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First Amendment Restrictions on Title I Programs in Private Schools

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FIRST AMENDMENT RESTRICTIONS ON TITLE I PROGRAMS IN PRIVATE SCHOOLS

I. INTRODUCTION

For nearly forty years,[1] the Supreme Court has wrestled with the establishment clause[2] problems raised by government[3] efforts to fund programs benefiting students of private schools.[4] As the political mood of the country has swung toward conservatism in recent years, these problems, which cut to the heart of sensitive church-state relations, have come into sharper focus. In evaluating the constitutionality of government programs designed to aid private schools, the Court has charted an uncertain path, upholding some programs[5] while striking

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1. The Court first considered the constitutionality of public aid to parochial school students in Everson v. Board of Educ., 330 U.S. 1 (1946). *Everson* is often heralded as the first modern establishment clause case.

2. U.S. CONST. amend. I. reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

3. Generally, state and local governments have provided the funding for programs aiding parochial schools. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Reagan, 444 U.S. 646 (1980) (state funds for testing and recordkeeping); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (New York statute providing tuition grants, tax benefits and funds for maintenance and repair). Aguilar v. Felton, 105 S.Ct. 3232 (1985), is the first case challenging *federal* aid to elementary and secondary parochial schools to come before the Supreme Court. *See* Wheeler v. Barrera, 417 U.S. 402, 405 (1974).

4. In the 1980-81 school year, private schools enrolled about 5.3 million schoolchildren. Cooper, McLaughlin, & Manno, *Latest Word on Private-School Growth*, 85 TEACHERS COLLEGE RECORD 88, 96 (1983). Experts predict that by 1990, 5% of all American schoolchildren will attend private schools. *Id.* at 95. Catholic schools make up the largest bloc of private schools. *See generally id.* Catholic school enrollment, however, is declining, perhaps because of financial difficulties: "Between 1965 and 1983, the number of Catholic elementary and secondary schools dropped from a total of 13,292 with enrollments of 5.6 million pupils to 9432 schools with slightly over 3 million children." *Id.* at 91.

5. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (state mandated testing and recordkeeping); Wolman v. Walter, 433 U.S. 229 (1977) (books, testing, diagnostic and therapeutic services, off-site remedial services); Hunt v. McNair, 413 U.S. 734 (1973) (revenue bonds); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants and loans to church related colleges and universities under the federal Higher Education Facilities Act of 1963); Board of Educ. v. Allen,

down others.[6] With no coherent method of legal analysis, the Court has relied on factual distinctions to differentiate permissible from impermissible parochial school aid programs.[7]

In *Meek v. Pittenger*,[8] the Court held *inter alia* that a program employing public school teachers to conduct educational activities on private school premises violated the establishment clause.[9] In the aftermath of *Meek*, local implementations of the federal Title I[10] program came under constitutional attack.[11] In its recent decision in

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392 U.S. 236 (1968) (textbook loans); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement for bus transportation).

6. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (instructional materials, equipment, field trips); Meek v. Pittenger, 421 U.S. 349 (1975) (auxiliary services); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair, tuition grants, tax benefits); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973) (internally prepared state-mandated testing); Lemon v. Kurtzman, 403 U.S. 612 (1971) (teacher salaries, textbooks, instructional materials).

7. *See infra* notes 151-56 and accompanying text.

8. 421 U.S. 349 (1975).

9. *Id.* at 373. The educational activities performed by public school teachers included remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services. *Id.* at 367.

10. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified at various sections of 20 U.S.C.). Because Congress incorporated ESEA into the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, § 551, 95 Stat. 463 (codified in various sections of 20 U.S.C.), which is now part of Subtitle D of Title V of the Omnibus Budget Reconciliation Act of 1981, Title I is now a misnomer. *See* Wilson, *ESEA Title I Litigation—Update*, 28 CATH. LAW 159, 159 (1982). Nevertheless, the courts continue to use Title I as a shorthand reference to the statute, and this Recent Development will follow that practice.

11. In 1976, the National Coalition for Public Education and Religious Liberty (PEARL) filed the first case directly challenging the constitutionality of Title I in the federal District Court for the Southern District of New York. *See* National Coalition for Pub. Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1976), *appeal dismissed sub nom.* National Coalition for Pub. Educ. and Religious Liberty v. Hufstedler, 449 U.S. 808, *reh'g denied*, 449 U.S. 1028 (1980). Because of a procedural error, the Supreme Court never heard the case. *See* Wilson, *supra* note 10, at 159. Plaintiffs also filed actions in California, Kentucky, Minnesota and Missouri, as well as a second suit in New York. The second New York case, Aguilar v. Felton, 105 S.Ct. 3232 (1985), reached the Supreme Court.

An earlier case had presented the Supreme Court with the opportunity to rule on the constitutionality of Title I, but the Court declined to do so. In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held only that nonpublic school students are entitled to comparable, if not identical, services under Title I to those provided public school students. *Id.* at 425. The Court decided the case as a matter of statutory construction. The Court stated, "At this time, we intimate no view as to the Establishment Clause effect of any particular program." *Id.* at 426. But several justices in separate opinions did take the opportunity to express their views on the constitutionality of Title I pro-

Aguilar v. Felton,[12] a divided Court followed *Meek* to invalidate New York City's implementation of Title I in private schools.[13]

II. HISTORY OF *AGUILAR*

Congress enacted Title I of the Elementary and Secondary Education Act of 1965[14] in response to the problem of educational deprivation in low income areas.[15] Title I provides federal funds for special educational programs to supplement existing state and local programs[16] for children[17] who are both educationally deprived[18] and live in low-income areas.[19] The regulations promulgated under Title I re-

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grams in which public school teachers instruct on private school premises. Justice Powell said that he ". . . would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools." *Id.* at 428 (Powell, J., concurring). Justice White was "pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools." *Id.* at 429 (White, J., concurring). Justice Douglas commented that "the Act is unconstitutional to the extent it supports sectarian schools, whether directly or through its students." *Id.* at 432 (Douglas, J., dissenting).

