Managing Legal Change: The Transformation of Establishment Clause Law

Hugh Baxter
Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.bu.edu/faculty_scholarship/532
MANAGING LEGAL CHANGE:
THE TRANSFORMATION OF ESTABLISHMENT CLAUSE LAW

Hugh Baxter*

One perspective on the Supreme Court is to see it as a manager of legal change. At a particular time, and with respect to a particular issue of federal law, a majority of Justices may coalesce around a law-transforming project. Because the Court enjoys nearly complete control over its docket, such a coalition of Justices may select carefully the cases most advantageous to the law-transforming project. And because the Court's pronouncements on matters of federal law are binding on all other interpreters, the Court may enforce its legal transformation by exercising its disciplinary powers of review. The Court's implementation of such law-changing projects is subject to a number of constraints, including the case-or-controversy limitation, the strategies of litigants, resistance by those the change would affect, disagreements among the change-favoring Justices, procedural rules, and informal norms such as stare decisis and the requirement of reasoned explanation. One way of evaluating the Court's work—besides substantive criticism of the rules or principles the Court ultimately adopts—is to examine how successfully the Court has pursued its law-transforming project, and in particular, how successfully it has negotiated the constraints that define the Court's power to manage legal change.

The law-transforming project examined in this Article is the Court's recent revision of Establishment Clause doctrine, particularly in the context of government aid to religious education. For a number of years, a majority of Justices were on record as opposing what had been the governing Establishment Clause standard—the Lemon test—on the grounds that it was insufficiently constraining on judicial interpretation and excessively restrictive on government aid to religion. But the change-favoring Justices could not obtain a majority for any Lemon-replacing standard. Finally, in its 1997 Agostini v. Felton decision, the Court moved toward clarifying Establishment Clause doctrine and transforming the principles set out in Lemon.

In this Article, Hugh Baxter argues that the Court made a serious error in choosing Agostini as the vehicle for its transformation of Establishment Clause doctrine. The prime difficulty was Agostini's procedural context which, as the

* Associate Professor, Boston University. A.B., Stanford University, 1980; Ph.D., Yale University, 1985; J.D., Stanford University, 1990. Special thanks to Pnina Lahav, Ron Cass, Fred Lawrence, Jack Beermann, Katharine Silbaugh, and Gerry Leonard for insightful comments on an earlier draft, and thanks to Manuel Utset, Richard McAdams, and Tracey Maclin for suggestions and guidance. For Marina Leslie.
Article explains, prevented the Court from acknowledging that its decision was changing the law. As a result, the Court could argue only that pre-Agostini precedent already had changed the law; the Court could not present new arguments, not yet sanctified by precedent, for transforming Establishment Clause doctrine. The Court’s reading of pre-Agostini precedent is mistaken, and more important, the Court did not—and because of the procedural context could not—develop the sort of reasoned explanation one would expect from a decision to overrule the Court’s precedents and change the law. Further, because Agostini denies lower courts the power to recognize what the Court itself professes to recognize—that the law already has been transformed, and Supreme Court precedents already have been abandoned—the Court finds itself ensnared in the paradox of reversing a lower-court decision it acknowledges was correct. Escaping this paradox would have required the Court to recognize a more active role for lower courts in the process of managing legal change. This Article maintains that, besides extricating the Court from paradox, recognizing a more active role for lower courts would have been independently desirable. Agostini’s irony, the Article concludes, is that it combines an insistence on the Court’s exclusive prerogative to manage legal change with an alarmingly poor exercise of that very prerogative.

I. THE SUPREME COURT AS MANAGER
OF LEGAL CHANGE ....................................................... 345

II. THE LEMON FRAMEWORK AND THE PROLIFERATION
OF ALTERNATIVE STANDARDS ........................................ 357
   A. School-Aid Cases Under Lemon .................................. 358
      1. The Wolman, Ball, and Aguilar Line .......................... 362
      2. The Mueller, Witters, and Zobrest Line ...................... 375
   B. Alternative Tests and Lemon’s Uncertain Status ............. 382
   C. Kiryas Joel and the Justices’ Law-Transforming Agenda .... 391
   D. Response to the Kiryas Joel Invitation ....................... 395

III. AGOSTINI: FINDING A CHANGE IN THE LAW .................. 398
   A. The Rule 60(B)(5) Problem ........................................ 398
   B. The Court’s Theory of Post-Aguilar Legal Change .......... 400
   C. The Court’s Treatment of the Rule 60(b)(5) Problem ......... 410

IV. MISMANAGING LEGAL CHANGE ................................... 413
   A. The Court’s Use of Precedent .................................... 415
      1. Indoctrination by Public Employees .......................... 415
      2. Symbolic Union .................................................. 419
      3. Subsidization of Sectarian Education ......................... 421
      4. The On-Premises/Off-Premises Distinction ................. 426
      5. Entanglement ................................................... 429
      6. Significance of the Court’s Misuse of Precedent .......... 429
   B. Agostini’s Paradox ............................................... 433
   C. Alternate Routes .................................................. 441

CONCLUSION ................................................................. 457
I. THE SUPREME COURT AS MANAGER OF LEGAL CHANGE

One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change. The Court stands at the apex of the federal judicial hierarchy, and through the doctrine of hierarchical precedent, the Court's pronouncements on matters of federal law are binding on all courts. Because the Court fills its docket almost entirely at its own discretion, a self-conscious majority of Justices can pursue a project of transforming an existing body of federal law by selecting the case or cases strategically most advantageous to that project. The Court then can exercise its disciplinary powers of review to ensure that its interpretation holds sway. Both of these aspects of the Court's power—its ability to pursue coherent law-reform strategies when a majority coalesces around a particular issue, and its ability to enforce those strategies by disciplining other legal interpreters—are what I mean by the Supreme Court's power to manage legal change.

This power, of course, has limits. Given the Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention. Other governmental agencies, as well as persons subject to the law, also may be able to evade or circumvent the Court's requirements. Losing litigants may choose not to seek the Court's review, thus diminishing the occasions upon which the Court will have an opportunity to issue law-changing decisions, and Congress can overturn the Court's law-changing statutory decisions by legislative enactment. Finally, the Court's

---

1. For an investigation into the rationales for hierarchical precedent, see Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817 (1994).
2. See Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1095 (1987) (“[T]he Court’s awareness of how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law.”); cf. William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 75 (1994) (referring to the “neglected point” that “the Supreme Court presides over the entire federal court system and depends on lower courts to carry out any agenda the Court might have”).
3. Cf. Strauss, supra note 2, at 1095 (noting the “management dilemmas” the Court faces in controlling lower courts and agencies).
4. For an excellent study of the dynamics of congressional overriding of the Court's statutory decisions, see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991).
law-reform efforts do not always have social effect, or at least not the social effect the Court would like them to have.\textsuperscript{5}

The Justices' power to pursue law-transforming projects is subject to an additional set of constraints: the various rules and norms that govern the Court's own decision-making processes. The Constitution, for example, imposes the case-or-controversy requirement and jurisdictional limits. Statutes and procedural rules, including the Court's self-prescribed rules, additionally limit the Court's ability to pursue law-changing strategies in particular cases. While there is no formal legal procedure for enforcing these requirements against the Court,\textsuperscript{6} the Court nonetheless regularly treats them as constraints.

The Justices are further constrained—although again, not in a way officially enforceable against the Court—by informal norms governing the Court's operation. One such norm is stare decisis. While as the Court has said repeatedly, "[s]tare decisis is not an inexorable command,"\textsuperscript{7} and while the Court on occasion overrules its own decisions, still, stare decisis limits—or at least influences—the Court's transformation of the law.\textsuperscript{8} In some cases when the Court's inclination toward legal change is weak, stare decisis likely prevents the Court from overruling. And even when the impulse to change is stronger, overruling has costs for the prevailing majority—perhaps impaired relations with fellow Justices who would have adhered to the precedent,\textsuperscript{9} the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.\textsuperscript{10} While these costs will not always deter the majority from executing its law-transforming project, at a minimum they affect the way in which the majority manages its transformation.


\textsuperscript{6} While impeachment proceedings are theoretically available, they are practically unimaginable except in the most extreme instances of judicial disobedience.


\textsuperscript{9} See Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 GEO. WASH. L. REV. 68, 122 (1991) ("[T]he more areas in which a Justice routinely dissents or deviates from precedents, the less influence she has on the Court and the more likely she becomes a marginalist.").

Stare decisis is related to a second informal norm that governs the Court's exercise of its law-changing power. Even in ordinary cases, the Court is expected to provide reasoned explanations for its decisions.11 This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.12 At least occasionally, this requirement might deter an overruling or other change in the law.13 In other cases, it leads the Court to take special care in constructing a plausible justification. Even if not formally enforceable against the Court, the requirement of reasoned explanation, like the norm of stare decisis, channels the course of the Court's law-transforming strategies.

Finally, the norms governing the Court's decision-making processes impose one additional and important constraint: the need for five Justices to reach agreement on the law-changing standard. This requirement may operate as a brake on legal change. In some instances, the required five Justices may agree on the need for change, and agree even on the general direction of change, yet disagree as to the particular standard that should govern. This difficulty may thwart the change altogether, and at a minimum, it will affect significantly the course and extent of the transformation. The most moderate change-favoring Justices may well be in a position to limit the extent of legal change. The lack of particular agreement may produce either a splintered Court—changing prior law, but without a majority behind any particular standard—or a compromise outcome that no single Justice would have preferred. In my references to the law-changing strategy of "the Court," or a "majority" of the Court's Justices, I mean to include the possibility that particular disagreements among the change-favoring Justices will complicate any attempt to manage a change in the law.14


12. See Monaghan, supra note 8, at 757-58 (arguing that in constitutional adjudication something more than disagreement with the precedent's conclusion should be required for overruling); see also Gerhardt, supra note 9, at 141–43 (supporting Monaghan's position and arguing for full explanation of the grounds of overruling).

13. See Gerhardt, supra note 9, at 143.

14. I recognize that my references to "the Court" as actor, or even "a majority of the Court" as actor, will strike some readers as bizarre personifications. The Supreme Court, after all, is an institution that operates through the (largely) independent judgment of its personnel, and the institution's personnel changes over time. I retain the conventional usage for two reasons. First, the idea of "the Court" structures the discourse that bears the Supreme Court's name: the various writings the Justices issue in the course of rendering decision either are written "for the Court," or if not, are correspondingly limited in their power. This basic institutional fact affects both the way in which the Justices operate and the legal effects of their writings. Second, in some instances a majority of Justices may agree even on the particulars of a possible legal change, and in that event,
All of the above constraints on the Court's law-changing projects—resistance from other interpreters, actors, or litigants; legislative correction of statutory decisions; the slippage between legal decision and social effect; and the various rules and norms governing the Court's own decision making—do not just circumscribe or limit the Court's power to manage legal change. In an important sense, they define that power. These constraints are the conditions under which the Court exercises its power to manage legal change. And the Court exercises its power most effectively when the Justices take these conditions self-consciously into account.

At any particular time in the Court's history, one could discern a number of law-changing projects in the making. Certainly this is true of the Court's recent history. For example, a majority of Justices on the Warren Court, with greater and lesser degrees of enthusiasm and self-conscious desire for change, pursued reform strategies in criminal procedure and habeas corpus. The gradual expansion of the right to privacy, from Griswold to Roe and beyond, straddled the Warren and Burger Court periods. With respect to sex discrimination, a plurality of four Justices on to the extent they cooperate effectively, they can act for the Court in selecting and deciding law-changing cases. The idea of "the Court" may be a legal construction, produced and maintained by the very legal communications it structures, but nonetheless—or rather, for that very reason—legal theory cannot simply "unmask" it as mere fiction. Fiction it may be, with respect to some other discourse, but it is hardly a fiction without legal significance or effects.

15. I include the qualification "in an important sense" because, in another sense, the Court has the power (i.e., the ability) to violate all of the constraints I described as governing the Court's decision-making process. We can imagine the Court issuing advisory opinions apart from anything resembling a live case or controversy, dispensing entirely with stare decisis, rendering decisions on the merits with one-word orders, and the like. When I say these constraints define the Court's power, I mean that they describe the set of social expectations about how the Court will operate.


20. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs., 431 U.S. 678 (1977); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Roe, 410 U.S. at 113; Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold, 381 U.S. at 479. The story here is of course complicated. The due process right of privacy vied, for a time, with a Ninth Amendment theory to similar effect. See Roe, 410 U.S. at 210-11 (Douglas, J., concurring) (invoking the Ninth Amendment as a textual warrant for the right of privacy); Griswold, 381 U.S. at 486-87 (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.) (relying on the Ninth Amendment rather than the Due Process Clause). Further, the change-favoring Justices in Griswold likely did not foresee specifically the later extension of their theories to (for example) abortion. In this transformation, and in others, both the choice of theory and the extent of the theory's application changed in the course of constitutional transformation. But surely it was clear...
the Burger Court took as their project the adoption of strict scrutiny;\textsuperscript{21} when that project stalled, a majority settled on the law-changing norm of intermediate scrutiny.\textsuperscript{22} Members of the present Court certainly have a number of law-reform projects of their own—pursued through various coalitions, more or less coherently and systematically, and in varying stages of completion. Among those projects: limiting the scope and availability of habeas corpus relief;\textsuperscript{23} restricting (though, it turns out, not abolishing) the constitutional right to abortion;\textsuperscript{24} terminating long-running school desegregation plans and reducing the scope of federal court control over schools;\textsuperscript{25} limiting (perhaps abolishing) affirmative action;\textsuperscript{26} narrowing the
even at the beginning that the Court had undertaken an important expansion of constitutional personal liberties, even if the future dimensions of that transformation were uncertain.

\textsuperscript{21} See Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (Brennan, J.) (plurality opinion).


Justice O’Connor, however, who authored the Court’s opinions in Teague and Coleman, did not want to go so far. Her opinion in West decisively repudiated the Thomas opinion’s law-transforming ambitions. See \textit{id.} at 297–306 (O’Connor, J., concurring in the judgment) (discussing, seriatim, what O’Connor characterized as eight errors in Thomas’s opinion). Justice Kennedy, who had joined or authored all of the opinions cited at the beginning of this footnote, likewise resisted Thomas’s implications. See \textit{id.} at 306–10 (Kennedy, J., concurring in the judgment). Here, as elsewhere, the more moderate of the change-favoring Justices were able to control the extent of the transformation. See \textit{also infra} notes 24, 26.

\textsuperscript{24} See Planned Parenthood v. Casey, 505 U.S. 833 (1992); \textit{cf.} Webster v. Reproductive Health Servs., 492 U.S. 443 (1989). In \textit{Planned Parenthood}, as in the habeas corpus cases discussed in the preceding footnote, the Justices interested in the more moderate transformation were able to control. Justices O’Connor and Kennedy, both of whom had authored or joined opinions sharply criticizing Roe, were able to moderate Roe, rejecting its “rigid trimester framework” but without overruling (what they called) Roe’s “central holding.” \textit{Planned Parenthood}, 505 U.S. at 869–79 (joint opinion of Justices O’Connor, Kennedy, and Souter).


\textsuperscript{26} See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling \textit{Metro Broad., Inc. v. FCC}, 497 U.S. 547 (1990)); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The interposition of \textit{Metro Broadcasting} between \textit{Croson} and \textit{Adarand} is a further illustration that the most moderate member of a law-changing coalition can control the reach of the law-transforming project. In \textit{Metro Broadcasting}, Justice White—who had joined the Court’s opinion in \textit{Croson}, striking down a municipal affirmative action plan—cast a deciding vote to uphold a federal affirmative action plan. The event that led to \textit{Metro Broadcasting}’s overruling in \textit{Adarand}}
use of race-based remedies under the Voting Rights Act, placing constitutional controls on awards of punitive damages, limiting the federal government’s power vis-à-vis the states, increasing the level of constitutional protections available to property owners under the Takings Clause, and finally—the project I examine in this Article—transforming

was the replacement of Justice Marshall with Justice Thomas. Here, as elsewhere, the scope of a law-transforming project depended upon changes in the Court’s personnel.

27. See Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). Although the Court’s case-selecting discretion is limited in the Voting Rights Act context, where cases come to the Court on appeal rather than on writ of certiorari, the order in which the Court considered these cases was important for its strategy of law transformation. In Shaw v. Reno, the Court invalidated a plan that created two “majority-black” districts, placing emphasis on the districts’ “bizarre” shape. See 509 U.S. 630, 635–36, 646–47, 658–59 (1993). The Court thus was able to consider, first, a case in which race seemed to have been the only significant factor in drawing district lines before addressing—and invalidating—a plan in which other objectives at least arguably competed with race. The Court explained in Miller that Shaw v. Reno’s emphasis on the districts’ bizarre shape was only to underscore that the plan had violated more general principles. See Miller, 515 U.S. at 912–14.

28. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (invalidating a punitive damages award under a substantive due process theory); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (invalidating an award under a procedural due process theory); cf. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (upholding an award against substantive and procedural due process challenge); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (same); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that the Excessive Fines Clause does not apply to punitive damages in civil cases). The punitive damages issue is an interesting one. As the above citations indicate, over a seven-year period the Court regularly took cases in which one federal constitutional limit or another was suggested, until finally, in BMW and Honda, the Court was able to find that a constitutional limitation had been violated. The Court’s recurring attention to the issue illustrates that a coalition of Justices found “runaway” punitive-damages awards constitutionally troubling. See Haslip, 499 U.S. at 18 (“We note once again our concern about punitive damages that ‘run wild.’”); id. at 9–12 (recounting statements by various Justices expressing constitutional concern over punitive damage procedures and awards). The special concern for this issue appears, further, in the fact that the issues in some of the cases were highly fact-specific. See BMW, 517 U.S. at 562–63 (describing the facts and stating that “[t]he question presented is whether [the award involved in the case] exceeds the constitutional limit”); TXO, 509 U.S. at 446 (describing the award and stating that “[t]he question we granted certiorari to decide is whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment”). Ordinarily, the Court does not take cases to decide only whether there has been a constitutional violation on the facts presented.

Further, at least on the facts, BMW was well selected to serve as the first case in which the Court found an award of punitive damages constitutionally excessive. The party who had received punitive damages was a physician whose harm was only a bad paint job on his BMW. Originally he had received $4 million in punitive damages (cut to $2 million by the state supreme court), though his compensatory damages amounted only to $4,000.


Establishment Clause doctrine to lower the “wall of separation” earlier Courts had erected between church and state.

Two clarifications are necessary. First, I do not assume that the Justices’ law-changing strategies take the form of explicit agreements, pacts, or contracts to change the law in particular directions. Instead, my sense and working assumption is that communication among Justices about Court matters ordinarily is minimal, outside of officially scheduled conferences and memoranda circulated generally among members of the Court. Nonetheless, on many issues a thoughtful Justice will have a strong sense of what his or her colleagues think the law should be. In such circumstances, Justices who agree with one another may be in a position to cooperate on a law-transforming project without express discussions of strategy and tactics, or any discussion beyond the official channels of Court communication. This Article does not depend upon any conspiracy theory of Court-managed change.

Second, by using the terms “management,” “project,” and “strategy,” I do not mean to suggest that all of the Court’s legal reforms are necessarily nefarious or illegitimate. A legal order without change is impossible, and resisting change is not inherently a social good. This Article is not a hymn to abstract values of stare decisis. In my view, it is entirely proper for Justices of the Supreme Court to have, and to pursue self-consciously, visions of what the law should be. Rather than criticize the present Court, or past Courts, as “agenda-driven,” the more pertinent lines of criticism for any particular reform strategy seem to me the following: Are the changes substantively desirable, and does the Court pursue those changes effectively and legitimately?

In this Article I do not follow the first line of criticism. The substantive merits of the Court’s attempted transformation of Establishment Clause doctrine are well debated elsewhere. Instead, my interest is in whether the

---

31. Cf. Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 STAN. L. REV. 395, 396 (1995) (“Readings of the Constitution change.... No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core.”).

32. I will mention here only a few of the many contributions that defend a general approach to the Establishment Clause, selected to represent a range of views. See Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 NW. U. L. REV. 1113 (1988) (defending the Lemon test, described infra notes 56–65 and accompanying text); Daniel O. Conkle, Lemon Lives, 43 CASE W. RES. L. REV. 865 (1993) (same); Christopher L. Eisgruber, Political Unity and the Powers of Government, 41 UCLA L. REV. 1297, 1304–12 (1994) (defending, for cases involving “official prayers and publicly sponsored religious displays,” an “anti-affiliation principle” that would bar government from affiliating itself with a particular religious sect or religion generally, but recommending different principles for other cases); Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 68, 70 (1997) [hereinafter
Justices have pursued their law-transforming strategies in an effective and legitimate way. "Effective" and "legitimate," in this context, are partly distinct and partly overlapping. In asking whether the Justices' transformation is "effective," I mean to inquire whether they have selected an appropriate "vehicle" for their project (or projects) and whether they have employed that vehicle skillfully. Relevant here is the extent to which the change-favoring Justices have considered and negotiated any differences in their visions of what the law should be. In asking whether the transformation is legitimate, I mean to investigate whether the Court has successfully negotiated the various constraints imposed by the rules and norms governing the Court's exercise of its decision-making power. When it overrules precedent, has the Court dealt adequately with stare decisis issues?


33. In cases of disagreement among the Justices about the particulars of legal change, see supra note 14 and accompanying text, the criteria for effectiveness are difficult to determine. I assume, however, that if the disagreement had the effect of blocking any change, the attempted transformation would be (at that point) a failure. If the disagreement led to some change, but either without a majority endorsing a particular law-changing standard, or with a hopelessly incoherent replacing standard, the transformation would be at that point less than a success, though not entirely a failure. Criteria for success are difficult to specify in these circumstances; they depend upon a choice between or among the competing views of the change-favoring Justices.

34. For an account of the relation between stare decisis and court-managed legal change, see Monaghan, supra note 8, at 739-73.
provided a satisfactory explanation of its decision? Has it observed the procedural rules that condition the Court’s law-changing power?

The story of the transformation of Establishment Clause doctrine begins with the Court’s 1971 ruling in *Lemon v. Kurtzman.* *Lemon* set out a three-part test for evaluating government aid to religious institutions. Under that test, to avoid invalidation a challenged program “must have a secular legislative purpose; [its] . . . primary effect must be one that neither advances nor inhibits religion,” and the program and its administration “must not foster an ‘excessive government entanglement with religion.’”

As I recount in Part II.A of this Article, the Court for a time used the *Lemon* test aggressively to enforce a strict separation between church and state, particularly in cases involving government aid to religiously affiliated elementary and secondary schools. The decisions from this period in which I am most interested include the Court’s 1975 ruling in *Meek v. Pittenger,* and its 1985 decisions in *School District v. Ball* and *Aguilar v. Felton.* The latter two decisions, invalidating programs that provided supplementary and remedial education programs in religious schools, mark the outer limit of the Burger Court’s expansion of the Establishment Clause. They mark also the last occasion on which the Court invalidated an aid program under the *Lemon* test.

I discuss in Part II.B the Rehnquist Court’s growing disenchantment with the *Lemon* test—both its form (or formlessness) and also the results reached under that test. Beginning around the time *Ball* and *Aguilar* were decided, various Justices began to develop new Establishment Clause theories that could displace the *Lemon* test. While they reached no consensus on a replacement test, a group of five Justices dissatisfied with *Lemon* seemed to have coalesced. These Justices, in three separate opinions filed in the 1994 *Board of Education of Kiryas Joel Village School District v. Grumet* case, seemed to signal *Lemon*’s demise. Even more clearly, they indicated

---

35. 403 U.S. 602 (1971).
36. Id. at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).
37. See, e.g., Laycock, *Underlying Unity*, supra note 32, at 54–55 (noting that the strictest application of *Lemon* principles has been in cases involving aid to what the Court has called “pervasively sectarian” institutions, a term that “in practice . . . seems to be a synonym for [religiously affiliated] elementary and secondary education”).
42. See infra Part II.C.
their desire to overrule *Aguilar* and *Ball*. These Justices, constituting a majority of the Court, seemed to be inviting a petition that could serve as a vehicle for overruling *Aguilar* and *Ball* at a minimum, and likely for replacing the *Lemon* test as well.

For more than two years, the Court waited. Then, in January 1997, the Court granted certiorari in *Agostini v. Felton*—the very same case as *Aguilar*, though newly recaptioned. In *Agostini*, the New York City Board of Education sought, under Rule 60(b)(5) of the Federal Rules of Civil Procedure, to vacate the injunction imposed as a result of *Aguilar*. According to the Court's most recent interpretation of Rule 60(b)(5), the board had to show "a significant change . . . in law" that justified relief from the *Aguilar* judgment. The lower courts found no such change in the law, reasoning that *Aguilar*, though clearly imperiled, had not yet been overruled and therefore was still binding precedent. While the Supreme Court agreed that the lower courts were correct to follow *Aguilar*, it held also that cases post-*Ball* and post-*Aguilar* had rendered those decisions "no longer good law." Accordingly, the Court formally overruled *Aguilar* and significant portions of *Ball*. It did not, however, overrule *Lemon*. Instead, for reasons to be explained, the Court ended up, in effect, reaffirming a modified version of *Lemon* as "current law."

I argue in Part IV of this Article that in deciding to pursue the transformation of Establishment Clause doctrine in *Agostini*, the change-favoring Justices made a spectacular misjudgment. In any other case, the Court would have been free to announce a revised, *Lemon*-displacing theory of the Establishment Clause, provide reasons sufficient to justify that new theory,

43. See *Kiryas Joel*, 512 U.S. at 717–18 (O'Connor, J., concurring in part and concurring in the judgment); see id. at 730–32 (Kennedy, J., concurring in the judgment); see id. at 750 (Scalia, J., dissenting). The Chief Justice and Justice Thomas joined Justice Scalia's opinion.
45. That rule provides:
   (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.—
   On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [when]:
   . . .
   (5) . . . it is no longer equitable that the judgment should have prospective application.
   The motion shall be made within a reasonable time . . . .

FED. R. CIV. P. 60(b)(5).
48. *Id.* at 2012; see also *id.* at 2016 (referring to the "criteria we currently use to evaluate whether government aid has the effect of advancing religion"); *id.* at 2017 (referring to "our current understanding of the Establishment Clause").
and then overrule both *Ball* and *Aguilar* under the new post-*Lemon* test. Or, even if they could not agree on a post-*Lemon* test, the change-favoring Justices could have overruled *Ball* and *Aguilar* without adopting definitively a new post-*Lemon* test—reasoning that the result followed from any of the competing Establishment Clause theories those Justices preferred.

But neither of these law-changing strategies was genuinely available in *Agostini*. The reason was *Agostini*’s Rule 60(b)(5) procedural context. As the Court acknowledged, Rule 60(b)(5) prohibited the Court from changing the law in its *Agostini* decision. Instead, the Court had to locate the required “significant change in the law” in its own pre-*Agostini* precedents. As a result, *Agostini*’s reasoning consists entirely in a parsing of post-*Aguilar* precedent. But these precedents, I argue in Part IV.A, are not exactly fertile ground: They do not expressly criticize *Aguilar*, *Ball*, or *Lemon*, and in fact, they fit themselves into the *Lemon* framework in which *Ball* and *Aguilar* operated. The Court’s arguments that those precedents implicitly overruled *Ball* and *Aguilar*, then, are necessarily unconvincing. And notwithstanding the ambitions for change the five Justices expressed in *Kiryas Joel*, the Court could not legitimately develop a law-transforming Establishment Clause theory in *Agostini*.

I contend in Part IV.B that *Agostini*’s Rule 60(b)(5) context exacted further revenge, in the form of paradox. In *Agostini*, the Court was reviewing a district court judgment that refused relief, reasoning that only the Supreme Court could pronounce the not-yet-overruled *Aguilar* dead. The Court agreed that it alone has this power. But that made the judgment below legally correct, and the Court therefore had to contend with the paradox of reversing, as an abuse of discretion, a correct lower-court judgment.

Something like this pattern appears in most overruling decisions, provided that the lower courts properly have followed the precedent the Court later overrules. But in the standard case of overruling, the apparent paradox is easily dispelled: The Court’s overruling decision changes the law, and so the lower courts’ decisions, correct when rendered, are incorrect from the perspective of the new rule. Accordingly, in these cases the Court properly reverses, without paradox.

---

49. The separate opinions in *Kiryas Joel* did criticize all three cases, but the Court determined in *Agostini* that *Kiryas Joel* could not count as a law-changing decision. See infra note 305 and accompanying text.

50. See *Agostini*, 117 S. Ct. at 2017–18 (acknowledging that “abuse of discretion” is the standard under which district court Rule 60(b) decisions are reviewed).

51. “Something like this pattern” because generally the standard will be de novo review. Still, when the Court overrules a governing precedent, the lower courts will be correct to have relied on it, and the Court nevertheless will reverse their judgments.
This escape strategy is unavailable to the Court in Agostini, again because of the case’s procedural context. In order to grant relief under Rule 60(b)(5), the Court must insist that its Agostini decision does not change the law, but instead only recognizes post-Aguilar changes the Court had effected earlier. These changes, the Court says, were complete by 1993, four years before Agostini. Thus the Court, in deciding Agostini, rules that Aguilar already is not good law. But the Court forbids the lower courts from recognizing this change in the law. Until the Court has confirmed its transformation of Establishment Clause law by overruling Aguilar expressly, the Court maintains, the lower courts are bound by the Aguilar decision. In so maintaining, the Court is insisting that it, alone among courts, may legitimately manage the transformation of Establishment Clause law. The consequence of that insistence is incoherence in Agostini’s reasoning. Between 1993 and the Court’s 1997 decision, the Court must suppose, “the law” doubles into two contradictory bodies of law, simultaneously valid—post-Aguilar law in the Supreme Court, and Aguilar itself in all other courts.

The Court, I argue, could have escaped this embarrassment if it had assigned other courts even a small part in the process of legal change. The Court need not have allowed lower courts themselves to change the law that the Supreme Court has announced. Rather, the Court could have escaped paradox by ceding a much more limited power: the power to follow the Supreme Court’s commands faithfully by recognizing what the Court itself claims to recognize in Agostini—that the Court has already, though implicitly, changed the law. Instead, the Court treats the lower courts simply as objects of Supreme Court disciplinary authority.

Agostini, in short, represents a misuse of the Court’s power to manage legal change. The irony of Agostini—and what makes it, I think, a


53. The Court wrote:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” . . . The trial court . . . was . . . correct to recognize that the [Rule 60(b)(5)] motion had to be denied unless and until this Court reinterpreted the binding precedent [Aguilar].


profoundly unsettling decision—is that the Court insists that it alone can manage the legal change it envisions, and then proceeds to manage that transformation so alarmingly badly.

