Maryland Law Review

Volume 58 | Issue 1 Article 8

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Recommended Citation

Brian Saccenti, *Agostini v. Felton: Shifting the Evidentiary Burden in Establishment Clause Challenges Back to the Plaintiff*, 58 Md. L. Rev. 300 (1999)

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Note

AGOSTINI v. FELTON: SHIFTING THE EVIDENTIARY BURDEN IN ESTABLISHMENT CLAUSE CHALLENGES BACK TO THE PLAINTIFF

In *Agostini v. Felton*,[1] the United States Supreme Court considered whether recent changes in the Court's Establishment Clause[2] jurisprudence justified relief under Federal Rule 60(b)(5)[3] from a permanent injunction entered twelve years earlier after the Court held in *Aguilar v. Felton*[4] that a program that placed public school employees in religious schools to teach remedial classes was unconstitutional.[5] The Court, overruling its decision in *Aguilar*, answered affirmatively and held that a government-funded program that places supervised public employees in religious schools to provide supplemental remedial instruction to disadvantaged children on a neutral basis does not violate the Establishment Clause.[6] The Court reasoned that its recent Establishment Clause decisions had so undermined the basic assumptions upon which *Aguilar* rested that it was no longer good law.[7] The Court's abandonment of these assumptions and its reliance on the factual findings of the district court effectively shift the evidentiary burden in Establishment Clause cases from the government back to the plaintiff.

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

2. U.S. CONST. amend. I. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." *Id.*

3. FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Id.

4. 473 U.S. 402 (1985), *overruled by Agostini*, 117 S. Ct. at 2017.

5. *Agostini*, 117 S. Ct. at 2003, 2006.

6. *Id.* at 2016.

7. *See id.* at 2010, 2016; *see also infra* Part III.

I. THE CASE

Congress enacted Title I of the Elementary and Secondary Education Act of 1965 (Title I)[8] to "provid[e] full educational opportunity to every child regardless of economic background."[9] The program channels federal funds, through the States, to "local education agencies" (LEAs), which use these funds to provide remedial education, guidance counseling, and job training to all eligible students, whether they attend public or nonpublic schools.[10] Title I services must be "secular, neutral, and nonideological";[11] must "supplement, and in no case supplant, the level of services" already provided by the nonpublic school;[12] and may be provided only to those private school students who meet the eligibility requirements.[13] To be eligible, a student must live within the attendance boundaries of a public school located in a low-income area, and be failing, or in danger of failing, the State's student performance standards.[14]

Title I services are subject to additional constraints when they are provided to children enrolled in private schools.[15] LEAs can provide these services only to private school students eligible for aid, must retain title to all materials used, and must provide the services "through public employees or other persons independent of the private school and any religious institution."[16]

In 1966, the New York City Board of Education (Board) began using public school employees to provide Title I services to private school students.[17] Because more than ninety percent of New York's

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8. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6514 (1994 & Supp. II 1996)). Title I has been reenacted several times since 1965. *Agostini*, 117 S. Ct. at 2003 n.*. The *Agostini* Court referred to the current Title I provisions, which are found in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 20 U.S.C. §§ 6301-6514 (1994 & Supp. II 1996)), but noted that they "do not differ meaningfully" from the Title I program referred to in *Aguilar*. *Agostini*, 117 S. Ct. at 2003 n.*.

9. *Agostini*, 117 S. Ct. at 2003 (alteration in original) (quoting S. REP. No. 89-146, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1450).

10. *Id.* at 2003-04 (citing 20 U.S.C. §§ 6311; 6312; 6314(b)(1)(B)(i),(iv); 6315(c)(1)(A), (E)).

11. *Id.* at 2004 (quoting 20 U.S.C. § 6321(a)(2)).

12. *Id.* (quoting 34 C.F.R. § 200.12(a) (1996)).

13. *Id.*

14. *Id.* at 2003-04 (citing 20 U.S.C. §§ 6313(a)(2)(B), 6315(b)(1)(B)).

15. *Id.* at 2004.

16. *Id.* (citing 20 U.S.C. § 6321(c)(1), (2)).

17. *Id.*; Aguilar v. Felton, 473 U.S. 402, 406 (1985), *overruled by Agostini*, 117 S. Ct. at 2017. Private school students comprise approximately 10% of students eligible to receive Title I services. *Agostini*, 117 S. Ct. at 2004.

private schools were religious,[18] "the Board initially arranged to transport [eligible private school students] to public schools for after-school Title I instruction."[19] However, the plan ultimately failed because "[a]ttendance was poor, teachers and children were tired, and parents were concerned for the safety of their children."[20] The Board then chose to provide after-school instruction on private school campuses.[21] When this also yielded mixed results, the Board implemented a plan calling for the provision of Title I services on private school campuses during school hours.[22]

Public employees who provided Title I services in private schools were given a detailed set of instructions on the rules to be followed to effectuate the secular purpose of Title I and "to ensure that this purpose was not compromised."[23] They were directed to avoid involvement with religious activities at the school, to bar religious materials from their classrooms, and to minimize contact with private school personnel.[24] The employees were supervised by public officials "who attempt[ed] to pay at least one unannounced visit per month."[25] Public employees were assigned to private schools "on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school."[26] In fact, most of the "Title I teachers worked in nonpublic schools with religious affiliations different from their own."[27]

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18. *Agostini*, 117 S. Ct. at 2004 (citing Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar*, 473 U.S. at 414).

19. *Id.*

20. *Id.* (citing *Felton*, 739 F.2d at 51).

21. *Id.*

22. *Id.*

23. *Id.* The Court set forth the instructions that the public employees were given:

> Specifically, employees would be 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 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. (citing *Aguilar*, 473 U.S. at 406).

24. *Aguilar*, 473 U.S. at 407.

25. *Id.*

26. *Agostini*, 117 S. Ct. at 2004 (citing *Aguilar*, 473 U.S. at 406; Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 53 (2d Cir. 1984), *aff'd sub nom. Aguilar*, 473 U.S. at 414).

27. *Id.* (citing *Aguilar*, 473 U.S. at 406).

In 1978, six taxpayers brought a lawsuit to enjoin the Board from using Title I funds for instruction by public employees on the premises of sectarian schools, alleging that the Title I program, as administered by the Board, violated the Establishment Clause.[28] The district court granted the Board's motion for summary judgment based on the record in a case involving an identical challenge to the Title I program[29] in which the court found no factual support for the allegation that the Title I program impermissibly advanced religion.[30] While noting that the Board's Title I program had "done so much good and little, if any, detectable harm,"[31] the Court of Appeals for the Second Circuit nevertheless reversed, holding that New York City's Title I program violated the Establishment Clause.[32]

Before the Supreme Court, the Board argued that its system for monitoring the content of Title I classes distinguished this case from *School District v. Ball*,[33] in which the Court held a similar program unconstitutional,[34] because the monitoring system eliminated the risk that public school employees would "inculcate the religious beliefs of the surrounding parochial school."[35] The Supreme Court acknowledged that the two cases differed, but nonetheless affirmed the judg-

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28. *Aguilar*, 473 U.S. at 407.

