

9-1-1985

Aguilar v. Felton: Lemon Revisited - The Supreme Court's Tug-of-War with the Entanglement Doctrine

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Aguilar v. Felton: Lemon Revisited - The Supreme Court's Tug-of-War with the Entanglement Doctrine

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I. INTRODUCTION

Using federal funds made available to state and local educational agencies, New York City instituted a program providing supplementary instruction to educationally-deprived children.¹ Over thirteen percent of the program's eligible recipients attended nonpublic, predominantly parochial schools. The program provided children from low income families with remedial instruction in reading, mathematics, and English. In addition, it provided needy students with clinical guidance services.² The teachers and other professionals involved in the program were all public employees. Instruction and services were provided at nonpublic school facilities during the regular school day. Supervisory personnel monitored the instruction and services for religious content by regularly visiting the schools, unannounced. In 1978, six taxpayers challenged the program.³ They asserted that it violated the establishment clause of the first amendment, and sought to enjoin fed-

1. The statute authorized the states' use of federal funds for programs for educationally-deprived children. 20 U.S.C. §§ 2701-2854 (1982). Section 2734(a) provided:

A local educational agency may use funds received under this subchapter only for programs and projects which are designated to meet the special educational needs of [educationally-deprived children]. Such programs and projects may include the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, and, where necessary, the construction of school facilities, and planning for such programs and projects.

20 U.S.C. § 2734(a). Section 2740 required local agencies to provide students enrolled in private schools with similar equal programs. 20 U.S.C. § 2740.

2. As part of the program, New York City hired teachers, psychiatrists, psychologists, guidance counselors, and social workers to provide clinical guidance services and remedial instruction. *Aguilar v. Felton*, 105 S. Ct. 3232, 3235 (1985).

3. *Felton v. Department of Educ.*, No. 78 Civ. 1750 (E.D.N.Y. Oct. 20, 1983), *rev'd*, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

eral and city governments from funding the program. The suit was delayed pending the outcome of a similar challenge in a New York district court.⁴ When it resumed, the United States District Court for the Eastern District of New York granted the defendants' motion for summary judgment.⁵ On appeal, the United States Court of Appeals for the Second Circuit unanimously reversed the district court, holding that the establishment clause "constitutes an insurmountable barrier to the use of federal funds" to finance New York's nonpublic school aid program.⁶ On certiorari, the Supreme Court of the United States *held*, affirmed: The first amendment proscribes the use of federal funds to pay the salaries of public employees that provide remedial instruction and guidance counseling to nonpublic school students at parochial school facilities. *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).⁷

The Supreme Court of the United States has often recognized the inherent conflict between the establishment clause⁸ and the free exercise guarantee of the first amendment.⁹ While the establishment clause requires the government to remain neutral in religious matters, the free exercise clause precludes the government from interfering with the individual's religious freedom. Government neutrality at times can hinder an individual's religious practice.¹⁰ This conflict is often compounded where the government is obliged to simultaneously and nondiscriminatorily advance the general welfare,¹¹ and yet refrain from sponsoring, financially sup-

4. The suit was delayed because a New York district court was deciding an identical challenge in *National Coalition for Pub. Educ. & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), *appeal dismissed*, 449 U.S. 808 (1980). When the Supreme Court of the United States dismissed the *Harris* appeal for want of jurisdiction, the New York taxpayers revived their challenge. *Aguilar*, 105 S. Ct. at 3236.

5. *Felton v. Department of Educ.*, No. 78 Civ. 1750 (E.D.N.Y. October 20, 1983).

6. *Felton v. Department of Educ.*, 739 F.2d 48, 50 (2d Cir. 1984).

7. Justice Brennan delivered the Court's opinion. He was joined by Justices Marshall, Blackmun, and Stevens. Justice Powell wrote a concurring opinion expanding on the political entanglement issue raised by the majority. *Aguilar*, 105 S. Ct. at 3239. *See infra* note 34 and accompanying text (discussing political entanglement). Chief Justice Burger and Justices Rehnquist, O'Connor, and White wrote separate dissenting opinions. 105 S. Ct. at 3242, 3243, 3249.

8. The religion clauses provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

9. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 668-71 (1970); *see* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2 (1978).

10. *See, e.g., Committee for Pub. Educ. & Religious Freedom v. Nyquist*, 413 U.S. 756, 788-89 (1973); *see Pfeffer, Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 574 (1980).

11. *See Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); *cf. Wheeler v. Barrera*, 417 U.S. 402 (1974) (holding that although Title I programs provided to public and nonpublic

porting, or actively involving itself in religious activities. Nowhere is this dilemma more apparent than in the nonpublic school aid programs.¹²

II. HISTORICAL BACKGROUND

Over the years, the Court has used various analytical tools to decide establishment clause cases. Although the *Lemon v. Kurtzman*¹³ three-part test has been most prominent, at times the Court has completely ignored it.¹⁴ Instead, it has occasionally applied either the historical¹⁵ or benefit approach.¹⁶ Nonetheless, since

school students must be "comparable," states are not obliged to provide identical educational programs to nonpublic school students.)

