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Putting the Cart before the Horse: Agostini v. Felton Blurs the Line between Res Judicata and Equitable Relief

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It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.\footnote{The Federalist No. 78, at 398-99 (Publius) (Clinton Rossiter ed., 1961).}

INTRODUCTION

In the recently decided case of \textit{Agostini v. Felton},\footnote{117 S. Ct. 1997 (1997).} the Supreme Court lifted an injunction against the New York City Board of Education that it had affirmed twelve years earlier in \textit{Aguilar v. Felton}.

\textit{Aguilar}, the New York City Board of Education was enjoined from sending public school teachers into sectarian schools for the purpose of remedial education because such practices violated the Establishment Clause of the First Amendment.\footnote{473 U.S. 402 (1985) (the injunction was imposed by the District Court on remand reflecting the Supreme Court's ruling).}

In \textit{Agostini}, Justice O'Connor, writing for the majority, held that \textit{Aguilar} was no longer good law because subsequent Establishment Clause decisions had "eroded" it.\footnote{See id. at 412 (holding that the practice specifically violated the "entanglement" prong of the test established by the Court in \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971)).} The \textit{Agostini} Court, therefore, granted the Petitioners relief under Federal Rule of Civil Procedure 60(b)(5), which states that a court may relieve a party from final
judgment or order if the judgment has been "satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."  

This last clause has generally been interpreted to require a showing that either the underlying factual conditions at the time of the original ruling, or the law, has changed.

While the Aguilar decision had never been explicitly or implicitly overruled, the Agostini Court determined that the decisional law had significantly changed so as to "undermine" its holding in Aguilar. As the basis for its decision, the Agostini majority relied on two recent opinions, Witters v. Washington Department of Services for the Blind and Zobrest v. Catalina Foot hills School District, which, according to the Agostini Court, had changed the law in such a way that Aguilar was no longer consistent with current First Amendment jurisprudence. In the lower court proceedings, the trial and appellate courts denied relief to the Agostini Petitioners because, according to the trial court, while "[t]here may be good reason to conclude that Aguilar's demise is imminent," it had not yet occurred.

Thus, it appears that in Agostini, the Supreme Court used Rule 60(b)(5) as an opportunity to overrule a decision that was not only frowned upon by a majority of the Court, but had also been widely criticized by the legal community. While the outcome of Agostini may be more consistent with recent Establishment Clause jurisprudence and more palatable for the legal community, the decision, nevertheless, sets a dangerous precedent.

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6 FED. R. CIV. P. 60(b)(5) (emphasis added).
7 See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992) (“A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.”).
8 See Agostini, 117 S. Ct. at 2010.
12 Id. at 2006 (citation omitted).
15 But see Agostini, 117 S. Ct. at 2019 (Souter, J., dissenting) (opining that Aguilar was perfectly consistent with current First Amendment jurisprudence).
The use of Rule 60(b)(5) to effectuate a change in the law to gain relief from prospective judgment is unprecedented and raises several questions about its procedural implementation, as well as its effect on the doctrine of res judicata. Not only is the decision in Agostini likely to create confusion at the appellate court level in reviewing denials of 60(b) motions, but it also creates a paradox for trial courts in that it may now be possible for a trial judge to abuse her discretion simply by following a controlling Supreme Court decision. Additionally, this decision may open the "floodgates" by allowing parties to re-litigate decisions that would otherwise be barred by res judicata. Indeed, it now seems possible that mere statements by Supreme Court Justices expressing dissatisfaction with a decision could provide a "backdoor" to re-litigation that circumvents the principle of res judicata.

The purpose of this Note is to analyze the Agostini decision in light of the history of Rule 60(b)(5) and recommend a strict interpretation of the decision that would avoid the possible problems of this unprecedented application of Rule 60(b)(5). Part I discusses the history of Rule 60(b)(5). Part II analyzes the Agostini opinion in light of that history as well as the possible problems created by this decision. Part III explores a less problematic approach for dealing with modifications of this sort. Finally, this Note concludes with recommendations for interpreting the Agostini decision so as to minimize its potential negative consequences.

I. THE HISTORY OF RULE 60(b)(5)

Federal Rule of Civil Procedure 60(b), entitled "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.," allows a court to relieve a party from a final judgment or order for a variety of reasons. Subsection (5) of Rule 60(b) allows relief where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." This last

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16 FED. R. CIV. P. 60(b).
17 See FED. R. CIV. P. 60(b)(1) (mistake, inadvertence, surprise or excusable neglect); FED. R. CIV. P. 60(b)(2) (newly discovered evidence which by due diligence could not have been discovered); FED. R. CIV. P. 60(b)(3) (fraud, misrepresentation, or other misconduct of an adverse party); FED. R. CIV. P. 60(b)(4) (the judgment is void); FED. R. CIV. P. 60(b)(5), infra note 18 and accompanying text; FED. R. CIV. P. 60(b)(6) (any other reason justifying relief from operation of the judgment).
18 FED R. CIV. P. 60(b)(5).
clause was the codification of the common law standard for modifying injunctions set forth by the Supreme Court in *United States v. Swift & Co.*

A. The Swift Decision

In 1932, the Supreme Court in *Swift* reversed an appellate court decision modifying a twelve-year-old consent decree. This decree was the result of years of litigation in a complex antitrust suit. The Defendants were a group of five large meat packing companies that had, through price-fixing and other monopolistic behavior, gained an “evil eminence” in the grocery distribution business. The 1920 decree enjoined the Defendants from several enumerated trade practices and monopolistic behaviors. After an unsuccessful attempt by an intervening party to modify the decree in 1929, the court of appeals, in 1930, allowed partial modification. The appellate court justified its decision by stating:

During the years that had intervened between the entry of the decree and its final confirmation, conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive.

In an opinion authored by Justice Cardozo, the *Swift* Court held that the appellate court erred in granting the modification, reasoning that the conditions at the time of the injunction had not

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19 286 U.S. 106 (1932); see also Cook v. Birmingham News, 618 F.2d 1149, 1151 (5th Cir. 1980) (stating that Rule 60(b)(5) was a codification of *Swift*); OWEN M. FISS, INJUNCTIONS 378 (1972) (“There is nothing in the Rules, their history, or their commentary to suggest that the words [of 60(b)(5)] were intended to do more than to adopt the standard evolved in *Swift* and other decisions.”).

20 Consent decrees and injunctions are treated identically by the courts in modification litigation, as both are judgments with prospective applications. See *Swift*, 286 U.S. at 114 (“The result is all one whether the decree has been entered after litigation or by consent.”). However, Professor Jost argues that Justice Cardozo, in his majority opinion, might have intended consent decrees to require a stricter modification standard than fully litigated decrees. See Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1111 (1986).

