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The Aftermath of Agostini: Confusion Continues as the Modified Lemon Test is Applied in *Helms v. Picard*

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I. INTRODUCTION

In *Helms v. Picard*,[1] the Fifth Circuit Court of Appeals applied the modified Lemon test announced in *Agostini v. Felton*[2] to reach a decision that falls short of what prudence dictates as necessary and academia will decry as improvident. In attempting to apply common sense to its Establishment Clause jurisprudence within the education context, the Supreme Court in *Agostini* found that presumptions relied on in the past when deciding the role of public funding in the sphere of private schooling were incorrect.[3] The Court then reversed its reliance on such propositions and held that federally funded programs that provided supplemental remedial instruction to disadvantaged children on a neutral basis were not invalid under the Establishment Clause when given in sectarian schools by government employees such as in the *Agostini* programs.[4] With the rejection of prejudicial presumptions and a recognition of both the professionalism and the law-abiding character of educators, *Helms,* a case that has been dragging its way through the court system for thirteen years, finally reached the promised land of resolution, at least on the Circuit Court level.

Unfortunately, while *Helms* resolved an issue that had plagued sectarian schools in the Jefferson Parish school district of Louisiana for thirteen years, it expanded and emphasized the confusion that still remains in Establishment Clause jurisprudence and direction within the educational environment context. This note will explore the reasoning utilized in ascertaining the constitutionality of an educational funding program in Louisiana. This framework, while allowing the ability of public funds to be used within the private school context, did not extend to the providing of materials to a private school. The Supreme Court in the past has held that providing materials was unconstitutional in the private school context,[5] and

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1. 151 F.3d 347 (5th Cir. 1998).
2. 117 S.Ct. 1997 (1997).
3. *See id.* at 2015-16.
4. *See id.* at 2016.
5. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 664 (1970); Meek v. Pettinger, 421 U.S. 349 (1975).

reserved to itself the right to overturn previous cases that deal with similar issues raised using the analytical criteria developed in *Agostini*. Lower courts are not allowed to use this more current analysis to reach a decision, but instead must wait for the Supreme Court to overrule a specific case before applying the newly announced criteria for constitutionality to similar matters.

This note is divided into five sections. The background section will give a brief outline of the development of the Lemon test[6] and its application in cases shortly after its announcement. In the facts section, the journey of *Helms* through the courts will be tracked as it was decided using the Lemon test. The reasoning section will introduce the determinations made by the *Helms* court in deciding the issues presented under the *Agostini*-mandated modifications to the Lemon test. The analysis section will discuss the application of the modified test to *Helms* and the results that were reached there, as well as the questions that were left unresolved by the decision. In the conclusion, this paper will comment on additional steps the Court will need to take when it chooses to intervene in this or a similar case in the future, as well as offer some suggestions on how best to take those steps in resolving questions left unanswered by *Agostini* and reemphasized in *Helms*.

II. BACKGROUND

Establishment clause jurisprudence as applied in the education environment saw a major theme brought into its decision-making through *Everson v. Board of Education*[7] in 1947. In *Everson*, the question arose as to whether the state could reimburse parents for transportation costs incurred in sending their children to attend a private sectarian school. The program established by the state allowed for the reimbursement for transportation costs incurred while sending any child to school. The dissent argued that by providing reimbursement funds to parents of children attending a private religious school, the state in effect was supporting the establishment of a religion, and since this was prohibited by the Constitution, the legislative action should be found unconstitutional. Brought forth in this discussion was the quote attributed to Jefferson identifying the need to have a "wall of separation" between church and state.[8] The dissent asserted

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6. In determining the constitutionality of state action, the three-prong Lemon test requires first, that there be a valid, secular purpose to the legislation; second, that the legislation neither advances nor inhibits a religion; and third, that there be no excessive entanglement between the state and the religion. *See* Lemon v. Kurtzman, 403 U.S. 664 (1970).

7. 330 U.S. 1 (1947).

8. *See id.* at 16.

that this reimbursement scheme was an attempt to breach that wall. The Court recognized that in this instance the state was being evenhanded in its reimbursement scheme to parents of children who needed transportation to school.[9] The individual choice made by parents to send their children to a private school was not the same as forcing parents to send their children to a private school.[10] However, the court also incorporated a controlling philosophy geared toward recognizing this "wall of separation."