12. The controversial school aid issue applies to both elementary and secondary schools. The Court has upheld programs aiding church-affiliated institutions of higher education. See *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upholding state subsidies to religious colleges and universities offering degrees in nonreligious as well as religious disciplines); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding state bond issue to finance construction for sectarian schools of higher education); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding state loans to sectarian colleges and universities for construction of facilities to be used strictly for secular education).

The Court has distinguished church-affiliated institutions of higher learning from parochial schools on three bases. First, university students are "less impressionable and less susceptible to religious indoctrination." *Tilton*, 403 U.S. at 686 (footnote omitted). Second, religious indoctrination is not the primary purpose of church-affiliated institutions of higher learning. *Id.* at 687. Finally, many sectarian related universities and colleges subscribe to a high degree of academic freedom that encourages the nonsectarian study of secular disciplines. *Id.* at 686. These differences decrease the likelihood that state aid will primarily advance religion and lessen the need for surveillance to ensure that such aid is strictly secular. See also Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 19 (1978-1979) ("[T]he Court has made it quite clear that both the national and state governments are free to dispense large sums of money to these colleges and universities, so long as the moneys are not directly used for sectarian purposes.").

13. 403 U.S. 602, 612-13 (1971); see *infra* text accompanying notes 25-34 (discussing *Lemon*).

14. For recent commentaries discussing the *Lemon* test and its application in nonpublic school aid cases, see Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U.L. REV. 707 (1984); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981); Note, *State Aid to Parochial Schools: A Quantitative Analysis*, 71 GEO. L.J. 1063 (1983); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14-8 to -12 (1978).

15. Under the historical approach, the Court, primarily motivated by the length of time the challenged practice has continued, will uphold the practice. See *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (upholding a city's inclusion of a nativity scene in its Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Nebraska legislature's practice of beginning each day with a prayer recited by a Presbyterian minister does not violate establishment clause); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding property tax exemptions for religious properties used for worship). Although the Court has indicated that a long history will not render constitutional an otherwise prohibited involvement between church and state, the resilience of the practice is significant: "[A]n unbroken practice [continued]

Lemon, the Court has consistently used this three-part test to determine the constitutionality of school aid programs.¹⁷ To meet the *Lemon* requirements, a statute that grants aid to parochial schools must: (1) have a secular purpose;¹⁸ (2) have a primary effect that neither advances nor inhibits religion; and (3) not excessively entangle church and state.¹⁹ The Court's varying results are not attributable to disagreement among the Justices over which standard to apply, but to disagreement over how to apply it.²⁰ The "entanglement" prong of the test has proven to be a major source of conflict on the Court.²¹

openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Walz*, 397 U.S. at 678; see also *Recent Developments—The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1202 (1984) ("The Court's continued use of the new historical approach threatens not only uniformity in establishment clause jurisprudence under the *Lemon* test, but also the fundamental first amendment protections that the traditional approach has secured.").

16. The benefit approach refers to the Court's concern over who receives the benefit of the state aid. Applying the benefit approach, if the parochial school students or their parents benefit directly and the sectarian schools benefit only incidentally, then the program is constitutional. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 360-62 (1975); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947). See generally R. CORD, *SEPARATION OF CHURCH AND STATE* 105-24 (1982) (discussing the "child benefit" theory).

17. Prior to *Lemon* the Court decided two important parochial school aid cases. In *Everson v. Board of Educ.*, the Court upheld a New Jersey statute authorizing local school districts to reimburse school students' parents for the cost of bus transportation to and from school. 330 U.S. 1 (1947). The Court stated, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. In spite of the Court's strict establishment clause posture it upheld the reimbursement program because the program benefitted the students' parents and not the sectarian schools. *Id.*

In *Board of Educ. v. Allen*, the Court upheld a New York statute authorizing local school districts to loan secular textbooks to all seventh through twelfth grade students, including students attending parochial schools. 392 U.S. 236 (1968). The Court held that because "no funds or books [were] furnished to parochial schools and the financial benefit [was] to parents and children, not to schools," the program did not violate the establishment clause. *Id.* at 243-44. See *supra* note 16 (discussion of the Court's benefit approach).

18. Parochial school aid programs routinely pass the "secular purpose" prong of the *Lemon* criteria. *Mueller v. Allen*, 463 U.S. 388 (1983). But cf. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) ("secular purpose" test invalidated state-authorized moment of silence in public schools).

