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Assessing *Agostini v. Felton* in Light of *Lemon v. Kurtzman*: The Coming of Age in the Debate Between Religious Affiliated Schools and State Aid

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ASSESSING *AGOSTINI V. FELTON* IN LIGHT OF *LEMON V. KURTZMAN*: THE COMING OF AGE IN THE DEBATE BETWEEN RELIGIOUS AFFILIATED SCHOOLS AND STATE AID

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I. INTRODUCTION

The long litigious history of the Establishment Clause exposes the difficulty that various legislative bodies have had in maintaining a consistent interpretation of neutrality toward religion. The inability of courts to determine clear guidelines for interpreting the relationship between Church and State creates ambiguity in the various legislative attempts to benefit religion through funding educational programs. Although some cases appear to present clear guidelines, they actually fail to provide comprehensible results.[1] The result is an increase in the tension of the twin clauses of the First Amendment of the Constitution: "[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] The duality created by these two clauses reinforces the principle that the government shall not use its legal powers to coerce citizens into supporting the beliefs of one religion over another, or to provide direct funding toward promoting any religion. This amendment also prohibits the creation of laws that infringe upon an individual's right to practice religion according to the dictates of his or her chosen faith.[3]

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1. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Mueller v. Allen, 463 U.S. 388 (1983).

2. U.S. CONST. amend. I, § 1.

3. However, the Supreme Court has even attempted to overcome this barrier with the doctrine of public interest, or government interest for the public good. Bob

This First Amendment struggle has led to complex court decisions that are often difficult for local policy makers to follow. Thomas Jefferson originally proposed the concept of "separation of Church and State" in a letter to the Danbury Baptist Association in Danbury, Connecticut, on January 1, 1802. The Supreme Court's application of Jefferson's statement to the issue of funding educational programs within religiously affiliated educational institutions seemed to culminate in its decision in *Lemon v. Kurtzman*.[4]

This paper traces the development in First Amendment freedom of religion jurisprudence where it overlays education issues. Part II will address the development of the *Lemon* test. Part III will trace the shift in jurisprudence brought by *Agostini*. Part IV will analyze the novel approach of using the Federal Rules of Civil Procedure in this area. Part V reviews the effects of recent decisions and concludes with a discussion of possible ramifications of the current jurisprudence.

II. *LEMON V. KURTZMAN*

Lemon v. Kurtzman centered on the constitutionality of a statute in Pennsylvania, which provided financial support to non-public elementary and secondary schools. The program supplemented non-public teachers' salaries to the same levels as those of public school teachers and reimbursed funds to the private schools for textbooks and other instructional materials. The statute provided that the salaries, textbooks, and materials had to be used for classes teaching strictly secular subjects. The Court also considered the constitutionality of a similar program in Rhode Island, which provided direct payments to teachers in private schools who taught secular subjects.

Both the Rhode Island and Pennsylvania statutes were declared unconstitutional by the Supreme Court on the basis that they clearly transgressed the First Amendment's prohibition of government "sponsorship, financial support, and active in-

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Jones Univ. v. United States, 461 U.S. 574, 605 (1983), provides the clearest example of the Court's willingness to override individual religious belief if it were in violation of public policy. *See also* Goldman v. Weinberger, 475 U.S. 503, 508-09 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345-46 (1987); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988).

4. Lemon v. Kurtzman, 403 U.S. 602 (1971).

volvement of the sovereign in religious activity."[5] Chief Justice Burger, writing for the majority opinion stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion."[6]

Notwithstanding the influence of the separatists' doctrine, the Court felt that total separation of Church and State was not practical or warranted. The Court stated:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[7]

The Court further stressed that the holding in *Lemon* was not to be construed into a strict "legalistic minuet in which precise rules and forms must govern."[8] Rather, the Court held that each case should determine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[9]

In developing the *Lemon* test, the Court relied on *Allen*[10] and *Walz*[11] to undergird its view of Church and State relations. In *Allen*, the Court allowed for the loaning of secular textbooks