21 See *Swift*, 286 U.S. at 110.
22 See id. at 111.
23 See id. at 112.
24 See id. at 113.
25 Id.
substantially changed. Justice Cardozo then presented what would become the established judicial standard for modification: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."\(^2\)

Swift's "grievous wrong" standard became the cornerstone of modification litigation for over a half century.\(^2\)\(^8\) In 1968, the Supreme Court added to the Swift standard by stating that modification of injunctions was not appropriate where the "purposes of the litigation as incorporated in the decree . . . have not been fully achieved."\(^2\)\(^9\)

B. Application of 60(b)(5) under the Swift Standard

Although Swift was recognized as the seminal decision for modification of prospective judgments, Cardozo's "grievous wrong" standard was interpreted quite differently by courts. Some courts interpreted this standard literally and were rigid in their application of the standard,\(^3\)\(^0\) other courts, however, found the standard malleable and were liberal in their application.\(^3\)\(^1\)

While the "draconian" standard set forth in Swift\(^3\)\(^2\) controlled most 60(b)(5) motions for modification, there was a movement among some courts to apply a more flexible test, especially in the area of institutional reform.\(^3\)\(^3\) Moreover, many commentators argued that the Swift standard was too inflexible.\(^3\)\(^4\) Professor Jost, for

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\(^{26}\) See id. at 115-18.
\(^{27}\) Id. at 119.
\(^{30}\) See Humble Oil & Ref. Co. v. Am. Oil Co., 405 F.2d 803, 813 (8th Cir. 1969) ("[T]he Swift standard means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the degree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movant's task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.").
\(^{31}\) See United States v. Am. Cyanamid Co., 719 F.2d 558, 565-66 (2d Cir. 1983) (allowing modification for "public interest" purposes); Penwell, 700 F.2d at 574 (relieving state from obligations to do more than necessary to comply with federal law); United States v. Motor Vehicles Mfrs. Ass'n, 643 F.2d 644, 650 (9th Cir. 1981) (basing modification on whether intention of the parties was met); Flavor Corp. of Am. v. Kemin Indus., 503 F.2d 729, 732 (8th Cir. 1974) (allowing modification to ensure the injunction conformed to the purpose of the law).
\(^{32}\) See Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983) (characterizing the "grievous wrong" standard of Swift as "draconian").
\(^{33}\) See supra note 31.
\(^{34}\) See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (arguing for a flexible approach in institutional reform litigation); Owen Fiss, The Forms of Justice, 93 HARV. L. REV. 1 (1979) (asserting that remedies based on specific legal
example, has noted that the "seeds" of flexibility could be found in the *Swift* opinion itself.\textsuperscript{35} He classified the types of situations in which courts grant modifications under the varying interpretations of *Swift* into four general categories: (1) modification to maintain consistency between the order and the law, (2) modification to relieve a party from an unfairly oppressive or inefficient consent decree, (3) modification to achieve the rights of the beneficiary, and (4) modification to protect the public interest.\textsuperscript{36}

Indeed the Supreme Court has, in several subsequent decisions, moved away from the "grievous wrong" standard, or at least liberalized its own interpretation of that standard. In *System Federation No. 91, Railway Employees' Department v. Wright*,\textsuperscript{37} the Court held that a change in relevant statutory law was sufficient grounds to modify a consent decree.\textsuperscript{38} In that case, a railroad union sought modification of a consent decree in which railroad employees were not required to join the labor union.\textsuperscript{39} The decree was congruous with the "union shop" provision of the Railway Labor Act.\textsuperscript{40} In 1951, the Railway Labor Act was amended to allow union-shop agreements between railroads and labor unions.\textsuperscript{41} The *Wright* Court justified its decision by stating that a court must be free to "modify the terms of a consent decree when a change in law brings those terms in conflict."\textsuperscript{42} Citing *Swift*, the Court stated that courts have power to modify injunctions "by force of principles inherent in the jurisdiction of the chancery."\textsuperscript{43}

In *United States v. United Shoe Machinery Corp.*,\textsuperscript{44} the Court placed the *Swift* test within a broader context for interpretation.\textsuperscript{45} In *United Shoe*, a civil case brought by the United States government for violations of the Sherman Antitrust Act, the consent decree was designed to curb the Defendant's monopolistic behavior and to establish workable competition in the market.\textsuperscript{46} After twelve years under the decree, the competitive situation of the

\textsuperscript{35} See Jost, supra note 20, at 1113.
\textsuperscript{36} See id. at 1114-15.
\textsuperscript{37} 364 U.S. 642 (1961).
\textsuperscript{38} See id. at 647.
\textsuperscript{39} See id. at 643-44.
\textsuperscript{40} 45 U.S.C. § 152 (1926) (amended 1951).
\textsuperscript{41} See Wright, 364 U.S. at 644-45.
\textsuperscript{42} Id. at 651.
\textsuperscript{43} Id. at 647 (quoting United States v. Swift & Co., 286 U.S. 106, 114 (1932)).
\textsuperscript{44} 391 U.S. 244 (1968).
\textsuperscript{45} See id. at 248-49.
\textsuperscript{46} See id. at 245.
market had not substantially changed and the government moved to modify the decree to achieve a more competitive market. The District Court, following Swift, did not allow the modification because there was no clear showing of a "grievous wrong." Distinguishing Swift, the United Shoe Court reversed, finding that the purpose of the modification in Swift was to avoid the impact of the decree, whereas in the present case, the purpose of the modification was to achieve the purposes of the decree and, therefore, this case was the "obverse" of Swift.

In Board of Education v. Dowell, the Supreme Court, by distinguishing the role of courts in remedying racial discrimination, held that the Swift "grievous wrong" standard was not appropriate in the case of school desegregation decrees. The Court stated that the consent decree involved in Swift was intended as a permanent prospective solution, whereas the federal court's supervisory role in the public schools was to cease when the objectives of remedying past racial discrimination were substantially completed.

Perhaps the most influential decision applying a flexible standard for the modification of a consent decree is New York State Ass'n for Retarded Children, Inc. v. Carey. In Carey, Judge Friendly, writing for the majority, reversed a district court's decision not to modify a consent decree entered on behalf of mentally retarded residents of the Willowbrook State School in New York City. The decree ordered the defendants to reduce the population of the school from 5700 residents to 250. Notwithstanding the Defendant's efforts to comply with the decree, several years had passed without the population being decreased to the ordered number. The Plaintiffs moved for enforcement while the Defendant moved for modification of the decree. Judge Friendly held that the Swift decision was to be read in light of the facts of that case, and relied on the less austere language of Justice Cardozo's opinion, which stated that "[a] continuing decree of injunction

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47 See id. at 247.
48 See id.
49 See id. at 249.
51 See id. at 247-48.
52 See id.
54 See id. at 971-72.
55 See id. at 959.
56 See id. at 961-62.
57 See id. at 960.
directed to events to come is subject always to adaptation as events may shape the need . . . .”58 Judge Friendly also cited his earlier opinion in King-Seeley Thermos Co. v. Aladdin Industries, Inc.,59 as support for the proposition that “[w]hen a case involves drawing the line between legitimate interests on each side, modification will be allowed on a lesser showing.”60

C. The Rufo Decision

The most important impact of Judge Friendly’s decision in Carey came in the Supreme Court’s decision in Rufo v. Inmates of Suffolk County Jail.61 In Rufo, the Court adopted the Second Circuit’s flexible test, and seemingly abandoned the Swift “grievous wrong” standard, at least for institutional reform consent decrees.

