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SCHOOL AID: CONSTITUTIONAL ISSUES AFTER *AGUILAR v. FELTON*

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To avoid possible confusion, I will refer to the *Felton* decision as it will be reported in the Supreme Court Reports—*Aguilar v. Felton.*[1] Other speakers have referred to that case as it was referred to in the District Court and Court of Appeals—*i.e., Felton.* But the case will be reported by the Supreme Court as *Aguilar v. Felton.* Consequently, my references to *Aguilar* refer to the *Felton* case mentioned by others.

The cases of *Grand Rapids School District v. Ball*[2] and *Aguilar v. Felton* were issued on July 1, 1985, a day that will be remembered by those concerned about church/state litigation as a day that struck a severe blow against the concept of equity in education for all children. Particularly in *Aguilar*, the Court ruled that private school children have to be put to severe logistical disadvantages if they are to receive the benefits of a federal program designed to aid all economically and educationally disadvantaged children, disadvantages not incurred by public school children.

I should add that those decisions were disappointing for reasons other than the results. Both decisions, written by Justice Brennan, are unanalytical in the extreme. Every time I pick up those cases to reread them, as I did this morning, I am reminded of the story of the sports fan who went to a fight and suddenly found that a hockey game had broken out. Whenever I pick up the *Grand Rapids* and *Aguilar* decisions and read them, I hope that rationality will break out in Justice Brennan's analysis. But the words of those decisions are immutable and those decisions will always lack analytical coherence.

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* Wilson & Connolly.

[1] 473 U.S. 404 (1985).

[2] 473 U.S. 373 (1985).

A second disappointment, apart from the result in those decisions, is that they seem to signal an end to a trend, begun in 1980, toward decisions that were less hostile toward programs that attempted to accommodate religious and secular concerns. I refer specifically to four decisions from the Court from 1980 through 1984.

The first was *Committee for Public Education v. Regan*,[3] a case in which the Supreme Court by a 5 to 4 vote upheld New York State's Mandated Services Act, an act under which public funds flow directly to church schools. That program reimburses church schools for the costs of complying with requirements of state law for recordkeeping, maintaining attendance records and administering standardized or state-prepared tests. It is the only case on the books where the Supreme Court has validated a program where public funds flow directly to church-related elementary and secondary schools, and that seemed to signal the beginning of the relaxation of the rather rigid Establishment Clause rulings that the Court issued beginning in 1971.

The second case—one that Mr. Willkie referred to—is *Mueller v. Allen*,[4] The Minnesota Tax Education Program in which Justice Powell joined and which effectively overruled the decision in *Committee for Public Education v. Nyquist*,[5] of which Justice Powell was the author.

The third of the cases was *Marsh v. Chambers*,[6] in which the Court sustained the Nebraska Legislative Chaplain Program. That case seemed to be quite encouraging because the Court disregarded this three-part test that has been a constant problem in the aid cases and decided the *Marsh* case based on its perception of the understanding of the drafters of the Bill of Rights as to what the reach of the Establishment Clause should be. It upheld that program because the very same Congress that passed and sent the Bill of Rights, including the First Amendment, on to the states for ratification approved the congressional chaplain program that has existed uninterrupted since that day.

The Court reasoned, without much question, that the Congress wrote the Establishment Clause and did not perceive a conflict between that clause and legislative chaplains paid with public funds. The Congress that approved the chaplaincy program could not have viewed it as inconsistent with the commands of the Establishment Clause. That return to the original understanding seemed to offer encouragement.

Finally, we had the decision in *Lynch v. Donnelly*,[7] that approved the inclusion of a Nativity scene in a Christmas display by the City of

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[3] 444 U.S. 646 (1980).
[4] 403 U.S. 388 (1983).
[5] 413 U.S. 756 (1973).
[6] 463 U.S. 783 (1983).
[7] 465 U.S. 688 (1984).

