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Gravissimum Educationis: Golden Opportunities in American Catholic Education 50 Years after Vatican II

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Chapter Two

A Legal History of American Roman Catholic Schools

Charles J. Russo

INTRODUCTION

The Second Vatican Council’s Declaration on Catholic Education (Gravissimum Educationis [GE], literally “the Importance of Education”) was one of its crowning achievements. GE was promulgated in 1965, a time when American Catholic elementary and secondary schools were at about their zenith in terms of student enrollments before heading into a steady decline in numbers of institutions and enrollments.

As could have been expected, GE was consistent with the Church’s universal teaching in recognizing education as essentially a fundamental human right. Although it was unlikely to have done so intentionally, GE reflects from a Catholic perspective much the same message as is contained in such secular international human rights documents as the 1948 Universal Declaration on Human Rights, the 1959 Declaration on the Rights of the Child, and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. GE thus recognized the right to Christian—specifically Roman Catholic—education and the authority of parents to make such free choices for their children.

According to GE, “Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools” (GE, 6). The United States Supreme Court’s opinion in Pierce v. Society of Sisters of the Holy Names of Jesus and Mary (Pierce, 1925), the Justices’ first case involving religion and education, predated GE by more than 40 years. In Pierce the Court upheld the rights of parents to direct the upbringing of their children, presaging later developments that impacted pos-
itively on religiously affiliated non-public educational institutions, most notably for this chapter and book, Catholic schools.

Invalidating a law from Oregon that would have obligated parents to send their children to public schools, the Court reasoned in *Pierce* that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations” (p. 535). In so ruling, the Court recognized the rights of proprietors of a Roman Catholic school and a secular military academy to operate, setting the stage for further growth and development of religiously affiliated non-public elementary and secondary schools, the vast majority of which were Roman Catholic schools.

As important as *Pierce* was, especially combined with the role religion played both in American history and education, the Supreme Court did not rely on the First Amendment Religion Clauses in the fray over religiously affiliated non-public schools until 1947 in *Everson v. Board of Education* (*Everson*). Pursuant to the Religion Clauses of the First Amendment, “Congress shall make no law regarding an establishment of religion or prohibiting the free exercise thereof.” *Everson* was a dispute over the costs of transporting children to their religiously affiliated, mostly Roman Catholic, non-public schools.

Following *Everson*, the Supreme Court resolved more K–12 cases on religion under the First Amendment than any other subject involving schooling. It is important to note that insofar as the litigation involving Roman Catholic schools also impacts other religiously-affiliated non-public schools, this chapter tends to use the latter term unless a case was initially litigated in one or primarily involved Catholic institutions.

Decisions of the Supreme Court have shaped the parameters of permissible aid that the Federal and state governments can provide to Catholic, and other faith-based schools. This chapter examines its major decisions. The chapter focuses largely on Supreme Court cases involving elementary and secondary education because they served to help effectuate, albeit without intending to do so, the basic principles proclaimed in *GE*.

**LEGAL PREHISTORY**

The 200 Roman Catholic schools in existence in 1860 grew to more than 1,300 in the next decade. Spurred on by the 1884 Third Plenary Council of Baltimore, which mandated the creation of a parish school near every Catholic Church to serve the rapidly growing immigrant population that was largely unwelcome in many public schools, by the turn of the century almost 5,000 Catholic schools operated in the United States (Mahr, 1987). During this same time, the number of Catholics in the United States rose from
7,855,000 in 1890 to an incredible 17,735,553 in 1920 (Buetow, 1970, p. 167, as cited in the *Official Catholic Directory*).

The rapid growth in the numbers of Catholics and their schools notwithstanding, they were not involved in federal litigation until *Pierce*. At the same time, though, a small number of state cases dealt with ancillary questions as, for instance, courts in New York (*O'Connor v. Hendrick*, 1906), and Pennsylvania (*Commonwealth v. Herr*, 1910) agreed that Roman Catholic nuns could not wear religious garb if they taught in public schools.

*Pierce*, the first Supreme Court case implicating Roman Catholic and other religiously affiliated non-public schools, relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause. Later, on entering the modern era of its Establishment Clause jurisprudence in *Everson*, the Supreme Court examined two cases that significantly impacted faith-based schools and their students. In both cases, the Court relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause.