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5. *Id.* at 612.
6. *Id.* (citations omitted).
7. *Id.* at 614 (citations omitted).
8. *Id.*
9. *Id.* at 614-15.
10. Board of Educ. v. Allen, 392 U.S. 236 (1968).
11. Walz v. Tax Comm'rs, 397 U.S. 664 (1970).

to students in parochial schools. The Court determined that secular textbooks provided by the state were not instrumental in the teaching of religion because secular and religious teachings were not that intertwined.[12] It also cited *Walz*[13] to support the third prong of the *Lemon* test. The Court opined that direct aid or subsidy of religion by the government would create a potentially dangerous relationship with a harness of administrative enforcement that would burden both parties.[14]

Lower court decisions employed the three-prong test and ruled in favor of plaintiffs who alleged that a school district or state school system was unconstitutionally involved in benefiting parochial schools.[15] However, other cases began to erode the decision of *Lemon*.[16] The influence of the *Lemon* test, while still substantial, has declined over time.[17]

In *Mueller v. Allen*,[18] a Minnesota statute allowed parents to deduct educational expenses, such as tuition, textbooks, and transportation from state income taxes. Ten years earlier, in *Committee for Public Education and Religious Liberty v. Nyquist*,[19] the courts found a similar deduction unconstitutional. In *Nyquist*, the reimbursements were only for private school

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

13. *See id.* at 614-615.

14. In *Lemon*, Justice Burger quoted from *Walz*: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." *Id.* at 621 quoting *Walz*, 397 U.S. at 675.

15. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1979); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349, 356-57, n.6 (1975); Sloan v. Lemon, 413 U.S. 825 (1973).

16. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Board of Educ. of Westside Comm. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

17. Although *Lemon* did maintain a considerable influence upon the court for many years, there were decisions that demonstrated the Court's propensity to adjust its interpretation of the Establishment Clause. These cases have created an understanding that religious views must be accorded the same constitutional guarantee as any other opinion. In effect, the Court was refining its position towards an understanding of the second half of the Establishment Clause, which deals with the government's charge not to create laws that inhibit free exercise of religion. Cases have been brought in which the Court has ultimately permitted religious groups to use public school and university facilities and to have access to student support funds for religious publications. *See* Rosenberger v. Rectors, 515 U.S. 819 (1995).

18. 463 U.S. 388 (1983).

19. 413 U.S. 756 (1973).

parents while the Minnesota statute applied to all parents. The Supreme Court found that the statute under examination in *Mueller* did not primarily benefit religious institutions because all parents could take advantage of the tax deductions. Furthermore, the Establishment Clause was not violated because the law channeled assistance through the parents and not directly to the schools. Therefore, public funds became available only through the choice of the individual parents. The Court ruled, regarding the entanglement issue, that since the Minnesota program required a minimal amount of textbook monitoring, the program would not qualify as excessive.[20]

The Court felt that "a religious organization's enjoyment of merely incidental benefits does not violate the prohibition against the primary advancement or establishment of religion."[21] The Court also stated, "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."[22] The Court's decision in *Mueller* created a fine line between benefit to institutions and benefit to individuals. Later decisions, in *Witters* and *Zobrest*[23] strengthen that line leading to a newer understanding of the Establishment Clause outside of the *Lemon* test.

In *Witters v. Washington Department of Services for the Blind*,[24] a vocational rehabilitation assistance program was challenged because it had been used to support a visually-impaired student who, at the time he applied for public funds, was attending a private religious college. The challenge brought before the court alleged that the funding was unconstitutional. Following the rationale of similar cases, the Supreme Court based its Establishment Clause question on the second prong of the *Lemon* test. The Court found that the state had a neutral policy of generally providing grants for qualified students to attend institutions of their choice, and had no influence on how students chose to use such grants. The Court found such a neutral focus to be Constitutional although the money ultimately flowed to a sectarian college, it was through

20. *Mueller*, 463 U.S. at 403.

21. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1973).

22. *Mueller*, 463 U.S. at 397 (citing Widmar v. Vincent, 454 U.S. 263, 277 (1981)).

23. Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

24. *Id.*

the student and for that student's benefit.[25] The Court later stated in *Agostini* that such neutral programs as IDEA and Title I did not advance religion by relieving sectarian institutions of any cost they would otherwise have. It further opined that these programs provided services that were not part of the programs of the religiously affiliated schools and were not providing an incentive to attend such institutions or to provide any support to these institutions.[26]

In *Zobrest v. Catalina Foothills School District*,[27] parents sued on behalf of their disabled child. The parents requested a public school district to supply an interpreter for their deaf child while she was attending a private school. The parents argued that the school district was financially responsible under the Individuals with Disabilities Education Act . The school district argued that since the student would be in a private religious school, providing a public school interpreter would be in violation of the Establishment Clause under *Lemon*. The Supreme Court ruled that providing a public school employee to a disabled student in a private school would not violate the Establishment Clause. The evidence did not support the presumption that a public employee would inevitably inculcate religion.

The Court thus moved away from the three-prong test established in *Lemon*. Many of the Justices were not willing to base their decisions in similar issues on one single test.[28] However, the Court was willing to apply criteria other than the *Lemon* test in determining the separation between Church and State.

The struggle to maintain neutrality is exacerbated by the influences of those who feel that government money should be available to all regardless of belief, of those who are strict separationists, and of varied court decisions. These influences also

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25. *Id.* at 487-88.

26. *See* Agostini v. Felton, 521 U.S. 203, 226 (1997). Although the Court had found in *Aguilar* that the distribution of Title I services to students in the NYCSD violated the Establishment Clause as determined by *Lemon*, the NYCSD was not trying to advance a religious institution but merely attempting to fulfill the mandate of Title I: i.e., providing services to students from both private and public schools.

27. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

28. *See, e.g.*, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Lynch v. Donnelly, 465 U.S. 668 (1984); Mueller v. Allen, 463 U.S. 388, 391 (1983).

appear within the decisions of the courts.[29] *Agostini v. Felton* arises from this volatile background.[30]

III. *AGOSTINI V. FELTON*

In *Agostini v. Felton*, the Supreme Court overturned two earlier rulings: *School District of Grand Rapids v. Ball*,[31] which addressed the constitutionality of a "Shared Time" program, and *Aguilar v. Felton*,[32] which addressed the disbursement of Title I public services of the Elementary and Secondary Education Act of 1965 ("ESEA") to parochial schools.[33]

In *Ball*, Justice Brennan, writing for the majority, held that the First Amendment clearly proscribes both the federal and the state government from "any active involvement of the sovereign in religious activity." Citing the decision of *Everson v. Board of Education*,[34] Justice Brennan declared that the state and federal government should not pass laws that would aid any religion. Further, they should not pass laws that would provide tax revenue to support any religious institution. He stated:

> Providing for the education of school children is surely a praiseworthy purpose. But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion generally or when the aid unduly entangles the government in matters religious.[35]

This decision would regard any attempt to assist a religious organization by the government as unconstitutional.[36] The Court

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29. In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), the Supreme Court declared that a New Jersey program that provided bus transportation for private school students was constitutional. However, in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court declared unconstitutional a New York City program that was designed to benefit nonpublic schools because the program had the affect of aiding and advancing religion. Both programs had the affect of aiding those who attended religious programs, but the Court decided the cases on different interpretations.

30. 521 U.S. 203 (1997).

31. 473 U.S. 373 (1985).

32. 473 U.S. 402 (1985).

33. *Id.* at 403 (explaining Title I services).

34. 330 U.S. 1 (1947).

35. *See Ball*, 473 U.S. at 382.

36. Justice Brennan cited cases in the decision which demonstrated the Court's concern that any relations between public teachers and private schools would endanger

postulated in *Ball* and *Aguilar* that the possibility of inculcating a religious belief was highly probable if public school teachers were to work in private sectarian schools.