The *Everson* decision evidenced the coercion analysis used by the Court in early establishment jurisprudence. This methodology was a coercion analysis[11] and used the principle that "[g]overnment must have coerced or compelled an individual to religious practice or belief for a constitutional violation to have occurred."[12] Shortly after *Everson,* the Court decided *McCollum v. Board of Education,*[13] a case where the public schools allowed students, with parental permission, to attend religious classes conducted on the school premises during the school day. The Court found that the power of the state was used to force the student to attend religious instruction, and thus was unconstitutional. The Court seemed to be drawing a line of demarcation in determining the bounds of religious instruction occurring on public school property.

This line was clarified in *Zorach v. Clauson,*[14] where students, with parental permission, were allowed to leave the school campus to attend religious instruction off campus. The Court recognized this as a proper accommodation of the free exercise clause, and not as the state coercing an individual to attend religious instruction. Justice Black, in his dissenting opinion, did not see a difference between having the religious education on the campus as in *McCollum* and releasing the student to attend classes off campus.[15] Justice Jackson, in a separate dissenting opinion of the same case, insisted that there was evidence of coercion in this situation. He saw that the student was forced to be in school by the state, and thus the machinery of the state was utilized to force the child to go to Church as well, if he wished to be released from public school activity during the day.[16] However, in this decision, it is clear that the majority of the Court was persuaded that the proper role of the state, while doing nothing to either encourage or inhibit religious instruction or belief, was to accommodate the

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9. *See id.* at 16-17.
10. *See id.* at 18.
11. *See* Kristin J. Graham, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation,* 42 BUFF. L. REV. 147, 148 (1994).
12. *Id.* at 149.
13. 333 U.S. 203 (1948).
14. 343 U.S. 306 (1952).
15. *See id.* at 316.
16. *Id.* at 323.

beliefs of those individuals who wished to receive religious instruction outside of the context of a public school setting.

The Court's point of view, for the state to do nothing to either encourage or inhibit religious belief in the education sphere, led to the rejection of the coercion analysis by the Court in the early 1960's, as evidenced by the reasoning offered in *Engle v. Vitale.* This particular case raised the issue of a daily prayer in the classrooms of public schools in New York. This "offering of a prayer" was defined as a religious activity (note that this is not religious *instruction*) and, as a religious activity in a public school, was found unconstitutional even without any evidence of coercion to participate in the prayer.[17] The Court went further by defining a religious activity as "reading the [B]ible or reciting the Lords Prayer."[18] In *Schempp* we are also introduced to what would eventually become the first two prongs of the Lemon test.[19] As proscribed by the Court, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[20] The third prong of the Lemon test, that there be no excessive entanglement between church and state, comes out of *Walz v. Tax Commission.*[21] Rejection of coercion as a factor to consider when deciding constitutionality of a state action is completed as the Court finally replaces this methodology with the Lemon test[22] and its basis in activity, real or perceived.

In *Lemon v. Kurtzman,*[23] the Court again addressed the appropriateness of providing public monies to a private school. This case involved two state legislative actions, one to subsidize the salaries of teachers in a private school setting, and another to reimburse private schools for the purchase of instructional materials used in the teaching of students. The three prongs of the Lemon test as enunciated by the Supreme Court are "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."[24] In applying this rule, the Court found that the actions promulgated by the state legislature were unconstitutional in two ways. First, the state was paying for teachers in a sectarian environment, which was aiding or supporting a religion and thus ran counter to the second prong of

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17. *See id.*
18. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).
19. *See* William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C. L. REV 909 (1987).
20. *Supra* note 18, at 222.
21. 397 U.S. 664, 674 (1970); *See* Alstyne, *supra* note 19, at 909.
22. *See* Graham, *supra* note 11.
23. 403 U.S. 602 (1971).
24. *Id.* at 612-13 (citations omitted).

the test as identified. Second, in the supervision of the teacher subsidy, as well as in the materials that were used and the auditing of the funds expended for these materials, there was an excessive entanglement between the Church and State, which was counter to the third prong of the test.