29. *Id.* (citing National Coalition for Pub. Educ. & Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980)).

30. *Harris*, 489 F. Supp. at 1265. The record in *Harris* included:

> [E]xtensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services.

Id. The court found that the facts of the case did not support the assumption that providing educational services on parochial school premises advances the school's religious mission, and refused to "conjure up hypothetical situations in the face of a fourteen year record." *Id.* (citing Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974)).

31. *Felton*, 739 F.2d at 72.

32. *Id.*

33. 473 U.S. 373 (1985), *overruled by Agostini*, 117 S. Ct. at 2017.

34. In *Ball*, which was decided the same day as *Aguilar*, the Court held that the program at issue had the impermissible effect of promoting religion in three ways:

> The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Id. at 397.

35. Aguilar v. Felton, 473 U.S. 402, 409 (1985), *overruled by Agostini*, 117 S. Ct. at 2017.

ment of the Second Circuit, holding that New York's Title I program violated the Establishment Clause because its monitoring system gave rise to excessive entanglement of religion and government.[36] In separate dissenting opinions, Justices O'Connor and Rehnquist observed that the records developed in *Aguilar* and *Ball* contained no evidence of even a single incident of religious indoctrination.[37] On remand, the district court permanently enjoined the use of publicly employed teachers on the premises of sectarian schools.[38]

In response to *Aguilar*, the Board, like LEAs across the nation, modified its program so that it could continue to provide Title I services to eligible religious school students.[39] Under the modified program, Title I services were provided at public schools, at leased sites, and in mobile classrooms parked near the sectarian schools.[40]

Between 1986 and 1997, the Board spent more than $100 million to provide these services in a manner that complied with *Aguilar*.[41] These "*Aguilar* costs" meant that the LEAs had less money to spend on remedial education.[42] When *Aguilar* was decided, experts estimated that the decision would result in a decline in the availability of Title I services for approximately 20,000 low-income children in New York City and 183,000 nationwide.[43] In 1987, the Senate Committee on Labor and Human Resources found that *Aguilar* costs had caused a thirty-five percent reduction in the number of eligible private school students served.[44]

In 1995, the Board and several parents of parochial school students eligible for Title I services (Petitioners), under Federal Rule 60(b),[45] moved for relief from the injunction issued after the Court's decision in *Aguilar* on the theory that the "decisional law [had] changed to make legal what the [injunction] was designed to pre-

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36. *Id.* at 413-14.

37. *Id.* at 428 (O'Connor, J., dissenting); *Ball*, 473 U.S. at 399 (O'Connor, J., concurring in part and dissenting in part); *id.* at 401 (Rehnquist, J., dissenting).

38. *Agostini*, 117 S. Ct. at 2005.

39. *Id.*

40. *Id.* The Board also furnished computer-aided instruction, which could be provided on parochial school premises because it did not require that public employees be physically present in the schools. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (citing Aguilar v. Felton, 473 U.S. 402, 431 (1985) (O'Connor, J., dissenting); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 176 (1986)).

44. *Agostini*, 117 S. Ct. at 2005-06 (citing S. REP. NO. 100-222, at 14 (1987), *reprinted in* 1988 U.S.C.C.A.N. 101, 114).

45. *Id.* at 2006; *see supra* note 3 (quoting FED. R. CIV. P. 60(b)(5)).

vent."[46] The district court denied the motion on the ground that the Supreme Court had not overruled *Aguilar.*[47] After the Court of Appeals affirmed,[48] the Supreme Court granted certiorari to consider whether changes in Establishment Clause law since *Aguilar* entitled the Petitioners to relief from the permanent injunction under Rule 60(b).[49]

II. LEGAL BACKGROUND

A. *The Court's Early Approach to Establishment Clause Challenges*

The Court has struggled for more than fifty years to delineate what forms of government aid to religious schools or their students are consistent with the Establishment Clause.[50] The Court upheld state aid to religious school students and their parents in two of the earliest cases to consider the issue. In *Everson v. Board of Education,*[51] the Court considered whether a New Jersey statute authorizing a local school district to reimburse parents for the cost of bus transportation of their children to public or Catholic schools violated the Establishment Clause.[52] A 5-4 majority upheld the statute, reasoning that the "legislation, *as applied,* does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[53] Justice Black, writing for the Court, explained that although the Establishment Clause must be applied broadly to prevent governmental promotion of religion, the Free Exercise Clause[54] prohibits a state from exclud-

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46. *Agostini,* 117 S. Ct. at 2006 (alteration in original) (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992)).

47. *Id.*

48. Felton v. Secretary, United States Dep't of Educ., 101 F.3d 1394 (2d Cir. 1996) (unpublished table decision), *rev'd sub nom. Agostini,* 117 S. Ct. at 2019.

49. Agostini v. Felton, 117 S. Ct. 759 (1997).

50. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court referred to its struggle when it stated: "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.* at 612.

51. 330 U.S. 1 (1947).

52. *Id.* at 5.

53. *Id.* at 18 (emphasis added). The Court's opinion ends with the admonishment that the First Amendment "has erected a wall between church and state . . . [that] must be kept high and impregnable," and that the Court "could not approve the slightest breach." *Id.* Over the vigorous dissent of four Justices, the Court decided that the New Jersey transportation reimbursement did not breach this wall of separation. *Id.*

54. U.S. CONST. amend. I. The Free Exercise Clause of the First Amendment immediately follows the Establishment Clause, and provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*. . . ." *Id.* (emphasis added).

ing people from the benefits of public welfare legislation because of their religious faith.[55]

In *Board of Education v. Allen*,[56] the Court considered whether a state law that required local school districts to lend textbooks free of charge to all students in grades seven through twelve, including those attending religious schools, violated the Establishment Clause.[57] Upon the parties' cross-motions for summary judgment, the trial court found the law unconstitutional under the First and Fourteenth Amendments.[58] Consequently, there was only a "meager record" for the Supreme Court to consider.[59] The Court held that the law did not violate the Establishment Clause, reasoning that it could not hold the law unconstitutional based solely on judicial notice when the record contained no evidence about particular schools, teachers, courses, or books, or that the sectarian schools were using the books to teach religion.[60] The majority refused to assume, absent any evidence, that public school authorities charged with approving books for the loan program would be unable to distinguish between secular and religious books or that they would not honestly perform their duties under the law.[61] The Court specifically rejected the argument "that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[62]

In his dissenting opinion, Justice Black, distinguishing his opinion in *Everson*, argued that, unlike transportation, "[b]ooks are the most essential tool of education" and "although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect."[63] He also warned that state aid to religious schools would generate the kind of "discord, disharmony, hatred, and strife among our people" that the Establishment Clause was intended to

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55. *Everson*, 330 U.S. at 16.