12. 105 S.Ct. 3232 (1985).

13. *Id.* at 3238-39.

14. Pub. L. No. 89-10, 95 Stat. 27 (codified in scattered sections of 20 U.S.C.).

15. Congress intended that the Act would broaden opportunities for private school students to participate in remedial programs. S. REP. NO. 146, 89th Cong., 1st Sess. 11 (1965). The Senate report lists several possible Title I programs including supplementary instructional materials, curriculum materials centers, remedial programs, enrichment programs, instructional media centers, mobile learning centers and supplemental health and food services. *Id.* at 10-11.

16. The federally funded programs must supplement, not supplant, state programs. *See* 34 C.F.R. § 200.62 (1985). *See generally* Holl, *The Title I Supplanting Prohibition*, 9 NOLPE SCH. L.J. 23 (1980).

17. The Act refers to aid to children, rather than aid to schools. Thus, Title I is arguably analogous to the legislation at issue in Everson v. Board of Educ., 330 U.S. 1 (1947), in which the Court upheld bus fare reimbursement as permissible aid to children rather than unconstitutional assistance to parochial schools. *Id.* at 5. *See infra* note 37-38 and accompanying text; Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U. L. REV. 151, 157 (1981).

18. The implementing regulations define "educationally deprived children" as "children whose educational attainment is below the level that is appropriate for children of their age." 34 C.F.R. § 200.3(b)(2) (1985).

19. The Congressional statutory declaration of policy states:

> 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 assist-

quire that services provided to nonpublic school students be comparable to those provided public school students.[20] The language of the statute does not explicitly authorize sending public school teachers into private schools to conduct educational activities.[21] Nevertheless, the Senate report suggested that on-premises instruction might be an option for local educational agencies.[22]

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ance . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.

Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10 1 § 2, 79 Stat. 27, 27 (codified at 20 U.S.C. 2701 (1982)). Congress structured the Act so that local educational administration would remain in the hands of local educational agencies (LEAs); Congress did not want to federalize traditional local control over education. LEAs propose Title I programs for local implementation; state educational agencies (SEAs) must approve the plans. Congress then channels the funds through the SEAs for implementation of the plans by the LEAs.

20. 34 C.F.R. § 200.71 (1985). The regulations do not require that private school programs be identical to those in public schools; rather, they demand that LEAs distribute services to private school students on an equitable basis:

. . . In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the LEA who are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children . . .

. . . If the LEA decides to serve educationally deprived, low-income children under Section 556(b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children . . .

(b) Services on an equitable basis. The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

34 C.F.R. §§ 200.70(a), 200.71(b) (1985). *See also* Wheeler v. Barrera, 417 U.S. 402, 422 n.17 (1974).

The program, however, has not been administered equitably. One 1977 report estimated that Title I aid reached only about 47% of eligible nonpublic school students, and that those students received only about 18% of the services to which they were entitled. Vitullo-Martin, *Interim Report, Summary Report: Delivery of Title I Services to Non-Public School Students, reprinted in Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. 555, 565 (1977).

21. *See* Felton v. Secretary, Dep't. of Educ., 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom.* Aguilar v. Felton, 105 S.Ct. 3232 (1985): "If we were to look only at the language of the statute, we would not be altogether sure that a program sending public school teachers into religious schools was authorized." 739 F.2d at 50 n.2.

22. The Senate Report noted the appropriate restrictions on such instruction: "[P]ublic school teachers will be made available to other than public school facilities

In 1976, taxpayers began to mount constitutional challenges to Title I programs as administered in parochial schools.[23] The New York City program was the target of litigation that reached the Supreme Court in *Aguilar*.[24] The district court held that New York City's use of Title I funds for remedial instruction by public school teachers on the premises of parochial schools was consistent with the establishment clause.[25] The Second Circuit reversed, holding that the presence of public school teachers in private parochial schools created a risk that the public personnel would act to foster religion.[26] In *Aguilar* a sharply divided Supreme Court affirmed that holding.[27] Justice Brennan, writing for the majority, relied on entanglement principles[28] articulated in *Meek* and *Lemon v. Kurtzman*[29] to invalidate the New York City program.[30] Justices Burger, Rehnquist,[31] O'Connor and White[32] filed separate dissents; O'Connor accused the majority of mishandling first amendment doctrine to strike down a legitimate government program that had

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only to provide specialized services . . . (such as therapeutic, remedial or welfare services) and only where such services are not normally provided by the nonpublic school." S. REP. No. 146, 89th Cong., 1st Sess. 12 (1965).

23. *See supra* note 11.

24. Failure to file a timely appeal foreclosed earlier opportunity for Supreme Court review of a Title I holding. *See* National Coalition for Pub. Educ. and Religion v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1976), *appeal dismissed sub. nom.* National Coalition for Pub. Educ. and Religion v. Hufstedler, 449 U.S. 808, *reh'g denied*, 449 U.S. 1028 (1980). Thus, it was a full nine years after the first challenge to Title I, *see supra* note 11, before the Supreme Court issued an opinion on Title I's constitutionality. *See infra* notes 105-144 and accompanying text.

