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### Constitutional Law—First Amendment and Establishment Clause—The Wall of Separation Crumbles. *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

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## I. INTRODUCTION

In *Agostini v. Felton*,<sup>1</sup> the United States Supreme Court ruled that allowing public employees to provide services to students on the premises of sectarian schools did not violate the First Amendment's Establishment Clause.<sup>2</sup> The decision continued the Court's trend toward a more liberal view of the separation of church and state requirements.<sup>3</sup> Aside from the constitutional issues, the *Agostini* decision also had procedural implications. The petitioners employed Federal Rule of Civil Procedure 60(b)(5),<sup>4</sup> a device never previously used, to get their case before the Supreme Court.<sup>5</sup>

Part II of this note examines the facts related to the *Agostini* decision. Part III reviews the history of the First Amendment's Establishment Clause and related decisions. After analyzing the reasoning of the Court in Part IV, this note delves into the significance and future implications of the *Agostini* ruling in Part V.

## II. FACTS

Congress enacted Title I of the Elementary and Secondary Education Act of 1965<sup>6</sup> to provide federal funding to aid students in meeting state performance standards.<sup>7</sup> The federal government distributes funding for Title I programs through the states to be administered by local education agencies.<sup>8</sup> Local education agencies must provide services through Title I programs to

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1. 117 S. Ct. 1997 (1997).

2. *See id.* at 2016 (citing U.S. CONST. amend. I.). The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

3. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 989 (1998).

4. FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) states that a party may be granted relief from a final judgment or order if "it is no longer equitable that the judgment should have prospective application." *Id.*

5. *See Agostini*, 117 S. Ct. at 2006. *See also* Daniel Wise, *City's Novel Strategy to Vacate Order: 12-Year-Old Ban in Special Education Case Before Supreme Court Tomorrow*, N.Y.L.J., April 14, 1997, at 1.

6. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

7. *See* 20 U.S.C. § 6301(d) (1994). Services available through Title I include: college and career awareness, work programs with local businesses, counseling, and transitional programs for pre-school students. *See* 20 U.S.C. § 6315(c)(1)(E) (1994).

8. *See* 20 U.S.C. §§ 6311-6312 (1994).

students in both public and sectarian schools.<sup>9</sup> To avoid violating the Establishment Clause,<sup>10</sup> added restrictions apply when Title I funds are used to provide educational services to students in private, specifically sectarian schools.<sup>11</sup>

In 1966, the state of New York first distributed Title I funds to the New York City Board of Education.<sup>12</sup> After two methods of providing Title I services to sectarian schools failed,<sup>13</sup> the Board formulated an extensive plan for providing services to students in these schools.<sup>14</sup> Under this plan, public employees provided Title I services on sectarian school property during school hours.<sup>15</sup> The plan required public employees to follow rigid standards,<sup>16</sup> and supervisors made monthly visits to monitor compliance with the plan guidelines.<sup>17</sup>

Six taxpayers brought suit against the Board, stating that the plan under which the Board provided Title I services to students in sectarian schools violated the Establishment Clause.<sup>18</sup> The District Court for the Eastern District of New York granted summary judgment for the Board.<sup>19</sup> On appeal, the Second Circuit Court of Appeals reversed the district court's decision and

9. See 20 U.S.C. § 6312(c)(1)(f) (1994).

10. See *supra* note 2 for the language of the Establishment Clause.

11. See 20 U.S.C. §§ 6314, 6321(a)(2), (c)(1) (1994). Title I does not allow school-wide services to be provided in sectarian schools; sectarian school employees are not permitted to provide Title I instruction; and Title I services may not be used as a replacement for the services provided by the sectarian school. See *id.*

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

13. See *id.* Under the Board's first plan, the Board transported sectarian school students to public school premises to receive services in an after-school program. See *id.* "[T]his enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children." *Id.* (citation omitted). The Board's second plan, providing the services on the premises of sectarian schools during after-school hours, also proved unsuccessful. See *id.*

14. See *id.*

15. See *id.*

16. See *id.* Employees were informed of the "secular purpose of Title I" and were told 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 children who met the eligibility criteria for Title I; (iii) their materials and equipment would only be used 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.* (citing *Aguilar v. Felton*, 473 U.S. 402, 406 (1985)).

17. See *Agostini*, 117 S. Ct. at 2005 (citing *Aguilar*, 473 U.S. at 407).

18. See *id.* Several parents of sectarian school students who received services under Title I joined as codefendants through intervention. See *id.*

19. See *id.*

found the Board's Title I program unconstitutional.<sup>20</sup> The United States Supreme Court granted certiorari and upheld the Second Circuit's decision.<sup>21</sup> On remand, the district court permanently enjoined the Board from allowing public employees to provide Title I services on sectarian school property.<sup>22</sup> Following this decision, the Board restructured its Title I program.<sup>23</sup> Under the new plan, the Board offered Title I services to sectarian students on public school premises, on leased premises, in mobile instructional units,<sup>24</sup> and through computer-aided instruction.<sup>25</sup>

The Board, joined by parents of sectarian school students, sought relief from the permanent injunction concerning the Title I program under Rule 60(b)(5),<sup>26</sup> arguing that Establishment Clause law had changed.<sup>27</sup> Although acknowledging a shift in Establishment Clause law, both the district court and the United States Court of Appeals for the Second Circuit<sup>28</sup> denied the petitioners' motion.<sup>29</sup> The United States Supreme Court granted certiorari<sup>30</sup> and reversed the Second Circuit, holding that New York City's Title I program, whereby services are provided on the premises of sectarian schools, comports with the Establishment Clause.<sup>31</sup>

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20. See *Felton v. Secretary, U.S. Dep't of Educ.*, 739 F.2d 48, 72 (2d Cir. 1984), *aff'd*, 473 U.S. 402 (1985).