Aguilar v. Felton[37] addressed the New York City School District's ("NYCSD") disbursement of Title I services. The NYCSD sent public school teachers into parochial schools to provide Title I services under the ESEA. The school district attempted to secularize the program in the private religiously affiliated schools by following strict guidelines. First, the city assigned teachers to religious schools on a voluntary basis. Second, the school district supervised teachers with personnel who visited each school once a month. These supervisors in turn reported to another administrative level. Third, each teacher was instructed to avoid involvement in religious activities and to bar religious materials from the classrooms.[38] Lastly, materials for Title I services were provided entirely by the government. Despite these precautions, the Supreme Court declared the program unconstitutional in light of the three-prong test established in *Lemon*.[39]

In 1995 the NYCSD and parents of parochial school students brought suit in U.S. District Court to reverse the ruling in *Aguilar v. Felton* under the Federal Rule of Civil Procedure 60(b).[40] When its requirements are met, this rule allows a party to escape implementation of the final judgment. The plaintiffs argued that recent decisions under the Establishment Clause and comments by the majority in the Supreme Court's recent ruling in *Board of Education of Kiryas Joel Village*

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the public school employee's neutrality by causing the employee to somehow be pressured to inculcate religious doctrine into the curriculum. *See* Stone v. Graham, 449 U.S. 39, (1980); *Meek*, 421 U.S. at 370; *Lemon*, 403 U.S. at 619; Levitt v. Comm'r for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952).

37. *See Aguilar*, 473 U.S. at 402.

38. The private schools were required to provide classrooms with no religious artifacts.

39. Justice Brennan wrote that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. 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. These prophylactic contacts will involve excessive and enduring entanglement between State and Church." *Aguilar*, 473 U.S. at 410 (quoting *Lemon*, 403 U.S. at 619).

40. *Agostini*, 521 U.S. at 209; Fed. R. Civ. P. 60(b)(1996).

School District v. Grumet[41] nullified or drastically changed the decisions of *Aguilar* and *Ball*. The district court admitted that *Aguilar* might no longer be valid but refused to overturn the ruling against the NYCSD, noting that it lacked the jurisdiction to overturn Supreme Court precedent.[42] The U.S. Supreme Court granted *certiorari* for review on appeal by the NYCSD.[43]

IV. FEDERAL RULES OF CIVIL PROCEDURE 60(B)(5)

The use of Rule 60(b)(5) was a novel attempt by the petitioners in *Agostini* to obtain Supreme Court review of *Aguilar*. This rule states that "[o]n motion and upon such terms as are just, the court may relieve a party, from a final judgment [or] order for the following reasons: . . .[or when] (5) it is no longer equitable that the judgment should have prospective application."[44] The Supreme Court recognized that Rule 60(b)(5) was an appropriate motion when there had been a change in the factual conditions or in the law.[45]

The petitioners had initially filed under Rule 60(b)(5), requesting that the District Court relieve the NYCSD from an earlier ruling after *Aguilar*. The petitioners made this request because there had been a change in the costs of administering the Title I services and because *Aguilar* was no longer good law. The District Court agreed with the petitioners that perhaps the Supreme Court's decision in *Aguilar* should be changed, but it did not grant relief because there were no clear court cases that had specifically overturned *Aguilar*. However, the District Court did acknowledge that the use of Rule 60(b)(5) was justified in this case. The Court of Appeals agreed with the District Court, and the Supreme Court granted *certiorari*.

Using Rule 60(b)(5), the petitioners made three basic argu-

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41. 512 U.S. 748 (1994). In this ruling two concurring and three dissenting justices made various arguments indicating a desire to overturn *Aguilar*. *See* R. Craig Wood & Luke M. Cornelius, *Kiryas Joel II: The Continuing Controversy Of Church And State Separation*, 15 ED. LAW RPTR. 227 (1997).

42. The District Court's unpublished decision is cited in the record. This decision was also upheld without comment by the Second Circuit in 1996. *See* Felton v. Secretary, 101 F.3d 1394 (1996).

