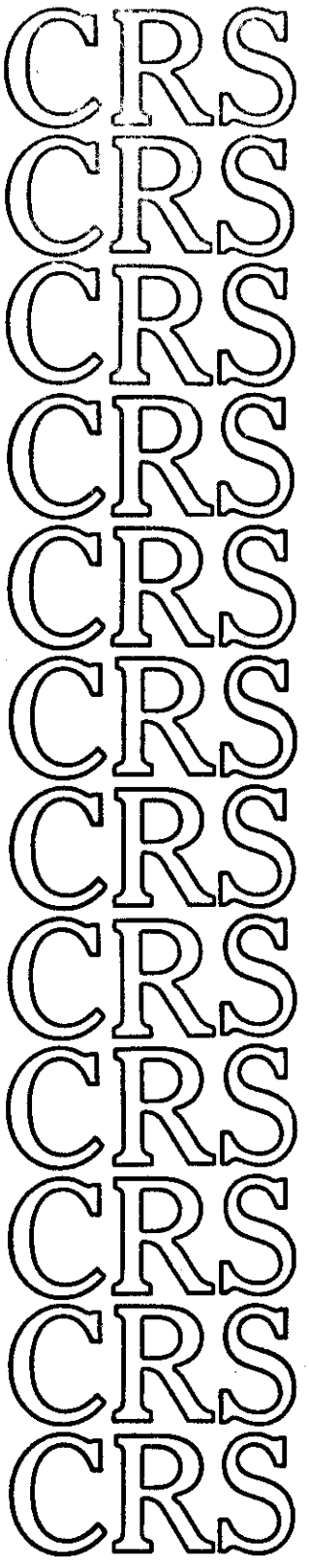

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PUBLIC AID TO CHURCH-RELATED COLLEGES: AN ANALYSIS OF ROEMER v. BOARD OF PUBLIC WORKS OF MARYLAND

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PUBLIC AID TO CHURCH-RELATED COLLEGES: AN ANALYSIS OF ROEMER v. BOARD OF PUBLIC WORKS OF MARYLAND

On June 21, 1976, the Supreme Court handed down a significant decision concerning the constitutional boundaries of public aid to church-related colleges. In Roemer v. Board of Public Works of Maryland, 387 F.Supp. 1282 (1974), aff'd, ___ U.S. __, 44 LW 4939 (1976), the Court upheld a state program of general, non-categorical aid to private colleges, including those that are church-related, as not violating the establishment of religion clause of the First Amendment.[1/] Although closely divided,[2/] the Court confirmed in this decision that for purposes of analysis under the establishment clause, there are constitutionally significant factual differences between church-related colleges and church-related elementary and secondary schools. Because of these differences, public aid programs that would be unconstitutional on their face if extended to church-related elementary and secondary schools may be constitutional when church-related colleges are the beneficiaries. The Court also made clear in Roemer that public aid programs benefitting such institutions need not be limited to categorical programs only but can be general in nature, so long as the statute contains a bar against use of the funds for "sectarian purposes."

This paper will summarize the Roemer case and analyze its constitutional implications.

1/ The establishment of religion clause provides that "Congress shall make no law respecting the establishment of religion. . . ."

2/ The decision was 5-4.

Roemer v. Board of Public Works of Maryland

(a) Background

In 1971 the State of Maryland enacted a statute authorizing a program of non-categorical grants to private colleges within the state meeting certain criteria. Annotated Code of Maryland, Art. 77A, Sec. 6 69 (1975) (see Appendix). One criterion excluded from the program institutions "awarding only seminarian or theological degrees." As originally enacted, the statute imposed no restrictions on the colleges' use of the funds, but after the Supreme Court's decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971) and Tilton v. Richardson, 403 U.S. 672 (1971), the Maryland legislature adopted the following restriction:

> None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. Annotated Code of Maryland, Art. 77A, Sec. 68A.

The program is administered primarily by the Maryland Council for Higher Education, with assistance from the State's Board of Public Works. The Council enforces compliance with the above restriction regarding use of the funds for sectarian purposes primarily by means of pre- and post-grant affidavits from the applicant/recipient colleges certifying compliance and stating projected and actual uses. The recipients are required to segregate the state funds received in a separate account and to identify the state-aided expenditures separately in their budgets. If questions regarding the use of the funds arise that can not be resolved on the basis of information and reports submitted by the recipient colleges, the Council possesses authority to perform audits, described by the district court as "quick and non-judgmental."