II. THE LEMON FRAMEWORK AND THE PROLIFERATION OF ALTERNATIVE STANDARDS

Under the Court’s path-marking decision in Lemon, if a challenged statute or government program is to avoid invalidation on Establishment Clause grounds, it “must have a secular legislative purpose . . . ; [its] primary effect must be one that neither advances nor inhibits religion; and [it] must not foster an excessive government entanglement with religion.” In a number of cases decided during Lemon’s 1971–85 heyday, the Court used the “effects” and “entanglement” parts of the Lemon test to invalidate government programs of aid to religious education. I discuss those cases and the various doctrinal categories and distinctions the Court developed in Part II.A below. I discuss also a second line of cases, decided between 1983 and 1993, in which the Court upheld programs that had the effect, at least in the particular case before the Court, of providing assistance to religious education. Until Agostini, these two lines of precedent coexisted more or less peacefully: The Court decided particular cases by placing them in one or the other line, based largely on the Court’s characterization of the facts. But with changes in the Court’s personnel, by the early 1990s a majority of the Justices had, at one time or another, expressed dissatisfaction with the Lemon test. I discuss this growing dissatisfaction, and the various Lemon-displacing tests that were suggested, in Part II.B.

This discussion of the Lemon framework, and of the Court’s increasing distaste for that framework, serves as background for my account of Agostini’s transformation of Establishment Clause doctrine. Agostini, I argue in Part III, transforms the law by denying the distinction separating the two lines of Lemon precedent. Without this distinction to differentiate the two lines of cases and explain their differing outcomes, the school-aid cases are simply inconsistent in their outcomes. The Court, then, must choose between the two lines of precedent, and not surprisingly the Court chooses the line upholding government aid to religious education. What makes the Court’s treatment of precedent illegitimate, I argue, is not so much the

substance of the Court’s choice as its pretense that the choice already had been made before Agostini.

A. School-Aid Cases Under Lemon

In Lemon, the Court considered a Pennsylvania program that reimbursed private schools, nearly all of them religiously affiliated,56 for expenditures incurred in teaching secular subjects. In Lemon’s companion case, Earley v. DiCenso,57 the Court evaluated a Rhode Island program that provided salary supplements to teachers in private schools, nearly all of which were religious schools.58 The Court set out its three-part test of purpose, effect and entanglement, and found that both programs created an impermissible entanglement of government and religion.59 Although the statutes authorizing both programs prohibited state expenditures on religious indoctrination, the Court held that to ensure that these limits were respected, “[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required.”60 The surveillance would have to be “continuing,” the Court said, because “[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion,”61 and because religious-school teachers, working in a sectarian environment, face ongoing pressures to engage in religious indoctrination.62 Monitoring religious-school instruction for religious content would “involve excessive and enduring entanglement between state and church.”63 Review of religious-school records to determine which expenditures were for religious instruction and which were for secular teaching involved similar state intrusion into religion.64 Finally, the Court said, the potential for political divisiveness inherent in state financial assistance to religious schools creates a “broader base of entanglement.”65

56. See id. at 610.
57. 403 U.S. 602 (1971).
58. Lemon, 403 U.S. at 607–08. I refer to both Lemon and Earley as “Lemon,” as the Court’s opinion does in its running headers.
59. See id. at 614. The Court found that both programs had the required secular purpose, see id. at 613, and it did not rule on whether the programs had an impermissible “primary effect,” see id. at 613–14.
60. Id. at 619 (referring to the Rhode Island program); see also id. at 621 (referring to the Pennsylvania program).
61. Id. at 619.
62. See id. at 618–19.
63. Id. at 619.
64. See id. at 620 (discussing the Rhode Island program); see also id. at 621–22 (discussing the Pennsylvania program).
65. Id. at 622–24; see also id. at 623–24.
The Court's subsequent school-aid decisions developed and extended Lemon's analysis. For present purposes, the key decision was the Court's 1975 ruling in *Meek v. Pittenger*, which set out the basic effects and entanglement categories that the Court used until Agostini. The Court considered in *Meek* a program under which a state loaned secular textbooks to nonpublic school students, loaned various instructional materials and equipment to the schools themselves, and sent state-paid teachers and other professionals into nonpublic schools to provide on-premises "auxiliary" services that included remedial and advanced instruction, guidance counseling, and testing. The Court evaluated the two loan provisions under the effects part of the *Lemon* test and the auxiliary services under the entanglement part.

Under the effects test, the Court upheld the textbook-loan provision, on the authority of its pre-*Lemon* decision in *Board of Education v. Allen*, but it invalidated the loan of instructional materials and equipment. The Court explained its different treatment of the two loan provisions by distinguishing between permissible "indirect" and "incidental" aid to religious schools, on one hand, and impermissible "direct and substantial" aid, on the other. In upholding the textbook provision, the Court emphasized that the challenged program loaned secular, nonideological books directly to the students rather than to the religious schools. Even if the schools received an indirect benefit from the textbook loans, "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." According to the Court, the textbook-loan program resembled other constitutionally permissible forms of aid to religious-school students, such as "bus transportation, school lunches, and public health facilities."

The loan of instructional materials, on the other hand, was "massive aid" provided directly to the nonpublic schools, and as such the aid was "neither indirect nor incidental." The Court acknowledged that under the challenged program the loaned instructional materials were to be secular rather than religious in character. Nevertheless, the Court emphasized, the "primary beneficiaries" of the loaned instructional materials were "religion-pervasive institutions" that provided "integrated secular and religious

---

68. See *Meek*, 421 U.S. at 359–62 (relying on *Allen*, 392 U.S. at 236).
69. See id. at 361.
70. Id. at 359; see also id. at 364–65 ("Indirect and incidental benefits to church-related schools... do not offend the constitutional prohibition against establishment of religion.").
71. Id. at 364.
72. Id. at 365.
education." Because secular education and these schools’ “religious mission” are “inextricably intertwined,” the Court concluded, “direct” and “substantial” aid to these schools’ “educational function” necessarily “results in the direct and substantial advancement of religious activity” — in violation of the effects part of the Lemon test.

As both then-Justice Rehnquist and Justice Brennan observed in their partial dissents, Meek’s distinction between the two kinds of loan is difficult to maintain. The loaned textbooks seem to serve the religious schools’ “educational function” as surely as do the loaned instructional materials. The Court later acknowledged this point, describing Meek’s treatment of the textbook-loan provision as a “unique presumption” established in Allen, before the Court’s adoption of the Lemon test. While the Court allowed that this “presumption” was in “tension” with Meek’s rationale, it held that Allen should be followed “as a matter of stare decisis,” though Allen’s “presumption” should not be expanded. Notwithstanding this stare decisis-driven quirk in its analysis, however, the Court’s distinction between permissible “incidental and indirect” aid, on one hand, and “direct and substantial” aid to religious schools’ educational function, on the other, became its central effects criterion. This test, with elaborations shortly to be explained, governed the effects issue until the Court repudiated the test in Agostini.

Meek’s other contribution to Establishment Clause doctrine concerned the entanglement test, under which the Court analyzed the program providing on-premises “auxiliary services” in religious schools. The Court focused particularly on the parts of the program providing remedial instruction, accelerated instruction, and guidance counseling. The lower court had upheld these parts of the program as permissible “incidental and indirect aid,” on the ground that the instruction was secular and nonideological and only supplemented the schools’ basic curricula. The lower court had emphasized also that the “good faith and professionalism of

73. Id. at 366.
74. Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring)).
75. Id.
76. See id. at 388–91 (Rehnquist, J., concurring in part and dissenting in part); id. at 378–85 (Brennan, J., concurring in part and dissenting in part). For Rehnquist, the similarity between the two issues meant that both loan provisions were constitutional; for Brennan, the similarity meant that both were unconstitutional.
78. Id. (“When faced . . . with a choice between extension of the unique presumption [concerning textbook loans] and continued adherence to the principles announced in our subsequent cases, we choose the latter course.”).
the secular teachers and counselors" were sufficient guarantee that the state
would not fund sectarian religious instruction.79

Meek sidestepped the effects issue, refusing to decide whether "substan-
tial state expenditures to enrich the curricula of church-related elementary
and secondary schools" constitute forbidden direct and substantial aid to
religious schools' educational function.80 Instead, invoking Lemon, the
Court held that the teachers' and counselors' professionalism did not ade-
quately ensure that state officials would refrain from religious indoctrina-
tion. In the context of a pervasively sectarian school,81 the Court had said
in Lemon, "'[a] comprehensive, discriminating, and continuing state sur-
veillance' would be required for the government to be "'certain . . . that
[state-]subsidized teachers do not inculcate religion."'82 And these very
"prophylactic contacts," the Court said, again invoking Lemon, would "nec-
essarily give rise to a constitutionally intolerable degree of entanglement
between church and state."83 The Court refused to distinguish in this regard
between supplementary and basic instruction or between basic instruction
and guidance counseling. Each context presented a constitutionally unac-
ceptable danger of state-sponsored religious indoctrination; each context,
therefore, would require impermissibly entangling state surveillance of
religious schools.84

Meek's entanglement analysis is the prime basis for the Court's sUbse-
quent decision in Aguilar, and later a target of the Court's Aguilar-overruling
transformation of Establishment Clause doctrine in Agostini. Meek's effects
analysis had more systematic significance still. The distinction between

79. Meek, 421 U.S. at 369.
80. Id.
81. The Court described these schools as ones "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. at 371.
82. Id. at 369-70 (quoting Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971)).
83. Id. at 370.
84. The Court wrote:
That [the challenged statute] authorizes state funding of teachers only for remedial and
exceptional students, and not for normal students participating in the core curriculum,
does not distinguish this case from [Earley] and [Lemon]. Whether the subject is "reme-
dial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and
the danger that religious doctrine will become intertwined with secular instruction per-
sists. The likelihood of inadvertent fostering of religion may be less in a remedial arith-
metic class than in a medieval history seminar, but a diminished probability of
impermissible conduct is not sufficient: "The State must be certain, given the Religion
Clauses, that subsidized teachers do not inculcate religion." And a state-subsidized guid-
ance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occa-
sion to separate religious instruction and the advancement of religious beliefs from his
secular educational responsibilities.
Id. at 370-71 (citations omitted).
constitutionally impermissible "direct and substantial" aid to religious schools and permissible "indirect and incidental" aid is the distinction on which the Court developed the two lines of precedent I mentioned in introducing this part. In one line of cases, running from Meek, to Wolman v. Walter, to Ball and Aguilar, the Court invalidated systematic aid programs as forbidden "direct and substantial" aid. In the other line, including the Court's decisions in Mueller v. Allen, Witters v. Washington Department of Services for the Blind, and Zobrest v. Catalina Foothills School District, the Court upheld other programs by classifying them as "indirect and incidental" aid. The Court's law-transforming technique in Agostini will be to treat the second line of precedent as repudiating the first.

1. The Wolman, Ball, and Aguilar Line

a. Wolman

Wolman, decided two years after Meek, followed Meek's rationale in determining the constitutionality of various forms of aid provided, under a state statute, to religious education. As in Meek, the Court upheld, again on the strength of Allen, a textbook loan provision, and it disapproved, again, a provision for loaning instructional materials—although in Wolman, unlike Meek, the provision was styled as a loan to students and their parents rather than a loan directly to religious schools.

The Court's treatment of the new items of aid was mixed in its results. The Court approved the state's provision and scoring of standardized tests used also in the public schools. Because the tests were prepared and evaluated by the state, the Court contended, they could not be used for religious indoctrination. For that reason, the testing program did not violate the effects test by providing "direct aid" to religion. And because the program presented no serious risk of indoctrination, no entangling supervision of the

89. Wolman, 433 U.S. at 236-38.
90. See id. at 249-51; see also id. at 250 (noting that the instructional materials were indistinguishable in kind from those involved in Meek, and stating that "it would exalt form over substance" if the program's different legal form "were found to justify a result different from that in Meek"). The remark is ironic because the distinction between direct and indirect aid is, at least on its face, one of form rather than substance.
91. Id. at 240.
religious schools would be necessary. The Court further approved speech and hearing diagnostic services, and psychological diagnostic services, to be conducted by state personnel in the nonpublic schools. These state employees' tasks would not be educational in nature, the Court said, and accordingly their services, unlike teaching or counseling, offered no occasion for "the transmission of sectarian views." For that reason, the program did not have the primary effect of advancing religion. Further, because the diagnostic services offered no opportunity for religious indoctrination, the state would not need to engage in entangling supervision.

The Court disapproved, however, a provision authorizing bus transportation for field trips by nonpublic school students. The Court distinguished its holding in Everson v. Board of Education, which had approved state reimbursement for bus transportation to and from schools, including religious schools. Unlike the transportation approved in Everson, the Court explained, field trips were "an integral part of the educational experience," and the planning and direction of those trips offered the opportunity for the religious-school teachers who directed the trips to engage in religious indoctrination. Accordingly, for the state to fund these trips would be impermissible "direct aid" to religious schools' educational function. Moreover, monitoring the field trips to ensure religious neutrality would require entangling government supervision.

The part of Wolman that will be directly relevant in Agostini concerns the Court's treatment of "auxiliary services" to be performed in neutral locations off religious-school premises. Some of these "auxiliary services"—therapeutic psychological and speech and hearing services, guidance services, "remedial services," and services for the handicapped—resemble those at issue in Aguilar and Agostini. The Court noted in Wolman that "the programs are not intended to influence the classroom activities in the nonpublic schools." Further, because state personnel would provide these

---

92. See id. at 238-41. Justice Blackmun's opinion with respect to these services was for a plurality of four only, but three other Justices concurred in the judgment on this point.
93. See id. at 241-44.
94. Id. at 244.
95. See id. at 242.
96. See id. at 244. Meek had invalidated a similar provision, but only because that provision was not severable from the otherwise unconstitutional statute. See Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).
98. Wolman, 433 U.S. at 254.
99. Id. at 252-55.
100. See id. at 254.
101. Id. at 246 n.13. For further analysis of this issue, see infra notes 456-462 and accompanying text.
services off religious-school premises, away from the pressures of a "pervasively sectarian" environment, the Court found the risk of state-funded religious indoctrination to be insignificant. For that reason, there would be no need for entangling supervision.

Wolman, then, is simply a matter of applying Meek to a new set of facts and evaluating the constitutionality of a laundry list of statutory provisions authorizing aid to nonpublic schools. The Court's decision eight years later in Ball, however, develops Meek's effects rationale by deciding the effects question Meek left open: whether "substantial" government expenditures to enrich religious schools' curricula are unconstitutional "direct and substantial" aid. Ball's elaboration of Meek's effects analysis has central significance for purposes of this Article because it is the prime target of the Court's law-transforming decision in Agostini.

b. Ball

In the two programs at issue in Ball—the "Shared Time" and "Community Education" programs—the City of Grand Rapids offered courses to nonpublic school students on the premises of nonpublic schools. Of the forty-one participating schools, forty were "pervasively sectarian." Community Education classes were taught after school to elementary-school students, mostly in subjects included also in the public school curriculum. The teachers generally were full-time employees of the nonpublic schools. The Shared Time program offered "remedial" and "enrichment" courses in reading and mathematics, as well as courses in art, music, and physical education. Public school teachers taught the challenged courses during the regular school day to nonpublic elementary-school students. For each program, the public school district "leased," for a nominal fee, classrooms from the nonpublic schools. Religious symbols were removed from the

102. Wolman, 433 U.S. at 246-47.
103. See id. at 248.
105. Id. at 379.
106. See id. at 376-77 (listing "Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation").
107. See id. at 377. For purposes of the program, these teachers were classified as part-time public-school employees. See id.
108. See id. at 375-76. About 10% of the teachers had taught before in nonpublic schools.
109. See id. at 377. The fee was $6 per classroom per week. The quotation marks around the word "leased" appear in the Court's opinion, suggesting the Court's skepticism that the arrangement was genuinely an arms-length lease transaction.
rooms, and a sign was posted outside declaring the room a public-school classroom.\footnote{110 See id. at 378. The sign read: “Grand Rapids Public Schools’ Room. This room has been leased by the Grand Rapids Public School District, for the purpose of conducting public school educational programs. The activity in this room is controlled solely by the Grand Rapids Public School District.” Id. at 378 n.2.}

The Court held that both programs violated Lemon’s effects test in three ways. First, relying upon Meek, the Court found in both programs a constitutionally unacceptable risk that government-subsidized teachers would engage in religious indoctrination. This risk was most apparent in the Community Education program, in which most of the instructors taught the very same students, in the same religious schools, during the regular school day.\footnote{111 See id. at 386–87.} The argument was more difficult for the Court with respect to the Shared Time program, in which the instructors were mostly full-time public school teachers. Nonetheless, the Court emphasized the effects of the pervasively sectarian environment, in which, as Meek had observed, secular and religious education were intertwined. Shared Time teachers, the Court observed, taught “academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious school day.”\footnote{112 Id. at 388 (citing Meek v. Pittenger, 421 U.S. 349, 371 (1975)). The Court’s observation seems to me more relevant to its other two theories of unconstitutional effect, discussed later in the text.} The fact that the programs’ challengers had identified no instances of actual indoctrination was irrelevant for two reasons: First, the school district did not monitor the program for religious content, and second, neither the teachers themselves, nor religious-school students, nor the parents who placed their children in religious schools, would be likely to report religious indoctrination if it occurred.\footnote{113 See id. at 388–89.} Following Meek, the Court took the “substantial risk” of state-funded indoctrination to be sufficient to invalidate the program—although in Ball, on effects grounds, rather than the entanglement grounds on which Meek had relied.\footnote{114 The Court rejected the argument, offered by Shared Time’s defenders, that the program merely supplemented but did not supplant the religious schools’ existing course offerings. In so holding, the Court noted that the same argument had been made and rejected in Meek. See id. at 388 (quoting Meek, 421 U.S. at 371). The Court rejected this same argument also under the heading of its “subsidization” theory of unconstitutional effect. See infra notes 126–132 and accompanying text.}

Ball’s second theory of unconstitutional effect was one not mentioned in Meek but discussed, the Court said, in other cases: the danger of
“symbolic union” between church and state. In the Court’s words, “[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines.” A “core purpose” of the Establishment Clause, the Court said, would be frustrated if such an identification conveyed a “message of government endorsement or disapproval of religion.”

Ball based its finding of “symbolic union” largely on the location of Shared Time and Community Education classes: pervasively sectarian schools, in which secular and religious education were ordinarily intertwined. In that setting, the Court reasoned, the “students would be unlikely to discern” the difference between the religious school’s regular classes and the government-sponsored Shared Time classes. According to the Court, even the school district’s attempt to distinguish between church and state—the sign proclaiming the classrooms to be public-school classrooms—would stand as “a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day.” Perhaps the best statement of what the Court meant by “symbolic union” is its quotation from Judge Friendly’s statement in Aguilar, companion case to Ball:

Under the City’s plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

The Court found a third unconstitutional effect in Ball—governmental subsidization of religion. This notion of subsidization was an attempt to explain what Meek had meant by “direct and substantial aid.” The Court acknowledged that in classifying programs as permissible “direct and substantial” aid, or impermissible “indirect and incidental” aid, the Court had not always given the terms “direct” and “indirect” the most straightforward significance. In particular, the Court had not drawn the constitutional distinction simply by looking to the aid program’s legal form. In Wolman, for

117. Id.
118. Id. at 391.
119. Id. at 392.
120. Id. (Internal quotation marks omitted) (quoting Felton v. United States Dep’t of Educ., 739 F.2d 48, 67–68 (2d Cir. 1984)).
example, the Court gave no constitutional significance to the fact that the challenged instructional materials were loaned to students and parents rather than directly to the religious schools.\footnote{121} Following \textit{Meek} and \textit{Wolman}, the Court held that because "pervasively sectarian" schools unite religious and secular education,\footnote{122} substantial aid to "the educational function of the religious school" has the unconstitutional effect of advancing religion.\footnote{123} By taking over a substantial function of the religious schools' educational function, the Court explained, the government in effect subsidized the parochial schools' religious mission.\footnote{124} And if the loans of instructional materials considered in \textit{Meek} and \textit{Wolman} amounted to a subsidy to sectarian schools, the Court concluded in \textit{Ball}, then "\textit{a fortiori} that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the parochial school building, 'inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise.'"\footnote{125}

Defenders of the Community Education and Shared Time programs argued that because the challenged courses were supplementary to the schools' curricula, the programs did not subsidize the religious schools. The Court rejected this argument for four reasons. First, the same argument had been made, without success, in \textit{Meek}.\footnote{126} Second, the Court said, "there is no way of knowing" whether the religious schools would have offered the challenged courses without the public support, and "[t]he distinction between courses that 'supplement' and those that 'supplant' the regular curriculum is therefore not nearly as clear as [the programs' defenders] allege."\footnote{127} Third, the Court maintained:

\begin{quote}
[\textit{A}]lthough the precise courses offered in these programs may have been new to the participating religious schools, their general subject matter—reading, mathematics, etc.—was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the 'supplemental' nature of the courses.
\end{quote}

Fourth, "and most important," the notion of "supplemental" classes is sufficiently elastic as to pose no real limit. The Court suggested that a religious school could drop a course from the curriculum, only to replace it a year or so later with a supplemental course in the Shared Time or Community Education program. The Shared Time program, as implemented at the time of the Ball decision, occupied 10% of the typical student's school day.

But there is no principled basis on which this Court can impose a limit on the percentage of the religious school day that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.

The Community Education and Shared Time programs, then, had the unconstitutional effect of "subsidiz[ing] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."

c. 

In Aguilar, the Court invalidated another program of aid to religious education, this time under Meek's entanglement rationale. Aguilar is particularly significant for purposes of this Article: Twelve years later, recapitoned Agostini v. Felton, that same case provided the Court occasion to transform its Establishment Clause doctrine by renouncing the principles established in Ball and Aguilar.

The statutory scheme at issue in Aguilar and later in Agostini, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, provides federal funds to states, and through the states to "local educational agencies" (LEAs), for remedial education and for guidance and

---

129. Id. at 396-97.
130. See id.
131. Id. at 397.
132. Id.
133. Pub. L. No. 89-10, §§ 1001-14802, 79 Stat. 27 (1965). The program, which has been modified in ways immaterial to the Court's decisions in Aguilar and Agostini, see Agostini v. Felton, 117 S. Ct. 1997, 2003 n.* (1997), is presently codified at 20 U.S.C. §§ 6301-8962 (1994). I call it "Title I" throughout this Article, notwithstanding the fact that with amendment and recodification its name has changed. In this matter of nomenclature, I follow Agostini. See Agostini, 117 S. Ct. at 2003 n.*.
counseling services. To be eligible for these services, students must both reside in a low-income area and be either failing or at risk of failing to meet the state's performance standards. LEAs must distribute Title I services "equitably" to public and private schools, including sectarian religious schools. With respect to private school students, the courses and services must be "secular, neutral, and nonideological," and the Title I funds must "supplement," not "supplant," the "amount of funds that would . . . be made available from non-Federal sources." Title I further requires private-school services to be rendered by public employees or others "independent of [the] private school and of any religious organization."

In its original Title I plan, the New York City Board of Education transported private-school children—of whom probably about 90% attended sectarian schools—to public schools after school hours. Soon after, however, the board abandoned that plan because of poor attendance, wear and tear on students and teachers; safety concerns, and difficulties in communication between the children's regular and Title I teachers. Instead, the board decided to provide Title I services on the private schools' premises during school hours. Public school employees taught classes in remedial reading and remedial arithmetic, and provided speech-therapy and guidance-counseling services. The shift to on-premises services saved significant amounts of money and was more effective educationally. In the revised program, the public-school personnel were instructed that they answered only to the public school system, that they should avoid involvement in religious activity at school, and that they should keep their contact with religious-school teachers professional. Religious symbols had to be

134. See Agostini, 117 S. Ct. at 2003 (citing 20 U.S.C. §§ 6315(c)(1)(A), (E), 6314(b)(1)(B)(i), (iv)).
135. See id. at 2003–04 (citing 20 U.S.C. § 6313(a)(2)(B)).
136. See id. (citing 20 U.S.C. § 6315(b)(1)(B)).
138. Id. § 6322(b)(1).
139. Id. § 6321(c)(2)(A), (B).
140. "Probably" because the earliest figure mentioned in the various Aguilar/Agostini opinions is from 1981–82. That figure is 92%: 84% of the nonpublic schools students attending schools affiliated with the Catholic Church and 8% attending Hebrew day schools. See Felton v. United States Dep't of Educ., 739 F.2d 48, 51 (2d Cir. 1984); see also Aguilar v. Felton, 473 U.S. 402, 406 (1985) (same figures), overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997).
141. See Felton, 739 F.2d at 51.
142. See id.: The Supreme Court described the programs as "including remedial reading, reading skills, remedial mathematics, and English as a second language, and guidance services." Aguilar, 473 U.S. at 406.
143. See Felton, 739 F.2d at 51 (noting that a study commissioned for the 1977–78 school year found that the change saved transportation and other expenses that would have been "more than 42% of the budget for the nonpublic school Title I program").
cleared from the classroom before Title I instruction could begin. Finally, New York City's program provided for unannounced visits by field supervisors to check for compliance with these rules.¹⁴

The Court began by noting its decision in the companion case, Ball, which had invalidated programs “very similar” to New York City's Title I plan.¹⁴⁵ “In both cases,” the Court noted, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.¹⁴⁶

Defenders of the city's plan attempted to distinguish Ball, by pointing out that New York, unlike Grand Rapids, had adopted a “system for monitoring the religious content” of instruction and counseling.¹⁴⁷ But this monitoring, the Court maintained, did not fully distinguish Ball and its holding of unconstitutional effect: “At best,” the Court said, “the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school.”¹⁴⁸ Apparently, then, even if the city's monitoring eased concern about state-sponsored indoctrination, the program still would have the unconstitutional effects of creating a symbolic union between church and state and subsidizing religious activity. The Court confirmed this interpretation by noting, in the opinion's closing paragraph, that the city's Title I program violated Lemon's effects test.¹⁴⁹

¹⁴⁴. See Agostini, 117 S. Ct. at 2004-05; Aguilar, 473 U.S. at 406-07; Felton, 739 F.2d at 53.
¹⁴⁵. Aguilar, 473 U.S. at 408-09.
¹⁴⁶. Id. at 409.
¹⁴⁷. Id.
¹⁴⁸. Id.
¹⁴⁹. In the Court's words:

Despite 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. at 414.

Justice O'Connor, in dissent, understood the Court's opinion to rest entirely on an entanglement basis. "Recognizing the weakness of any claim of an improper purpose or effect," O'Connor wrote, "the Court today relies entirely on the entanglement prong of Lemon to invalidate the New
The Court, however, did not analyze in any detail how Ball's effects reasoning applied to the "very similar" but not identical program in Aguilar. Instead, the Court simply carried over Ball's effects premise—that the challenged plan created a substantial risk that public employees would engage in religious indoctrination—and then, as in Meek, focused on the impermissible entanglement that supervision of these employees in parochial schools would cause.

As in prior cases that raised entanglement concerns, the Court noted, the environment in which government provided aid was "pervasively sectarian," and the aid came in the form of services rendered by teachers and counselors, who would require "ongoing inspection . . . to ensure the absence of a religious message." Further, the Court said, the values behind the prohibition on entanglement were implicated in New York City's Title I program. State supervision of Title I instruction in parochial schools threatened to impose bureaucratic control upon religious activity through ongoing governmental monitoring, judgments by government employees as to what is and is not a religious symbol, and ongoing administrative contacts between government and religious schools to work out details of the bureaucratic intervention. As the Court put it (undoubtedly hyperbolically):

&ldquo;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.&rdquo; . . .

&ldquo;The detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." . . . The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. . . . At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"\)

150. See id. at 412 (opinion of the Court).
151. See id. at 414.
152. See id. at 413-14 (citation omitted) (alteration in original) (quoting Lemon v. Kurtzman, 403 U.S. 349, 650 (1975) (Brennan, J., concurring)).
In the Court's view, the Title I program implicated, also, the risk of state favoritism toward a particular denomination, presenting "the dangers of political divisiveness along religious lines." While the Court did not specify which religious lines it had in mind, presumably it was considering the overwhelming percentage of private schools receiving Title I funds that were affiliated with the Roman Catholic church.

Thus, in sum, the Court held the following in *Aguilar*. The program of monitoring, offered as a distinction between the Title I program in *Aguilar* and the "very similar" programs in *Ball*, unconstitutionally entangled government and religion. Further, New York City's Title I program had the unconstitutional effect of advancing religion—although whether only through symbolic union and subsidization or also through indoctrination remains unclear.

d. The Effect of *Ball* and *Aguilar*

The outcomes in *Ball* and *Aguilar* follow straightforwardly from *Meek*. The reasoning in those cases, however, works two changes on prior doctrine: one concerning the entanglement test, and the other concerning the effects test.

The change with respect to the entanglement test is the correction of a conceptual difficulty in the Court's prior uses of that test. Put simply, the difficulty is that *Lemon* and *Meek* invalidated government aid programs by finding only a hypothetical entanglement between church and state. Consider, first, *Lemon*. In that case, the Court said that providing salary supplements to religious-school teachers is unconstitutional because state monitoring of religious education *would* be required, if the state were to be certain that it did not support religious indoctrination. And this monitoring *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision, the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle.
church and state. But here, too, no actual monitoring took place. Why, then, is the entanglement test the basis for invalidation?

Ball and Aguilar, in combination, resolve this difficulty by revising the relation between the two tests. The Community Education and Shared Time programs evaluated in Ball, like the auxiliary services provision invalidated in Meek, sent public employees into religious schools to teach and counsel. In both cases, the Court found a substantial risk that the publicly employed teachers and counselors would engage in religious indoctrination if they were not closely monitored. And in both cases, no actual monitoring took place. But Ball answers the question that Meek ducked in its reliance on the entanglement test: Does this kind of program provide direct and substantial aid to the religious schools' educational function, in violation of the effects test? Ball answers that question in the affirmative. According to Ball, then, if no actual monitoring has occurred, the effects test, not the entanglement test, is the relevant Establishment Clause criterion. Only if monitoring (or other administrative connection between church and state) actually has taken place—as in Aguilar—is the entanglement test the relevant criterion.

Ball also makes modest adjustments in the effects test. Meek and Wolman had suggested that the sole criterion for an effects violation is whether the government has provided direct and substantial aid to religious institutions. Ball adds "symbolic union" as an effects criterion. While the Court attributes this idea of symbolic union to pre-Lemon precedent, it likely had another source in mind. As shortly to be discussed, the year before Ball, Justice O'Connor had suggested government "endorsement" of religion as an Establishment Clause criterion. The Court seeks to incorporate O'Connor's suggestion by noting that its "symbolic union" criterion would be violated if the government "convey[ed] a message of... endorsement or disapproval of religion."