Pawtucket, Rhode Island. In that case, the Court went further than it had gone since 1952 in the case of *Zorach v. Clausen*,[8] in identifying as a central principle underlying the Establishment Clause the accommodation of religious and secular concerns.

That was the setting in which the *Grand Rapids* case and the *Aguilar* case came before the Court. The problem was that, with the exception of *Marsh v. Chambers*, which was a 6 to 3 decision, the other three cases I just mentioned were decided by five to four votes, and in each of those three cases, Justice Powell was the deciding and swing vote. We all anticipated as we went to court in December of 1984 for the argument in those cases that Justice Powell would be the swing vote. In fact, he was, and he swung the cases against us.

Let me now talk about the decisions themselves.

In *Grand Rapids*, two programs were at issue. One was called the Shared-Time Program. Under that program public school teachers went into church schools during regular school hours and, in leased classroom premises, offered instruction in several carefully delineated subjects. Those subjects were remedial and enrichment mathematics, remedial and enrichent reading, art, music and physical education. The classrooms were leased at a fixed amount and they were free of religious symbols. Each of the classrooms in which shared-time instruction was offered had a sign outside identifying the classroom as a classroom of the public schools of Grand Rapids School District.

There was a second program at issue—the Community Education Program. That was a program of after-hours instruction. It was essentially leisure-time instruction although not exclusively. Some of the courses described by the opinion included arts and crafts, home economics, Spanish, gymnastics, yearbook production, Christmas arts, drama, newspaper, model building, etc. One of the problems with that program was that to have a community education class, there had to be enough students to sign up for it or it was not offered. The experience of the Grand Rapids School District was that if a popular teacher in a particular school—public or private, because the public schools have these same after-hours programs—offered such a course, it would generally attract enough students, twelve at a minimum, to justify this course.

In the private or church schools, the teachers who were popular within the school were the regular teachers employed by the church schools. Consequently, without exception, the Community Education Program was taught in the church schools by full-time teachers of those schools who were hired as part-time public school teachers by the Grand Rapids School District.

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[8] 343 U.S. 306 (1952).

The Supreme Court held both the Shared-Time and Community Education Programs unconstitutional as having an impermissible primary effect of advancing religion. The shared-time program, in particular, according to the majority, failed the primary effect test in three ways.[9]

First, the Court ruled that, because the public school teachers would be teaching in an educational environment that was pervasively religious, there was a substantial risk that the teachers would be induced to include religion in their teaching. Thus, the program could result in state sponsored religious indoctrination. Justice Brennan, in so ruling, acknowledged that, as a matter of fact, there was no evidence that there had been any inclusion of religion in the secular content of the shared-time classes. But he said, in effect, that because of the pervasively sectarian nature of these schools there is no need for evidence that religion has in fact seeped into shared-time instruction. It is sufficient that there is a possibility it will happen. As a result, you do not have to prove your case. You just have to speculate that it might happen.

Secondly, the Court ruled that religion would be advanced through the shared-time program by the "symbolic union" that the church school students would perceive between church and state by the support that the challenged programs gave to the education offered by the church schools. Here Justice Brennan was speculating about how a second or third grader would perceive the presence of a public school teacher in a church school, and he concluded that they would perceive a symbolic union between church and state. Where he finds the basis for that conclusion is beyond my comprehension.

Finally, the Court ruled that the challenge programs have the effect of providing a substantial state subsidy to the operations of these church schools. That conclusion grew out of, in part, the fact that the record showed that students in these church schools got about ten percent of their education from the Shared-Time Program and that ten percent amounted to a substantial subsidy by the state of the operations of the pervasively sectarian schools. On that basis, in addition to the other two grounds for decision, the Shared-Time Program flunked the primary effect test.

There were separate dissents written by Chief Justice Burger, Justice White, Justice Rehnquist and Justice O'Connor. All four criticized the majority for relying on the possibility that state-sponsored religious indoctrination would occur in the face of a record that showed no instance of religion intruding into the secular instruction offered in the Shared-Time Programs.

