Agostini and the Politics of the Establishment Clause

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Background and Introduction

Agostini v. Felton (1997) is the most recent case in which the United States Supreme Court has considered how, and under what circumstances, it will permit state and federal financial aid for students attending schools which have a religious perspective. At issue were provisions of Title I of the Elementary and Secondary Education Act of 1965 that require local educational agencies (LEAs) to provide remedial education services to all eligible children. Under Title I, children who attend private schools are entitled to services that are "equitable in comparison to services and other benefits for public school children." It falls upon the LEAs to design and implement remedial education programs that comply with this mandate.

Agostini tells the story of how one LEA, the Board of Education of the City of New York, was trapped in an ongoing, high-stakes political and legal struggle over the distribution of federal education finance dollars. On one side of this struggle are children who attend schools that teach from a religious perspective, their taxpaying parents, non-public school administrators and teachers, and the religious organizations that sponsor schools. On the other side are organizations representing the interests of parents and children attending public schools, public school teachers and administrators, and individual taxpayers and organizations that object to any taxpayer financing of private education, especially if it has a discernable religious perspective.

The inclusion of funds for the support of children attending private and religiously affiliated schools in the provisions of the Elementary and Secondary School Act (ESEA) was a major political loss for the "no-aid" faction. They had only one avenue left: constitutional litigation designed to enshrine the "no-aid" position in the United States Constitution.

The premise that constitutional amendment was the only way to eliminate or avoid political gains by the factions supporting children in non-public schools was the basis of the political strategies of factions opposing religiously-affiliated schools during the period from 1865 to 1889. An attempt to amend the federal Constitution to prohibit any form of aid to nonpublic schools, dubbed the "Blaine Amendment" after its chief sponsor James G. Blaine, was attempted, but failed in 1875. If the "no-aid" position of the failed Blaine Amendment was to be enshrined in the Constitution, the Court would have to accomplish that goal by holding that the "no-aid" position was required by the First Amendment. Therefore litigation challenging the constitutionality of ESEA began almost immediately after its passage, with the goal of "constitutionalizing" the "no-aid" position, and thereby eliminating any possibility of either federal or state aid to nonpublic schools.

The litigation specific to the dispute in *Agostini* began in 1978 when a group of taxpayers sought and obtained an injunction that prohibited the Board of Education

> "from using public funds for any plan or program under (Title 1) to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City."

The United States Supreme Court affirmed this injunction in *Aguilar v. Felton* (1985). In the view of the five-Justice *Aguilar* majority, it is unconstitutional for Congress to allocate remedial education assistance funds for children enrolled in schools that have discernable religious perspectives in their curricula. The majority gave three reasons:

1. "(F)irst, state-paid teachers conducting classes in the sectarian environment might inadvertently (or intentionally) manifest sympathy with the sectarian aims (of the school) to the point of using public funds for religious educational purposes,"
2. "Second, the government's provision of secular instruction in religious schools produced a symbolic union of church and state that tended to convey a message to students and to the public that the State supported religion," and
3. "(F)inally, the . . . program subsidized the religious functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide."

The Legal and Political Importance of *Agostini*

The importance of *Agostini* is both legal and political. After *Agostini*, plaintiffs who want to challenge programs providing educational assistance to

children attending religious schools must find and produce evidence that the programs they oppose are operated in a manner that violates the First Amendment. It thus strikes a balance between the First Amendment and substantive due process rights of plaintiffs and the statutory and procedural due process rights of the beneficiaries of these programs.

The Court's determination to rely on adjudicative facts is politically significant as well. The thorny political nature of the "School Question" was apparent as early as the early 1800s, and it can only be resolved on a level political playing field. Until *Agostini*, the Court's "School aid" jurisprudence rested on sociological, political and demographic data—"social facts." Wittingly or unwittingly, the Court has created the impression that Establishment Clause litigation is "a continuation of cultural politics by other means."[1] Worse, it often appears implacably hostile to elementary and secondary educational programs having a religious perspective—especially when their sponsors are Catholics or Orthodox Jews. *Agostini* begins the process of leveling the political playing field.

Do the Requirements of Procedural Due Process and Equal Protection Apply to Litigation Arising Under the Establishment Clause?

