Pace Law Review

Volume 6
Issue 4 *Summer 1986*

Article 3

June 1986

Aguilar v. Felton: Will the Court Disentangle the Lemon Test?

Ann Farrissey Carlson

Aguilar v. Felton: Will the Court Disentangle the *Lemon* Test?

I. Introduction

In *Aguilar v. Felton*,[1] the United States Supreme Court struck down a New York City program which utilized federal funds provided under Title I of the Elementary and Secondary Education Act of 1965[2] to pay the salaries of public school professionals providing special services in parochial schools. The funds were used to conduct such programs as remedial reading and mathematics, reading skills, English as a second language, and guidance services.[3] In a five-to-four decision,[4] the Supreme

---

1. 105 S. Ct. 3232 (1985). The case was decided with Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985). In *Grand Rapids*, the Court struck down two Michigan programs, a Shared Time Program and a Community Education Program. *Id.* at 3218. These programs were held to violate the establishment clause because they had the primary or principal effect of advancing religion. The Shared Time Program offered supplemental classes to students in nonpublic schools during the regular school day. *Id.* at 3218. The classes were taught by full-time public school teachers. *Id.* at 3219. The Community Education Program involved classes offered to both children and adults that commenced at the end of the regular school day in nonpublic schools. *Id.* at 3219. The Community Education classes were taught by part-time public school employees. *Id.* Both programs were conducted in nonpublic schools, but the classrooms were leased by the public school system at a rate of six dollars per classroom per week. Of the forty-one nonpublic schools involved in the two programs, forty were sectarian in character. *Id.* at 3220.

The Court stated three ways in which the programs had the primary effect of advancing religion. First, the possibility existed that the public school teachers would be influenced by the sectarian nature of the schools and would indoctrinate students to religious teachings at public expense. Second, the public support of instruction in sectarian school buildings threatened to convey to students and the public a message of government support for religion. Third, the programs were, in effect, state subsidies of parochial schools because the programs relieved the schools of the responsibility of teaching certain subjects. *Id.* at 3218.

2. 20 U.S.C. §§ 2701-4206 (1986).

3. Aguilar v. Felton, 105 S. Ct. at 3234.

4. Justice Brennan wrote for the majority joined by Justices Marshall, Blackmun and Stevens. Justice Powell joined in the result but wrote a concurring opinion. Dissenting opinions were filed by Chief Justice Burger, Justice Rehnquist and Justice O'Connor. (In the U.S. Law Week report of this case there is a dissenting opinion written by Justice White. This opinion does not appear in the Supreme Court Reports' report of the case.)

Court was sharply divided over the appropriate means of analyzing whether a program violated the establishment clause. The majority held that the program offended the three-part test evinced in *Lemon v. Kurtzman*.[5] Because the public school professionals had to be supervised within the parochial schools, the Court determined that the program had the potential for excessive entanglement between government and religion, therefore violating the establishment clause of the first amendment.[6] The dissenters disagreed both with the majority's analysis under the *Lemon* test and the appropriateness of the test itself.[7]

Part II of this Note examines the genesis of the establishment clause and the precedents set by prior establishment clause cases. Part III sets out the facts and lower court decision of *Aguilar v. Felton*. The majority opinion, Justice Powell's concurrence and the critical dissent of Justice O'Connor are examined in Part IV. Finally, this Note concludes in Part V with an analysis of the strengths and shortcomings of these opinions, as well as a discussion of the need for the complete *Lemon* test.

II. Background

The Constitution of the United States guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[8] The first clause of this amendment is considered to be the establishment clause, while the second clause is considered the free exercise clause.[9] Although the intent of the Framers of the Constitution

---

5. 403 U.S. 602 (1971).

6. Aguilar v. Felton, 105 S. Ct. at 3235, 3238. The Court stated that the "pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement . . . . [T]he religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." *Id.* at 3238-39.

7. Aguilar v. Felton, 105 S. Ct. at 3232, 3247 (1985) (O'Connor, J., dissenting).

8. U.S. CONST. amend. I. The first amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

9. The free exercise clause was recognized as applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940) (state statute requiring individual to obtain certificate to solicit money for religious cause and giving public official authority to deny certificate

is often cited as support for a given interpretation of these religion clauses, the historical record as to their origin is somewhat ambiguous.[10] The brief historical discussion which follows is meant to outline the Court's interpretation of the Framers' intent without commenting on the historical veracity of that interpretation.

A. *Origin of the Religion Clauses of the First Amendment*

Although many of the early settlers fled to the American colonies in order to escape religious persecution, that fact alone does not explain the purpose of the religion clauses. At the time the Bill of Rights was adopted, state established churches existed in several states, and it is possible that the first amendment was intended only to prohibit congressional interference with religion.[11] Also, there were at least three prevailing views of the religion clauses' purpose at the time the first amendment

---

based on official's determination of whether cause was religious or not was held to be a restraint upon the free exercise of religion forbidden by the fourteenth amendment). The establishment clause was first applied to the states in Everson v. Board of Education, 330 U.S. 1 (1947) (state statute authorizing reimbursement of school transportation expenses held not to violate the establishment clause made applicable to states through fourteenth amendment).

The *Cantwell* Court recognized the importance of extending the guarantees of religious freedom to the states.

> The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship . . . . On the other hand, it safeguards the free exercise of the chosen form of religion.

Cantwell v. Connecticut, 310 U.S. at 303.

10. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963) (Brennan, J., concurring). Justice Brennan cautioned that

> [a] too literal quest for the advice of the Founding Fathers upon the issues of these [religion and schools] cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.

Id. at 237. *See generally* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-22.

11. *See* McGowan v. Maryland, 366 U.S. 420, 465 (1961). "The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation." (Frankfurter, J., concurring). *Id.*

was ratified. Roger Williams represented the evangelical view that the separation of church and state would protect religion from government interference.[12] Thomas Jefferson supported the view that separation would protect government from religion.[13] The third view, held by James Madison and others, was that separation would allow church and state to each attain their own high purpose.[14] Generally, the Supreme Court has considered the views of Madison and Jefferson to be the predecessors to the first amendment.[15]

The gravaman of the concerns articulated above found expression in the establishment and free exercise clauses, and together these clauses protect religious freedom.[16] The establish-

---

12. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 817 (1978).

> Roger Williams saw separation largely as a vehicle for protecting churches against the state. To the extent that it was possible to accept state aid without state control, he urged cooperation; indeed, he argued that the state must "countenance, encourage, and supply" those in religious service. Thus, his view has been called one of positive toleration, imposing on the state the burden of fostering a climate conducive to all religion.

(citing Whitson, *American Pluralism,* THOUGHT (Winter, 1962, at 402)).