19. *Lemon*, 403 U.S. at 612-13. The *Lemon* Court identified two types of entanglement: administrative and political entanglement. *Id.* at 620-22. Administrative entanglement pertains to the interaction between church and state necessary to ensure that the state aid neither advances nor inhibits religion. *Id.* For a discussion of political entanglement, see *infra* note 32 and accompanying text.

20. See *infra* note 80 and accompanying text.

21. For commentaries discussing the court's entanglement doctrine, see Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE

The "excessive entanglement" concern first emerged in *Walz v. Tax Commission*.²² Although the *Walz* Court identified only administrative entanglement,²³ in subsequent decisions it expanded the concept to include political entanglement.²⁴ One year after *Walz*, in *Lemon*,²⁵ the Court adopted and breathed life into the entanglement language. It became the permanent, third part of establishment clause analysis.

Lemon involved a challenge to the Rhode Island and Pennsylvania nonpublic school aid programs, which had similar provisions. The Rhode Island statute²⁶ authorized supplementary salaries for parochial school teachers. The Pennsylvania statute²⁷ authorized reimbursement of parochial schools for teachers' salaries, textbooks, and instructional materials. Both statutes limited aid to secular instruction and required the nonpublic schools to maintain comprehensive accounts for state inspection, separating the cost of secular and religious education. Using the "excessive entanglement" portion of its newly-devised test, the Court held that both programs violated the establishment clause.²⁸

The Court used an abstract analysis that was destined to pervade its future parochial school aid decisions. The Court invali-

FOREST L. REV. 207 (1979); Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143 (1981); Note, *The Forbidden Fruit of Church-State Contacts: The Role of Entanglement Theory in Its Ripening*, 16 SUFFOLK U.L. REV. 725 (1982); Comment, *Cessation of the Excessive Entanglement Test and the Establishment of Religion*, 7 OHIO N.U.L. REV. 975 (1980). See generally Shortt, *The Establishment Clause and Religion-Based Categories: Taking Entanglement Seriously*, 10 HASTINGS CONST. L.Q. 145 (1982) (discussing the development of the entanglement doctrine and its effect on religion oriented classification by the Internal Revenue Code).

22. 397 U.S. 664, 674 (1970). In *Walz*, the Court upheld New York's property tax exemption for sectarian organizations on property used for worship. Although the Court was primarily concerned with the long history of tax exempt status for religious organizations, the Court also considered whether the exemption led to excessive entanglement between church and state. See *supra* note 15. The Court determined that "the exemption [created] only a minimal and remote involvement between church and state." 397 U.S. at 676.

23. *Id.* at 674-75.

24. See *infra* note 34 and accompanying text (discussing political entanglement).

25. 403 U.S. 602 (1971).

26. Education: Salary Supplements to Nonpublic Schoolteachers, 1969 R.I. Pub. Laws 246 (codified at R.I. GEN. LAWS §§ 16-51-1 to -9 & subsequently repealed by 1980 R.I. Pub. Laws 395).

27. PA. STAT. ANN. tit. 24 §§ 5601-5608 (Purdon 1971) (repealed 1977).

28. 403 U.S. at 619-22. The *Lemon* Court concluded: "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that [state funds are not used to advance religion] and the First Amendment [is] otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.* at 619.

dated the statutes in the absence of evidence that the subsidized teachers were injecting religion into their teaching, either inadvertently or in bad faith.²⁹ It held that "the potential for impermissible fostering of religion"³⁰ was sufficient to invalidate the programs.³¹ The state had a duty to be certain that the state-sponsored teachers did not proselytize.³² Both statutes failed because the Court found that the level of surveillance necessary to ensure with certainty that the states did not foster religion would inevitably lead to an excessive entanglement between church and state.

The *Lemon* Court identified another form of entanglement fatal to school programs—political entanglement.³³ The Court used the term "political entanglement" to refer to the political division along religious lines caused by government support of sectarian schools. The Court explained that as different religious groups vie for increased aid, the electorate would become embroiled in a religious struggle. According to the Court, this struggle would ultimately threaten the democratic process. Because parochial school aid could lead to political division along religious lines, these statutes violated the establishment clause.³⁴

Lemon created more questions than answers. The decision made it clear that the "entanglement" test would invalidate statutes requiring continuing state involvement with parochial schools. It seemed, however, that if a state could devise an aid program that required little or no state involvement, it would be constitutional. State legislators were faced with a dilemma—how to give parochial schools secular aid without becoming excessively entangled with the religious institutions?

New York thought it had the answer. It passed school aid stat-

29. 403 U.S. at 618-19.

30. *Id.* at 619.

31. *Id.*

32. *Id.*

33. *Id.* at 622.

34. *Id.* at 622-23.