The other two effects criteria Ball employs—state-sponsored or state-financed religious indoctrination, on one hand, and state subsidization of

---

157. See supra note 115 and accompanying text.
159. School Dist. v. Ball, 473 U.S. 373, 389 (1985) (citing Lynch, 465 U.S. at 688 (O'Connor, J., concurring)), overruled in part by Agostini v. Felton, 117 S. Ct. 1997 (1997); id. at 390 ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."); id. at 392 ("[E]ven the student who notices the 'public school' sign temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day.").
religion or religious institutions, on the other—sound indistinguishable, and on their face they bear an uncertain relation to Meek's criterion of "direct and substantial aid to the educational function of religious schools." Consider first the question whether the Court's two criteria are distinguishable. By state-sponsored or state-financed religious indoctrination, the Court seems to focus on whether the state itself is directly engaged in religious indoctrination. In the context of school-aid cases, the core instance is when state personnel—primarily teachers or guidance counselors—themselves participate in religious instruction or counseling. The Court, through its <i>Ball</i> and <i>Aguilar</i> decisions, did not require proof that state employees actually were performing religious indoctrination. Rather, presumably for prophylactic purposes and to ease problems of proof, a substantial risk that they would do so sufficed.

With its subsidization criterion, however, the Court seems to focus on a different way in which government aid could have the effect of advancing religion. Even if state personnel do not themselves directly engage in indoctrination, state financing of religious-school activities could have the subsidizing effect of freeing up the religious school's resources for sectarian purposes. In <i>Meek</i> and <i>Wolman</i>, for example, providing secular instructional materials did not present the risk that those materials themselves would be used for religious indoctrination. What the Court found objectionable, instead, was that this form of aid to the religious school's "educational function" relieved the religious school of the burden of providing similar materials itself. As a result of the government aid, the religious school was better able to expend its scarce resources on specifically religious education.

So understood, both of these effects criteria express the "direct and substantial aid" formulation of <i>Meek</i> and <i>Wolman</i>, though with different focus and emphasis. When state personnel actually engage in religious indoctrination, they provide direct assistance to the religious school's sectarian mission. When the government provides direct and substantial aid to a religious school's educational function, whether or not through the indoctrinating activity of its own personnel, the state on <i>Ball's</i> view has subsidized the religious schools' sectarian activity. In either way, <i>Ball</i>

160. The main problem of proof is the one mentioned in <i>Ball</i>: Without monitoring, no one has sufficient incentive to report instances of religious indoctrination. See <i>supra</i> note 113 and accompanying text.

161. See <i>supra</i> notes 72–75, 90 and accompanying text.

162. <i>Ball</i> does not require programs' challengers to show actual indoctrination. The Court's challenger-friendly formulation of "substantial risk" of indoctrination operates as a prophylactic rule and eases problems of proof. See <i>supra</i> note 160 and accompanying text.
manages, the government has advanced religion by providing direct and substantial aid to the religious school’s educational function.

2. The Mueller, Witters, and Zobrest Line

Two years before Ball and Aguilar were decided, the Court inaugurated a second line of precedent that ran alongside the Meek, Wolman, Ball, and Aguilar line of cases. In these cases—Mueller, Witters, and Zobrest—the Court classified the challenged government aid as indirect and incidental and upheld the program against Establishment Clause challenge. One might wonder why I treat these cases as occupying a line separate from the Meek to Aguilar line, when they, too, operate with the same effects criterion used in Meek. The first reason is that these cases reach the “indirect and incidental aid” conclusion by using principles not used in the Meek line. The second reason is that the Court in Agostini takes these cases themselves to have effected a fundamental transformation in Establishment Clause doctrine. Witters and Zobrest, the Court argues in Agostini, have in effect overruled the line of cases from Meek to Aguilar.

a. Mueller

The statute considered in Mueller was a state tax provision allowing deductions for primary and secondary educational expenses, including tuition, transportation, textbooks, instructional materials, and the like. The challengers to this statute argued that the only significant deductions were for tuition expenses, and that the overwhelming majority of persons who could claim those deductions were parents of children in religious schools. For that reason, they argued, the statute’s primary effect was to advance religion.

In an opinion by then-Justice Rehnquist, the Court posed the question narrowly, as whether the statutory scheme bore “greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down.” Several considerations indicated that the statute resembled the former, approved kind of assistance. First, the Court noted, past cases “consistently have recognized that traditionally [l]egislatures have especially broad latitude in creating classifications...in tax statutes.” As a tax provision, the challenged statute was “entitled to

164. Id. at 394.
165. Id. at 396 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983)).
substantial deference." 66  Second, the Court observed that the statute was facially neutral, making the benefit "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 67  A statute that "neutrally provides state assistance to a broad spectrum of citizens," the Court said, "is not readily subject to challenge under the Establishment Clause." 68  Third, the Court found it significant that the state had "channel[ed] whatever assistance it may provide to parochial schools through individual parents." 69  Even if religious schools received "attenuated financial benefits" 70 because of parents' greater ability to afford tuition expenses, still, funds reached religious schools only indirectly, "as a result of numerous private choices of individual parents of school-age children." 71  In this way, the Court distinguished the cases that had found impermissible direct aid. 72

b.  Witters

Witters was decided one Term after Ball and Aguilar, and three years after Mueller. The issue in Witters was whether the Establishment Clause barred a state agency from providing a tuition grant, under a general statute authorizing vocational assistance to blind persons, to a particular student who planned to use the grant at a Christian college for the purpose of becoming a pastor, missionary, or youth director. The sole question was whether such a grant would violate the effects standard of the Lemon test. The Court decided unanimously, with the opinion authored by Justice Marshall, that the grant was permissible. 73

---

166.  Id.; see also id. at 397 n.6 (referring to "the traditional rule of deference accorded legislative classifications in tax statutes").

167.  Id. at 398 n.8 (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1983)).

168.  Id. at 398-99.

169.  Id. at 399. In so doing, the Court said, the state had "reduced the Establishment Clause objections to which its action is subject." Id.

170.  Id.

171.  Id.

172.  See id. The Court also questioned whether the taxation scheme actually benefited parents of private-school students. Such parents, who paid both taxes to support the public schools and tuition to private schools, yet did not use the public schools' services, were perhaps receiving a "rough return" from the state through the tax deduction provision. See id. at 401-02. The Court further questioned the challengers' statistical analysis, see id. at 400 n.9, and it noted that the Court "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." Id. at 401.

173.  Eight Justices joined the full opinion. Justice O'Connor did not join the section that contained the effects analysis, noting in a short concurrence that she reached the same result.
Although the Court did not rely expressly on Mueller, its opinion tracked Mueller's reasoning. The Court noted that the grant went directly to the student, who chose the institution at which to spend it. Thus, as in Mueller, "[a]ny aid provided under [the state's] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Benefits were "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." The program created no incentive to undertake religious education, the Court noted, and in fact the secular alternatives were more numerous. For these reasons, the Court said, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."

"Further and importantly," the Court said, "nothing in the record indicates that... any significant portion of the aid expended under the [state] program... will end up flowing to religious education." No other person, on the record presented, had used one of the program's grants for religious education. For these reasons, the Court held, distinguishing Ball, the program did not operate as a subsidy to religious education. "The combination of these factors," the Court concluded, made the connection between the state and the religious institution at which the grant was used "a highly attenuated one." The aid did not reach a religious school because of "a state action sponsoring or subsidizing religion."


174. Justice Marshall had dissented strenuously in Mueller, see 463 U.S. at 404 (Marshall, J., dissenting), and presumably for that reason he refused to cite the case for any substantive proposition. Five concurring Justices in Witters, however, wrote separately to suggest Mueller's relevance. See Witters, 474 U.S. at 490 (Powell, J., concurring) ("The Court's omission of Mueller v. Allen... from its analysis may mislead courts and litigants by suggesting that Mueller is somehow inapplicable to cases such as this one. I write separately to emphasize that Mueller strongly supports the result we reach today." (citation omitted) (footnote omitted)); id. (White, J., concurring) ("I agree with most of Justice Powell's concurring opinion with respect to the relevance of Mueller v. Allen... to this case." (citation omitted)); id. at 493 (O'Connor, J., concurring) ("Justice Powell's separate opinion persuasively argues" that Mueller establishes the grant's constitutionality). Chief Justice Burger and then-Justice Rehnquist joined Justice Powell's concurring opinion.

175. Witters, 474 U.S. at 487.
176. Id. (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973), but refusing to acknowledge that Mueller had quoted the same language).
177. See id. at 488.
178. Id.
179. Id.
180. See id.
181. Id.
Zobrest, like Witters, involved the question whether the Establishment Clause bars the government from providing aid, under a general and neutral statute, to a disabled person seeking educational assistance. The statute at issue in Zobrest was the federal Individuals with Disabilities Education Act (IDEA). The assistance sought was an interpreter for a deaf student who attended a Catholic high school. The constitutional difficulty was that the state-paid interpreter would be relaying all of the instruction offered in the sectarian school, including specifically religious instruction.

The Court upheld the provision of an interpreter, relying on Mueller and Witters. As did the programs in both those cases, IDEA makes benefits "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." The statute provides "parents freedom to select a school of their choice," and "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." In fact, the Court said, the case was "even easier" than Mueller and Witters. Because the aid came in the form of services rather than cash, "no funds traceable to the government ever find their way into sectarian schools' coffers." While a school might receive the "indirect economic benefit" of a particular student's tuition, this conclusion rests on a number of assumptions: "that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot."

The Court distinguished Meek and Ball. Meek involved "massive aid" to religious schools, and the "direct grants of government aid" in both Meek and Ball "relieved sectarian schools of costs they otherwise would have borne in educating their students." But in Zobrest, the school would not have provided an interpreter without the IDEA assistance, and thus the aid did not have the effect of subsidizing the religious school by relieving it of costs it otherwise would have borne. The aid, moreover, did not go directly to the religious school, and "any attenuated financial benefit that
parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents,' not to "state decisionmaking." With this reasoning, the Court held that the provision of aid did not offend Ball's subsidization theory of unconstitutional effect. The Court further rejected the argument that providing a government-paid interpreter would violate Ball's first effects standard—the prohibition on state employees' participation in religious indoctrination. The Court reasoned that "the task of a sign-language interpreter" is "quite different from" the tasks of the teachers and guidance counselors whose services were at issue in Ball. The Establishment Clause "lays down no absolute bar to the placing of a public employee in a sectarian school," the Court said, and the religious indoctrination whose content the interpreter faithfully conveyed would be independent of state action. The student's parents chose the sectarian environment, and "[t]he sign-language interpreter they have requested will neither add to nor subtract from that environment." Accordingly, no state employee was responsible for religious indoctrination.

d. Implications of the Mueller, Witters, Zobrest Line

In one sense, the line of cases running from Mueller to Zobrest coexists peacefully with Meek, Wolman, Ball, and Aguilar. Ball and Aguilar, decided two years after Mueller, do not refer to Mueller for any substantive purpose, nor did any of the Ball and Aguilar dissents argue that the decisions in those cases were inconsistent with Mueller. Viewed from the other side, Witters, decided the Term after Ball and Aguilar, specifically distinguishes Ball, as well as Meek and Wolman. Zobrest, decided seven years later, distinguishes both Meek and Ball. The two lines of precedent establish and

190. Id. (quoting Mueller v. Allen, 463 U.S. 388, 400 (1983)).
191. Id. at 10.
192. Id. at 13.
193. Id.
194. Id.
195. See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 n.4 (1986) ("This is not the case described in Grand Rapids School District v. Ball . . . ."); id. at 489 ("[W]hile . . . aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited under the Establishment Clause,' [Ball, 473 U.S.] at 395, because it may subsidize the religious functions of that institution, that observation is not applicable to this case.").
196. See Witters, 474 U.S. at 488.
197. See id. at 487 n.4.
198. See Zobrest, 509 U.S. at 11-13. Zobrest relies on Wolman's approval of forms of aid that Wolman classified as "indirect and incidental." Id. at 10, 13 n.10.
maintain their coexistence with their mutual use of the basic constitutional distinction, expressed in *Meek*, between permissible “indirect and incidental aid” and forbidden “direct and substantial aid.”

Nonetheless, a Court interested in transforming Establishment Clause law could find promising possibilities in the line of precedent that began with *Mueller*. The Court said in *Mueller* that a statute that “neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.”

In that case, as well as in *Witters* and *Zobrest*, the Court considered the program’s generality and neutrality to be only one of several factors pointing to the program’s constitutionality. But if the Court were to make this principle a sufficient condition for a program’s constitutionality, and not merely a necessary condition, then the Court could validate a wide range of aid programs—including a comprehensive school voucher plan, such as the one recently upheld by the Wisconsin Supreme Court.

---

199. See Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 24 (1996) ("*Mueller*, *Witters*, and *Zobrest* show that the Court treats indirect benefits to religious institutions differently from direct benefits.").


201. In one sentence in *Zobrest*, the Court suggested that it might be a sufficient condition. The Court wrote: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Zobrest*, 509 U.S. at 10 (quoting *Witters*, 474 U.S. at 488). The rest of the opinion, however, takes care to distinguish the cases that invalidate direct and substantial aid to religious schools' educational function. And elsewhere in the opinion, as in its use of the passage from *Mueller* quoted above in text, the Court takes the generality and neutrality of a challenged program to be only one factor in determining the program's constitutionality. For these reasons, I do not take the sentence quoted at the beginning of this footnote to be a law-changing statement. Neither, incidentally, does *Agostini* rely on the unusual strength of this sentence in deciding that *Zobrest*, together with *Witters*, so changed the law as to render *Ball* and *Aguilar* no longer good law.

202. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), cert. denied, 67 U.S.L.W. 2184 (U.S. Nov. 9, 1998) (No. 98-376). In *Jackson*, the court upheld a tuition grant program against an Establishment Clause challenge. Under that program, up to 15% of Milwaukee's public school students whose family income does not exceed 1.75 times the federal poverty level are eligible to attend private schools, including sectarian schools, with the state paying at least some of the tuition costs—either the average per-pupil expenditure in the Milwaukee public schools or the private school's per-student costs, whichever is lower. The payment takes the form of a check, given to the student's parents, that may be used only toward tuition at the relevant private school. The program allows participating students to opt out of any religious exercises at the private school. The state aid given to Milwaukee public schools is reduced by the amount paid to parents under the program. See *id.* at 608-09. In upholding this program, the Wisconsin court relied heavily on the *Mueller to Zobrest* line of cases, as well as on *Agostini*—the case, discussed in Part III below, that finds that line of cases effectively to overrule the *Meek to Aguilar* line. See *Jackson*, 578 N.W.2d at 613-19. The Court emphasized the generality and neutrality of the program's eligibility criteria, see *id.* at 617-18, as well as the principle, discussed in the next paragraph of text, that state money flowed to private schools only as a result of private decision making, see *id.* at 618-19.
not themselves place a significant constitutional limit on programs that benefit religious schools. These programs always can be cast so as to make aid available on equal terms to all educational institutions—both public and private, sectarian and nonsectarian.203

Similarly, a transformation of Establishment Clause doctrine could emphasize, as did the cases in the Mueller line, the mediating role that private decision making plays in determining whether and how state aid reaches religious institutions. All students who attend private schools are there by private choice. If it were made sufficient, to establish a challenged program's constitutionality, to show that religious schools would not have received any benefits from state aid absent private decision making, then any program of aid to religious schools could be made constitutionally valid. The technique would be simply to make aid available on a per-pupil basis, so that the religious school would not receive aid but for private decisions by students' parents. This kind of transformation of Establishment Clause doctrine, too, would lead to the upholding of voucher programs.204

Such transformations, however, would require some work on the Court's part. The Court would need to explain why the criteria of "generality and neutrality," or "private decisionmaking," should be sufficient conditions for a program's constitutionality. Or if the Court were to stop short of making these conditions sufficient, it would have to explain why they so strongly favor constitutionality that the principles in the Meek to Aguilar line no longer operate. Further, reliance on the Mueller line would have to acknowledge the peculiarities in each of the cases that arguably distinguish them from the Meek to Ball line: the tax context in Mueller, in which the Court relied upon a principle of "substantial deference" to legislatively established taxation systems, and the fact that both Witters and Zobrest involved aid only to a negligible—or in Meek's term, "insubstantial"—number of students. Or if the Court decided to transform Establishment Clause doctrine more fundamentally—by, for example, overruling Lemon and adopting some other theory of the Establishment Clause's limits,

---

203. Cf. Ira C. Lupu, The Lingering Death of Separationism, 62 GEO. WASH. L. REV. 230, 263-64 (1994) (distinguishing between broad and narrow readings of Zobrest and suggesting that "it may prove to be extremely difficult to distinguish in practice aid to the families of disabled students from financial aid—via tuition vouchers or otherwise").

204. See supra note 202.

205. Mueller, 463 U.S. at 396; see also id. at 396-97 n.6 (referring to "the traditional rule of deference accorded legislative classifications in tax statutes").
independent of the Lemon precedents—then the Court would have to justify such a theory from first principles.

Any transformation of Establishment Clause doctrine would require also a will to change. But in fact, as the next section demonstrates, dissatisfaction on the Court with Lemon had begun to deepen even before Ball and Aguilar were decided, and by the late 1980s a majority of Justices had either proposed or endorsed a test that could serve as an alternative to Lemon. For reasons to be explored, however, general agreement that transformation was desirable did not soon translate into agreement on a particular strategy of transformation.

B. Alternative Tests and Lemon's Uncertain Status

The Meek to Aguilar line of cases was vulnerable from the start. Probably the most apparent weakness is that these cases rested the constitutionality of aid programs on fine distinctions whose constitutional relevance was hardly obvious. According to the Court's decision in Meek, for example, government could provide textbooks to religious-school students, but not instructional materials.\(^\text{206}\) And under the Court's decision in Wolman, government could provide bus transportation to and from religious schools, but not bus transportation for religious schools' field trips.\(^\text{207}\) One can fashion explanations for these distinctions—stare decisis, in the case of textbooks,\(^\text{208}\) and the closer relation of field trips to religious schools' "educational function," in Wolman.\(^\text{209}\) But even if these explanations were sufficient, the Court's underlying constitutional theory would face deeper difficulties, even on its own terms.

One difficulty is that the logical scope of the various effects standards, as presented in Ball, seems to exceed the Court's actual application of those standards.

\(^{206}\) See supra notes 68–78, 89 and accompanying text.

\(^{207}\) See supra notes 97–100 and accompanying text.

\(^{208}\) As explained above, see supra notes 76–78 and accompanying text, the Court permitted textbook loan programs before adopting the Lemon test. The permissibility of such loans survived because of a peculiar coalition: Justices Stewart, Blackmun, and Powell adhered to the pre-Lemon decision for reasons of stare decisis, and on this issue they joined the Justices who were generally untroubled by any of the aid programs the Court considered. See Meek v. Pittenger, 421 U.S. 349, 359–62 (1975) (Stewart, J., joined by Blackmun and Powell, JJ.); see also id. at 385–87 (Burger, J., concurring in the judgment in part and dissenting in part); id. at 388–91 (Rehnquist, J., joined by White, J., concurring in the judgment in part and dissenting in part). Nonetheless, the Court remained committed to a constitutional distinction between books and, for example, maps. This distinction is easy to lampoon. See, e.g., Edward McGlynn Gaffney, Jr., A Case for Vouchers, WASH. POST, June 29, 1998, at A15 (recounting Senator Daniel Patrick Moynihan's question whether "an atlas, a book of maps," would be constitutionally permissible).

\(^{209}\) See supra notes 98–99 and accompanying text.
standards. This difference in scope suggests that the Court applied its standards selectively and without a coherent theory. The subsidization theory provides a good example. In invalidating the Community Education and Shared Time programs, Ball takes a strong view of subsidization. By providing secular instruction in religious schools, the Court explains, the government frees up the schools' resources for specifically religious use and thus subsidizes religious education. This is so, the Court maintains, even if the challenged programs did not supplant existing courses at the religious schools. If the Court were to follow this theory to its logical conclusion, it would have to forbid all government assistance to religious schools, including the “indirect and incidental” aid previously permitted. Any such assistance either subsidizes an existing expenditure at religious schools—thus freeing up the school's resources for specifically religious use—or, if it does not supplant an existing expenditure, it nevertheless would subsidize the religious school by allowing it to offer a new and a better service.

As Ball notes, however, the Court has never consistently taken such a strong view of subsidization. Instead, from Meek to Ball, the Court used the notion of “aid to the religious schools' educational function” as a limiting device, invalidating some forms of aid as impermissible “subsidies” but permitting others. Still, if the constitutional evil is government subsidization of religious institutions, the “educational function” limitation seems ad hoc. Whether the aid goes to the school's educational function or to some other account, in either event the school would be “subsidized”—either in the sense that its resources would be freed up for specifically religious use, or in the sense that it could offer new and more attractive services. Ball's subsidization theory thus seems logically to extend beyond the Court's application of that theory.

A similar difficulty afflicts Ball's “government indoctrination” theory of unconstitutional effect. From Meek to Ball, the Court approached the indoctrination issue by invoking its statement in Lemon: “The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.” The Court used this statement to invalidate aid programs in which the risk of indoctrination seemed slight—for example, the Shared Time program in Ball, in which most of the state-paid teachers were public school employees, teaching secular subjects. The weakness in this approach is that the state never can be certain that its employees will refrain from religious indoctrination—in public schools as well as private schools. As Justice O'Connor observed, dissenting in Ball, if the Court were

to take Lemon's pronouncement literally, government would have to close the public schools.\textsuperscript{211}

The Court, of course, did not apply Lemon's pronouncement literally. Instead, it distinguished among different kinds of public employees according to the risk that they would engage in religious indoctrination. But the Court's attentiveness to the different degrees of risk attributable to different professions only underscored the Court's refusal to ask—when it came to teachers and guidance counselors—whether, under the circumstances presented, the public employees were genuinely likely to engage in religious indoctrination.

The Court's indoctrination theory thus both overenforces and underenforces the Establishment Clause, even by its own criterion of proper enforcement. It overenforces by invalidating, wholesale, programs that involve state-paid teachers and guidance counselors, even those in which the actual instances of indoctrination likely would be few. It underenforces by approving programs involving other kinds of public employees, even though in those instances government cannot be certain that its employees will not engage in religious indoctrination. The Lemon "certainty" pronouncement operates as a convenient invalidating device in cases involving teachers and guidance counselors, but it is quickly forgotten when the activities of other kinds of public employees are at issue.

Moreover, the Lemon framework is vulnerable to more systematic criticism. First, even if we think government is barred from "advancing" religion, as Lemon maintains, from what baseline do we measure advancement? Lemon assumes that the constitutional baseline is no aid, so that any direct or substantial aid to religious schools unconstitutionally advances religion. This baseline might have been uncontroversial in the eighteenth century, before the rise of government-funded public schools. But under present conditions, with massive government aid given to public schools, invalidating all aid to religious schools is at least arguably a form of discrimination against religion rather than a refusal to advance religion. Perhaps a more appropriate baseline is the level of aid given to secular alternatives to religious institutions—public schools, in the present context. Such, at any rate, has been the argument of many commentators.\textsuperscript{212}


\textsuperscript{212} See, e.g., Laycock, \textit{Underlying Unity}, supra note 32; McConnell & Posner, supra note 32, at 10–20; McConnell, \textit{Religious Freedom}, supra note 32, at 183–86; Paulsen, supra note 32, at 804–08 (noting that the no-aid baseline logically should bar any aid to religion, even indirect and incidental aid).
More fundamental objections still have been made against the Lemon test. Why would one think that the tripartite Lemon approach—even apart from its particular specification in the Meek to Aguilar line of cases—accurately expresses the Constitution's theory of impermissible establishment? Why is a law "advancing" religion the same thing as a law "respecting an establishment of religion"? By what standard does entanglement become "excessive entanglement"? Why would the Court choose a test that is worded in terms of a conclusion ("excessive entanglement")? The original explanation of the Lemon test was that it stated the factors the Court's developing case law had applied. But if one calls that case law into question, asking whether the Court had erred even in its pre-Lemon cases—a question most naturally asked from an originalist or historicist position in constitutional theory—then the Lemon framework would be more vulnerable still.

With changes in the Court's personnel, the Justices grew more inclined to ask such questions and to criticize the difficulties in the Lemon approach. By the mid-1980s, a number of systematic alternatives to Lemon began to appear. The first was one I have mentioned already: Justice O'Connor's endorsement theory, announced in 1984, the year before Ball and Aguilar were decided. On that theory, first suggested as a "clarification" of Establishment Clause doctrine, courts should inquire under the purpose part of the Lemon test "whether the government intends to convey a message of endorsement or disapproval of religion." Under the effects part, the question is whether a challenged practice has "the effect of communicating a message of government endorsement or disapproval of religion."

213. In 1981, Justice O'Connor replaced Justice Stewart, who had authored Meek. That, it turned out, left only five votes for the Meek approach. When Justice Scalia joined the Court in 1986, the Meek/Aguilar approach had only four remaining adherents.

214. I omit the views of former Chief Justice Burger, author of the Lemon test but soon a frequent dissenter from later invalidating decisions, and the views of Justice White, who did not join the Lemon opinion and disagreed fundamentally with its approach. See, e.g., Lemon, 403 U.S. at 661-71 (White, J., concurring in the judgments in part and dissenting in part).

215. See supra notes 116, 119, 157-159 and accompanying text.

216. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); see also County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (offering the endorsement test as a "clarification of our Establishment Clause doctrine"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (stating that because the statute conveyed a message of endorsement, it had the "effect of advancing religion" and was therefore unconstitutional). I say "first suggested as a clarification" because later, in the Kiryas Joel case, O'Connor seems to recognize differences between the endorsement test and the Lemon approach. See infra notes 271-277 and accompanying text.

217. Lynch, 465 U.S. at 691 (O'Connor, J., concurring); see also id. at 690 ("The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion.")
religion," \textsuperscript{218} judged from the standpoint of an "objective observer." \textsuperscript{219} O'Connor's first presentation of the endorsement test preserved, by its side, a revised version of the \textit{Lemon} entanglement test. The test was revised in the sense that O'Connor understood it to reach only "institutional entanglement," or excessive entanglement between government and religious institutions; it did not include the more diffuse considerations of "political divisiveness" mentioned in the Court's early applications of the entanglement inquiry. \textsuperscript{220}

O'Connor enjoyed particular power on the Court in Establishment Clause matters. Her endorsement theory placed her in a middle position between those who would maintain the aggressive \textit{Lemon} approach exemplified in \textit{Ball} and \textit{Aguilar}—a group that by 1986 comprised less than a majority of the Court—and the soon-increasing group of Justices who preferred a far more lenient test. \textsuperscript{221} O'Connor's vote, then, was much in demand, and her endorsement test quickly achieved significant success. As noted above, endorsement was one basis for the Court's holding in \textit{Ball} that the challenged programs had unconstitutional effect. \textsuperscript{222} The endorsement test appeared in other opinions for the Court as well—though, consistent with O'Connor's presentation of the endorsement test as a "clarification," it appeared alongside or within, rather than instead of, the \textit{Lemon} test. \textsuperscript{223} As will become clear, however, O'Connor did not gain support for her theory from the other Justices most critical of \textit{Lemon}.

The year after O'Connor announced her endorsement theory, then-Justice Rehnquist filed a lengthy dissent in \textit{Wallace v. Jaffree}, \textsuperscript{224} denouncing the \textit{Lemon} test and the "wall of separation" metaphor on which the Court's modern Establishment Clause precedent is founded. Rehnquist maintained that "[t]he true meaning of the Establishment Clause can only be seen in its history," and specifically in the historical record of the Framers' intentions. \textsuperscript{225} What that record disclosed, he argued, was that "[t]he Framers

\vspace{1em}

\textsuperscript{218} \textit{Id. at 692.}  
\textsuperscript{220} \textit{See Lynch, 465 U.S. at 687-89 (O'Connor, J., concurring).}  
\textsuperscript{221} \textit{See supra notes 116-117, 157-159 and accompanying text.}  
\textsuperscript{222} \textit{See supra notes 116-117, 157-159 and accompanying text.}  
\textsuperscript{224} \textit{472 U.S. at 91-114 (Rehnquist, J., dissenting).}  
\textsuperscript{225} \textit{Id. at 113.}
intended the Establishment Clause to prohibit the designation of any church as a ‘national’ one and “to stop the Federal Government from asserting a preference for one religious denomination or sect over others.”226 With the incorporation of the First Amendment into the Fourteenth, “[s]tates are prohibited as well from establishing a religion or discriminating between sects.”227 The Establishment Clause does not “require[e] 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.”228 In announcing this standard, Justice Rehnquist differentiated his nonpreferentialist approach not just from the Lemon framework,229 but from O’Connor’s endorsement test as well.230

Justice Kennedy weighed into the Lemon controversy with his opinion in County of Allegheny v. ACLU.231 Kennedy proposed a “coercion” test that would invalidate actions that “further the interests of religion through the coercive power of government,” either by “compelling or coercing participation or attendance at a religious activity” or by “delegating government power to religious groups.”232 Acknowledging both “[p]ersuasive

226. Id.
227. Id.
228. Id.
229. Particularly striking was Rehnquist’s statement that “the Lemon test has never been binding on the Court.” Id. at 112.
230. See id. at 113–14.

It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from “endorsing” prayer. . . . Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any . . . “endorsement” of prayer.

Id.

232. Id. at 660; cf. id. at 659.

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so.


The Chief Justice’s decision to join Kennedy’s opinion is interesting in view of the significant differences between the coercion test and the nonpreferentialist approach the Chief Justice defended in Wallace v. Jaffree. See McConnell, Coercion, supra note 32, at 936 (“It is easy to imagine forms of nonpreferential aid, short of establishing a national church, that nonetheless would have the effect of coercing a religious observance.”). The Chief Justice’s willingness to join Kennedy’s opinion suggests that he is interested not so much in the details of the test, or its complete fidelity to the history he invokes in Wallace, as in ensuring simply that the governing test would invalidate only a very few governmental actions.
criticism" of the Lemon framework and the fact that some of the Court's cases had rejected his coercion theory, Kennedy suggested that "[s]ubstantial revision of our Establishment Clause doctrine may be in order." That task of revision, Kennedy said, was "unnecessary to undertake" in Allegheny. But while Kennedy was "content for present purposes to remain within the Lemon framework," he noted pointedly that he did "not wish to be seen as advocating, let alone adopting, that test as [the] primary guide." Kennedy's rejection of O'Connor's endorsement test was more definitive: He described it as "novel," "flawed in its fundamentals and unworkable in practice," insufficiently respectful of longstanding historical practice, "trivializ[ing]" of constitutional adjudication in its fact-specificity, and tending in its application to favor larger over smaller denominations.

Kennedy's coercion test had its moment in the spotlight in Lee v. Weisman, when a majority of the Court joined his opinion invalidating, as unconstitutionally coercive, a clergy-led prayer at a public-school graduation. The key to Kennedy's ability to gain a majority for this approach lay in the retirement of Justice Marshall at the end of the preceding Term. With the ascension of Justice Thomas to the Court, only four Justices remained who were committed to either the Lemon or the endorsement approach. That put Kennedy in a powerful position. He authored the Court's opinion, and the other four members of the Lee majority signed it, writing separately to note that the same result could be reached on either Lemon or endorsement grounds.

