Ius Ecclesiae, 10 (1998), p. 275-279

LOWERING THE WALL OF SEPARATION BETWEEN CHURCH AND STATE IN THE UNITED STATES (*)

In the American Constitution, there are two clauses of the First Amendment which deal with religion. The Establishment Clause prohibits government from «establishing» a religion. The Free Exercise Clause prevents government from interfering with the «free exercise» of religion. Over the years, the Supreme Court has liberally interpreted the scope of the Establishment Clause, while restricting the reach of the Free Exercise Clause. The result has been a certain establishment of secularism in American Constitutional Law, under the rubric «the wall of separation» between Church and state, a metaphor first employed by Thomas Jefferson in his correspondence. For fifty years the Supreme Court has been deciding cases that government financial aid to religious schools is not permitted, but that a variety of indirect forms of aid is permitted, including government-provided transportation to and from religious schools and the provision of secular textbooks to religious schools. Exactly where the line of permissible government aid is to be drawn is a perennial bone of contention before the U.S. Supreme Court, since its jurisprudence of the Establishment Clause is one of the more incoherent parts of Constitutional Law. Thus, whenever the Court addresses this issue it is worthy of note.

Recently, the Supreme Court of the United States allowed the government to send public school teachers into parochial schools to provide remedial education to disadvantaged children. The Supreme Court, on June 23, 1997, handed down its decision in *Agostini v. Felton*. The decision overruled a previous decision of that court, Aguilar v. Felton, which in 1985 had barred public school teachers from providing remedial education on parochial school

(*) *Agostini v. Felton*, U.S., 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

grounds because of the Establishment Clause of the First Amendment of the United States Constitution. The Establishment Clause says « Congress shall make no law respecting an establishment of religion.... »

In 1973, in the landmark case of *Lemon v. Kurtzman*, the Court explicated the meaning of constitutionally mandated separation by requiring three things of laws that implicated religious interests if they were to be upheld as constitutional: 1) the law or government program must have a secular purpose; 2) the principal effect of the law must be neither to advance nor hinder religion; and 3) the law or program must not involve « excessive entanglement » between government and religion. Depending on how strictly these tests were to be applied, the results could denude the public square in America of any religious character and effectively mandate secularism as a civil religion. Many of the justices of the Supreme Court have over the years criticized the *Lemon* test, but they have not been able to agree on a substitute. When an issue arose that was inconvenient to analyze under *Lemon*, as was the case involving legislative chaplains a few years back, the Court simply ignored the test and validated the practice.

The case that the Supreme Court just overturned was notorious because it involved a « Catch 22 », « Damned if you do, damned if you don't » application of *Lemon*. A program of remedial education to all needy students, regardless of whether they were in public or private school, obviously satisfied the requirement of having a secular purpose. Likewise, the principal effect of the program did not seem to be religious. Any aid to religious bodies seemed to be at most incidental to the non-sectarian aid to the students. However, the Court, in an opinion written by Justice Brennan, had pointed to the theoretical possibility of public teachers smuggling religion into their remedial instruction. In order to ensure that this would not happen, the government would have to supervise the instruction given in the context of religious schools. But that supervision would itself violate the third requirement of *Lemon*, that the government not be « excessively entangled » with religion. In other words, to make sure that the principal effect was not religious (the second requirement), the government would have to violate the third requirement. Thus the mere possibility of a violation of the wall of separation was construed as a breach of separation of Church and state.

Obviously, such a view is deeply suspicious of religious beliefs and institutions. It is that view that the Supreme Court has just retracted.

In its recent decision, the Supreme Court ruled that because of «fresh law» concerning the Establishment Clause, teachers are now able to provide remedial education to disadvantaged students on parochial school grounds, as originally mandated by Title I of the Elementary and Secondary Education Act.

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, to «provid[e] full educational opportunity to every child regardless of economic background». To accomplish that goal, Title I channeled federal funds, through the states, to «local educational agencies» (LEAs). The LEAs spend these funds to provide remedial education, guidance, and job counseling to eligible students.