Thus, the Court had established some guidelines that, while easy to describe, proved difficult to define and apply. This can be seen in *Florey v. Sioux Falls School District 49-5*,[25] where the court found that a school board policy that permitted the observance of holidays having both a religious and secular basis was not the prohibited advancement or establishment of religion. The court in this decision went on to state that "[t]he First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited."[26] Often, however, decisions by courts have forced school districts to prohibit any personal observation of religious expression or belief by a teacher or school administrator as a forbidden establishment of religion.[27]

More difficult are cases such as *Wallace v. Jaffree*,[28] given by the Court in 1984. In this case, the Alabama State legislature, in an attempt to allow students a choice of either meditation or prayer by allowing for a moment of silence to begin the school day, was rebuffed as attempting to establish a religion on the part of the state. This difficulty was highlighted in a strident dissenting opinion offered by Justice Rehnquist, as he followed the case history of establishment jurisprudence as defined by Court decisions since *Everson*, and noted how the premises of the majority were a misapplication of Jefferson's commentary.[29] He further commented that decisions based on the Lemon test were an abandonment of the common sense and pragmatic decision-making that should be the hallmark of the Court.[30]

The *Wallace* case was followed by *Lee v. Weisman*[31] in 1991. This case re-visited the offering of a prayer in a public school. However, this prayer was given by clergy invited to participate at a high school graduation ceremony. The Court found that this practice ran afoul of two prongs of the Lemon test. First, by extending an invitation to a clergy member, the governmental agency, in this instance the public school, was endorsing a religion.[32] Second, by providing a booklet of guidelines to the invited clergy in the preparation of a prayer, there was control over a representa-

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25. 619 F.2d 1311 (1979).
26. *Id.* at 1315 (1979) (citations omitted).
27. *E.g.*, policies by school districts prohibiting teachers from having a bible on their desk and changing the traditional "Christmas break" to the "Winter break".
28. 472 U.S. 38 (1984).
29. *See id.* at 90.
30. *See id.* at 113.
31. 505 U.S. 577 (1991).
32. *See id.* at 585.

tive of a church, and thus an excessive government entanglement.[33] In a scathing dissenting opinion authored by Justice Scalia, and joined by Chief Justice Rehnquist, Justice White and Justice Thomas, the theme of the historicity of establishment clause jurisprudence and the resulting confusion that followed among lower courts, and in the Supreme Court, in their attempts to apply the Lemon test since its development and announcement was continued.

These two cases illustrate the Supreme Court's restrictions on religious expression and teaching in the public school sphere. They show that, even within the public school context, the influence upon private schools when a state takes some action to help all school-aged children is different. However, when the state begins to limit the benefits given to schools because of their religious nature, there are considerations regarding the constitutional prohibition against the establishment of a religion. It is the historical context, and its mis-characterization to deny any recognition of a religious heritage, however, that is the focus of Justice Rehnquist in his dissent in *Wallace*, and Justice Scalia in his dissent in *Lee*. It is the effects of this recognition and the proposed neutrality that have been the philosophy of the Court that will be addressed in the discussion that follows.

III. FACTS

In the original *Helms* litigation, the district court used the analysis in *Zobrest v. Catalina Foothills School District*[34] to rule that the special education program as applied in the Jefferson Parish Public School System (JPPSS) was unconstitutional. In the *Zobrest* decision, the Supreme Court held that the Establishment Clause did not bar a school district from providing an exceptional child with a sign-language interpreter at a sectarian school "in order to facilitate his education."[35] The district court in *Helms* then asked whether the Louisiana special education program was one that resembled a school aid program found constitutional or if it more closely resembled a school aid program that had been ruled unconstitutional.[36]

At issue were state statutes that defined and implemented two programs. These two programs dealt with the funding of special education programs to public and private schools and the providing of educational materials to public and private schools through the use of block grants administered through state and local administrative agencies.

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33. *See id.* at 588.
34. 509 U.S. 1 (1993).
35. Helms v. Picard, 151 F.3d 347, 355 (1998) (citation omitted).
36. *See id.*

The first program the court addressed related to the funding provided for the provision of special education teachers and materials in public and private schools. The statutes that established this program were challenged as to their application in the private school context on the basis of supporting a religious institution. The teachers in the private schools were employed by an outside, independent agency, which contracted with the private school to provide the instruction required by the state statute. The funds used to pay for these programs were a combination of state and local funds. The program was questioned because state funds were going to support instruction, albeit remedial instruction, on the premises of a private, sectarian school. The objection was whether state funds should be used to provide any instruction within a sectarian school context. Also questioned under this statute was the provision of materials within the special education context. Again, the question concerned the appropriateness of using state aid to fund programs taking place within the premises of a private, sectarian school.