25. The district court disposed of the case upon defendants' motion for summary judgment. *Aguilar*, 105 S.Ct. at 3236.

26. Felton v. Secretary, Dep't. of Educ., 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom.* Aguilar v. Felton, 105 S.Ct. 3232 (1985). *See infra* note 75 (explaining Supreme Court's concern that publicly employed teachers might improperly foster religion).

27. 105 S.Ct. 3232 (1985).

28. For a discussion of entanglement principles see *supra* notes 50-53 and accompanying text.

29. 403 U.S. 602 (1971); *see infra* notes 47-59 and accompanying text.

30. *Id.* at 3237-38.

31. In Wallace v. Jaffree, 105 S.Ct. 2479, 2508 (1985) (invalidating school prayer and meditation statute), Justice Rehnquist authored a comprehensive opinion expressing his dissent to the judgments in *Wallace*, *Aguilar* and Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216 (1985) (invalidating local programs that provided for Shared Time and Community Education classes in parochial schools).

32. Justice White wrote briefly to reaffirm his dissenting opinion in *Lemon*, 105 S.Ct. at 3248.

been in successful operation for twenty years.[33]

III. Judicial Treatment of Public Aid to Parochial Schools

The Court decided *Everson v. Board of Education*,[34] the first case challenging government aid to parochial schools, in 1946. *Everson* upheld a program that reimbursed parents of all schoolchildren, public and private, for costs incurred in busing their children to school.[35] Justice Black's majority opinion[36] focused on the fact that the program benefitted children,[37] rather than schools.[38] Justice Black emphasized that the Court would not be so tolerant of aid programs that reached farther than the one involved there:[39] the reimbursement program approached the "verge" of constitutional permissibility.[40]

Following *Everson*, there was a twenty year lull in Supreme Court consideration of parochial school aid statutes. In 1968, the Court upheld a textbook loan program against an establishment clause challenge in *Allen v. Board of Education*.[41] Again, the Court emphasized that the benefits the program funded were available to all students in

33. Justice O'Conner stated that "over almost two decades, New York's public schoolteachers have helped thousands of impoverished parochial schoolchildren to overcome educational disadvantages without once attempting to inculcate religious values. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause." 105 S.Ct. at 3248 (O'Connor, J., dissenting).

34. 330 U.S. 1 (1946).

35. *Id.* at 5.

36. Justices Jackson and Rutledge filed dissenting opinions.

37. Justice Black explained that "the State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18. Compare the argument that Title I is a general program benefitting all children, on the order of *Everson*. Anastaplo, *supra* note 17, at 157.

38. *Cf.* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1682 (1969) ("The sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criterion.").

39. *Cf.* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1467 (1981) ("Black's unfortunate reading of the facts in *Everson* undercut the general welfare exception; thus eviscerated, the theory could provide no principled way of distinguishing free bus rides from state aid in the form of tuition grants or payment of other educational expenses.").

40. *Everson*, 330 U.S. at 18.

41. 392 U.S. 236 (1968).

specified grades, regardless of type of school attended.[42] The Court noted that policy considerations played a significant role in its analysis;[43] it emphasized the important place of private schools in our national educational system.[44] Justice Black[45] dissented in *Allen*, expressing concern that books could tend to propagate the religious views of the schools.[46]

In 1971, the court decided *Lemon v. Kurtzman*,[47] holding unconstitutional two state plans designed to supplement salaries of parochial school teachers.[48] *Lemon*, though today considered a landmark establishment clause case, was only a plurality decision.[49] The plurality assembled three tests used in prior establishment clause cases and applied them to the parochial school aid program. Now collectively known as the *Lemon* test, the three prongs are: first, the enactment in question must have a secular legislative purpose; second, its primary effect must neither advance nor inhibit religion; and third, its implementation must not involve an excessive entanglement of government with religion.[50] The third prong, entanglement, has both administrative and political

42. *Id.* at 243.

43. *Id.* at 247.

44. *Id.* at 247. Compare Justice Powell's comments in Wolman v. Walter, 433 U.S. 229, 262 (1977), arguing against a total cutoff of aid to parochial schools:

> The persistent desire of a number of states to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools . . . have provided an educational alternative for millions of young Americans and in some states they relieve substantially the tax burden incident to the operation of public schools.

Id.

45. Note that Justice Black wrote the majority opinion in *Everson*.

46. *Allen*, 392 U.S. at 252 (Black, J., dissenting). *See* Freund, *supra* note 38, at 1683, recalling Justice Black's "verge" language in *Everson*—" a bridge that carries you to the verge is apt to be burned behind when you discover that the verge is farther ahead after all."

47. 403 U.S. 602 (1971).

48. The Pennsylvania statute at issue provided for reimbursement to schools for teachers' salaries, textbooks and institutional materials; the challenged Rhode Island statute provided that the state would pay a 15% salary supplement directly to nonpublic school teachers. 403 U.S. at 607-10.

49. Chief Justice Burger delivered the judgment of the Court in an opinion in which Justices Harlan, Stewart and Blackmun joined. Justices White, Douglas and Brennan submitted separate opinions.