13. TRIBE, *supra* note 12, at 817.

> Thomas Jefferson, in contrast, saw separation as a means of protecting the state from the church. As early as 1779, he presented a bill to the Virgina Legislature to disestablish the tax-supported Anglican church. He also urged that the clergy be barred from public office. That view would today strike many as violative of free exercise, but it was Jefferson's conviction that only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views. . . .

Id. (footnotes omitted).

14. *Id.* "James Madison believed that both religion and government could best achieve their high purposes if each were left free from the other within its respective sphere. . . ." *Id.*

15. *See* Everson v. Board of Educ., 330 U.S. 1, 13 (1947).

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which [James] Madison and [Thomas] Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.

Id.

16. *See* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969).

> Three such [policy] grounds need to be considered: voluntarism in matters of religion, mutual abstention of the political and the religious caretakers, and governmental neutrality toward religions and between religion and non-religion. In a large sense, both of the guarantees of the first amendment — the free-exercise and the non-establishment clauses — are directed harmoniously toward these purposes, though in the context of specific governmental measures the two guar-

ment clause generally bars the inhibition of religious choice which arises from government aid to a particular religion.[17] The free exercise clause generally bars the curbing of religious practice through government penalties which place a burden on religious belief.[18] Although both of the clauses protect the freedom of religious belief and practice, there is a natural antagonism between them that has often been troublesome for the courts.[19]

In attempting to maintain a balance in the face of such tension, the Supreme Court has recognized two fundamental principles underlying the religion clauses; voluntarism and separatism.[20] Separatism has been viewed as more than an institutional isolation between church and state; it is a recognition that "the state should not become involved in religious affairs and that sectarian differences should not be allowed unduly to fragment the body politic."[21] The Court has gradually developed a test

---

antees may point in different directions and the purposes themselves may be discordant.

Id. at 1684.

17. TRIBE, *supra* note 12, at 818-19.

The establishment clause, at least when interpreted broadly and applied to the states, can be understood as designed in part to assure that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state. Religious groups, it was believed, should prosper or perish on the intrinsic merit of their beliefs and practices. The establishment clause, then, might also be seen as an expression of religious voluntarism.

Id. *See also* Gianella *supra* note 10, at 514.

18. *Id.* at 818.

The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief. It prohibited not only direct compulsion but also any indirect coercion which might result from subtle discrimination; hence, it was offended by any burden based specifically on one's religion. So viewed, the free exercise clause is a mandate of religious voluntarism.

Id. (footnotes omitted). *See also* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

19. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970). "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69. For example, if all penalties are barred by the free exercise clause, undue aid to religion may result and, likewise, if all aid is barred by the establishment clause, undue penalties against religion may result. *See infra* text accompanying notes 27-28. *See also supra* note 16 and accompanying text.

20. TRIBE, *supra* note 12, at 818. "What emerges from the Court's examination of history is a pair of fundamental principles, seen in the Court's religion discussions as animating the first amendment: voluntarism and separatism." *Id.*

21. *Id.* at 819. *See generally* Freund, *supra* note 16, at 1684-86.

under the establishment clause to protect these two fundamental principles. The constitutionality of public aid to parochial schools has often been at issue as the test became established.

B. *Modern Establishment Clause Doctrine and Aid to Religious Schools Cases*

The use of public funds to aid parochial schools has been a contested issue in much of the establishment clause litigation. In fact, the modern Court's first encounter with the establishment clause dealt with that very issue.[22] In *Everson v. Board of Education,*[23] the Court upheld a New Jersey program which reimbursed parents of children in parochial schools for the cost of bus transportation.[24] The New Jersey program applied to all public and nonpublic school children attending non-profit schools and, therefore, revealed no preference on the part of the state for religious schools.[25] Also, the state did not contribute money to the schools themselves.[26] The Court held that bus transportation was similar to those basic government services, such as fire and police protection, that could be constitutionally

---

22. Everson v. Board of Educ., 330 U.S. 1 (1947).

23. *Id.*

24. *Id.* at 3. "The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system." *Id.* This program included "the transportation of school children to and from school, other than a public school, except such school as is operated for profit in whole or in part." *Id.* at 3, note 1. The Court also stated, "we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." *Id.* at 17.

25. *Id.* at 3, 16.

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. . . . While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Id. at 16.

26. *Id.* at 18. "The State contributes no money to the schools. It does not support them." *Id.*

extended to religious institutions.[27] The Court also cautioned that it must not strike down a statute merely because it neared the verge of impermissible government power.[28] In so doing, however, the Court stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[29] But while *Everson* established that state aid to transport nonpublic school students is permissible, courts have struggled to identify the scope of the states' authority in this area.[30]

---

27. *Id.* at 17.

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment.

Id. at 17-18. *See also* Giannella, *supra* note 10, at 520. *See also* Freund, *supra* note 16, at 1682.

28. Everson v. Board of Educ., 330 U.S. at 16. "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." *Id.*

29. *Id.* at 18.

30. *See, e.g.*, Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955, 960 (S.D. Iowa 1975) (Iowa statute which provided transportation to nonpublic school students outside the school district where they resided struck down because statute aided a special class which consisted largely of religious school students); Vissar v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949) (transportation aid for religious school students violated Washington's state constitutional prohibition against using state funds to aid sectarian groups); *see also* Matthews v. Quinton, 362 P.2d 932, 939 (Alaska 1961) (state aid to transportation of nonpublic school students violates state constitution), *cert. denied, appeal dismissed*, 368 U.S. 517 (1962); Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1941) (state aid to transportation of nonpublic school students violates state constitution). Several states have also disregarded claims that nonpublic school students are denied equal protection by not providing publicly funded transportation. *See, e.g.*, Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974); Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied;* 406 U.S. 957 (1972). *But see* State *ex. rel.* Hughes v. Board of Educ., 154 W. Va. 107, 174 S.E.2d 711 (1970), *cert. denied*, 403 U.S. 944 (1971) (because local school board chose to provide bus transportation for public school students under a state law which permitted but did not require it to do so, local school board also had to provide such transportation for nonpublic school students); Attorney Gen. v. School Comm., 387

In *Board of Education v. Allen*,[31] the Court upheld a New York statute which required local public school authorities to loan textbooks free of charge to all students in grades seven through twelve, including parochial school children.[32] In reaching its conclusion, the Court applied a purposes and effects test.[33] The Court found that the program did not have a sectarian or religious purpose which would have rendered the program unconstitutional.[34] The Court also determined that the program did not have the primary effect of advancing religion because the textbooks were used solely as secular teaching components.[35] Therefore, the Court concluded that there was no vio-

---

Mass. 326, 439 N.E.2d 770 (1982) (state statute aiding transportation of nonpublic school students upheld); State *ex. rel.* Bouc v. School Dist., 211 Neb. 731, 320 N.W.2d 472 (1982) (state statute aiding transportation of nonpublic school students upheld); School Dist. v. Commonwealth Dep't of Educ., 33 Pa. Comm'n. 535, 382 A.2d 772 (1978), *aff'd sub nom.*, Springfield School Dist. v. Dep't of Educ., 483 Pa. 539, 397 A.2d 1154, *appeal dismissed*, 403 U.S. 901 (1979) (state statute aiding transportation of nonpublic school students upheld). The following states have passed statutes which aid transportation of nonpublic school students with public funding: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Lousiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, and Rhode Island. *See* K. ALEXANDER, SCHOOL LAW 186 (1980); M. MCCARTHY, A DELICATE BALANCE: CHURCH, STATE, AND THE SCHOOLS 118-20 (1983); New York amended its state constitution in 1938 to provide for public funding for such transportation. N.Y. CONST., art. XI, § 3.