Chief Justice Burger and Justice O'Connor, however, did concur in

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[9] *Grand Rapids*, 473 U.S. 373 (1985).

the majority's ruling that the Community Education Program was unconstitutional. In coming to that conclusion, both Chief Justice Burger and Justice O'Connor stressed the fact that the Community Education Program in the church schools was taught almost exclusively by Church school teachers under the after-hours supervision of the church school principals.

The *Aguilar* decision involved, when it was filed, an Establishment Clause challenge to Title I of the Elementary and Secondary Education Act of 1965. By the time the Supreme Court ruled, Congress had re-enacted Title I as Chapter 1 of the Education Improvement and Consolidation Act of 1981. The program though was unchanged despite that legislation.

Chapter 1 is a program whereby the federal government funnels through state agencies billions of dollars to local school districts. The local school districts are obligated to use Chapter 1 funds to hire remedial reading teachers and provide remedial educational instruction to economically disadvantaged students. At issue in *Aguilar*, specifically, was New York City's program for implementing the private school facet of the Chapter 1 program. Under that program public school teachers went on the premises of church schools during the regular school day, and provided remedial instruction to children who met the statutory requirements—economic and educational disadvantage. Those qualifications meant in New York City that the Chapter 1 program was available in fewer than twenty-five percent of all private schools in the city.

It was not a general aid program. It was directed towards those children who needed the help the most. The teachers were under close supervision and there was in the record no evidence of any intrusion of religion into Title I instruction. There was also no evidence of any undue entanglement or intrusiveness between the state and the church schools.

In his decision for the Court, Justice Brennan found that there was no invalid primary effect as there was in *Grand Rapids*. In so ruling, Justice Brennan implicitly acknowledged that New York City had taken the steps necessary to assure that there would be no intrusion of religion into the secular instruction offered through Chapter 1.

However, that very program of supervision that prevented religious content in Chapter 1 doomed the New York City program under the entanglement branch of the Establishment Clause test. Thus, in sharing Title I on the "catch-22" inherent in the conflicting commands of the primary effect test and the entanglement test, the majority ruled that the pervasively sectarian character of the church schools would mean that the supervision by public school officials of public school Title I teachers in church schools would involve excessive government entanglement with

religion.[10]

The Court gave no specific examples of any entangling clash between the religious and public school interests because the record was devoid of any such evidence. Indeed, when the Court became specific about the administrative relationships between public and religious school officials that it viewed as entangling, it described relationships that were devoid of any religious references. In describing those tainted relationships, the Court said:

> Administrative personnel of public parochial school systems must work together in resolving matters relating to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services and the dissemination of information regarding the program. . . . [t]he program necessitates frequent contacts between the regular and remedial teachers in which each side reports on individual student needs, problems encountered and results.[11]

There is not a single reference to religion in that quotation, except perhaps for the word "parochial." That omission is significant, because, as Mr. Willkie mentioned, the Supreme Court did not say it is unconstitutional for public school teachers to provide this form of instruction to church school students.

It simply said such instruction cannot be provided on the premises of the church schools. But the very contacts the Supreme Court described in the language I quoted will be required in an off-premises program. In *Wolman v. Walter*,[12] the Court ruled that off-premises programs of the type that are now mandated by *Aguilar* will be constitutional. Because such off-premises programs require some administrative interaction, one wonders what the reach of the entanglement proscription really is.

Nevertheless, because there would be the described interaction between religious and public school employees, the Court simply presumed excessive entanglement would result. In the process, the majority reinforced the Court's decision ten years earlier in *Meek v. Pittenger*,[13] that seemed to establish a per se rule against any type of communication between religious school teachers and public school teachers.