50. The Court adapted the first two prongs from a school prayer case, School Dist. v. Schempp, 374 U.S. 203 (1963). The third prong originated in Walz v. Tax Comm'n, 397 U.S. 664 (1970), which involved property tax exemptions for religious institutions.

aspects.[51] Administrative entanglement reflects concern that day-to-day government involvement with religious affairs injures nonadherents by appearing to endorse a particular religion.[52] Political entanglement rests on a notion that when government supports one or more religions, religious views are apt to control the political choices of voters and legislators.[53] Applying the test, Chief Justice Burger's plurality opinion found impermissible entanglement in *Lemon*.[54] He distinguished the plan at issue from the earlier textbook case, *Allen*, by reasoning that a teacher "under religious control and discipline"[55] poses a danger to separation of secular from sectarian that a book, whose contents are readily ascertainable, does not.[56]

In his separate *Lemon* opinion, Justice White articulated the views on which he relied in subsequent cases, including *Aguilar*.[57] Justice White lamented the quandary the *Lemon* test creates for parochial schools: an aid program must provide sufficient monitoring to ensure that religion is not advanced, yet that very governmental monitoring gives rise to entanglement.[58] Justice White favored an approach that would uphold an aid program so long as the financing serves a "separable secular function of overriding importance."[59]

The Court decided a trio of parochial school aid cases in 1973, strik-

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51. *See generally* MacNab, *The Forbidden Fruit of Church-State Contacts: the Role of Entanglement Theory*, 16 SUFFOLK U.L. REV 725 (1982). Generally, the presence of political entanglement alone is not enough to render a program unconstitutional. *Id.* at 741.

52. *Lemon*, 403 U.S. at 620; *see infra* notes 117-19 and accompanying text.

53. *Lemon*, 403 U.S. at 622. *Cf.* Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U. L. J. 183 (1980) (arguing that the Supreme Court Justices are influenced by their religions when deciding establishment clause cases).

54. Chief Justice Burger's plurality opinion examined three aspects of the church-state relationship to determine whether impermissible entanglement existed. First, it examined the character and purposes of benefited institutions; second, it examined the nature of the aid provided by the state; and third, it examined the resulting relationship between government and the religious authority. *Lemon*, 403 U.S. at 615.

55. *Id.* at 612.

56. *Id.* at 617.

57. *Aguilar*, 105 S.Ct. at 3248. *See also* Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216, 3248 (1985).

58. *Lemon*, 403 U.S. at 668.

59. *Id.* at 664. Justice White explained that parochial schools have a "dual role," performing both secular and religious functions: "legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute law[s] respecting an establishment of religion for-

ing down the challenged programs in each. *Sloan v. Lemon*[60] invalidated a program providing tuition grants; *Levitt v. Committee for Public Education and Religious Liberty*[61] struck down a program reimbursing private schools for the costs incurred in complying with state testing and record keeping requirements. The third case, *Committee for Public Education and Religious Liberty v. Nyquist*,[62] invalidated a comprehensive New York aid statute that provided funds for building maintenance and tuition grants, and authorized tax deductions for parents of children attending private schools. The *Nyquist* majority[63] emphasized that the flaw in the statute stemmed from its direct provision of funds to aid parochial schools, without corresponding safeguards that the use of those funds would be limited to secular functions.[64] Thus, the program violated the primary effect prong of the *Lemon* test.[65]

In contrast, during the 1973 term, the Court did approve a legislative scheme providing state revenue bonds to finance building projects at a sectarian college in *Hunt v. McNair*.[66] Over Justice Brennan's dissent,[67] the Court distinguished *Hunt* from earlier cases by arguing that higher-level institutions are less likely to inculcate religious values than their elementary and secondary counterparts.[68]

The Court next examined the private school aid issue in *Meek v. Pittenger*,[69] decided in 1975. *Meek* presented a challenge to a Pennsylvania statute closely resembling Title I in its provision for "auxiliary

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bidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission." *Id.* at 663-64.

60. 413 U.S. 825 (1973).

61. 413 U.S. 472 (1973).

62. 413 U.S. 756 (1973).

63. Justice Powell authored the majority opinion, in which Justices Brennan, Stewart, Marshall and Blackmun joined.

64. *Id.* at 780. Justice White, in dissent, argued that the statute was constitutional because the state should reimburse parents of private schoolchildren to the extent it is relieved of the burden of educating them. *Id.* at 814 (White, J., dissenting).

65. *Id.* at 780.

66. 413 U.S. 734, 746 (1973).

67. Brennan argued that the state policing of college activities necessary under the program to ensure nonsectarian use of funds rendered the program unconstitutional. *Id.* at 752.

68. *Id.* at 745-46. *See also* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976).

69. 421 U.S. 349 (1975).

services."[70] Those services included publicly employed teachers conducting remedial programs[71] on private school premises.[72] Citing *Lemon*, the Court held this portion of the statute unconstitutional.[73] The potential for improper fostering of religion is present, the Court reasoned, any time teachers render services in a pervasively sectarian atmosphere.[74] Therefore, the state would need to maintain continual surveillance to ensure that its publicly-funded teachers do not, even inadvertently,[75] advance religion. Accordingly, this provision fell under the excessive entanglement prong of the *Lemon* test.[76]

Other statutory provisions held unconstitutional in *Meek* included direct loans of instructional materials[77] and equipment to nonpublic schools. The Court stated that although the statute earmarked loans for secular use only, it is impossible to separate the secular educational functions of parochial schools from their predominantly religious mission.[78] Nevertheless, a different majority of the Court[79] upheld a provision of the statute that authorized textbooks loans on the authority of *Allen*.[80]

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70. *Id.* at 352-53.

71. The remedial programs involved both individual therapy and classroom instruction. *Id.* at 352.

72. "Act 194 specifies that the teaching and services are to be provided in the nonpublic schools themselves by personnel drawn from the appropriate intermediate unit, part of the public school system. . . ." *Id.* at 353.