The Rufo decision emerged from prison reform litigation involving Boston’s Charles Street prison. In 1973, a district court held that the conditions in the prison, built in 1848, were not constitutional under the Fourteenth Amendment.62 The court permanently enjoined the Defendants from housing pre-trial detainees in the facility.63 After five years, the court of appeals, noting that the overcrowding problem had not been corrected, ordered the prison closed unless the Defendants could create and present a plan for an adequate facility.64 The Defendants crafted a plan to construct a new facility that specifically disallowed the double bunking of inmates.65

In 1989, while the new facility was under construction, the Defendants moved to have the decree modified to allow double bunking.66 The Defendants cited Bell v. Wolfish67 in which the Supreme Court stated that double bunking of inmates was not per se unconstitutional.68 The district court denied the motion for

58 Id. at 967 (quoting United States v. Swift Co., 286 U.S. 106, 114 (1932)).
59 418 F.2d 31 (2d Cir. 1969).
60 Carey, 706 F.2d at 969.
62 Id. at 372 (quoting Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973): “As a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness and personal privacy.”).
63 See id. at 373.
64 See id. at 374.
65 See id. at 375.
66 See id. at 376.
68 See Rufo, 502 U.S. at 376.
modification, holding that the movant had failed to meet the Swift standard.69

Although the appellate court affirmed,70 the Supreme Court reversed, holding that the Swift standard was inapplicable.71 The Rufo Court stated, "[o]ur decisions since Swift reinforce the conclusion that the 'grievous wrong' language of Swift was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."72 Without overruling Swift, the Court reformulated the standard under Rule 60(b)(5) so that modification may be warranted when the moving party can show "a significant change either in factual conditions or in law."73

D. Application of 60(b)(5) under the Rufo Standard

The Court in Rufo was less than clear in communicating whether its new flexible standard was to apply to all prospective judgments or only to institutional reform litigation.74 Thus, the application of Rule 60(b)(5) after the Rufo decision has not been fully consistent. The language of Rufo stating that a change in either the factual conditions or the law may warrant modification of prospective judgments is by no means a new test for granting relief under 60(b)(5).75 What is new, however, is the threshold amount of change necessary for a court to grant relief. Lower courts have been split as to whether the Rufo standard completely replaces the Swift standard for 60(b)(5) motions to modify prospective judgments or, alternatively, whether the Rufo standard applies exclusively to institutional reform litiga-

69 See id. at 376-77.
70 See id. at 377.
71 See id. at 393.
72 Id. at 380.
73 Id. at 384. The Court continued, "Rule 60(b)(5) provides that a party may obtain relief, from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Id. at 383.
74 The Rufo Court spoke both in terms that both seemed to limit the new flexible test to institutional reform and in terms that seemed to cover all prospective judgments under Rule 60(b)(5). "To conclude, we hold that the Swift 'grievous wrong' standard does not apply to modify consent decrees stemming from institutional reform litigation." Id. at 393. The Court also stated, "[u]nder the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." Id.
75 See System Fed'n No. 91, Ry. Employees' Dept. v. Wright, 364 U.S. 642 (1961) (stating that it was error to refuse to modify a decree disallowing a union shop when an intervening act of Congress made it possible); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) (stating that a change in statutory law was a sufficient basis for the modification of an injunction).
Four basic interpretations of the applicability of the Rufo test in non-institutional reform litigation have developed among the Circuit Courts of Appeals. One group of courts holds that while the Rufo Court discussed modification in light of institutional reform litigation, the most salient aspect of the decision was its broad interpretation of Rule 60(b)(5). Other circuits have interpreted Rufo narrowly as applying only to institutional reform consent decrees. Alternatively, the Second Circuit considers Rufo as just one of many cases in determining whether to modify consent decrees. Finally, two circuits believe that Rufo and Swift are important cases for determining modification, but that the ultimate determination is based on equitable considerations and not case law.

Because the Agostini injunction was based on public institution reform litigation, it provided little help to courts in determining the scope of Rufo. Moreover, it is quite possible that Agostini will add to the confusion of the lower courts in determining modifications of prospective judgments by its unprecedented use of Rule 60(b)(5).

II. THE APPLICATION OF 60(B)(5) IN AGOSTINI

A. The Decision

Under Title I of the 1965 Elementary and Secondary Education Act ("Education Act"), Congress provided funding for local educational agencies to promote remedial education, guidance and

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77 See United States v. W. Elec. Co., 46 F.3d 1198, 1203 (D.C. Cir. 1995) (stating that the Rufo decision applies to "all types of injunctive relief"); In re Hendrix, 986 F.2d 195, 198 (7th Cir. 1993) (stating that while Rufo concerned institutional reform litigation, its flexible standard "is no less suitable to other types of equitable cases").
78 See Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148-49 (6th Cir. 1992) (holding that the flexible Rufo standard is applicable to school desegregation consent decrees); W.L. Gore & Assoc., Inc. v. C.R. Bard, Inc., 977 F.2d 558, 562 (Fed. Cir. 1992). (denying modification of a commercial consent decree).
79 See United States v. Eastman Kodak Co., 63 F.3d 95, 101-02 (2d Cir. 1995) (stating that Rufo did not overrule Swift).
80 See Building & Constr. Trades Council v. NLRB, 64 F.3d 880, 887-88 (3d Cir. 1995) (stating that Rufo and Swift were responses to specific circumstances); Alexis Lichine & CIE v. Sacha A Lichine Estate Selections, Ltd., 45 F.3d 582, 585-86 (1st Cir. 1995) (stating that Swift and Rufo are examples of applying a flexible standard for different situations).
job counseling. 82 Under the Education Act, these funds are to be used specifically to “help participating students meet . . . State performance standards.” 83 For eligibility, a student must “reside[] within the attendance boundaries of a public school located in a low-income area, and . . . must be failing or at risk of failing the State’s student performance standards.” 84 Additionally, these funds must be made available to all eligible children whether they attend public or private schools. 85 Furthermore, the services provided for private school students must be “equitable in comparison to services and other benefits for public school children.” 86

While Title I provides funds for students enrolled in sectarian schools, the statute does provide some safeguards for maintaining separation between church and state. Local educational agencies must “retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution.” 87

From 1966 until 1985 the New York City School District provided Title I services to the city’s parochial schools by sending its own employees to those schools to conduct programs in remedial reading, remedial math, English as a second language and other guidance services. 88 These on-site instructors were periodically inspected by field supervisors to ensure that the instructors “avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms.” 89 Additionally, the instructors were required to keep their contact with the private school personnel to a minimum. 90