The Court has often used political entanglement as an additional ground for invalidating school aid programs. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); *Committee for Pub. Educ. & Religious Freedom v. Nyquist*, 413 U.S. 756, 795-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). The Court, however, has never invalidated a program strictly on the basis of political entanglement. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1364 (1984). See generally Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 *FORDHAM L. REV.* 1209 (1984) (suggesting the Court elevate the political entanglement criterion to an independent fourth prong of the *Lemon* analysis).

utes which were challenged in *Committee for Public Education and Religious Freedom v. Nyquist*.³⁵ The statutes authorized: (1) direct grants to nonpublic schools for the maintenance and repair of school facilities; (2) tuition reimbursement to low income families; and (3) tax relief for families failing to qualify for the tuition reimbursement program.³⁶ Attempting to avoid the *Lemon* fate, the drafters did not require any state surveillance or auditing.

The second prong of the *Lemon* test was fatal to all three phases of the program.³⁷ Because the state could not be certain that parochial schools would use the aid for strictly secular purposes, the Court determined that the aid had the primary effect of advancing religion.³⁸ Consequently, the program was unconstitutional.³⁹

Paradoxically, although *Nyquist* did not involve administrative entanglement, it proved to be extremely instructional on the issue. The Court's opinion implied that had the program mandated the level of surveillance necessary to satisfy the "primary effect" test, it still would have failed the "entanglement" test. Instead, the statute provided no scrutiny of the program and failed the "primary effect" test.⁴⁰ Legislators realized that only a tightrope separated the "primary effect" and "entanglement" prongs of the *Lemon* test.

Pennsylvania attempted to constitutionally aid parochial schools by enacting two statutes⁴¹ which together provided non-

35. 413 U.S. 756 (1973).

36. N.Y. EDUC. LAW § 549(5) (McKinney Supp. 1984-85) (authorizing grants to nonpublic schools for maintenance and repair); N.Y. EDUC. LAW § 562 (McKinney Supp. 1984-85) (authorizing tuition reimbursement to low income families); N.Y. TAX LAW § 612(j) (McKinney 1975) (authorizing tax relief to families failing to qualify for tuition reimbursement).

37. See 413 U.S. at 798.

38. *Id.* at 774, 798.

39. The Court discounted the state's argument that the tax credit and reimbursement benefitted the parents and not the schools. The Court found that the parents received the funds as an incentive to send their children to nonpublic schools; thus the schools ultimately derived the benefit. *Id.* at 786. Compare *supra* note 16 (discussing the Court's benefit approach), with *Nyquist*. Although *Nyquist* turned on the "primary effect" issue, the Court felt compelled to address "political entanglement." The Court restated the *Lemon* Court's concern that involvement between church and state would cause political divisiveness. 413 U.S. at 796-98.

40. Justice Rehnquist would later describe the Court's entanglement doctrine as a "'Catch-22' paradox of its own creation." *Aguilar v. Felton*, 105 S. Ct. at 3243 (Rehnquist, J., dissenting).

41. PA. STAT. ANN. tit. Education, § 9-973 (Purdon Supp. 1985) (authorizing provision of instructional material and equipment); *id.* at § 9-972.1 (authorizing provision of auxiliary services).

public schools with instructional material, equipment,⁴² and auxiliary services.⁴³ The auxiliary services permitted public employees to teach and counsel parochial school students at nonpublic school facilities. The statute did not require the state to monitor the program. In *Meek v. Pittenger*,⁴⁴ the Court held that both aspects of the program were unconstitutional; the instructional material was unconstitutional because it primarily advanced religion, and the auxiliary services were unconstitutional because the state could not be certain that they did not primarily advance religion.⁴⁵

The Court noted the state's argument that provision of auxiliary services by public employees reduced the need for surveillance, but found the argument constitutionally insignificant.⁴⁶ It concluded instead that because the state employees worked in the religious environment of parochial schools, the state could not be certain that the "subsidized teachers [did] not inculcate religion."⁴⁷

Meek was significant because the Court did not end its inquiry at the "primary effect" issue. Instead, it made explicit what the *Nyquist* Court had merely implied; the Court determined that the level of state scrutiny required to ensure that aid to sectarian schools was purely secular would lead to "a constitutionally intolerable degree of entanglement between church and state."⁴⁸ *Meek* put state legislators on notice that the Court would apply strict "entanglement" analysis to programs aiding parochial schools. To pass the "primary effect" and "entanglement" prongs of the *Lemon* test, parochial school aid would have to be strictly confined

42. The instructional material and equipment provided by the state included such items as maps, photographs, globes, films, and recording equipment. 421 U.S. at 355 n.4.

43. The auxiliary services included remedial and therapeutic psychological, speech, and hearing services. *Id.* at 352-53. The program also authorized the loan of textbooks, which the Court upheld on the basis of *Board of Educ. v. Allen*, 392 U.S. 236 (1968). See *supra* note 17 (discussing *Allen*).