**Pierce v. Society of Sisters of the Holy Names of Jesus and Mary**

The more far-reaching of the Supreme Court’s two early cases on religion and non-public schools was *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (*Pierce*, 1925). In *Pierce*, the proprietors of two schools in Oregon, a Roman Catholic school and a secular school (the Hill Military Academy), challenged a voter-approved initiative enacted in 1922, intended to go into effect in 1926, that made public school attendance compulsory. The law required all students who did not need what would today be described as special education between the ages of eight and sixteen to attend public schools, unless they had already completed the eighth grade. Not surprisingly, the proprietors of the schools quickly filed a suit challenging the law as presenting a threat to the continued existence of their institutions.

After a federal trial court enjoined enforcement of the statute, the Supreme Court unanimously affirmed that enforcing the law would have seriously impaired, if not destroyed, the profitability of the schools while diminishing the value of their property. Although recognizing the power of the state “reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils . . . (*Pierce*, 534),” the Court focused on the schools’ property rights under the Fourteenth Amendment.

The *Pierce* Court grounded its judgment on the realization that the schools sought protection from unreasonable interference with their students and the destruction of their business and property. The Court also decided that while states may oversee such important features as health, safety, and teacher qualifications relating to the operation of non-public schools, they could not do so to an extent greater than they did for public schools.
Cochran v. Louisiana State Board of Education

Cochran v. Louisiana State Board of Education (Cochran, 1930) involved a state law providing free textbooks for all students in the state, regardless of where they attended school. A taxpayer unsuccessfully challenged the law on the ground that it violated the Fourteenth Amendment by taking private property through taxation for a non-public purpose. As in Pierce, the Supreme Court resolved the dispute based on the Due Process Clause of the Fourteenth Amendment rather than the First Amendment’s Establishment Clause.

In unanimously affirming the judgment of the Supreme Court of Louisiana that insofar as the students, rather than their schools, were the beneficiaries of the law, the United States Supreme Court agreed that the statute had valid secular purpose. In so doing, the Court anticipated the Child Benefit Test that emerged in Everson v. Board of Education (1947). As discussed below, while the Supreme Court has consistently upheld similar textbook provisions, as reflected in the companion chapter state courts have struck them down under their own more restrictive constitutions.

STATE AID TO ROMAN CATHOLIC AND OTHER RELIGIOUSLY AFFILIATED NON-PUBLIC SCHOOLS

The Supreme Court’s Establishment Clause perspective on state aid to K–12 education, sometimes referred to as “parochiaid,” evolved through three phases. During the first stage, beginning with Everson v. Board of Education in 1947 and ending with Board of Education of Central School District No. 1 v. Allen in 1968, the Court created the Child Benefit Test, which allows selected forms of publicly funded aid on the ground that it helps children rather than their faith-based schools.

The span between Lemon v. Kurtzman in 1971 (by far the leading case on the Establishment Clause in educational settings, with the Supreme Court applying it in more than thirty of its opinions), and Aguilar v. Felton in 1985 was the nadir from the perspective of supporters of the Child Benefit Test. This period represented the low point because during this time the Court largely refused to move beyond the limits it initiated in Everson and Allen. In Zobrest v. Catalina Foothills School District in 1993, the Court resurrected the Child Benefit Test, allowing it to enter a phase that extends through the present day, in which more forms of aid have been permissible.

Given this history, the remaining sections examine major Supreme Court cases involving state aid to faith-based schools and their students, essentially in the order in which they were litigated. These sections cover transportation, textbooks, secular services and salary supplements, aid to parents (divided into tuition reimbursements and income tax returns), reimbursements to
Transportation

As noted, *Everson v. Board of Education* (1947) was the first Supreme Court case on the merits of the Establishment Clause and education. *Everson* involved a law from New Jersey permitting local school boards to enter into contracts for student transportation.

After a local board authorized reimbursement to parents for the costs of bus fare for sending their children to primarily Roman Catholic schools, a taxpayer filed suit, challenging the law as unconstitutional in two respects: first, in an approach not unlike the plaintiff's unsuccessful argument in *Cochran*, he alleged that the law authorized the state to take the money of some citizens by taxation and bestow it on others for the private purpose of supporting non-public schools in contravention of the Fourteenth Amendment; second, he charged that the statute was one "respecting an establishment of religion," since it forced him to contribute to support church schools in violation of the First Amendment.