73. *Id.* at 372.

74. *Id.* at 371-72.

75. The Court does not infer bad faith on the part of teachers. The *Lemon* Court states that "[w]e need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." 403 U.S. at 618. The Court's concern, however, is that the atmosphere in which the teacher instructs may inadvertantly influence him. The policing necessary to ensure that teachers "play a strictly nonideological role" gives rise to excessive entanglement between church and state. *Meek*, 421 U.S. at 370.

76. *Meek*, 421 U.S. at 372.

77. The materials included maps, charts and laboratory equipment. *Id.* at 365.

78. *Id.* at 365. The Court held that the "direct loan" of these materials furthered the sectarian mission of the schools. *Id.* at 363. *Cf.* text accompanying *infra* note 93 (discussing the *Regan* majority's reading of *Meek*).

79. The Justices upholding the textbook provision included Justices Stewart, Blackmun, Powell, Rehnquist and White, and Chief Justice Burger. Justices Douglas, Brennan and Marshall dissented.

80. *Id.* at 362. *See* Allen v. Board of Educ., 392 U.S. 236 (1968); *supra* notes 41-46 and accompanying text.

In a subsequent case, *Wolman v. Walter*,[81] the Court again dissected a state aid program, upholding some of its provisions while declaring others impermissible. The Court upheld provisions authorizing state-funded textbook loans, testing services not under the control of the private school, and diagnostic services and therapeutic services to be provided away from private school premises.[82] Especially interesting is the court's analysis of the provision for therapeutic services. The program resembled both Title I and the program invalidated in *Meek*: all three programs provided remedial and therapeutic services to nonpublic school students.[83] The *Wolman* program, however, specified that the publicly-employed teachers and therapists were to render their services in public schools, public centers or mobile units off the private school premises.[84] To the Court, this site consideration distinguished the *Wolman* plan from the *Meek* program.[85] The Court said that the danger it perceived to be present in *Meek*, that teachers might improperly advance religious ideas, was absent in *Wolman* because teachers would be performing services away from the pervasively sectarian atmosphere of parochial schools.[86]

The most recent pre-*Aguilar* decision handed down by the Supreme Court in the area of public aid to parochial schools was *Committee for Public Education and Religious Liberty v. Regan*,[87] decided in 1980. *Regan*, a 5-4 decision,[88] upheld a New York statute directing payment to private schools for costs incurred in performing state mandated testing and recordkeeping services.[89] *Regan* was the first case to authorize

81. 433 U.S. 229 (1977).

82. *Id.* at 255.

83. *See supra* notes 16-22 and 69-76 and accompanying text; 433 U.S. at 244-48.

84. 433 U.S. at 244 n.12.

85. *Id.* at 247.

86. *Id.* at 247: "So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise."

87. 444 U.S. 646 (1980).

88. Justices White, Stewart, Powell, Rehnquist and Chief Justice Burger comprised the majority in *Regan*.

89. *Id.* at 648. The legislation involved in *Regan* required that private school personnel administer tests prepared by the state. *Id.* at 645. *Cf.* Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973) (Court invalidated earlier New York statute that financed tests *prepared* by private school personnel). The recordkeeping services for which the *Regan* Court upheld reimbursement involved compilation of data regarding the student body, faculty, physical facilities, curriculum and pupil attendance. 444 U.S. at 656.

direct payments of any kind to parochial schools.[90] The majority held that the services for which the schools receive reimbursements have neither a religious purpose nor religious effect,[91] and that the auditing procedures did not constitute impermissible entanglement.[92] Perhaps the most important contribution of *Regan* to the Title I issue is its reading of *Meek*. The *Regan* majority said that *Meek*, read in light of *Wolman*, did *not* stand for the broad proposition that "any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities."[93] The *Regan* dissent,[94] on the other hand, argued that *Wolman* reinforced the *Meek* conclusion that "direct aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole."[95]

The *Regan* majority cautioned that its decision should not be considered a "litmus-paper"[96] test for future problems. It acknowledged that past decisions in the area avoided "categorical imperatives" and "absolutist approaches," sacrificing "clarity and predictability" for "flexibility."[97]Thus, although *Regan* demonstrated that the *Lemon* test could be met by some legislative plans that provide aid to parochial schools, the sharp division on the Court,[98] together with the majority's reservations, evidences the uncertainty inherent in the test's application.[99]

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90. *See* Comment, Committee for Public Education v. Regan: *New Possibilities for State Aid to Nonpublic Schools*, 24 ST. LOUIS U.L.J. 406, 406 (1980). *See also* Comment, Committee for Public Education v. Regan, 26 N.Y.L. SCH. L. REV. 915, 940 (1981) (arguing that *Regan* is a policy decision designed to "maintain the viability of parochial schools").

91. 444 U.S. at 658-59. Because the New York Law provides "ample safeguards against excessive or misdirected reimbursement," the Court felt that the program's secular effect was ensured. *Id.* at 659.

92. *Id.* at 660. The New York statute required private schools to submit to the New York State Commissioner of Education an accounting of their reimbursable costs under the program along with substantiating documents. The statute also required periodic review of the accounts of participating schools to verify expenses. *Id.* at 660-61.

93. *Id.* at 661.

94. Justice Blackmun filed a dissent in which Justices Brennan and Marshall joined. Justice Stevens filed a separate dissenting opinion.

95. *Id.* at 666 (Blackmun, J., dissenting).

96. 444 U.S. at 662.