44. 421 U.S. 349 (1975).

45. *Id.* at 366, 372.

46. *Id.* at 371-72.

47. *Id.* at 371 (quoting *Lemon*, 403 U.S. at 619). The Court stated:

The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. . . . [T]hey are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present.

Id. at 371-72 (citations omitted).

48. 421 U.S. at 370.

to secular functions and not require ongoing monitoring.

Proponents of parochial school aid had their first breakthrough in *Wolman v. Walter*.⁴⁹ The Court appeared to alter its "entanglement" approach. In *Wolman*, the Court upheld sections of an Ohio statute⁵⁰ providing nonpublic schools with: (1) diagnostic services⁵¹ performed at nonpublic schools; (2) therapeutic services⁵² provided at public facilities; and (3) standardized tests and test scoring services.⁵³ The Court reaffirmed the *Lemon* test, but it quietly changed the "entanglement" criterion. It acknowledged that a diagnostic therapist paid by the state and attending to students at a parochial school may impart ideological views.⁵⁴ In spite of this possibility, the Court concluded that because this danger was slight, the program required no monitoring. Unlike *Meek*, the state was no longer obliged to be certain that aid was and remained strictly secular.⁵⁵ Unlike *Lemon*,⁵⁶ the state could now rely on its employees' good faith and ability to refrain from any religious interaction with the parochial school students and their administrators.⁵⁷

If *Wolman* began a trend, *Committee for Public Education and Religious Liberty v. Regan*⁵⁸ expanded upon it. The *Regan* Court upheld a New York statute⁵⁹ directing the State Commissioner to reimburse nonpublic schools for the costs incurred in complying with state-required student evaluation testing.⁶⁰ In ad-

49. 433 U.S. 229 (1977).

50. OHIO REV. CODE ANN. § 3317.06 (Page 1976).

51. *Id.* at § 3317.06(D),(E),(F) (current version at § 3317.06(B),(C),(D)).

52. *Id.* at § 3317.06(G),(H),(I),(J) (current version at § 3317.06(E),(F),(G),(I)).

53. *Id.* at § 3317.06(J) (current version at (H)). The state supplied the nonpublic schools with the identical standardized evaluation tests used in public schools and paid for an independent organization to grade the tests. The state also loaned textbooks to students, and authorized the state to pay for field trip transportation. *Id.* at § 3317.06(A),(L) (Page 1976) (§ 3317.06(L) repealed by 1977 Ohio Laws 834). The Court upheld the textbook loans, but held the transportation funding unconstitutional because it primarily advanced religion. 433 U.S. at 254-55.

54. *See* 433 U.S. at 241-42.

55. *Id.* at 244. Compare *Wolman* with *supra* note 47 and accompanying text (discussing *Meek*'s requirement of certainty regarding the states' neutrality).

56. *See supra* text accompanying note 27.

57. *See* 433 U.S. at 244.

58. 444 U.S. 646 (1980).

59. 1974 N.Y. Laws 507, amended by 1974 N.Y. Laws 508.

60. Nonpublic school teachers administered and scored the tests. The state reimbursed the schools for the portion of the teachers' time spent complying with the state's testing requirements. Although the Court emphasized that the state required the tests, it was apparent that nonpublic schools had to administer the tests to be permitted to operate. Consequently, the reimbursement constituted direct financial support of parochial schools. 444

dition, the statute included strict auditing procedures to guarantee that the state was paying only for the testing.⁶¹

Regan continued the shift in the Court's establishment clause analysis. The decision was especially significant for four reasons. First, it marked the first time the Court upheld direct financial support for parochial schools. Second, it established the presumption that the religious and secular aspects of parochial education were separable.⁶² Third, it indicated that the Court would require evidence of parochial schools' or public employees' bad faith before it would invalidate nonpublic school aid statutes.⁶³ Finally, like *Wolman*, it summarily dismissed the entanglement issue by concluding that there was no substantial danger of entanglement.⁶⁴

The *Regan* Court made it clear that the potential danger of diverted state funds or church and state entanglement would be insufficient to sustain an establishment clause challenge. After *Regan*, state programs would be presumptively valid. The Court would require specific evidence, not abstract potential dangers, to rebut that presumption.⁶⁵

Armed with *Wolman* and *Regan*, proponents of increased parochial school aid no doubt felt confident that the Court in *Aguilar v. Felton*⁶⁶ would overrule *Lemon* and its progeny. They were mistaken.

III. ANALYSIS OF *Aguilar v. Felton*

Aguilar v. Felton represents a forceful return to the establishment clause principles many thought were waning.⁶⁷ In particular,

U.S. at 668 (Blackmun, J., dissenting).