The second program dealt with the funding of materials for use within the school itself, and was not confined to the special education context. These materials were not textbooks but included library materials, tape recorders, film projectors and the like.[37] This program was the State of Louisiana's implementation of Chapter 2 provisions of federal education programs.[38]

The district court ultimately found that the programs had the impermissible effect of advancing religion and, because of the necessary monitoring to attempt to avoid such an effect, would result in an excessive entanglement between the church and state.[39] This was precisely the type of reasoning that Justice Rehnquist, in his dissenting opinion in *Wallace v. Jaffree,* had found so unreasonable.[40] The original *Helms* court further found that the employment contracts made with the public school teachers, while independent of the sectarian school's control, as a combination of State and Special Education Services Corporation (SESC) funds "amounted to assistance . . . given directly to the school themselves, and not [given] indirectly through the parents or students."[41] In accordance with these findings, the district court held the programs as administered by the JPPSS unconstitutional. The case was appealed to the Fifth Circuit.

Having been in the courts for over thirteen years, *Helms v. Picard* had seen the landscape of establishment jurisprudence change dramatically.[42] It

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37. *See Helms*, 151 F.3d at 367.
38. *See id.*
39. *Id.* at 350.
40. *See* 472 U.S. 38, 109 (1985) (Justice Rehnquist, dissenting).
41. *Helms*, 151 F.3d at 355 (citations omitted).
42. *See* 151 F.3d 347 (1998).

was this dramatic change that led to the *Agostini* decision in 1997, as the Supreme Court there rejected three key assumptions used in applying the Lemon test in prior cases.[43] Previous to the *Agostini* decision, the Court had presumed that

> (i) any public employee who works on a religious school's premises is presumed to inculcate religion in her work . . .; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state . . .; and , (iii) any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making.[44]

The Court had now, by its decision in *Angostini*, rejected these presumptions. The appeals court in *Helms* also noted a fourth premise rejected by the Court in *Agostini*: that in *Aguilar v. Felton*,[45] there was "an excessive entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion."[46]

Applying these changes allowed the circuit court in *Helms* to reverse the lower court's decision regarding the first program questioned about the employment of special education teachers to work on private school premises. This also allowed the provision of special education materials to be found constitutional as well. However, in applying the criteria to the second program in question (the loaning of materials to the school in general), the circuit court affirmed the decision of the lower court. As will be discussed in the next section, it is this affirmation of the lower court decision that continues the confusion of establishment clause direction in the private school setting.

IV. REASONING

The circuit court in *Helms* noted that even with the rejection of the presumptions as detailed in *Agostini*, the Court was "somewhat cryptic" regarding how to distinguish between valid and invalid government aid to sectarian schools.[47] However, the appeals court in *Helms* did establish

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43. *See, e.g.*, School District of City of Grand Rapids v. Ball, 473 U.S. 373 (1985); *see also* Aguilar v. Felton, 473 U.S. 402 (1985).
44. Agostini v. Felton, 117 S. Ct. 1997, 2001 (1997) (cites omitted).
45. 473 U.S. 402 (1985).
46. *Helms*, 151 F.3d at 357 (citations omitted).
47. *See id.* at 358.

three requirements that might be demanded before finding that the aid was constitutionally valid.[48] These requirements were that the aid be neutral (made available without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted); that the money go to religious institutions only as a result of genuinely independent and private choices of individuals; and finally, that the aid not indirectly finance a religious education by relieving the sectarian school of costs it would otherwise have to bear in educating its students.[49]

With these guiding criteria in mind, the Fifth Circuit Court addressed the main issues of the *Helms* appeal. The court then applied the Lemon test modifications to the district courts findings and rulings. The Fifth Circuit reversed the lower court's decision with regards to the constitutionality of the statute as passed by the state legislature regarding the special education program. The court found that the school district's implementation of Title 1, Chapter 2, however, was unconstitutional. The appeals court affirmed the constitutionality of allowing public funds to be used in a private school setting when in pursuit of a legitimate secular objective. However, the circuit court would not extend the reasoning of the Supreme Court defined in *Agostini* to the provision of instructional materials, although the reasoning and the test criteria defined and utilized in overturning the first part of the decision would also apply to this matter. Rather, the court followed a previous ruling to hold that materials were not included in the aid that the state could provide to a private school.

