini,* 117 S. Ct. at 2008-10.

37. *Id.* at 2010. Applying the *Lemon* test, the Court in *Ball* and *Aguilar* assessed each program in light of three criteria: "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." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

38. 509 U.S. 1 (1993) (allowing a deaf student the use of a state-employed sign-language interpreter in the student's Roman Catholic high school).

39. *See Agostini,* 117 S. Ct. at 2011.

of public employees on parochial-school premises.[40] According to Justice O'Connor, the third assumption was abandoned in *Witters v. Washington Department of Services for the Blind*[41] when the Court allowed government aid to flow to religiously affiliated organizations if it is made generally available without regard to the religious nature of that institution and it reaches the institution "only as the result of genuinely independent and private choices of" individuals.[42] Under these conditions, the aid "[could] not be attributed to state decisionmaking."[43] According to Justice O'Connor, these intervening decisions eliminated the Court's presumption in *Ball* and *Aguilar* that the aid programs in those cases had the impermissible effect of advancing religion.[44]

Finally, Justice O'Connor addressed the *Aguilar* Court's conclusion that the Board's Title I program required an "excessive entanglement" between the church and state.[45] Justice O'Connor first recharacterized the nature of the Court's entanglement inquiry. Rather than analyzing the entanglement issue independently of the inquiries into legislative purpose and primary effect, as the Court did in *Lemon* and *Aguilar*, Justice O'Connor held that the Court should view entanglement as an aspect of its inquiry into a statute's effect.[46] As such, an

40. *See id.* The majority rejected Justice Souter's dissenting claim that this second assumption is warranted because of the cooperation Title I requires between the public and sectarian faculties. Because Justice Souter did not dispute the propriety of this cooperation in the context of Title I services provided off-campus, the Court stated that it "did not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." *Id.*

41. 474 U.S. 481 (1986) (holding that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a religious school to become a pastor, missionary, or youth director).

42. *Agostini*, 117 S. Ct. at 2012 (quoting *Witters*, 474 U.S. at 487).

43. *Id.* (quoting *Zobrest*, 509 U.S. at 10). The Court noted that an assessment of the criteria by which a government-aid program identifies its beneficiaries has a second function beyond that of determining whether the aid subsidizes religion. The criteria are also assessed to determine whether they provide a financial incentive to undergo religious indoctrination. This incentive was found not to be present in the either of the programs considered in *Ball* and *Aguilar*. *See id.* at 2014.

44. *See id.*

45. *Id.* at 2015.

46. *See id.* Justice O'Connor noted that the entanglement analysis has been considered both as part of the "effect" assessment, as in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 674 (1970), and as an inquiry separate from "effect," as in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Regardless of the characterization, argued Justice O'Connor, "the factors [the Court] use[s] to assess whether an entanglement is 'excessive' are similar to those used to assess 'effect.'" *See Agostini*, 117 S. Ct. at 2015.

entanglement between the government and a religious institution must advance or inhibit religion before it violates the Establishment Clause.[47]

Justice O'Connor held that, given the intervening case law, the Board's pre-*Aguilar* Title I program did not result in an excessive entanglement between church and state. Justice O'Connor noted that the *Aguilar* Court's finding of excessive entanglement rested 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."[48]

Justice O'Connor summarily disposed of the second and third grounds as "insufficient by themselves to create an 'excessive' entanglement."[49] She argued that they were present regardless of the location where the Board provided Title I services and that no Court has held that they violate the Establishment Clause when offered off-campus. Finally, the Court's abandonment in *Zobrest* of the presumption that public employees will inculcate religion dictates that the Court abandon the first assumption that pervasive monitoring of Title I services is required in the Board's program.[50]

Justice Souter dissented,[51] arguing that the majority's opinion had "authorize[d] direct state aid to religious institutions on an unparalleled scale" by rejecting the "very reasonable line drawn in *Aguilar* and *Ball*."[52] He claimed that the Court's focus on the issue of entanglement neglected two equally important

Justice O'Connor continued: "It is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect." *Id.*

47. An entanglement must be deemed "excessive" before it constitutes a violation of the Establishment Clause. According to the Court's opinion, entanglement is considered excessive if it has the effect of advancing or inhibiting religion. *See id.* at 2014-15.