61. See 1974 N.Y. Laws 507 §§ 3-7.

62. See 444 U.S. at 660.

63. *Id.* at 660-61.

64. The Court concluded:

The reimbursement process, furthermore, is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.

Id. at 660-61 (footnote omitted).

65. *Mueller v. Allen* followed the *Regan* decision. 463 U.S. 388 (1983). *Mueller* involved a Minnesota tax deduction for both public and nonpublic school tuition. MINN. STAT. § 290.09(22) (1982), repealed by 1983 Minn. Laws 342 art. 1 § 44. Although the parents of parochial students benefitted most from the statute, the Court upheld it based on the *Regan* Court's interpretation of the *Lemon* criteria. Like *Wolman* and *Regan*, the *Mueller* Court summarily dismissed the entanglement issue. 463 U.S. at 403.

66. 105 S. Ct. 3232 (1985).

67. For commentaries addressing the Court's weakening entanglement posture after

Aguilar reversed the *Regan* trend toward neutralizing the "entanglement" criterion. In deciding *Aguilar*, the Court ignored its most recent precedents,⁶⁸ and instead reembraced the *Lemon* "entanglement" analysis. Significantly, the Court reversed the *Regan* Court's recently-created presumptions. First, it dispelled the notion that the religious and secular aspects of parochial school education are separable.⁶⁹ It concluded, as the *Meek* Court did, that the dominant concern of parochial schools is with providing students with an overall religious education.⁷⁰ Second, the Court did not require evidence of diverted government funds before the Court could apply the "entanglement" test.⁷¹ The Court indicated that "[i]f any significant number of the Title I schools create the [risk]"⁷² of federally-funded religious instruction, then the entanglement doctrine applies. Finally, the Court reestablished that public employees' good faith is irrelevant.

The Court concluded that without extensive, ongoing monitoring, the city could not be certain that the federally-funded teachers, in the religious environment, would not inject sectarian ideol-

Mueller, see Note, *Constitutionality of State Tax Deductions for Private School Tuition: A New Door in the Wall of Separation*, 63 NEB. L. REV. 572 (1984); Comment, *Permissible State Aid to Parochial Schools: A Plea for Neutrality*, 33 EMORY L.J. 487 (1984); Comment, Mueller v. Allen: *Tuition Tax Relief and the Original Intent*, 7 HARV. J. L. & PUB. POL'Y 551 (1984); Comment, Mueller v. Allen: *The Continued Weakening of the Separation Between Church and State*, 19 NEW ENG. L. REV. 459 (1984); Comment, *Aid to Parochial Schools: A Free Exercise Perspective*, 23 SANTA CLARA L. REV. 587, 592-93 (1983); Case Comment, *A Breach in the Impregnable Wall: An Analysis of Tuition Tax Credits and the Establishment Clause*, 38 U. MIAMI L. REV. 903 (1984). For commentaries after *Regan*, see Note, *Constitutional Law-First Amendment-Establishment Clause-State Aid to Parochial Schools*-Committee for Public Education and Religious Liberty v. *Regan*, 26 N.Y.L. SCH. L. REV. 915 (1981); Note, *Public Aid to Private Schools: Committee for Public Education and Religious Liberty v. Regan*, 34 SW. L.J. 1261 (1981); *Recent Developments, Constitutional Law-First Amendment-Establishment Clause-Direct Public Aid to Secular Educational Function of Parochial Schools*, 48 TENN. L. REV. 127 (1980).

68. The majority opinion in *Aguilar* never mentioned *Regan*, *Wolman*, or *Mueller*, the Court's most recent decisions addressing parochial school aid. Commentators had viewed all three decisions as liberalizing the Court's previously strict entanglement doctrine. See *supra* note 67.

69. See 105 S. Ct. at 3238.

70. The Court described parochial schools as "schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* (quoting *Meek*, 421 U.S. at 371).

71. Compare *Aguilar*, 105 S. Ct. 3232, with *Tilton*, 403 U.S. at 682 (differing level of specificity of evidence required to invalidate an aid program for parochial school and institutions of higher learning).

Justice O'Connor criticized the majority, indicating that the Court should require evidence of impermissible proselytizing before finding the program unconstitutional. 105 S. Ct. at 3246-47 (O'Connor, J., dissenting).

72. *Id.* at 3238 n.8.

ogy into their instruction.⁷³ The Court did not indicate whether New York City's monitoring procedures guaranteed the mandated level of certainty. Instead, it held that by following those procedures the city became excessively entangled in church affairs.⁷⁴ The Court determined that if government aid was likely to advance religion or require excessive administrative entanglement to ensure that it did not, then the program was unconstitutional. Once again, states "must be certain"⁷⁵ not to sponsor religion.