In finding the statute providing for the instruction of exceptional students itself constitutional, yet determining that the provision concerning instructional materials was unconstitutional, the court relied on *Meek v. Pettinger*.[50] It is the *Helms* court's reliance on *Meek* that leads to the continuing confusion in the direction given by the Supreme Court when examining establishment clause arguments. This resulting confusion is expected when looking at the presumptions that the Supreme Court rejected when modifying the Lemon test in *Agostini*. Among those presumptions now rejected was that "any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making."[51] Now it is necessary to show that the aid provided does not diminish the costs that the private school would normally incur in its providing of an education. However, in defining the new analytical criteria, yet denying

48. *See id.*
49. *See id.*
50. 421 U.S. 349 (1975).
51. Agostini v. Felton, 117 S. Ct. 1997, 2001 (1997).

their use when appropriate, the Supreme Court continues the lack of clear direction that the lower courts rely upon.

In *Walker v. San Francisco Unified School District*,[52] a California case decided about two years before *Agostini*, the Ninth Circuit looked to *Meek* as well. The *Walker* court found that the analysis used in other Supreme Court cases allowed it to conclude that state aid could extend to the provision of instructional materials.[53] Moreover, the *Walker* court followed an analysis similar to that used by the Supreme Court in Agostini to find that *Meek's* direction was no longer valid. However, by adhering to the direction given in *Agostini* to follow previous cases on point, a different decision by the *Helms* court was reached as compared to the *Walker* court.

V. ANALYSIS

The *Helms* court made its determination regarding the constitutionality of the statutory provisions enacted by the Louisiana State legislature by looking not only at *Agostini*, but also reviewing the decisions that were over-turned in *School District of City of Grand Rapids v. Ball*[54] and *Aguilar v. Felton*[55] to define the parameters of their decisional analysis. As the court noted, "*Agostini* is as important for what it did *not* hold as for what it did."[56] The court found that the Supreme Court had overruled only part of the analysis in *Ball* as it found one of the two programs in question unconstitutional because of the premises governing that analysis. The *Helms* court concluded that the other aspect of the *Ball* analysis, which was not overturned, was still valid.[57]

After reviewing the aspects of *Ball* and *Aguilar* that were still valid, the *Helms* court concluded that there were several key items still useful in any analysis. Among these were "(1) 'the character and purposes of the institutions benefitted,' (2) 'the nature of the aid that the State provides,' and, (3) 'the resulting relationship between the government and religious authority.' "[58] These factors were examined to determine the status of the teacher who provided the services required by the statute in question and the extent of control exercised by the sectarian school authorities over that teacher.

The purpose of the Louisiana statute in question was to "assure and require that the state shall fund a program of special education and related

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52. 46 F.3d 1449 (1995).
53. *See id.* at 1465.
54. 473 U.S. 373 (1985).
55. 473 U.S. 402 (1985).
56. *Helms*, 151 F.3d at 360.
57. *See id.*
58. *Id.* at 359.

services for the exceptional children of the state."[59] The *Helms* court found nothing on the face of the statute to detract from the Legislature's secular goals in enacting it.[60] The funding was evenhandedly distributed to the individual schools. The schools did not have the statutory obligation to provide remedial instructions; rather, remedial instruction was an aspect of the educational sphere that the state had chosen to undertake itself. Looking further into the statue, the *Helms* court found that it was designed to provide equal educational opportunities to all students, regardless of their "national origin, sex, economic status, race, religion, physical or mental handicap or any other exceptionalities."[61] As such, the neutral provisions in the statute were directed *toward* a valid secular legislative purpose, and thus met the first prong of the Lemon test.