In 1978, six taxpayers brought a suit alleging that New York City’s Title I program violated the Establishment Clause of the First Amendment and sought to enjoin the City from funding on-site instruction at parochial schools. 91 The district court granted the City’s motion for summary judgment and dismissed the tax-

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83 Id. at 2003 (citing 20 U.S.C. § 6315(e)(1)(E)).
84 Id. at 2003-04 (citing 20 U.S.C. §§ 6313(a)(2)(B), 6315(b)(1)(B)).
85 See id. at 2004 (citing 20 U.S.C. § 6321(c)(1)(F)).
86 Id. (citing 20 U.S.C. § 6321(a)(3)).
87 Id. at 2004 (citing 20 U.S.C. §§ 6321(c)(1)-(2)).
88 See Aguilar v. Felton, 473 U.S. 402, 406 (1985) (describing how the City of New York provided education to parochial students with Title I funding).
89 Id. at 407.
90 See id. at 406.
91 See id. at 403-06.
Writing for the Second Circuit, Judge Friendly reversed, holding that the program did in fact violate the Establishment Clause. In 1985, the Supreme Court, in *Aguilar v. Felton*, affirmed Judge Friendly’s ruling and remanded the case to the district court for issuance of a permanent injunction.

Specifically, the *Aguilar* Court held that New York City’s administration of the Title I program violated the “entanglement prong” of the test set forth in *Lemon v. Kurtzman*. On remand, the district court issued a permanent injunction prohibiting the Board of Education from “using public school funds for any plan or program . . . 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.”

To comply with the terms of the injunction, New York City spent significant amounts of money to provide computer-aided instruction and to lease sites and mobile instructional units as well as provide students transportation to those sites. These additional costs were not reimbursed by the Title I funds, thus reducing the number of students that would be eligible to receive those funds.

In 1995, the Board of Education and a new group of parents of sectarian school students filed motions in district court for relief from the permanent injunction. Citing changes in factual conditions and the law, the Petitioners argued that relief was proper un-

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92 See id. at 402.
93 See *Felton v. United States Dept. of Educ.*, 739 F.2d 48 (2d Cir. 1984).
95 See id. at 414.
96 403 U.S. 602 (1971). In *Lemon*, the Court devised a three prong test to determine if governmental action was constitutional under the Establishment Clause. First, the action must not have a religious purpose. See id. at 615. Second, the effect of the action must not favor religion and third, the action must not create an excessive entanglement between the government and the church. See id. In *Aguilar*, it was the third, or “entanglement,” prong that was at issue. The *Aguilar* Court held that New York City’s program necessitated an “excessive entanglement of church and state in the administration of benefits.” *Aguilar*, 473 U.S. at 414. The *Aguilar* Court stated that “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.’” Id. (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970)).
98 See id. (citing statistics demonstrating that since the 1986-87 school year New York City spent over 100 million dollars to comply with *Aguilar*, with the average annual cost of compliance estimated at 15 million dollars).
99 See id. For example, in the 1993-94 school year the City’s Title I funding was reduced by 7.9 million dollars to comply with *Aguilar*. See id.
100 See id. at 2006.
der rule 60(b)(5). The Petitioners also relied on the Court’s decision in Rufo and cited the opinions of five Justices in the 1994 decision Board of Education of Kiryas Joel Village School District v. Grumet, calling for the overruling of Aguilar.

The district court recognized that “the landscape of Establishment Clause decisions has changed” going so far as to suggest that “[t]here may be good reason to conclude that Aguilar’s demise is imminent.” The district court, however, ultimately denied the motion because “Aguilar’s demise had ‘not yet occurred.’” The court of appeals affirmed the district court’s decision for substantially the same reasons. In a five to four decision, the Supreme Court in Agostini reversed.

Justice O’Connor, writing for the Agostini majority, stated that the law had in fact changed, warranting relief under Rule 60(b)(5). The majority opinion began by dismissing two of the Petitioner’s three arguments. First, Justice O’Connor concluded that the high cost of compliance with the injunction was not foreseeable at the time of the issuance of the injunction and, therefore, a substantial change in the facts had not occurred affording relief.

Second, O’Connor dismissed the Petitioner’s argument that the statements of five Justices in Kiryas Joel constituted a change in the law warranting relief under Rule 60(b)(5). O’Connor

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101 See id.
102 Id. (”[D]ecisional law [had] changed to make legal what the [injunction] was designed to prevent.”) (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992)).
104 See Agostini, 117 S. Ct. at 2006.
105 Id. (citation omitted).
106 Id. (citation omitted).
107 Id. (citation omitted).
108 Id. (citation omitted).
109 See id.
110 See id. at 2003.
111 See id. at 2007. O’Connor discussed her own dissent in Aguilar predicting that “the costs of complying . . . would likely cause a decline in Title I services for 20,000 New York City students . . . that these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5).” Id. Under Rufo, relief “should not be granted where a party relies upon events that actually were anticipated at the time of issuance of the injunction.” Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992); see also United States v. Swift & Co., 286 U.S. 106, 119 (“The injunction whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making.”); RESTATEMENT (SECOND) OF JUDGMENTS § 73 cmt. b (“[T]he principal factor in whether a judgment is subject to modification is whether it contemplates an interaction between the activity of the judgment obligor and some other conditions over which the judgment does not exercise control. When an unforeseen or uncontrollable interaction occurs between the judgment obligor and the surrounding circumstances, the balance between burden and benefit can be disturbed. If the disturbance assumes substantial proportion, redress by modification may be appropriate.”) (emphasis added).
112 See Agostini, 117 S. Ct. at 2007 (distinguishing Kiryas Joel from Aguilar).
stated that "[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."  

The Agostini Court, however, agreed with the Petitioner’s third argument that, because subsequent Supreme Court decisions had changed Establishment Clause jurisprudence, the holding of Aguilar had been undermined. Consequently, the “eroded” Aguilar was no longer good law, thus warranting relief under Rule 60(b)(5).

The Agostini Court based its analysis on two post-Aguilar cases that changed the paradigm of Establishment Clause jurisprudence, Witters v. Washington Department of Services for the Blind and Zobrest v. Catalina Foothills School District. While neither of these cases explicitly or implicitly overruled Aguilar, in the view of the Agostini Court, these decisions nonetheless changed the law so that Aguilar was no longer consistent with them.

After determining that Establishment Clause jurisprudence had significantly changed, Justice O’Connor responded to the contention of both Justice Ginsburg and the Respondent that such an unprecedented use of Rule 60(b)(5) to effectuate changes in the law, rather than simply recognizing them, was improper. Under this argument, as a consequence of the majority’s decision, parties would deluge the courts with motions for relief based on no more than statements from Justices or speculation that a Court with different composition would decide the issue differently.
Justice O’Connor summarily dismissed these criticisms by stating, “[w]e think their fears are overstated.” Moreover, she issued assurances that “[o]ur decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue.” Finally, she stated that there was “no reason to wait for a ‘better vehicle’” to determine the validity of Aguilar. Justice O’Connor dismissed the dissent’s claims that this decision would mark a departure from the “responsive, non-agenda-setting character of this Court.” Justice O’Connor’s concern was the inequity of New York spending millions of dollars on off-site instructional units, depriving disadvantaged children of “a better chance at success in life.”