Most aspects of the *Aguilar* decision are not novel, but merely follow the *Lemon* entanglement analysis. The Court, however, introduced a nuance in its reasoning that may have increased relevance in future decisions. Prior to *Aguilar*, entanglement analysis primarily involved establishment clause violations. The Court perceived state support for religion as an impermissible step toward the creation of a state-supported, sectarian ideology.⁷⁶ In *Aguilar*, the Court reintroduced the guarantee of the free exercise clause as part of the entanglement analysis.⁷⁷ The Court indicated that entanglement between parochial schools and the state impermissibly inhibited the schools' religious freedom.⁷⁸

73. *Id.* at 3238-39.

74. The Court concluded: "This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.* at 3238.

75. *Id.* at 3240 (Powell, J., concurring) (quoting *Meek v. Pittenger*, 421 U.S. 349, 371 (1975)).

76. In *Lemon*, the Court recognized that excessive church and state entanglement leads to "a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." 403 U.S. at 620. The Court continued: "[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Id.* Although the *Lemon* Court held that an excessive entanglement between church and state impermissibly interferes with the churches' religious freedom, the Court ignored the entanglement aspect of the free exercise clause in its subsequent decisions. *E.g.*, *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *cf.* *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (including the free exercise clause as part of its *Lemon* analysis and concluding that the religious freedom of the parties challenging an aid program was not compromised because their taxes were used to finance the program). See generally Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980) (discussing the argument made by some parents that the government, by not sponsoring parochial schools, violates their religious freedom).

77. See 105 S. Ct. at 3237, 3239.

78. See *id.* at 3239.

The Court identified two bases underlying the free exercise clause prohibition of entanglement. First, "[w]hen the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers." *Id.* at 3237. Second, "the freedom of even the adherents of the de-

The free exercise guarantee may prove to be a powerful addition to the *Lemon* criteria. Nonpublic school aid programs, which may have been upheld under *Lemon*, *Nyquist*, and *Meek*, may fail after *Aguilar*. A program that manages to squeeze past the "primary effect" and "excessive entanglement" criteria may now be unconstitutional because the program restricts church-controlled schools in violation of the churches' religious freedom. Legislators may now find the free exercise language to be a further impediment in their struggle to aid nonpublic schools.

IV. IMPACT OF *Aguilar v. Felton*

Aguilar will have a substantial impact on subsequent cases. Lower courts are sure to see the case as prohibiting almost all nonpublic school aid. Legislators and parochial schools will find themselves back in the post-*Lemon* era. They can derive some comfort, however, in knowing that the *Aguilar* decision attracted only a bare majority of the Court's members.⁷⁹

nomination is limited by the governmental intrusion into sacred matters." *Id.*

79. Only five members of the Court supported the majority opinion. *See supra* note 7. Justice Powell's concurring opinion enlarged on the political entanglement issue which the majority raised. 105 S. Ct. at 3240-41 (Powell, J., concurring); *see also supra* note 34 and accompanying text (discussing political entanglement). Justice Powell noted the state and federal governments' dilemma in attempting to aid nonpublic schools; he implied that a program aiding public and nonpublic schools equally and requiring no monitoring would be constitutional. *Id.* at 3241-42.

Chief Justice Burger, dissenting, opined that state action violates the establishment clause only when "the statute or practice is a step towards establishing a state religion." *Id.* at 3242 (Burger C.J., dissenting). Criticizing the majority's "obsession" with the *Lemon* test and emphasizing the program's importance to children afflicted with learning disorders, the Chief Justice determined that New York City's program did not lead to the creation of a state supported religious ideology. Chief Justice Burger, therefore, found it constitutional. *Id.*

Referring to the majority's entanglement doctrine as a "'Catch-22' paradox," Justice Rehnquist dissented on the basis of his dissenting opinion in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2508 (1985) (Rehnquist J., dissenting). *Aguilar*, 105 S. Ct. at 3243 (Rehnquist J., dissenting). In *Wallace* the court held that a state authorized moment of silence in public schools violated the establishment clause. Dissenting in *Wallace*, Justice Rehnquist criticized the Court's historical analysis of the establishment clause. 105 S. Ct. at 2518. Justice Rehnquist determined that the framers intended only that the state be precluded from preferring or choosing one religion over another and not that the state be strictly neutral. *Id.* at 2520. Consequently, according to Justice Rehnquist, any program providing nondiscriminatory aid to sectarian groups is constitutional. *See id.* at 2520.

Justice O'Connor wrote a separate opinion in which she questioned the usefulness of the court's entanglement doctrine. 105 S. Ct. at 3246-47 (O'Connor J., dissenting). Justice O'Connor blamed the entanglement prong of the *Lemon* test for the Court's "anomalous results," and she suggested that the Court limit its establishment clause doctrine to the "secular purpose" and "primary effect" prongs of the *Lemon* test. *See id.* at 3248.