31. 392 U.S. 236 (1968).

32. *Id.* at 238. "A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. . . . We hold that the law is not in violation of the Constitution." *Id.*

33. *Id.* at 243. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

> [T]he Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? . . . That is to say that 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.

Id. at 222.

34. Board of Educ. v. Allen, 392 U.S. at 243. "The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." *Id.*

35. *Id.* at 248.

> [W]e cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined

lation of the establishment clause.[36] Subsequent to *Allen*, the Court has generally upheld textbook programs.[37] This decision is also important, however, because it represented a significant step in the development of the three-part test evinced by the Court in later establishment clause decisions.

The three-part test was first articulated in *Lemon v. Kurtzman*,[38] where the Court struck down Pennsylvania and Rhode Island statutes which provided public funds for teachers' salaries in nonpublic schools, including parochial schools.[39] In so doing,

---

> that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. . . . Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.

Id.

36. *Id.* In dissent, Justice Black, who authored the Court's opinion in *Everson*, distinguished state support to transport nonpublic school students from the use of state tax dollars to supply books. *Id.* at 251-54 (Black, J., dissenting). While school books were "the most essential tool of education," transportation was a mere public welfare service. *Id.* at 253-54. Also dissenting, Justice Fortas claimed that New York's program was "hand-tailored to satisfy the specific needs of sectarian schools" because sectarian authorities chose the books. *Id.* at 271 (Fortas, J., dissenting). Also dissenting, Justice Douglas queried the Court's willingness to support such aid, because text books were "the chief . . . instrumentality for propogating a particular religious creed or faith." *Id.* at 257 (Douglas, J., dissenting).

37. *See* J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1033 (1983). The Supreme Court has held in several instances that public funds may be used to purchase secular textbooks in order to loan them to sectarian school students. *See also* Wolman v. Walter, 433 U.S. 229 (1977) (Ohio statute upheld); Meek v. Pittenger, 421 U.S. 349 (1975) (Pennsylvania statute upheld). In Norwood v. Harrison, 413 U.S. 455 (1973), however, the Court held that textbooks cannot be loaned to private schools which are racially exclusive because such state aid would unconstitutionally foster racial discrimination. State statutes which permit use of state funds for textbook use in nonpublic schools exist in Iowa, Louisiana, Mississippi, New Mexico, New York, and Rhode Island. *See* K. ALEXANDER, SCHOOL LAW at 193. *But see* Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974) (state law which reimbursed parents of nonpublic school students for costs of textbooks with state funds held invalid). State courts have also invalidated state provided textbooks to nonpublic school students as violative of the state constitution. *See* Dickman v. School Dist., 232 Or. 328, 366 P.2d 533 (1961), *cert. denied sub. nom.*, Carlson v. Dickman, 371 U.S. 823 (1962); Bloom v. Springfield School Comm., 376 Mass. 35, 379 N.E.2d 578 (1978); *In re* Advisory Opinion, 394 Mich. 41, 228 N.W.2d 772 (1975); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), *cert denied*, 419 U.S. 1111 (1975); Gaffney v. State Dep't of Educ., 192 Neb. 358, 220 N.W.2d 550 (1974); California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981). *See also* MCCARTHY, *supra* note 30, at 121-23.

38. 403 U.S. 602 (1971).

39. *Id.* at 607. Under the Pennsylvania program, the state was authorized to reimburse "nonpublic schools for their actual expenditures for teachers' salaries, textbooks,

the Court announced a test for analyzing the constitutionality of nonpublic school aid programs which consisted of three prongs.[40] First, the test required that the program have a secular legislative purpose.[41] Second, the program could not have the principal or primary effect of advancing or inhibiting religion.[42] Finally, the program must not involve the government in excessive entanglement with religion.[43]

The Court in *Lemon* found that both of the programs at issue were unconstitutional because they involved excessive government entanglement with religion.[44] Under both programs, the states would be required to provide surveillance of teachers in the parochial schools to ensure that religion was not advanced.[45]

---

and instructional materials." *Id.* at 609. The program was limited to reimbursement for programs normally available in public schools and for programs that were in the secular subjects of mathematics, modern foreign languages, physical science, and physical education. *Id.* at 610. The Rhode Island statute authorized the state to supplement teachers' salaries in an amount not to exceed fifteen per cent of a teacher's annual salary. *Id.* at 607. To be eligible for the supplement, a teacher must have taught a subject available in the public schools and must have used teaching materials which were used in the public schools. *Id.* at 608. Also, the teacher must have agreed not to teach a course in religion while receiving the supplement. *Id.*

40. *Id.* at 612-13. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* (citations omitted).

41. *Id.* at 612.

42. *Id.* The Court cited Board of Educ. v. Allen, 392 U.S. 236, 243 (1968). *See supra* notes 33-34 and accompanying text.

43. Lemon v. Kurtzman, 403 U.S. at 613. The Court cited Walz v. Tax Comm'n, 397 U.S. 664, 674 (1968). In *Walz*, the Court stated that "[d]etermining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result — the effect — is not an excessive government entanglement with religion." *Id.*

To determine whether there was excessive government entanglement with religion, the Court in *Lemon* stated that it was necessary to "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, 403 U.S. at 615.

44. *Id.* at 615. The Court emphasized that the merits and benefits of parochial schools were not at issue; the Court recognized their contribution to society, but emphasized the historical decision to separate religion and government. *Id.* at 625.

45. *Id.* at 619.

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective ac-

The Court also stated a concern that the statutes would foster political division along religious lines, such division being one of the evils against which the first amendment was designed to protect.[46] The inclusion of the entanglement prong in the test reflected the Court's concern with the fundamental principle of separatism.[47]

The next major decision in the area of public funding of parochial schools was *Meek v. Pittenger*,[48] in which the Court considered a Pennsylvania statute authorizing the commonwealth to provide "auxiliary services" and to lend textbooks and other instructional material to children enrolled in nonpublic elementary and secondary schools.[49] The Court determined that the loan of textbooks was constitutional,[50] but it struck down the program for the loan of instructional material (other than text-

---

ceptance of the limitations imposed by the First Amendment.
Id.