The Supreme Court rejected the plaintiff's Fourteenth Amendment claim in *Everson* in interpreting the law as having a public purpose, adding that the First Amendment did not prohibit the state from extending general benefits to all of its citizens without regard to their religious beliefs. The Court treated student transportation as another category of public services such as police, fire, and health protection.

In what became something of a Trojan Horse because of difficulties it would create for state aid to faith-based schools, the analysis in the majority opinion was proffered by Justice Hugo Black, a former member of the Ku Klux Klan (Hamburger, 2002, p. 422). Of course, the Klan hated Catholics along with African-Americans, Jews, among others. Black introduced the Jeffersonian metaphor into the Court's First Amendment analysis, writing that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach" (*Everson*, 1947, p. 18).

Following *Everson*, states had to choose whether to provide publicly funded transportation to students who attend faith-based schools. As examined in the companion chapter, lower courts, relying on state constitutional provisions, reached mixed results on this issue.

In *Wolman v. Walter* (*Wolman*, 1977), the Supreme Court considered whether public funds could be used to provide transportation for field trips for children who attended faith-based schools in Ohio. The Court held that the practice was unconstitutional because insofar as field trips were oriented
to the curriculum, they were in the category of instruction rather than that of non-ideological secular services such as transportation to and from school.

Textbooks

*Board of Education of Central School District No. 1 v. Allen* (Allen, 1968), another case involving textbooks, was litigated at the Supreme Court three years after Catholic schools reached their peak enrollments in the United States. In *Allen*, the Justices relied on the First, rather than the Fourteenth, Amendment. They essentially followed the precedent from *Cochran* in affirming the constitutionality of a statute from New York that required local school boards to loan books to children in grades seven to 12 who attended non-public schools.

The law at issue in *Allen* did not mandate that the books loaned to all students had to be the same as those used in the public schools but did require that titles be approved by local board officials before they could be adopted. Relying largely on the Child Benefit Test, the Court observed that the statute's purpose was not to aid religious or non-public schools and that its primary effect was to improve the quality of education for all children.

Other than for the delivery of special education services to individual students—as in *Zobrest v. Catalina Foothills School District* (1993)—*Allen* represented the outer limit of the Child Benefit Test for large groups of children prior to the Supreme Court's ruling in *Agostini v. Felton* (1997) discussed below. The Justices upheld like textbook provisions in *Meek v. Pittenger* (1975) and *Wolman*, both of which are also examined in more detail below.

Secular Services and Salary Supplements

The Supreme Court's most important case involving the Establishment Clause and education was *Lemon v. Kurtzman* (1971). In *Lemon*, the Court invalidated a statute from Pennsylvania calling for the purchase of secular services and a law from Rhode Island that provided salary supplements for teachers in non-public schools, most of which were Roman Catholic.

The Pennsylvania law directed the superintendent of education to purchase specified secular educational services from non-public schools. Officials directly reimbursed the non-public schools for their actual expenditures for teacher salaries, textbooks, and instructional materials. The superintendent had to approve the textbooks and materials, which were restricted to the areas of mathematics, modern foreign languages, physical science, and physical education.

In Rhode Island, officials could supplement the salaries of certificated teachers of secular subjects in non-public elementary schools by directly
paying them amounts not in excess of 15% of their current annual salaries; their salaries could not exceed the maximum paid to public school teachers. The supplements were available to teachers in non-public schools where average per-pupil expenditures on secular education were less than in public schools. In addition, the teachers had to use the same materials as were used in public schools.

In striking down both laws, the Supreme Court enunciated the three-part test known as the *Lemon* test. In creating this measure, the Court added a third prong to the two-part test it created in *School District of Abington Township v. Schempp* and *Murray v. Curlett* (1963), companion cases dealing with prayer and Bible reading in public schools. This third part, which dealt with excessive entanglement, came from *Walz v. Tax Commission of New York City* (1970), which upheld New York State's practice of providing state property tax exemptions for church property that is used in worship services.

According to the *Lemon* test:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion" (*Lemon*, 1971, 612–13).

As to entanglement and state aid to faith-based schools, the Court identified three other factors: "[W]e must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority" (*Lemon*, 1971, 615).

In *Lemon* the Supreme Court maintained that aid for teachers' salaries was different from secular, neutral, or non-ideological services, facilities, or materials. Reflecting on *Allen*, the Court remarked that teachers have a substantially different ideological character than books. In terms of the potential for involving faith or morals in secular subjects, the Court feared that while the content of a textbook can be identified, how a teacher covers subject matter is not.