This analysis and the conclusion reached are interesting because they run counter to the analysis the Supreme Court had utilized in determining the unconstitutionality of the statute at issue in *Wallace v. Jaffree*.[62] There, the Court looked beyond the face of the statute, focusing only on one phrase of the state statute to the exclusion of the entire force and intent of the statute to determine whether it was valid on its face. The Court there also used statements made over a year after the passage of the statute to determine its intent.[63] The *Helms* court, on the other hand, looked at the entire purpose of the statute in question to determine the complete effect of the legislation. Moreover, the *Helms* court was applying the modified Lemon test, with its rejected presumptions, to a case addressing funding issues in a private school context. Thus, in finding the remedial program and its funding constitutional, the *Helms* court not only looked at the entirety of the case, but used a lens unencumbered by the prejudicial presumptions of previous jurisprudence. The *Helms* court seemed to take to heart the direction of the Court to be reluctant to attribute "unconstitutional motives to the State" as they sought to find a "plausible secular purpose for the states program [that could] be discerned from the face of the statute."[64]

Regarding the status of the public teacher employed and working in the sectarian school environment, the *Helms* court expressed some discomfort with the shared control that the local school district had over the public employee.[65] However, the court determined that this contact was sufficiently minimal, and that the state retained substantial control over the

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59. *Helms*, 151 F.3d at 363 (citation omitted).
60. *See id.*
61. *Id.*
62. 472 U.S. 38 (1985).
63. *See id.* at 86 (Burger, C.J. dissenting).
64. *Helms*, 151 F.3d at 363 (1998) (citation omitted).
65. *See id.* at 364.

conduct and content of the public employee to the extent that there was no constitutional conflict. More importantly, since the key presumptions of the Lemon test previously identified were now rejected, the court did not have to labor long over the issue of the extent of monitoring necessary nor the actual content of the remedial help provided to find that it also passed constitutional muster.

In considering the next issue raised on appeal, the loaning of instructional materials bought with state funds into the sectarian school environment, the analysis of the court took an interesting turn. First, the *Helms* court reviewed the provisions of Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 and its counterpart in the Louisiana statutes. Then the court noted that the district court had used an analysis similar to that used in *Walker v. San Francisco Unified School District*[66] to conclude that the implementation of the Act was constitutional as performed in that school district. The review of the steps followed by the district court in the original *Helms* litigation showed that the *Walker* methodology was used to determine whether the funding program, as applied to school materials in Louisiana, was constitutional. The *Walker* court used Supreme Court analytical methodology to extend constitutional legitimacy to providing aid in the form of instructional materials to private sectarian schools. The *Walker* court reasoned that since the Court had found constitutional the State's ability to provide testing materials to a private school, as well as grading such tests, then the logical extension was that other material for classroom use could also be provided.[67] The *Helms* court observed, however, the dissenting opinion given by Judge Fernandez in *Walker*. While agreeing with the analysis utilized, Judge Fernandez believed that *Meek* was still binding law.[68] As he noted in the dissent, "[t]he Supreme Court has given us the book-for-kids versus materials-for-kids dichotomy. Only it can take it away."[69]

The *Helms* court, although following *Agostini*, examined more carefully the reasoning in *Wolman v. Walter*[70] as used by the *Walker* court, but reached a different conclusion. The *Helms* court found that it was insufficient to look only at the amount of aid given; one also had to examine the character of the aid used to determine its constitutionality.[71] With this principle as a guide, the *Helms* court concluded that the testing program was not a program the school would have to provide. The *Helms* court concluded that the State was the entity requiring the measurement that would

66. 46 F.3d 1449 (1995).
67. *See id.* at 1455 (citations omitted).
68. *See Helms*, 151 F.3d at 371.
69. *Id. See also Walker*, *supra* note 52.
70. 433 U.S. 229 (1977).
71. *See Helms*, 151 F.3d at 372.

be obtained by the testing, and the information was for the benefit of the state. With these findings, there was no difficulty in finding this aid constitutional. The *Helms* court continued in its reasoning to determine that this was fundamentally a different type of aid as compared to providing aid in the form of library books, video tape machines, recorders and other types of instructional materials.[72] This conclusion becomes difficult to reconcile given the stated objective of the Louisiana statute to provide materials to all students in whatever school district they happen to be enrolled. The state has granted to parents the right to choose where to educate their children, so long as state requirements regarding the instruction provided are met.

However, the *Helms* court was relying on the *Agostini* decision and discussion. In *Agostini*, the Supreme Court had stated 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 to this Court [the Supreme Court] the prerogative of overruling its own decisions."[73] Thus, the court found unconstitutional the provision of instructional materials as implemented under Title 1, Chapter 2 by the JPPSS as per the holding found in *Meek*.