97. *Id.*

98. Note that although Justice Powell was in the *Regan* majority, upholding aid to parochial schools, he also voted with the majority in *Aguilar* and wrote an opinion concurring in that judgment. *See infra* notes 124-27 and accompanying text.

99. Outside the parochial school aid area, the Court continued the *Regan* accomodationist trend. In Lynch v. Donnelly, 104 S.Ct. 1355 (1984), the Court upheld

The modern establishment clause cases demonstrate that in spite of the Court's articulation of a test in *Lemon*,[100] subsequent decisions continued to turn on factual distinctions. In general, the Court has permitted welfare services provided to all children regardless of the type of school they attend.[101] On the other hand, the Court has viewed more suspiciously services which touch on the educational function of parochial schools.[102] The Court has used location of service provision as a differentiating factor between permissible and impermissible aid programs.[103] The Court also makes a distinction between aid directed to colleges and aid directed to lower level schools.[104] The Court invokes these factual distinctions without persuasive empirical support. Because of the Court's reliance on factual distinctions, the content of the *Lemon* test remains in doubt. The Court's unprincipled application of the *Lemon* test in the parochial school aid context renders predictability of results almost impossible to obtain.

IV. *AGUILAR V. FELTON*

In 1985, the Supreme Court decided several cases involving sensitive church-state issues.[105] Two of those cases concerned public aid to parochial schools. In *Grand Rapids School District v. Ball*,[106] a divided court struck down a locally-funded program in which publicly employed teachers conducted "Shared Time" and "Community Education" classes in classrooms leased from private schools.[107] Over the

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the City of Pawtucket, Rhode Island's practice of exhibiting a creche in its annual Christmas display. *Id.* at 1359. The Court characterized the creche as a symbol of general good will, rather than one with religious significance. *Id.*

100. *See supra* note 50 and accompanying text.

101. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 5 (1946); *see also* Anastaplo, *supra* note 17, at 157.

102. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 372 (1975); *see also* Anastaplo, *supra* note 17, at 159.

103. *Compare* Wolman v. Walter, 433 U.S. 229 (1977) (off-site remedial services permissible) *with* Meek v. Pittenger, 421 U.S. 349 (1975) (on-site remedial services unconstitutional).

104. *Compare* Hunt v. McNair, 413 U.S. 734 (1973) (revenue bonds for sectarian colleges upheld) *with* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (aid package for lower level schools unconstitutional).

105. *See* Aguilar v. Felton, 105 S.Ct. 3232 (1985); Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216 (1985); Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

106. 105 S.Ct. 3216 (1985).

107. *Id.* at 3231. "Shared Time" classes supplemented the core curriculum in private schools by providing "remedial" and "enrichment" services. *Id.* at 3218. "Com-

partial dissents of Chief Justice Burger and Justice O'Connor,[108] and the dissents of Justices Rehnquist[109] and White, the majority[110] concluded that the Grand Rapids program violated the primary effect prong of the *Lemon* test.[111] Because the Grand Rapids School District failed to provide a system of monitoring to ensure that religion was not advanced in the program classes,[112] entanglement was not an issue.

The Title I program at issue in *Aguilar*, in contrast, operated through New York City's Bureau of Nonpublic School Reimbursement which supervised all activities conducted in nonpublic schools.[113] The city argued that this system of monitoring, bolstered by a twenty year record of operation without incident, precluded a holding that the Title I program had the effect of advancing religion.[114] The majority opinion, authored by Justice Brennan, chose not to address that argument.[115] Instead, the majority relied on the entanglement prong of the *Lemon* test and the precedent set by *Meek*.[116]

The majority identified the two concerns of the *Lemon* entanglement

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munity Education" classes were offered after the close of the normal school day and were strictly voluntary, nonacademic classes. *Id.* at 3219.

108. Chief Justice Burger and Justice O'Connor agreed with the majority that the "Community Education" classes were unconstitutional, but dissented from the judgment inasmuch as it struck down the "Shared Time" classes.

109. Justice Rehnquist wrote a comprehensive dissenting opinion in *Wallace*, 105 S.Ct. at 2508, on which he relied in *Aguilar* and *Grand Rapids*. *See infra* notes 132-38 and accompanying text.

110. Justice Brennan authored the majority opinions in both *Grand Rapids* and *Aguilar*.

111. 105 S.Ct. at 3223-24.

112. *Id.* at 3224-25.

113. *Aguilar*, 105 S.Ct. at 3235. Field personnel of the Bureau of Nonpublic School Reimbursement made occasional unannounced visits to participating nonpublic schools. Title I instructors were directed to carefully avoid any involvement with the schools' religious activities. All religious symbols were removed from Title I classrooms. *Id.*

114. *Id.* at 3236.

115. The majority explained:

> Appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. 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.

116. *Id.* at 3237-38.

prong.[117] The Court declared that state involvement in the affairs of a religious institution injures the religious freedom of nonadherents by appearing to lend governmental support to the religion.[118] Conversely, government interference compromises the religious freedom of adherents.[119] The Court found that the New York City program implicated both concerns.[120] Justice Brennan then surveyed the history of parochial school aid decisions, although mention of *Regan* was conspicuously absent.[121] The Court cited language from *Meek* that focused on the pervasively sectarian atmosphere of parochial schools.[122] Because such an atmosphere might influence teachers and result in subtle or blatant advancement of religion, the Court reasoned, state surveillance is necessary to prevent that advancement of religion. Although the Court conceded that the New York City plan arguably provided the requisite monitoring to avoid the danger of improper effect, the Court held that the surveillance impermissibly entangled the government with the church schools.[123]

Justice Powell authored a separate concurring opinion. Powell

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117. *Id.* *See generally supra* notes 51-53 and accompanying text.