The *Lemon* Court added that conflict can arise when teachers who work under the direction of religious officials are faced with separating religious and secular aspects of education. The Court held that the safeguards necessary to ensure that teachers avoid non-ideological perspectives give rise to impermissible entanglement. The Court concluded that an ongoing history of government grants to non-public schools suggests that these programs were almost always accompanied by varying measures of control.
Higher Education

The Supreme Court has yet to hand down a judgment directly involving Catholic higher education. In a related development, though, on the same day that it ruled in Lemon, the Court upheld the constitutionality of the Higher Education Facilities Act of 1963, which made construction grants available to institutions of higher education, including church-related colleges and universities. In Tilton v. Richardson (Tilton, 1971), a case originating in Connecticut, the Court reasoned that while the section of the law that limited recipients’ obligation not to use federally financed facilities for sectarian instruction or religious worship for 20 years unconstitutionally allowed a contribution of property of substantial value to religious bodies, that section was severable.

The Supreme Court was satisfied that the remainder of the statute in Tilton did not violate the First Amendment. In upholding the remainder of the statute, the Justices distinguished Tilton from Lemon insofar as in Tilton, indoctrination was not a substantial purpose or activity of church-related colleges because the student body was not composed of impressionable children, the aid was non-ideological, and there was no excessive entanglement since the grants were one-time and single-purpose.

Two years later, in Hunt v. McNair (1973), the Supreme Court decided that insofar as religion was not pervasive in an institution, South Carolina was free to issue revenue bonds to benefit the church-related college. The Court was satisfied that this arrangement was acceptable because the bonds were not guaranteed by public funds.

Aids to Parents

Tuition Reimbursement

Two months after Lemon, the Pennsylvania legislature enacted a statute that allowed parents whose children attended non-public schools to request tuition reimbursement. The same parent as in Lemon challenged the new law as having the primary effect of advancing religion.

In Sloan v. Lemon (Sloan, 1973) the Supreme Court affirmed that the law impermissibly singled out a class of citizens for a special economic benefit. The Justices viewed this as unlike the “indirect” and “incidental” benefits that flowed to religious schools from programs that aided all parents by supplying bus transportation and secular textbooks for their children. The Court commented that transportation and textbooks were carefully restricted to the purely secular side of church-affiliated schools and did not provide special aid to their students.

The Supreme Court expanded on Sloan’s analysis in a case from New York, Committee for Public Education and Religious Liberty v. Nyquist (Ny-
quist, 1973). The Court ruled that even though the grants went to parents rather than to school officials, this did not compel a different result. The Court explained that since parents would have used the money to pay for tuition and the law failed to separate secular from religious uses, the effect of the aid unmistakably would have provided the desired financial support for non-public schools.

In so doing, the Nyquist Court rejected the state's argument that parents were not simply conduits because they were free to spend the money in any manner they chose since they paid the tuition and the law merely provided for reimbursements. The Court indicated that even if the grants were offered as incentives to have parents send their children to religious schools, the law violated the Establishment Clause regardless of whether the money made its way into the coffers of the religious institutions.

Income Tax

Another section of the same New York statute in Nyquist aided parents via income tax benefits. Under the law, parents of children who attended non-public schools were entitled to income tax deductions as long as they did not receive tuition reimbursements under the other part of the statute. The Supreme Court invalidated this provision in pointing out that in practical terms there was little difference, for purposes of evaluating whether such aid had the effect of advancing religion, between a tax benefit and a tuition grant. The Court based its judgment on the notion that under both programs qualifying parents received the same form of encouragement and reward for sending their children to non-public schools.

In Mueller v. Allen (Mueller, 1983), the Supreme Court upheld a statute from Minnesota that granted all parents state income tax deductions for the actual costs of tuition, textbooks, and transportation associated with sending their children to K-12 schools. The law afforded all parents deductions of $500 for children in grades K-6 and $700 for those in grades 7-12.

The Justices distinguished Mueller from Nyquist primarily because the tax benefit was available to all parents, not only those whose children were in non-public schools. The Court also recognized that the deduction was one among many rather than a single, favored type of taxpayer expense.