56. 392 U.S. 236 (1968).

57. *Id.* at 238. The *Allen* Court abandoned the "high and impregnable" wall rhetoric used in *Everson*, *see supra* note 53, and recognized that "the line between state neutrality to religion and state support of religion is not easy to locate. . . . 'The problem, like many problems in constitutional law, is one of degree.'" *Allen*, 392 U.S. at 242 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

58. *Allen*, 392 U.S. at 240-41.

59. *Id.* at 248.

60. *Id.*

61. *Id.* at 245.

62. *Id.* at 248.

63. *Id.* at 252 (Black, J., dissenting).

prevent.[64] Justice Douglas, in his dissenting opinion, argued that books, unlike buses, are inherently ideological and that competing sects would put "[p]owerful religious-political pressures . . . on the state agencies to provide the books . . . which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church."[65]

B. *The Court Imposes a Burden that the Government Can Not Meet*

After *Everson* and *Allen*, the Court began to assume that certain forms of state aid advanced religion in violation of the Establishment Clause, despite the absence of any supporting evidence in the record. In *Lemon v. Kurtzman*,[66] the Court articulated and applied a three-part test (the *Lemon* test) to determine whether statutes authorizing salary subsidies for teachers employed by religious schools to teach "secular" subjects comported with the Establishment Clause:[67] "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[68]

The Court found that the statutes had a secular legislative purpose, i.e., "to enhance the quality of the secular education in all schools."[69] However, the Court also "recognize[d] 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."[70] Observing that "[t]he

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64. *Id.* at 254.

65. *Id.* at 265 (Douglas, J., dissenting).

66. 403 U.S. 602 (1971).

67. *Lemon* involved Pennsylvania's Nonpublic Elementary and Secondary Education Act, PA. STAT. ANN., tit. 24, §§ 5601-5609 (West Supp. 1971) (repealed 1977), which authorized the reimbursement of nonpublic schools for their expenditures for teachers' salaries, textbooks, and instructional materials, and the Rhode Island Salary Supplement Act, R.I. GEN. LAWS §§ 16-51-1 to -9 (Supp. 1970) (repealed 1980), which authorized the State to supplement the salaries of certain parochial school teachers by 15% of their current annual salary. *Lemon*, 403 U.S. at 607-11.

68. *Lemon*, 403 U.S. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). In *Allen*, the Court observed that the line between permissible and impermissible state aid "is not easy to locate." *Allen*, 392 U.S. at 242. In *Lemon*, the Court asserted that "[i]n the absence of precisely stated constitutional prohibitions," these lines must be drawn "with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon*, 403 U.S. at 612 (quoting *Walz*, 397 U.S. at 668).

69. *Lemon*, 403 U.S. at 613.

70. *Id.* at 618. The Court noted that most of the lay teachers in the Rhode Island Roman Catholic elementary schools were members of the Catholic faith, that parochial

State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion,"[71] the Court held that the "comprehensive, discriminating, and continuing state surveillance . . . inevitably . . . required to ensure that . . . the First Amendment . . . [is] respected" violated the Establishment Clause because it created excessive entanglement between the state and the religious schools.[72] The Court in *Lemon* distinguished the supervision required from that in *Allen*, in which it upheld state loans of secular textbooks to parochial school students, by noting that "a textbook's content is ascertainable, but a teacher's handling of a subject is not. . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[73]

The Court also noted that these programs had the potential for dividing communities along religious lines.[74] Although debate is normally healthy, the Court observed that "political division along reli-

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schools "involve substantial religious activity and purpose," and that they are used to indoctrinate students into the religion. *See id.* at 616, 618. Furthermore, the Court stated that parochial school teachers will "*inevitably* experience great difficulty in remaining religiously neutral," in part because some of a teacher's responsibilities "*[i]nevitably* . . . hover on the border between secular and religious orientation." *Id.* at 618 (emphases added). The Court also asserted that impermissible state "surveillance" of the parochial school teachers would "*inevitably* be required to ensure that . . . the First Amendment [is] respected." *Id.* at 619 (emphasis added).

The Court offered other reasons why it is "inevitable" that the parochial school teachers would find it difficult to remain religiously neutral: "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." *Id.* at 618.

Another explanation for the Court's reliance on these "inevitable" consequences to invalidate the programs, however, may be its "unwillingness to accept the District Court's express findings that *on the evidence* before it none of the teachers . . . involved mixed religious and secular instruction." *Id.* at 665-66 (White, J., concurring in part and dissenting in part) (emphasis added).

71. *Lemon*, 403 U.S. at 619 (emphasis added). The Court's view that the United States Constitution required the State to be *certain* that its aid does not advance religion marked a change in its approach to Establishment Clause cases. Only two years earlier, the *Allen* Court rejected the argument that a book loan program might violate the Establishment Clause because there was no evidence in the record that the program actually advanced religion. *See Allen*, 392 U.S. at 245. The *Allen* Court said it was willing to *assume* in the absence of contrary evidence that the books loaned to the students were not unsuitable for use because of religious content. *Id.*

72. *Lemon*, 403 U.S. at 619.

73. *Id.* at 617, 619.