21. See *Aguilar*, 473 U.S. 402. The United States Supreme Court upheld the Second Circuit in a five-to-four decision. See *id.*

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

23. See *id.*

24. See Brief for Petitioner at 14, *Agostini v. Felton*, 117 S. Ct. 1997 (1997) (No. 96-552, 96-553). The mobile instruction units used in the Title I programs were buses that had been converted into classrooms and parked on public streets near sectarian school sites. An expensive method, these vehicles were leased at a cost of \$83,729,440 during the first eight years of use. See *id.*

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

26. See *id.* (citing FED. R. CIV. P. 60(b)(5)). See *supra* note 4 quoting FED. R. CIV. P. 60(b)(5).

27. See *Agostini*, 117 S. Ct. at 2006-07. The petitioners argued that the *Aguilar* decision had been "undermined by subsequent Establishment Clause decisions." *Id.*

28. *Felton v. Secretary, United States Dep't of Educ.*, 787 F.2d 35 (2d Cir. 1986).

29. See *Agostini*, 117 S. Ct. at 2006. The petitioners asserted that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." *Id.* The district court and the court of appeals denied the motion "because *Aguilar's* demise had 'not yet occurred.'" *Id.* (quoting Application to Petition for Certiorari in 96-553, p. A20).

30. See *Agostini v. Felton*, 117 S. Ct. 759 (1997).

31. See *Agostini*, 117 S. Ct. at 2006, 2016. The Supreme Court reversed the Second Circuit in a five-to-four decision. See *id.* at 2006.

### III. BACKGROUND

This section first addresses the Constitutional history and background of the Establishment Clause. Second, it considers the early Establishment Clause decisions in which the Court took a strict approach to separation of church and state. Third, this section examines the test the Court formulated in *Lemon v. Kurtzman*<sup>32</sup> to analyze cases falling under the Establishment Clause. Fourth, it considers the Establishment Clause cases following *Lemon* that concerned aid to private schools. Finally, this section addresses the Court's recent decisions in which the Court took an accommodation approach to religion.

#### A. Constitutional Background of the Establishment Clause

The first portion of the First Amendment to the United States Constitution is known as the Establishment Clause.<sup>33</sup> It should come as no surprise that the Establishment Clause is the subject of much litigation and legal confusion, for those individuals who were the primary influences behind the Constitution and Bill of Rights often had opposing views on the separation of church and state.<sup>34</sup> Subsequently, it is difficult, if not impossible to formulate the Constitutional framers' intent.<sup>35</sup> Most would agree, however, that the Establishment Clause at least meant that the government lacked the authority to legislate on the subject of religion or in matters concerning religion.<sup>36</sup>

The changes that have occurred in both religion and education since the eighteenth century add to the uncertainty over the precise meaning of the Establishment Clause.<sup>37</sup> The modern religious landscape of America is much more diverse than in the country's early history.<sup>38</sup> Furthermore, the framers could not possibly have imagined all the educational options that exist today.<sup>39</sup> It is unlikely the framers envisioned the church and state conflicts that have arisen in recent years, specifically those concerning aid to sectarian schools.<sup>40</sup> Subsequently, the Supreme Court must wade through a sea of uncertainty in its analysis of the Establishment Clause.

32. 403 U.S. 602 (1971).

33. U.S. CONST. amend I. See *supra* note 2 for the language of the Establishment Clause.

34. See JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 3 (1995).

35. See *id.* Congress kept no records of the debate over the Bill of Rights. See *id.*

36. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 89 (1986). Constitutional history "proves that the framers of the [E]stablishment [C]lause meant to make explicit a point on which the entire nation agreed: The United States had no power to legislate on the subject of religion." *Id.*

37. See CHOPER, *supra* note 34, at 4-5.

38. See CHOPER, *supra* note 34, at 5.

39. See CHOPER, *supra* note 34, at 5.

40. See CHOPER, *supra* note 34, at 5.

## B. A Strict Approach to Separation of Church and State

Justice Black authored the first Establishment Clause opinion concerning public aid to sectarian schools, *Everson v. Board of Education*.<sup>41</sup> Everson, a school district taxpayer, brought suit challenging the Board of Education's authorization of reimbursement to parents for costs incurred in sending their children to school on public transportation.<sup>42</sup> The Board of Ewing Township in New Jersey paid transportation costs to parents of students in public as well as Catholic parochial schools.<sup>43</sup> Although upholding the reimbursement program, the Court took a strict separationist view.<sup>44</sup> The Court characterized the program not as support to sectarian schools,<sup>45</sup> but rather as a general welfare program benefitting all of New Jersey's citizens.<sup>46</sup> The majority stated that New Jersey could not provide tax monies toward the support of sectarian schools and comply with the Establishment Clause, but here the Court likened

41. 330 U.S. 1 (1947). Justice Black, writing for the majority, put forth his definition of the Establishment Clause:

The 'establishment of a religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. 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 the 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.'

*Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

42. *See Everson*, 330 U.S. at 3-4.

43. *See id.* at 3.

44. *See id.* at 18. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.*

45. *See id.* at 16. Justice Black did note, however, that "it is undoubtedly true that children are helped to get to church schools." *Id.* at 17. "There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets . . ." *Id.*

46. *See id.* at 16. One scholar asserted:

The clear implication of this is that a law denying bus transportation for parochial school pupils while granting it to those attending public schools would violate at least three constitutional prohibitions: it would prefer nonbelievers in public schools over believers in parochial schools . . . ; it would make attendance at parochial schools economically impossible to children of low-income parents whose religious conscience impelled such attendance and, . . . [it] would deny to parents of parochial school pupils the equal protection of the laws guaranteed by the Fourteenth Amendment.

LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT 23-24 (1984).

the reimbursement program to police and firefighter services provided to students in sectarian schools.<sup>47</sup> Accordingly, the Court embarked on a vessel of strict separation, while at the same time allowing the marginally acceptable reimbursement program to continue.<sup>48</sup>

*Board of Education v. Allen*<sup>49</sup> further demonstrated the Court's continuing reluctance to prohibit programs benefitting sectarian school students that did not aid the schools directly.<sup>50</sup> In *Allen*, a New York statute requiring school boards to acquire and loan textbooks to students in public and private, including sectarian, schools was at issue.<sup>51</sup> The Court, holding that the law did not violate the Establishment Clause, noted the struggle that arises when a questionable program is analyzed for inconsistencies with the First Amendment.<sup>52</sup> The majority applied the test used in *School District of Abington v. Schempp*,<sup>53</sup> which involved determining the purpose and primary effect of the governmental enactment.<sup>54</sup> Relying on *Everson*, the Court held that the New York law had a general secular purpose of enhancing educational opportunities for children.<sup>55</sup> The Court asserted that the only financial benefit was an indirect one, bestowed on the parents and students, not the sectarian schools.<sup>56</sup> The Court reasoned that since the textbooks were only used for secular and not religious instruction, the governmental aid neither advanced nor inhibited religion, thus satisfying the test outlined in *Schempp*.<sup>57</sup> Once again, although operating from a strict separationist view, the Court allowed the questionable program to survive, unhampered by the Establishment Clause.<sup>58</sup>

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47. See *Everson*, 330 U.S. at 16-18.

48. See Lisa N. Seidman, Note, *Religious Music in the Public Schools: Music to Establishment Clause Ears?*, 65 GEO. WASH. L. REV. 466, 472 (1997). "Ironically, the decision credited with first advancing the principle of strict separation actually permitted the questionable program." *Id.* (citing *Everson*, 330 U.S. at 19 (Jackson, J., dissenting)).

49. 392 U.S. 236 (1968).

50. See *id.* at 243-44.

51. See *id.* at 239.

52. See *id.* at 242. "[T]he line between state neutrality to religion and state support of religion is not easy to locate." *Id.*

53. 374 U.S. 203 (1963) (holding a statute and school board regulation requiring mandatory Bible reading in public schools unconstitutional).

54. See *Allen*, 392 U.S. at 243-44.

55. See *id.*

56. See *id.*

57. See *id.* at 245-46.

58. See *id.* at 248.

### C. The *Lemon* Test: A Framework for Establishment Clause Decisions

In *Lemon v. Kurtzman*, the Burger Court formally adopted a three-prong test for use in the analysis of Establishment Clause cases.<sup>59</sup> Under this test, governmental action would be deemed constitutional if it satisfied each of the following requirements: first, the action must have a secular purpose; second, the action must have a principal or primary effect that does not advance or inhibit religion; and third, the action must not foster excessive government entanglement with religion.<sup>60</sup> In *Lemon*, the Court applied this test to Pennsylvania and Rhode Island statutes.<sup>61</sup> Both states provided financial support to sectarian schools through reimbursement of teacher salaries and school materials in secular subjects.<sup>62</sup> As a restriction on receipt of this aid, teachers who obtained support could teach only secular subjects.<sup>63</sup> Basing its findings on legislative intent, the Court found that the purpose of the statutes was not to advance religion, but rather to further secular education.<sup>64</sup> Thus, the programs did not violate the first prong of the *Lemon* test.<sup>65</sup> The Court found it unnecessary to address the second prong of the test, because the result of the relationships created under the statute constituted an excessive entanglement of government and religion, violating the third prong.<sup>66</sup> The Court questioned whether the teachers would be able to remain neutral even when teaching secular subjects.<sup>67</sup> The Court noted that even if teachers were able to remain neutral, the supervision and monitoring necessary to ensure their neutrality

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59. See *Lemon*, 403 U.S. at 612-13.

60. See *id.*

61. See *id.* at 606-07.

62. See *id.*

63. See *id.* at 608, 610.

64. See *id.* at 613.

65. See *Lemon*, 403 U.S. at 613.

66. See *id.* at 613-14.

67. See *id.* at 618. The Court noted:

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.



would also result in an entanglement.<sup>68</sup> Therefore, the Court invalidated the statutes as a violation of the Establishment Clause.<sup>69</sup>

The *Lemon* test, while not necessarily creating a change in the outcome of Establishment Clause decisions, did affect the process by which these cases were decided.<sup>70</sup> Unfortunately, all too often, the test first adopted in *Lemon* has offered more confusion than help.<sup>71</sup> Some have questioned whether it has any usefulness at all.<sup>72</sup> Regardless, the Court continued to apply, at least in form, the analysis of *Lemon*.<sup>73</sup>

#### D. Post-*Lemon* Decisions

In *Mueller v. Allen*,<sup>74</sup> the Court applied the *Lemon* test and upheld a Minnesota statute that allowed parents of students in public and sectarian schools to deduct school expenses.<sup>75</sup> The Court reasoned that the statute passed the first prong of the *Lemon* test because it had a secular legislative purpose of

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68. See *id.* at 619. As one commentator has noted, this analysis created a dilemma. Therefore, if the government were to help fund any subjects in these [sectarian] schools, the effect would aid religion unless public officials monitored the situation to see to it that those courses were not infused with religious doctrine. But if public officials did engage in adequate surveillance . . . there would be excessive entanglement between government and religion, the image being government spies regularly or periodically sitting in the classes conducted in parochial schools.

Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 CAL. L. REV. 5, 6 (1987).

69. See *Lemon*, 403 U.S. at 619.

70. See Sharon I. Block, Note & Comment, *The Establishment Clause in Public Schools: A Model for Future Analysis*, 79 GEO. L.J. 121, 128 (1990).

The impact of the *Lemon* decision was not felt in the outcome of [E]stablishment [C]lause cases, but rather in the analytic framework of the opinions. After *Lemon*, instead of simply declaring on which side of the wall separating church and state the government action fell, the Court analyzed the action within the structure of the tripartite test.

*Id.*

71. See CHOPER, *supra* note 34, at 175. "It is fair to say that application of the Court's three-part *Lemon* test has produced a conceptual disaster area, generating ad hoc judgments that are incapable of being reconciled on any principled basis." CHOPER, *supra* note 34, at 175.

72. See CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT 115 (Philip B. Kurland ed., 1975). With the *Lemon* test "[t]he Court . . . put itself in an . . . awkward position. If the concept of 'excessive entanglement' is to be taken seriously, it raises more questions than it answers. Its broad and amorphous nature makes predictability an impossibility . . ." *Id.*

73. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983).