Acknowledging the legislature's broad latitude to create classifications and distinctions in tax statutes, and that the state benefited from the scheme since it promoted an educated citizenry while reducing the costs of public education, the Supreme Court was satisfied that the law met all three of Lemon's prongs. The Court paid little attention to the fact that since the state's public schools were essentially free, the expenses of parents whose children attended them were at most minimal and that about 96% of taxpayers who benefited had children enrolled in religious schools.
Charles J. Russo

Reimbursements to Faith-Based Schools

On the same day that it resolved *Nyquist*, in a second case from New York, the Supreme Court applied basically the same rationale in *Levitt v. Committee for Public Education and Religious Liberty* (*Levitt*, 1973). Here the Court invalidated a law allowing the state to reimburse non-public schools for expenses incurred while administering and reporting test results as well as other records. Insofar as there were no restrictions on the use of the funds, such that teacher-prepared tests on religious subject matter were seemingly reimbursable, the Court observed that the aid had the primary effect of advancing religious education because there were insufficient safeguards in place to regulate how the monies were spent.

*Wolman v. Walter* (1977), a case from Ohio, saw the Supreme Court uphold a law permitting reimbursement for religious schools where officials used standardized tests and scoring services to evaluate student progress. The Justices distinguished these tests from the ones in *Levitt* since the latter were neither drafted nor scored by non-public school personnel. The Court also reasoned that the law did not authorize payments to church-sponsored schools for costs associated with administering the tests.

In *Committee for Public Education and Religious Liberty v. Regan* (1980, *Regan*) the Supreme Court reexamined another aspect of *Levitt* after the New York State legislature modified the law. Under its new provisions, the statute provided reimbursements to non-public schools for the actual costs of complying with state requirements for reporting on students and for administering mandatory and optional state-prepared examinations. Unlike the law in Ohio, this statute permitted the tests to be graded by personnel in the non-public schools that were, in turn, reimbursed for these services. The law also created accounting procedures to monitor reimbursements.

The *Regan* Court conceded that the differences between the statutes were permissible, since scoring of essentially objective tests and recording their results along with attendance data offered no significant opportunity for religious indoctrination while serving secular state educational purposes. The Court concluded that the accounting method did not create excessive entanglement since the reimbursements were equal to the actual costs.

*Instructional Materials*

In *Meek v. Pittenger* (1975, *Meek*), the Supreme Court examined the legality of loans of instructional materials, including textbooks and equipment, to faith-based schools in Pennsylvania. Although the Court upheld the loan of textbooks, it struck down parts of the law on periodicals, films, recordings, and laboratory equipment as well as equipment for recording and projecting; the statute had the primary effect of advancing religion due to the predominantly religious character of participating schools.
The *Meek* Court was concerned because the only statutory requirement imposed on the schools to qualify for the loans was directing their curricula to offer the subjects and activities mandated by the commonwealth’s board of education. The Court thought that because the church-related schools were the primary beneficiaries, the massive aid to their educational function necessarily resulted in aid to their sectarian enterprises as a whole.

The Supreme Court reached similar results in *Wolman v. Walter* (*Wolman*, 1977), upholding a statute from Ohio which specified that textbook loans were to be made to students or their parents, rather than directly to their non-public schools. The Justices struck down a provision that would have allowed loans of instructional equipment including projectors, tape recorders, record players, maps and globes, and science kits. Echoing *Meek*, the Court invalidated the statute’s authorization of the loans in light of its fear that insofar as it would be impossible to separate the secular and sectarian functions for which these items were being used, the aid inevitably provided support for the religious roles of the schools.

*Mitchell v. Helms* (*Helms*, 2000), a Supreme Court case originating in Louisiana, expanded the boundaries of permissible aid to faith-based schools (*Mawdsley & Russo*, 2001). A plurality upheld the constitutionality of chapter 2 of Title I—now Title VI—of the Elementary and Secondary Education Act (2014), a federal law that permits the loans of instructional materials including library books, computers, television sets, tape recorders, and maps to non-public schools.

In *Helms*, the Supreme Court relied on the modified *Lemon* test enunciated in *Agostini v. Felton*, discussed below, by reviewing only its first two parts while recasting entanglement as one criterion in evaluating a statute’s effect. Insofar as the purpose part of the test was not challenged, the plurality only considered chapter 2’s effect. They concluded that it did not foster impermissible indoctrination because aid was allocated pursuant to neutral secular criteria that neither favored nor disfavored religion and was available to all schools based on secular, nondiscriminatory grounds. In its rationale, the plurality explicitly reversed those parts of *Meek* and *Wolman* that were inconsistent with its analysis on loans of instructional materials.