74. *Id.* at 622-23. The majority's observation that state aid to religious schools could divide the community along religious lines echoes the concern raised by the four dissenting Justices in *Everson* that state aid to religious schools would result in "the struggle of sect against sect for the larger share." Everson v. Board of Educ., 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting).

gious lines was one of the principal evils against which the First Amendment was intended to protect"[75] and characterized this divisiveness as another form of entanglement.[76]

In his dissenting opinion, Justice White asserted that a "critical factor" in the Court's decision to invalidate one of the statutes was its "unwillingness to accept the District Court's express findings that on the evidence before it none of the teachers . . . involved mixed religious and secular instruction."[77]

Four years later in *Meek v. Pittenger*,[78] the Court considered a challenge to a Pennsylvania statute that authorized the use of public employees to provide teaching and guidance counseling for exceptional, remedial, and educationally disadvantaged students on the premises of nonpublic schools.[79] Following *Lemon*, the Court held that the program would necessitate excessive entanglement between church and state; therefore, it violated the Establishment Clause.[80] The majority noted that the teachers in *Meek* were less likely than the parochial school employees in *Lemon* to impermissibly foster religion because they were state employees not subject to the control and discipline of a religious institution.[81] Nevertheless, the Court determined that the teachers could potentially be influenced by the religious atmosphere that pervaded the schools[82] and held that the district court erred in relying on the good faith and professionalism of the publicly employed teachers to ensure that the program did not advance reli-

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75. *Lemon*, 403 U.S. at 622 (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

76. *Id.* The Court did not appear to rely on this form of entanglement between government and religion in holding that the programs were unconstitutional. *See id.* at 621-23. However, some Justices have asserted it as a basis for holding that a challenged law violates the Establishment Clause. *See* Aguilar v. Felton, 473 U.S. 402, 417 (1985) (Powell, J., concurring) ("[T]he potential for [political] divisiveness is a strong additional reason for holding that the . . . program[ ] [is] invalid on entanglement grounds."); Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring in part and dissenting in part) (arguing that the potential for political divisiveness, without more, required the conclusion that the statute at issue offended the First Amendment's prohibition against laws respecting an establishment of religion); *id.* at 258-59 (Marshall, J., concurring in part and dissenting in part) (arguing that funding for textbooks "should not be provided because of the dangers of political 'divisiveness on religious lines'"); *see also* Meek v. Pittenger, 421 U.S. 349, 374 (1975) (Brennan, J., concurring in part and dissenting in part) (characterizing political divisiveness as a fourth factor of the *Lemon* test).

77. *Lemon*, 403 U.S. at 666 (White, J., dissenting).

78. 421 U.S. 349 (1975).

79. *Id.* at 352-53.

80. *Id.* at 370.

81. *Id.* at 371.

82. *Id.* at 371-72.

gion.[83] Although the Court cited no instances of indoctrination by public employees and admitted that "[t]he likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar," it determined that "a diminished probability of impermissible conduct is not sufficient."[84] The Court, citing *Lemon*, again asserted that the Constitution required the state to be certain that its teachers remained religiously neutral, and concluded that the only way to be certain was to engage in some form of continuing surveillance that would itself violate the Establishment Clause.[85]

In a separate opinion, Justice Rehnquist, joined by Justice White, criticized the majority's "significant *sub silentio* extension" of *Lemon* to cases involving publicly employed teachers in private schools.[86] He argued that the Court's holding in *Lemon* flowed from the "susceptibility of parochial school teachers to 'religious control and discipline,'" and asserted the "exorcisation of that constitutional 'evil' [in *Meek* should have led] to a different constitutional result."[87]

There was also criticism of the *Meek* majority's "unsubstantiated factual proposition"[88] that the risk with regard to public employees was significant enough to require the level of surveillance that gives rise to excessive entanglement.[89] Justice Rehnquist argued that the Court's "*ex cathedra* pronouncement" that guidance counselors were as likely as teachers to inculcate religion relieved the plaintiff of the burden of proof and was "deficient as a matter of process and insupportable as a matter of law."[90]

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83. *Id.* at 369.

84. *Id.* at 370-71.

85. *Id.* at 369-72.

86. *Id.* at 392 (Rehnquist, J., concurring in part and dissenting in part).

87. *Id.* at 394.

88. *Id.* The district court in *Meek* had found "[t]he notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence." Meek v. Pittenger, 374 F. Supp. 639, 657 (E.D. Pa. 1974), *aff'd in part, rev'd in part*, 421 U.S. at 373.

89. *Meek*, 421 U.S. at 385-86 (Burger, C.J., concurring in part and dissenting in part). Chief Justice Burger argued:

> [T]here is no basis in 'experience and history' to conclude that a State's attempt to provide—through the services of its own state-selected professionals—the remedial assistance necessary for *all* its children poses the same potential for unnecessary administrative entanglement or divisive political confrontation which concerned the Court in *Lemon v. Kurtzman*.

Id.

90. *Id.* at 391-92 (Rehnquist, J., concurring in part and dissenting in part).

In 1985, the Court again discussed the constitutionality of publicly employed teachers in religious schools in *School District v. Ball*[91] and *Aguilar v. Felton.*[92] Relying on the assumptions erected in *Meek* and *Lemon,*[93] the *Aguilar* Court held that the continuing supervision required by New York's Title I program to ensure that publicly employed Title I teachers were not inculcating religion inevitably gave rise to unconstitutional entanglement between government and the religious schools.[94] The Court also observed that excessive entanglement would result both from the administrative cooperation required between the schools and the state to maintain the Title I program and from the dangers of political divisiveness along religious lines.[95] The Shared Time program at issue in *Ball,*[96] which did not have a system for monitoring teachers, was invalidated on the ground that it had the primary effect of advancing religion.[97] The *Ball* Court identified three ways in which the challenged program violated this second prong of the *Lemon* test.[98] First, the teachers, influenced by the "pervasively sectarian" atmosphere of the religious schools, could subtly or overtly inculcate religion.[99] Second, the presence of publicly em-

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91. 473 U.S. 373 (1985), *overruled by Agostini,* 117 S. Ct. at 2017.

92. 473 U.S. 402 (1985), *overruled by Agostini,* 117 S. Ct. at 2017.

93. *See supra* notes 70-73 and accompanying text (discussing the *Lemon* Court's assumption that publicly subsidized religious school teachers would experience great difficulty in remaining religiously neutral and its conclusion that the continuing surveillance needed to be certain that the teachers would not promote religion would constitute excessive entanglement); *supra* notes 80-85 and accompanying text (discussing the *Meek* Court's extension to public employees of the *Lemon* Court's assumption that teachers might inculcate religion and its reaffirmation of the conclusion that the Constitution required the government to be *certain* that its programs did not advance religion).

94. *Aguilar,* 473 U.S. at 409, 412-13.

95. *Id.* at 413-14.

96. The Shared Time program was one of two state programs challenged in *Ball.* The program provided classes to private school students at public expense on the premises of the private schools. *Ball,* 473 U.S. at 375. The classes were offered during the regular schoolday and were intended to supplement the "core curriculum" required by the state for accreditation. *Id.* Classes included remedial and enrichment mathematics, reading, art, music, and physical education, *id.*, and occupied approximately 10% of a private school student's week. *Id.* (citing Americans United for Separation of Church & State v. School Dist., 546 F. Supp. 1071, 1079 (W.D. Mich. 1982) (mem.)). Although the program was only offered in private schools, similar courses were offered in the public schools. *Id.* at 375-76. The classes were taught by full-time public school employees. *Id.* at 376. This Note confines its discussion to the Shared Time program because that program more closely resembled the Title I program at issue in *Aguilar* and *Agostini.*

97. *Id.* at 397.