74. 463 U.S. 388 (1983).

75. See *id.* at 391. These expenses included costs of tuition, textbooks, and transportation of students to public and sectarian schools. See *id.*

ensuring that the citizens of Minnesota received a good education.<sup>76</sup> Under the second prong, the statute neither advanced nor inhibited religion because Minnesota had numerous other tax deductions, and the deduction at issue applied not only to parents of students in sectarian schools, but also to parents of students in public schools.<sup>77</sup> The Court also asserted that since parents received the benefit rather than the sectarian schools, the program neither advanced nor inhibited religion.<sup>78</sup>

The Minnesota statute did not create an excessive entanglement between government and religion, passing the third *Lemon* prong.<sup>79</sup> The Court determined that pervasive monitoring would not be required.<sup>80</sup> The only surveillance necessary to ensure that no entanglement occurred would be the examination of textbooks to decide whether they were eligible for a deduction.<sup>81</sup> Thus, with the *Mueller* decision, financial assistance to sectarian schools received a boost.<sup>82</sup>

In the summer of 1985, the Supreme Court rudely awakened those who hoped the *Mueller* decision signaled the judicial embracing of public aid to sectarian schools.<sup>83</sup> On July 1, 1985, the Court decided the companion cases

76. *See id.* at 395. The Court also noted that by educating a host of students, private schools "relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Id.*

77. *See id.* at 396-97.

78. *See id.* at 399. Justice Rehnquist characterized the aid as merely an "attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue." *Id.* at 400.

79. *See id.* at 403.

80. *See Mueller*, 463 U.S. at 403.

81. *See id.* "State officials must disallow deductions taken from 'instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.'" *Id.* (quoting MINN. STAT. § 290.09(22) (1982)).

82. *See Choper*, *supra* note 68, at 11.

The major conclusion to be drawn from *Mueller v. Allen* is that it opened a large window for aid to parochial schools. After *Lemon* and its progeny, states only had narrow opportunities for providing financial assistance to church related schools. After *Mueller*, the issue has become simply a matter of form.

*Choper*, *supra* note 68, at 11.

Another scholar noted that the *Mueller* decision "appeared to signal the beginning of a retreat by the Supreme Court from its post-*Lemon* decisions that had prohibited most forms of direct or indirect aid to parochial schools." GREGG IVERS, *LOWERING THE WALL: RELIGION AND THE SUPREME COURT IN THE 1980S* 42 (1991).

83. *See School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985).

of *School District of Grand Rapids v. Ball*<sup>84</sup> and *Aguilar v. Felton*.<sup>85</sup> These two cases marked an important limitation on public aid to sectarian schools.

The Shared Time program, attended by sectarian school students on sectarian school premises, was at issue in *Ball*.<sup>86</sup> Public school teachers taught these remedial or enrichment classes, and public schools financed the program.<sup>87</sup> In holding the Shared Time program unconstitutional, the Court applied the *Lemon* test.<sup>88</sup> The Court had no problem finding the program satisfied the first prong, that it had a secular purpose.<sup>89</sup> The Court invalidated the Shared Time program, however, because it failed the second prong of the *Lemon* test.<sup>90</sup> The Court asserted that the program could advance religion in three different ways.<sup>91</sup> First, the public school instructors could, either intentionally or unintentionally, instruct the students in certain religious beliefs or practices.<sup>92</sup> Second, students and the general public could perceive a union between government and religion under which the federal government sanctioned state support of religion.<sup>93</sup> Third, the government could provide a subsidy to the sectarian school by assisting sectarian schools under this program.<sup>94</sup> Thus, the Court concluded the Shared Time program violated the Establishment Clause.<sup>95</sup> The Court found it unnecessary to consider the third prong of the *Lemon* test.<sup>96</sup>

In the companion case of *Aguilar v. Felton*, the Court held New York City's Title I program unconstitutional.<sup>97</sup> The Title I program provided remedial services to students in sectarian schools through public employees who taught on sectarian school premises.<sup>98</sup> The Board required the public employees to follow strict guidelines, and the Board closely monitored the public employees to ensure the separation of church and state.<sup>99</sup>

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84. 473 U.S. 373 (1985).

85. 473 U.S. 402 (1985).

86. *See Ball*, 473 U.S. at 375.

87. *See id.*

88. *See id.* at 382-83.

89. *See id.*

90. *See id.* at 385. *See supra* note 60 and accompanying text for a discussion of the second prong of *Lemon*.

91. *See id.*

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

93. *See id.*

94. *See id.*

95. *See id.* at 397.

96. *See id.* *See supra* note 60 and accompanying text for a discussion of the third prong of *Lemon*.

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

98. *See id.* at 405-07.

99. *See id.* *See supra* note 16 for a discussion of the requirements of public employees providing services in sectarian schools.

The Court only analyzed *Aguilar* using the third prong of the *Lemon* test, and found that the program created an excessive entanglement between church and state for two reasons.<sup>100</sup> First, the Board provided the services in a primarily sectarian environment.<sup>101</sup> Second, the monitoring required to guard against public employees promoting religion created an entanglement.<sup>102</sup> The majority noted that the contact between the government and sectarian schools required to implement the Title I program also created an impermissible entanglement.<sup>103</sup>

#### E. Accommodation - A Contemporary View

Less than a year after the *Ball* and *Aguilar* decisions, the Court handed down its decision in *Witters v. Washington Department of Services for the Blind*.<sup>104</sup> In *Witters*, the unanimous Court upheld a vocational educational assistance program that provided funding to a blind student to attend a Christian college and receive religious career training.<sup>105</sup> In applying the first prong of the *Lemon* test, the Court found a secular purpose for the program—providing educational assistance to the visually handicapped.<sup>106</sup> The Court also concluded that the program did not have the effect of either advancing or inhibiting religion, thereby successfully passing the second prong.<sup>107</sup> The Court reasoned that the state gave the aid directly to the student, who then decided which school would be the recipient.<sup>108</sup> Therefore, the student, not the government made the choice to support sectarian education, and the choice was indirect.<sup>109</sup> The Court also noted that financial gain was not

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

101. *See id.* at 412.