**Support Services**

In *Meek v. Pittenger* (1975), the Supreme Court invalidated a Pennsylvania law permitting public school personnel to provide auxiliary services on-site in faith-based schools. At the same time, the Court forbade the delivery of remedial and accelerated instructional programs, guidance counseling and testing, and services to aid children who were educationally disadvantaged. The Court asserted that it was immaterial that the students would have received remedial, rather than advanced, work; the required surveillance to
ensure the absence of ideology would have given rise to excessive entanglement between church and state.

*Wolman v. Walter* (1977) saw the Supreme Court reach mixed results on aid. In addition to upholding the textbook loan program, the Court allowed Ohio to supply non-public schools with state-mandated tests while allowing public school employees to go on-site to perform diagnostic tests to evaluate whether students needed speech, hearing, and psychological services. The Court also allowed public funds to be spent providing therapeutic services to students from non-public schools as long as they were delivered off-site. The Court forbade state officials from loaning instructional materials and equipment to schools or from using funds to pay for field trips for students in non-public schools.

The Supreme Court’s 1993 decision in *Zobrest v. Catalina Foothills School District* (*Zobrest*) was a harbinger of change to come in its Establishment Clause jurisprudence. At issue was a school board in Arizona’s refusal to provide a sign language interpreter for a student who was deaf, under the Individuals with Disabilities Education Act, after he transferred into a Roman Catholic high school. In a suit filed as the student entered high school but which was resolved shortly after he graduated, the Court found that an interpreter provided neutral aid to him without offering financial benefits to his parents or school, and that there was no governmental participation in the instruction because the interpreter was only a conduit to effectuate his communications.

The *Zobrest* Court relied in part on *Witters v. Washington Department of Services for the Blind* (1986), wherein it upheld the constitutionality of extending a general vocational assistance program to a blind man who was studying to become a clergyman at a religious college. Yet the Supreme Court of Washington later interpreted its state constitution as forbidding such use of public funds, and the Supreme Court refused to hear a further appeal (*Witters v. State Commission for the Blind*, 1989).

A year later, in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), the Supreme Court reviewed a case where the New York State Legislature enacted a statute creating a school district with the same boundaries as an Orthodox Jewish community. The legislature created the district in seeking to accommodate the needs of parents of children with disabilities who wished to send them to a nearby school that would have honored their religious customs and beliefs, particularly with regard to dietary practices.

On further review of state court orders invalidating the law, the Court affirmed that it was unconstitutional. The Supreme Court maintained that while a state may accommodate a group’s religious needs by seeking to reduce or eliminate special burdens, it went too far. Instead, the Court sug-
gested that the board could have offered an appropriate program at one of its
public schools or at a neutral site near one of the village’s religious schools.

Within days after the Supreme Court struck down the statute, the New
York State Legislature amended the statute in an attempt to eliminate the
Establishment Clause problem. Still, New York’s highest court invalidated
the revised law as a violation of the Establishment Clause, insofar as it had
the effect of advancing one religion (Grumet v. Cuomo, 1997; Grumet v.
Pataki, 1999).

Another set of conflicts arose when officials in public and non-public
schools entered into cooperative arrangements. More than a decade after the
Supreme Court of Michigan upheld a state constitutional amendment on
shared time, officials in Grand Rapids created an extensive program. The
program grew to the point where publicly paid teachers conducted 10% of
classes in religious schools. Many of them worked in the religious schools.
After the Sixth Circuit invalidated the plan, in School District of City of
Grand Rapids v. Ball (Ball, 1985), the Supreme Court affirmed that the
released time program was unconstitutional because it failed all three prongs
of the Lemon test.

On the same day that it resolved Ball, in a more far-reaching case, the
Supreme Court reviewed a dispute from New York City. In Aguilar v. Felton
(Aguilar, 1985), the Justices considered whether public school teachers could
provide remedial instruction under Title I of the Elementary and Secondary
Education Act of 1965 (1965)—enacted the same year as Gravissimum Edu-
cationis was promulgated—in religiously affiliated non-public schools. The
Title I provision of the Act, which passed with considerable support from
Catholic leaders in particular (Buetow, 1970), was designed for specifically
targeted children, who were educationally disadvantaged, on-site in their
faith-based schools.