What this decision does, however, is establish a conflict in the lower courts with regards to the extent of the reasoning as described in *Wolman* when brought up against the reasoning in *Agostini*. The *Walker* court had found that the Supreme Court, in reaffirming *Meek*'s holding in *Wolman*, had undermined the rational of *Meek* sufficient to extend the kinds of aid benefits available to sectarian schools to include instructional materials.[74] *Helms*, however, found just the opposite conclusion. In contrast, there is an indication that the *Helms* court's application of the *Agostini* analysis to its question may have resulted in the same conclusion as the *Walker* court. Apparently the *Helms* court felt compelled to stay within the parameters strictly laid down by the Supreme Court. Indeed, when reviewing the instruction that the Court gave in the *Agostini* decision regarding other cases, it becomes clear that the Court was anticipating more discussion and decisions in the field of establishment jurisprudence to come before it.[75]

With this split in conclusions now evidenced using an analysis defined and applied by the Supreme Court in *Agostini*, there are several factors that the Court should bear in mind as it prepares to consider cases that will inevitably come before it. First and foremost, the Court must not only clearly

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72. *See id.*

73. *Id.*

74. *See Walker*, *supra* note 52 at 1465.

75. As evidenced by the Court's reiteration of reserving the "prerogative of overruling its own decisions." Agostini v. Felton, 117 S.Ct 1997, 2017 (citations omitted).

define the decision it renders, but must allow its reasoning, once defined, to be utilized in related cases. Second, the Court will have to act quickly to prevent further splintering among the various appeals courts, especially given the common sense rationality of the *Agostini*-made changes to the Lemon test. And last, the Court should adhere to the common-sense approach it appears to be taking with regards to establishment clause jurisprudence in the educational sphere by recognizing a more complete historical context of foundational constitutional principles.

In *Agostini*, the Court tried to limit the extent of the changes it was announcing by inserting a comment about the Court's intent to reserve for itself the prerogative of overturning its own previous decisions.[76] This may have been a response to the decision by *Walker* and its analysis to find the provision of instructional material permissible; unfortunately, all this accomplished was to provide tools for the lower courts to use, but then not allow their use. However, the direction and analytic tools defined in *Agostini* are necessary to bring some coherence to a body of decisions that need some sense of orderliness.

The Court needs to not only create clear analytical tools and direction by decision, it must allow the use of the tools it creates to resolve conflicts as they appear in the lower courts. As the dissenting opinions in *Wallace v. Jaffree* and *Lee v. Weisman* make abundantly clear, the confusion in the lower courts, and thus the disparity among their decisions, is a direct result of the unclear direction from the Supreme Court itself when deciding cases before the Court. This confusion is aggravated by the misapplication of historical context in attempting to resolve the disputes of today. Refusing to use clearer direction for lower court decision making can only result in an increase in that confusion.

Further, the Supreme Court must accept jurisdiction to hear several cases that deal with the issues that need resolution to quickly overturn other Establishment Clause precedent of recent years, and thus diminish the recurring tide of confusion that continues to occur but which can easily be extinguished. In the dissenting opinion of *Agostini,* Justice Ginsberg noted that it would be better to get a vehicle more in keeping with the precedents it is seeking to overturn.[77] Justice Ginsberg's most stinging commentary was regarding the fact that the issue before the Supreme Court in *Agostini* was for relief sought under rules of procedure, and not a case that dealt with live issues currently in conflict and properly before the Court.[78] With the disparate decisions in *Walker* and *Helms*, Justice Ginsberg may very well get her wish.

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76. *See* Agostini, 117 S.Ct. at 2017.
77. *See id.* at 2029.
78. *See id.* at 2026.

Finally, the Court needs to remember its difficult role. Its role should be to resolve conflicts that come before it, recognize the practical guidance that the lower courts rely on to administer the judicial direction that the Court gives, and refrain from refereeing changing societal mores by considering extreme positions of possibility in the conflicts it is asked to adjudicate. In the past, the Court has shown wisdom born of practicality in its decisions as previous members of the Court have sought to answer the problems of their day with directness and simplicity. The same could be said for the Supreme Court of today as it applies its collective wisdom to resolving the conflicts of today with similar directness and simplicity.