Justices Souter, Ginsburg, Stevens and Breyer, dissented, with Justices Souter and Ginsburg authoring the two dissenting opinions. Justice Souter’s dissent focused on the majority’s allegedly improper reading of Witters and Zobrest. He regarded Aguilar as not only a “correct and sensible decision,” but one that properly drew the line for determining the propriety of state aid to sectarian schools.

Justice Ginsburg’s dissent focused on the procedural propriety of the Aguilar decision, arguing that relief under Rule 60(b)(5) was not proper in this case. She characterized the majority’s actions as simply another way “to rehear a legal question decided in respondents’ favor in this very case some 12 years ago.” After citing the Supreme Court’s Rule 44 on rehearing and determining

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121 Id.
122 Id.
The term “ordinary civil litigation” hardly seems to limit the scope of the holding.
123 Id.
124 Id. at 2017-18 (citation omitted).
125 Id.
126 See id. at 2019 (Souter, Ginsburg, J.J., dissenting).
127 Id. at 2021 (Souter, J., dissenting). Justice Souter argued that while Zobrest recognized there was no per se bar to public employees in a parochial school, the rejection of the bar was based on the nature of the public employee’s tasks. See id at 2022-23. For Souter, Zobrest’s sign language interpreter was quite different from Aguilar’s teacher or counselor. See id. at 2023. Souter distinguished Witters from Aguilar on grounds that the nature of the aid in Witters, a state grant to a student to attend a sectarian college, was for the benefit of the individual student. See id. at 2024. In contrast, New York’s Title I program in Aguilar was a district wide program teaching core subjects, thus necessarily relieving the sectarian schools of a basic educational function. See id. Therefore, these two cases did not undermine the principles set forth in Aguilar, but merely presented distinguishable factual situations. See id.
128 Id. at 2020 (1997) (Souter, J., dissenting).
129 See id. at 2021.
130 See id. at 2026 (Ginsburg, J., dissenting).
131 Id.
that it was inapplicable to the case at bar,\textsuperscript{132} Justice Ginsburg attacked the unprecedented use of Rule 60(b)(5).\textsuperscript{133}

Justice Ginsburg first noted that the appellate standard of review for denial of 60(b)(5) motions is abuse of discretion.\textsuperscript{134} She then pointed out that, because the district court has no power to preemptively overrule Supreme Court decisions, the district court could not have abused its discretion.\textsuperscript{135} That is, by ruling that \textit{Aguilar} was still good law and therefore no significant change in the law had occurred, the denial of the motion was clearly within the discretion of the trial court.\textsuperscript{136} Consequently, the court of appeals properly affirmed the district court’s denial of the motion.\textsuperscript{137} For Ginsburg, the majority’s insistence that the district court properly denied the motion and passed the case up “bends Rule 60(b) to a purpose—allowing an ‘anytime’ rehearing in this case—unrelated to the governance of the district court proceedings to which the rule, as a part of the Federal Rules of Civil Procedure, is directed.”\textsuperscript{138}

The \textit{Agostini} decision seems to be problematic given the decisional history of Rule 60(b)(5) for several reasons. First, the decision leaves resolved the question of what constitutes a change in the law. Second, the Supreme Court has perhaps unwittingly “bent” Rule 60(b)(5) into a tool for unhappy parties to relitigate their original suits. Third, the \textit{Agostini} Court may have created confusion as to the role of the district and appellate courts in the determination of relief under Rule 60(b)(5). Finally, the Court has undermined its own credibility with an activist reading of Rule 60(b)(5) to overrule an unpopular and expensive decision.\textsuperscript{139}

\textbf{B. Was There a Change in the Law?}

It is well established that a change in the law subsequent to the order of a prospective judgment may be grounds for relief from

\begin{itemize}
\item \textsuperscript{132} See id. (stating that Supreme Court Rule 44 only allows for rehearing for petitions filed within 25 days of entry of judgment—\textit{Aguilar} was, by this time, 12 years old).
\item \textsuperscript{133} See id. (citing Tr. of Oral Arg. at 11, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552, 96-553): “[W]e do not know of another instance in which Rule 60(b) has been used in this way.”).
\item \textsuperscript{134} See id.; at 2027 (citing Browder v. Dir., Dept. of Corrections of Ill., 434 U.S. 257, 263 n.7 (1978); Ry. Employees v. Wright, 364 U.S. 642, 648-50 (1961)).
\item \textsuperscript{135} See id. (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).
\item \textsuperscript{136} See id. at 2027-28.
\item \textsuperscript{137} See id. at 2028.
\item \textsuperscript{138} Id. at 2028.
\item \textsuperscript{139} See supra notes 14, 98 and accompanying text
\end{itemize}
that judgment. There is no precedent, however, in which a court has preemptively overruled a higher court's decision, declaring that the law has changed or eroded, thus warranting relief from a prospective judgment. Without entertaining the larger jurisprudential question of what actually constitutes a change in the law, there is little reason to believe that the "erosion" that Justice O'Connor spoke of in Agostini constituted a substantial change required to activate 60(b)(5).

First, the decisions relied upon by the Agostini majority, Zobrest and Witters, did not explicitly or implicitly overrule Aguilar. It is noteworthy that the majority opinions in neither case give Aguilar even the slightest mention. The natural surmise from this obvious lack of consideration is that neither of those cases created tension with Aguilar. As Justice Souter explained in his Agostini dissent, the most reasonable explanation is that these two cases are simply distinguishable on their facts.

Second, the Petitioners argued that the fact that five Justices in Kiryas Joel called for reconsideration or overruling of Aguilar constituted a change in the law warranting relief under 60(b)(5). In Agostini, Justice O'Connor correctly held that the statements of Justices in dicta certainly did not constitute a change in the law. The argument, furthermore, proves the opposite: Aguilar was still good law. The fact that several Justices called for its reconsideration indicates that they believed it was still good law. This is consistent with the majority opinion in Kiryas Joel, which held that Aguilar was still good law.

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140 See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992); System Fed'n No. 91, Ry. Employees' Dept. v. Wright, 364 U.S. 642 (1961) (stating that it was error to refuse to modify a decree disallowing a union shop when an intervening act of Congress made it possible); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) (holding that an intervening act of Congress was grounds for modification of an injunction); Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975) (holding that the Supreme Court's clarification of the interpretation of a statute constituted a change in the law warranting modification); Elgin Nat Watch Co. v. Barrett, 213 F.2d 776 (5th Cir. 1954) (dissolving an injunction against the violation of a state's fair trade act after a Supreme Court decision held that such acts are unenforceable); Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788 (10th Cir. 1943) (holding that injunction prohibiting Defendant from using the word "cola" in the name of its product should be vacated because of numerous decisions holding Plaintiff had no exclusive right to use the word "cola"); see also 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.47[2][c] (3d ed. 1997) (stating that changes in decisional law that make legal what was forbidden can warrant modification). Nonetheless, it is clear that not all changes in the law warrant modification. See RESTATEMENT (SECOND) OF JUDGMENTS § 73 (1982) ("When a change in the law occurs following a judgment regulating future conduct that may be a circumstance justifying relief...") (emphasis added).