46. *Id.* at 622. *But see* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 PITT. L. REV. 673, 684 (1980) (The constitutionality of a state statute should be weighed on the basis of whether it advances religion, and not because of potential political divisiveness.). *See also* M. MCCARTHY, *supra* note 30, at 123.

47. *See supra* text accompanying notes 20-21. In a concurring opinion to the *Lemon* decision, Justice Douglas pursued the problem of entanglement. He stated that public support of parochial schools "puts those schools under disabilities with which they were not previously burdened." Lemon v. Kurtzman, 403 U.S. at 632 (Douglas, J., concurring). The burden to which Justice Douglas referred was government surveillance and meddling. Justice Douglas emphasized the need to protect the interest of the religious institution in being free from government interference. *Id.* at 634. *See also* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (New York statute which provided funds for the maintenance and repair of, tuition reimbursements for, and state tax benefits for all parents of students enrolled in nonpublic schools invalidated under primary effect prong of the *Lemon* test); Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (New York law for tests and recordkeeping in nonpublic schools held invalid as offending the secular purpose prong of *Lemon* test); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania statute which provided tuition reimbursements to parents of nonpublic school students held invalid because it offended the second prong of *Lemon*).

48. 421 U.S. 349 (1975).

49. *Id.* at 352. "Auxiliary services include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged . . . ." *Id.* at 352-53. The state could also lend textbooks free of charge as well as instructional materials such as "periodicals, photographs, maps, charts, sound recordings [and] films." *Id.* at 353-55.

50. *Id.* at 362. The Court relied upon its decision in Board of Educ. v. Allen, 392 U.S. 236 (1968), to uphold the loan of textbooks.

books) and the auxiliary services program.[51] In reaching its decision, the Court applied the three-part test outlined in *Lemon v. Kurtzman*.[52] The Court determined that the program to loan instructional material had a secular purpose and satisfied the first prong of the test.[53] The Court found, however, that the program to loan instructional materials failed the second prong because it had the primary effect of advancing religion.[54] The Court determined that when aid was directed towards an institution with a substantially religious mission, that aid had the unconstitutional effect of promoting religion.[55]

In examining the auxiliary services program, the Court found that the state performed important educational functions in schools where the advancement of religion was maintained and where education was an integral part of the religious mission.[56] Focusing on the entanglement prong of the test, the Court determined that there was excessive entanglement of government in religion, consisting of both administrative and political entanglement.[57] Administrative entanglement existed be-

---

51. Meek v. Pittenger, 421 U.S. at 363, 372.

52. 403 U.S. at 602, 612-13. The Court emphasized, however, that "the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." Meek v. Pittenger, 421 U.S. at 359.

53. Meek v. Pittenger, 421 U.S. at 363. The Court stated that the legislative purpose was to extend to every schoolchild in the commonwealth the benefits of free educational aids. The Court accepted "the legitimacy of this secular legislative purpose." *Id.*

54. *Id.* at 363. The Court found that the program had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act." *Id.* The Court also found that "the massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental." *Id.* at 365.

55. *Id.* at 366. Because the Court determined that the instructional material loan program had the impermissible effect of advancing religion, thus failing the second prong of the test, there was no need to examine the program under the third prong. *Id.* at 363 n.13.

56. *Id.* at 371.

> To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they 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.

Id.

57. *Id.* at 372. "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related

cause the state would have to engage in surveillance to ensure that teachers did not promote religion.[58] There was also political entanglement because appropriations were considered each year, and there existed the opportunity for "repeated confrontation between proponents and opponents of the auxiliary-services program."[59]

In *Mueller v. Allen*,[60] the Court, in a five-to-four decision, upheld a Minnesota statute which permitted state taxpayers to claim a state income tax deduction for certain expenses incurred by dependents attending elementary and secondary schools.[61] The majority characterized the *Lemon* test as a well-settled principle which provided "no more than a signpost" in the constitutional analysis and that, therefore, a caveat should be kept in mind when applying the test.[62] Thus, any program which somehow aided a religiously affiliated institution was not necessarily unconstitutional.[63]

---

schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Id.*

58. *Id.* "To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." *Id.*

59. *Id.* There was evidence in this case of the kind of division the Court would exhibit in future cases concerning aid to parochial schools. For example, Chief Justice Burger and Justices Rehnquist and White stated that they would have upheld the auxiliary services program. *Id.* at 385, 391. Chief Justice Burger did not find excessive entanglement and was concerned that children were being deprived of needed programs. *Id.* at 385-86. Justice Rehnquist, in an opinion joined by Justice White, articulated a concern that the Court was supporting a purely secular society. He observed that

> [t]he Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question . . . .

Id. at 395 (Rehnquist, J., dissenting).

60. 463 U.S. 388 (1983).

61. *Id.* at 390-91. Deductions were allowed for expenses incurred for "tuition, textbooks, and transportation." *Id.* at 391.

62. *Id.* at 394.

63. *Id.* at 393. "One fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 742 (1973)).

The Court found that the program had a discernible secular purpose and therefore

Despite the Court's willingness to invalidate public aid to parochial schools since the modern view of the first amendment's establishment clause emerged in 1947 in the *Everson* case, state programs designed to aid and fund nonpublic schools have greatly expanded in recent years.[64] *Lemon v. Kurtzman*[65] and its progeny show that the establishment clause requires state neutrality vis-a-vis religion, but the principles evinced in those cases are not easily applied.[66] State tax dollars may be used to enhance secular aspects of nonpublic education, but courts must be on guard to the fact that when public funds assist a sectarian organization in order to carry out a secular task,

---

met the first prong of the *Lemon* test. "A state's decision to defray the cost of educational expenses incurred by parents — regardless of the type of schools their children attend — evidences a purpose that is both secular and understandable." *Id.* at 395. The Court also found that the program did not have the primary effect of advancing religion, and therefore, the program met the requirements of the second prong. *Id.* This was so because the Court determined that "the deduction [was] available for educational expenses incurred by *all* parents, including those whose children attend[ed] public schools and those whose children attend[ed] non-sectarian private schools or sectarian private schools." *Id.* at 397 (emphasis in original). Also, the aid was disbursed to the parents and not through the schools which lessened the likelihood that the state was supporting religion. *Id.* at 399. In contrast to the dissent, the majority declined to engage in an empirical inquiry to determine whether the program had the effect of advancing religion. *Id.* at 401. Moreover, the Court found no excessive entanglement because the only state surveillance necessary would be to determine whether a particular textbook qualified for a deduction. *Id.* at 403. Therefore, while applying the *Lemon* test cautiously, the Court upheld the Minnesota statute.