In Aguilar v. Felton (Aguilar, 1985), the Supreme Court affirmed earlier
orders that the program permitting the on-site delivery of services to children
in their religiously affiliated non-public schools, the vast majority of which
were Roman Catholic, was unconstitutional. Even though the New York City
Board of Education (NYCBOE) developed safeguards to ensure that public
funds were not spent for religious purposes, the Court struck the program
down based on the fear that a monitoring system to have avoided the creation
of an impermissible relationship between Church and state might have re-
sulted in the presence of excessive entanglement under the third prong of the
Lemon test.

Twelve years later, in Agostini v. Felton (Agostini, 1997), the Supreme
Court took the unusual step of dissolving the injunction that it upheld in
Aguilar (Russo & Osborne, 1997). The Court reasoned that the Title I pro-
gram did not violate the Lemon test since there was no governmental indo-
ctrination, there were no differences between recipients based on religion, and
there was no excessive entanglement. The Court thus ruled that a federally funded program that provides supplemental, remedial instruction and counseling services to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when the assistance is provided on-site in faith-based schools pursuant to a program containing safeguards such as those that the NYCBOE implemented. Perhaps the most important outcome in Agostini was the Court’s having modified the Lemon test by reviewing only its first two prongs, purpose and effect, while recasting entanglement as one criterion in evaluating a statute’s effect.

Vouchers

Considerable controversy has arisen over the use of vouchers, with courts reaching mixed results in disputes over their constitutionality. Still, the only Supreme Court case on vouchers arose in Ohio. The Ohio General Assembly, acting pursuant to a desegregation order, enacted the Ohio Pilot Project Scholarship Program (OPPSP) to assist children in Cleveland's failing public schools. The main goal of the OPPSP was to permit an equal number of students to receive vouchers and tutorial assistance grants while attending regular public schools. Another part of the law provided greater choices to parents and children via the creation of community, or charter, schools and magnet schools. A third section featured tutorial assistance for children.

The Supreme Court of Ohio upheld the OPPSP but severed the part of the law affording priority to parents who belonged to a religious group supporting a sectarian institution (Simmons-Harris v. Goff, 1999). Moreover, in finding that the OPPSP violated the state constitutional requirement that every statute have only one subject, the court struck it down. Still, when the court stayed enforcement of its order to avoid disrupting the then-current school year, the Ohio General Assembly quickly reenacted a revised statute.

After lower federal courts, relying largely on Nyquist (1973), enjoined the operation of the revised statute as a violation of the Establishment Clause, the Supreme Court agreed to hear an appeal. In Zelman v. Simmons-Harris (Zelman, 2002), the Court reversed the judgment of the Sixth Circuit and upheld the constitutionality of the OPPSP (Russo & Mawdsley, 2002).

Relying on Agostini, the Zelman Court began by conceding the lack of a dispute over the program's valid secular purpose in providing programming for poor children in a failing school system. The Court examined whether it had the forbidden effect of advancing or inhibiting religion. The Court upheld the voucher program because as part of the state's far-reaching attempt to provide greater educational opportunities in a failing school system, the law allocated aid on the basis of neutral secular criteria that neither favored nor disfavored religion, was made available to both religious and secular beneficiaries on a nondiscriminatory basis, and offered assistance directly to
a broad class of citizens who directed the aid to religious schools based entirely on their own genuine and independent private choices.

The *Zelman* Court was not concerned by the fact that most of the participating schools were faith-based because parents chose to send their children to them insofar as surrounding public schools refused to take part in the program. If anything, the Court acknowledged that most of the children attended the religiously affiliated non-public schools, most of which were Roman Catholic, not as a matter of law but because they were unwelcomed in the public schools. The Court concluded that insofar as it was following an unbroken line of its own precedent supporting true private parental choice that provided benefits directly to a wide range of needy private individuals, its only choice was to uphold the voucher program.

**CONCLUSION**

Roman Catholic schools clearly have the legal right to operate but face an increasingly uncertain future in the face of declining enrollments due to a variety of factors beyond the scope of this chapter. Even so, as with most issues involving the law, the one thing to be sure of is that litigation will continue over the status of aid to Catholic schools, their students, and parents.

The extent to which aid may be available to Catholic schools of all levels depends on a combination of legislative action and judicial interpretation by the Supreme Court which, as demonstrated, has gone through three distinct periods of greater or lesser support for the schools. Whether the Court is willing to continue to support aid to Roman Catholic and other religiously affiliated non-public schools bears constant watching.

**REFERENCES**

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).
Tilton v. Richardson, 403 U.S. 672 (1971),