98. *See supra* text accompanying note 68 (outlining the *Lemon* test).

99. *Ball,* 473 U.S. at 397. In *Ball,* as in *Lemon* and *Meek,* the record contained no evidence of publicly employed teachers inculcating religion. *Ball,* 473 U.S. at 388 (citing Americans United for Separation of Church & State v. School Dist., 718 F.2d 1389, 1404 (6th Cir. 1983); *see supra* notes 70, 77, 84, 88 and accompanying text (discussing the lack of

ployed teachers inside a sectarian school would create a "symbolic union of church and state" that conveys a message of state support of the school's religion to the impressionable students as well as the general public.[100] Third, the program would "subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[101] For these reasons, the Court held the Shared Time program unconstitutional.

C. *Reconsidering the Assumptions Created by the Court*

The Court set the stage for its decision in *Agostini* in two recent cases which upheld state aid to students at religious schools. In *Witters v. Washington Department of Services for the Blind*,[102] the Court held that the Establishment Clause did not prevent a state from financing a blind person's training at a Christian college.[103] The Court reasoned that the program did not have the primary effect of advancing religion because the financial aid was made available to individuals without regard for the secular or religious nature of the institution benefited. Any aid that ultimately flowed to a religious institution did

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evidence in *Lemon* and *Meek* of indoctrination by publicly employed teachers at sectarian schools). The Court asserted that this lack of evidence was "of little significance" because "there is no reason to believe that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself." *Id.* at 388-89.

100. *Ball*, 473 U.S. at 390. The Court held that government aid has a primary effect of advancing religion when it is likely to be perceived by adherents of the aided religion as an endorsement, and by nonadherents as a disapproval, of their individual religious choices. *Id.* The Court found that the symbolic union created by the presence of publicly employed teachers and state sponsored classes in parochial schools was especially likely to send this message to young and impressionable students. *Id.*

101. *Id.* at 397. The Court has noted that "incidental" or "indirect" benefits to religious institutions do not necessarily render a law unconstitutional. *Id.* at 393 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion); Hunt v. McNair, 413 U.S. 734, 742-43 (1973)). The second prong of the *Lemon* test is violated only when the effect of advancing religion is "direct and substantial." *Id.* at 394 (quoting *Nyquist*, 413 U.S. at 783-85 n.39). The school district argued that the program only supplemented the courses in the current curricula and did not supplant them, and therefore did not relieve a substantial portion of the school's responsibility for teaching secular subjects. *Id.* at 396. The majority rejected this argument on the grounds that (1) it is impossible to know whether a parochial school would have offered a course if the State did not offer it first, (2) the state-sponsored courses were on topics such as math and reading that were already a part of the parochial schools' curricula, and (3) the parochial schools could shift responsibility for teaching certain courses to the State simply by ceasing to offer them and waiting for them to be replaced by a state-sponsored course with the same content. *Id.* at 396-97.

102. 474 U.S. 481 (1986).

103. *Id.* at 489.

so "only as a result of the genuinely independent and private choices of aid recipients."[104]

In *Zobrest v. Catalina Foothills School District*,[105] the Court considered whether the Establishment Clause barred a publicly employed sign-language interpreter from accompanying a deaf student to his parochial high school.[106] The district court had held that the Establishment Clause prohibited the school district from providing an interpreter, reasoning that "'[t]he interpreter would act as a conduit for the religious inculcation of [the student]—thereby, promoting [the student's] religious development at government expense.'"[107] The Supreme Court disagreed, noting that the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[108] The Court distinguished *Meek* and *Ball* on the grounds that (1) the programs at issue in those cases "relieved sectarian schools of costs they otherwise would have borne in educating their students,"[109] whereas the school in *Zobrest* would not have paid for an interpreter; and (2) the role of a sign-language interpreter is different from that of a teacher or counselor, and there was no evidence in the record to suggest that the interpreter would do more than accurately interpret the material presented in class.[110]

III. THE COURT'S REASONING

In *Agostini v. Felton*, the Supreme Court held that recent changes in Establishment Clause law justified relief from the injunction entered after the Court's decision in *Aguilar*, which prohibited the use of Title I funds for instruction by public school employees on the premises of parochial schools.[111] Writing for the majority, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, Ken-

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104. *Id.* at 486-87.

105. 509 U.S. 1 (1993).

106. *Id.* at 3.

107. *Id.* at 5 (first alteration in original) (quoting Appendix to Petition for Certiorari at A-35, *Zobrest* (No. 92-94)).

108. *Id.* at 8 (citing Mueller v. Allen, 463 U.S. 388 (1983); *Witters*, 474 U.S. 481).

109. *Id.* at 12 (citing *Witters*, 474 U.S. at 487 (quoting School Dist. v. Ball, 473 U.S. 373, 394 (1985), *overruled by Agostini*, 117 S. Ct. at 2017)).

110. *Id.* at 13. The Court noted that ethical guidelines require interpreters to "'transmit everything that is said in exactly the same way it was intended.'" *Id.* (quoting Joint Appendix to Brief for Petitioners at 73, *Zobrest* (No. 92-94)).

111. *Agostini*, 117 S. Ct. at 2016.

nedy, and Thomas, first observed that relief from an injunction under Rule 60(b)(5) is appropriate when the movant can show "'a significant change either in factual conditions or in law.'"[112] The Court rejected the petitioners' argument that "the exorbitant costs of complying with the District Court's injunction [in *Aguilar*] constitute[d] a significant factual development warranting modification of the injunction."[113] The argument that the views expressed by five Justices in *Board of Education v. Grumet*[114] that *Aguilar* should be reconsidered or overruled "effected a change in Establishment Clause law" was also rejected.[115]

The Court then turned to the petitioners' argument that *Aguilar* had been so undermined by the Court's subsequent Establishment Clause decisions that it was no longer good law.[116] In examining this question, the Court first found that *Aguilar* and *Ball* rested on four assumptions: (1) any public employee who works in a sectarian school is presumed to inculcate religion; (2) the presence of public employees in sectarian schools creates a "symbolic union" between church and state; (3) public programs that directly aid the educational function of sectarian schools impermissibly finance religious indoctrination, even if the aid only reaches such schools as a result of private decisionmaking; and (4) public employees on parochial school campuses must be closely monitored in order to be certain that they do not inculcate religion.[117]

The Court then sought to determine whether the Title I program satisfied the three primary criteria that it currently uses to evaluate whether government aid has the impermissible effect of advancing religion—whether the aid results in governmental indoctrination, defines its recipients by reference to religion, or creates an excessive entanglement between church and state.[118] However, as the majority applied this familiar three-part analysis, it reconsidered the assumptions that had guided the Court's application of these criteria in re-

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112. *Id.* at 2006 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)).