233. Allegheny, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
234. See id. at 661.
235. Id. at 656.
236. Id.
237. Id. at 655.
238. Id. at 669.
239. See id. at 669–74.
240. Id. at 674; see also id. at 674–76.
241. See id. at 677. But see McConnell, Religious Freedom, supra note 32, at 162–65 (arguing that there may be little practical difference between Kennedy's and O'Connor's tests, though Kennedy's is probably slightly narrower).
243. See id. at 599.
244. See Paulsen, supra note 32, at 819 n.97.
246. See Lee, 505 U.S. at 604 (Blackmun, J., concurring) (arguing that "proof of government coercion is not necessary to prove an Establishment Clause violation" and finding the challenged prayer to violate both Lemon and endorsement principles); id. at 609 (Souter, J., concurring) (rejecting Rehnquist's nonpreferentialist theory; arguing that coercion, "over and above state endorsement of religious exercise or belief," is not a "necessary element of an Establishment
But the coercion test's victory in Lee was at best equivocal. Presumably to secure the votes of the four Justices who joined him as to the outcome, but not as to the desirability of the coercion test, Kennedy expressly refused the solicitor general's request that Lemon be overruled. Instead, he wrote, whatever "the definition and full scope" of the Establishment Clause might be, the Clause guarantees "at a minimum . . . that government may not coerce anyone to support or participate in religion or its exercise."

Kennedy's conclusion that the prayer challenged in Lee involved "indirect coercion," and his reliance on social-psychological theories of "peer pressure," brought predictable scorn from Justice Scalia, joined by the Chief Justice and Justices White and Thomas. Scalia, who had both authored an earlier opinion critical of the purpose part of the Lemon test and signed Kennedy's announcement of the coercion theory in Allegheny, made clear in his Lee dissent that he would support Lemon's overruling. Indeed, he suggested that the Court's failure to apply Lemon in Lee might have signaled Lemon's demise already: "[T]he interment of that case," Scalia wrote, "may be the one happy byproduct of the Court's otherwise lamentable decision."

---

247. Id. at 586-87 (opinion of the Court).
248. As Michael Stokes Paulsen points out, he did have five votes to adopt the coercion test and five votes to invalidate the prayer. See Paulsen, supra note 32, at 824-25. But the four Justices who joined as to the outcome did not accept the coercion theory, and the four who agreed with the coercion theory disagreed with Kennedy as to the outcome.
249. Lee, 505 U.S. at 586.
250. Id. at 587.
251. Id. at 592.
252. Id. at 593-94.
253. See id. at 631-46 (Scalia, J., dissenting). Still, Paulsen, who defends the coercion test, agrees with Kennedy as to the result in Lee. See Paulsen, supra note 32, at 820 n.100, 821, 828-31. Paulsen disagrees, however, with Kennedy's invocation of indirect coercion and peer pressure. See id. at 832-38.
256. Lee, 505 U.S. at 644.
But *Lemon* was not yet dead. In the *Lamb's Chapel v. Center Moriches Union Free School District* case the next Term, the Court invoked *Lemon* in rejecting a school district's defense that it was required by the Establishment Clause to deny after-school access by a religious group. Scalia responded:

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* . . . conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it.

Scalia went on to note that six (now five) sitting Justices had written or signed opinions criticizing *Lemon*. And he vowed for the future: “I will decline to apply *Lemon*—whether it validates or invalidates the government action in question.”

Scalia noted further that he could not join the Court's opinion in *Lamb's Chapel* because of its suggestion that endorsement was an Establishment Clause standard.

But despite the general dissatisfaction with *Lemon*, the very proliferation of alternative tests had prevented a majority of Justices from agreeing upon any particular *Lemon*-replacing standard. The issue of *Lemon*'s status remained unsettled. The Court seemed to be temporizing, deciding the *Zobrest* case, for example, by employing the particularized categories developed under *Lemon*'s aegis, but studiously avoiding, to the extent possible, reference to *Lemon* itself.

When the Justices next addressed the issue of *Lemon*'s status, they did so in a context that, on one point, encouraged greater agreement among those who had criticized *Lemon*. The case was *Kiryas Joel*, and the point on which *Lemon*'s critics agreed was that, at a minimum, the *Lemon*-following

---

257. Cf. Paulsen, supra note 32, at 821–25 (arguing that *Lemon* is dead and the coercion test has replaced it). Paulsen likely would have been right, had Justice White, the fifth member of the *Lee* “doctrinal majority” that favored the coercion test, id. at 825, not retired at the end of the Term. See id. at 862 (recognizing the effect that White's departure might have on “The Coercion Five”).


259. Id. at 398 (Scalia, J., concurring in the judgment) (citation omitted).

260. The number went from six to five with Justice White's retirement.

261. See *Lamb's Chapel*, 508 U.S. at 398–99 (Scalia, J., concurring in the judgment).

262. Id. at 399–400.

263. See id. at 400. Justice Thomas joined Scalia's opinion, and Justice Kennedy stated his agreement on both points that Scalia mentioned: “[T]he Court's citation of *Lemon*,” as well as its “use of the phrase 'endorsing religion,'” was “unsettling and unnecessary.” Id. at 397 (Kennedy, J., concurring in part and concurring in the judgment).
decisions in *Ball* and *Aguilar* should be overruled. This agreement, it will turn out, gave the Court at least a modest agendum for transforming Establishment Clause doctrine—the agendum pursued, three years later, in *Agostini*.

C. *Kiryas Joel* and the Justices' Law-Transforming Agenda

The *Kiryas Joel* case arose out of attempts to provide special education services to the handicapped children of the Satmar Hasidim, a sect of Hasidic Jews who had established a religious enclave in Orange County, New York. The enclave, a 320-acre village within the town of Monroe, was occupied entirely by Satmars. The Satmars' practice was to avoid assimilation into the surrounding community and to educate their children in religious schools. These schools, however, did not provide services for handicapped children. Instead, the Monroe-Woodbury Central School District offered such services at an annex to one of the religious schools until, after *Aguilar* and *Ball*, the district terminated that arrangement. The affected Satmar children then enrolled in the Monroe-Woodbury public schools, but assimilation into the secular world proved too traumatic and disorienting. In response to the plight of these Satmar children, the New York legislature created a special school district, coextensive with the village of Kiryas Joel, that could provide special education for the handicapped children of the Satmar community. The Court, in the *Kiryas Joel* case, declared the creation of this school district unconstitutional.

Thus although neither *Ball* nor *Aguilar* figured in the reasoning that decided *Kiryas Joel*, they were the decisions that had prompted the legislative act declared unconstitutional. That connection provided the occasion for the critical comments directed at *Ball* and *Aguilar* in three of the *Kiryas Joel* opinions. Each opinion noted that the case would not have arisen but for *Ball* and *Aguilar*; each asserted, or at least strongly suggested, that those decisions were mistaken and should be overruled.

Justice O'Connor stated her belief that the arrangement terminated in response to *Aguilar* was entirely constitutional:

> The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion.

---

264. I take this account of the facts in *Kiryas Joel* from the Court's opinion. See Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 690–93 (1994).

265. Political pressures, too, likely motivated the legislature. See Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 118–19 (1996) (detailing the political influence of village leaders and concluding that the creation of the special school district "showed all the marks of insider politics").
All handicapped children are entitled by law to government-funded special education. . . . If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

I thought this to be true in Aguilar, . . . and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. . . . It is the Court's insistence on disfavoring religion in Aguilar that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider Aguilar, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, toward religion.266

Although Justice O'Connor spoke of "reconsider[ing]" Aguilar, her remarks made plain enough that she meant "reconsider and overrule."

Justice Kennedy noted that the problem considered in Kiryas Joel was "attributable in no small measure to what I believe were unfortunate rulings by this Court."267 He elaborated:

The decisions in [Ball] and Aguilar may have been erroneous. In light of the action before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a later date. . . . But for [Ball] and Aguilar, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described.268

Still, Kennedy concluded, "[o]ne misjudgment is no excuse . . . for compounding it with another. We must confront this litigation as it comes before us, without bending rules to free the Satmars from a predicament into which we put them."269

Justice Scalia, joined by the Chief Justice and Justice Thomas, noted Kennedy's and O'Connor's criticisms of Ball and Aguilar. "I heartily agree," Scalia wrote, "that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity. . . ."270

---

266. Kiryas Joel, 512 U.S. at 717-18 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor mentioned Aguilar also in the course of discussing the Lemon test's shortcomings as a "unitary test," id. at 719: "Entanglement' is discovered in public employers monitoring the performance of public employees—surely a proper enough function—on parochial school premises, and in the public employees cooperating with the school on class scheduling and other administrative details." Id. (citing Aguilar v. Felton, 473 U.S. 402, 413 (1985), overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997)).
267. Id. at 730 (Kennedy, J., concurring in the judgment).
268. Id. at 731.
269. Id. at 731-32.
270. Id. at 750 (Scalia, J., dissenting).
The statements of these five Justices indicated that the Court had set itself at least a limited agenda for transforming Establishment Clause law: overrule \textit{Ball} and \textit{Aguilar}. The question, though, was under what framework? Would the Court go further and overrule \textit{Lemon} as well? And if so, could the Court reach agreement on a test to replace \textit{Lemon}?

Justice O'Connor's \textit{Kiryas Joel} concurrence addressed these questions, though her answers were far from clear. On one hand, she seemed no longer to understand her own approach as merely a "clarification" of \textit{Lemon}. Understood as a "unitary" Establishment Clause standard, she said, \textit{Lemon} had "with some justification" been criticized as "so vague as to be useless." While the impulse toward "a single test, a Grand Unified Theory that would resolve all the cases" is in one sense "appealing," O'Connor wrote, at the same time the use of \textit{Lemon} as unitary standard had directed the Court's attention away from relevant differences among various Establishment Clause contexts. It had led the Court, further, to create an increasingly arcane set of distinctions that had "deform[ed] the language of the test" and had departed from everyday understandings of the relevant \textit{Lemon} terms (such as "primary effect" and "entanglement"). The "bad test," O'Connor suggested, had begun to "drive out the good," and by the "good" tests she meant inquiries that were "narrower" and more "precise" than the "bad," "broad," "amorphous and distorted" \textit{Lemon} test. For these reasons, O'Connor seemed to say farewell to \textit{Lemon}. "[T]he slide away from \textit{Lemon}'s unitary approach is well under way," O'Connor wrote, and "[a] return to \textit{Lemon}, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions."

But what, in O'Connor's view, should replace \textit{Lemon}? One might have thought, before reading her criticism of "unitary" frameworks, that her answer would be the endorsement test. Yet neither could that test, O'Connor indicated, provide a "unitary" approach valid in all Establishment Clause contexts. The endorsement test, she suggested in \textit{Kiryas Joel}, 512 U.S. at 718-19 (O'Connor, J., concurring in part and concurring in the judgment).

---

\textsuperscript{271} This was her characterization of the endorsement test when she introduced it in \textit{Lynch}. \textit{See supra} note 216 and accompanying text.

\textsuperscript{272} \textit{Kiryas Joel}, 512 U.S. at 718-19 (O'Connor, J., concurring in part and concurring in the judgment).

\textsuperscript{273} \textit{id.} at 718.

\textsuperscript{274} \textit{See id.}

\textsuperscript{275} \textit{id.} at 719.

\textsuperscript{276} \textit{id.} at 720.

\textsuperscript{277} \textit{id.} at 721.

\textsuperscript{278} Christopher Eisgruber points out that O'Connor may always have understood endorsement principles as something other than a unitary test. As Eisgruber observes, she applied the endorsement test in cases involving "public sponsorship of religious displays and observances," but
Joel, was most appropriate for "[c]ases involving government speech on
religious topics," such as the cases involving religious holiday displays on
government property. In other contexts, however—such as the Kiryas Joel
case itself, in which the question involved "[g]overnment delegations of
power to religious bodies"—other non-Lemon, nonendorsement principles
would be appropriate. While perhaps one day "a unified, or at least more
unified" test might "distill" from future cases, until then, she said, a plurality
of more fact-specific tests would be appropriate. Establishment Clause
law, O'Connor concluded, "will better be able to evolve... [if] freed from
the Lemon test's rigid influence" and "distorted framework." Yet for
O'Connor, "abandoning the Lemon framework need not mean abandoning
some of the insights that the test reflected, nor the insights of the cases that
applied it."

Justice Scalia could not let O'Connor's remarks on Lemon go without
comment. Scalia might have been encouraged by O'Connor's sharper criti-
cisms of, and past-tense references to, the Lemon approach. But the sugges-
tion that it be abolished and "replace[d]... with nothing," or at least
nothing more than "a series of situation-specific rules," only recapitulated
the error of Lemon:

The problem with (and the allure of) Lemon has not been that it is
"rigid," but rather that in many applications it has been utterly
meaningless, validating whatever result the Court would desire.... To
replace Lemon with nothing is simply to announce that we are now so
bold that we no longer feel the need even to pretend that our hap-
hazard course of Establishment Clause decisions is governed by any
principle.

not in Ball or Aguilar—decided one year after she had announced the endorsement test. See
Eisgruber, supra note 32, at 1310–11.

279. Kiryas Joel, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the
judgment) (citing, inter alia, County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v.
Donnelly, 465 U.S. 668 (1984)); see also Capitol Square Review and Advisory Bd. v. Pinette, 515
U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (applying the
endorsement test, post—Kiryas Joel, in a case involving the Klu Klux Klan's request to display a
cross on a statehouse plaza).

280. Kiryas Joel, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the
judgment).

281. Id. at 721; cf. Eisgruber, supra note 32, at 1304–12 (defending a modified version of the
endorsement test for cases involving "official prayers and publicly sponsored religious displays").

282. Kiryas Joel, 512 U.S. at 721 (O'Connor, J., concurring in part and concurring in the
judgment).

283. Id.

284. Id. at 751 (Scalia, J., dissenting) (citation omitted).
The “principle” with which Scalia would replace *Lemon* was “fidelity to the longstanding traditions of our people.” This Establishment Clause inquiry, Scalia insisted, would not (unlike O’Connor’s “evolving” standards) leave the Court to its “own devices.”

For present purposes, then, *Kiryas Joel* is significant in three respects. First, it made explicitly clear that a majority of the Justices were prepared, at a minimum, to overrule *Aguilar* and significant parts of *Ball*. Second, after O’Connor’s *Kiryas Joel* concurrence, five Justices now were on record clearly opposing not just the way in which *Aguilar* and *Ball* had applied *Lemon* principles, but the *Lemon* framework itself—at least when understood as a “unitary test.” But third, the difference between the O’Connor and Scalia opinions in *Kiryas Joel* made clear that the five Justices most interested in transforming Establishment Clause law still had not settled upon a *Lemon*-replacing standard. The Court had agreement on one limited agenda of transformation, but not on the broader principles by which Establishment Clause doctrine should be transformed.

D. Response to the *Kiryas Joel* Invitation

*Kiryas Joel*’s pointed statements about *Ball* and *Aguilar* read like an invitation for a request that those cases be overruled. Perhaps the five Justices who issued that invitation intended to address it to the New York legislature or to local Kiryas Joel officials, who could have responded to the Court’s invalidation of the special school district by reinstating the original plan terminated because of *Ball* and *Aguilar*. But the invitation was answered instead by the New York City Board of Education, still operating under the twelve-year-old injunction entered in *Aguilar*. Just shy of one year after the Court’s *Kiryas Joel* decision, the board authorized its counsel to seek *Aguilar*’s reconsideration. The form in which the board sought relief was a motion, under Rule 60(b) of the Federal Rules of Civil Procedure, for relief from the *Aguilar* judgment. The board invoked, in particular, clause (5) of the Rule, which provides:

(b) Mistakes; Inadverterence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.—

285. *Id.*

286. *Id.* But see Paulsen, supra note 32, at 839–41 (criticizing, as a “classic example of result-oriented reasoning,” the idea “that a legal test must be wrong if it would invalidate longstanding traditional practices”).

On motion and upon such terms as are just, the court may relieve a party... from a final judgment, order, or proceeding... [when]:

(5)... it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time... 288

In seeking relief under Rule 60(b)(5), the board relied on the Supreme Court's gloss in Rufo v. Inmates of Suffolk County Jail: 289 Relief from an injunction is appropriate if the moving party can show "a significant change either in factual conditions or in the law." 290 The board's argument for a "significant change... in the law" depended, the district court recognized, "most heavily on the opinions in Kiryas Joel." 291 Although the board argued that the district court itself had authority to "pronounce Aguilar dead" and to grant relief from the judgment, 292 the court interpreted this argument to seek, "at bottom," only a "procedurally sound vehicle to get the issue back before the Supreme Court." 293

---

288. FED. R. CIV. P. 60(b)(5).
290. Id. at 384; see also id. at 388 ("[M]odification... may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."). Rufo speaks in terms of a consent decree rather than an injunction, but the statement applies to both kinds of order. See Agostini v. Felton, 117 S. Ct. 1997, 2006 (1997); see also System Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("There is... no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.").
291. Felton v. United States Dep't of Educ., No. 78-CV-1750 (E.D.N.Y. May 20, 1996) (unpublished memorandum and order), reprinted in Petition for a Writ of Certiorari, Appendix at 15, Agostini, 117 S. Ct. at 1997 (No. 96-552); see also Agostini, 117 S. Ct. at 2006 (arguing that the law had changed, the board "pointed to the statements of five Justices in [Kiryas Joel] calling for the overruling of Aguilar").
293. Id. The federal secretary of education supported the board's underlying legal position but argued that only the Supreme Court had authority to declare Aguilar's demise: [T]he Secretary states that although the motion cannot be granted, "we should not be understood to suggest that a reconsideration of [Aguilar] would be inappropriate in the Supreme Court. . . . We preserve our right to support a request by the [Board] that the Supreme Court reconsider its ruling in this case." Id. at 17 n.3.
The district court acknowledged that Rule 60(b) responds to competing concerns. On one hand, the rule is designed to do justice in particular cases, when the circumstances that once justified the original judgment have changed. On the other hand, application of the rule must respect also the principle of finality, and for that reason, "Rule 60(b) may not be used as a substitute for appeal."\textsuperscript{294} The court resolved this tension in favor of the board.

"There could have been no further appeal from the adverse decision by the Supreme Court in 1985," the court pointed out, and "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now."\textsuperscript{295} In these circumstances, the district court concluded, "allowing the defendants to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done."\textsuperscript{296} For these reasons, the district court held, the board's Rule 60(b)(5) motion was "procedurally firm."\textsuperscript{297}

The district court, however, proceeded to deny the motion on the merits. The court stated:

There may be good reason to conclude that Aguilar's demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, it does seem clear to me that the Board should be permitted to seek the reconsideration of Aguilar that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.\textsuperscript{298}

The Second Circuit affirmed without opinion, "substantially for the reasons stated" in the district court's memorandum and order.\textsuperscript{299} The board, joined

\textsuperscript{294} Id. at 18.
\textsuperscript{295} Id.; see also id. at 16 (stating that "the life expectancy of Aguilar itself is, to put it mildly, subject to question," and citing the various opinions in Kiryas Joel).
\textsuperscript{296} Id. at 18.
\textsuperscript{297} Id. at 19. The district court also held that the law of the case doctrine did not apply because, under Second Circuit precedent, the doctrine was "limited by discretion and should be discarded for a compelling reason such as an intervening change of law . . . ." Id. at 18 (internal quotation marks omitted).
\textsuperscript{298} Id. at 19. The district court noted also that challenge under Rule 60(b)(5) was "far preferable to contemptuously defying the injunction by placing teachers back in the parochial schools, the course that, according to counsel for plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction." Id.
by a group of parochial school parents who wanted Title I services restored on-premises, and also by the federal secretary of education, petitioned for certiorari and asked the Court to overrule Ball and Aguilar.

For reasons I suggest in Part IV, the prudent course of action—even from the point of view of the five Justices committed to overruling Ball and Aguilar and revising Establishment Clause doctrine—would have been for the Court to deny review. The Rule 60(b) context, I argue, kept the Court from getting a clear shot at Ball and Aguilar in particular, and kept it from being able to reform Establishment Clause law more generally.

But perhaps impatient to reach the issues it had flagged two-and-one-half years before, the Court granted certiorari in the case, now captioned Agostini v. Felton, and pursued its transformation of Establishment Clause law in that case's inhospitable context.

III. AGOSTINI: FINDING A CHANGE IN THE LAW

A. The Rule 60(B)(5) Problem

Thus, by the time the Court considered Agostini, five Justices had come to agree that Aguilar and significant parts of Ball should be overruled, and they agreed also that the principles governing this school-aid branch of Establishment Clause doctrine should be revised. They agreed, further, that the Lemon test was no longer satisfactory—though they disagreed as to what test should replace it.

Had the Court undertaken its law-reform activities in a case untroubled by Agostini's Rule 60(b)(5) complications, it would have had a relatively free hand in completing its most particular project: overruling Ball and Aguilar. Toward this end, any of the various theories that had come to compete with Lemon would have sufficed—whether Justice O'Connor's endorsement test, Justice Kennedy's coercion test, or the tests defended by the Chief Justice and Justices Scalia and Thomas. Alternatively, without definitively adopting one of these tests, the Court could have explained that the principles of the Mueller, Witters, and Zobrest line of Lemon-inspired cases should be extended in the way I suggested above—by taking the principle of a program's generality and neutrality, and the mediating role of private decision making, to be sufficient conditions for

300. 117 S. Ct. 759 (1997). The first-named member of the parents' group that sought relief from the Aguilar injunction was Rachel Agostini, replacing Yolanda Aguilar—thus the case's changed name.

301. See supra notes 200–205 and accompanying text.
the program's constitutionality.\textsuperscript{302} Or the Court could have postponed adoption of a definitive, Lemon-replacing test, holding only that \textit{Ball} and \textit{Aguilar} were wrongly decided under any of the theories that competed with \textit{Lemon}. In short, if the Court had reconsidered \textit{Ball} and \textit{Aguilar} outside of the Rule 60(b) context, it could have overruled those cases unproblematically, even if no single Establishment Clause test could have commanded a majority's allegiance.

The Rule 60(b)(5) context, however, complicated the Court's law-transforming strategy immensely. That Rule sharply limited the Court's freedom to adopt a Lemon-replacing test, and it restricted even the Court's ability to overrule \textit{Aguilar} and \textit{Ball}. As the Court acknowledged, the change in the law that could justify relief under Rule 60(b)(5) had to precede the Court's decision in \textit{Agostini}—or, as the Court put it, \textit{Agostini} could only "recogniz[e]" a change in the law worked by pre-\textit{Agostini} cases; it could not itself "effect[ ]" that change.\textsuperscript{303} The Court, therefore, could not decide simply that, from its present perspective, it would like to change the law and overrule \textit{Ball} and \textit{Aguilar}. Instead, the Court had to parse its decisions post-\textit{Agular} and pre-\textit{Agostini} to determine whether any of those decisions had, in the Court's phrase, \textit{already} "so undermined \textit{Aguilar} that it is no longer good law."\textsuperscript{304}

This task of searching the Court's precedents for a law-changing decision was not easy. The most obvious candidate was \textit{Kiryas Joel}—the only case in which a majority of Justices had criticized either \textit{Ball} or \textit{Aguilar}. Yet, relying on the distinction between holding and dictum, the Court noted that "the question of \textit{Aguilar}'s propriety was not before" the Court in \textit{Kiryas Joel}. Accordingly, "[t]he views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law."\textsuperscript{305} The next most obvious candidates were the cases in the \textit{Mueller} to \textit{Zobrest} line. These, indeed, were the cases in which the Court, in \textit{Agostini}, chose to find the required change in the law. As my earlier discussion of those cases already has suggested, however, the decisions in the \textit{Mueller} to \textit{Zobrest} line certainly do not explicitly overrule \textit{Ball} and \textit{Aguilar}, but instead distinguish them and operate within the same Lemon framework. The \textit{Mueller} line provides opportunity for a Court interested in changing the law, but finding them \textit{already} to have changed the law, I argue, is untenable.\textsuperscript{306}

\begin{footnotes}
\item[302.] See \textit{supra} notes 202–205 and accompanying text.
\item[304.] \textit{Id.} at 2007.
\item[305.] \textit{Id.}
\item[306.] See \textit{infra} Part IV.A.
\end{footnotes}
The Rule 60(b)(5) context presented the Court with an additional difficulty. The Court in Agostini was reviewing the Second Circuit’s affirmance of a district court judgment denying relief. The basis for the lower courts’ action was that Aguilar was the controlling Supreme Court precedent—it was, after all, a ruling in the very same case, not yet overruled by the Court. To reverse the Second Circuit’s decision, one would think, the Court would have to determine that the lower courts erred in denying relief. That, however, would seem to mean that the lower courts had power to determine that Aguilar, an obviously applicable Supreme Court case not expressly overruled, was so undermined by subsequent Court decisions as to be no longer good law. And the Court had disavowed that possibility eight years earlier, in Rodriguez de Quijas v. Shearson/American Express, Inc.³⁰⁷ In Rodriguez de Quijas, the Court had said that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”³⁰⁸ The combination of the Rule 60(b)(5) context, together with the Rodriguez de Quijas stricture, ensnared the Court in an insoluble paradox.³⁰⁹

The Court recognized these difficulties, at least in some measure, from the outset. In granting certiorari, the Court, sua sponte, asked the parties to brief not just the merits questions, but also the question “[w]hether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief Petitioner seeks.”³¹⁰ In the following sections, I sketch the Court’s argument that post-Aguilar and pre-Agostini cases undermine Ball and Aguilar, then turn to the way in which the Court tries to answer the Rule 60(b)(5) question.

B. The Court’s Theory of Post-Aguilar Legal Change

The Court began its account of post-Aguilar legal change by acknowledging a general continuity with the Lemon framework: The “general principles” of Establishment Clause doctrine, the Court maintained, “have not changed since Aguilar was decided.”³¹¹ The Court still inquires whether the challenged statute or program has the purpose or effect of advancing or inhibiting religion, and the purpose part of the Lemon inquiry “has

³⁰⁸. Id. at 484.
³⁰⁹. See infra Parts IV.B-C.
remained largely unchanged. But "[w]hat has changed since . . . Ball and Aguilar," the Court said, "is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."

As the Court recognized, whether the law has changed in this respect since Ball and Aguilar depends upon what those cases are taken to hold. On the Court's reading in Agostini, Ball's conclusions of impermissible effect rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

The Court's holding in Aguilar added a "fourth assumption": "that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion." These four "assumptions," the Court said in Agostini, were the basis for the judgments in Aguilar and Ball. And according to the Court, "more recent cases"—post-Aguilar and pre-Agostini—had so "undermined" these assumptions that "Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law."

The post-Aguilar decisions on which Agostini relied were Witters and Zobrest. Zobrest, the Court maintained in Agostini, undermined Aguilar's first two assumptions—concerning state-sponsored indoctrination and symbolic union. On the indoctrination issue, Agostini emphasized Zobrest's statement that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." In this pronouncement, Agostini reasoned, Zobrest "expressly rejected the notion—relied on in

312. Id. The Court does not mention Lemon expressly in this context, but it does cite cases that employed the Lemon purpose inquiry.
313. Id.
314. Id.
315. Id.
316. Id.
317. Id. at 2016.
320. Id. at 13, quoted in Agostini, 117 S. Ct. at 2010. Zobrest buttressed this claim by citing Wolman, which allowed public employees to perform speech and hearing diagnostic services on sectarian school premises. See id. at 13 n.10.
Ball and Aguilar—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students.\textsuperscript{321} In fact, according to the Court, Zobrest reversed the presumption: “In the absence of evidence to the contrary,” the Court wrote in Agostini, “we assumed . . . that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.”\textsuperscript{322} And further, through its silence on the point, Zobrest also “implicitly repudiated” the second “assumption” on which Ball and Aguilar turned—that “the presence of a public employee on private school property creates an impermissible ‘symbolic link’ between government and religion.”\textsuperscript{323}

Witters, the Court said in Agostini, undermined the third “assumption” of Ball and Aguilar: The principle that direct aid to religious schools’ educational function “impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.”\textsuperscript{324} In fact, Agostini maintains, Witters upheld the challenged aid—a vocational-education grant to a blind student at a religious school—precisely because state funds reached the religious school only as a “consequence of private decisionmaking.”\textsuperscript{325} In so holding, Agostini noted, Witters emphasized two factors: the neutrality of the program’s eligibility criteria, and the fact that the grant was paid directly to the student, who could choose the school—public or private, sectarian or nonsectarian—at which he would spend the grant. For these reasons, Witters held, “any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.”\textsuperscript{326} Accordingly, any religious indoctrination the grant recipient received would not be attributable to the state.\textsuperscript{327}

Zobrest, the Court declared, was to similar effect. Zobrest attributed the challenged aid—i.e., “the interpreter’s presence in a sectarian school”—not to state action, but instead to “the private decision of individual parents.”\textsuperscript{328}

\textsuperscript{321} Agostini, 117 S. Ct. at 2011; see also Zobrest, 509 U.S. at 13 (noting that the interpreter was ethically bound to do no more than “accurately interpret whatever material is presented to the class as a whole”).
\textsuperscript{322} Agostini, 117 S. Ct. at 2011.
\textsuperscript{323} Id.
\textsuperscript{324} Id. at 2010.
\textsuperscript{325} See id. at 2010–12.
\textsuperscript{327} See id. at 488 (“[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.”).
\textsuperscript{328} Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993), quoted in Agostini, 117 S. Ct. at 2012.
Zobrest emphasized, further, that because the parochial school would not have paid for the interpreter on its own, absent the aid, the school was for that reason "not relieved of an expense that it otherwise would have assumed in educating its students." The aid did not operate as an impermissible subsidy to religious activity. The Agostini Court thus understood both Zobrest and Witters to "depart[] from the rule relied on in Ball" that would invalidate all direct government aid to sectarian schools' "educational function."

That left only Aguilar's final "assumption": that the Title I program created an excessive entanglement "because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion." The Court began its analysis of the entanglement issue by incorporating Justice O'Connor's suggestion, in her Aguilar dissent, that entanglement be treated as part of the effects inquiry, not as a separate test. The Court's conclusion that programs like Title I do not effect an excessive entanglement followed from its rejection of Ball's first "assumption." If public employees no longer are presumed likely to inculcate religion, then close monitoring of those employees no longer will be required. Finally, Agostini concluded, the other forms of entanglement found in Aguilar—the need for administrative cooperation between government and religious schools, and the danger of political divisiveness—were not by themselves sufficient to invalidate a program on entanglement grounds.

For the Agostini Court, then, the post-Aguilar decisions in Zobrest and Witters undermined the four crucial assumptions of Ball and Aguilar and changed "the criteria used to assess whether aid to religion has an impermissible effect." That, however, is to say only that the Ball and Aguilar criteria are no longer in effect. Two questions remain. First, what are the new effects criteria? And under those criteria, is the Aguilar injunction no
longer legally correct? Agostini answers both questions by looking to the changes that, in the Court's view, Zobrest and Witters worked on Ball's three effects inquiries.