48. *See id.* at 2015.

49. *Id.*

50. *See id.* at 2016. The Court found that, in the absence of evidence to the contrary, the monthly visits of public supervisors in the Board's program were sufficient to detect inculcation by public employees. The Court noted that it had upheld much more onerous monitoring burdens on religiously affiliated institutions. *See id.* (citing Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988)).

51. Justice Souter was joined by Justice Stevens and Justice Ginsburg, with Justice Breyer joining the dissent in part.

52. *Agostini*, 117 S. Ct. at 2019 (Souter, J., dissenting).

components of Establishment Clause analysis—subsidization and endorsement.[53] Justice Souter argued that the Board's program directly subsidized religion, rejecting the Title I program's distinction between remedial and regular courses. He reasoned that the Board's program relieved parochial schools of the burden of providing remedial education, freeing resources the parochial schools could apply toward religious indoctrination.[54] Recognizing that this argument could be used to halt Title I services provided off-campus as well, Justice Souter asserted that, "if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains."[55] In addition, Justice Souter argued that the provision of on-campus services amounted to a public endorsement of religion because it is "more likely to telegraph approval of the school's mission than keeping the State's distance would do," especially when one religious denomination is overwhelmingly benefited.[56]

Justice Souter also disagreed with the Court's broad reading of the intervening case law. He concluded that the outcome of *Zobrest* was based on the small number of students receiving the aid and the status of the public employee as a sign-language interpreter rather than as a counselor or teacher.[57] As a result, he argued that the majority's position in *Agostini* "does not enjoy the authority of *Zobrest*" and is "fresh law."[58] Justice Souter also denied that *Zobrest* implicitly rejected the view that instruction by publicly employed teachers in a sectarian school constituted a

53. *See id.* at 2020 (Souter, J., dissenting) (citing School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

54. *See id.* at 2021-22 (Souter, J., dissenting).

55. *Id.* at 2022 (Souter, J., dissenting). The Court responded that "[b]ecause the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus." *Id.* at 2014 (majority opinion). Concerning a perceived endorsement of religion, the Court responded that it "[did] not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." *Id.* at 2012.

56. *Id.* at 2022 (Souter, J., dissenting).

57. *See Agostini*, 117 S. Ct. at 2023 (Souter, J., dissenting). Responding again to Justice Souter's dissent, the Court argued that "[a]lthough Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant." *Id.* at 2013 (majority opinion). "In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA." *Id.* at 2012.

58. *Id.* at 2023 (Souter, J., dissenting).

symbolic union or a perceived endorsement of the school's aims.[59]

Justice Souter further disagreed with the Court's conclusion that *Zobrest* and *Witters* undermined the assumption in *Ball* that all public aid that benefits the educational function of parochial schools is forbidden, even when the aid reaches the schools as a consequence of private decisionmaking. He claimed that *Ball* stood for the more modest principle that aid that is "direct and substantial" is unconstitutional, whereas aid that is "indirect and incidental" is permissible.[60] Rather than refuting this principle, *Zobrest* and *Witters* merely emphasized the limited nature of the aid in their respective situations and the indirect nature of the state aid.[61] Consequently, Justice Souter found "puzzling" the Court's comparison of the aid programs in *Zobrest* and *Witters* with the Board's Title I program, which provided aid to almost 22,000 students and allowed the Board, a public decisionmaker, to determine which students at which schools received the aid.[62]

Finally, Justice Souter argued that allocating the aid according to neutral, secular criteria did not save the Board's program from violating the Establishment Clause. He 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."[63]

Justice Ginsburg also dissented in a brief opinion.[64] In her view, the Court had ignored its own Rules and instead substituted a rule governing orders and judgments of the federal

59. *See id.* (Souter, J., dissenting).