113. *Id.* at 2006-07 (noting that the petitioners and the Court were aware of the costs of complying with *Aguilar* at the time it was decided (citing Brief for Petitioner Agostini at 38-40)).

114. 512 U.S. 687 (1994).

115. *Agostini*, 117 S. Ct. at 2007. "[T]he question of *Aguilar*'s propriety" was not before the Court in *Grumet*. *Id.*

116. *Id.*

117. *Id.* at 2010.

118. *Id.* at 2016.

cent decades. The Court ultimately found that its recent cases had undermined each of these assumptions.[119]

The Court first considered whether the Title I program resulted in government indoctrination of religious beliefs. The majority reasoned that *Zobrest* explicitly repudiated the assumption that a public employee on sectarian school property will inculcate religion,[120] and implicitly rejected the assumption that the presence of a public employee in a sectarian school creates an impermissible "symbolic link" between church and state.[121]

The Court also stated that *Zobrest* and *Witters* departed from the rule relied on in *Ball* that any government aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination.[122] The Court observed that New York's Title I program was indistinguishable from the aid which it upheld in *Zobrest* and *Witters*, because Title I services were neutrally provided to eligible students at whatever school they chose to attend, and by law could not supplant the regular curricula.[123] These services, therefore, did not "'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'"[124] For these reasons, the Court stated that *Zobrest* and *Witters* "make clear that, under current law . . . New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination."[125]

The Court next considered whether the program defined its beneficiaries by reference to religion, thereby subsidizing religion or creating a financial incentive for students to choose a religious school.[126]

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119. *Id.* at 2010 ("Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied.").

120. *Id.* at 2011 (asserting that "[i]n the absence of evidence to the contrary, we assumed [in *Zobrest*] that the interpreter would dutifully discharge her responsibilities" and not inculcate religious messages).

121. *See id.* The Court stated:

> We do 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. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound," and the Court in *Zobrest* rejected it.

Id. at 2012 (citation omitted).

122. *Id.* at 2012.

123. *Id.* at 2013 (citing 34 C.F.R. § 200.12(a) (1996)).

124. *Id.* (alteration in original) (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)).

125. *Id.* at 2012.

126. *Id.* at 2014.

It observed that aid allocated based on neutral, secular criteria in a way that does not discriminate between religious and secular beneficiaries "is less likely to have the effect of advancing religion."[127] The majority noted that although the Court had sustained programs that provided aid to all children regardless of where they went to school,[128] it gave this consideration no weight in *Aguilar* and *Ball*.[129] The Court concluded that Title I services were allocated based on criteria that neither favored nor disfavored religion, and therefore provided no incentive for prospective aid recipients to modify their religious beliefs or practices in order to receive the service.[130] The Title I program, therefore, did not define its recipients by reference to religion.

Finally, the Court considered whether the Title I program resulted in an excessive entanglement of church and state. The majority observed that the Court's finding of excessive entanglement in *Aguilar* 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.'"[131] The majority stated that the need for "administrative cooperation" or the threat of "political divisiveness" are "insufficient by themselves to create an 'excessive' entanglement" because they are present regardless of where Title I services are offered, and no court has held that Title I services offered to students off the sectarian school premises are unconstitutional.[132] The Court then held that because the assumption underlying the supposed need for "pervasive monitoring"—that public employees in a sectarian school would inculcate religion—was abandoned in *Zobrest*, the assumption that *pervasive* monitoring of Title I teachers is required must also be disregarded.[133] For these reasons, the Court held that the administration of New York's Title I

127. *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

128. *Id.* (citing Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947); Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968); Mueller v. Allen, 463 U.S. 388, 398-99 (1983); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986); *Zobrest*, 509 U.S. at 10).

129. *Id.*

130. *Id.*

131. *Id.* at 2015 (citing Aguilar v. Felton, 473 U.S. 402, 413-14 (1985), *overruled by Agostini*, 117 S. Ct. at 2017).

132. *Id.* (citing *Aguilar*, 473 U.S. at 413-14; Walker v. Board of Educ., 46 F.3d 1449 (9th Cir. 1995); Pulido v. Cavazos, 934 F.2d 912, 919-20 (8th Cir. 1991); Committee for Pub. Educ. & Religious Liberty v. Secretary, United States Dep't of Educ., 942 F. Supp. 842 (E.D.N.Y. 1996)).

133. *Id.* at 2015-16.

program does not create an excessive entanglement between government and religion.

The Court concluded that New York City's Title I program did not "run afoul" of any of the criteria used to evaluate "whether government aid has the effect of advancing religion" and held:

> [T]hat a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. 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. Accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.[134]

In a dissenting opinion, Justice Souter, joined by Justices Stevens and Ginsburg, defended "the very reasonable line drawn in *Aguilar* and *Ball*" which permitted public employees to teach sectarian school students only at off-campus locations.[135] The dissenters asserted that the Court was able to justify relief under Rule 60(b) only by reading *Aguilar* and *Ball* for exaggerated propositions and then interpreting *Witters* and *Zobrest* as utterly abandoning those propositions.[136]

In another dissenting opinion, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, argued that the issue whether *Aguilar* was still good law was not properly before the Court.[137] Appellate courts review denials of Rule 60(b) motions for an "abuse of discretion."[138] Lower courts must "'follow the [Supreme Court] case which directly controls, leaving to [that] Court the prerogative of overruling its own decisions.'"[139] Justice Ginsburg argued that because *Aguilar*

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134. *Id.* at 2016 (citations omitted).

135. *Id.* at 2019, 2022 (Souter, J., dissenting).

136. *Id.* at 2023-25.

137. *Id.* at 2026-28 (Ginsburg, J., dissenting).

138. *Id.* at 2027 (citing Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7 (1978); System Fed'n No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 648-50 (1961)).

