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# *Agostini v. Felton* (1997)

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By **Kevin R. Den Dulk**

## **Related cases in Parochial Schools**

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that New York did not violate the First Amendment's establishment clause by administering a federally funded program in which public school teachers provided remedial instruction in private religious schools.

## **Program allowing public school teachers to teach in private schools struck down**

The case reconsidered two decisions — *Aguilar v. Felton* (1985), and *Grand Rapids School District v. Ball* (1985) — that the Court had rendered 12 years prior.

In *Aguilar* and *Ball*, the Court had relied on two prongs of the Lemon test — that state funding should neither advance nor prohibit religion and should not entangle government with religion in an “excessive” manner — to declare unconstitutional the New York program and a similar “shared time” arrangement in Grand Rapids, Michigan.

The Court's 1985 decisions led to a lower court injunction against New York's use of a Title I grant from the Elementary and Secondary Education Act of 1965 to fund the instructional program.

## **Parents sued to reinstate program**

Several years later, a group of parents in New York, joined by state officials, sued to have the order lifted, claiming that *Aguilar* had become obsolete in light of subsequent precedents and had unnecessarily burdened the state. In *Agostini*, the Supreme Court agreed and explicitly reversed its *Aguilar* decision as well as the relevant portion of *Grand Rapids v. Ball*.

## **Court said program served secular purpose, did not advance religion**

Writing for the 5-4 *Agostini* majority, Justice Sandra Day O'Connor suggested that there was little disagreement that the Title 1 program served the secular purpose of serving disadvantaged children.

The more controversial matter was whether its primary effect had been to advance religion. On that question, O'Connor asserted that the New York funding arrangement, a supplement to regular instruction at the religious schools, did not implicate government in the inculcation of religion, as *Aguilar* had presumed, nor did it create a “symbolic union” of state and religion.

She also read the Court's post-*Aguilar* decisions, particularly *Zobrest v. Catalina Foothills School District* (1993), as undermining past criteria for identifying an "excessive entanglement" of the state with religion (for example, that state monitoring of teachers would inevitably create unconstitutional church-state conflict). O'Connor essentially folded the excessive entanglement prong into the primary effect prong of the *Lemon* test. In other words, the entanglement analysis becomes part of the effects test.

## Sourter said program violated First Amendment

In dissent, Justice David H. Souter insisted that the Court had misread its own post-*Aguilar* decisions and unreasonably rejected the "sensible" proscriptions in the *Aguilar* and *Ball* cases. He argued that the Title I money was, in effect, not supplementary to ordinary instruction, but a form of direct aid; that public school teachers faced real temptations to inculcate the religious sensibilities of the parochial schools they served; and that these kinds of church-state partnerships required a level of state monitoring that would likely run afoul of the establishment clause.

Justice Ruth Bader Ginsburg's dissent took a slightly different tack, suggesting that the way the case had reached the Court – namely, as a request to reconsider a 12-year-old injunction against the Title I program – did not meet certain requirements of civil procedure. In the final analysis, however, the Court's majority rejected the dissenters' arguments, and *Agostini* went on to become a pivotal case in several subsequent decisions.

*This article was originally published in 2009. Kevin R. den Dulk is a Professor of Political Science at Calvin University.*

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