60. *Id.* at 2024 (Souter, J., dissenting).

61. *See id.* (Souter, J., dissenting).

62. *See Agostini,* 117 S. Ct. at 2024-25 (Souter, J., dissenting). In response to Justice Souter's argument, the Court stated that none of these distinctions is meaningful:

> [W]e fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application .... Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.

Id. at 2013 (majority opinion).

63. *Id.* at 2025 (Souter, J., dissenting).

64. *See id.* at 2026-28 (Ginsburg, J., dissenting). Justice Ginsburg's dissent was joined by Justice Stevens, Justice Souter, and Justice Breyer.

trial courts, Rule 60(b)(5), in order to reconsider *Aguilar*.[65] Despite the Court's intention to disfavor any future attempts to expand its ruling, Justice Ginsburg contended that the Court should await a more traditional vehicle through which to reconsider the underpinnings of *Aguilar*.[66]

The United States Supreme Court has long labored under the erroneous conception that the Establishment Clause requires a strict separation between government and religiously affiliated institutions,[67] especially in the context of parochial schools.[68] The Supreme Court's *Agostini* decision thus signifies a victory for these religious institutions as it marks the Court's repudiation of a separationist jurisprudence[69] in favor of a principle of neutrality allowing parochial schools to participate equally in generally available government programs.[70] Read broadly, the

65. *See id.* at 2026 (Ginsburg, J., dissenting). Justice Ginsburg noted that the Court has a rule concerning rehearing, Rule 44, "but it provides only for petitions filed within 25 days of the entry of the judgment in question." *Id.* (Ginsburg, J., dissenting). "The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of *Aguilar* contend otherwise." *Id.* (Ginsburg, J., dissenting).

66. [I] find just cause to await the arrival of . . . another case in which our review appropriately may be sought, before deciding whether *Aguilar* should remain the law of the land. That cause lies in the 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 speculations on chances from changes in the Court's membership.

Id. at 2028 (Ginsburg, J., dissenting) (citations and internal quotation marks omitted).

67. The Establishment Clause was originally intended to prohibit the federal government from establishing a national church. *See* Robert L. Cord, SEPARATION OF CHURCH AND STATE 15 (1982); William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

68. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 703-12 (1998) (tracing the Court's Establishment Clause jurisprudence regarding parochial schools).

69. *See* Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U. L. REV. 1, 48 ("The Court's recent reversal of *Aguilar* in *Agostini* seems to solidify a trend where the Court is willing to condone governmental grants to individuals for use in either public or religiously affiliated schools if they are administered on a non-sectarian basis."); *see also* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (1995) (discussing recent Court decisions emphasizing equal treatment of religious institutions); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994) (tracing the Court's movement away from a separationist establishment analysis).

70. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-02 (1990) (describing and endorsing the principle of "substantive neutrality" which requires that government neither encourage nor discourage religious belief or practices).

Agostini Court's expansion of this principle, as applied in *Witters* and *Zobrest*, signals its willingness to consider and ultimately uphold the participation of parochial schools in school-choice voucher programs.[71] Even under a more modest interpretation, the decision's abandonment of *Aguilar*'s assumptions concerning parochial schools should still allow unprecedented forms of direct government aid to flow to religious schools at the elementary and secondary levels. According to either reading, the *Agostini* decision provides greater discretion to States and local school boards to include parochial schools in broadly available government-aid programs alongside their private, secular counterparts.