102. *See id.* at 412-13. "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." *Id.* at 413.

103. *See Aguilar*, 473 U.S. at 412-13. "Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program." *Id.* at 413.

104. 474 U.S. 481 (1986).

105. *See id.* at 489. *Witters* was "studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director." *Id.* at 483.

106. *See id.* at 485-86.

107. *See id.* at 486.

108. *See id.* at 488. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487.

109. *See id.* One scholar noted the "analytical weakness" of this point. *See Choper, supra* note 68, at 12. This distinction had been rejected "by Justice Marshall and the three members of the Court who joined his persuasive dissent in *Mueller* just three years earlier." Choper,

an incentive for a student to choose a sectarian education, because the benefit was not available to only those students who chose to attend sectarian schools.<sup>110</sup> With this decision the Court became more accepting of sectarian aid, provided the government directly awarded the aid to the student and only indirectly gave aid to the school.<sup>111</sup>

Just four years prior to the *Agostini* decision, the Court decided *Zobrest v. Catalina Foothills School District*.<sup>112</sup> In *Zobrest*, the Court relied heavily on *Mueller* and *Witters* to find that a school district did not violate the Establishment Clause by providing a sign language interpreter in a sectarian school.<sup>113</sup> This case involved a deaf child and his parents who asked a school district to provide a sign language interpreter to assist the child in his classes at a Catholic high school, pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>114</sup> The school district refused, stating such a provision violated the Establishment Clause.<sup>115</sup> The Court held that the Establishment Clause did not prevent a school district from providing a disabled child in a sectarian school a sign language interpreter to assist his education.<sup>116</sup> The Court stated that the government distributed aid neutrally under the program at issue, without regard to the type of school the student attended.<sup>117</sup> Relying on the *Mueller* and *Witters* decisions, the Court noted that the IDEA did not create any financial incentive for a student to attend a sectarian school.<sup>118</sup> Because the IDEA did not create a financial incentive, the mere presence of a sign-language interpreter on the premises of a sectarian school was not the result of state action.<sup>119</sup>

The Court managed to distinguish *Zobrest* from *Ball* in two major ways. First, the Court made a distinction between direct and indirect aid.<sup>120</sup> The Court asserted that the sectarian school was not freed from an expense it would

*supra* note 68, at 12. "Justice Marshall also reasoned, contrary to his position in *Mueller*, that the aid provided by the Washington program was available for expenditure in *all* schools . . ." Choper, *supra* note 68, at 12.

110. See *Witters*, 474 U.S. at 488.

111. See IVERS, *supra* note 82, at 45. "State legislatures looking to provide parochial schools with meaningful financial subsidies may increasingly take this route in future parochia[*l*] plans at the elementary and secondary school level." IVERS, *supra* note 82, at 45.

112. 509 U.S. 1 (1993).

113. See *id.* at 10.

114. See *id.* at 3-4 (citing 20 U.S.C. § 1400 (1994)).

115. See *Zobrest*, 509 U.S. at 4.

116. See *id.* at 13-14.

117. See *id.* at 10.

118. See *id.*

119. See *id.* A publicly-employed interpreter would only be present on a sectarian campus because of a decision made by a parent, not the government. See *id.*

120. See *id.* at 12-13.

ordinarily have undertaken, as in *Ball*.<sup>121</sup> Further, the main intended beneficiaries under the IDEA were handicapped children, not sectarian schools.<sup>122</sup> Therefore, the sectarian school was not receiving a direct subsidy from the government.<sup>123</sup> Second, the Court distinguished the role of a sign language interpreter from that of a teacher used in the Shared Time program in *Ball*.<sup>124</sup> An interpreter would merely interpret the subjects being taught to the disabled child, without injecting any personal beliefs into the material.<sup>125</sup>

Neither the majority nor the dissent applied the *Lemon* test to reach their conclusion. Perhaps *Zobrest* represented a new approach to analyzing cases arising under the Establishment Clause. Certainly the *Lemon* test had its critics, Supreme Court Justices among them.<sup>126</sup> Although the *Zobrest* case was a victory for those who supported the accommodation of religion, lower courts and Establishment Clause scholars were left to merely guess whether the demise of *Lemon* had occurred and the ways and situations in which it should still be applied.<sup>127</sup>

## V. REASONING OF THE COURT

This section will analyze the Court's determination that Rule 60(b)(5) was applicable. Additionally, this section will outline the basis for the Court's decision that a change in Establishment Clause law had occurred which warranted the use of Rule 60(b)(5). This section will also examine the two dissenting opinions written in *Agostini*.

### A. Majority Opinion

In *Agostini v. Felton*,<sup>128</sup> the United States Supreme Court held that a Title I program that allowed public employees to provide services to students on the premises of sectarian schools was valid under the Establishment Clause.<sup>129</sup> The Court first stated that a Rule 60(b)(5) motion would only be granted if a party

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121. See *Zobrest*, 509 U.S. at 12.

122. See *id.* at 12-13.

123. See *id.* at 12.

124. See *id.* at 13.

125. See *id.*

126. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring). Justice Scalia stated: "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 . . ." *Id.* at 398 (Scalia, J., concurring).

127. See *Zobrest*, 509 U.S. at 13-14.

128. 117 S. Ct. 1997 (1997).