According to Agostini, Zobrest and Witters changed, first, Ball's government-indoctrination inquiry—in ways that demonstrate that New York's Title I program did not impermissibly indoctrinate. Whereas Ball and Aguilar presumed indoctrination, considering "the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant," the Zobrest Court searched the record for evidence of translator-introduced indoctrination. In Agostini, the record disclosed no evidence that any New York City teacher had ever attempted to proselytize students in the Title I program's nineteen-year history. Without such evidence, a conclusion of impermissible indoctrination would not follow.

Second, Agostini reiterated, Zobrest repudiated Ball's presumption that the presence of Title I teachers on parochial school property creates a symbolic union of church and state. Even if the Title I program established a stronger connection between church and state than the mere presence of a public employee in a sectarian school, Agostini maintained, no court had found that Title I services may not be provided to sectarian-school students off premises. Nor is the "difference in the degree of symbolic union between a student receiving remedial instruction in a classroom and one receiving instruction in a van parked just at the school's curbside" even "perceptible (let alone dispositive)." New York City's Title I program therefore did not fail on symbolic-union grounds.

Zobrest further established, the Court said in Agostini, that New York City's Title I program did not "impermissibly finance" or subsidize religious instruction. As in Zobrest, the services provided to religious-school students are "by law supplementary to the regular curricula," and thus they do not "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." According to the Court, the fact that New York City distributed Title I services to thousands of sectarian-school stu-

336. Id. at 2008–09. The Court did explain that the Ball Court "reason[ed] that potential witnesses to any indoctrination ... might be unable to detect or have little incentive to report the incidents." Id. at 2009.
337. See id. at 2011.
338. See id. at 2012.
339. See id.; see also id. at 2015 (noting that Aguilar's holding extended only to on-premises services and citing cases from the federal courts of appeals upholding off-premises delivery of Title I services to sectarian-school students).
340. Id. at 2012.
341. Id.
342. Id. at 2013 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)).
dents, whereas Zobrest involved aid to only one such student, did not distinguish Zobrest. Further, the Court maintained that "[w]hat is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and Aguilar implied that providing the services off-campus is entirely consistent with the Establishment Clause."

Agostini found Zobrest and Witters instructive in another respect, related to but distinct from the subsidization inquiry. Apart from the question whether a challenged program subsidizes a sectarian institution and its activities of indoctrination, Agostini maintained, Zobrest and Witters focused on whether the program gives potential recipients a financial incentive to undertake religious indoctrination. The Court observed that both Zobrest and Witters, as well as cases decided before Ball and Aguilar, had emphasized that the nature of a challenged program's eligibility criteria is relevant in this respect. If "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," Agostini explained, then potential beneficiaries have no financial incentive to select religious activity. Accordingly, Agostini concluded, "the aid is less likely to have the effect of advancing religion."

Zobrest and Witters relied on this factor in upholding the programs challenged in those cases. Ball and Aguilar, by contrast, gave this factor "no weight." On the facts of the Agostini case, the Court found, the Title I program, like the programs sustained in Zobrest and Witters, allocates aid "on the basis of criteria that neither favor nor disfavor religion." Thus in this respect, too, the post-Zobrest effects test points toward the Title I program's constitutionality.

In concluding that the Title I program was constitutional under post-Aguilar cases, Agostini moved from its initial position—that the "assumptions" of Ball and Aguilar had been undermined—to a fuller account of the changes it believed Witters and Zobrest had worked on Establishment Clause doctrine. In the course of announcing its conclusion that New York's Title I program

343. See id. (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").
344. Id.
345. See id. at 2014.
346. Id.
347. Id.
348. Id.
349. Id.
was constitutional, the Court stated its post-Zobrest effects criteria as follows:

New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement. 350

Some aspects of this revised effects test are clear. For one thing, the Court has converted Lemon's entanglement test from a separate inquiry, alongside purpose and effect, into a part of the effects test. Further, as mentioned, Agostini makes clear that only "institutional entanglement"—and that now means something more than routine administrative contacts or ordinary workplace supervision—will count as impermissible excessive entanglement. Also clear is the disappearance from the effects test of the symbolic-union theory on which Ball relied. 351 Further, Agostini makes apparent that the Court no longer will find an impermissible risk of government indoctrination whenever state-paid teachers or counselors work in the "pervasively sectarian" environment of a religious school. Finally, the Court's second effects criterion—that a program may not "define its recipients by reference to religion"—also seems clear (as well as easy for government to avoid).

In other respects, however, Agostini's revised effects test is difficult to interpret. For example, the Court does not specify whether, as in the old Ball effects test, a plaintiff can prevail on effects, and thus prevail in the case, by prevailing on any of the three effects criteria. I assume, in the absence of any statement to the contrary in the Agostini opinion, that this is so. 352 Unclear, also, is what a plaintiff would have to show to demonstrate that the challenged program "result[s] in government indoctrination." The Court collapses, under the heading of "government indoctrination," two separate inquiries prescribed by Ball: the question whether public employees are likely themselves to engage in religious indoctrination, and the question whether government aid advances religion by subsidizing the educational function of sectarian schools. 353 I assume that a plaintiff may prevail on this effects criterion, and thus prevail in the case, by showing either. But the

350. Id. at 206.
351. It seems to survive, however, in the form of the endorsement test, which in Agostini has an uneasy status alongside the purpose and effects tests. See infra notes 358–360 and accompanying text.
352. All of the factors are phrased in terms of effects that were prohibited under prior law, and the Court's opinion takes care to demonstrate that Title I violates none of the three criteria.
353. These were the two parts of the effects test that Ball had distinguished. See supra notes 160–162 and accompanying text.
Managing Legal Change

criteria the Court prescribes for these two government-indoctrination factors are not at all clear.

Agostini's discussion of the first government-indoctrination subcriterion—the participation of public employees in religious indoctrination, when this participation may be charged to the state—changes the Ball inquiry in two ways. First, as mentioned, Agostini insists upon genuine evidence that a public employee is likely to engage in religious indoctrination. Second, and potentially more important, Agostini emphasizes Zobrest's point that even when public employees actually participate in religious teaching, the government nonetheless may not be responsible. In discussing this second point, Agostini relies upon Zobrest's conclusion that, because the challenged program's eligibility criteria were neutral, the fact that James Zobrest received aid in a religious rather than a public school was a "result of the private decision of individual parents" and "[could] not be attributed to state decisionmaking." 354

The question after Agostini will be how broadly to interpret these notions of "neutral criteria" and "private decisionmaking." Any aid program can be outfitted with eligibility criteria that make aid "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 355 A comprehensive tuition voucher program, such as the one recently upheld by the Wisconsin Supreme Court, 356 is the most obvious example. If the neutrality of a program's eligibility criteria guarantees that the availability of aid to parochial schools is always the result of private, not state decision making—and that for that reason the resulting religious teaching is not attributable to the state—then any aid program whose eligibility criteria are neutral will survive the first part of the government-indoctrination inquiry.

What the Court means with its second criterion for impermissible government indoctrination—state subsidization of religious education—likewise is unclear. On one hand, Agostini's account of the subsidization inquiry emphasizes the distinction between programs that "supplement" and those that "supplant" religious schools' existing curricula, and the Court seems to adopt, as a criterion of subsidization, Zobrest's "relieve sectarian schools of costs they otherwise would have borne" formulation. The Court mentions also that "[n]o Title I funds ever reach the coffers of religious schools." If these are the subsidization criteria, then a voucher program

354. Agostini, 117 S. Ct. at 2012 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993)).
355. Id. at 2011 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
would subsidize religious schools impermissibly—both because state funds would reach religious schools' "coffers," and because the tuition grants likely would relieve religious schools of costs they otherwise would have borne. On the other hand, the Court could extend its "private decisionmaking" rationale to the issue of subsidization. In a voucher program, for example, if aid were available neutrally, on a per-pupil basis, the Court could maintain that government funds reach religious-school coffers only as a result of private, not state, decision making. The Court, then, would uphold the challenged program.

This latter interpretation of Agostini's effects test is plausible, and it would allow the Court to uphold virtually any aid program with neutral eligibility criteria. But reading Agostini in this way leaves other features of the opinion unexplained. For example, if the subsidization test really does reduce to the issue whether the program's eligibility criteria are neutral, why would the Court have bothered to discuss the supplant/supplement distinction? And why would it emphasize that New York's Title I program did not relieve sectarian schools of costs they otherwise would have borne? Why, also, would the Court mention that no government funds reach religious schools' coffers? Why, for that matter, would the Court even suggest that subsidization was an issue separate from the issue of the program's neutrality?

In short, the Court leaves its revised effects test unclear—perhaps because of disagreements within the Agostini majority, perhaps in order to leave room open in later cases for further changes, and most likely for both reasons. The Court, in some future case—perhaps one involving a voucher program—will have to resolve the uncertainties of Agostini's "current law." The best that can be said for Agostini's statement of current effects

357. Christopher Eisgruber and Lawrence Sager interpret the revised effects test similarly. They see in Agostini both a broad and a narrow rationale. The broad rationale lies in the Court's emphasis on the generality and neutrality of the program's eligibility criteria, and the two consequences the Court draws: (1) the program creates no incentive to undertake religious rather than secular education, and (2) the program channels benefits to religious schools only as a result of private decisions. As Eisgruber and Sager point out, if the Court takes these to be the decisive Establishment Clause criteria, then it would uphold, for example, a comprehensive voucher program that provides equal benefits to public- and private-school students. See Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 Sup. Ct. REV. 79, 125–27. The narrower rationale, they say, emphasizes that New York's Title I program did not send money directly into religious-school coffers, nor did it relieve sectarian schools of costs they otherwise would have borne. If these features of Title I are a sine qua non for surviving an Establishment Clause challenge, Eisgruber and Sager argue, then a voucher program would be unconstitutional because "there is no doubt" that it would "add public money to the accounts of religious educational programs." Id.
law is that whatever the Court decides in the future will not be inconsistent with what the Court said in Agostini.

Alongside the revised effects inquiry the Court places the endorsement test. "The same reasons that justify" holding that New York City's Title I program survives the effects test, the Court wrote, "require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement." The Court seemed to base this conclusion on its earlier position that the program established no symbolic union of church and state. Perhaps Justice O'Connor had in mind also her earlier position about the endorsement test—that it expresses and specifies the purpose and effects parts of the Lemon inquiry. But the Court did not make clear what relation it meant to establish between the endorsement test and the revised Lemon test.

The Court concluded: "[W]e must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law." This conclusion, the Court maintained, removed any barrier that stare decisis might be thought to impose. Here the Court relied on the usual pro-overruling decisions and language, noting that "[s]tare decisis is not an inexorable command," and that the force of stare decisis is "at its weakest" in constitutional cases, in which the Court's decisions "can be altered only by constitutional amendment or by overruling." In particular, the Court noted, various decisions have held that overruling is proper when intervening decisions have "erod[ed]" the precedent's "underpinnings." Accordingly, the Court announced, in a curious formulation: "We therefore overrule Ball and Aguilar to the extent those decisions are inconsistent with our current understanding of the Establishment Clause."

Daniel Farber, too, suggests that on the voucher question, after Agostini, "it would be far from impossible to write an opinion going either way." DANNY A. FARBER, THE FIRST AMENDMENT 278 (1998). 358. Agostini, 117 S. Ct. at 2016. 359. See supra Part III.A.2 (discussing the Court's symbolic-union conclusion); Agostini, 117 S. Ct. at 2016 (citing, as support, one case finding no endorsement and another case finding no symbolic link). 360. See supra notes 215-223 and accompanying text. 361. Agostini, 117 S. Ct. at 2016. 362. Id. (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)). 363. Id. 364. Id. (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)); see also id. at 2016-17 (citing other cases to the same effect). 365. Id. at 2017. For similar reasons, the Court decided that the law-of-the-case doctrine did not bar relief:

The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." In light of our conclusion that Aguilar
C. The Court's Treatment of the Rule 60(b)(5) Problem

The Court's journey did not end with its conclusion that Aguilar and the relevant parts of Ball were "no longer good law." One further obstacle remained—the question whether the New York City School Board, having demonstrated successfully a change in the law, could obtain relief under Rule 60(b)(5).

The difficulty, as I mentioned earlier, arose from the Court's decision in Rodriguez de Quijas. If a Supreme Court precedent "has direct application in a case," the Court wrote in Rodriguez de Quijas, and "yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls." Only the Supreme Court has "the prerogative of overruling its own decisions." And when the district court acted in Agostini, Aguilar had "direct application": It was the Supreme Court's ruling in the very same case. Thus even if Aguilar "rest[ed] on reasons rejected" in Witters and Zobrest, as the Supreme Court later contended, still, Rodriguez de Quijas required the district court, and later the court of appeals, to follow Aguilar and deny relief. How, then, could the Supreme Court reverse the lower courts' decisions—particularly under the abuse-of-discretion standard that governs denial of Rule 60(b)(5) motions? How could a decision that the Court acknowledged was correct be an abuse of the district court's discretion?

would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply.

Id. (citations omitted). For support, the Court cited Davis v. United States, 417 U.S. 333, 342 (1974), in which the "Court of Appeals erred in adhering to [the] law of the case doctrine despite intervening Supreme Court precedent." Agostini, 117 S. Ct. at 2017. Reliance on Davis is odd: As we will see, the Court's theory in Agostini is that the lower court was correct in following Aguilar rather than the "intervening precedent[s]" of Witters and Zobrest. See supra notes 307-308 and accompanying text; infra Part III.B.

367. Rodriguez de Quijas, 490 U.S. at 484.
368. Id.
369. See Agostini, 117 S. Ct. at 2017-18 (acknowledging that the abuse-of-discretion standard applies).
370. See id. at 2017.

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas, 490 U.S. at 484. Adherence to this teaching by the District Court and Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within
The Court answered these questions by reframing them. Its strategy was
to make the Court’s use of Rule 60(b)(5) look like a routine application of
standard and settled legal principles. The Court’s general practice, it said, is
to “apply the rule of law we announce in a case to the parties before us.”
The Court “adhere[s] to this practice,” it said, even when it overrules a case
on which the lower courts properly have relied. The fact that Agostini
arose in the Rule 60(b)(5) context, the Court suggested, did not take the
case out from under these basic principles. While “the trial court has
discretion” in deciding Rule 60(b)(5) motions, “the exercise of discretion
cannot be permitted to stand if we find it rests upon a legal principle that
can no longer be sustained. . . . The standard of review we employ in this
litigation does not therefore require us to depart from our general prac-
tice.” Because the controlling legal principles are those of Zobrest and
Witters, not Aguilar and Ball, the district court’s exercise of discretion could
not be permitted to stand.

In framing its decision as a routine application of settled principles, the
Court responded to arguments in Justice Ginsburg’s dissent that the Court’s
action was anything but routine. Unsurprisingly, the Court presented those
arguments as pleas for an exception to general Rule 60(b)(5) principles.
Ginsburg’s suggestion that the Court was “effecting” changes in the law,
rather than “recognizing” them, failed, the Court said, because the Court
in fact had identified a “bona fide, significant change” that Zobrest and
Witters already had worked on the law. Further, because Rule 60(b)(5)
applies, by its terms, only to judgments with prospective application, the

its discretion in entertaining the motion with supporting allegations, but it was also cor-
tect to recognize that the motion had to be denied unless and until this Court reinter-
preted the binding precedent.

371. Id. (citing Rodriguez de Quijas, 490 U.S. at 485).
372. Id. The Court’s examples:
In Adarand Constructors, Inc. v. Pena, for example, the District Court and Court of
Appeals rejected the argument that racial classifications in federal programs should be
evaluated under strict scrutiny, relying upon our decision in Metro Broadcasting, Inc. v.
FCC. When we granted certiorari and overruled Metro Broadcasting, we did not hesitate
to vacate the judgments of the lower courts. In doing so, we necessarily concluded that
those courts relied on a legal principle that had not withstood the test of time. See also
Hubbard v. United States (overruling decision relied upon by Court of Appeals and
reversing the lower court’s judgment that relied upon the overruled case).

Id. (citations omitted).
373. Id. at 2018 (citations omitted).
374. Id. at 2026 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.).
375. See id. at 2018 (opinion of the Court) (“Respondents nevertheless contend that we
should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts.”).
376. See id. at 2028 (Ginsburg, J., dissenting).
377. Id. at 2018 (opinion of the Court).
Court's decision would "have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue." For these reasons, the Court maintained, fears of a "deluge of Rule 60(b)(5) motions" were unfounded, and Justice Ginsburg's pointed concern that litigants would be encouraged to "speculat[e] on chances from changes" in the Court's membership was, the Court said, "overstated."

The Court replied also to Justice Ginsburg's observation that other cases already in the Court's pipeline might present the issue of whether to overrule Aguilar, but without the complications that Agostini's Rule 60(b)(5) context created. The Court rebuffed Ginsburg's implication that the Court had departed from "integrity in the interpretation of procedural rules" with the assertion that "Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here." The Court

378. Id. The Court cited here Teague v. Lane, 489 U.S. 288 (1989), which limits the ability of federal habeas corpus petitioners to take advantage of favorable "new rules" announced after their convictions have become final. Nothing in Agostini, the Court was suggesting, would change the Court's usual practice of treating cases whose outcomes were not "dictated by precedent," see, e.g., id. at 301, as cases that establish "new rules" unavailable to habeas petitioners (except in rare and exceptional situations). The Court's sensitivity to the possibility that Agostini might be read to modify existing habeas corpus jurisprudence might help explain its insistence, at the opening of the opinion, that post-Aguilar cases "dictate" the conclusion that "Aguilar is no longer good law." Agostini, 117 S. Ct. at 2003.

379. Agostini, 117 S. Ct. at 2018 (quoting id. at 2028 (Ginsburg, J., dissenting)). In referring to changes in the Court's personnel, Justice Ginsburg presumably had in mind the fact that Justice Stevens was the only member of Ball's and Aguilar's five-member majorities still on the Court. See id. at 2026 (Ginsburg, J., dissenting).

380. Id. at 2018 (opinion of the Court).

381. Id.; see also id. at 2026, 2028 (Ginsburg, J., dissenting) (mentioning cases pending in the lower courts).

382. Id. at 2028 (Ginsburg, J., dissenting). Justice Ginsburg emphasized that Aguilar had not been overruled before the Court's Agostini decision. See id. at 2027; id. at 2028 ("[N]othing can disguise the reality that, until today, Aguilar had not been overruled. Good or bad, it was in fact the law."). "Lacking any rule or practice allowing us to reconsider the Aguilar judgment directly," Ginsburg wrote, "the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts." Id. at 2026. But this rule, Ginsburg argued, "had no office to perform in the District Court," given the Court's conclusion that Aguilar was still binding on lower courts. Id. at 2028. Accordingly, Ginsburg contended,

[a]l]l the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose—allowing an "anytime" rehearing in this case—unrelated to the governance of district court proceedings to which the rule, as part of the Federal Rules of Civil Procedure, is directed.

Id. (citing FED. R. CIV. P. 1)

383. Id. at 2018 (opinion of the Court). I read the words "specifically contemplates" to be an ill-considered rhetorical flourish. Even if one agrees with the Court that its Agostini decision is permissible under Rule 60(b)(5), it can hardly be said that the Rule "specifically contemplates the grant of relief in the circumstances presented." The text of the rule, see supra text following note 287, speaks in general terms, authorizing relief from a final judgment when "it is no longer equitable that the judgment should have prospective application." Even the Court's decisions glossing
closed its opinion by invoking the plight of the City of New York and its affected children:

[I]t would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.

IV. MISMANAGING LEGAL CHANGE

The Court's opinion in Agostini marks the only path the Court could have taken to the conclusions it reaches: the Court's declaration that Aguilar and the relevant parts of Ball are no longer good law, and its ruling that relief under Rule 60(b)(5) is appropriate under Agostini's circumstances. For reasons explained below, however, neither of the Court's conclusions is ultimately convincing. Even taking the Court's goal of overruling Aguilar and revising Establishment Clause doctrine as a fixed destination, I argue, both the Court's selection of Agostini as a vehicle, and the way in which it operates that vehicle, represent a misuse of the Court's power to effect legal change.

The Court reaches its conclusion that the law changed, post-Zobrest and pre-Agostini, by relying on readings of the two lines of Lemon school-aid precedent I distinguished in Part II: the line that runs from Meek to Ball and Aguilar, and the line extending from Mueller to Witters and Zobrest. These two lines of precedent, I argued, coexist through their mutual employment of Meek's basic constitutional distinction: the distinction between unconstitutional "direct and substantial" aid to religious schools' educational function, on one hand, and constitutionally permissible "indirect and insubstantial" aid, on the other. Agostini's interpretive technique is to read the post-Aguilar cases in the second line of precedent—Witters and Zobrest—as undermining the "assumptions" of the Aguilar/Ball line, and as substituting new constitutional principles that govern the issues of unconstitutional effects and entanglement. Accordingly, the Court maintains, relief under Rule 60(b)(5) is proper, because the Court has identified a significant change in the law, post-Aguilar but pre-Agostini.

this rule do not "specifically contemplate" relief in the circumstances Agostini presents, where the Supreme Court has concluded that its earlier ruling—a ruling controlling the very same case—has been undermined by its later decisions.

I argue in Part IV.A that Agostini misreads both lines of precedent. As Justice Souter pointed out in dissent, the Court interprets Aguilar and Ball to stand for “exaggerated propositions” that the Court never endorsed in Aguilar, Ball, or any other case. Thus, while demonstrating that Witters and Zobrest rejected those propositions was easy work for the Court, it also was not at all to the point. Further, in its reading of the other line of precedent, Agostini exaggerates the holdings of Witters and Zobrest, reading them as categorical repudiations of Ball and Aguilar, complete with a new and revised theory of the Establishment Clause’s limits. A more plausible reading of Witters and Zobrest, however, would see them not as path-altering rulings, but as decisions that still operate within the Ball and Aguilar framework—even if, as I suggested above, their reliance on “generality and neutrality” and on “private decisionmaking” could be a resource for a future law-changing decision. That, at any rate, is my argument in Part IV.A below.

I consider, in Part IV.B, the Court’s second general conclusion: that relief under Rule 60(b)(5) is appropriate under the circumstances of Agostini. This conclusion, too, I argue, is mistaken—albeit in more interesting ways than the Court is mistaken in its reading of precedent. Among other problems, the Court’s decision generates a paradox: It reverses a correct decision, on the theory that the deciding court abused its discretion in deciding the case correctly. This paradox does not disappear so readily as the Court hopes. Agostini’s escape strategy, I argue, depends upon the incoherent view that two contradictory bodies of law held sway at the same time. Moreover, the Court’s attempt to transform Establishment Clause law, in a case in which it cannot admit to changing the law, prevents the Court from developing an independent, normatively justifiable theory of the Establishment Clause. And by locating the change in Establishment Clause law in Witters and Zobrest, the Court attributes a change in the law to decisions that contain not a word of explanation for the change—not even a recognition that the law is being changed. Thus, whichever decision one takes to have changed the law—Witters, Zobrest, or Agostini—the Court never provides the sort of reasons one would expect from a law-transforming, precedent-overruling decision.

In Part IV.C, I suggest a way in which the Court could have avoided the paradox of reversing a legally correct decision without lapsing into incoherence. The Court does not choose this path because it would require ceding some of its interpretive authority, and some of its management

385. Id. at 2025 (Souter, J., dissenting).
386. See supra Part II.A.2.d.
powers over legal change, to the lower courts. I argue that, contrary to the Court's view, this strategy of resolving Agostini's paradox is normatively defensible—certainly more defensible than the path the Court actually chose in Agostini. Adopting this strategy still would have left the Court vulnerable to criticism for its use of precedent, and the Court still would not have been able to effect the changes that the Agostini majority would have desired. But the Court's account of the process of legal change at least would have been coherent and consistent with the procedural norms that partially define the Court's authority to manage legal change.

A. The Court's Use of Precedent

Agostini's argument for a post-Aguilar change in the law begins with its interpretation of the Meek to Aguilar line of precedent. The four "assumptions" Agostini "distill[s]" from the Ball and Aguilar opinions have only a loose connection to what the Court actually said in those cases. And Agostini's arguments for how Witters and Zobrest both undermined those assumptions and established new effects criteria are no more persuasive. Because the Court's theory of pre-Agostini legal change is its sole basis for overruling Aguilar, any significant missteps in the Court's use of precedent are fatal.

1. Indoctrination by Public Employees

Consider the Court's rendition of Ball's first assumption: that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work." The Ball opinion, however, does not speak of "any public employee," but specifically of teachers—the only public employees whose services on sectarian-school premises were at issue in the case. Ball relied on the Court's earlier decision in Meek v. Pittenger, and, slightly buttressing the Agostini Court's interpretation, Ball

388. The Court described the issue in Ball as follows:

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.

did describe Meek as “invalidat[ing] a statute providing for the loan of state-paid professional staff—including teachers—to nonpublic schools” for on-premises teaching and other services. But Meek specifically distinguished between the activity of teachers and counselors, and the activities of the other professionals whose activities were challenged. The teachers and counselors were “performing important educational services” in sectarian schools, the Court said. The other professionals—speech and hearing specialists—were not. Of their activities, the Court wrote that “[t]he speech and hearing services authorized by [the statute], at least to the extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools.”

Similarly, in Wolman, the Court drew a constitutional distinction between the activities of teachers and guidance counselors, on one hand, and the activities of other state-employed professionals, on the other:

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostican to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or counselor and student.

For these reasons, the Court concluded, “providing diagnostic services will not create an impermissible risk of the fostering of ideological views.”

In light of Meek and Wolman, then, it can be no surprise that Zobrest could announce—citing rather than rejecting the discussions in Meek and Wolman—that “the Establishment Clause lays down no absolute bar to

390. Ball, 473 U.S. at 386.
391. Meek, 421 U.S. at 371.
392. Id. at 371 n.21. The Court invalidated the provision of the statute authorizing speech and hearing services, but only because it found the provision unseverable from the otherwise unconstitutional statute. See id.
394. Id.; see also id. at 242 (“This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion.”).
the placing of a public employee in a sectarian school." That, in fact, was one proposition those cases had established. Zobrest tracks the distinction established in Meek and Wolman, explaining that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor." The interpreter, unlike the teacher or guidance counselor, simply relays the material to the student who relies on her services; she does not contribute any content herself, religious or otherwise. Accordingly, on the Court's view, the state is not responsible for any religious indoctrination that occurs.

Thus from Meek, to Wolman, to Ball and Aguilar, and finally to Zobrest, the Court consistently distinguished among kinds of public employees and the correspondingly different risks that they would engage in state-sponsored indoctrination. When the challenged program involved publicly employed teachers or counselors working on religious-school premises, the Court consistently invalidated the program. When the challenged program involved other kinds of public employees, the Court upheld the program if it found the service sufficiently distinguishable from teaching or counseling. Ball thus did not depend upon an "assumption" about public employees generally. And Zobrest, rather than upsetting the distinctions established in Meek and applied in Ball, works within them.

Agostini tries to fend off this conclusion, with the suggestion that Zobrest could not have depended on the view that "signers had no 'opportunity to inject religious content into their translations.'" If Zobrest had rested on that basis, the Court says, then the Court "would have had no reason to consult the record for evidence of inaccurate translations." Both the interpreter and the teacher had the opportunity to inject religious content, the Court maintains, and so "there is no genuine basis upon which to confine Zobrest's underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters." Further, the Court contends, "even the Zobrest dissenters acknowledged the shift Zobrest effected in our Establishment Clause law when they criticized the

396. Id. at 13.
397. Id.
398. See id.
399. See Agostini v. Felton, 117 S. Ct. 1997, 2011 (1997) ("Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that 'the provision of such assistance was not barred by the Establishment Clause.'" (quoting Zobrest, 509 U.S. at 13)).
400. Id. (quoting id. at 2023 (Souter, J., dissenting)).
401. Id. at 2011 (citing Zobrest, 509 U.S. at 13).
402. Id.
majority for 'straying...from the course set by nearly five decades of Establishment Clause jurisprudence.'

Agostini is right that Zobrest presumed, in the absence of evidence to the contrary, that interpreters would follow their profession's ethical guidelines. And Agostini is right, also, that an interpreter, like a teacher, could inject new religious content into classroom instruction. Nonetheless, Zobrest followed Meek and Wolman in treating teachers as a special case. Far from repudiating the assumption that publicly employed teachers present a special danger, Zobrest located the interpreters' services on the permissible side of the line only by distinguishing them from teaching. This strategy would make no sense if, as Agostini suggests, Zobrest had treated teachers and interpreters as equally unlikely to engage in religious indoctrination.

Finally, the argument based on the Zobrest dissent is mistaken. The opinion for the Court in Zobrest operates within the Meek and Ball framework, distinguishing teachers from other professionals. And the Zobrest dissent reads the Court's opinion in just this way, stating that "[t]he majority's decision must turn...upon the distinction between a teacher...

403. Id. (quoting Zobrest, 509 U.S. at 24 (Blackmun, J., dissenting)).
404. Zobrest did not, however, "consult the record for evidence of inaccurate translations." Zobrest says only that "[n]othing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole." Zobrest, 509 U.S. at 13.
405. See id. ("[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.").
406. Zobrest's basis for distinguishing between teachers and interpreters, while hardly unchallengeable, is readily apparent. It was unquestionably true in Zobrest that the religious-school classroom teacher would be generating, and the publicly paid interpreter would be conveying, religious content to James Zobrest. The question was only whether to attribute to the government the religious indoctrination that undoubtedly would occur. The Court focused not on the government's role in conveying religious material to Zobrest in particular, but instead on whether the government had a role in conveying religious content to the class as a whole. The Court's theory was that because indoctrination already would be occurring in the classroom, the presence of the interpreter "neither add[ed] to nor subtract[ed] from" the "pervasively sectarian environment" that already would be in place, independent of the government's assistance. Id. The government, then, could not be held responsible for the generation of religious indoctrination in that environment.

Certainly one could argue that the appropriate focus should have been on the particular student receiving assistance, not on the classroom as a whole. By providing Zobrest an interpreter, the argument would go, the government participated in the religious indoctrination of at least one student. That was, in effect, the argument pressed by Justice Blackmun's dissent in Zobrest. But that is simply to say that the Court could have held that the interpreter is more like a teacher, for Establishment Clause purposes, than like (for example) a diagnostic specialist. Whether or not the Court correctly applied the distinction between teachers and other public employees, the Zobrest opinion is very clear that one important difference between Zobrest and Ball is the difference between "the task of a sign-language interpreter" and "that of a teacher or guidance counselor." Id.
The dissent's point was that the Court had "stray[ed] from the course" in failing to recognize that a state-paid interpreter, working in a sectarian school, necessarily would be engaged in religious indoctrination. The dissent did not read the Court's opinion in Zobrest to hold that teachers, as well as interpreters, were unlikely to become instruments of religious indoctrination—the point Agostini would like to attribute to Zobrest.