Of the seventeen colleges aided during 1971 and the eighteen benefitted in 1972, five were church-related, four being affiliated with the Roman

Catholic Church and one with the United Methodist Church. These five colleges were awarded approximately one-third of the funds available in the program.

Four Maryland taxpayers [3/] brought suit against the State and the five church-related beneficiaries seeking to enjoin further distribution of funds to the church-related colleges, to recover past disbursements, and to obtain a declaration of the program's unconstitutionality.

(b) Lower court decision

On Oct. 16, 1974, a divided three-judge federal district court upheld the program as amended as constitutional and unanimously denied recovery of past disbursements. [4/] Roemer v. Board of Public Works of Maryland, 387 F. Supp. 1252 (1974). The court examined the program using the familiar three-part test evolved by the Supreme Court to determine the constitutionality of programs under the establishment clause:

> 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 v. Kurtzman, supra, at 612-613.

All three judges agreed that the program had a secular purpose:

> The program will save the taxpayers of Maryland substantial amounts of money which would otherwise have had to be spent to expand public educational facilities. 387 F.Supp. at 1286.

But the judges divided on whether such a non-categorical program could be

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3/ Two organizational plaintiffs -- the American Civil Liberties Union and Protestants and Other Americans United for Separation of Church and State -- were dismissed by the district court for lack of standing. 387 F.Supp. at 1284.

4/ By the time the court rendered its decision, only three church-related colleges remained as defendants. The Methodist-affiliated college had been dismissed as a defendant, and one of the Catholic-affiliated colleges had become defunct.

effectively limited to the secular aspects of the beneficiary colleges and be administered in a manner that would avoid excessive entanglement. The majority closely examined the nature of the colleges in question and concluded that they were not so pervasively sectarian that their secular functions could not be distinguished from their sectarian ones. They further concluded that the statute's limitations regarding the use of the funds for sectarian purposes and the participation of seminaries, as administered, were sufficient to assure that the funds would not be diverted by the colleges to religious use. (The majority excepted from this conclusion the colleges' religion and theology courses, however. Because they could not firmly conclude that these courses were taught as an academic discipline rather than as a means of religious indoctrination, they required that public funds under the statute not be used for such courses.) Finally, the majority found the state monitoring of the colleges' use of the public funds, necessary to assure that the restrictions to secular use were honored, to be less than that upheld by the Supreme Court in Hunt v. McNair, 413 U.S. 734 (1973) and thus not be constitute excessive entanglement.

One judge disagreed with these conclusions and termed the non-categorical nature of the program "a blunderbuss discharge of public funds" fraught with the potential both of advancing religion and of excessively entangling the State with the beneficiary institutions. This judge found a danger of pervasive sectarianism in the prominence given by the colleges to their religion and theology courses, and deemed the prohibition against sectarian use of the funds an insufficient safeguard against deliberate or inadvertent funding of religious activities, as, for instance, by paying faculty salaries or in the maintenance of buildings used for religious activities. He further concluded

that the non-categorical nature of the program would of necessity involve the state in a close surveillance of the use of the grants by the colleges and possibly in some control over the schools' curricula. Notwithstanding these conclusions, he agreed with the majority that none of the church-related colleges needed to repay past disbursements under the statute.

(c) Supreme Court decision

On June 21, 1976, the Supreme Court affirmed the district court judgment in all respects. Roemer v. Board of Public Works of Maryland, ___ U.S. ___, 44 LW 4939 (1976). Five opinions were issued in the case: a plurality opinion by Justice Blackmun, joined in by Chief Justice Burger and Justice Powell; an opinion concurring in the result by Justice White, joined in by Justice Rehnquist; and dissents by Justices Stewart, Brennan, and Stevens, with Justice Marshall joining in the Brennan dissent.

The various opinions addressed the constitutional issues in the same framework as had the district court, namely, whether the program had a secular purpose, had a primary effect of advancing religion, or led to excessive state-church entanglement. The opinions focussed on the last two tests. No issue had been raised on appeal regarding the purpose of the program; all parties agreed that it was the secular one of supporting private higher education as an economic alternative to a wholly public system.