129. See *id.* at 2016.

could prove a significant change in facts or law.<sup>130</sup> The Court then addressed the three changes the Board argued justified relief in this instance.<sup>131</sup> The Court dismissed the Board's first argument that the excessive costs incurred since *Aguilar* constituted a significant factual change.<sup>132</sup> The Court also rejected the Board's second assertion that statements made by five Justices calling for a reexamination of *Aguilar* established a significant legal change.<sup>133</sup> Therefore, the Board would only be entitled to relief from the permanent injunction if the Court agreed with the Board's third argument and found that Establishment Clause law had undergone a significant evolution.<sup>134</sup>

The Court began its analysis by discussing the four assumptions established in *Ball* and *Aguilar v. Felton*,<sup>135</sup> two landmark cases in Establishment Clause law.<sup>136</sup> In both cases, the Court concluded that the methods by which services were offered to students in sectarian schools were unconstitutional because they advanced religion.<sup>137</sup>

Essentially, the *Ball* Court's decision was grounded on four assumptions.<sup>138</sup> First, the Court assumed that any public employee providing services on the premises of a sectarian school would incorporate religion into her work.<sup>139</sup> Second, the Court assumed that the mere presence of public school employees on sectarian school property fostered a fusion of government and religion.<sup>140</sup> Third, the Court assumed that any public aid used to provide educational services to sectarian schools advanced religion.<sup>141</sup> A fourth assumption originated from the *Aguilar* decision.<sup>142</sup> The Court assumed that excessive government entanglement resulted from the extensive monitoring of

130. See *id.* at 2006. The Court stated that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Id.* (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1991)). See *supra* note 4 for the language of Rule 60(b)(5).

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

132. See *id.* at 2007. See *supra* notes 97-103 and accompanying text for a discussion of the *Aguilar* decision.

133. See *id.* at 2006-07. The Justices made the statements in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (holding that a New York state law allowing for the creation of a school district which includes only members of a specific religious sect violated the Establishment Clause). The Court rejected this argument stating that "[t]he views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law." *Id.* at 2007.

134. See *id.*

135. 473 U.S. 402 (1985).

136. See *Agostini*, 117 S. Ct. at 2008.

137. See *id.* at 2010.

138. See *id.* at 2008-09 (citing *Ball*, 473 U.S. at 385, 388, 391).

139. See *id.* at 2008 (citing *Ball*, 473 U.S. at 388).

140. See *id.* at 2009 (citing *Ball*, 473 U.S. at 391).

141. See *id.* at 2009 (citing *Ball*, 473 U.S. at 385).

142. See *Agostini*, 117 S. Ct. at 2009-10 (citing *Aguilar*, 473 U.S. at 409).

public employees on sectarian school premises that was necessary to safeguard against any religious promotion.<sup>143</sup>

The Court then analyzed its decisions subsequent to *Aguilar* to determine whether the Court's four assumptions had been undermined, thereby creating an evolution in Establishment Clause law.<sup>144</sup> The Court noted that in *Zobrest v. Catalina Foothills School District*,<sup>145</sup> it rejected the first two assumptions established in *Ball*.<sup>146</sup> Therefore, the Establishment Clause did not invalidate the Board's Title I program simply because it mandated that public employees provide services on sectarian school premises.<sup>147</sup> Additionally, the Court noted it had departed from the third assumption that the Establishment Clause barred all public aid to provide educational services to religious schools.<sup>148</sup> Discussing the second assumption, the Court held that a symbolic union of government and religion was not created merely by placing a public employee in a sectarian school classroom.<sup>149</sup> According to the Court, the roles of an interpreter in *Zobrest* and Title I instructor in *Agostini* were essentially identical.<sup>150</sup> Further, both programs were offered only to those students that met the requirements of the statute.<sup>151</sup> Since neutral criteria govern those persons eligible for Title I aid, the Court reasoned that sectarian schools were neither preferred nor dispreferred.<sup>152</sup> The Court concluded that under the current interpretation of Establishment Clause law, they no longer viewed the programs in *Ball* and *Aguilar* as invalid.<sup>153</sup> This change, the abandonment of the four assumptions, satisfied the requirements of Rule 60(b)(5)<sup>154</sup> allowing court action, but the Court still needed to jump the Establishment Clause hurdle.

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143. See *id.* at 2009-10 (citing *Aguilar*, 473 U.S. at 409).

144. See *id.* at 2010.

145. 509 U.S. 1, 12-13 (1993). See *supra* notes 112-127 and accompanying text for a discussion of *Zobrest*.

146. See *Agostini*, 117 S. Ct. at 2011. See *supra* notes 91-93 and accompanying text for a discussion of the first two assumptions established in *Ball*.

147. See *Agostini*, 117 S. Ct. at 2012. The Court reasoned that "there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee . . . will depart from her assigned duties . . . and embark on religious indoctrination . . . ." *Id.* The Court also noted that subsequent case law "implicitly repudiated" the presumption that "an impermissible 'symbolic link' between government and religion" was created by the presence of public employees in religious schools. *Id.* at 2011.

148. See *id.* (citing *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)). See *supra* notes 104-111 and accompanying text for a discussion of *Witters*.

149. See *Agostini*, 117 S. Ct. at 2012.

150. See *id.* at 2012-13.

151. See *id.*

152. See *id.* at 2014.

153. See *id.* at 2012.

154. FED. R. CIV. P. 60(b)(5). See *supra* note 4 for language of Rule 60(b)(5).



After determining that Rule 60(b)(5) applied, the Court analyzed three separate grounds to determine whether the Board's Title I program resulted in excessive entanglement between church and state, thus violating the Establishment Clause.<sup>155</sup> First, the *Aguilar* Court found that the intense monitoring required to ensure Title I instructors did not promote religion created excessive government entanglement with religion.<sup>156</sup> Second, the administrative cooperation between the sectarian schools and state officials necessary to conduct the program created an excessive entanglement.<sup>157</sup> Third, the *Aguilar* Court feared political divisiveness would result in excessive entanglement.<sup>158</sup> The *Agostini* Court concluded that the final two considerations would exist even when Title I services were offered on public school premises or in mobile instructional units.<sup>159</sup> Since the Court abandoned its previous presumption that public employees would inject religion into their work, it reasoned that extensive monitoring of these employees was no longer necessary.<sup>160</sup> Therefore, New York City's Title I program was not unconstitutional as a violation of the Establishment Clause.<sup>161</sup> Essentially, the Court's decision rested on the third prong of *Lemon*.<sup>162</sup>

The Court then critiqued Justice Souter's dissenting opinion in which he argued that the programs in *Ball* and *Aguilar* amounted to a subsidization of the services that would ordinarily be offered by sectarian schools.<sup>163</sup> In order to determine whether New York City's Title I program had the effect of subsidizing religion, the Court examined the method by which students who received Title I services were selected.<sup>164</sup> The Court held that the determination of which New York City students would receive Title I services was made

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155. See *Agostini*, 117 S. Ct. at 2015. The Court in *Aguilar* held that excessive entanglement occurred based on three grounds. See *id.* (citing *Aguilar*, 473 U.S. at 413-414).