In sum, then, Zobrest did reject the first "assumption" Agostini attributes to Ball—that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work." But Ball never endorsed this proposition, and it was rejected not just in Zobrest, but in the cases on which Ball relies. Zobrest, no less than Meek, Wolman, or Ball, operated by distinguishing between teachers and counselors, on one hand, and other publicly employed professionals, on the other. Nothing in Zobrest questions the notion that teachers and counselors—those connected with a religious school's educational function—present a particular danger of government-sponsored indoctrination. Only by distinguishing interpreters from teachers does Zobrest distinguish the holdings in Meek and Ball.

2. Symbolic Union

According to Agostini, Ball assumed that "the presence of public employees on private school premises creates a symbolic union between church and state." By upholding the provision of an interpreter on private school premises, the Agostini Court reasons, Zobrest "implicitly repudiated" Ball's assumption.

407. Id. at 21 (Blackmun, J., dissenting).
408. Id. at 22 (opinion of the Court) ("It is beyond question that a state-employed sign-language interpreter would serve as the conduit for [Zobrest's] religious education, thereby assisting [the school] in its mission of religious indoctrination.").
409. Further, the strategy of relying on the dissent for propositions not defended in the Court's opinion is, while familiar, inherently suspect. One standard strategy of dissent writing—though perhaps not the wisest—is to criticize the Court by emphasizing, and sometimes exaggerating, the degree to which it has departed from precedent. In these cases, when the Court wedges its decision into the framework of existing precedent, it is not so much that "even the dissent" recognizes the Court's departure from precedent as that only the dissent so recognizes. Bootstrapping on the dissent's hyperbole allows the later Court to take propositions as established that the earlier Court did not have the boldness—or the votes—to establish and defend itself. See Paulsen, supra note 32, at 821 n.102 ("One ... should be wary of a dissent's hysterical characterization of a majority holding or of dissenting suggestions of limits to the majority's holding. Frequently, such statements are rhetorical or tactical exaggerations.").
411. Id.
412. Id. at 2011.
One might well wonder whether a court could "repudiate" an assump-
tion only implicitly. But even so, the Court's argument here is vulnerable
to the same objection made to its treatment of Ball's first putative assump-
tion. The Court did not say in Ball that any public employee's presence on
private school premises effects a symbolic union. Instead, Ball's argument
for impermissible symbolic union is more nuanced. Here, too, the Court
emphasized the special significance of teachers, as opposed to other kinds of
public employees. Borrowing from Judge Friendly's opinion in Aguilar, the
Court described the public school teachers as, "so far as appearance is con-
cerned, a regular adjunct of the religious school." The apparent fusing of
two faculties meant that "the religious school appears to the public as a
joint enterprise." The sign outside Shared Time classrooms, declaring
them to be public-school classrooms, would stand as "a powerful symbol of
state endorsement and encouragement of the religious beliefs taught in the
same class at some other time during the day." The Court's theory of
symbolic union, then, was not based on the mere presence of a generic pub-
lic employee on parochial-school premises.

To be sure, the Court is right that Zobrest implicitly rejected the
symbolic-union theory on Zobrest's facts. This is because the Court, in
deciding Zobrest, reviewed a judgment by the court of appeals that rested its
conclusion of unconstitutionality squarely on the symbolic-union theory. Zobrest's silence on that point, together with its reversal of the appellate
court's judgment, implies that the Court found no unconstitutional sym-
bolic union in that case. And the Court is right, also, that the Zobrest deci-
sion implicitly rejects the "assumption" Agostini attributes to Ball—that
public employees' presence in a sectarian school necessarily creates an
impermissible symbolic union. But without any analysis in the opinion,
Zobrest cannot be read to reject the more modest and more nuanced version
of the symbolic-union theory actually applied in Ball. The fusing of two
faculties, secular and religious, may well constitute a more "graphic symbol'
of the 'concert or union or dependency' of church and state than the
presence of a single interpreter translating for a single child.

quoting Felton v. United States Dep't of Educ., 739 F.2d 48, 67 (2d Cir. 1984)), overruled in part
414. Id. (internal quotation marks omitted) (quoting Felton, 739 F.2d at 67-68).
415. Id.
417. See id. at 13 ("[T]he Establishment Clause lays down no absolute bar to the placing of
a public employee in a sectarian school.").
418. Ball, 473 U.S. at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)).
3. Subsidization of Sectarian Education

The third "assumption" of Ball, according to the Court in Agostini, was that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking." Agostini maintains that both parts of this Ball approach—the criterion of "direct aid," and the disregard of whether aid reaches the school through private decision making—have been undermined by Witters and Zobrest.

On the issue of "direct aid," Agostini contends, Zobrest displaces the assumption that all direct aid to religious schools' educational function is unconstitutional, inquiring instead whether the aid relieves "sectarian schools of costs they otherwise would have borne in educating their students." When, as in Zobrest, the government aid merely supplements and does not supplant the religious school's existing offerings, the aid does not amount to an impermissible subsidy to religious activity.

The problem with the Court's argument, as with its other arguments for a post-Aguilar change in the law, is that the Court both misstates Ball's "assumption" and overreads the holdings of Witters and Zobrest. Ball did not assert that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination." Nor did Ball rely on a simple distinction between direct and indirect aid. Instead, Ball distinguished also between substantial and insubstantial aid. According to Ball, following Meek, the test of an aid program's constitutionality is whether the program provides direct and substantial aid to the educational function of sectarian schools. Ball explained that this pivotal distinction between unconstitutional direct and substantial aid, on one hand, and permissible indirect and incidental aid, on the other, is a matter of "degree."

Witters and Zobrest accept this distinction and operate within its confines. In Witters, the Court emphasized that the program it upheld would not provide substantial amounts of aid to religious institutions:

[importantly, nothing in the record indicates that, if petitioner succeeds, any substantial portion of the aid expended under the

---

420. Id. at 2012–13 (quoting Zobrest, 509 U.S. at 12).
421. See id. at 2013.
422. See Ball, 473 U.S. at 393 (declaring that the test is whether government aid results in the "direct and substantial advancement of the sectarian enterprise" (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977)) (emphasis added)); Meek v. Pittenger, 421 U.S. 349, 366 (1975) ("Substantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole.").
423. Ball, 473 U.S. at 394 (citing Zorach, 343 U.S. at 314).
Washington program as a whole will end up flowing to religious education.... The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program.\footnote{424}

\textit{Zobrest} was, if anything, more explicit in its acceptance of the \textit{Ball} and \textit{Meek} framework. \textit{Zobrest} acknowledged the Court's holdings in \textit{Meek} and \textit{Ball} that "[s]ubstantial aid to the educational function of [religious] schools" results in "the direct and substantial advancement of religious activity."\footnote{425} And the distinction between substantial and incidental aid structures much of \textit{Zobrest}'s discussion. The program invalidated in \textit{Meek}, the Court noted in \textit{Zobrest}, involved "massive aid to private schools," most of them sectarian.\footnote{426} Further, the Shared Time and Community Education programs, invalidated in \textit{Ball}, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."\footnote{427} But under the program challenged in \textit{Zobrest}, by contrast, religious schools are "only incidental beneficiaries," "to the extent [they] benefit at all."\footnote{428} In fact, the Court said,

\begin{quote}
[t]he only \textit{indirect} economic benefit a sectarian school might receive [under the program] is the disabled child's tuition—and that is, of course, assuming that the school makes a profit on each student; that, without an . . . interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.\footnote{429}
\end{quote}

\textit{Zobrest}, then, far from undermining the \textit{Ball} framework, upholds the placement of an interpreter in a religious school precisely by employing that framework, locating the challenged aid on the indirect and incidental side of the line.

\textit{Agostini} is right that \textit{Zobrest}, on the issue of subsidization, notes that the challenged government aid did not "reliev[e] the sectarian school of costs [it] otherwise would have borne in educating [its] students."\footnote{430} The \textit{Agostini} Court goes on, however, to draw two inferences from \textit{Zobrest}'s use of this formulation. First, \textit{Agostini} suggests, the \textit{Zobrest} formulation

\begin{footnotes}
\footnote{425.} Zobrest, 509 U.S. at 12 (quoting Meek, 421 U.S. at 366).
\footnote{426.} Id. at 11 (quoting Meek, 421 U.S. at 364–65).
\footnote{427.} Id. at 12 (quoting Ball, 473 U.S. at 397).
\footnote{428.} Id. (emphasis added).
\footnote{429.} Id. at 10–11 (emphasis added).
\end{footnotes}
displaces Ball's direct and substantial aid test.\footnote{Compare id. at 2011 ("[W]e have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid."), with id. at 2012 ("[T]he aid in Zobrest did not indirectly finance religious education by 'relieving' the sectarian school[ ] of costs [it] otherwise would have borne in educating [its] students." (quoting Zobrest, 509 U.S. at 12)) and id. at 2013 (Title I services do not "relieve secular schools of costs they otherwise would have borne in educating their students." (quoting Zobrest, 509 U.S. at 12)).} And if so, Agostini continues, then the question is whether New York City's Title I program "relieve[s] sectarian schools of costs they otherwise would have borne in educating their students."\footnote{Id. at 2013 (quoting Zobrest, 509 U.S. at 12).} Because Title I instruction by law may only supplement, not supplant, the instruction that otherwise would be offered in a sectarian school,\footnote{See id. (citing 34 C.F.R. § 200.12(a) (1996)).} Agostini concludes, then as a matter of law the city's Title I program does not impermissibly finance government indoctrination.\footnote{See id. at 2012-13.}

Both steps in this argument are mistaken. Zobrest does not displace the "direct and substantial aid" test of Meek and Ball. In the passages of Zobrest discussed above, the Court also classifies the aid to the school in which the interpreter was to work as indirect and incidental, and therefore permissible. Further, even if we were to accept Agostini's argument that the "relieve of costs otherwise borne" formulation is the reigning subsidization test, still, the Court's ultimate conclusion—that Title I does not impermissibly subsidize sectarian education—would not follow from Zobrest. This is because in Zobrest, the Court says explicitly that the aid in Ball did relieve sectarian schools of costs they otherwise would have borne—\footnote{See supra notes 126-132 and accompanying text.}—in spite of the fact that the courses provided in the Shared Time and Community Education programs had not been offered in the sectarian schools before.\footnote{See Zobrest, 509 U.S. at 12 ("The programs in Meek and Ball—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students.").} Ball, in other words, rejected the significance of Agostini's distinction between aid that "supplements" and aid that "supplants" a sectarian school's curriculum.\footnote{See Ball, 473 U.S. at 396-97.} Nevertheless, Zobrest still described the aid in Ball as "relieving the sectarian school of costs it otherwise would have borne." Thus, the Court's conclusion—that aid that merely supplements rather than supplants a
sectarian school's curriculum is necessarily constitutional—is inconsistent with, not a consequence of, what the Court said in Zobrest.38

The second part of Agostini's argument against Ball's subsidization "assumption" is that Ball ignored the role of "private decisionmaking" as a factor mediating between the state and the individual recipient of government aid. Witters and Zobrest, the Court says, relied explicitly on this factor—together with the related factor of the challenged programs' neutral eligibility criteria—to uphold the challenged programs. And the Title I program, according to Agostini, is relevantly similar. Here, too, the Court maintains in Agostini, Title I funds go to local educational agencies, and they distribute services "directly to the eligible students within [their] boundaries, no matter where [the students] choose to attend school."39 Here, too, the eligibility criteria are neutral, making aid "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."40 And here, too, the Court emphasizes in Agostini, aid reaches the private schools only to the extent that parents make the "genuinely independent and private" choice to place eligible children in religious schools.

The problem with this argument is the same problem discussed above: Agostini discusses only half of the subsidization test applied in Witters and Zobrest. At most, the argument shows that Title I aid reaches religious schools only indirectly, through the effects of private choices. But both Witters and Zobrest noted, further, that the aid at issue in those cases was not "substantial."41 The Court in Agostini may insist that the number of religious-school students served is constitutionally insignificant,42 but as

438. In his Agostini dissent, Justice Souter goes on to argue that the distinction between supplementary and supplanting services is "impossible to draw." What was "remarkable" about New York City's Title I program pre-Aguilar, he says, was that it assumed, at public expense, a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them. Agostini, 117 S. Ct. at 2021 (Souter, J., dissenting). In this argument, Justice Souter follows Ball and Meek. See id. at 2022. For the Court's discussion on this point in Ball, see supra notes 126–131. Justice Souter argues, further, that because Title I instruction covers "core subjects," the Court's "relieve of costs otherwise borne" criteria is satisfied. Agostini, 117 S. Ct. at 2024 (Souter, J., dissenting).


440. Id. at 2011 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

441. See supra notes 424–438 and accompanying text.

442. See Agostini, 117 S. Ct. at 2013 ("Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant."); id. ("Zobrest did not turn on the fact that James Zobrest had, at
Managing Legal Change

discussed, both Witters and Zobrest upheld the challenged aid only after classifying it as incidental or minimal.\(^4\)

Let me be clear about my argument here. I have acknowledged that Witters and Zobrest would be helpful resources to a Court that seeks to change the law. The Mueller to Zobrest line of cases, I have said, depends upon notions not mentioned in the Meek to Aguilar line. These notions—the generality and neutrality of eligibility criteria, and private decision making as a mediating factor between state and religious school—are potentially expansive. If these notions were made sufficient conditions of a program’s constitutionality, then the Court could validate a wide range of programs aiding religious education, including comprehensive voucher schemes.\(^4\)

My point is simply that Witters and Zobrest did not themselves undertake this change in the law. These cases may be in tension with the Meek to Aguilar line, but the two bodies of precedent coexisted before Agostini.\(^4\)

The mechanism of their coexistence was the distinction, invoked in each line of cases, between unconstitutional direct and substantial aid and constitutionally permissible indirect and incidental aid. It may well be that a program’s constitutionality should not turn on this distinction. But to undo that distinction is to change the law that prevailed through Zobrest, and that is precisely what the Rule 60(b)(5) context bars the Court from doing.

the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.”).

\(^{443}\) Agostini relies on the neutrality of an aid program’s eligibility criteria for one further point, apart from the subsidization issue: neutral eligibility criteria, Agostini says, give potential recipients no incentive to undertake religious indoctrination, and to that extent, the program is less likely to advance religion. See id. at 2014. In the course of criticizing Ball and Aguilar for giving this consideration “no weight,” Agostini elevates the “neutral criteria” factor to one part of its three-part effects test. Giving greater “weight” to this consideration, however, would not by itself change the Ball and Aguilar outcomes. As the Court admits, the neutrality of a program’s eligibility criteria is a necessary but not sufficient condition for constitutionality. See id. (citing, with an “accord” signal, this point in Justice Souter’s dissent). The question still would remain whether the challenged program impermissibly indoctrinated, or impermissibly subsidized religion. And the arguments above have suggested that the post-Aguilar decisions did not effect a pre-Agostini legal change in these respects. See id. at 2025 (Souter, J., dissenting).

\(^{444}\) See supra note 202 and accompanying text.

\(^{445}\) Their coexistence becomes more clear when one considers also Mueller, not just Witters and Zobrest. Mueller was decided in 1983. Ball and Aguilar were decided in 1985. Witters was decided in 1986. The two lines of precedent were thus intertwined from the start. Focusing only on the post-Aguilar cases in the Mueller line—Witters and Zobrest—makes apparently more plausible the Court’s argument that the Mueller principles repudiate the Meek to Aguilar line.
4. The On-Premises/Off-Premises Distinction

In its arguments against both the symbolic union and subsidization theories, Agostini relies on a claim about Aguilar's limits. Aguilar, the Court says in Agostini, "implied that providing [Title I] services off-campus is entirely consistent with the Establishment Clause." The Court here renews an argument Justice O'Connor made in her Aguilar dissent. While Aguilar itself considered only on-premises services, the argument goes, Wolman, decided eight years earlier, upheld programs in which public employees provided off-premises remedial instruction and guidance counseling to parochial school children. O'Connor's opinion for the Court in Agostini, like her Aguilar dissent, relies heavily on the apparent arbitrariness of the distinction between on-premises and off-premises services. With respect to symbolic union, the Court declares that there is no "perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." And with respect to the subsidization theory, the Court maintains, the circumstance "most fatal" to this argument is "that it applies with equal force when . . . services are provided off-campus."

Justice Souter's Agostini dissent responds to this argument by noting, first, that the issue of off-premises services was not presented in Aguilar (or Agostini), and thus the question whether Aguilar's rationale should extend that far remains open. Further, Souter argues, "if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects," the on-premises/off-premises line is "sensible." When state officials administer classes inside the religious school, Souter maintains, the degree of symbolic union between church and state is greater than when the state "keep[s] its distance." And finally, Souter contends with respect to the subsidization point, a religious school is "arguably less likely" to rely on programs like Title I to supplant its existing courses when the courses...
must be offered off-premises—although Souter’s reasoning here is not entirely clear.\textsuperscript{453}

Justice Souter is right that teaching Title I courses off-premises will diminish the degree of perceptible union, and he may be right that religious schools are more likely to turn over instruction in basic subjects when they can do so conveniently, through on-premises instruction. Whether these differences in degree should make a constitutional difference, however, is not exactly obvious. Particularly with respect to subsidization, the distinction between on-premises and off-premises instruction is difficult to defend: Either way, the government, by covering instruction in basic secular subjects, would “make it easier for [religious schools] to . . . concentrate their resources on their religious objectives.”\textsuperscript{454}

The more pertinent reply to Agostini’s suggestion that the distinction is arbitrary is Souter’s first observation—off-premises instruction was not at issue in Aguilar, and thus it was not at issue in Agostini either. Given the Rule 60(b)(5) context, the question the Court must answer in Agostini is whether the Court’s cases post-Aguilar have undermined the distinction between on-premises and off-premises instruction, not whether the distinction, from the Court’s present perspective in Agostini, makes sense. The Court, however, does not even attempt to argue that either Witters or Zobrest undermines the distinction between on-premises and off-premises instruction.

Further, even if the distinction is arbitrary, the Court in Aguilar was not clearly committed to that distinction. Agostini acknowledges this point at least implicitly.\textsuperscript{455} And thus even if Aguilar, to avoid arbitrariness, must be either expanded or contracted, that insight does not tell us the direction

\textsuperscript{453} See id. Justice Souter writes:

The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patent significance cut-backs in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains.

\textsuperscript{454} Id.

\textsuperscript{455} See id. at 2012 (opinion of the Court) (“Justice Souter does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off-campus locations”); id. at 2013 (“Aguilar implied that providing the services off-campus is entirely consistent with the Establishment Clause”); id. at 2015 (stating that “no court has held that Title I services cannot be offered off-campus,” citing Aguilar as “limiting [its] holding to on-premises services,” and citing also three decisions from lower federal courts).
in which the Court should proceed. Nor do Witters or Zobrest speak to the question.

The Court’s best argument that Aguilar was committed to a constitutional distinction between on-premises and off-premises instruction is its suggestion that Wolman decided that very point eight years before Aguilar. Wolman, as the Court describes the case, upheld “programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school children at sites away from the nonpublic school.” But whereas Justice O’Connor’s dissent featured this argument, contending that unless Wolman were overruled the Court was committed to the distinction between on-premises and off-premises services, Agostini invokes this aspect of Wolman only in passing, in a “cf.” citation. Agostini’s caution in relying on Wolman seems to me justified. Wolman did permit publicly funded “remedial services” and guidance counseling for parochial-school students, when offered off-premises, but the Court’s opinion does not make clear the precise nature of those services. The Court stated its belief that “the programs are not intended to influence the classroom activities in the nonpublic schools.” While “involvement with the day-to-day curriculum of the parochial school would be impermissible,” and while “grave constitutional questions” would arise if “remedial service teachers” were to “plan courses of study for use in the classroom,” the Court did not understand the programs it reviewed to be connected with the ongoing operations of the religious school.

These programs did not, therefore, threaten to subsidize sectarian schools by “taking over a substantial portion of [the schools’] responsibility for teaching secular subjects,” as in Ball and Aguilar.

456. Id. at 208.
460. Id. But see Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 COLUM. L. REV. 87, 93 n.37 (1996) (stating that, under Wolman, the public school district in the Kiryas Joel case could have offered “special education classes for students attending religious schools,” so long as the classes were held at a neutral site).
462. Because Aguilar focused on entanglement rather than effects, it did not draw this subsidization conclusion explicitly. Nonetheless, Aguilar noted the similarity between New York City’s Title I program and the programs invalidated in Ball. See Aguilar, 473 U.S. at 409. And in rejecting the argument that New York City’s monitoring system distinguished Aguilar from Ball, the Court stated that “at best” the system of monitoring would prevent direct religious indoctrination—not, presumably, subsidization. See id.
Thus, whether or not the distinction between on-premises and off-premises instruction should be considered constitutionally significant, the Court was not clearly committed to it pre-Aguilar. Neither Ball nor Aguilar addressed the issue of off-premises instruction, nor did any post-Aguilar case establish that the distinction between on-premises and off-premises instruction is arbitrary. Agostini's conclusion that the distinction is arbitrary, then, is its own contribution, not a reflection of law already in place pre-Agostini. In the Rule 60(b)(5) context, therefore, the Court cannot rely on this "arbitrariness" argument to unsettle the decisions in Ball and Aguilar.

5. Entanglement

The Court's entanglement conclusion depends heavily on its reading of the indoctrination issue. If, as the Court maintains, Title I teachers present no significant risk of engaging in religious indoctrination, then no intrusive system of monitoring would be constitutionally required. The Court's argument against Aguilar's entanglement theory, then, is no stronger than its argument against Ball's "state-sponsored indoctrination" theory. And for reasons expressed above, the Court fails to displace the latter theory.65

This is not to deny the accuracy of Agostini's charge that Aguilar's indoctrination and entanglement theories might merit revision. Aguilar doubtless does exaggerate the risk that publicly employed teachers, when teaching secular subjects in various schools whose religious affiliations the teachers generally do not share, will depart from their instructions and launch into religious indoctrination.66 And as for the entanglement theory, even Justice Souter's dissent concedes his "reservation" about Aguilar's "emphasis on the excessive entanglement produced by monitoring religious instructional content."67 But in the context of a Rule 60(b)(5) motion for relief from Aguilar's judgment, the Court was required to find a change in the law in post-Aguilar cases, not to effect legal change through the Agostini decision itself. And in that task, the Court failed.

6. Significance of the Court's Misuse of Precedent

Suppose I am right that the Court mischaracterized its own precedent in order to reach a particular result in Agostini. The objection might be: so

463. See supra Part III.A.1.
464. See Aguilar, 473 U.S. at 424 (O'Connor, J., dissenting); see also, e.g., Lupu, supra note 203, at 244; Laycock, Neutrality, supra note 32, at 1007.
what? What can be considered so unusual about an opinion in which the Court pretends, without adequate justification, that its present decision is compelled by past precedent? That the Court issues such opinions is not exactly fresh news. While it might be worth noting that the Court was not, contrary to its claims, compelled by precedent to reach its present result, this criticism would seem to amount only to the familiar call for greater candor.

The Court, on this well-worn story, should own up to the fact that its present decision makes new law and is not compelled by past decisions, and it should explain the theory that adequately justifies its present decision.

Part of the argument against Agostini is indeed the argument for greater candor. The Court does not take responsibility for its decision to change the law in Agostini, and it is incorrect to attribute that change to past decisions. The Court, also, has failed to provide a theory, independent of precedent, that justifies the Agostini result. But Agostini is not just a garden-variety case of the Court’s disingenuous manipulation of precedent. In standard cases, the Court’s result could be justified by an independent theory that it could have provided but instead left only implicit. That is not so in Agostini. In selecting Agostini as the case in which to overrule Ball and Aguilar, and to revise Establishment Clause law, the Court forfeited the right to rely on a theory of the Establishment Clause that is independent of the Court’s post-Aguilar decisions. Agostini’s Rule 60(b)(5) context requires the Court to locate a change in Establishment Clause law in its own post-


467. On the academic demand for judicial candor, see, for example, David L. Shapiro, In Defense of Candor, 100 HARV. L. REV. 731 (1987).

Since they first began publication, American law reviews have seen the criticism of judicial opinions as a major part of their mission. A typical law review note, or even a leading article, will address an important judicial decision, or series of decisions, in an effort to show that the court has misconceived the problem, the solution, or both. Implicit in the analysis is a hint that whoever wrote the opinion was too inept, or perhaps too devious, to reveal what was really at stake.

Id. at 731. This is not to say that legal scholars always have understood the same thing by judicial candor, nor is it to deny that some scholars have questioned whether judges always must be candid. See, e.g., Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 TEX. L. REV. 1307, 1316-21 (1995) (discussing different conceptions of judicial candor defended in the academic literature); id. at 1310 ("[j]udges—especially life-tenured appellate judges, such as those sitting on the U.S. Supreme Court and Courts of Appeals—may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity."); cf. Scott Altman, Beyond Candor, 89 MICH. L. REV. 296 (1990) (distinguishing between candor and "introspection" or self-consciousness and arguing that more self-conscious judicial decision making would not necessarily be better judicial decision making).

As explained in text below, however, my argument is not simply that the Court’s opinion did not disclose its true grounds of decision, but also that its choice of Agostini as a law-transforming vehicle made adequate justification of its decision impossible, even post hoc.
Aguilar precedents, not in a theory that was never adopted in those precedents. The Court's misreading of precedent, therefore, cannot be made good by specifying post hoc a constitutional theory, implicitly presupposed but not articulated in the Court's opinion, that would justify the Agostini result.

The Court's mistake in Agostini, then, is more than just lack of candor or a disingenuous manipulation of precedent. It amounts, instead, to a more general error—the Court's failure to manage properly the process of legal change. Even assuming that some theory of the Establishment Clause properly would justify the transformation initiated in Agostini, the Court was required not just to provide such a theory, but to select a case in which such a theory permissibly could be offered. The Court's failure to do so makes more irresistible the inference that the Court has not merely written an unconvincing opinion, but embarked upon a more fundamentally illegitimate enterprise.

Doubtless one reason the Court settled on Agostini as its overruling vehicle was its difficulty in finding other suitable cases that presented the Aguilar issue. The Court does not refer directly to this difficulty in its Agostini opinion, but the arguments presented to the Court made the problem clear. According to the merits brief filed on behalf of the group of parents who challenged Aguilar:

[T]here is [no] way for these parties, or any others, to seek Aguilar's overruling in any other case that has arisen in its aftermath. There have been a series of lawsuits filed across the country in which plaintiffs have attempted to extend Aguilar by arguing that the Establishment Clause prohibits the alternative arrangements that have been implemented in its wake. These challenges have been rejected by various lower courts. Yet in none of these cases have pro-Aguilar plaintiffs petitioned for certiorari in this Court. The clear signals of Aguilar's impending demise have produced a situation in which cases

468. Justice Ginsburg's dissent suggests that other "vehicles" for reconsidering Aguilar were already "in motion." Agostini, 117 S. Ct. at 2028 (Ginsburg, J., dissenting). The Court responds, not by denying that other cases that might present the Aguilar issue were available, but by stating: "We see no reason to wait for a 'better vehicle' in which to evaluate the impact of subsequent cases on Aguilar's continued vitality." Id. at 2018 (opinion of the Court). According to the Court, the Agostini decision neither "undermines 'integrity in the interpretation of procedural rules' [n]or signals any departure from the 'responsive, non-agenda-setting character of this Court.'" Id. (quoting id. at 2028 (Ginsburg, J., dissenting)). Further, the Court says, delay in reaching the issue would compound the injustices Aguilar visited on the New York City schools and their students. Id. at 2018-19.
that might present an opportunity to overrule Aguilar are being strategically withheld from the Court’s consideration.\textsuperscript{469}

But even if we assume that plaintiffs’ attorneys had a stranglehold on Title I cases pending at the time the Court considered Agostini, it does not follow that no other case would present the Aguilar issue. The government conceded that “a school district other than New York” could request funding for Title I services that would be offered on the premises of religious schools, and then contest the decision by the secretary of education to deny funding.\textsuperscript{470} While, as the government points out, “all lower courts in the Nation would be obligated to follow Aguilar”\textsuperscript{471} in this action, still, when the case reached the Supreme Court it would not involve Agostini’s Rule 60(b)(5) complications. The Court, then, would have been free to present all the arguments against Aguilar, not just the ones it can torture out of the Witters and Zobrest opinions.

Similarly, the question whether Aguilar should be overruled might arise from a challenge to a state school-aid program. The government’s Agostini brief comes close to conceding this point,\textsuperscript{472} but then argues that factual differences between Title I and a state scheme might preclude the Court from reaching the Aguilar issue.\textsuperscript{473} Both Aguilar and Agostini demonstrate that this argument is unpersuasive. In Aguilar, the Court treated Grand Rapids’s Community Education and Shared Time programs as essentially similar to New York City’s Title I program, differing only in the two programs’ respective degrees of monitoring.\textsuperscript{474} The Court therefore held, without further analysis, that Title I failed Ball’s effects test, with the possi-

\textsuperscript{469} Brief for Petitioners Rachel Agostini et al. at 44–45, Agostini (Nos. 96-552, 96-553) (footnote omitted). The Government’s brief makes a similar argument:

it is doubtful whether, absent the avenue for relief under Rule 60(b) that petitioners have invoked, this Court would ever be presented with a suitable vehicle for reconsideration of Aguilar. . . . [P]rivate plaintiffs have challenged the provision of Title I services to religious school students even after Aguilar as inconsistent with the Establishment Clause, but those contentions have been uniformly rejected in the lower courts. The losing plaintiffs have not sought this Court’s review, and, because the school districts and the Secretary prevailed in those cases, there has been no opportunity to request this Court to reconsider Aguilar.

Brief for the Secretary of Education at 44, Agostini (Nos. 96-552, 96-553).

\textsuperscript{470} Brief for the Secretary of Education at 45, Agostini (Nos. 96-552, 96-553). The government adds, however, that because the secretary’s position is that Aguilar should be overruled, there might be difficulties in finding counsel to defend the pro-Aguilar position. See id. The government does not explain why a group of intervenors or an amicus group would not take up Aguilar’s defense.

\textsuperscript{471} Id.

\textsuperscript{472} See id. at 44 n.17.

\textsuperscript{473} See id.

\textsuperscript{474} See supra notes 145–146 and accompanying text.
ble exception that the Title I monitoring procedures might relevantly decrease the risk that state officials would engage in religious indoctrination.\textsuperscript{475} And in Agostini, while the Court was faced directly with New York City's Title I program only, it did not hesitate to overrule the portions of Ball dealing with Grand Rapids's Shared Time program.\textsuperscript{476} Establishment Clause cases may be more fact-specific than cases in many other areas of law, but the Court never has treated each statute as wholly incommensurable with every other.\textsuperscript{477}

It seems at least likely, then, that the Court could have reached the Aguilar issue in a case that would have allowed the Court to consider all the reasons for Aguilar's overruling, not just those allegedly implicit in Witters and Zobrest. Doubtless the Court was frustrated that the strategic behavior of litigants prevented it from reconsidering Aguilar as quickly as it would have liked. That, however, is a limit on the Court's power to manage legal change that it ordinarily must tolerate.