Despite nominally applying the same establishment test used by past separationist Courts, the *Agostini* Court's application of the *Lemon* test[72] marks a departure from the strictures of past analyses in favor of a principle of neutrality. To be sure, the Court is continuing to adhere to a form of the *Lemon* test, despite the predictions of some commentators that it would be abandoned.[73] According to Justice O'Connor, the Court still inquires, when examining state aid programs, "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion"—the first two prongs of the original *Lemon* test.[74] Without an independent "entanglement" prong, however,

71. *See* Andrew A. Adams, *Cleveland, School Choice, and "Laws Respecting an Establishment of Religion,"* 2 TEX. REV. L. & POL. 165, 185 (1997) (describing *Agostini* as a "landmark decision" in this respect); Margaret A. Nero, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L.J. 1103, 1134 (1997) (concluding that the Court is ready to recognize the constitutionality of voucher programs that include parochial schools). *But see* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 230 n. 417 (1997) (observing that the *Agostini* opinion "seems too incompletely theorized to dictate a result" on the question of vouchers). *See also* Viteritti, *supra* note 68, at 715 (arguing that the Court's federalism concerns will also play an important role in such a decision).

72. *See supra* note 5.

73. *See, e.g.*, Kristin M. Engstrom, *Establishment Clause Jurisprudence: The Souring of* Lemon *and the Search for a New Test*, 27 PAC. L.J. 121, 127-8 (1995) (predicting the Court's abandonment of *Lemon*); *cf.* Fallon, *supra* note 71, at 123 ("[*A*]*gostini* struck no blows at the continuingly resilient *Lemon* test."); Thomas C. Marks and Michael Bertolini, Lemon *is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1, 70 (1997) (arguing that *Agostini* did not abandon the *Lemon* test but that the Court is beginning to do so).

74. *See Agostini*, 117 S. Ct. at 2010. The original three-pronged test announced in *Lemon* included the separate "entanglement" prong. *See supra* note 5. The *Agostini* Court announced that it considered the third prong of "entanglement" as an aspect of the inquiry into "effect." *See id.* at 2015.

the *Agostini* Court's reformulation of the *Lemon* test is a considerably more lenient establishment analysis that may indeed allow more direct forms of aid, such as tuition vouchers, to survive the Court's current establishment analysis.

Careful crafting of a school-choice voucher program may ensure that it will survive the Court's remaining purpose-and-effect analyses. The Court's first inquiry into an aid program's secular purpose under the modified *Lemon* test should not present an obstacle to a voucher program that includes both secular and sectarian private schools because the courts usually take state legislatures' statements of purpose at face value.[75] The more ardently pursued inquiry involves the effect of the aid program, though a carefully crafted program is likely to survive this inquiry as well.[76] First, a properly crafted voucher program should not define its recipients by reference to religion.[77] According to *Agostini*, aid flowing to parochial schools is less likely to be deemed to have the effect of advancing religion "'where 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.'"[78] The *Agostini* Court highlighted the dual significance of this nondiscrimination principle when it found that, because the Board provided Title I services according to neutral criteria, the aid neither subsidized religion generally nor provided financial incentives for students to undertake a religious education.[79]

75. *See* Adams, *supra* note 71, at 181 (noting the lax inquiry into secular purpose of state voucher programs).

76. According to Justice O'Connor, the Court currently uses three factors to assess whether government aid has the impermissible effect of advancing religion: (i) whether the aid results in government indoctrination of religion; (ii) whether recipients are defined by reference to religion; and (iii) whether the aid program results in an excessive entanglement. *See Agostini*, 117 S. Ct. at 2016. Presumably, after *Agostini*, only extraordinarily burdensome monitoring requirements would result in a finding of excessive entanglement: "We have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here." *Id.*

77. *See* Adams, *supra* note 71, at 169 (describing the structure of Cleveland's voucher program); Nero, *supra* at note 71, at 1111 (same); *see also* Viteritti, *supra* note 68, at 685-99 (comparing the constitutionally relevant structural elements of voucher programs in Ohio, Wisconsin, and Vermont).