118. 105 S.Ct. at 3237.

119. *Id.*

120. *Id.* at 3238. The pervasively sectarian nature of many schools involved in New York City's Title I program required that a permanent state presence be maintained in the schools, thereby implicating the first concern. *Id.* at 3238. *But cf.* Lynch v. Donnelly, 104 U.S. 1355 (1984) (Court approved exhibition of city owned creche in Christmas display). The New York City Plan also implicated the second concern because it required sectarian schools to endure a permanent state presence. 105 S.Ct. at 3239.

121. *Id.* at 3237-38; *see supra* notes 87-97 and accompanying text.

122. 105 S.Ct. at 3238; *see supra* note 74 and accompanying text; *cf.* the *Regan* Court's reading of *Meek*, *supra* note 93 and accompanying text.

123. Justice Brennan stated:

> 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. Agents of the state must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matters in Title I classes. . . . In addition, the religious schools must obey these state 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. In short, the religious school . . . must endure the ongoing presence of state personnel. . . .

Id. at 3238-39. Yet, had the city failed to provide this monitoring, the Court would undoubtedly have found its program unconstitutional under the "primary effect" prong of the *Lemon* test. *Cf.* Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216 (1985) (program whereby publicly employed teachers conducted classes in private schools was unconstitutional under the "primary effect" prong).

agreed that the New York City plan involved excessive entanglement,[124] but went on to explore the question of whether the program violated the primary effect prong of the *Lemon* test. To support his affirmative answer to that question, Justice Powell argued that Title I impermissibly subsidized private schools by relieving them of the duty to offer remedial courses.[125] Powell characterized Title I aid as "direct,"[126] thereby distinguishing those cases in which the Court upheld aid to parochial schools.[127]

Chief Justice Burger's stinging dissent accused the majority of a paranoic reaction to a legitimate and beneficial program.[128] Relying on his separate opinion in *Meek v. Pittenger* for support,[129] the Chief Justice argued that no demonstrable damage is done to the establishment clause by Title I programs.[130] He asserted that the majority's invalidation of New York City's program, though purporting to be done in the name of religious neutrality, actually evidenced hostility toward religion.[131]

Justice Rehnquist dissented in *Aguilar* for the reasons he articulated in *Wallace v. Jaffe*,[132] in which he mounted an attack on the entire framework of establishment clause jurisprudence. Rehnquist surveyed the historical context of the adoption of the first amendment religion clauses.[133] Rehnquist concluded that the separationist theory[134] un-

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124. *Id.* at 3240 (Powell, J., concurring).

125. *Id.* at 3241. The Court, however, had consistently rejected Justice Powell's argument in prior cases. *See, e.g., Regan*, 444 U.S. at 658; Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 744 (1976); *see also* New York v. Cathedral Academy, 434 U.S. 125, 134 (1977). Further, the Title I statute itself belies Powell's subsidy concern: Title I programs should only *supplement* parochial school programs already in existence. *See supra* note 16.

126. 105 S.Ct. at 3241 (Powell, J., concurring).

127. *But cf.* Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding direct grant to parochial schools for testing and recordkeeping costs).

128. Chief Justice Burger stated: "It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs . . . vital to the nation's schoolchildren. . . ." 105 S.Ct. at 3242 (Burger, C. J., dissenting).

129. *Id. See Meek*, 421 U.S. at 385 (Burger, C. J., concurring in part and dissenting in part).

130. 105 S.Ct. at 3242 (Burger, C. J., dissenting).

131. *Id.* at 3242-43.

132. 105 S.Ct. 2479, 2508 (1985).

133. *Id.* at 2508-15. *See generally* Anastaplo, *supra* note 17, at 183; N. DORSEN, P. BENDER AND B. NEWBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1170 (4th ed. 1976) [hereinafter cited as N. DORSEN]; Note, *supra* note 39; THE LIFE

derlying the modern court's analysis had no historical basis; rather, the framers intended only to prevent the establishment of a national religion and to forbid governmental preference among religions.[135] He argued that the *Lemon* test, based upon historical misconception, is unworkable.[136] Citing the anomolous results and divided opinions resulting from use of the *Lemon* test,[137] Justice Rehnquist advocated abandonment of the test in favor of an approach measuring legislation against the historical basis of the establishment clause.[138]

Justice O'Connor also filed a separate dissent, joined in part by Justice Rehnquist. O'Connor first noted the majority's failure to address the issue of whether Title I programs have the effect of advancing religion.[139] O'Connor's evaluation of that issue yielded a negative answer.[140] Justice O'Connor then criticized the majority's holding on the

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AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (A. Koch and W. Peden eds. 1944).

134. The separationist theory entered the modern court's jurisprudence in Everson v. Board of Education, 330 U.S. 1, 15 (1946):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state or the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Id.

135. 105 S.Ct. at 2512 (Rehnquist, J., dissenting). This historical theory enjoys acceptance among a number of eminent constitutional scholars. *See, e.g.*, Anastaplo, *supra* note 17; N. DORSEN, *supra* note 133.

136. 105 S.Ct. at 2517-18 (Rehnquist, J., dissenting).

137. Justice Rehnquist pointed out that few Supreme Court opinions in the area of aid to parochial schools ever commanded a majority of the Court; none has been unanimous. *Id.* at 2516.

138. *Id.* at 2520. Justice Rehnquist explained that "history abundantly shows . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." *Id.*

139. 105 S.Ct. at 3244 (O'Connor, J., dissenting).