43. Agostini v. Felton, 519 U.S. 1086 (1997).

44. Fed. R. Civ. P. 60(b)(5) (1996).

45. *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992); Railway Empl. v. Wright, 364 U.S. 642, 652-53 (1961); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-38 (1976).

ments to justify overturning *Aguilar*. First, they argued that since *Aguilar,* the costs of compliance had increased so significantly that the factual situation was altered, warranting a modification or injunction. Second, they argued that the majority opinion in *Kiryas Joel* concerning *Aguilar* constituted a change in the law. Lastly, the plaintiffs argued that recent Supreme Court Establishment Clause rulings had undermined *Aguilar*.

The Court's assessment of the petitioner's arguments resulted in the review of *Aguilar*, but the Court was not persuaded by two of the arguments proposed. First, the Court rejected the expense argument because the extra expense was accounted for in the *Aguilar* decision and did not constitute a change in factual situation under Rule 60(b).[46] Next, the Court considered whether the various comments made regarding *Aguilar* in the *Kiryas Joel* decision proved a change in the law under Rule 60(b). The *Kiryas Joel* ruling dealt with the creation of a special school district in New York City to encompass the inhabitants of an Orthodox Jewish sect. The school district was created to allow the particular Jewish group to maintain control of the Jewish children's education while receiving special education services needy students. The plaintiffs noted that some of the Justices' comments in dicta indicated a willingness to reconsider *Aguilar*. Rejecting this argument, the Court noted that the issue of *Aguilar* was not under consideration in *Kiryas Joel*, and nothing in the *Kiryas Joel* ruling related to *Aguilar*.[47]

The majority opinion did agree with the petitioners' final argument that subsequent Supreme Court rulings meant that *Aguilar* was no longer good law.[48] The Court's decision to overturn *Aguilar* ultimately relied on two specific rulings: *Witters v. Washington Department of Services for Blind*[49] and *Zobrest v. Catalina Foothills School Dist.*[50] *Zobrest* erased the perceived symbolic union of Church and State created by the presence of public school teachers in parochial schools. Since this issue had

46. *Agostini*, 521 U.S. at 216.

47. *Id.* at 217. Justices O'Connor and Kennedy had concurred in the judgment but argued against *Aguilar*. Justices Thomas and Scalia, and Chief Justice Rehnquist, dissented and questioned the continued viability of *Aguilar*.

48. *Id.* at 218.

49. 474 U.S. 481 (1986).

50. 509 U.S. 1 (1993).

been central to the rulings of *Aguilar, Meek,* and *Ball,* the *Zobrest* ruling implicitly overturned this aspect of the previous cases. Hence, the Court ruled that *Zobrest* created new law in holding that the presence of public employees in parochial schools did not create a symbolic union of Church and State so long as those public employees performed only secular functions.[51]

The Court cited *Witters* where it considered a state policy that allowed a state to issue tuition grants to students attending a sectarian college to pursue a degree allowing them to become Christian pastors, missionaries, or youth directors. Since the state had a neutral policy of granting funds to qualified students to attend institutions of their choice and had no influence on how students chose to use such grants, the Court determined the program to be Constitutional even when moneys ultimately flowed to a sectarian college. The rationale was that the funds were for the benefit of the individual.[52]

Finding that *Witters* and *Zobrest* had caused substantive changes in the law, the Court determined that the original *Aguilar* ruling was eligible for review under Rule 60(b) of the Federal Rules of Civil Procedure. The Court then turned to the *Lemon* criteria to determine the appropriateness of the original program of conducting Title I instruction within parochial school classrooms. In applying the three-pronged *Lemon* test, the Court found that Title I clearly had a secular purpose because it sought to benefit students who were educationally underprivileged. The Court found that Title I did not lead to governmental indoctrination, nor did it select particular students based on religious affiliation. The primary effect of Title I was to enhance a child's secular education, while neither advancing nor inhibiting religion.

There remained the issue of excessive entanglement between Church and State, which had been an important feature of the *Aguilar* decision because of the monitoring feature of the NYCSD program. In *Agostini,* the Court determined that the entanglement engendered by offering Title I programs in parochial schools was no greater than if those programs were offered in some other location. The Court determined that there would be some need for cooperation between public and paro-

51. *Id.* at 224.