Legally, the most significant aspect of *Agostini* is its reaffirmation of the evidentiary and remedial holdings in *Bowen v. Kendrick* (1988). In *Bowen*, the Court held that it was not enough for plaintiffs to prove that an organization is "religiously-inspired" or affiliated with a religious organization to make it ineligible to participate in public welfare programs. The proofs must also demonstrate that the government engaged in unconstitutional behavior.

The constitutional rule announced in *Aguilar*, by contrast, rested on speculation about matters impossible to prove. There was no actual misuse of public funds by the teachers employed by the New York City School Board, or any credible evidence they were "tempted" to engage in religious instruction. Justice Louis Powell, who cast the deciding vote in *Aguilar*, admitted as much when he noted that the educational programs involved "concededly have done so much good and little, if any, detectable harm."

Justice Powell voted to invalidate the programs anyway. In his view, "(the) State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion."

This position raises two important questions:

1) What "adjudicative facts," if any, are relevant to a showing that government action violates the Establishment Clause?
2) How, as a practical matter, is such certainty to be achieved in any educational program or activity subsidized by the government?

A. The Relevance of Adjudicative Facts in Establishment Clause Litigation

Justice O'Connor's opinion for the majority in *Agostini* requires a showing that unconstitutional action is either imminent or in progress before federal or state aid to children enrolled in religious schools may be questioned on Establishment Clause grounds. The judicial role envisioned rests on a procedural due process model. Denial of the benefits under the statutory entitlement cannot take place until there is notice and an opportunity for the beneficiary to be heard, and proof that an illegal expenditure has been made.

Justice Souter's dissenting opinion takes a very different approach:

> I believe *Aguilar* was a correct and sensible decision, and my only reservation about its opinion is that the emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence. The State is forbidden to subsidize religion directly *and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement.* (emphasis added)

Reduced to its essentials, the dissent's approach would permit no aid of any sort—including "remedial education even when it takes place off the religious premises"—to children enrolled in non-public schools. In Justice Souter's view, the "constitutional facts" that trigger a holding that the Establishment Clause has been violated are historical, political, and social, not adjudicative.

It has long been known that some factions in the political process will always perceive either an inability (or an unwillingness) on the part of subsidized teachers to comply with the "no religious content" rules the Court has developed. Among these are factions associated with "other religions that would like access to public money for their own worthy projects," factions who believe, on religious grounds, that religious groups should take no money from state funds, and advocates for a secular approach to publicly-funded education. We know, too, that some factions will always interpret direct or indirect payments made on behalf of children enrolled in schools having a religious perspective on education as an "endorsement" of the religion of the sponsoring organization. If the judgement is to rest on political and social grounds such as these, a trial is little more than constitutional window-dressing.

Justice O'Connor's approach requires a real trial, and proof that the government has actually done something wrong. More important, the majority opinion implicitly recognizes that "other religions" and groups having a secular ideological orientation already have access to substantial sums from the public fisc, and that they have used that access for years to support "their own

worthy projects" (*e.g.* universities, hospitals, homes for the elderly, social welfare, adoption, and overseas relief agencies). History demonstrates convincingly that control of the rituals, curricula, and environments of the public schools has been the most "worthy" of all.

Agostini thus sets the stage for thorough reexamination of the constitutional and political legitimacy of the Court's approach to "The School Question."

B. The Establishment Clause and Judicial Affirmation of Structural Inequality

Agostini also paves the way for the reexamination of the structural inequality and religious intolerance evident in the Court's Establishment Clause decisions. The Court's assertion in Aguilar that "(the) State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion" is a prime example of both. (emphasis added)

The five-Justice majority in Aguilar and the four dissenters in *Agostini* correctly observe that the only way to be *absolutely* certain that government subsidies for education will not be used for an improper purpose is to eliminate them. The position of these Justices, taken at face value, is that the need for prophylaxis is absolute. *All* education subsidies must be eliminated.

It seems clear, however, that these Justices do not mean what they say. Public schools have been inculcating a variety of state-approved religious beliefs and practices for nearly two centuries. Since at least the mid-nineteenth century, state officials have created and maintained public school environments hostile to the beliefs and practices of religiously-observant students who are adherents of religions holding minority status in their respective communities. In both word and deed, state-funded teachers have been inculcating state-approved messages concerning religion for years—and there is no indication from the reported cases that they have any incentive to stop.