140. *Id.* at 3245-46. Justice O'Connor pursued a factual analysis to reach the conclusion that the Title I program had no impermissible effect. The New York City pro-

entanglement issue as inconsistent with the factual record,[141] and questioned the utility of the entanglement test in any circumstances.[142] Expressing concern that the Court had repeatedly invoked entanglement as an independent ground to thwart legislative efforts that had both secular purposes and effects,[143] Justice O'Connor argued that entanglement should be a consideration only as a factor in the Court's evaluation of the effect of legislation.[144]

V. ANALYSIS

Aguilar v. Felton demonstrates the tenuous position the *Lemon* test occupies. The majority's invocation of the entanglement prong to invalidate New York City's Title I program seemed inevitable in light of *Meek*,[145] yet scrutiny of the Court's analysis reveals several flaws that ultimately topple the analytical structure.

First, the majority's emphasis on avoiding the appearance of endorsing a religion seems out of step with the Court's recent decision in *Lynch v. Donnelly*.[146] The city-owned creche, upheld in *Lynch*, conveys a message of government endorsement of religion far stronger than that flowing from the offer of remedial services on private school premises. The creche is a symbol with readily apparent religious significance; in contrast, the remedial classes conducted by Title I teachers have no religious significance.[147] Moreover, the New York City pro-

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gram had operated successfully for 14 years, without incident of improper advancement of religion. Justice O'Connor stated that:

> [T]he actual and perceived effect of the program is precisely the effect intended by Congress: impoverished school children are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

Id. at 3245.

141. Justice O'Connor emphasized that in the 19 years the New York City Title I plan operated, not one incident of teachers attempting to inculcate religion could be cited. *Id.* at 3245.

142. *Id.* at 3247.

143. *See generally* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 683 (1980) (arguing that enlargement should not "represent a value to be judicially secured by the Establishment Clause.").

144. 105 S.Ct. at 3248.

145. *See supra* notes 69-80 and accompanying text.

146. 104 S.Ct. 1355 (1984); *see supra* note 99.

147. As Justice O'Connor observed in her *Aguilar* dissent:

> [A]n objective observer of the implementation of the Title I program in New York would hardly view it as endorsing the tenets of the participating parochial schools.

gram explicitly prohibits any involvement of public personnel in the religious functions of the participating schools.[148]

Second, the majority argues that the religious schools suffer when government intrudes into their day-to-day operation.[149] Yet it is hard to see how Title I programs are any more intrusive than the accepted involvement of governmental agencies in setting curricula, mandating state testing and establishing minimum attendance requirements for private schools.[150] Moreover, the sectarian schools stand to suffer more if the Court forces the government to withdraw its sorely needed aid.

Finally, the *Lemon* test has trapped the Court into a pattern of holdings based on factual distinctions that seem to have little legal significance. For example, the *Aguilar* majority distinguished the Title I program, directing aid mainly to schools for younger children, from constitutional programs aiding sectarian colleges.[151] The Court characterized these lower level schools as "pervasively sectarian," with a broader concern for the inculcation of religious values than their college counterparts.[152] This conclusory characterization is inadequate to explain why a Title I plan, specifically targeted for secular uses, should fall while a general grant for any "non-sectarian purpose" to a sectarian college[153] withstands constitutional scrutiny. The *Meek* distinction between on-site and off-site instruction is similarly flawed. The notion that a public schoolteacher will abdicate his professional obligations when he crosses the parochial school threshold has no empirical support.[154] The danger that state or local government will inadvertently

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To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished school children are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

105 S.Ct. at 3245 (O'Connor, J., dissenting).

148. *Aguilar*, 105 S.Ct. at 3235: "The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms."

149. *Id.* at 3239; *see supra* notes 119-20 and accompanying text.

150. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

151. 105 S.Ct. at 3238.

152. *Id.*

153. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); *see also supra* note 68 and accompanying text.

154. *Cf.* Hargrove, *Teachers' Perceptions of ESEA Title I Programs*, 103 EDUCA-

advance religion is no more present in a parochial school classroom, that New York City demands be stripped of religious symbols,[155] than it is in a mobile classroom down the block.[156]

The *Lemon* test, as illustrated in *Aguilar*, leads to factual linedrawing rather than clear judicial imperatives. Thus, the test both confuses the lower courts and stymies legislatures. Legislatures must walk a tightrope—they must draft programs with enough government controls to assure that religion is not advanced but not so many that entanglement results.[157] As *Aguilar* demonstrates, the *Lemon* test often operates to defeat the legislative process.

The vehemence of the *Aguilar* dissents and the current political climate portend a decline in the importance of the *Lemon* test. An additional Reagan appointee to the Supreme Court probably would shift it toward a less separationist interpretation of the establishment clause. The test that replaces *Lemon* should be designed to produce uniformity of result. In the meantime, lower courts and legislatures have only the imprecise contours of the weakened *Lemon* test to guide them in drawing appropriate lines between church and state.

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TION 196, 196 (1982), assessing how teachers view operation of Title I programs: "The perceptual framework of a teacher in a particular school is shaped by past and present classroom experiences, by students, parents, and immediate colleagues." *See also Aguilar*, 105 S.Ct. at 3246 (O'Connor, J., dissenting): "Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated."

155. 105 S.Ct. at 3235.

156. The Court approved publicly financed instruction for parochial school students conducted in mobile units in Wolman v. Walter, 433 U.S. 229 (1977); *see supra* notes 81-86 and accompanying text.

157. *See supra* note 58 and accompanying text.

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