In attempting to reign in the confusion inherent in Establishment Clause jurisprudence as it now exists, the Supreme Court will need to reflect on the foundational principles of free exercise according to the individual dictates of the conscience. More importantly, the Court will need to step back from its blind application of rules it has established for decision making and look to the reasons for the inclusion of the specific amendments when originally accepted. Much is to be learned from the application of restraints on the state, but more importantly, restraints on the federal government, as pointed out by Justice Rehnquist in his dissenting opinion in *Wallace v. Jaffree.*[79]

Of note is the historical context of the First Amendment, and the restraints that were envisioned by the founders on the federal government to coerce religious practice and support. As one looks at the evils that the amendment was designed to overcome, Justice Rehnquist argues that it becomes quite clear that the underlying principles deal more with preserving individual liberties against coercion by the state to belief in a particular manner or to support a particular religious sect.[80] There is no restraint on the ability of the state to accommodate, and even support a general religious heritage. This, of course, is at odds with Supreme Court opinions going back even before Everson, where the Establishment Clause has been defined as meaning neither advancing nor inhibiting religious belief in any way. It is adherence to this underlying premise that has led to the creation of a wholesome neutrality in Establishment Clause jurisprudence that, in reality, is not neutrality toward religion, but rather exorcism of religion and religious belief from the public sphere. This is a presumption that is best quickly overturned, for as Justice Rehnquist in *Wallace v. Jaffree* and Justice Scalia in *Lee v. Weisman* point out, the heritage of the founding fathers is a deeply held religious belief that extended to their public pronouncements and actions.[81] The fear of the founding fathers in adding the

79. 472 U.S. 38, 91-112 (1985) (Justice Rehnquist, dissenting).
80. *See id.* at 99-100.
81. *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985); *see also* Lee v. Weisman, 505 U.S. 577,

First Amendment was not to prohibit the governmental recognition of religion in the public sphere, but rather a fear that individuals would enter government and then prescribe only one religious pattern of worship to the exclusion of any other.

VI. CONCLUSION

In *Helms v. Picard*, we were treated to a close look at the application of the modified Lemon test toward questions of the applicability of the Establishment Clause to the private education sphere. In allowing for a more common-sense approach and result based on the rejection of patently prejudiced presumptions, the Court has taken a small step toward restraining the state and federal governments from inhibiting the development of a religious heritage. Recent judicial neutrality has been skewed toward no reference or regard for religion, either as an institution or a creed of beliefs, in the educational sphere of judicial discussion. While previous Establishment Clause jurisprudence attempted to prohibit the endorsement of any religion, most cases have overreached when insisting on no acknowledgment of religion, either as a government or an individual in a governmental capacity. To disallow recognition of the religious heritage of this country is not neutrality, but exorcism.

By limiting the lower courts in how to apply the modified Lemon test analysis, the Supreme Court has allowed confusing criteria for deciding questions of state aid to private schools. While the *Helms* court found one statute in Louisiana was valid, it held as unconstitutional a second statute that attempted to give aid to all the schools in the state without regard to the school's status as public or private. We are then left, while not in the same place we were before the modification, not much further along in allowing the state to serve all of its citizens, whether they have a belief in a Supreme Being or not.

In the Supreme Court's attempts to constrain governmental recognition of religious expression and sever any recognition of religiosity by the state for fear of endorsement or establishment within the context of the educational environment, the Court has turned its back on the contributions of those who believe in a Supreme Being. The Court, instead, seems to favor those who promote beliefs that are not religious or even irreligious. In exorcizing the religious heritage of the general public from the public school and, in effect, from the public morality, the Court has been on a crusade to displace the majority respect of religion and belief with the minority disregard of religious faith. The promise to protect the rights of

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631 (1992).

the minority in the face of the majority does not mean displacing the majority view with the minority view. The more reasonable assumption is to allow both views to exist, not at the expense of either, but to the benefit of both.

In attempting to allow public monies to be used for the benefit of all citizens, the Court has sought to remember the evils that are possible by misplaced or misguided zealous adherence to a religious belief. Thus, the debate of establishment of religion has become based on a fear of atrocities rendered in the past, rather than a recognition of the positive morality available for the future. This led the Court to begin a crusade of extremeness against any religious recognition. In taking a step toward rectifying its own zealous adherence to what seems to be an erroneous constitutional creed, the Supreme Court has shown that wisdom is not in short supply among its members today as it remembers its role as a pragmatic decision-maker relying on basic foundational constitutional principles in rendering its decisions.

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