156. See *Agostini*, 117 S. Ct. at 2015.

157. See *id.*

158. See *id.* "The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase." *Aguilar*, 473 U.S. at 414.

159. See *Agostini*, 117 S. Ct. at 2015.

160. See *id.* at 2015-16.

161. See *id.* at 2016.

162. See *id.* at 2015-16. See *supra* note 60 and accompanying text for discussion of the third prong of *Lemon*.

163. See *Agostini*, 117 S. Ct. at 2014. See *infra* notes 169-172 and accompanying text for a discussion of Justice Souter's dissent.

164. See *Agostini*, 117 S. Ct. at 2014. To receive Title I services, students must fall within one of the categories outlined in 20 U.S.C. § 6315. 20 U.S.C. § 6315 (1994). Categories of eligible students include those who are "economically disadvantaged, children with disabilities, migrant children or limited English proficient children . . ." 20 U.S.C. § 6315(b)(2)(A)(i) (1994).

using neutral guidelines.<sup>165</sup> The Court determined that under the Board's plan the district provided services to students whom it deemed eligible without regard to religion.<sup>166</sup>

After reexamining post-*Aguilar* decisions, the Court found that New York City's Title I program was valid under the Establishment Clause, overruling *Ball* and *Aguilar* to the extent of their inconsistencies.<sup>167</sup> The Court concluded that this instance, where there had been a substantial change in law, was precisely the situation to which Rule 60(b)(5) applied and granted the Board's motion.<sup>168</sup>

## B. Dissenting Opinions

In a three-part dissenting opinion,<sup>169</sup> Justice Souter discussed what he believed to be the Court's incorrect reading of the post-*Aguilar* Establishment Clause decisions.<sup>170</sup> Suggesting that sectarian schools are less likely to benefit if services are provided away from sectarian school premises, Justice Souter argued for a minimal level of contact between church and state.<sup>171</sup> Justice Souter asserted that the safeguards provided in *Ball* and *Aguilar* were more prudent than the Court's current view.<sup>172</sup>

In a separate dissenting opinion,<sup>173</sup> Justice Ginsberg found fault with the Court's use of Rule 60(b)(5).<sup>174</sup> Arguing that the Court's only determination was whether the district court had abused its discretion in rejecting the motion,

165. See *Agostini*, 117 S. Ct. at 2014.

166. See *id.* “[I]t is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion . . . . The Board’s program does not . . . give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.” *Id.* (citing 34 C.F.R. § 200.10(b) (1996) and 20 U.S.C. § 6312(c)(1)(F) (1994)).

167. See *Agostini*, 117 S. Ct. at 2016. “The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.” *Id.*

168. See *id.* at 2017 (citing FED. R. CIV. P. 60(b)(5)). See *supra* note 4 for the language of Rule 60(b)(5).

169. See *Agostini*, 117 S. Ct. at 2019 (Souter, J., dissenting). Justice Stevens and Justice Ginsberg joined in Justice Souter’s dissent. See *id.* (Souter, J., dissenting). Justice Breyer joined in part. See *id.* (Souter, J., dissenting).

170. See *id.* (Souter, J., dissenting). “In sum, if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the *Aguilar-Ball* line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.” *Id.* at 2022 (Souter, J., dissenting).

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

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

173. See *id.* at 2026 (Ginsberg, J., dissenting). Justice Ginsberg was joined by Justice Souter, Justice Stevens, and Justice Breyer. See *id.* (Ginsberg, J., dissenting).

174. See *id.* at 2027 (Ginsberg, J., dissenting) (citing FED. R. CIV. P. 60(b)(5)). See *supra* note 4 for the language of Rule 60(b)(5).

Justice Ginsberg asserted that at the time of the district court's decision, *Aguilar* was still good law.<sup>175</sup> Since the district court was correct in its ruling, Justice Ginsberg concluded that the Court misapplied Rule 60(b) in its haste to rule on an Establishment Clause case.<sup>176</sup>

## V. SIGNIFICANCE

As a result of the United States Supreme Court's decision in *Agostini*, local education agencies are now free to send public employees into sectarian schools to offer Title I services to eligible students.<sup>177</sup> One of the most obvious effects of this ruling will be a decrease in expenditures necessary to comply with the *Aguilar* decision.<sup>178</sup> The millions of dollars once needed to provide the services at a neutral location or through computer-aided instruction at sectarian schools may now be used exclusively on remediation for students.<sup>179</sup> The quality of instruction for eligible students is likely to increase, as both students and teachers alike will have fewer distractions resulting from the location of the mobile instructional units.<sup>180</sup>

Further, the Court's acceptance of the *Agostini* case by way of Rule 60(b)(5) is of special procedural significance. This unusual method of review by the Supreme Court startled some in the legal community who feel it dispels

175. See *Agostini*, 117 S. Ct. at 2025-26 (Ginsberg, J., dissenting).

176. See *id.* at 2028 (Ginsberg, J., dissenting).

177. See *id.* at 2016.

178. See John A. Farrell, *Court OK's Religious School Aid: Ruling Ends a 12-Year Ban on Public Role*, BOSTON GLOBE, June 24, 1997, at A1.

179. See Joan Biskupic & Laurie Goodstein, *Church-State Divide Narrowed; Taxpayer-Funded Teachers Allowed to Tutor in Parochial Schools*, WASH. POST, June 24, 1997, at A1. "Federal education officials said that not only was a poor environment for students who needed help but [also] wasted millions of dollars that otherwise could have been spent on more direct academic aid." *Id.* "[T]o honor the [C]ourt's earlier ruling and still provide Title I services, New York had to spend almost \$100 million in the last 12 years to lease special vans and buses that were parked on public streets and used as classrooms for parochial school students." Farrell, *supra* note 178, at A1.