78. *Agostini*, 117 S. Ct. at 2014. The Court noted that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 2015 (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

79. *See id.* at 2014 ("The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to

Second, a properly crafted voucher program should filter the aid through the "genuinely independent and private choices of" parents before reaching a parochial school in order to not be viewed by the Court as government-sponsored indoctrination.[80] The Court's use of Justice Marshall's *Witters* analogy to a government paycheck issued with the knowledge that the employee would donate part or all of it to a religious institution is illustrative on this point.[81] According to the Court, because the money paid to the citizen via the government payroll passed through the conduit of a citizen's private choice, any benefit accruing to the religious organization would not be attributed to the actions of the state.[82] Similarly, if the funds paid to parents in the form of vouchers is ultimately paid to a sectarian school, it will not be viewed as a direct benefit from the state to the religious institution. A voucher program meeting these two criteria is not likely to be deemed to have the impermissible effect of advancing religion according to the *Agostini* Court's Establishment Clause analysis.[83] Because a school-choice voucher program including religious schools does not establish a religion, the Supreme Court should clarify its jurisprudence and explicitly uphold the constitutionality of such a school voucher program.[84]

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school . . . . The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services."). Arguably, providing the Title I services in an unequal fashion in favor of public schools—as the services were provided under the post-*Aguilar* injunction—would also violate the Court's principle of neutrality.

80. *See id.* at 2012. Providing tuition checks to parents who then sign them over to the chosen private school is a common method of payment in existing voucher programs.

81. *See id.* at 2011-12 (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486-87 (1986)).

82. *See id.* The *Agostini* Court implicitly rejected that portion of Justice Marshall's *Witters* opinion emphasizing the small amount of aid actually accruing to religious entities: "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 2013 (citing Mueller v. Allen, 463 U.S. 388, 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.")).

83. *See* Adams, *supra* note 71 at 195 (reaching a similar conclusion). Justice O'Connor also noted that the Court relied on these same considerations when determining whether the program in question could reasonably be viewed as an "endorsement" of religion. *See Agostini*, 117 S. Ct at 2016.

84. The Court is likely to hear such a case as three state supreme courts are currently considering the issue. *See* Viteritti, *supra* note 68, at 690, 690 n.158, 695-96.

Even if the Court once again misconstrues the Establishment Clause so as to disallow voucher programs,[85] the *Agostini* decision still lays the foundation for increased public aid to parochial-school students. When the *Agostini* Court discarded the presumptions underlying *Ball* and *Aguilar* concerning state-sponsored indoctrination and symbolic endorsement specific to parochial schools, it substantially eliminated the Court-drawn distinctions between these schools and religious colleges and universities. As a result, the States may now be able to offer the more extensive and direct forms of aid that currently flow to sectarian colleges and other religiously affiliated institutions to parochial elementary and secondary schools.

Prior to the *Agostini* decision, the Supreme Court applied a stricter form of Establishment Clause scrutiny to public aid to parochial schools than to aid to religious colleges, despite formally applying the *Lemon* test in both contexts.[86] The Court based this double standard on the "pervasively sectarian"[87] character of parochial schools and heightened concerns of state-sponsored indoctrination and symbolic endorsement in elementary and secondary education.[88] The Court had believed that programs providing aid to these schools required such intrusive state monitoring that the aid resulted inevitably in an excessive entanglement between the state and parochial

85. Simply because a voucher program meets the Court's current establishment criteria does not entail that the Court will uphold such a program. The Court's establishment analysis has led to a series of seemingly conflicting rulings. *Compare* Everson v. Board of Educ., 330 U.S. 1 (1947) (allowing reimbursement of bus fares to and from parochial schools), *with* Wolman v. Walter, 433 U.S. 229 (1977) (disallowing government funding for parochial-school field-trip transportation); *compare* Board of Education v. Allen, 392 U.S. 236 (1968) (allowing government to lend state-approved textbooks to parochial-school students), *with* Wolman v. Walter, 433 U.S. 229 (1977) (disallowing the lending of instructional materials and equipment such as maps and films).

86. *See, e.g.*, Roemer v. Maryland Bd. of Public Works, 426 U.S. 736 (1976) (upholding annual noncategorical grants to religious colleges); Hunt v. McNair, 413 U.S. 734 (1973) (upholding state-issued revenue bonds to religious colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal construction grants to religious colleges). The Court has treated aid to parochial schools differently than aid to almost all other religiously affiliated institutions. *See* Bowen v. Kendrick, 487 U.S. 589, 616-17 (1988) (distinguishing a non-educational religious organization from "pervasively sectarian" schools for purposes of federal grants for adolescent family counseling).