52. *See id.* at 225.

chial schools regardless whether the instruction took place inside the parochial school or in a bus parked a few yards away.[53]

The District Court case *Committee for Public Education and Religious Liberty v. Secretary,*[54] decided a year before *Agostini,* demonstrates the difficult nature of the NYCSD's ability to deliver Title I services according to the statute's requirement that the services be delivered to all eligible students regardless of religious affiliation. The plaintiffs argued unsuccessfully that the alternative program implemented by the NYCSD still resulted in excessive entanglement and symbolic union of Church and State. Much of the record dealt with the issue of how the Title I program in New York and other cities should be financed. To remain in compliance with both the Court's ruling in *Aguilar* and the mandate of Congress that all Title I eligible children be served equally, regardless of which school they attended, the U.S. Department of Education required districts to use "off the top" funding.[55] The cost of compliance, including the cost of leased sites and mobile instructional units, would initially be funded and then the per-student allotment would be determined from the remainder of Title I funds. The district court further noted that not only did the Federal Department of Education mandate this funding approach, but that it had survived multiple legal challenges as well.[56] Consequently, the requirements of *Aguilar* not only reduced funding available for direct Title I instruction to parochial school students, it also reduced the Title I funds available to public school students.

Committee for Public Education also demonstrated the magnitude of this diversion of Title I funds in New York City. Exclusive of the actual instruction costs in the 1990-91 school year, the New York City public schools paid $11,739,588 to comply with the alternative plan designed in the wake of *Aguilar.*[57] While transporting children to nearby public schools was an option, the extreme problems of overcrowding and lack of fa-

53. *See id.* at 228.

54. 942 F. Supp. 842 (E.D.N.Y. 1996).

55. *Id.* at 861-62.

56. *Id.* at 861; *See* Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992); Board of Educ. of City of Chicago v. Alexander, 983 F.2d 745 (7th Cir. 1992).

57. *See Committee for Pub. Educ,* 942 F.Supp at 852. This spending breaks down as follows: $280,402 for leased space, $225,711 for Computer Aided Instruction, $106,934 for maintenance, insurance, and drivers for the MIU's, and $11,126,541 for the lease of the MIU's. *Id.*

cilities in the NYCSD made this option increasingly difficult for the district. Therefore, the NYCSD was forced to divert funds from actual Title I instruction to auxiliary services in order to provide private and parochial school children with these services in an acceptable manner. These costs were taken from the initial Title I fund. This meant that there was less money for both public and private school students since the balance had to be split between the remaining students. Although it was not a determinant in allowing for a rehearing under Rule 60(b), the Court viewed the injunction against the NYCSD as punishing secular and public students alike.[58]

The Supreme Court ruling in *Agostini* allowed public school districts to provide Title I services or other mandated programs such as IDEA (Individuals with Disabilities Education Act) to children in parochial schools. The ruling recognized the unique circumstances in New York City and developed a policy that allowed the public schools to provide a neutral, non-sectarian benefit to all school children in an efficient and cost effective manner for the district. The ruling also allowed similar districts the option to provide on-site Title I programs to private and parochial students. Consequently, local policy makers can make this decision based on local or individual criteria. *Agostini* allows public schools greater freedom to determine the appropriate manner and place in which to deliver mandatory programs to non-public school students. This ruling appears to remove the constraints that bar providing similar on-site services to private and parochial school students.

Another fiscal concept is that *Agostini* may lead to the legalization of vouchers for parochial school students. Much has been written regarding this issue.[59] Most point to Justice O'Connor's quote of the vocational funding of tuition grants in *Witters*. Justice O'Connor clearly stated in *Agostini* that no infringement of the Establishment Clause would be created if the state were to pay individual citizens who then pay private tuition. She stated that:

> this transaction was no different from a State's issuing a pay-

58. *Agostini*, 521 U.S. at 212.

59. Peter Applebome, *Parochial Schools Ruling Heartens Voucher Backers*, N.Y. TIMES, June 25, 1997, at B6; Daniel Wise, *Parochial School Teaching May Be Paid by Federal Funds*, THE NEW YORK L.J., June 24, 1997. *See also* Arval A. Morris, Comment, *Public Educational Services in Religious Schools: An Opening Wedge for Vouchers?*, 122 ED. LAW RPTR. 545 (1998).