The four Justices who dissented in *Grand Rapids* also dissented in *Aguilar*, stressing that the record provided no support for the entanglement fears expressed by the majority and criticizing once again, as those dissenters have many times, the "catch-22" tension between the primary effect and entanglement test.

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[10] 473 U.S. 402 (1985).
[11] *Id.* at 413.
[12] 433 U.S. 229 (1977).
[13] 421 U.S. 349 (1975).

Justice Powell, for whom we had so much hope as a result of the decisions I described earlier, wrote a separate concurrence. He concurred in the judgment of both *Grand Rapids* and *Aguilar* but wrote separately in *Aguilar*. In that concurrence, he did two things that are disturbing.

First, he suggested that the *Aguilar* program was invalid under the political entanglement subpart of the entanglement branch of the three-part Establishment Clause test. He did so even though the Court in *Mueller* and in *Lynch v. Donnelly*, with Justice Powell's concurrence, seemed to say that political entanglement was no longer an analytical concern in these cases. Secondly, Justice Powell would have ruled that the *Aguilar* program had the same primary effect defects as the *Grand Rapids* case. Thus, he would have gone much further than the majority, despite agreeing with the Second Circuit that Chapter I was a program that, and I quote from the Second Circuit and from Justice Powell's decision, "has done so much good and little, if any, detectable harm."[14]

Let me briefly speculate on the direction Establishment Clause doctrine is taking. It is too soon to determine whether *Grand Rapids* and *Aguilar* represent a move away from that trend in the early '80s that I mentioned or whether they will simply become constitutional aberrations. I do think that those two decisions cast a constitutional cloud over any programs that provide direct support for the instruction that occurs in church-related elementary and secondary schools.

A very disturbing aspect of the *Grand Rapids* decision was the emergence of the so-called symbolic union aspect of the primary effect test. That aspect of the ruling is likely to cause difficulties as local public school administrators try to find off-premises alternatives to the Chapter 1 program. The arguments are already being raised that, when mobile vans are placed too close to the church school, there will be a symbolic union between church and state. Whether the argument can be overcome will depend on the future course of litigation.

I have mentioned that both of these cases were decided by the narrowest of margins, five to four. In fact, if you take the Title I or Chapter 1 litigation from the beginning, the results could not have been closer.

The constitutionality of Title I was considered by eight lower court judges before it reached the Supreme Court in the *Aguilar* case. Four of those judges upheld the constitutionality of on-premises Title I instruction. The other four ruled the program was unconstitutional.

When the case reached the Supreme Court, the lower court judges were split 4 to 4 on constitutional issues, and the Supreme Court was divided 5 to 4. I suggest you will not find a closer decision in the annals of

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[14] 473 U.S. 402, 415 (1985) (quoting Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 72 (2d Cir. 1984)).

constitutional history.

Some have speculated that, because of the closeness of those decisions, *Aguilar* and *Grand Rapids* will have a very short shelf life. I suggest that speculation may be ill-founded. One of the disturbing aspects of *Aguilar* is that Justice Brennan seemed to go out of his way to reaffirm the decision a decade earlier in *Meek v. Pittenger*[15] which struck down a state program that mimicked Chapter 1. I suggest that no matter how many appointments President Reagan will make to the Supreme Court before he leaves office, it will be very difficult for a new court to overturn ten years of precedent.

One need only recall that, when Chief Justice Burger was appointed to replace Chief Justice Warren, many conservatives in the country hoped that *Miranda v. Arizona*[16] would be quickly overruled. Today, *Miranda* is alive and well. It has been eroded somewhat, but *Miranda* is on the books. It is alive and well.

New Justices are reluctant to come in and suddenly wipe out years of precedent. Whether new appointments to the Court will have an impact on these decisions, is quite speculative.

I think our responsibility, as we look at the programs that are being challenged in the wake of these decisions, is to find the best way to distinguish these unfortunate decisions and move ahead in that way.

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[15] 421 U.S. 349 (1975).
[16] 384 U.S. 436 (1966).