Congress placed several restraints on Title I services to children who attend parochial schools that are not in place for students who receive services while attending public schools. First, Title I services may be provided only to students who qualify for aid, and cannot be used on a school wide basis. Second, the LEA must retain complete control over Title I funds. Third, Title I teachers' services must be provided by public employees. Fourth, Title I services themselves must be «secular, neutral, and nonideological» and must «supplement, and in no case supplant, the level of services» already provided by the private school.

Title I services were to be provided during school hours, and on private school campuses. Assignments to private schools were made on a voluntary basis, without regard to the private school's wishes or the instructors' religious beliefs. The majority of Title I teachers worked in private schools with religious affiliations different from their own. Title I teachers also moved frequently between schools, often spending five or fewer days at a particular school. In addition, a detailed set of written and oral instructions outlining the secular purpose of Title I was given to each teacher before she could begin giving Title I services. Specifically, instructors were told that they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

In 1985 the Supreme Court had decided, in *Aguilar v. Felton*, that the Board's Title I Program necessitated an «excessive entanglement of church and state in the administration of [Title I] benefits»,

and therefore was unconstitutional. The Board then modified its Title I program so as to continue providing remedial education to students attending private schools. The Board reverted to its old program of offering Title I instruction at public school sites, at leased sites, and in mobile instructional units parked near the sectarian school. Also, the Board offered computer aided instruction « on premises » because it did not require a public employee to be physically present on private school grounds.

The results of *Aguilar* were significant. Since the 1986-1987 school year, the Board has spent over $100 million in computer-aided instruction, leasing sites, mobile instructional units and transporting students to those sites. The « *Aguilar* costs » resulted in a reduced amount of federal money available for remedial education. Thus, LEAs had to cut back on the number of students who received Title I benefits. It has been estimated that 20,000 economically disadvantaged children in New York City, and 183,000 children nationwide, experienced a decline in Title I services.

In the present analysis of Title I, the Court in *Agostini* found that under current law, New York's Title I Program did not, as a matter of law, have the effect of advancing religion through indoctrination or creating an excessive entanglement between Church and state. In reaching this decision, the Court relied on three « fresh law » premises derived from recent Supreme Court cases. First, the Court abandoned the premise that public school teachers are « uncontrollable and sometimes very unprofessional ». The Court determined that there is no reason to presume that a public school teacher would automatically depart from her duties and incorporate religion into her classroom upon entering a private school.

Second, the Court found that the location of a public school teacher, whether it be at the curbside, or inside the private school, does not make any difference as to the creation of a symbolic link between the church and state. The Court said that the degree of cooperation between a public school teacher and the private school is the same, either at the curb-side or in the private school.

Third, the Court reasoned that the services Title I offers do not relieve the private schools of costs they otherwise would have borne in educating their students. In reaching this decision the Court said that Title I is only available to eligible students, and therefore, could not be seen as offsetting the costs that the private schools would otherwise have in educating its students.

The Supreme Court found this fresh law to have two effects in the present analysis of the Title I Program. First, the second prong of the Establishment Clause's Lemon test (principal effect neither advances nor inhibits religion) was no longer in violation. The Court found that the state funded program did not give rise to the impermissible effect of advancing religion. Second, the third prong of the Lemon test (excessive entanglement between church and state) was no longer violated. The Court found that because public school teachers are no longer deemed to stray from their assigned duties, and incorporate religion into their teaching, monthly visits by monitoring officials are no longer necessary to ensure conformance with Title I guidelines. Hence, the Court no longer found an excessive entanglement between church and state.

Hopefully, the *Agostini* case represents a more nuanced and welcoming view of the relation between religion and government in the United States, one that is more consistent with the other religion clause of the First Amendment: « Congress shall make no law ... prohibiting the free exercise [of religion] ».

DWIGHT G. DUNCAN
CLARK R. WHALEY