> check to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so only as a result of the generally independent and private choices of individuals.[60]

However, nothing in this decision would indicate such a result. In making its decision, the Court was careful to frame the Title I program in terms of the child benefit theory. It made analogies between the decision in *Agostini* and its rulings in direct child benefit cases like *Board of Education of Central School District No. 1 v. Allen*[61] and *Everson v. Board of Education of the Township of Ewing*.[62] By contrast, the Court sought to demonstrate the difference between this case and cases where it rejected direct support, either in financial terms or in loans of personnel and material that could be used for religious purposes or to defray regular instructional expenses of private sectarian schools.[63]

V. CONCLUSION

The *Agostini* decision clearly stretched the boundaries of judicial prerogative, although it was decided with the intent to benefit children. In addition, the decision was made with financial considerations in mind. The uniqueness of this ruling should not lead anyone to speculate beyond the legal and financial perspectives experienced by the NYCSD, and further analysis needs to be predicated upon those unique features.

The Title I program addressed by *Agostini* provides educa-

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60. *Agostini*, 521 U.S. at 226.

61. Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) (upholding the constitutionality of a New York State statute which required school districts to purchase and loan textbooks to all children residing within the district, even those attending sectarian private schools). The Court found the loan of secular textbooks to students fulfilling compulsory attendance requirements by attending a private school was a religiously neutral benefit directly to the child and did not violate the Establishment Clause. *Id.*

62. Everson v. Board of Educ. of Ewing Township., 330 U.S. 1 (1947) (determining that the use of public moneys to transport parochial students to school was a direct benefit to children, by providing them with free and safe transportation to school, and did not violate the Establishment Clause. An analogy was drawn in this case to using public dollars to provide other services to such children, such as police and fire protection, while attending a sectarian school).

63. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975).

tional services directly to parochial and private school children which they would not otherwise receive from their non-public schools. Such instruction does not relieve these schools from any educational services they must already provide nor does it provide any public moneys for these schools. Any indirect benefit to the sectarian school, such as improved student achievement, is incidental to the program and would occur regardless of where the instruction occurred. This is a major distinction from voucher programs and other schemes designed to provide public funding to parochial schools or relieve them of regular expenses such as equipment purchases and facilities maintenance.

The Supreme Court ruling in *Agostini v. Felton* is exceptional in that the court has directly overturned its own twelve year-old precedent in *Aguilar v. Felton*. As noted by the dissent in *Agostini*, the plaintiffs' successful use of Rule 60(b) to reverse the earlier ruling and *stare decisis* may well open the Court to numerous requests to reconsider other precedents.[64] Therefore, it may be some time before the legal effects of this ruling are fully apparent.

Equally important is that a careful reading of this ruling shows no language to suggest that the Court is on the verge of accepting voucher programs or any other direct subsidy of parochial education with public tax dollars. Indeed, the majority in this case is careful to point out the distinction between the direct provision of Title I services to children and previous rulings prohibiting the provision of direct public support to religious schools. By arguing for this reversal based on the child benefit theory, the Court has distanced *Agostini* from cases involving direct public aid to parochial institutions. This is not to say that this Court or some future court may not someday choose to accept a voucher program as Constitutional, but there is no language in this ruling that either explicitly or implicitly supports such a conclusion.

From a fiscal perspective, *Agostini* removes a great burden from the New York public schools which, when complying with the earlier Aguilar ruling, saw the annual diversion of millions of dollars from direct Title I. This ruling imposes no new mandate or burden on public education. Rather, it merely provides local educational policy makers greater flexibility in providing

64. *See Agostini*, 521 U.S. at 254-58.

mandatory programs for non-public school students. It is important to note that the major plaintiff in this case was the Board of Education of the City of New York. The Court's verdict in *Agostini v. Felton* represents a victory for all public school districts, especially those facing similar challenges.