141 See Agostini, 117 S. Ct. at 2027 (Ginsburg, J., dissenting).

142 In Zobrest, Aguilar is cited in the dissenting opinion approvingly, stating only its holding as a foundation of Establishment Clause jurisprudence. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 20 (1993) (Blackmun, J., dissenting).

143 See Agostini, 117 S. Ct. at 2022-25 (Souter, J., dissenting).

144 See id. at 2007.

145 See id.

146 In fact, the Respondents made this very argument, but it was seemingly ignored by the Agostini majority. See Brief for Respondent at 19 n.4, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552, 96-553).
eration strongly implies that those Justices believed that the case was still viable.

Third, while it is certainly possible that a court decision could lose its viability over time as its legal foundations are eroded by subsequent decisions and factual circumstances, Aguilar was relatively new and four of the nine Justices did not see the erosion. Again, the natural surmise, at best, would be that Aguilar was eroding but, as the district court stated in Agostini, its demise "had not yet occurred." If in fact Aguilar was still good law at the time the Supreme Court heard the case, the Court was not modifying the injunction based on the law as it stood on that day. The Court was, in effect, considering the case as if they were deciding it for the first time. The only difference was the Court's changed membership. This reconsideration under the guise of modification simply allowed the New York City Board of Education to re-litigate the issue to its satisfaction.

C. The Problem of Relitigation

In Swift, Justice Cardozo cautioned:

We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of re-adjusting.

Justice Cardozo's admonition captures the well-established doctrine that motions for modifications of prospective judgments are not to be used as vehicles to relitigate the original dispute.

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148 Agostini, 117 S. Ct. at 2006.
149 See FED. R. CIV. P. 60 (b) advisory committee's note, 1946 amendment (stating that Rule 60(b) "does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief").
151 See 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2863 (2d ed. 1995) (stating that Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment"); RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE § 7.85 (4th ed. 1991) ("The provision [Rule 60(b)(5)] does not contemplate relitigation of issues that have been resolved by the judgment . . . ").
An instructive decision on this point is *Fortin v. Commissioner of the Massachusetts Department of Public Welfare*.\(^{152}\) Here, the First Circuit affirmed a district court's denial of Rule 60(b)(5) in a case with a posture somewhat analogous to that of *Agostini*. In *Fortin*, the Plaintiffs, a class of welfare recipients, filed a class action suit to force the Massachusetts Department of Public Welfare to comply with federal and state regulations in administering relief programs.\(^{153}\) The Department was allegedly not furnishing aid within the statutory time limits.\(^{154}\) The parties entered into a consent decree that prescribed time limits for the Department to process and furnish aid.\(^{155}\) After several years under the decree the Plaintiffs filed a motion for civil contempt alleging that the Department was not complying with the decree.\(^{156}\) The district court granted the motion and the Department appealed on two grounds. The Department first argued that it had substantially complied with the decree, and second that the district court abused its discretion by not allowing a modification of the decree based on a subsequent change in the law.\(^{157}\) The Department also argued that the law prescribing processing and distribution time limits was misunderstood by both the court and the parties at the time of the decree, with the proper time limits being longer than originally interpreted.\(^{158}\)

The court of appeals held that the district court did not abuse its discretion in denying a modification of the decree because there had been no change or reinterpretation of the law subsequent to the time the parties entered into the agreement.\(^{159}\) The court of appeals stated that because there was no subsequent judicial or legislative reinterpretation of the statutory time limits, the district court would have had to reinterpret the law as a matter of first impression.\(^{160}\) Such a modification would have allowed "relitigation" of the original dispute.\(^{161}\) The appellate court stated that the movant's request that "in one breath that the law be reinterpreted and the

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152 692 F.2d 790 (1st Cir. 1982).
153 See id. at 792.
154 See id. at 793.
155 See id.
156 See id.
157 See id. at 798.
158 See id.
159 See id.
160 See id.
161 Of course, a consent decree issued here would not necessarily involve litigation as would an injunction. "Relitigation" is used here in its broadest sense because the effect of modifying a consent decree or an injunction would have the same effect. That is, the order would be modified according to the present legal or factual circumstances without regard to the original legal or factual circumstances.
decree modified . . . would transform the modification procedure into an impermissible avenue of collateral attack on the interpretation to which the parties consented."

When reviewing denials of Rule 60(b)(5) motions, several appellate courts do not consider the substance of the underlying judgment in order to discourage parties from using the Rule to relitigate the merits of the case. It is, therefore, apparent that courts generally respect the principle of res judicata when determining the modifiability of prospective judgments.

While the finality of judgments should be given significant weight in determining relief from prospective judgments, several courts have made a distinction between private litigation and institutional reform or public interest litigation. For those courts, the finality of judgments is more important to private litigation. The reasons for this distinction are clear enough. Parties that would otherwise consent to a decree would be less likely to do so with the knowledge that the opposing party could have that decree easily modified or vacated. For institutional reform and public interest litigation, however, there is less need to protect the sanctity of agreements. Moreover, a stronger argument can be made that public institutions are required to function within the constraints of current law and current factual circumstances.

The injunction involved in Agostini did not result from private litigation and falls squarely into the institutional reform/public interest category of cases. Therefore, it follows that the doctrine of res judicata should have been given less weight in the determination of whether the injunction should have been vacated. What

162 Fortin, 692 F.2d at 799.

163 See, e.g., Browder v. Dept of Corrections, 434 U.S. 257, 263 n.7 (1978); Calumet Lumber Inc. v. Mid Am. Indus., Inc., 103 F.3d 612, 615 (7th Cir. 1997); Wilson v. Felton, 684 F.2d 249, 251 (3d Cir. 1982); Silas v. Sears, Roebuck & Co., Inc., 586 F.2d 382, 386 (5th Cir. 1978).


165 See 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.47[2][c] (3d ed. 1997) ("[In private litigation] there is a greater concern for the commercial stability that results from the finality of judgments. Particularly when the injunction results from a negotiated consent decree, finality of judgments and the sanctity of a bargain are strong factors that weigh against any modification."); see also W.L. Gore & Assoc. v. C.R. Bard, Inc., 977 F.2d 558, 562 (Fed. Cir. 1992) (denying modification in commercial consent decree).

166 See Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148-49 (6th Cir. 1992) (holding that the Rufo standard applies to institutional reform litigation, and thus to school desegregation which falls into that category).
does not follow, however, is a presumption that res judicata has no bearing on that determination.