The dissent, however, determined that the establishment clause prohibits a state from subsidizing religious education either directly or indirectly. *Id.* at 404. Concluding that the Minnesota statute violated the establishment clause, the dissent focused on the program's effect during the 1978-1979 school year; it found that 95% of the students in private schools attended sectarian schools, and that although the deduction was available to parents of children in public schools, those parents did not pay tuition or expenses (unless the child attended school in another district, but only 79 out of the 815,000 public school children attended school outside of their district). *Id.* at 405. The dissent characterized the statute's effect as indirect aid which was impermissible because the tuition deduction was a financial incentive for parents to send their children to parochial schools. *Id.* at 407. The dissent also found no restriction in the program which would guarantee a separation of religious and educational functions. *Id.*

64. *See* Education Daily, Nov. 3, 1982, at 5. In addition to the fiscal crisis which faces nonpublic education, the burgeoning interest nationwide in providing alternatives to public schools suggests that state assistance to nonpublic schools will continue. *See* McCarthy, *supra* note 30, at 132-33.

65. 403 U.S. 602 (1971).

66. Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976).

the organization's resources are freed for religious purposes.[67] At present, the parochial aid cases do not present clarity and, according to one commentator, they seem to be mere "ad hoc judgments which are incapable of being reconciled on any principled basis."[68]

C. *Title I of the Elementary and Secondary Education Act of 1965*

Title I of the Elementary and Secondary Education Act of 1965[69] was intended to provide funds to school systems in low income areas.[70] Recognizing that concentrations of low income families negatively impact an educational agency's ability to serve the special educational needs of those families' children,[71] Title I provides assistance to school systems with children who are educationally deprived.[72] These children must reside in areas with high concentrations of low income families.[73] The funds were intended to be used for programs designated by local edu-

---

67. *Id.* at 747; *See* MCCARTHY, *supra* note 30, at 132.

68. Choper, *supra* note 46, at 680. *See also* Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783, 816 (1978) (Beginning with *Everson*, the Court "started down a conceptual road of uncertain destination.").

69. 20 U.S.C. §§ 2701-4206 (1982 & Supp. III 1985).

70. 20 U.S.C. § 2701 (1982). Section 2701 provides:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

71. *Id.*

72. 20 U.S.C. § 3804(a) (1982). Section 3804(a) provides: "Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children."

73. 20 U.S.C. § 3805(b) (1982 & Supp. III 1985). Section 3805(b) provides: "The application described in subsection (a) of this section shall be approved if . . . the programs and projects described in (1) (A) are conducted in attendance areas of such agency having the highest concentration of low-income children."

cational agencies[74] to supplement programs which would be made available through the use of non-federal funds.[75] In *Aguilar v. Felton*,[76] Title I funds were used by the City of New York to support a "shared-time" program[77] in which remedial subjects were taught to nonpublic school students by public school professionals.[78] In short, the program aided certain sectarian schools by allowing the schools to offer a complete curriculum, partly at public expense.[79]

III. Aguilar v. Felton

A. *Facts*

Under Title I of the Elementary and Secondary Education Act of 1965, New York City used federal funds to provide instructional services to parochial school children who were educa-

---

74. 20 U.S.C. § 3805(a) (1982). Section 3805(a) provides:

> A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

75. 20 U.S.C. § 3807(b) (Supp. III 1985). The funds were to be used to supplement programs and not to supplant the use of non-federal funds for those programs. Section 3807(b) provides:

> A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection . . . no local education agency shall be required to provide services under this subchapter outside the regular classroom or school program.

76. 105 S. Ct. 3232 (1985).

77. The United States Senate Subcommittee on Education defined "shared-time" programs in 1963:

> As generally used in current literature in the field of education, the term 'shared time' means an arrangement for pupils enrolled in nonpublic elementary or secondary schools to attend public schools for instruction in certain subjects . . . regarded as mainly or entirely secular, such as laboratory science or home economics.

STAFF OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 88TH CONG., 1ST SESS., PROPOSED FEDERAL PROMOTION OF "SHARE TIME EDUCATION" 1 (Comm. Print 1963), *See* MCCARTHY, *supra* note 30, at 103.

78. *Aguilar*, 105 S. Ct. at 3233.

79. *Id. See* MCCARTHY, *supra* note 30, at 104.

tionally deprived.[80] The programs which were funded included "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services."[81] Of all those children eligible to benefit under Title I during the 1981-1982 school year, 13.2% were enrolled in private schools.[82] Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools.[83]

The programs were taught on parochial school grounds by public school employees who were directed to refrain from becoming involved in religious activities conducted at the schools.[84] All materials and equipment used in the programs were supplied by the federal government.[85] The teaching professionals were responsible for the selection of participating students.[86] The teachers were supervised by field personnel who attempted to make at least one unannounced visit to the classroom each month.[87] Field personnel in turn reported to a program coordinator.[88] Parochial school administrators were not involved in operating the program, except to clear the rooms used by public school personnel of all religious symbols.[89] The dispute in this case arose when six federal taxpayers sought to enjoin the use of federal funds by New York City to finance the shared-time programs.[90]

---

80. Aguilar v. Felton, 105 S. Ct. 3232, 3235 (1985).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* The program coordinators also attempted to make unannounced visits to the classrooms. *Id.*

89. *Id.*

90. Felton v. Secretary, United States Dep't of Educ. 739 F.2d 48, 49 (2d Cir. 1984). The original defendants in the action were the Secretary of the United States Department of Education and the Chancellor of the Board of Education of the City of New York. *Id.* at 49. Four individuals whose children attended non-public schools in New York City and received remedial assistance under the Title I program were allowed to intervene as defendants. *Id.* at 52.

B. *The Lower Court*

The six plaintiffs commenced an action in the United States District Court for the Eastern District of New York, alleging that the Title I program violated the establishment clause of the first amendment of the Constitution.[91] Affirming the program's constitutionality, the district court placed dispositive reliance on *National Coalition for Public Education and Religious Liberty v. Harris*.[92] *Harris* dealt with an identical challenge to the Title I programs, and the District Court for the Southern District of New York determined that the programs were constitutional.[93] The *Aguilar* court therefore granted defendants' motion for summary judgment.[94]

On appeal to the United States Second Circuit Court of Appeals, the district court's decision was reversed.[95] Holding that the establishment clause prohibited use of federal funds to provide religious schools with public school teachers and professionals,[96] the Second Circuit found that the program involved excessive government entanglement with religion.[97] The court reached this conclusion despite recognition of the strong humanitarian desire to find the program constitutional — people want to allow parochial schools to be able to provide their students with remedial programs.[98] The Second Circuit concluded, however, that the Framers' objective in drafting the first amendment was to restrain government activity in religion.[99]

The defendants appealed to the United States Supreme

---

91. *Id.* The district court opinion was not recorded because the court followed the decision in National Coalition for Pub. Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980).

92. 489 F. Supp. 1248 (S.D.N.Y.) *appeal dismissed*, 449 U.S. 808 (1980). Harris was decided while this case was pending in the district court.

93. *Id.* at 1250.