180. See *Case's Origin Mars School Decision*, ALLENTOWN MORNING CALL, June 25, 1997, at A14.

[A]n Allentown teacher who taught pupils from the downtown Sacred Heart School in a van parked on North Fourth Street tells of having to compete with rumbling truck traffic and the screaming sirens of ambulances en route to nearby Sacred Heart Hospital. And, there was a special stigma attached to 'going to the trailer.' Moving these services into the school buildings will be better for the children.

*Id.*

the finality usually accorded judgments.<sup>181</sup> The application of Rule 60(b)(5) did appear unusual for a Court that is continually restricting its caseload.<sup>182</sup>

More far-reaching than the practical ramifications of the *Agostini* decision are the implications this ruling has in the area of school vouchers.<sup>183</sup> Those favoring the use of school vouchers urged that this decision implied constitutionality of voucher programs.<sup>184</sup> Voucher supporters will most assuredly rely on *Agostini* when crafting school voucher legislation.<sup>185</sup> Bob Chanin, counsel for the National Education Association, maintained that the limited nature of the ruling had no effect on vouchers.<sup>186</sup> Although supporting the *Agostini* decision, President Clinton is against vouchers and argued for a qualified ruling in the case that left no doors open for supporters of vouchers.<sup>187</sup>

181. See Daniel Wise, *City's Novel Strategy to Vacate Order: 12-Year Ban in Special Education Case Before Supreme Court Tomorrow*, N.Y.L.J., April 14, 1997, at 1. "Professor Donald L. Doernberg, who teaches federal courts at Pace University School of Law, said that the opening up of a Rule 60(b) route carries with it a 'danger that Yogi Berra's maxim that "it's not over until it's over" will be raised to new heights.'" *Id.*

182. See Wise, *supra* note 5, at 1. "At a time when Congress has passed laws to conserve the Court's scarce resources by limiting direct appeals . . . approval of the Rule 60(b) approach would, instead, 'add to the [C]ourt's burden.'" Wise, *supra* note 5, at 1 (quoting Stanley Geller, the attorney who defended the *Aguilar* decision).

183. See Daniel Wise, *Parochial School Teaching May Be Paid Be Fed'l Funds*, N.Y.L.J., June 24, 1997, at 1.

School choice theorists seek[] to enhance parents' ability to select schools most appropriate for their children. The device favored for reaching this result is the school voucher. In a typical voucher plan, the state would first deliver vouchers to parents. Parents could then submit the voucher to whichever school they wished their child to attend. In turn, schools would be reimbursed by the state for the value of the vouchers each school accumulated. Advocates believe that school choice, facilitated through school voucher legislation, can revitalize America's schools.

Eric Nasstrom, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 WM. MITCHELL L. REV. 1066, 1066-67 (1996).

184. See Wise, *supra* note 183, at 1. General counsel of the U.S. Catholic Conference, Mark E. Chopko stated that "the Court has provided states with 'a blueprint' for the adoption of vouchers and other forms of aid for parochial students which can withstand constitutional scrutiny." *Id.* "Advocates of tax aid to sectarian private schools claim that *Agostini* is a green light for voucher programs . . ." Edd Doer, *A Bad Week in June (Supreme Court Strikes Down Several Laws Involving Religion and Ethics)*, HUMANIST, Sept. 19, 1997, at 37. "Chip Mellor, president of the Institute for Justice, . . . believes the ruling provides ammunition for groups that advocate school choice through the use of vouchers." Art Moore, *Justices Void Ruling on Remedial Teachers (Supreme Court Ruling on Public-Religious Schools Relations)*, CHRISTIANITY TODAY, August 11, 1997, at 53.

185. See Biskupic & Goodstein, *supra* note 179, at A1. "[S]ome religious leaders immediately declared that it could help their effort to get government to pay for vouchers that could be used by parents to send their children to religious schools." Biskupic & Goodstein, *supra* note 179, at A1.

186. See Moore, *supra* note 184, at 53.

187. See Moore, *supra* note 184, at 53.

Finally, *Agostini* raises a crucial question in the area of Establishment Clause law—what is the status of the three-prong *Lemon* test? For years, the *Lemon* test was the yardstick by which the Court decided Establishment Clause cases.<sup>188</sup> After a brief absence in *Zobrest*, the Court resurrected *Lemon* in the *Agostini* decision.<sup>189</sup> Most scholars agree that the Court has loosened the reins of strict separation in favor of a friendlier approach to religious accommodation.<sup>190</sup> Arguably, the Court has fashioned the same test once used to restrict religious interference with government into a test that underplays the coexistence of government and religion. Some argue the Court's application of the excessive entanglement prong of the *Lemon* test changed dramatically.<sup>191</sup>

Certainly, the Supreme Court's interpretation expanded the government's power to funnel aid to sectarian schools. While maintaining the *Lemon* test, the Court modified its application significantly in *Agostini v. Felton*. Whether the Court was fashioning a trend toward other methods of government support for sectarian schools or merely remedying one judicial inequity remains to be determined.

*Missy McJunkins*

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188. See *Witters*, 474 U.S. 481; *Aguilar*, 473 U.S. 402; *Ball*, 473 U.S. 373; *Mueller*, 463 U.S. 388; *Lemon*, 403 U.S. 602.

189. See *Agostini*, 117 S. Ct. at 2014-16.

190. See *Wise*, *supra* note 183, at 1. Notre Dame Law School Professor Douglas W. Kmiec stated that "[t]he Court made very clear . . . that it has moved from a test that emphasizes exclusion to one that relies on accommodation; from a principle of separation to a principle of non-discrimination." *Wise*, *supra* note 183, at 1.

191. See *Moore*, *supra* note 184, at 53. Steven K. Green, the legal director of Americans United, stated: "This is the first case since 1971 where you have actually seen one of the prongs collapse in a significant way. . . . That's going to have a major effect on the way that people do church-state litigation in the future." *Moore*, *supra* note 184, at 53.