Justice O'Connor was not deterred from disregarding the doctrine of finality because of equitable consideration of the financial burden of maintaining the decree until a more suitable procedural vehicle could be found. While the economic considerations of the Aguilar injunction were by no means negligible, as Justice Ginsburg pointed out in her dissent, there were other procedurally proper opportunities to reconsider Aguilar awaiting the court. Moreover, Justice O'Connor dismissed the idea that the cost of compliance was a change in circumstance that did not warrant relief under 60(b)(5).

E. The Credibility Issue

The Agostini majority used the appeal before it as an opportunity to effectuate a change in the law and in the process disregarded the doctrine of finality. In doing so, the Supreme Court may have damaged its credibility as a "responsive, non-agenda-setting" forum. By allowing the New York City Board of Education to use Rule 60(b)(5) as a tool to effectuate a change in the law, the Supreme Court has unwittingly emanated the impression that procedural rules are no obstacle to achieving the desired outcome. It appears that the Supreme Court jumped at the opportunity to overrule a decision that did not coincide with either the views of five of the Court's Justices or the majority of legal commentators. At best, the Agostini decision represents the Supreme Court sacrificing procedural stability to the god of equity. At worst, it represents a Supreme Court taking on the judicial activist role that it was chosen to replace.
F. The Problem of Interpretation for Lower Courts: Standard of Review

In Agostini, Justice Ginsburg argued in dissent that the majority should have reviewed the trial court's denial of the Rule 60(b)(5) motion for abuse of discretion. There is substantial support for her assertion, including a concurring opinion by Justice O'Connor in Rufo. Justice O'Connor's Rufo opinion, however, does not deny that the trial court has discretion but states, "[i]t is true that the trial court has discretion, but 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 reader is left wondering what, if any, standard of review O'Connor chose to employ when considering the Agostini appeal. This is problematic because the District Court was simply following the Supreme Court's command in Rodriguez de Quijas v. Shearson/American Express, Inc., which expressly forbids lower courts from preemptively overruling Supreme Court decisions. This, of course, begs the question: how can a trial court abuse its discretion by following the Supreme Court's instructions prohibiting anticipatory overrulings? O'Connor seems to avoid this paradox by not clearly articulating a standard of review in Agostini. Moreover, she goes to great lengths to affirm the holding of

175 See Agostini, 117 S. Ct. at 2026 (Ginsburg, J., dissenting).
176 Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 393-94 (1992) (O'Connor, J., concurring) ("Determining what is 'equitable' [under Rule 60(b)(5)] is necessarily a task that entails substantial discretion, particularly in a case like this one, where the District Court must make complex decisions requiring the sensitive balancing of a host of factors. As a result, an appellate court should examine primarily the method in which the District Court exercises its discretion, not the substantive outcome the District Court reaches. If the District Court takes into account the relevant considerations (all of which are not likely to suggest the same result) and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance.") (emphasis added); see also Browder v. Dir., Dept. of Corrections, 434 U.S. 257 (1977) (stating that the review of a denial of a 60(b) motion does not bring up the underlying judgment for reconsideration)
177 Agostini, 117 S. Ct. at 2018.
179 See id. at 484 ("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."). For a general discussion on preemptive overruling, see C. Steven Bradford, Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling, 59 FORDHAM L. REV. 39 (1990).
Rodriguez de Quijas so as not to allow the Agostini decision to overrule it. Apparently, the only way to reconcile the standard of review with the Rodriguez de Quijas decision is to view Rule 60(b)(5) as the Petitioners in Agostini did. That is, a court is still bound by the controlling authority of the higher court, but the function of Rule 60(b)(5) allows the Supreme Court in its appellate role, deciding as a matter of equity, to modify judgments based on its own interpretation of intervening law.

While this interpretation leads right back to the problem of relitigation, there is authority for the proposition that the facts of Agostini call for wider appellate scrutiny, because that decision did not depend on "first-hand observation or direct contact with the litigation." Nevertheless, it seems that Agostini did not change the appellate standard of review for denials of motions under Rule 60(b)(5) because in the view of the majority, the type of relief required in this case was simply beyond the ken of the district or appellate courts.

IV. ANALYSIS AND RECOMMENDATIONS

A. A Better Means to the End?

Perhaps the first question that comes to mind upon reading the Agostini opinion is why the Court did not simply invoke Rule 60(b)(6) as the procedural vehicle to vacate the injunction. Federal Rule of Civil Procedure 60(b)(6) allows a court to relieve a party from final judgment, order or proceeding for "any other reason justifying relief from the operation of the judgment." This broad "catch all" provision was considered unprecedented when it

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180 See Agostini, 117 S. Ct. 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.").
181 See Brief for the Sec. of Educ. at 39-40, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552, 96-553) ("The lower courts were, of course, bound to follow this Court's directly controlling precedent, as they recognized. But this Court may nonetheless reconsider and overrule Aguilar on review of the lower court's denial of relief under Rule 60(b). ").
182 See infra Part III(C).
183 See Toussaint v. McCarthy, 801 F.2d 1080-81 (9th Cir. 1986) (discussing the review of "structural injunctions"); Fiss, THE CIVIL RIGHTS INJUNCTION 1098 (1978) (arguing that structural injunctions involve many factors that call for close appellate review, "a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority"); William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635, 642-44 (1982) (discussing the means by which courts and judges use discretion in decision making).
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was added to the Rules in 1948. While there has been some confusion as to the application of this Rule, courts have generally agreed that this section is mutually exclusive of the other five clauses. That is, relief is not available if it would have been attainable under the other provisions of Rule 60(b). Moreover, relief under 60(b)(6) is determined under the “extraordinary circumstances” test outlined by the Supreme Court in *Klapprott v. United States*. If the Court had used 60(b)(6) to dispose of the injunction, perhaps holding that the heavy financial burden of compliance justified modification, there would have been no need to torture Zobrest and Witters into the tools of Aguilar’s contrived demise. Because the Agostini Court did not address the propriety of Rule 60(b)(6), one can only assume that the Respondent’s argument as to the mutual exclusivity of Rule 60(b)(6) prevailed. However, both parties addressed the possible use of Rule 60(b)(6) only in light of the argument that the statements of the five Justices in *Kiryas Joel* could satisfy “extraordinary circumstances” test of *Klapprott*. The parties did not address whether the burdensome costs of compliance with Aguilar could satisfy that test. Thus, the Court could have vacated the injunction if the cost of complying with Aguilar created “extraordinary circumstances” and the subsequent unforeseen financial burden of complying with Aguilar did not lend itself to relief under the other clauses of Rule 60(b).