94. *Aguilar*, 105 S. Ct. at 3236.

95. Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir. 1984).

96. *Id.* at 49-50. The court stated that "the Establishment Clause . . . constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here." *Id.*

97. *Id.* at 64.

98. *Id.* at 71.

99. *Id.* at 72. The court stated that "efficiency was not the objective of the framers of the Bill of Rights; they aimed to restrain government from certain acts which legistative majorities had determined to be wise." *Id.*

Court. The Court concluded that jurisdiction by appeal did not lie because the decision of the Second Circuit was not a final judgment which held an Act of Congress unconstitutional.[100] The Court determined to treat the appeal papers as a petition for a writ of certiorari, however, and the writ was granted.[101]

IV. The United States Supreme Court Opinions

A. *The Majority*

In a five-to-four decision,[102] the Court applied the three-part test of *Lemon v. Kurtzman*[103] and determined that the use of Title I funds by the City of New York to aid the shared-time program in parochial schools entailed too much state entanglement with religion.[104] Excessive entanglement arose because the program required pervasive supervision by the government in order to ensure that the program did not promote religion.[105] The majority focused on the entanglement aspect of the program, and, in doing so, stated that the use of the entanglement test was rooted in two concerns.[106] First, governmental support of a given denomination causes the religious freedom of other sects to suffer.[107] Moreover, the Court found that the religious freedom of adherents to a government-supported denomination

---

100. Aguilar v. Felton, 105 S. Ct. at 3236. The Court determined that the appeal from the Second Circuit was taken under 28 U.S.C. § 1252, but also found that the appeal did not meet the requirements of that statute, and it was therefore dismissed for want of jurisdiction. *Id.* at 3236 n.7.

101. *Id.*

102. *See supra* note 4 and accompanying text.

103. 403 U.S. 602 (1971).

104. Aguilar v. Felton, 105 S. Ct. 3232, 3239 (1985). This case was decided at the same time as Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985). In that case the Court held that the remedial and enhancement programs there were unconstitutional. *See supra* note 1.

105. *Aguilar*, 105 S. Ct. at 3236-37. "Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid." *Id.* at 3237. The majority did not examine the other two prongs of the *Lemon* test.

106. *Id.* at 3237.

107. *Id.* The Court stated that "[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, even when the governmental purpose underlying the involvement is largely secular." *Id.*

would also suffer.[108] These concerns reflect a consideration for the fundamental principle of separatism and stem from the Court's recognition that government and religion each perform best when separated.[109]

Applying these principles to the facts, the Court found that the supervisory system designed to prevent the Title I program from being used to inculcate the religious beliefs of the parochial schools inevitably resulted in the excessive entanglement of church and state.[110] Reciting the similarities between the present case and the services program struck down in *Meek v. Pittenger*,[111] the Court expressed concern that the instruction was given in schools where education was an integral part of the religious mission.[112] The critical elements of entanglement were present in both cases.[113] One critical element was that the aid was provided in a purely sectarian environment.[114] Another was that the aid was in the form of teachers, which required supervision to ensure that the aid did not contain a religious message.[115] The Court determined that such an extent of supervision forced excessive entanglement because agents of the state were required to visit the religious schools on a regular basis.[116] Religious schools were required to tolerate an ongoing presence of state officials in order to "guard" against the infiltration of religious

---

108. *Id.* "[T]he freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters." *Id.*

109. *Id.* (quoting McCollum v. Board of Educ., 333 U.S. 203, 212 (1948)) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). *See supra* notes 11-21 and accompanying texts.

110. *Aguilar*, 105 S. Ct. at 3236-37. In reaching this conclusion, the Court cited its decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971) and Meek v. Pittenger, 421 U.S. 349 (1975).

111. 421 U.S. 349 (1975).

112. *Aguilar*, 105 S. Ct. at 3238.

113. *Id.*

114. *Id.* In *Aguilar*, for example, "many of the schools . . . receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denomination." *Id.*

115. *Id.* The Court stated that "because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." *See supra* notes 87-88 and accompanying text.

116. *Id.* "Agents of the State must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes." *Id.*

thought.[117]

Along related lines, the Court also expressed concern about the secularization of religious schools.[118] For example, the program required religious school administrators to obey the public school personnel's determination of which religious symbols were required to be removed from the classrooms.[119] In short, although the program was well-intentioned, New York City violated the constitutional principle that the state or federal government shall neither promote nor hinder religion through governmental benefits or excessive governmental entanglement with religion.[120]

B. *The Concurrence*

Concurring in the Court's holding but not its rationale, Justice Powell expressed concern about the extent of political entanglement and the fact that the program failed the effects prong of the *Lemon* test as well.[121] Observing that New York City has a varied sectarian population,[122] there existed the likelihood that politics would be involved in decisions to provide aid to parochial schools.[123] Such involvement of politics with religion was viewed to be another form of excessive government entan-

---

117. *Id.* at 3239. "In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." *Id.*

118. *Id.*

119. *Id.* "In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.*

120. *Id.* The Court concluded that

> [d]espite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate — that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

Id.

121. *Id.* at 3240-41.

122. *Id.*

123. *Id.* at 3240. "In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools." *Id.*

glement in religion.[124]

Justice Powell also addressed the effects prong of the *Lemon* test,[125] determining that funds provided under the Title I program were tantamount to a state subsidy of the parochial schools because such subsidies relieved schools of the duty to provide remedial and supplemental programs.[126] The public school professionals assumed some of the parochial schools' educational responsibilities, and Justice Powell did not consider that type of aid to be the indirect aid that would be permissible under the Constitution.[127] In sum, Justice Powell concluded that the program failed both the entanglement and effects prongs of the *Lemon* test.[128]

C. *The Dissent*

Justice O'Connor filed a dissenting opinion which questioned both the Court's analysis under and continued use of the entanglement test.[129] Justice O'Connor concluded that the Title

---

124. *Id.* at 3241. "In short, aid to parochial schools of the sort at issue here potentially leads to 'that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.' " *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970)).

125. *Id.*

126. *Id.*

> [T]he type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institution" that we suggested in *Nyquist* would survive Establishment Clause scrutiny.

Id. (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 775 (1973).

127. *Id.*

128. *Id.* at 3241-42. "The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools — resulting in both the advancement of religion and forbidden entanglement." *Id.*

129. *Id.* at 3243. Justice O'Connor addressed both the entanglement prong and the effects prong in her analysis of the Title I program.

Chief Justice Burger and Justice Rehnquist also filed brief dissenting opinions. Chief Justice Burger stated his concern that invalidating the program would prevent children from receiving needed remedial programs. The Chief Justice also voiced his concern that the Court had become unduly obsessed with the criteria defined in the *Lemon* case. *Id.* at 3242.