B. Agostini's Paradox

Even if Agostini were correct in its reading of post-Aguilar precedent, the Court would face one further difficulty: the problem of whether relief under Rule 60(b)(5) is appropriate. One indication of this difficulty is the solicitor general's concession at oral argument that he did "not know of another instance in which Rule 60(b) has been used" to grant relief from a judgment under circumstances similar to the Agostini case.\textsuperscript{478} While lack of precedent is not necessarily fatal to the theory, it does indicate the extraordinary nature of the Agostini proceedings.

I have already identified one central problem in Agostini's Rule 60(b)(5) theory. The Court had said in Rodriguez de Quijas that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."\textsuperscript{479} The district court complied

\textsuperscript{475} See supra notes 148-149 and accompanying text.
\textsuperscript{476} See Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) ("We . . . overrule Ball and Aguilar to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.").
\textsuperscript{477} One final way in which the Court could have reconsidered Aguilar free from Rule 60(b)(5) problems: The New York City Board of Education could have obtained review by violating the Aguilar prohibition and contesting the Aguilar issue in a contempt proceeding.
\textsuperscript{478} Oral argument in Agostini at 11, cited in Agostini, 117 S. Ct. at 2026 (Ginsburg, J., dissenting).
with this rule in Agostini, denying relief. And in reviewing this decision, the Supreme Court confirmed that the district court had ruled correctly. Yet it reversed the trial court's decision as an abuse of discretion. And how can a legally correct decision be an abuse of discretion? This difficulty is one side of Agostini's paradox.

The other side of the paradox appears when one considers what the Court would have done if the district court had decided Agostini the other way—accepting the theory the Court later announced in Agostini, and deciding that Aguilar is no longer good law. Under Rodriguez de Quijas, the Court would have denounced the district court's illegal usurpation of Supreme Court prerogative. Nonetheless, because the district court and Supreme Court would have shared the same Establishment Clause theory, the Court doubtless would have affirmed the district court's judgment. But how could a legally incorrect decision be affirmed as a proper exercise of discretion? This difficulty is the other side of Agostini's paradox.

Agostini tries to escape the paradox by denying it, suggesting that the Court has done nothing other than apply standard principles in granting Rule 60(b)(5) relief. Under the abuse-of-discretion standard, the Court observes, "an exercise of discretion cannot be permitted to stand if... it rests upon a legal principle that can no longer be sustained." That, the Court implies, is the case in Agostini. Further, Agostini maintains, the Court's ordinary practice is to "apply the rule of law we announce in a case to the parties before us," even if, as in Agostini, the Court is overruling a case on which the district court properly relied. In this connection the Court invokes Adarand Constructors v. Pena, in which the lower courts properly relied on a precedent that the Court proceeded to overrule. In Adarand, Agostini notes, the Supreme Court reversed the lower courts' decisions, even
though those courts were correct to rely on the precedent that the Supreme Court subsequently overruled.\textsuperscript{486}

The Court's general observation that legal error is an abuse of discretion does not address Agostini's paradox. The standard situation in which the Court applies this general rule is one in which the lower court has committed an ordinary legal error.\textsuperscript{497} In this case of ordinary legal error, reversal creates no paradox: The lower court decided the case incorrectly, and accordingly its decision must be reversed. This standard case, however, is different from the Agostini situation, in which the lower court has ruled correctly, not incorrectly, and the Court nevertheless reverses. If Agostini is to be defended, then, it must be with a principle more particular than the general rule that legal error is an abuse of discretion.

More to the point is the Court's further and more particular argument—that when the Court overrules its own precedent, it will reverse a lower court's decision that properly relied on the overruled precedent. In Adarand, to take the Court's example, the decision below was legally correct when rendered, and yet the Court nonetheless reversed. Agostini, the Court suggests, follows the same pattern. Cases like Adarand, then, seem to support the Court's claim that its action in Agostini was not extraordinary.

The other side of the paradox, I said, is a case in which the Court, in overruling, affirms a legally incorrect decision. Here the Court could mention Rodriguez de Quijas, the case from which the Court takes its rule that lower courts must follow directly controlling Supreme Court precedents, even if those precedents seem to be undermined by later Supreme Court pronouncements. In Rodriguez de Quijas, the Court reviewed a Fifth Circuit decision that had declared a Supreme Court precedent, Wilko v. Swan,\textsuperscript{488} "obsolescent" in light of more recent Court authority.\textsuperscript{489} Wilko, not yet overruled by the Supreme Court, spoke directly to the specific issue that the Fifth Circuit considered, while the more recent precedent on which the Fifth Circuit based its "obsolescence" conclusion concerned only analogous situations.\textsuperscript{490} The Supreme Court agreed with the Fifth Circuit that Wilko

\textsuperscript{486} See Agostini, 117 S. Ct. at 2017.

\textsuperscript{487} This situation is the one envisioned in the case the Court cites for support. See id. at 2018 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990))).

\textsuperscript{488} 346 U.S. 427 (1953).

\textsuperscript{489} Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988).

\textsuperscript{490} Wilko concerned the arbitrability of claims arising under section 12(2) of the Securities Act of 1933, whereas the more recent Supreme Court precedent addressed the arbitrability of claims arising under section 10(b) of the Securities Exchange Act of 1934. The relevant issue in Rodriguez de Quijas was the arbitrability of the former kind of claim. See id. at 1296–97. The Fifth Circuit noted the similarities between the two kinds of claims. See id. at 1299.
should be overruled, and the Court in fact did overrule that case. On that basis, the Court affirmed the Fifth Circuit's judgment. But at the same time, the Court stated that the Fifth Circuit had no authority to do anything other than follow Wilko, the directly controlling and not-yet-overruled Supreme Court precedent. Thus in Rodriguez de Quijas, the Supreme Court, in overruling, affirmed a decision it deemed legally incorrect.

This strategy of escape from Agostini's paradox does have the benefit of making Agostini appear to be routine rather than unprecedented. Yet, as an initial matter, it does not so much dispel the paradox as deepen it, locating the paradox in the ordinary case, and the very logic, of overruling. This strategy, then, is not an appealing way of justifying Agostini's decision to overrule.

Moreover, Adarand and Rodriguez de Quijas are not in fact on the same footing with Agostini with respect to the paradox I have identified. As I will suggest, the paradox is dispelled easily enough in considering Adarand and Rodriguez de Quijas. The paradox, however, is more intractable in Agostini—because of Agostini's Rule 60(b)(5) context, not present in Adarand or Rodriguez de Quijas.

Consider, first, the Adarand side of the paradox, in which the lower courts correctly rely on a precedent the Supreme Court proceeds to overrule. In Adarand, the lower courts properly refused to apply strict scrutiny to a federal agency's affirmative action plan, following the Court's earlier decision in Metro Broadcasting, Inc. v. FCC. The Supreme Court's decision to overrule Metro Broadcasting, however, changed the relevant law. Thus, while the lower courts' decisions were correct at the time they were rendered, they were incorrect by the time the Court had changed the law.

492. See id. at 484; see also id. at 486 (Stevens, J., dissenting) (“The Court of Appeals refused to follow Wilko v. Swan,... a controlling precedent of this Court. As the majority correctly acknowledges,... the Court of Appeals therefore engaged in an indefensible brand of judicial activism.” (citations omitted)).
493. Jack Beermann has pointed out to me that the Rodriguez de Quijas principle is dictum, in the sense that it is unnecessary to the Court's judgment. On either side of the paradox, the Court will affirm or reverse the lower court's judgment based on the Court's view of the substantive legal issue, not the lower court's obedience to the Rodriguez de Quijas principle. In fact, the point of the paradox is that the Court will affirm when the lower court disobeys the Rodriguez de Quijas stricture, and reverse when the lower court obeys. Still, as Justice Scalia has noted:

Let us not quibble about the theoretical scope of a "holding"; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

and overruled the precedent on which the lower courts had relied. The Court, therefore, properly reversed. The apparent paradox disappears when we distinguish between the law as it was at the time the district court acted and the law as it was when the Supreme Court reached its decision. At the latter time, the lower courts' decisions, though correct when rendered, "rest[ed]," as Agostini relates, "upon a legal principle that [could] no longer be sustained" by the time the Court acted.

Or consider Rodriguez de Quijas, the case I have taken to exemplify the other side of Agostini's paradox. In that case, the Fifth Circuit refused to follow Wilko, the directly controlling Supreme Court precedent. The Fifth Circuit's decision was therefore legally incorrect when rendered, because Wilko was then still the governing law. But when the Court overruled Wilko and changed the law, the Fifth Circuit's judgment—though not its method of reaching that judgment—became legally correct. On that basis, the Supreme Court affirmed the judgment. Here, too, the paradox dissolves when we distinguish between the times at which the lower court and Supreme Court acted, and when we consider that the Supreme Court changed the law with its overruling decision.

This strategy for escaping the paradox, however, is not available in Agostini. The reason is Agostini's Rule 60(b)(5) context. In order to grant relief under that rule, Agostini must profess merely to recognize prior changes in the law, not itself to effect legal change. Thus while Agostini, like Adarand, overrules precedents on which the lower courts properly relied, its theory is that the law had changed no later than June 1993, when Zobrest was decided. And that means that in Agostini, unlike Adarand, the relevant legal change already had occurred before the lower courts' decisions in 1996. Thus, no change in the law post-dating the lower courts' decisions is available to extricate Agostini from the paradox. The Court needs some other theory to explain how the paradox may be resolved.

The theory the Court would have to articulate is the following. Witters and Zobrest, particularly Zobrest, changed the law post-Aguilar to establish the principles Agostini calls "current law." These principles were thus in place from the date of Zobrest forward—from June 18, 1993 to the present. The Court's confirmation of those principles in Agostini does not, on Agostini's story, work a change in the law, and in that sense Agostini is unlike Adarand and Rodriguez de Quijas. But still, the Court could argue, from the perspective of those principles, the lower courts' adherence to Ball

496. Id. at 2012; see also id. at 2016 (referring to the "criteria we currently use to evaluate whether government aid has the effect of advancing religion"); id. at 2017 (referring to "our current understanding of the Establishment Clause").
and Aguilar, although justified at the time the courts acted, "rest[ed] upon ... legal principle[s] that can no longer be sustained." Accordingly, the Court reverses the lower courts' decisions as inconsistent with current law, just as the Court determined in Adarand and Rodriguez de Quijas. And accordingly, the paradox disappears through a distinction between the different rules of law that governed at the relevant times of decision.

This solution to the paradox, however, exacts a price. Although from the point of view of the Supreme Court, the "current law" announced in Zobrest was in place from June 1993 on, it was in place only for the Supreme Court's consideration. The Court, under Rodriguez de Quijas, forbids the lower courts from declaring that Aguilar has been overruled until the Supreme Court has said so expressly. Thus, for district courts and courts of appeals, the governing law was not the law Agostini deems "current," but still Aguilar—from the day Aguilar was decided until the Court's June 1997 decision in Agostini.

The effect of this theory is an extraordinary doubling of the law. For the four years between Zobrest and Agostini, two distinct bodies of valid, binding law coexisted—one in the lower federal courts (and presumably state courts as well), and a contrary body of law in the Supreme Court. During this four-year period, the principles confirmed in Agostini were the law from the perspective of the Supreme Court. But at the same time, Aguilar was the law in every other court. From the perspective of the Supreme Court, Witters and Zobrest worked significant changes on the law and bound the Supreme Court to confirm that Ball and Aguilar were no longer good law. From the perspective of the lower courts, however, Witters and Zobrest worked no such changes, and their binding force could not overcome the force of Ball and Aguilar. Only the Court's decision in Agostini, the Court's theory would have it, reconciled these two contradictory bodies of law that held sway at the different levels of the judicial hierarchy.

And for that four-year period between Zobrest and Agostini, what principles governed those subject to the law—school boards, parent groups, teachers, and school children? The Court might like to answer that even before its Agostini decision, its law was supreme. From the point of view of the parties, however, Ball and Aguilar were, at the same time, still binding law, unless and until the Court was willing, in its discretionary exercise of certiorari jurisdiction, to take the Agostini case and render the decision it eventually rendered. If the Court, for whatever reasons, had denied certiorari or otherwise denied relief in Agostini, the parties would have remained

497. Id. at 2018.
subject to the principles of *Ball* and *Aguilar*, even if those cases were no longer good law from the perspective of the Supreme Court. Only the Supreme Court itself—not other courts, and not the parties—could see the *Agostini* theory as binding law before its announcement in *Agostini*.

*Agostini* thus resolves the paradox of reversing a legally correct decision, but only by transposing the paradox into a contradiction between two bodies of simultaneously valid, but opposed, legal doctrine. In so doing, the Court seems to join hands with the critical legal studies movement. 498

Further, the Court's attempted resolution of the paradox presents a normatively unattractive conception of adjudication and constitutional change. In *Agostini*, the Court professes not to change the law but merely to apply it. The Court locates the change in Establishment Clause law in two prior decisions that, for their part, say nothing about changing the law. The Court, then, changes the law, but in none of its opinions does the Court ever assume present responsibility for the change. In *Agostini*, we are told, the change was the work of past Courts. In *Zobrest* and *Witters*, the putative law-changing decisions, we see not even a hint that the Court saw itself as presently changing the law, and accordingly, we encounter no explanation of the reasons for change. And in *Kiryas Joel*—the only pre-*Agostini* decision that addressed the question whether *Ball* and *Aguilar* should be overruled—the change is projected into the future for some later Court to effect. 499 *Kiryas Joel*’s call to future Courts is ironic after *Agostini* because on the Court’s theory, the law already had changed with *Zobrest*—before *Kiryas Joel* was decided. Thus even the Supreme Court seemed unable to see that the law had changed before *Agostini*.

The inevitable consequence of the Court’s strategy is its failure to provide adequate reasons for transforming Establishment Clause effects doctrine. *Witters* and *Zobrest*, as decisions that still move in *Ball*’s orbit, suggest no such reasons. And *Agostini*, which attributes the change in the law to decisions already made in *Witters* and *Zobrest*, can offer only the reasons explicit or implicit in those cases. As a result, the *Agostini* opinion is a kind of ventriloquism, in which the Court attempts to project reasons for changing the law into the silent *Witters* and *Zobrest* opinions. The more justification *Agostini* purports to find in *Witters* and *Zobrest*, the less persuasive its reading of those cases becomes. And in that same measure, the *Agostini* opinion becomes less convincing. The Court in *Agostini* must either develop an independent theory of the Establishment Clause—and in

498. Cf. Mark Kelman, A Guide to Critical Legal Studies 258 (1987) ("[l]t is impossible to imagine any central or local legal institutions advocating a coherent, noncontradictory body of basic rules." (emphasis omitted)).

499. See supra notes 266–270 and accompanying text (describing the *Kiryas Joel* opinions).
that event, it would become evident that *Agostini* itself has changed the law—or the Court must attribute, unpersuasively, such a theory to *Witters* and *Zobrest*. Neither strategy can succeed.

Finally, and importantly, the Court’s selection of *Agostini* as its *Aguilar*-overruling vehicle sharply limited the available options in the Court’s law-reform strategy. If the Court had chosen to reconsider *Aguilar* in a case outside the Rule 60(b)(5) context, it could have decided whether to retain the *Lemon* test, or instead to overrule it and adopt one of the other Establishment Clause standards that the members of the *Agostini* majority had proposed. But the cases on which *Agostini* relies to establish the principles of “current law”—*Witters* and *Zobrest*—are modest decisions that operate within the *Lemon* framework.\(^{500}\) The consequence of this strategy is to freeze, as “current law,” a version of the *Lemon* test that all members of the *Agostini* majority had criticized in earlier cases.\(^{501}\) Even if the *Agostini* majority could not reach agreement on a particular *Lemon*-replacing test, still, the reaffirmation of even a revised version of *Lemon* had to be difficult for those five Justices to swallow—difficult, particularly, for Justice Scalia, who in an opinion joined by the Chief Justice and Justice Thomas had vowed never again to join an opinion that applied the *Lemon* test.\(^{502}\) And it leaves readers wondering what the fuss about *Lemon* was, if that case’s sharpest critics were willing, without a word of protest, to enshrine *Lemon*, even a revised version of *Lemon*, in “current law.” To be sure, the Court might decide in the next case that *Agostini’s* revised effects criteria, or its purpose inquiry, or both, are no longer “current.” But that determination would require the Court to overrule *Agostini*. The more direct course to

---


501. See * supra* notes 311–313 and accompanying text. The effects standard the Court adopts, see * supra* notes 350–357 and accompanying text, is more lenient than the one applied in *Ball* and *Aguilar*. One significant difference is that the test modified the “risk analysis” of *Ball* and *Aguilar*—that is, the Court’s prior willingness to invalidate a program based upon a “substantial risk,” not necessarily documented in the record, that the program will be turned toward religious indoctrination. (I borrow the term “risk analysis” from Greene, * supra* note 199, at 21.)

overruling or modifying Lemon would have been for the Court to have passed on Agostini and to face the issue in a less problematic case.

All of the difficulties I have identified in the Agostini opinion arise, at least in part, from the Court's decision to reconsider Aguilar within the Rule 60(b)(5) context. That context forces the Court—if it is to grant relief—to misread Ball and Aguilar, overread Witters and Zobrest, posit coexisting but contrary bodies of law post-Zobrest and pre-Aguilar, wrongly disavow responsibility for changing the law, and fail to present adequate reasons for the change in the law Agostini effects. The better course would have been for the Court to wait for another case, as Justice Ginsburg's dissent recommends—a case that did not involve the complications that the Rule 60(b)(5) context creates. In such a case, the Court could have decided, on the basis of an independent and fully developed theory of the Establishment Clause, whether to overrule Ball and Aguilar.

The Court, however, did not follow this better course. But in what follows, I suggest that the Court could have avoided at least some of Agostini's difficulties, even within that case's Rule 60(b)(5) context.

C. Alternate Routes

One weakness in the Court's Agostini opinion is the implausibility of its argument that Witters and Zobrest changed the law. The Court, it seems, might have been able to avoid this difficulty by declaring, instead, that the various Aguilar-repudiating statements in Kiryas Joel changed the law, or at least reflected a change in the law. Kiryas Joel, after all, was the decision prompting the filing of the Rule 60(b)(5) motion in the first place, and the moving parties relied most heavily on that decision in their arguments to the district court. Further, Kiryas Joel was the only pre-Agostini case in which five Justices criticized Aguilar and—with differing degrees of directness—called for Aguilar's overruling. While, as Agostini notes, the issue of Aguilar's overruling was not directly presented in Kiryas Joel, still, the Justices' attention was focused on Aguilar and its consequences: the legislative scheme declared unconstitutional originated as a response to Aguilar. Further, if the Court had relied on Kiryas Joel to find the pre-Agostini change in the law, Agostini's paradox would have disappeared. On that theory, the law would have changed in 1994, before the lower courts' 1996 decisions, and it would have changed in all courts. Accordingly, the lower courts

503. See Agostini, 117 S. Ct. at 2028 (Ginsburg, J., dissenting). On the issue whether the Court could have encountered such a case, see supra notes 314-323 and accompanying text.
504. See supra note 291 and accompanying text.
505. See supra notes 266-270 and accompanying text.
would have erred in ignoring Kiryas Joel, and their decisions properly could have been reversed.

But although the Court is willing enough to find a repudiation of Aguilar through creative readings of other post-Aguilar precedents, elevating the Kiryas Joel statements to the status of a law-changing decision apparently would be simply too much. None of the anti-Aguilar statements appeared in an opinion for the Court, and finding them to change the law would be too frontal an assault on the fundamental distinction between holding and dictum. Piecing together the various separate Kiryas Joel opinions to find a change in law arguably would treat the Court as an assemblage of individual Justices whose noses are to be counted, rather than a collective body that renders collective judgments. Nose-counting, or at least vote-counting, is in some ways part of normal judicial practice: When the Court is not unanimous, it determines which view has prevailed by counting votes. But still, it may be more objectionable to find the Court to have overruled one of its own precedents by aggregating opinions, none of which was an opinion for the Court. And further, relying on Kiryas Joel as the law-changing decision seems simply inconsistent with the language of the opinions filed in that case—none of which suggest that any Justice saw Kiryas Joel as itself changing Establishment Clause law in a way that could help the New York City Board of Education.

For some or all of these reasons, even the lawyers challenging Aguilar in Agostini did not argue to the Supreme Court that Kiryas Joel had changed the law. Kiryas Joel had done its work for them earlier, operating as a signal to the lower courts that the Supreme Court would be receptive to a petition calling for Aguilar's overruling. The arguments presented to the Court referred to Kiryas Joel as the Court's "invitation" to seek Aguilar's

506. It would be ironic confirmation of the dictum often attributed to Justice Brennan: "Five votes can do anything around here." BERNAUER SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6 (1996); cf. Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 682-84 (1995) (describing the idea that a multimember court is the sum of its individual members as inconsistent with the rule of law).

507. And in cases without a majority opinion, one counts the number of Justices who subscribed to particular results. In cases in which the Court is especially splintered (the 4-1-4 split is the classic scenario), different methods of aggregation can produce different interpretations of the case's holding. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 CAL. L. REV. 1, 18-24 (1993); David Post & Steven C. Salop, Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels, 80 GEO. L.J. 743, 750-58 (1992).

508. See supra notes 266-270 and accompanying text (discussing the separate opinions filed in Kiryas Joel).

509. This strategy seems to have worked. The district court's opinion describes the Supreme Court's interest in overruling Aguilar and goes on to present the Agostini case as the ideal vehicle for such a decision—thus giving the case "special handling" treatment on its way up to the Court.
overruling," not as a decision that, in effect, already had accomplished that result. They suggested, further, that having invited the petition, the Court could not now withdraw that invitation in Agostini, when, as the district court had put it, there could "scarcely be a more appropriate vehicle" for overruling Aguilar. But the primary focus of these arguments was the contention that other post-Aguilar cases, particularly Witters and Zobrest, had changed the law.

Another and better strategy the Court could have followed would have been to eliminate, or at least to take a relaxed view of, the restrictions on lower courts that Rodriguez de Quijas imposes. Under Rodriguez de Quijas, lower courts must follow a Supreme Court precedent that "directly controls," even if it is undermined by later authority. The Supreme Court, on this theory, has a peculiar interpretive privilege or, in the Court's term, "prerogative." Only the Supreme Court, in the situations Rodriguez de Quijas posits, may survey the entire body of Court precedent as a body of

510. See, e.g., Petition for a Writ of Certiorari at 3, Agostini v. Felton, 117 S. Ct. 1997 (1997) (No. 96-552) (stating that "five Members of the Court have expressly called for Aguilar's overruling or invited its reconsideration" and citing Kiryas Joel); Brief for Petitioners Rachel Agostini et al. at 3, Agostini (Nos. 96-552, 96-553) (same); Petition for a Writ of Certiorari at 12, Agostini (No. 96-552) ("This petition is a direct response to the invitation of five Justices two years ago in [Kiryas Joel]."); id. at 13 ("[A] majority of the Court has invited reconsideration of Aguilar in an appropriate case."); Brief for Petitioners Rachel Agostini et al. at 14–15, Agostini (Nos. 96-552 & 96-553) ("A majority of this Court . . . invited a request to reconsider Aguilar in a proper case."); Reply Brief for Petitioners Rachel Agostini et al. at 4, Agostini (Nos. 96-552, 96-553) (stating that in Kiryas Joel, "a majority of the Members of this Court . . . explicitly criticized or questioned Aguilar and at least implicitly invited a request for its reconsideration").

511. See Reply Brief for the Secretary of Education at 2, Agostini (Nos. 96-552, 96-553) ("Aguilar has not been overruled, and . . . Kiryas Joel itself was not a 'change in the law' warranting a grant of relief from the injunction by the district court; the lower courts were obliged to deny relief . . . since they were bound . . . by this Court's directly controlling precedent in Aguilar."); Reply Brief for Petitioners Rachel Agostini et al. at 4, Agostini (Nos. 96-552, 96-553) ("Contrary to respondents' contention, petitioners do not maintain that these individual expressions of opinion [in Kiryas Joel] themselves constituted a change in law."); see also Brief for Petitioners Chancellor and Board of Education of the City of New York at 24, Agostini (Nos. 96-552, 96-553) (noting that in Kiryas Joel, "five members of the Court explicitly stated their wish to reconsider Aguilar"); Brief for the Secretary of Education at 35, Agostini (Nos. 96-552, 96-553) (indicating that "five Justices expressly criticized Aguilar as inconsistent with the Court's Establishment Clause jurisprudence").


513. See Reply Brief for Petitioners Rachel Agostini et al. at 6–7, Agostini (Nos. 96-552, 96-553) ("It advances no institutional interest for the Court to issue decisions that undermine Aguilar, for a majority of the Justices to invite reconsideration of the decision, and for the Court then to turn a deaf ear to the affected parties who seek the reconsideration that has been invited.").

principle and determine whether later precedents have so undermined an earlier precedent as to have changed the law. Lower courts, by contrast, are bound by a rule of specificity or local priority,\textsuperscript{513} as well as one of hierarchy: A command from above that is directly on point controls, whether or not the Court's subsequent cases are best read as countermanding the earlier order.

Rejecting or relaxing the Rodriguez de Quijas principle still would have left all the problems associated with Agostini's use of precedent. But at least it would have allowed the Court to avoid the difficulties that Agostini's paradox creates. Relaxing Rodriguez de Quijas's constraint would mean that the lower courts could have engaged in the same process of interpretation the Court undertook in Agostini—reading Aguilar against the body of more recent cases, and recognizing (by accepting the Court's theory) that Witters and Zobrest had changed the law. If the Court in Agostini had allowed the lower courts this power, then the Court unproblematically could have reversed, as erroneous, the lower courts' decisions to follow Aguilar rather than the law-changing decisions in Witters and Zobrest. The Court would have had no need to suppose that two contradictory bodies of law coexisted between Zobrest and Agostini—Aguilar in the lower courts and post-Aguilar law in the Supreme Court—and it would have escaped the paradox of reversing a correct judgment.

Despite the benefits this course would have had for the Court's Agostini opinion, the Court's decision to reject it is unsurprising. The Court remains firmly committed to the strictures for lower-court interpretation it laid down in Rodriguez de Quijas. Both the majority and the dissent in that case stated that the lower court had erred in declaring a Supreme Court precedent obsolescent. If anything, the dissent in that case was more insistent on the point than the majority, describing the court of appeals as having engaged in "an indefensible brand of judicial activism."\textsuperscript{516} The Court did not offer justifications for the principle it announced in Rodriguez de Quijas. But a number of reasons for the Court's commitment to that principle are imaginable.

Doubtless one reason is the fear that "rogue" district judges otherwise might disregard a Supreme Court precedent simply because they, for whatever reasons, find it incorrect or unattractive.\textsuperscript{517} This concern might be

\textsuperscript{515} On the notion of "local priority" in judicial interpretation, see RONALD DWORIN, LAW'S EMPIRE 250–54 (1986).

\textsuperscript{516} Rodriguez de Quijas, 490 U.S. at 486 (Stevens, J., dissenting).

\textsuperscript{517} The classic example, perhaps, is Judge William Brevard Hand's decision in Jaffree v. Board of School Commissioners, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), holding that the Establishment Clause does not apply to the states.
good reason to oppose, for example, Michael Stokes Paulsen's theory of
"underruling," under which lower courts should refuse to enforce Supreme
Court precedents that are, in the lower court's conscientious independent
judgment, "clearly outside the range of allowable judicial interpretation of
the Constitution." But relaxing Rodriguez de Quijas's strictures would not
necessarily give such free rein to lower courts. The proposal I am
considering is narrower in two respects than Paulsen's theory of "underrul-
ing." First, Rodriguez de Quijas itself deals with a sharply limited class of
cases—those in which later Supreme Court authority undermines, without
expressly overruling, an earlier and directly relevant precedent. Rodriguez
de Quijas does not concern the ordinary case, in which the Supreme Court
has issued a clear command, or at least has not issued later commands that
undermine, without expressly rescinding, an earlier and clearly binding
instruction. And under the modification of Rodriguez de Quijas I am sug-
gestig, the question for the district judge is not whether she, in an
independent exercise of her judgment, would agree with the Supreme
Court's directly controlling precedent, or even find it a permissible interpre-
tation of the law. The question would be only whether the Supreme Court
itself has so undermined an earlier precedent that the better reading is to see
that precedent as implicitly overruled by the Court's later decisions.

Presenting the question this way addresses a second possible defense of
Rodriguez de Quijas: that the interpretive principle announced in that case
follows necessarily from a distinction between superior and inferior courts.
The proposal I am considering—under which lower courts would have the
authority to determine whether the Court itself has overruled implicitly an
otherwise controlling precedent—is consistent with the idea that inferior
courts must follow the Supreme Court's instruction. In order to follow an
instruction, one must interpret it first. And it does not follow from the
nature of taking instruction, or the nature of interpretation, that the earlier
and more specific command should control, when later instructions coun-
termand it or make it senseless. In these cases, after all, to follow the more
specific command is at the same time to ignore the more recent instruc-
tions. Deciding that the Supreme Court's own cases implicitly have

518. Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M.
Cover's Justice Accused, 7 J.L. & RELIGION 33, 87 (1989) [hereinafter Paulsen, Accusing Justice]; see
also Michael Stokes Paulsen, Protestantism and Comparative Competence: A Reply to Professors
Levinson and Eisgruber, 83 GEO. L.J. 385, 386 & n.3 (1994). Paulsen suggests that "the case for
'underruling' is especially strong where it is anticipated that the Supreme Court may be prepared
to reconsider a constitutional holding." Paulsen, Accusing Justice, supra, at 87. He notes, how-
ever, that the rationale of his proposal is not necessarily limited to such situations. See id. at 86
n.142.
overruled an earlier precedent defers to, rather than defies, the Court’s authority.\(^{519}\)

Another reason behind \textit{Rodriguez de Quijas} might be the Court’s desire to ensure that inferior tribunals decide cases by interpreting and following the Court’s decisions, rather than by predicting whether the Court, in some future decision, will overrule one of its own precedents. The “predictive” mode of lower-court decision making, it may be argued, is inconsistent with the rule of law—at least when the predictions are based upon factors such as changes in the Court’s personnel, the Justices’ extrajudicial statements, or estimations of particular Justices’ ideological views.\(^{520}\) On this theory, lower courts should refrain from predictive, “anticipatory overruling” of Supreme Court precedents, “leaving to th[e] Court the prerogative of overruling its own decisions.”\(^{521}\)

One response to this defense of \textit{Rodriguez de Quijas} is to note that the Court has not always disapproved of lower courts’ anticipatory overruling, even when it has been based on factors such as changes in the Court’s personnel. The most famous example is the Court’s celebrated \textit{West Virginia State Board of Education v. Barnette}\(^ {522}\) decision, invalidating a compulsory flag-salute in public schools, and overruling the Court’s contrary decision just three years before in \textit{Minersville School District v. Gobitis}.\(^ {523}\) The Court’s \textit{Barnette} opinion affirmed, without critical comment, a lower-court decision that had refused to apply \textit{Gobitis}, based in part on a correct prediction that the two Justices who had joined the Court since \textit{Gobitis} would cast deciding

\(^{519}\) On the question whether a general policy tolerating outright defiance of Supreme Court authority could be justified, see Sanford Levinson, \textit{On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation}, 25 CONN. L. REV. 843, 851 (1993) (“It is difficult indeed to envision an institutional judiciary that allowed its underlings in effect to ignore the decisions of those at the top.”).