139. *Id.* (first alteration in original) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); *see also Agostini*, 117 S. Ct. at 2017 ("We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving [the] Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas*, 490 U.S. at 484)).

had not been overruled prior to *Agostini*,[140] the district court did not abuse its discretion in denying the motion.[141] Consequently, the Court should have reconsidered *Aguilar* at a later time.[142]

IV. ANALYSIS

Agostini improves the Supreme Court's approach to Establishment Clause challenges by taking the district court's factual findings into account and purging the decisional law that created the "untested assumptions"[143] relied on by the Court to invalidate programs involving public employees in religious schools. These changes shift the evidentiary burden from the government entity implementing the program back to the party challenging the program to show that it has the impermissible effect of advancing religion. Ultimately, the Court's decision in *Agostini* is a return to, and refinement of, its early approach to Establishment Clause challenges.[144]

In the early case of *Board of Education v. Allen*,[145] the Court stated that, *absent evidence*, it would not assume that school authorities responsible for selecting non-sectarian textbooks for public schools would be unable or unwilling to do the same when the books were requested by religious schools pursuant to a book loan.[146] However, after *Allen*, the Court began to invalidate programs by assuming that publicly funded teachers and counselors would be unable or unwilling to avoid fostering religion, despite a lack of evidentiary support for this assumption.[147] Moreover, the Court repeatedly asserted that the

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140. *Id.* at 2027 (Ginsburg, J., dissenting).

141. *Id.*

142. *Id.* at 2028; *but see Agostini*, 117 S. Ct. at 2017-18 (rejecting this argument on the ground that "the [trial court's] exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained" (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990))).

143. *See* Lemon v. Kurtzman, 403 U.S. 602, 666 (1971) (White, J., dissenting) (characterizing the Court's assertion that state-funded teachers in parochial schools would impermissibly foster religion as an "untested assumption" that was not supported by the record).

144. *See supra* notes 50-62 and accompanying text (discussing the Court's analysis in *Everson* and *Allen*). In the early cases of *Everson* and *Allen*, the Court attributed importance to the actual effects of the challenged programs, rather than the possible, but unrealized, consequences that guided the Court in later cases. In *Everson*, the Court analyzed the challenged statute as it was actually applied. *See* text accompanying *supra* note 53. In *Allen*, the Court refused to hold the challenged statute unconstitutional when the record contained no evidence that the books provided by the States were used to teach religion. *See* text accompanying *supra* notes 60-61.

145. 392 U.S. 236 (1968).

146. *Id.* at 245; *see also supra* notes 56-62 (discussing the Court's holding and reasoning in *Allen*).

147. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373, 388-89, 397 (1985) (noting the absence of proof of specific incidents of religious indoctrination in the record but holding that this

government could not assume that the publicly funded teachers and counselors would *not* inculcate religion because the Establishment Clause required it to be *certain* that they did not.[148] The Court effectively created an irrebuttable presumption that these programs were unconstitutional by placing the burden on the government to prove that public employees in sectarian schools did not inculcate religion and consistently disregarding district court findings that supported the government's position.[149] Furthermore, when the government instituted safeguards to detect and prevent the inculcation of religion, the Court held that these safeguards violated the Establishment Clause because they gave rise to excessive entanglement,[150] thus creating a "'Catch-22' paradox"[151] that virtually guaranteed no program would pass constitutional muster.

Agostini extricates the government from this conundrum by abandoning the assumptions on which the Court has relied to invalidate programs and considering the district court's factual findings in its determination of whether the program is constitutional. *Agostini* rejected the assumption that the risk that publicly funded teachers or counselors on parochial school campuses would inculcate religion is so great as to violate the Establishment Clause.[152] The Court noted that in *Zobrest* it had instead assumed, in the absence of contrary evidence, "that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession."[153] The *Agostini* Court's application of this new assumption to publicly funded teachers signals that the Court will require plaintiffs in future Establishment Clause challenges to

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was of little significance and invalidating a program that placed publicly employed teachers in parochial schools on the grounds that the teachers may "indoctrinate the students in particular religious tenets"), *overruled by Agostini*, 117 S. Ct. at 2017.

148. *See* Meek v. Pittenger, 421 U.S. 349, 369 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778-79 (1973); *Lemon*, 403 U.S. at 619.

149. *See Meek*, 421 U.S. at 391-92 (Rehnquist, J., concurring in part and dissenting in part) (criticizing this approach as "deficient as a matter of process and insupportable as a matter of law").

150. *See* Aguilar v. Felton, 473 U.S. 402, 409 (1985) (concluding that the supervisory system maintained by New York City results in the excessive entanglement of church and state), *overruled by Agostini*, 117 S. Ct. at 2017; *Meek*, 421 U.S. at 370 (explaining that "[t]he prophylactic contacts required to ensure" that publicly employed teachers play a wholly secular role creates "a constitutionally intolerable degree of entanglement between church and state" (citing *Lemon*, 403 U.S. at 619)).

151. *See Aguilar*, 473 U.S. at 420 (Rehnquist, J., dissenting) (quoting Wallace v. Jaffree, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting)); *Lemon*, 403 U.S. at 668 (White, J., dissenting) (criticizing the Court for creating this "insoluble paradox" for the government and religious schools).

152. *Agostini*, 117 S. Ct. at 2012.

153. *Id.* at 2011 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)).

produce some evidence that the teachers actually inculcated religion.[154]

In her opinion for the Court in *Agostini*, Justice O'Connor argued that *Zobrest* implicitly rejected *Ball's* and *Aguilar's* assumption that the mere presence of public employees on private school property creates a "symbolic union" between government and religion, but did not explain why.[155] However, her dissent in *Aguilar* suggests a basis for rejecting the "symbolic union" assumption. She reasoned that given the lack of even a single incident of indoctrination in nineteen years, an objective observer of the Title I program would more likely view it as helping impoverished children get a decent education than as endorsing the tenets of the religious schools.[156]

The *Agostini* majority also found that subsequent cases had rejected *Ball's* assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking."[157] The Court specifically noted that its cases had recognized that aid made available to individuals based on neutral criteria unrelated to religion that reached religious institutions only as a result of private decisionmaking, and that did not relieve a religious school of costs it otherwise would have borne in educating its students, did not have the effect of advancing religion.[158] The Court's conclusion that New York's Title I services reach schools as a result of "private decisionmaking" essentially means that whether the government provides the aid directly to the student or the religious school is irrelevant so long as its provision depends on the private decisions of the individual students (or their parents) to attend the religious school.

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154. *See id.* at 2012 (noting that there was no evidence that instructors ever attempted to inculcate religion and that, therefore, "both our precedent *and our experience* require us to reject" this assumption (emphasis added)).

155. The *Agostini* dissenters argued that *Aguilar's* implicit conclusion that the Title I program created a symbolic link rested on the fusing of public and private faculties, not the "mere presence" of public employees on religious school property. *Id.* at 2023 (Souter, J., dissenting). The majority responded that there was no constitutionally significant difference in the symbolic link created by publicly funded teachers in religious schools and the symbolic link that is created when they teach religious school students at off-campus locations. *Agostini*, 117 S. Ct. at 2012. This argument may have merit, but it does little to rebut the dissenter's point that *Zobrest* did not reject the "symbolic link" assumption with regard to teachers.