Justice Rehnquist filed a dissenting opinion in which he stated that the Court had strayed from the concerns which prompted the adoption of the first amendment. He noted the "Catch-22" paradox adopted by the Court as follows: "[t]he aid must be super-

I program did not have the primary effect of advancing religion because the public school professionals were not likely to indoctrinate students in religious teachings.[130] The teachers were supervised, thus reducing the risk that they would inculcate religion in their classes.[131] Moreover, the Title I program was not a state subsidy of religion because it contained a statutory provision which required that the funds supplement and not supplant services provided by the local educational agency.[132]

Addressing the entanglement issue, Justice O'Connor stated that because the majority could not invalidate the program under the effects prong, it had to invalidate it under the entanglement prong.[133] Concluding that the state's supervision of the teaching professionals did not rise to the level of unconstitutional entanglement, Justice O'Connor stated that the degree of supervision required was exaggerated by the majority.[134] Fur-

---

vised to ensure no entanglement but the supervision itself is held to cause an entanglment." *Id.* at 3243.

130. *Id.* at 3245. "New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes." *Id.*

131. *Id.*

> They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.

Id.

132. *Id.*

> The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students.

Id. (citations omitted).

133. *Id.* at 3246. "Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City Title I program." *Id.*

134. *Id.*

> Just as the risk that public schoolteachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York Title I program is instructive. What supervision has been necessary in New York to enable public school teachers to help disadvantaged children for 19 years without once proselytizing? Public officials have prepared careful instructions warning public schoolteachers of their exclusively secular mission, and have required Title I teachers to study and observe them. . . . To ensure compliance with the rules, a field supervisor and a program

thermore, the public school teachers had full responsibility for the selection of students and were not answerable to the parochial school administration.[135] In short, there was no excessive government entanglement with religion.[136]

Justice O'Connor also criticized the usefulness of the entanglement prong,[137] because programs with valid purposes and effects have been struck down only because of undue entanglement.[138] Advocating a return to the pre-*Lemon* purposes and effects test, Justice O'Connor suggested incorporating any entanglement considerations into the effects prong.[139] Justice O'Connor argued that a program should not be struck down simply because a state supervises the program to ensure that the

---

coordinator, who are full-time public school employees, make unannounced visits to each teacher's classroom at least once a month.

Id. at 3246-47.

135. *Id.* at 3247.

Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching.

Id.

136. *Id.* "The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree." *Id.*

137. *Id.*

138. *Id.*

I adhere to doubts about the entanglement test that were expressed in *Lynch* [v. Donnelly, 465 U.S. 668 (1984)]. It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit. My reservations about the entanglement test, however, have come to encompass its institutional aspects as well. As Justice REHNQUIST has pointed out, many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement.

Id. (citing Wallace v. Jaffree, 105 S. Ct. 2479 (1985)).

139. *Id.* at 3248.

Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause, *Walz v. Tax Commission*, 397 U.S. 664 (1970), but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute.

Id.

public funds are used only for nonsectarian ends.[140]

V. Analysis

In the hotly-contested decision of *Aguilar v. Felton,* the Supreme Court revealed the continuing tension that exists among the members of the Court on the issue of the appropriate method of analysis in first amendment establishment clause cases. While the cases show that the Court disallowed most types of parochial aid from 1971 to 1976, recent cases such as *Mueller v. Allen*[141] seemed to reverse this trend.[142] In *Aguilar,* the Court took little note of that recent trend and returned to the less lenient views of parochial aid which governed the early 1970's. The majority in *Aguilar* relied on the established entanglement prong of the *Lemon* test to invalidate New York City's Title I program. In a highly critical dissent, Justice O'Connor found that no entanglement existed, and would also have eliminated the entanglement prong as a separate and distinct consideration in establishment clause cases.

While the entanglement prong can be criticized for its potential for subjectiveness and unreliability, its importance to the establishment clause doctrine cannot be overlooked nor understated. To remedy some of the potential defects of the entanglement prong, the Court should not mechanically apply the criteria involved, but should also focus on the purposes it serves.

A. *Purposes of the Entanglement Prong and its Usefulness in the Aguilar Case*

The free exercise and establishment clauses of the first amendment have been interpreted as prohibiting the government from establishing or interfering with religion, thus requiring a policy of separatism or neutrality towards religion.[143] To

---

140. *Id.* "If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion." *Id.*

141. 463 U.S. 388 (1983).

142. *See supra* notes 60-68 and accompanying text; Wolman v. Walter, 433 U.S. 229 (1977); *See* McCARTHY, *supra* note 30, at 124.

143. Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1969).

Each value judgment under the Religion Clauses must therefore turn on whether

determine whether a government program fell within the prohibition, the Court developed the three-part test articulated in *Lemon v. Kurtzman.* In the *Lemon* decision the Court stated that "[i]n the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[144]

It is the concern over active involvement of the sovereign in religious activities which is considered under the entanglement prong. While it is true that the entanglement concept was first considered to be part of the effects test,[145] its importance as a separate test should not be overlooked. By maintaining the entanglement prong as a distinctive and potentially dispositive factor, the Court recognizes the importance of the fundamental principle of separatism.[146]

Separatism, or neutrality, embraces the view of James Madison that government and religion each functions best when it is independent of the other.[147] In this regard, the entanglement prong functions as a protection of government as well as religion. For example, a government program may neither advance nor inhibit religion but may so closely involve religion in political matters as to cause political division along religious lines. As stated previously, such division was one of the evils against which the first amendment was designed to protect.[148]

---

particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practices.

Id.

144. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

145. Walz v. Tax Comm'n, 397 U.S. at 674. "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result — the effect — is not an excessive government entanglement with religion." *Id.*

146. *See supra* text accompanying notes 20-21 and 47.

147. *See supra* notes 14-15 and accompanying text.

148. *See supra* text accompanying note 46. *See also* Freund, *supra* note 17, at 1686. In discussing the concept of separatism, Freund used the example of the government

Therefore, it is important to maintain the entanglement prong as a distinctive analytical element.

The majority in the *Aguilar* decision appropriately took note of the separate concerns which the entanglement prong addressed by recognizing that religious freedom could be infringed upon even when the governmental purpose was secular.[149] In *Aguilar*, the secular purpose of the aid was to provide educational services. Although religion may not be advanced or inhibited by a government program because the aid is secular in nature, freedom of religious belief may still be impinged by the government intrusion into the religious institution. Thus, the Court found that the monitoring involved in the New York City program produced a continuing relationship between religion and government that violated the principle of separatism.[150]

Justice O'Connor's dissent characterized the majority's employment of the entanglement prong as leading to inconsistent decisions because it could be used to invalidate a program which had passed both the purpose and effects test.[151] This criticism ignores the purpose of the entanglement prong, however, because if a program has a valid purpose and effect only because of excessive government supervision, the program should be unconstitutional. Excessive government involvement in religious affairs should not be allowed to correct a program that would otherwise have the unconstitutional effect of advancing or inhibiting religion.