The Court sharply divided over whether the program had a primary effect of advancing religion. The differing conclusions on this issue turned largely on judgments about the nature of the institutions benefitted. A bare majority[5/] agreed with the district court that the church-related colleges were of such a nature that their secular functions could be distinguished from their

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5/ Chief Justice Burger and Justices Blackmun, Powell, White, and Rehnquist.

religious ones so that public aid could be channelled only to the former. That is, upon analysis of the nature of the institutions, they concluded that the institutions were not "pervasively sectarian." This same majority further agreed that the bar against use of the funds for "sectarian purposes", as implemented by the Maryland Council for Higher Education, provided a sufficient safeguard against the use of the funds to subsidize specific religious activities.

The four dissenters,[6/] on the other hand, found the colleges to be of such a nature that public funds would inevitably have the effect of advancing religion. Justice Stewart said the lower court's finding that the colleges' compulsory religion and theology courses could be used to inculcate the religious beliefs of the sponsoring churches created a "constitutionally significant distinction" between these colleges and those involved in the Court's earlier case of Tilton v. Richardson, supra. Because of this "salient characteristic", he said, state money would inevitably be used to advance religion if made available to the colleges. The other three dissenters advanced a more sweeping objection: they did not disagree that the secular functions of the church-related colleges might be distinguished from their religious ones, but argued that the provision of public aid to any of the functions of such institutions inevitably benefitted all of their functions, including the religious ones, and thus unconstitutionally advanced religion.

The Court was even more divided on the entanglement issue. The opinion by Justice Blackmun found no excessive entanglement to ensue, primarily because of the nature of the institutions benefitted. The fact that they were not pervasively sectarian, he said, meant that the state would not need to engage in intrusive surveillance to assure compliance with the restriction

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6/ Justices Stewart, Brennan, Marshall, and Stevens.

to secular use. Although the annual nature of the subsidy enhanced the danger of "political fragmentation. . . on religious lines," Justice Blackmun found the wide dispersion of the colleges' constituencies, the inclusion of non-church-related colleges in the program, and the "substantial autonomy" of the colleges from their sponsoring churches to diminish this danger. Justices White and Rehnquist found the entire entanglement inquiry superfluous and redundant:

> As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason. . . to take the constitutional inquiry further. 44 LW 4949 (White, J., concurring).

The dissenters, on the other hand, found the Maryland program to create too close a relationship between church and state:

> The discrete interests of government and religion are mutually best served when each avoids too close a proximity to the other. . . . The Maryland Act requires "too close a proximity" of government to the subsidized sectarian institutions and in my view creates real dangers of the "secularization of a creed." 44 LW 4950 (Brennan, J., dissenting).

Thus, by a bare majority, the Supreme Court upheld the Maryland program of general aid to private colleges as not violating the establishment clause of the First Amendment.

Analysis

(a) Differences from parochial elementary and secondary school aid

The Court's decision in Roemer makes clear that under the establishment clause of the First Amendment, public aid may be extended to sectarian colleges much more readily than to sectarian elementary and secondary schools. In recent years the Court has held unconstitutional numerous programs of public aid benefitting parochial elementary and secondary schools:

state salary supplements to parochial school teachers of secular subjects (Lemon v. Kurtzman, 403 U.S. 602 (1971); state "purchase" of secular educational services from nonpublic schools (Early v. DiCenso, 403 U.S. 602 (1971); tuition reimbursement and tax credits to parents of parochial schoolchildren (Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); grants for maintenance and repair of parochial school equipment and facilities (Id.); reimbursements to parochial schools for the costs of government-required testing and recordkeeping (Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973); and provision of auxiliary services and loan of instructional materials and equipment to parochial schools (Meek v. Pittenger, 421 U.S. 349 (1975). At this level of education, the Court has made clear that only incidental and carefully focussed forms of public aid may be made available: Its cases have upheld public bus transportation of parochial schoolchildren (Everson v. Board of Education, 330 U.S. 1 (1947) and the loan of secular textbooks to parochial schoolchildren (Board of Education v. Allen, 392 U.S. 236 (1968) and Meek v. Pittenger, supra); in dicta it has further suggested the constitutional acceptability of school lunches and health facilities (Meek v. Pittenger, supra, at 364).