What are “extraordinary circumstances” in light of Rule 60(b)(6)? Generally, Rule 60(b)(6) has been narrowly construed by courts, allowing relief in very limited circumstances. For example, courts have used Rule 60(b)(6) when parties have not

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187 See id.
188 See id.
189 See id.
189 See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988) (discussing the process by which Rule 60(b) can be implemented to relieve a party from a final order).
190 335 U.S. 601 (1949).
192 Indeed, the Petitioners asked the court to consider its request under both Rule 60(b)(5) and 60(b)(6). See Brief for Petitioners at 20, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552, 96-553). The Agostini Court did not address the propriety of 60(b)(6).
193 See Brief for the Respondent, at 20 n.5, Agostini v. Felton, 117 S. Ct. 1997 (1997) (Nos. 96-552, 96-553) (“Insofar as petitioners cannot prove a ‘significant change in law’ under clause (5), they may not fall back on clause (6) claiming an anticipated change in the law. Rule 60(b)(6) does not enlarge or modify the grounds for relief from a judgment; it merely ‘incorporates generally the substance of the old common law and equitable ancillary remedies.’”) (citation omitted).
194 See id.
195 See supra note 17 and accompanying text.
196 See WRIGHT ET AL., supra note 186.
complied with settlement agreements as well as in situations of fraud by the moving party's own counsel. The most common situation in which relief is granted under Rule 60(b)(6), however, is when the moving party has not received notice of the original judgement in time to file for appeal.

Thus, it seems that the unforeseen subsequent financial burden of an injunction would not at all fit into the traditional grounds for relief under 60(b)(6). Furthermore, using 60(b)(6) under those circumstances would not ease the problem of relitigation created by the Agostini decision. If the Agostini Court had granted relief under 60(b)(6), however, instead of 60(b)(5), the decision would not have created tension with Rodriguez de Quijas over the problem of anticipatory overruling. Moreover, the Court would not have had to contrive the "erosion" of Aguilar. Thus, the Agostini Court could have simply waited to overrule Aguilar at a more procedurally appropriate time without any continued burden on New York City Board of Education's treasury.

Even if the use of Rule 60(b)(6) would have limited the problems resulting from the Agostini Court's use of 60(b)(5), the Agostini Court still could not insulate itself from the charge of judicial activism. To be sure, the less damaging 60(b)(6) decision would have resulted in an unprecedented use of that Rule as well. But the type of activism employed in fashioning an unprecedented equitable remedy is quite distinguishable from the activism of refashioning constitutional jurisprudence by artificially "eroding" a controlling case with subsequent decisions tenuously connected to that case. Judge William Wayne Justice has distinguished these two types of activism as "jurisprudential activism" and "remedial activism." Judge Justice describes "jurisprudential activism" as "decisions whereby judicial precedents or statutory schemes are overturned based upon the constitutional values determined by the judges considering the case." He defines "remedial activism" as "expansive remedies imposed and monitored by federal district courts pursuant to evidentiary showings of constitutional in-

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197 See id. at 353.
198 See id.
200 See id. at 2026.
201 One could argue that the precedential value of a 60(b)(6) decision would be less authoritative because of the purely equitable nature of the rationale. For a discussion of the distinction between equity and law, see infra note 208 and accompanying text.
203 Id.
While the Agostini decision, as it stands, seems to fall squarely in the "jurisprudential activism" category, a ruling under 60(b)(6) would have been analogous to a "remedial activist" decision; less politically charged, with weaker precedential value, but most importantly, more credible.

The above discussion is, of course, academic at this point, as the Agostini Court vacated the injunction solely under Rule 60(b)(5). Thus, the final inquiry involves assessing the place Agostini will hold precedentially, as well as determining ways to minimize any of its possible negative impacts.

B. Toward a Narrow Interpretation

It may be difficult not to view Agostini as yet another case, in the long line of decisions since Swift, lessening the test for modification of prospective judgments. However, that is not necessarily the best way to read the majority opinion. Agostini did not in fact change the flexible standard of Rufo, but instead added an unprecedented backdoor to reach the test.

Perhaps the best way to interpret Agostini is as Justice Ginsburg did: an aberration. There is, however, the possibility that Agostini sets a dangerous precedent and weakens several civil rights and school desegregation consent decrees. The current Court has a decidedly different view towards affirmative action programs than the Supreme Court did at the time many of those decrees were entered into. Perhaps the best way to reduce this threat as well as the threat of increased litigation, is to interpret Agostini as narrowly as possible. that is, only within the context of civil litigation and only within institutional reform litigation. Certainly, if Agostini is read to encompass private consent decrees, the sanctity of the parties' agreement would be greatly compromised.

Justice O'Connor and Justice Ginsburg both viewed this use of Rule 60(b)(5) as aberrational. It is difficult, however, to

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204 Id. 205 See Agostini v. Felton, 117 S. Ct. 1997, 2026 (1997) (Ginsburg, J., dissenting). 206 See, e.g., Adarand v. Pena, 515 U.S. 200 (1995) (raising the level of scrutiny applied to affirmative action programs). 207 See Agostini, 117 S. Ct. at 2018. 208 See Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148-49 (6th Cir. 1992). 209 See Agostini, 117 S. Ct. at 2018, 2026 (Ginsburg, J., dissenting) ("I therefore anticipate that the extraordinary action taken in this case will remain aberrational."). The notion that a decision decided on equitable principles has little or no precedential value is, of course, part of the foundation of the classic distinction between law and equity. See G. Hegel, Philosophy of Right 142 (T.M. Knox trans., Clarendon Press 1952) ("A court of equity, how-
imagine that this decision will not become a tool in the litigator's belt, and not without a *bona fide* belief in its legitimacy. Thus, it appears that the Supreme Court has added a new interpretation to Rule 60(b)(5) whether it intended to or not. As Justice Holmes stated in his oft cited dissent in *Lochner v. New York*, "[e]very opinion tends to become a law."

**CONCLUSION**

The over-solicitous may argue that *Agostini* will open the floodgates of litigation by allowing a new form of attack upon the doctrine of *res judicata*. Whether unsuccessful litigants come forward with 60(b)(5) motions in hand every time "any public statement by a Justice—whether in a dissenting opinion, an opinion attached to a denial of certiori, or even a speech or article" creates the impression that a Supreme Court decision should be reconsidered, remains to be seen. Perhaps even more damaging than open floodgates, is the small crack in the dike of the Court's credibility that has resulted from *Agostini*. The Court's blatant disregard for the letter and spirit of Rule 60(b)(5) may certainly have damaged the "integrity in the interpretation of procedural rules, [and] preservation of the responsive, non-agenda-setting character of this Court."

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*ever, comes to mean a court which decides in a single case without insisting on the formalities of a legal process . . . . Further, it decides on the merits of the single case as a unique one, not with a view to disposing of it in such a way as to create a binding legal precedent for the future."). This distinction is muddied because of the merger of equity and law. Whether *Agostini* remains exceptional is difficult to predict.

210 *See* *Agostini*, 117 S. Ct. at 2018 ("Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here . . . .").

211 198 U.S. 45 (1905).

212 *Id.* at 76.


214 *Id.*

215 *Agostini*, 117 S. Ct. at 2028 (Ginsburg, J., dissenting).

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