The *Aguilar* decision is illustrative of this point. The proponents of New York City's program argued that the program was unlike the one that had been struck down in *Grand Rapids*

---

supplying textbooks to parochial schools. "For the identity and integrity of religion, separateness stands as an ultimate safeguard. And on the secular side, to link responsibility for parochial and public school texts is greatly to intensify sectarian influences in local politics at one of its most sensitive points." *Id.*

149. *See supra* note 107 and accompanying text.

150. *Aguilar*, 105 S. Ct. at 3239. "[T]he detailed monitoring and close administrative contact required to maintain New York's Title I program can only produce a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." [citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)]. The numerous judgments that must be made by agents of the state concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. *Id.*

151. *Id.* at 3247.

School District v. Ball[152] as having the unconstitutional effect of advancing religion. The Court stated that the supervision of the teachers in the New York City program, which was not present in the *Grand Rapids* program, may have prevented the program from having the primary effect of advancing religion, but the excessive entanglement involved in the monitoring made the program unconstitutional.[153]

In his concurring opinion, Justice Powell took note of the difficulty that governments face in attempting to provide aid programs which do not have an unconstitutional effect of advancing religion, and which do not involve excessive government entanglement with religion.[154] Justice Powell emphasized that, although the requirements of *Lemon* place a burden upon governments, "the Court has never foreclosed the possiblity that some types of aid to parochial schools could be valid under the Establishment Clause."[155]

Recognition of the need for the entanglement prong in establishment clause analysis, however, does not dispel criticism of the test. Also at issue has been the method of application, which has led to some anomalous results.[156] An examination of the appropriate criteria for analysis under the entanglement prong is

---

152. 105 S. Ct. 3216 (1985).

153. *Aguilar*, 105 S. Ct. at 3237.

154. *Id.* at 3241.

> I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, and avoiding excessive entanglement.

Id. (citing Lemon v. Kurtzman, 403 U.S. at 612).

155. *Aguilar*, 105 S. Ct. at 3241. Justice Powell cited as examples of acceptable types of aid to parochial schools the assistance discussed in Board of Educ. v. Allen, 392 U.S. 236 (1968), in which the Court upheld state income tax deductions for certain educational expenses, and in Everson v. Board of Educ., 330 U.S. 1 (1947), in which the Court upheld reimbursements for transportation expenses to school.

156. *Aguilar*, at 3247. Justice O'Connor found the entanglement prong to be the source of inconsistencies in establishment clause decisions.

> For example, we permit a State to pay for bus transportation to a parochial school, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), but preclude States from providing buses for parochial school field trips, on the theory such trips involve excessive state supervision of the parochial officials who lead them.

Id. (citing Wolman v. Walter, 433 U.S. 226, 254 (1977).

therefore required.

B. *Criteria for the Entanglement Prong*

Although the entanglement prong may be criticizied for its subjectiveness, *Lemon* articulated criteria which could be considered in an entanglement analysis. These criteria include "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[157] Using this criteria as a guideline leads to a less subjective analysis under the entanglement prong.[158]

Although the Court in *Aguilar* did not specifically refer to these criteria in its analysis, it did focus on the three areas mentioned above. For example, the Court noted that a critical element of entanglement was that the institutions benefiting from the Title I program were sectarian in character.[159] The Court also stated that the nature of the aid, in the form of teachers, was of a type that would require supervision.[160] Finally, the Court considered the resulting relationship between New York City (the government) and the parochial school (the religious institution).

The critical elements of that ongoing relationship were that the religious institution, with its emphasis on advancement of religion through education, was required to endure a government presence designed to guard against that advancement of religion through education.[161] Moreover, the administration of the program required ongoing cooperation with the parochial schools, and under certain critical circumstances, the parochial school administrators were required to abide by the decisions of the

---

157. Lemon v. Kurtzman, 403 U.S. at 615.

158. It should be acknowledged that the entanglement prong is by nature a subjective analysis. What is needed in these establishment clause cases is not an abandonment of the entanglement prong because of its potential for subjectiveness, but rather a set of criteria that would enhance the reliability and workability of the prong.

159. *Aguilar*, 105 S. Ct. at 3238. "First, as noted above, the aid is provided in a pervasively sectarian environment." *Id.*

160. *Id.* "Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." *Id.*

161. *Id.* at 3239. *See supra* note 117 and accompanying text.

public school personnel.[162] The resulting relationship between New York City and the parochial schools was one in which the government's presence threatened to secularize the religious functions of the parochial schools. Such a relationship is in contradiction of the fundamental principle of separatism which the entanglement prong was designed to protect.[163]

In contrast to the majority's use of the criteria stated in *Lemon* for examining the entanglement issue, Justice O'Connor's dissenting opinion did not explore these areas. Rather, the dissent focused only on the nature of the aid, reaching the conclusion that the aid was not of the type that caused excessive government entanglement with religion. The dissent also ignored other aspects of the aid. For example, Justice O'Connor did not address the critical concern of the resulting relationship between the parochial schools and New York City. It was, therefore, incongruous for Justice O'Connor to make an appropriate assessment of the extent of entanglement without examining the underlying church-state relationship.

C. *Future Establishment Clause Cases*

The Court has struggled with establishment clause cases recently, and has increasingly questioned the use of the *Lemon* test generally, and the entanglement prong specifically.[164] However, at this time, those calling for an abandonment or revision of the *Lemon* test are in the minority on the Court. Presumably, the *Lemon* test will not be abandoned completely. Still, there is a justifiable concern that the principal of separatism will be weakened should the Court decide to abandon the entanglement prong of the *Lemon* test. If there is a perception that the entanglement prong is unworkable, the Court should consider the importance of separating governmental and religious functions. Perhaps such consideration would make the application of the entanglement prong more uniform.

---

162. *Id. See supra* note 119 and accompanying text.

163. *See supra* notes 20-21 and accompanying text.

164. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479 (1985) in which the Court struck down an Alabama statute calling for a daily period of silence in public schools to be used for meditation or voluntary prayer. In that opinion, Justice Rehnquist criticized the *Lemon* test and called for its abandonment. *Id.* at 2517-20.

VI. Conclusion

Although the ultimate decision in this case may be a harsh one for those involved in parochial schools, the decision was a proper one. As citizens of the United States, the American people have chosen to sacrifice outright governmental assistance of religions and religious institutions in exchange for a guarantee of religious freedom. It matters not that the aid is benevolent, i.e. assisting schoolchildren. In this case, the potential for infringement upon religious freedom (*e.g.* the freedom of parochial school children to have religion as a part of their entire education) was great. The recognized fundamental principle of separatism is an acknowledgement of the potential harm in not insisting that government and religion avoid excessive entanglement. It is, therefore, vital to an analysis under the establishment clause that entanglement be considered.

Ann Farrissey Carlson