Justice White dissented on the basis of his dissenting opinions in *Lemon v. Kurtzman*,

The Court has been seriously divided in all of its major decisions concerning nonpublic school aid.⁸⁰ Justice White noted this division and wrote for the majority in *Regan*: "Establishment clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."⁸¹

At the Supreme Court level, the predictive value of *Aguilar* is questionable. Both sides of the issue have ardent supporters.⁸² Justices Brennan, Marshall, Stevens, and Blackmun favor restricting state support for nonpublic schools; Chief Justice Burger and Justices Rehnquist, White, and O'Connor support increased financial support for parochial schools. Justice Powell, frequently casting the deciding vote, holds the key.⁸³ Although *Aguilar* appears to be a forceful return to *Lemon* entanglement principles, its resilience depends almost entirely on Justice Powell.⁸⁴ Future Supreme

403 U.S. 602, 661 (1971) (White J., dissenting) and *Committee for Pub. Educ. & Religious Freedom v. Nyquist*, 413 U.S. 756, 813 (1973) (White J., dissenting). In *Lemon*, Justice White criticized the Court's abstract analysis and suggested that the Court refrain from invalidating parochial school programs absent specific evidence of state-subsidized religious indoctrination. 403 U.S. at 670-71 (White J., dissenting). In *Nyquist*, Justice White emphasized the important role parochial schools play in elementary and secondary education and characterized the Court's decision as "contrary to the long-range interests of the country." 413 U.S. at 820 (White J., dissenting).

80. See *School Dist. v. Ball*, 105 S. Ct. 3216 (1985) (parochial school teachers paid by the state to teach as part-time public employees held unconstitutional by a five to four margin); *Mueller v. Allen*, 463 U.S. 388 (1983) (state tuition cost tax deduction upheld by a five to four majority); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 644 (1980) (parochial school reimbursement for state-mandated testing and reporting upheld by a five to four margin); *Wolman v. Walter*, 433 U.S. 229 (1977) (textbook loans to parochial school students upheld by a six to three margin, instructional material and equipment loans to parochial schools held unconstitutional by the same margin and the use of state funds for field trip transportation held unconstitutional by a five to four majority); *Meek v. Pittenger*, 421 U.S. 349 (1975) (textbook loans to students of sectarian schools upheld by a six to three majority and state-provided auxiliary services and instructional material and supplies invalidated by the same margin).

81. 444 U.S. at 662.

82. See *Regan*, 444 U.S. at 663-64 (Blackmun J., dissenting); see also *supra* note 79.

83. See Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581, 581 (1984) ("With the Court frequently split five to four on school cases, Powell is often the swing vote, and even when in the minority, his dissenting opinions have exerted significant influence on later decisions.").

84. Justice Powell has been in the majority of most school aid opinions, whether the majority approved or disapproved parochial school aid. Because his decisions appear to be ambiguous, it is instructional to compare them. Justice Powell has favored: tax relief for families of students attending nonpublic schools, *Mueller*, 463 U.S. 388 (1983); parochial school reimbursement for state-mandated testing, *Regan*, 444 U.S. 646 (1980); textbook loans to parochial school students, state provided standardized tests and test scoring services to nonpublic schools, diagnostic services performed at nonpublic school facilities, therapeutic services provided for nonpublic school students at public facilities, and state-funded

Court decisions will reveal whether *Aguilar* has indeed neutralized *Regan*, or if *Regan* is merely waiting for a school aid program that Justice Powell finds acceptable.

When viewed in isolation, *Aguilar v. Felton* appears to be a major victory for the proponents of strict entanglement analysis. When viewed in its historical context, however, its relevance is not so clear. Undoubtedly, time will tell whether *Aguilar* is indeed a meaningful return to the strict *Lemon* entanglement doctrine—or whether it is merely another example of the Justices' ad hoc determination of how much aid is too much.

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field trip transportation for nonpublic schools, *Wolman*, 433 U.S. 229 (1977), and *Meek*, 421 U.S. 349 (1975). On the other hand, Justice Powell has opposed: remedial services provided by public employees at nonpublic schools, *Aguilar*, 105 S. Ct. 3232 (1985); state-funded after-school instruction by nonpublic school teachers at religious school facilities, *Ball*, 105 S. Ct. 3216 (1985); state-provided instructional material and equipment to parochial schools, *Wolman*, 433 U.S. 229, and *Meek*, 421 U.S. 349; and therapeutic services performed at nonpublic schools by public employees, *Meek*. With the exception of the field trip transportation issue in *Wolman*, Justice Powell has been in the majority in all of the above decisions. He also indicated in his concurring opinion in *Aguilar* that he does not read *Aguilar* to preclude all further parochial school aid. 105 S. Ct. at 3241-42 (Powell, J., concurring).