Roemer makes clear that the permissible forms of public aid to sectarian colleges are considerably broader. The Court has now upheld as constitutional a categorical program of construction grants benefitting sectarian colleges (Tilton v. Richardson, supra), the issuance through a state agency of revenue bonds for the construction and renovation of academic facilities at a Baptist college (Hunt v. McNair, supra), and a program of general aid benefitting sectarian colleges (Roemer v. Board of Public Works of Maryland, supra).

The reason for these differing results does not lie in any difference in the legal principles used. For public aid programs at both the elementary-secondary and the college levels, the Court applies the tests articulated in Lemon v. Kurtzman, supra, at 612-13:

> 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."

At both levels, the Court interprets the primary effect test in the same manner:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. Hunt v. McNair, supra, at 743.

Thus, at both levels it has struck down as unconstitutional statutes or parts of statutes that are not effectively limited to the secular functions of church-related schools. Tilton v. Richardson, supra; Committee for Public Education v. Nyquist, supra. It has further struck down an aid program because the pervasive sectarianism of the recipient institutions rendered it impossible to separate the secular from the religious functions. Meek v. Pittenger, supra. Finally, it has made clear that even if an aid program is limited to secular aspects, it may nonetheless be held unconstituional if the recipient institutions are so "religion-pervasive" that an intrusive state surveillance of the institutions' use of the aid is necessary to assure compliance with the restrictions to secular use. Lemon v. Kurtzman, supra; Meek v. Pittenger, supra.

The reason programs benefitting sectarian colleges appear able to meet these tests more easily than counterpart programs at the elementary and

secondary level lies in a judicially perceived difference in the nature of the institutions benefitted. At the elementary and secondary level, the Court permits decisions regarding the constitutionality of public aid programs to be decided on the basis of a general profile of the nature of the beneficiary parochial schools. These profiles inevitably lead to the conclusion that the schools are pervasively sectarian and are an integral part of the religious mission of the sponsoring churches. 7/ As a result, most public aid programs, even if purportedly limited to benefitting the secular functions of such schools, are held either to have a primary effect of advancing religion or to lead to excessive entanglement. Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist, supra; Meek v. Pittenger, supra.

The Court has viewed church-related colleges in a different light, however:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in precollege church schools is "to assure future adherents to a particular faith by having control of their total education at an early age....[C]ollege students are less impressionable and

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7/ The profile used in Nyquist described the church schools as institutions that

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restriction on what or how the faculty may teach."
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> Committee for Public Education v. Nyquist, supra, at 767-68, quoting 350 F. Supp. 655, 664.

> less susceptible to religious indoctrination....Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students. Tilton v. Richardson, supra, at 685-86.

Consequently, at this level the Court has engaged in an institution-by-insitution analysis to determine if any of the defendant institutions are so pervasively sectarian that their secular functions cannot effectively be distinguished from their religious ones.

The three cases the Court has considered involving sectarian colleges suggest the factors that are, and are not, decisive in determining whether a particular institution is religion-pervasive. In Tilton v. Richardson, supra, the Court found no pervasive sectarianism notwithstanding that the colleges were governed by religious organizations, that the faculties and student bodies were predominantly of the same religion as the sponsoring church, and that students were required to take religion and theology courses. In Hunt v. McNair, supra, the Court reached this conclusion notwithstanding a thin evidentiary record that showed the sponsoring church controlled not only the governing board of the college but also certain financial transactions and amendments to the college's charter. In Roemer the opinion by Justice Blackmun found no pervasive sectarianism notwithstanding that members of the sponsoring churches predominated on the governing boards of the defendant colleges, that the student bodies and faculties were predominantly of the same religion as the sponsoring churches, that religion and theology courses were mandatory and were not necessarily taught as academic disciplines, that some classrooms contained religious symbols, and that some faculty began their classes with prayer.

In each of these cases the Court gave decisive weight to the facts that the colleges imposed no religious tests on either the admission of students or the hiring of faculty and that they subscribed and honored principles of academic freedom in their educational functions.[8/] On the basis of these factors, the Court has concluded that "religious indoctrination is not a substantial purpose or activity of these church-related colleges...." Tilton v. Richardson, supra, at 687.