87. *See supra* note 15.

88. *See* Aguilar v. Felton, 473 U.S. 402, 411 (1985) ("Unlike the colleges, which were found not to be pervasively sectarian, many of the schools involved in this case [have] as a substantial purpose the inculcation of religious values . . . .").

schools.[89] The Court reasoned that these concerns were less significant in the context of higher education and, therefore, that state monitoring of aid to religious colleges was unlikely to result in excessive entanglement.[90] Consequently, federal and state lawmakers have found it easier to provide more direct forms of aid, such as grants and loans, to religious colleges.[91]

The *Agostini* Court's disavowal of *Aguilar*'s presumptions specific to parochial schools and the consequent weakening of the entanglement inquiry may have obliterated the constitutionally relevant distinctions between aid to parochial schools and aid to religious colleges. Although Justice O'Connor did not explicitly address the issue, the Court's application of the *Zobrest* and *Witters* precedents implies a rejection of any meaningful distinctions. The Court pointed to these decisions, each concerning a different level of religious education, to argue that it had abandoned the presumptions of state indoctrination and endorsement espoused in *Ball* and *Aguilar*[92]—both of which involved schools at the elementary or secondary levels. Perhaps more significantly, the Court relied predominantly on *Witters*, a religious college case, to reject the notion in *Ball*, a parochial-school case, that "all government aid that directly aids the educational function of religious schools is invalid."[93]

Even so, the *Agostini* Court missed an opportunity to reject explicitly the "pervasively sectarian" distinction and further reenforce its trend toward a consistent Establishment Clause jurisprudence. The Court's reconsideration of *Aguilar* provided a fitting vehicle to announce that it would apply the same school-by-school establishment scrutiny to aid to parochial

89. *See id.* at 412 (describing the "critical elements of the entanglement proscribed in Lemon" as (i) whether the aid is provided in a "pervasively sectarian" environment; and (ii) whether the instructors require ongoing monitoring).

90. *See Tilton*, 403 U.S. at 687 ("Correspondingly, the necessity for intense government surveillance is diminished and the resulting entanglements between government and religion lessened.").

91. *See supra* note 86.

92. *See Agostini*, 117 S. Ct. at 2012 ("*Zobrest* and *Witters* make clear that . . . the program[s] in *Ball* and . . . in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination.").

93. *Id.* at 2011. The Court continued by stating that "any money [at issue in *Witters*] that ultimately went to religious institutions [in the form of vocational tuition grants] did so 'only as the result of the genuinely independent and private choices of' individuals." *Id.* at 2011-12 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

schools that it applies to aid to religious colleges and universities. Interestingly, the *Aguilar* Court itself considered and ultimately rejected this approach.[94] Instead, that Court opted for a blanket presumption against direct forms of aid to all parochial schools.[95] *Aguilar*'s rejection of the first approach rested on the assumption that, because the secular education the state intended to aid was so intertwined with the parochial school's sectarian functions, the state would be required to monitor the aid to such an extent that an excessive entanglement would result.[96] The *Agostini* Court could have easily reversed this presumption in the favor of parochial schools by requiring evidence of an establishment violation, such as a misuse of public funds, before invalidating the state aid program.[97] This is the Court's approach to direct aid to colleges and universities.[98] Such an approach to parochial-school aid

94. *See* Aguilar v. Felton, 473 U.S. 402, 412 n.8 (1985). In response to the Board's argument that the degree of sectarianism differed from school to school, the Court stated its presumption that if a significant number of the private schools receiving Title I services were pervasively sectarian then the whole program was invalid. *See id.* ("It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving Title I aid have . . . abandoned 'the religious mission that is the only reason for the school's existence.'") (quoting Felton v. Secretary, U.S. Dep't of Educ., 739 F.2d 48, 70 (1984)).