\(^{520}\) This is Michael Dorf’s conclusion. See Dorf, supra note 506, at 655 (concluding that “as a general matter, the prediction approach undermines the rule of law,” notwithstanding the existence of some “marginal benefits”); cf. Evan H. Caminker, \textit{Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking}, 73 TEX. L. REV. 1, 6 (1994) (concluding that a predictive approach by lower courts is justified in some cases). On the sources available to a purely predictive approach, other than written judicial opinions, see Dorf, supra note 506, at 663–64 (mentioning the Justices’ “non-judicial writings and speeches” and their “general ideological commitments”). See also Caminker, supra, at 17–19 (mentioning dicta, “law review articles, confirmation-hearing testimony, and public speeches,” as well as “particular Justices’ general ideological commitments or proclivities”); cf. Dorf, supra note 506, at 652 (describing pro se petitions filed in the Supreme Court, seeking rehearing of denial of certiorari, and invoking as the required “intervening circumstance” Justice Thomas’s ascension to the Court).

\(^{521}\) \textit{Rodriguez de Quijas}, 490 U.S. at 484.

\(^{522}\) 319 U.S. 624 (1943).

\(^{523}\) 310 U.S. 586 (1940).
votes to overrule. Decisions like *Barnette* make it difficult to see the predictive method of lower-court decision making, even when used for anticipatory overruling, as necessarily inconsistent with the rule of law.

But in any event, the modification of *Rodriguez de Quijas* I am considering does not depend upon approval of predictive lower-court decision making or anticipatory overruling. On the proposal I am considering, lower courts need not predict what the Supreme Court will do, nor need they "overrule" Supreme Court decisions anticipatorily. Instead, they need only interpret and follow existing Court decisions—giving no dispositive preference to the earlier precedent simply because of its local priority. This method of interpretation will not take the same form as a purely predictive method, nor will it necessarily produce the same results.

Commentators have recognized this distinction between predictive anticipatory overruling and a lower court's recognition that the Supreme Court itself has overruled implicitly one of its earlier decisions. Evan Caminker, writing before *Agostini*, reads *Rodriguez de Quijas* only to "admonish[] inferior courts not to engage in anticipatory overruling." But a lower court's determination that "newer precedents implicitly overrule the old," he recognizes, does not qualify as anticipatory overruling. Further, Caminker argues, so far as the lower court reaches that conclusion by "interpreting binding precedents," rather than by anticipating a future Supreme Court decision to overrule, the court has not engaged in predictive decision making. Michael Dorf, too, distinguishes between

---

524. The three-judge district court noted that "[o]f the seven justices now members of the Supreme Court who participated in *Gobitis*, four have given public expression to the view that it is unsound ...." *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942), aff'd 319 U.S. at 624. What the district court did not say expressly is that "Justices Rutledge and Jackson, new appointees to the Court, were widely thought to be uncommitted to *Gobitis* as a result of their opinions in other cases." Levinson, supra note 519, at 851 n.29. This consideration, though, seems implicit in the district court's calculations, which total only four votes against *Gobitis*, but indicate that two new Justices would be voting. See Caminker, supra note 520, at 2 (classifying the district court's decision in *Barnette* as an example of a decision refusing to apply a Supreme Court precedent, based on a prediction the Supreme Court would overrule); Dorf, supra note 506, at 661–63 (same).

525. Caminker, supra note 520, at 20.

526. Id. at 20 n.73; see also id. at 20. Since Caminker wrote these words, *Agostini* has made clear that the Court sees its "implicitly overrule[d]" precedents as covered by the *Rodriguez de Quijas* principle, not as exceptions. See Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997). But Caminker may be right that in *Agostini* the Court could have drawn the distinction he suggests by interpreting *Rodriguez de Quijas* restrictively. See infra notes 555–556 and accompanying text.

527. See Caminker, supra note 520, at 5–7 (distinguishing between the precedent and proxy (or, predictive) methods of inferior-court decision making); see also id. at 20 n.73 (noting that if the court concludes from examination of superior-court precedent that later decisions have overruled an earlier precedent, "the court can fairly be characterized as following the precedent model").
decisions in which lower courts base their refusal to enforce a Supreme Court precedent on "predictions" of "individual Justices' views"—which Dorf disapproves as undermining the rule of law—
and decisions in which lower courts conclude, based on "conventional legal reasoning" concerning "impersonal legal materials," that the Supreme Court already has overruled its own precedent sub silentio. The "troubling" aspect of Rodriguez de Quijas, Dorf says, is that it conflates the two kinds of decision and disapproves of both. Caminker and Dorf thus differently interpret both Rodriguez de Quijas's scope and the legitimacy of lower courts' predictive decision making. But they agree that concerns about anticipatory overruling and predictive decision making should not prevent lower courts from determining that the Supreme Court itself already has overruled a precedent implicitly.

The terms "overruling" and "underruling," sometimes used to include any lower court decision that refuses to enforce a Supreme Court precedent, obscure one further limitation on the present theory. A lower court's determination that the Supreme Court has abandoned or implicitly overruled an earlier precedent would not have the same legal impact as a similar decision by the Supreme Court itself. The lower court's decision in such a case would have no more authority than any other lower court decision—that is, it would not bind higher courts in the same jurisdiction, nor would it bind courts from other jurisdictions. Further, if the decision were rendered by a federal district court, it would be subject to a contrary determination by a court of appeals panel, and that decision itself would be subject to possible en banc review. Similar checks on lower-court interpretation are in place in the state courts. These layers of pre-Supreme Court review likely would insulate the Court from most "rogue" decisions—decisions that are, in any event, always possible, with or without Rodriguez de Quijas's teaching. And finally, of course, the Supreme Court would have in these matters the last and decisive word.

Speaking last and decisively, however, is apparently not enough for the Court. Rodriguez de Quijas's insistence on the Court's special "prerogative" may rest on three additional considerations. First, the Court may believe

528. See Dorf, supra note 506, at 655.
529. See id. at 676–77 n.87. As Dorf puts it, Rodriguez de Quijas "appears to confuse the power to declare a precedent dead with the power to kill it." Id.
530. I would expect, though I cannot prove the point, that courts of appeals would be reluctant to declare Supreme Court precedents implicitly overruled.
531. Those who speak of lower courts "overruling" and "underruling" the Supreme Court are of course aware that the lower court's judgment has effects different from, and less far-reaching than, a substantively similar judgment by the Supreme Court. The terms "overruling" and "underruling," however, seem to me to efface these differences unnecessarily.
that reasons of judicial economy require limits on the lower courts' interpretive freedom. Second, the Court may believe that line-drawing problems counsel against recognizing even a small category of cases in which lower courts permissibly could refuse to enforce a Supreme Court precedent. Third, the Court likely prefers to retain maximum control over the timing of legal change and maximum control over its own docket. Allowing lower courts the opportunity to force a decision whether to overrule a precedent arguably would interfere with the Court's power to manage the process of legal change.532

The judicial economy point is not wholly mistaken. Admittedly, allowing lower courts to determine that a Supreme Court precedent is no longer applicable might marginally increase the likelihood or scope of litigation in some cases. The reasons why are as follows. Under Rodriguez de Quijas, the only chance of ultimate victory for the party seeking an overruling decision lies in the Supreme Court. This still would be true if Rodriguez de Quijas's constraints were relaxed, because the losing party likely would seek Supreme Court review, and the Court likely would grant it, in most cases in which a federal court of appeals or state supreme court refused to apply a Supreme Court precedent. But the party seeking an overruling decision would have a better chance of getting Supreme Court review, and perhaps ultimately victory, if the lower courts could force the Court to take the case by declining to apply one of the Court's precedents. This improved chance of success might make parties more likely to challenge embattled Supreme Court precedents. Some suits likely would be filed that would not have been filed under Rodriguez de Quijas, and in some cases that would have been filed anyway, the additional issue whether to follow the Court's precedent would marginally burden the courts at each level.

Still, given the relatively small number of cases in which one can argue credibly that the Supreme Court implicitly has overruled its own precedent, the total effect of this burden likely would be small. And it would be at least partly counterbalanced by speedier Supreme Court clarification of its own messy precedent. Considerations of judicial economy,

532. One might also suppose an additional argument—that the Rodriguez de Quijas rule is justified because it prevents the injustice of delayed victory in cases in which the Supreme Court reaffirms its embattled precedent. Whether or not this argument supports a general requirement that lower courts follow Supreme Court precedent, see Caminker, supra note 1, at 843-45 (arguing that there should be an additional "normative justification"), the argument is weaker here. If the Supreme Court arguably has overruled a precedent implicitly, then the law as the Supreme Court would apply it does not give the party relying on that precedent a clear entitlement to victory.
then, while not nonexistent, do not seem to me powerful support for *Rodriguez de Quijas*.

The Court might believe that judicial economy concerns are heightened by what I supposed as a second argument for *Rodriguez de Quijas*—the problem of drawing lines that will limit the number of cases in which lower courts could deem Supreme Court precedents obsolescent. This second argument is, of course, partly correct. Any distinction between questionable and implicitly overruled precedents will be contestable, and thus we can imagine a category of cases in which parties could make, and courts might accept, nonfrivolous but nonmeritorious arguments that the Court implicitly has overruled its own precedent. This line-drawing problem likely would be serious for a proposal authorizing lower courts not to enforce precedents with which they strongly disagreed. But the present proposal is much more tightly drawn: The lower court must find that the Supreme Court itself has abandoned an earlier precedent. Thus even if the rule would be hazy at the margins, the number of cases in which nonfrivolous arguments could be made is relatively small.

A more weighty argument in favor of *Rodriguez de Quijas*, I think, concerns the Court's interest in managing the process and timing of legal change, by maintaining full control over its own docket. The Court may have determined to overrule one of its precedents, but only in the right sort of case. It may be interested, for example, in taking a case with a particular kind of fact-situation, in ensuring that both sides are represented by good counsel, in avoiding procedural quirks in the case under review, or in taking a case in which the issue has adequately "percolated" in lower courts. Such considerations, important in any decision to grant certiorari, are perhaps more important in cases in which the Court is considering whether to announce the overruling of one of its own precedents. Yet the Court would feel strong pressure to take any case in which the lower court held a directly relevant Court precedent unenforceable in light of more recent Court authority. Relaxing the constraints of *Rodriguez de Quijas*, then, arguably would interfere with the Court's management of legal change.

These considerations are genuine. But first, even if the Court would feel pressure to take cases that held a Supreme Court precedent unenforceable, the Court always has the option of denying review if it deems the

533. Cf. Caminker, supra note 1, at 860-65 (suggesting that line-drawing concerns counsel against allowing lower courts to refuse enforcement of superior court precedents "whenever they believed those precedents to be 'outside the range of allowable judicial interpretation,' or 'lawless,' or 'clearly wrong,' or 'not fully informed,'" id. at 863–64).

particular case an unsuitable "vehicle." Denial of certiorari is not a judgment on the merits, and thus the possibility of addressing the issue in a better case would remain. To be sure, the result of denying review would be to let stand a decision that might have been wrong in refusing enforcement of an embattled Supreme Court precedent. Further, denial of review likely would leave the law uncertain and nonuniform. But the Court regularly tolerates nonuniformity when it allows conflicts among courts of appeals to "percolate," and by hypothesis, in the cases under consideration the Court's own precedent is already uncertain. Moreover, as to the risk that the lower court's judgment was erroneous, the Court regularly denies review of decisions that arguably misapply the Court's precedents. Perhaps the misapplication is more serious when it is an incorrect determination that one of the Court's precedents is no longer good law. But most of this idea's force comes from a sense that the lower court has committed an act of disobedience or defiance, and for reasons suggested above, this is not necessarily so. If the lower court's decision is rendered skillfully and in good faith, it could better be characterized as an act of respecting the Court's precedents—even if the Court later determined that the lower court's respect was misplaced.

Further, the Court perhaps should feel obliged to act, and act relatively promptly, when its decisions are in such disarray that one of their number is arguably nullified by later authority. Empowering lower courts to make such a determination would exercise pressure on the Court to clarify and rationalize its untidy precedent. *Rodriguez de Quijas* is acutely concerned with the disciplinary power the Supreme Court wields over lower courts. But it ignores the possibility that disciplinary pressures from the bottom up might be beneficial—at least when the Court cannot claim to have excelled in its managerial role.

Besides the disciplinary and rationalizing pressure they could create, the lower courts have another positive role in the process of legal change—that of elaborating the new legal principles the Court announces in its law-changing decisions. Consider, for the moment, the more ordinary cases

535. See id. at 230–34.
536. Paulsen's recommendation of a much more general practice of "underruling," see supra text accompanying note 518, depends in part on the premise that underruling would compel superior courts to rethink mistaken precedent. Caminker acknowledges that in some cases such "forced rethinking" might be beneficial, although as noted above, see supra note 533, ultimately he rejects the proposal, in part because of line-drawing problems. See Caminker, supra note 1, at 860–65. Still, Caminker has suggested elsewhere that declining to follow a decision the Court itself has "implicitly overruled" would be consistent with the idea that lower courts are to interpret and follow superior-court precedent rather than predict outcomes in superior courts. See discussion supra notes 525–527 and accompanying text.
of Court-induced legal change, when the Court's law-changing decision does not implicitly overrule, without expressly overruling, an earlier Court precedent. In these cases—the ones that Rodriguez de Quijas's interpretive principle does not address—the Court's law-changing standard may resolve the legal uncertainty that prompted the Court to grant certiorari. But at the same time, the Court's announcement of a new legal standard typically creates fresh uncertainties—uncertainties, for example, as to the precise scope and particulars of the new standard's applications. In these ordinary cases, all would concede, the lower courts have an important role in implementing and specifying the new legal standard. The Supreme Court can supervise this process of implementation and specification, by undertaking review of a decision that applies the new standard. Typically, however, the Court will stay its hand until after a number of lower courts have had a chance to address the new uncertainties. And typically, though not invariably, the Court will wait until a "certworthy" conflict has developed over implementation of the new standard—generally, a conflict between or among federal courts of appeals, or a conflict between a federal court of appeals and a state high court. In these more ordinary cases of legal change, the lower courts participate, albeit under the Supreme Court's supervision, in the process of implementing legal change.

Rodriguez de Quijas, however, changes this dynamic in the lower-court cases its interpretive principle covers: those in which the Court has rendered a decision that seriously undermines, without expressly overruling, an earlier precedent that "directly controls" the lower court's decision. In these circumstances, Rodriguez de Quijas prescribes, the lower courts must follow the earlier precedent, leaving to the Supreme Court the "prerogative" of implementing further change. In the cases covered by Rodriguez de Quijas, then, the lower courts are ousted from their ordinary role of implementing, under the Supreme Court's supervision, the legal changes that the Court has initiated.

An example of the role that lower courts might play in implementing legal change—but for Rodriguez de Quijas—appears in the interaction between the Supreme Court and the lower federal courts after Brown v. Board of Education. In Brown, the Court declared that the "separate but equal" standard of Plessy v. Ferguson had "no place" in "the field of public education." The Court did not, however, expressly overrule Plessy, nor did it discuss whether the "separate but equal" standard still might apply in
fields other than public education. And the Brown opinion specifically emphasized the special significance of education, as well as the special effect that segregation in public schools has on the “hearts and minds” of children. The Court’s discussion certainly undermined the Plessy doctrine, but the Court stopped short of declaring that “separate but equal” had no legitimate place in any aspect of public life.

The task of extending Brown to other public institutions and facilities fell in the first instance to the lower courts. Less than a year after Brown was decided, the Fourth Circuit, in Dawson v. Mayor & City Council of Baltimore, held that city beaches and bathhouses could not be segregated, whether or not the separate facilities were equal. No sensible distinction could be maintained, the court reasoned, between recreational facilities, whose use was “entirely optional,” and the system of compulsory education in which the Supreme Court had ruled segregation unlawful—at least not a distinction that favored the statute’s constitutionality. In so holding, Dawson dealt directly not with Plessy, but with circuit and state-court precedent that had approved segregated park facilities. But because that precedent was based on Plessy, and because Plessy would control if it were still good law, Dawson necessarily determined that Plessy effectively had been overruled, even beyond the context of public education that Brown had addressed directly. In so holding, the court violated the principle later announced in Rodriguez de Quijas: The court refused to enforce an otherwise binding Supreme Court precedent that had not yet been expressly overruled, citing later authority that undermined the precedent’s rationale.

One year after Dawson, a lower court faced the question whether any aspect of Plessy had survived the Court’s decision in Brown. The question was presented this starkly because the facts posed the narrow issue decided in Plessy: Could government segregate seating by race on intrastate transportation? The case was Browder v. Gayle, and the particular challenge was to the practice of segregated seating on Montgomery, Alabama city buses.

A three-judge district court decided in Browder that Plessy was no longer good law, even in its domain of original application. The court relied both on Dawson and on the lower court’s decision in Barnette. In

541. See id. at 492–95.
542. 220 F.2d 386, 387 (4th Cir. 1955) (per curiam).
543. Id.
544. See id. at 386–87.
545. Unless one were to read Plessy narrowly, and unconvincingly, as a case only about seating on intrastate railroads, rather than a decision that constitutionally underwrote an entire regime of status regulations.
both cases, the Browder court suggested, a Supreme Court precedent, not yet expressly overruled, was "so impaired by later decisions as no longer to furnish any reliable evidence" as to the state of the law.\endnote{447}{Id. at 716; see also id. at 716 n.14.} The primary decision that "impaired" Plessy was, of course, Brown, but the court relied also on the line of Supreme Court cases disapproving instances of segregation in higher education, and a case holding that segregated seating on interstate rail transportation violated the Interstate Commerce Act.\footnote{448}{See id. at 715–16.} Browder thus determined that Plessy, an otherwise directly controlling Supreme Court case not yet expressly overruled, had been so undermined by subsequent Supreme Court cases that it was no longer good law—even in its original domain of seating on intrastate transportation.\footnote{449}{See id. at 716–17.} In so holding, the court did exactly what Rodriguez de Quijas later prohibited, even more clearly than the Dawson court had done.

The Court, however, summarily affirmed both Browder\footnote{450}{Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam).} and Dawson.\footnote{451}{Mayor & City Council v. Dawson, 350 U.S. 877, 877 (1955) (per curiam).} And on the day that it summarily affirmed Dawson, the Court relied on that decision to reverse summarily a Fifth Circuit decision that had permitted "separate but equal" treatment with respect to city golf courses.\footnote{452}{See Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam), vacating 223 F.2d 93 (5th Cir. 1955).} Using only its powers of summary affirmation and summary reversal to superintend the process, the Court thus relied on the lower courts to extend Brown's equality principle from public education to public facilities generally. The Court's summary affirmances gave these lower-court decisions the status of binding national precedent, while allowing the Court to remain in the background as an entire legal regime was uprooted. These lower-court decisions would not have been possible had the Court been committed to the principle Rodriguez de Quijas later announced.

Certainly one can argue, as Herbert Wechsler argued, that in extending Brown's reach through unexplained summary affirmances the Court abdicated its responsibility to explain its decisions.\footnote{453}{See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 22-23 (1959).} Or one could defend the Court's strategy of lying low after Brown, and relying heavily on the assistance of lower courts, as a wise preservation of its institutional capital, given the national tumult over Brown. However one resolves the debate over whether the Supreme Court properly exercised its management powers post-Brown, the point for present purposes is simply that the Court found
the lower courts useful partners in implementing the legal changes initiated with Brown—in circumstances under which Rodriguez de Quijas now would require the Court to go it alone. With Wechsler, one might well suppose that the Court should have noted probable jurisdiction and heard argument in Dawson, Browder, and the other cases in which it acted summarily. But even so, the Court would not have acted more properly, or more wisely, if it had required the lower courts to follow Plessy—leaving to the Supreme Court the question whether Brown should be extended beyond the sphere of public education. Nothing would have been gained by requiring the lower courts to pass the cases up to the Supreme Court for it to decide that question in the first instance.

Relaxing Rodriguez de Quijas's constraints, then, would be normatively defensible. Rodriguez de Quijas is anomalous in its treatment of lower courts' role in legal change, and the features of the context that case covers do not sufficiently justify the anomaly. The proposal I have been considering—allowing lower courts to refuse enforcement of Supreme Court precedents that the Court has implicitly overruled—provides sufficient protection against "rogue" decisions, is consistent with rule-of-law values and adequately protects the Court's legitimate interests in managing legal change. Of course, one might well disagree with my assessment. But that would raise only a further difficulty for the Court's transformation of Establishment Clause doctrine in Agostini: The Court needed to follow the course I have been suggesting, if its Agostini opinion were to be coherent.

Suppose one accepts, as a general matter, that relaxing Rodriguez de Quijas's limits on lower-court interpretation would be desirable. One further question remains: Given Agostini's Rule 60(b)(5) context, could the Court have followed the strategy I am suggesting in Agostini? The difficulty is that, as mentioned, the Court has interpreted Rule 60(b)(5) to prohibit courts from changing the law in their own relief-granting decisions. The Court, however, would seem to offend this principle, if overruling or modifying Rodriguez de Quijas were part of Agostini's theory. The Court, it seems, would be relying on a change in the law that its own relief-granting decision effected.

This difficulty is not insuperable. First, although in referring above to "Rodriguez de Quijas" I have taken the case to have the full scope Agostini attributes to it, a narrower reading is possible. The Court could have read Rodriguez de Quijas to bar only "anticipatory overruling," not a lower court's

554. See also New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (invalidating the practice of segregating golf courses), aff'd 252 F.2d 122 (5th Cir. 1958); Holmes, 350 U.S. at 879 (reversing summarily a lower-court decision that had approved segregation in the use of golf courses if opportunities were equal).
conclusion that the Supreme Court itself already has overruled, even if implicitly, its own decision. That, as mentioned above, was Caminker's interpretation of Rodríguez de Quijas before Agostini. This interpretation of Rodríguez de Quijas is at least plausible, if not compelling.  

Further, even if the Court would have had to acknowledge modifying or overruling Rodríguez de Quijas, Rule 60(b)(5) would not have barred the Court from relying on its new understanding to grant relief in Agostini. The "change in law" that may entitle movants to Rule 60(b)(5) relief is a change in substantive law. As the Court put it in Rufo v. Inmates of Suffolk County Jail:557 “[M]odification . . . may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.” What the Court cannot do in granting Rule 60(b)(5) relief is to effect such a change in substantive law in its own relief-granting decision. But the Rodríguez de Quijas principle is not a substantive rule that determines the legality vel non of the parties' conduct. It speaks, instead, to the conduct of lower courts and to the allocation of power among courts in the hierarchical federal court system. Neither Rufo, nor the Court's other Rule 60(b)(5) cases, nor the text of Rule 60(b)(5), expressly limits the Court from effecting and relying upon these kinds of legal change in its relief-granting decision.  

555. See supra text accompanying notes 525–527; cf. supra text accompanying notes 528–529 (discussing Dorf's reading of Rodríguez de Quijas as conflating anticipatory overruling with lower-court determinations that a precedent already has been implicitly overruled and as condemning both practices).

556. Against Caminker's interpretation, the lower court in Rodríguez de Quijas indicated that Wilko, the earlier precedent, already had been "effectively overruled" by the Supreme Court and that a "formal overruling . . . appears inevitable—or, perhaps, superfluous." Rodríguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1297–98 (5th Cir. 1989) (citation omitted). Yet the Supreme Court disapproved the Fifth Circuit's recognition of this implicit overruling. The argument in favor of understanding the Fifth Circuit's action as an anticipatory overruling would focus on the fact that the Supreme Court, in the case that allegedly overruled Wilko implicitly, in fact distinguished Wilko, suggesting that "stare decisis concerns may counsel against upsetting Wilko's . . . conclusion." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 234 (1987). The Fifth Circuit, then, could not argue credibly that the Supreme Court already had overruled Wilko.


558. Id. at 388.

559. Nor would overruling or modifying Rodríguez de Quijas in the Court's Agostini opinion lead to paradox. As discussed above, the paradox I identify in Agostini arose because of the Court's commitment to the Rodríguez de Quijas principle. Overruling that principle, even in a Rule 60(b)(5) case like Agostini, would be like the ordinary case of overruling. While the lower courts were correct to follow Rodríguez de Quijas's interpretive strictures, the Court could explain, the law has changed with the Court's decision to modify or overrule that aspect of Rodríguez de Quijas. And from the perspective of the new, changed law, the lower courts' decisions were legally incorrect and may be reversed without paradox.
Relaxing Rodriguez de Quijas's constraints, then, is normatively defensible, and it was an available option in Agostini. Had the Court selected that option, the cost to the Court's authority would have been minimal. Even in relaxing Rodriguez de Quijas's constraints, the Court would have been instructing the lower courts to follow the Court's decisions—to recognize, as the Court says it is itself constrained to recognize, that more recent cases rendered Aguilar no longer good law. The Court, however, did not choose this option. It chose instead to guard its interpretive "prerogative" jealously, and to maintain its exclusive managerial control over the transformation of Establishment Clause law. The price of this decision is the incoherence I criticized above—Agostini's supposition that post-Zobrest and pre-Agostini, "the law" had divided into two simultaneously valid, yet contradictory, bodies of law.

To be sure, the Agostini opinion still would have been implausible, even if the Court had relaxed the constraints of Rodriguez de Quijas. The opinion still would have rested on untenable readings of Witters and Zobrest as implicitly overruling Ball and Aguilar—readings that seem driven by the desire to reach a particular result, and to reach it as soon as possible, no matter how implausible and incoherent its opinion would have to be. My point, instead, is that if the Court had not insisted on sole power to transform the law, its Agostini opinion could have been implausible in only one respect rather than two. Given the choice between avoiding incoherence and maintaining maximum power, the Court opts for power.

**CONCLUSION**

The criticisms of Agostini I have been developing do not depend upon any particular view of the underlying substantive Establishment Clause issues. I criticize not the substance of the Court's transformation of Establishment Clause law—though that, too, surely is at least contestable—but instead, the process by which the Court manages its transformation of Establishment Clause law.

In the Introduction, I said that the criteria by which I would evaluate the Court's transformation of Establishment Clause law were "effectiveness" and "legitimacy." Under "effectiveness," I said, I would examine whether the Court had selected an appropriate vehicle for its law-transforming project, whether the change-favoring Justices had employed that vehicle skillfully, and whether they had realized their law-transforming ambitions. Under "legitimacy," I said, I would inquire whether the Court successfully

---

560. See supra notes 33-34 and accompanying text.
had negotiated the constraints that define its power to manage legal change, including procedural rules, as well as norms such as stare decisis issues and the requirement of reasoned explanation.

By these criteria, the Court's management of its law-transforming project in *Agostini* was a failure. The Court's first mistake—and a mistake that made the other errors in the Court's transformation strategy unavoidable—was its selection of *Agostini* as law-transforming vehicle. In any other case, the Court could have considered the full range of reasons for overruling *Ball* and *Aguilar*, and it would have been free to adopt an Establishment Clause standard that had not yet been sanctified by precedent. In *Agostini*, however, the Rule 60(b)(5) context required the Court to apply current law, not change it, and accordingly the Court was confined to the argument that precedents, post-*Aguilar* but pre-*Agostini*, "dictate" that "*Aguilar* is no longer good law." This argument, I have contended, depended upon thoroughly implausible readings of the Court's precedents, and it led the Court to adopt an unclear Establishment Clause standard that no member of the *Agostini* majority had defended in the long struggle over *Lemon*’s continued survival.

Further, the strategy of finding the law-changing decision in the past allowed the Court to escape present responsibility for changing the law. In *Agostini*, we are told, the Court is not presently changing the law, but merely acknowledging past changes effected in *Witters* and *Zobrest*. When we turn to *Witters* and *Zobrest*, however, we find no indication that the Court was changing the law. And when we look to *Kiryas Joel*, the decision that prompted the *Agostini* proceedings, we find the transformation of Establishment Clause law projected into the future, as the work of some later Court—even though, on the theory later announced in *Agostini*, that transformation had already occurred in *Witters* and *Zobrest*. In this constitutional shell game, the change in the law, and consequently the reasons for the change, are always somewhere else. In no case does the Court offer the sort of reasons one would expect from a decision to overrule the Court's own precedents.

The Court's *Agostini* decision, I have contended, is flawed for an additional reason. *Agostini* holds that *Aguilar* already was "no longer good law" no later than the 1993 *Zobrest* decision, and at the same time the Court insists that it alone among courts legitimately could recognize this change in the law. The consequence, I have argued, is that the Court must suppose that "the law" was really two coexisting but contradictory bodies of law, one valid from the perspective of the Supreme Court, the other valid in all

562. See supra notes 348–357 and accompanying text.
other courts. The escape from this bizarre consequence, I have contended, would have been to authorize lower courts to recognize the implicit overruling of Aguilar that the Court finds in Witters and Zobrest. Such a decision would not seriously have compromised the Supreme Court's authority over other courts, and it would have made the Court's treatment of the Rule 60(b)(5) issue at least coherent. But instead, the Court insisted upon full control over the transformation of Establishment Clause doctrine.

On the day he announced his retirement, Justice Marshall charged that "[p]ower, not reason, is the new currency of this Court's decisionmaking."563 One might well doubt that this characterization is a fair assessment of the present Court's full body of work—or that, to the extent the claim is true, it would distinguish the present Court from past Courts.564 But in Agostini, at least, the Court's management of legal change is long on power and short on reasons for power's exercise.

564. The legal process thinkers leveled similar charges against the Warren Court, both as to specific decisions or lines of decisions, and as to the Court's performance more generally. For classic instances, see, for example, Wechsler, supra note 553, at 19 (stating that courts are "bound to function otherwise than as a naked power organ," and their decisions have "legal quality" only so far as they "rest[] on reasons with respect to all the issues in the case"); id. at 22-23 (criticizing the Court's reliance on per curiam decisions in post-Brown segregation cases); id. at 33-34 (suggesting that Brown could not have rested on its stated reasons, and finding difficulties with other reasons hypothesized to support the result); Henry Hart, The Time Chart of the Justices, 73 HARV. L. REV. 84, 98 (1959) (arguing that the Court's use of case-by-case adjudication in Federal Employers' Liability Act cases "is a misuse of power"); id. at 98-99 (stating that the Court's tendency to offer ipse dixits rather than reasoned explanation is a misuse of judicial power); id. at 99 ("Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do."); id. at 100 (noting the Court's tendency to rely on dogmatic pronouncement rather than reason).