156. *Aguilar*, 473 U.S. at 425 (O'Connor, J., dissenting).

157. *Agostini*, 117 S. Ct. at 2010, 2012.

158. *See id.* at 2011-13 (citing *Zobrest*, 509 U.S. at 10, 12; Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

Agostini also signals that, absent evidence, the Court will no longer assume that a program designed to provide only "supplementary" services will in fact relieve the religious schools of responsibility for providing secular education. The *Agostini* dissenters and the *Ball* majority argued that Title I services supplant the remedial instruction already provided in New York's religious schools because sectarian schools reduce remedial instruction once their students begin to receive Title I instruction.[159] Additionally, they argue that it is impossible to draw the line between supplemental and general education.[160] The *Agostini* majority rejected these arguments as speculative and unsupported by any evidence on the record.[161] Again, the *Agostini* Court rejected the assumption relied on in past cases that public officials could not be trusted to operate within the legal limitations imposed by the program, and instead placed the burden back on the plaintiffs to produce evidence that the challenged program, as applied, does in fact relieve the religious schools of secular educational responsibilities.[162]

Agostini also limited the reach of the "entanglement" prong. Because it was assumed by the Court in *Aguilar* that teachers were likely to inculcate religion, the *Aguilar* court found that the Title I program would require "pervasive monitoring" to be "certain" that the Establishment Clause was not violated.[163] The Court held that the pervasive monitoring itself would "inevitably" constitute excessive entanglement.[164] However, in *Agostini*, the Court held that because it had abandoned the assumption that teachers were likely to inculcate religion, it "must also discard the assumption that *pervasive* monitoring of Title I teachers is required."[165]

The Court reviewed the Title I program's system of monitoring teachers to determine whether it was adequate to prevent or detect

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159. *Id.* at 2021 (Souter, J., dissenting).

160. *Id.*; *see also* School Dist. v. Ball, 473 U.S. 373, 396 (1985) (explaining that the distinction between courses that supplement and those that supplant the regular curriculum is not clear), *overruled by Agostini*, 117 S. Ct. at 2017.

161. *Agostini*, 117 S. Ct. at 2013.

162. *See id.* (rejecting this assumption based in part on the fact that there was no evidence in the record to support it).

163. Aguilar v. Felton, 473 U.S. 402, 411-13 (1985), *overruled by Agostini*, 117 S. Ct. at 2017.

164. *Id.* at 409.

165. *Agostini*, 117 S. Ct. at 2016. The *Agostini* Court stated that some interaction between church and state is inevitable and tolerable. *See id.* at 2015 (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). Entanglement is unconstitutional only when it is "excessive." *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988); Roemer v. Board of Pub. Works, 426 U.S. 736, 764-65 (1976) (plurality opinion)).

indoctrination by public employees without giving rise to excessive entanglement. The majority noted that there was "no suggestion in the record . . . that unannounced monthly visits of public supervisors [were] insufficient to prevent or to detect inculcation of religion by public employees."[166] The Court's decision suggests that the Establishment Clause no longer requires the State to be "certain" that its employees will not indoctrinate students,[167] but only that reasonable and effective safeguards be in place.[168]

The *Agostini* Court held that the need for administrative cooperation between the school systems and the potential that the program would cause political divisiveness along religious lines did not render the program unconstitutional, explaining that "[u]nder our current understanding of the Establishment Clause, [these] considerations are insufficient by themselves to create an 'excessive' entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus."[169] It is unclear whether the Court was ruling out "administrative cooperation" and "political divisiveness" as sufficient bases for invalidating public aid to parochial schools, or was only claiming that they were not present in this case to such a degree as to cause "excessive" entanglement. However, the fact that the dissenters did not raise these considerations as grounds for finding "excessive" entanglement could mean that they too see them as insufficient for invalidating such aid.[170]

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166. *Id.* at 2016. In her *Aguilar* dissent, Justice O'Connor criticized the suggestion that publicly employed teachers in sectarian schools require extensive supervision "because the State must be *certain* that public school teachers do not inculcate religion." *Aguilar*, 473 U.S. at 428-29 (O'Connor, J., dissenting). "That reasoning would require us to close our public schools, for there is always some chance that a public school teacher will bring religion into the classroom, regardless of its location." *Id.* at 429 (citing Wallace v. Jaffree, 472 U.S. 38, 44-45 n.23 (1985)).

167. *See supra* notes 71, 84, 85 and accompanying text (discussing cases in which the Court invalidated aid programs even though there was no evidence of advancement of religion, because the Court had to be *certain* that the programs would not advance religion).

168. *Agostini*, 117 S. Ct. at 2016.

169. *Id.* at 2015 (citing *Aguilar*, 473 U.S. at 413-14; Walker v. Board of Educ., 46 F.3d 1449 (9th Cir. 1995); Pulido v. Cazazos, 934 F.2d 912, 919-20 (8th Cir. 1991); Committee for Pub. Educ. & Religious Liberty v. Secretary, United States Dep't of Educ., 942 F. Supp. 842 (E.D.N.Y. 1996)).

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

V. Conclusion

The Court has sent a clear message that it will no longer rely on "untested assumptions"[171] to automatically invalidate government programs that use public employees to provide services to students on the premises of sectarian schools absent some evidence that the program actually advances religion or leads to "excessive" entanglement in violation of the Establishment Clause.[172] *Agostini* places the burden on the plaintiff to present such evidence, and marks an end to the days when the government was essentially confronted with an irrebuttable presumption that such programs were unconstitutional.[173] In so doing, the Court has taken a significant step towards grounding its Establishment Clause jurisprudence in its experience rather than speculation.[174]

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171. *See supra* note 143 and accompanying text (referring to Justice White's dissent in *Lemon*, in which he characterized the Court's assertion that there was an impermissible risk that state-funded private school teachers would inculcate religion as an "untested assumption" with no support in the record).

172. *See Agostini*, 117 S. Ct. at 2017-19.

173. *See supra* notes 149-151 (describing the irrebuttable assumptions and "Catch-22" created by the Court's holdings in *Lemon*, *Meek*, and *Aguilar*).

174. *See Agostini*, 117 S. Ct. at 2012-13 (stating that the Court must look to factual realities to determine if there is a risk of public employees being used to inculcate religious beliefs); *supra* note 89 and accompanying text (quoting Chief Justice Burger's observation that there was no basis in "experience and history" to support the holding of the Court in *Meek*).