95. *See id.* at 414.

96. *See id.* at 412-13 ("In short, the scope and duration of New York City's Title I program would require a permanent and pervasive state presence in the schools receiving aid. This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.")

97. The Court has taken such an approach in regard to other religious institutions. Referring to the now overruled *Ball* decision, the Court in *Bowen* held that "[o]nly in the context of aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would . . . result in religious indoctrination." *See* Bowen v. Kendrick, 487 U.S. 589, 612 (1988). The *Agostini* Court's rejection of *Ball*'s premises, however, should entail that a mere risk that aid may be used for unconstitutional purposes is simply not enough to overcome the Court's presumption of validity. *See* Hunt v. McNair, 413 U.S. 734, 743 (1973) (articulating a school-by-school approach to establishment inquiries of aid programs).

98. The Court has also sought to distinguish parochial schools from religious colleges by inquiring as to whether the state can identify and fund a separate secular function of parochial schools. *See* Roemer v. Maryland Public Works Board, 426 U.S. 736, 765 (1976). This consideration, however, stems from an assumption that parochial schools are "pervasively sectarian" and therefore that "a substantial portion of its functions are subsumed in the religious mission" of the school. *See Hunt*, 413 U.S. at 743. As the *Agostini* decision demonstrated, such blanket assumptions may be improper in the absence of evidence to the contrary. Indeed, the Court has long given aid to other religious institutions a presumption of validity in the absence of such evidence. *See id.* at 743 ("Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented that the institution

would allow the state to fund the secular educational function of these schools while placing the burden of demonstrating establishment violations on those opposed to such funding.[99]

Although the Court failed to equalize explicitly the doctrinal analyses applicable to religious colleges and parochial schools, its rejection of *Aguilar* and the heightened entanglement scrutiny applied to parochial schools may have already opened the door for the States to provide more direct forms of financial aid to these schools and their students. In the absence of the "pervasively sectarian" aspect of the strict entanglement inquiry, more direct public-aid programs benefiting parochial schools should survive the "secular purpose" and "effect" prongs of *Lemon* just as similar aid to religious colleges does. Court precedent already permits such direct forms of financial aid to religious colleges as federal construction grants,[100] state-issued revenue bonds to permit religious schools to borrow at low interest,[101] and annual noncategorical grants (subject to the restriction that they not be used for sectarian purposes).[102] The Court's approval of these direct forms of aid and the common practice of college students applying federal grants and subsidized loans to their tuition at religious colleges provide examples of the generally available forms of public aid that might be accessible to parochial schools, even if the Court holds voucher programs benefiting parochial schools to be impermissible.

The Constitution's Establishment Clause does not command a strict separation between government and religious institutions providing a secular service to the state. Yet, this is precisely what the Supreme Court's establishment jurisprudence has required in the context of parochial education. In an attempt to erect a

does in fact possess those characteristics." (quoting Tilton v. Richardson, 403 U.S. 672, 682 (1971))).

99. The Court has never prohibited the funding of a religious institution's secular function simply because other institution funds could be used for religious activities. *See Hunt*, 413 U.S. at 743 ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); *see also Roemer*, 426 U.S. at 747 ("The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends.")

100. *See Tilton*, 403 U.S. 672.

101. *See Hunt*, 413 U.S. 734.

102. *See Roemer*, 426 U.S. 736; *see also Bowen*, 487 U.S. 589 (permitting federal grants to religiously affiliated organizations for counseling and research in the area of adolescent sexual relations and pregnancy).

wall of separation between church and state, the Court has long denied parochial-school students and their parents an equal share of the common weal, relegating these Americans to a second-class status. *Agostini* marks the Court's return to first principles and common sense in the context of aid to parochial education. By allowing parochial schools and their students to participate equally in generally available government benefits, the Court's *Agostini* decision signals an important victory for the principles of religious liberty and educational choice.

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