Since there is *always a chance* that publicly-funded teachers will advance or inhibit religion in the course of their professional duties, consistent application of the Aguilar formulation would deny funding to both public and private schools. If publicly-funded teachers cannot express an opinion, either positive or negative, concerning religion, the members of the Court who support the reasoning in Aguilar have the guarantee that they believe the First Amendment requires. Parents, however, would not have access to any public funding for their children's education.

A "no-aid for education" approach would resolve a number of other thorny Establishment Clause issues too. Parents who want their children to have an education that includes an identifiable religious or moral perspective would bear the entire cost. The state could not prefer non-religion (secularism) over religion. No parent would have grounds on which to claim discrimination,

and no observer, "reasonable" or otherwise, could possibly conclude that the government is supporting religious education.

It will not happen.

No Justice would even consider affirming an injunction against state expenditures for the support of children enrolled in public schools, even if a flagrant violation were to be found. When one considers that the ground asserted for the injunction in Aguilar was the chance that the activities of a teacher or administrator might violate the Establishment Clause, the disparity in treatment is clear. Schools having a religious perspective are held to a higher standard.

More serious is the reason for the disparate treatment. Four members of the Court in *Agostini* are hostile to any educational program that embodies a religious perspective on the subjects included in the curriculum. The bias, however, is "structural"; that is, it is deeply embedded in their cultural assumptions regarding the alleged "neutrality" of public schools.

Agostini does not entirely level the political playing field, however. It does set the stage for consideration of three key issues.

1. What are the substantive differences, if any, among elementary and secondary educational programs having "religious," "secular," and "non-sectarian" perspectives?
2. What are the criteria for distinguishing between and among educational programs that include such perspectives? and
3. What are the constitutional bases for arguments that the Constitution requires discrimination against educational programs that include "religious" perspectives.

Given the inherent vagueness of the constitutional definitions of the terms "religion" and "religious," as well as the paucity of scholarship on the meanings that should be attributed to the terms "secular" and "non-sectarian," it should be an interesting discussion.

Conclusion

Agostini is an important case, legally and politically. Its legal importance is simply stated. By requiring that opponents of aid to children enrolled in non-government schools produce evidence of unconstitutional behavior, the *Agostini* Court makes it feasible now to experiment with programs of public-private educational financing.

Viewed from a federalism perspective, *Agostini* stands for the proposition that the federal government (the Supreme Court) will not make a prophylactic rule that denies any possibility of aid to children enrolled in church-affiliated schools. It thus frees local political factions to bargain over the distribution of state and local money available for education.

And bargain they will. The public schools are under enormous political pressure to improve student achievement scores. They are under even greater fiscal and legal pressure to provide high-quality education at a reasonable cost. Litigation challenging the constitutionality of state education finance programs has been ongoing for twenty-five years. Several state supreme courts have ordered their respective legislatures to redesign the taxing and finance mechanisms used to support public schools. Billions of dollars are now in play, and the competition for scarce tax dollars has made the issue one of the most controversial in state and federal politics.

Federal rules prohibiting aid for children whose parents opt for education that does not occur in a state-controlled environment provide political "cover" for factions opposing aid to all children. They also make reasonable political solutions difficult to achieve.

If taxes are to be raised to support education reforms, it will be necessary to create broad-based coalitions that include all voters having an interest in the fair distribution of education funds. Voters who send their children to private and church-related schools pay taxes. So too do parents who home-school their children. The increasing number of inner-city parents who have given up on the public schools' ability to serve the educational needs of their children have even longer-standing grievances.

Without the political support of these factions, compromise will be difficult. If they oppose proposed reforms because their children are short-changed, compromise will be impossible.

Agostini also has significance for the ongoing debate in Congress over reform of the public welfare system. If the First Amendment forbids any "direct" payments to religious organizations because they might use the public welfare programs they administer as an opportunity to inculcate their religious views, many federal and state welfare reform proposals currently under consideration will never make it off the drawing boards.

In sum, *Agostini* affirms that there is a more rational, more egalitarian, and less political way to understand the liberties protected by the First Amendment. That such an approach will have a more egalitarian and less political impact on the distribution of public funds is also clear. Unfortunately, this is precisely what the dissenters fear.

Endnotes

1. Kenneth L. Karst, "Paths to Belonging: The Constitution and Cultural Identity," 64 *N. C. L. Review* 303, 340 (1986).