Because of this factual conclusion, the Court has been able to determine that particular public aid programs neither have the effect of advancing religion nor lead to excessive entanglement. With regard to the primary effect test, such findings have led the Court to conclude that the colleges' secular functions can be effectively distinguished from their religious functions. Thus, public aid restricted to the secular functions does not advance religion. For the entanglement test the finding that a church-related college is not pervasively sectarian

> means that secular activities, for the most, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity -- the study of biology, the learning of a foreign language, an athletic event -- will actually be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced. Roemer v. Board of Public Works of Maryland, 44 LW 4947.

In other words, Roemer confirms that the Court views church-related colleges as primarily secular institutions, performing a primarily secular educational function. The religious functions of such insitutions are pre-

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8/ In Hunt v. McNair, supra, the lower court record did not discuss academic freedom at the defendant college. Consequently, the Supreme Court relied on the absence of religious tests and the fact that a substantial minority of the students were of a religion other than that of the sponsoring church. 413 U.S. at 743-44.

sumptively secondary and separable from the secular functions. Thus, public aid programs that are circumscribed to benefit only the secular functions neither advance religion nor lead to excessive entanglement. Particular institutions may be disqualified from receiving aid under such programs if they are affirmatively demonstrated to be pervasively sectarian. 9/ But the aid programs themselves are not thereby rendered unconstitutional.

(b) Reformulation of entanglement test

The Roemer case further confirms that in determining whether an aid program leads to excessive entanglement, the primary factor at the level of higher education is whether the institution is pervasively sectarian. The court has stated that the entanglement test does not bar all contacts between government and religious organizations:

> Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Lemon v. Kurtzman, supra, at 614.

Entanglement, thus, is a matter of degree. At the level of elementary and secondary education, the Court has made clear that the determination of whether an aid program results in excessive entanglement requires the examination of three factors: (1) the "character and purposes of the institutions that

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9/ In Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D.C. Kan., 1974), a three-judge federal district court disqualified four church-related colleges from receiving funds under a tuition grant program because one had a preferential admission policy for students of a specified faith, another required an oral exam involving an affirmation of Christian faith as a condition of graduation, and several mandated student attendance at certain religious activities.

are benefitted," (2) "the nature of the aid that the State provides," and (3) the "resulting relationship between the government and the religious authority." Id., at 615. Thus, in Lemon v. Kurtzman, supra, which involved state subsidies of teachers of secular subjects in parochial elementary schools, the Court found excessive entanglement to ensue because (1) the institutions involved were "substantially religious," (2) the nature of the aid program -- teachers -- had the potential of inculcating religious ideology and values, and (3) to ensure that the aid provided was not used for religious purposes, the state would have to engage in a "comprehensive, discriminating, and continuing. . . surveillance." at 617-20. The state might also have had to become involved in examining the schools' records in order to determine how much was expended on secular education and how much to religious activity. That relationship, the Court said, was "pregnant with dangers of excessive government direction of church schools and hence of churches." at 620.

In Meek v. Pittenger, supra, the Court reached the same conclusions by means of the same kind of analysis. That case involved, inter alia, a program of auxiliary services in which public school personnel were to provide auxiliary services to parochial schoolchildren on the premises of the parochial schools. Notwithstanding that the teachers provided were public employees rather than directly under the control of the parochial schools, the Court concluded excessive entanglement would ensue: the aid would be provided in schools "in which an atmosphere dedicated to the advancement of religious belief is constantly maintained," the form of the aid -- teachers -- carried potential for religious use, and therefore the state would have to engage in an intrusive surveillance to ensure the aid was not used for religious purposes. 421 U.S. 371-72.

At the level of higher education, the Court has gradually moved to a form of analysis regarding entanglement that gives primacy to whether the institutions involved are pervasively sectarian. In Tilton v. Richardson, supra, which involved a program of federal construction grants for academic buildings at public and private colleges, the plurality opinion by Chief Justice Burger emphasized that "religious indoctrination is not a substantial purpose of these church-related colleges and universities," and on the basis of this factor alone concluded that "the necessity for intensive government surveillance is (correspondingly) diminished." 403 U.S. 672, 687. But he did not indicate that that factor standing alone would suffice. He noted as well that the form of the aid -- buildings -- was nonideological, and that the "minimal" state inspection necessary to assure compliance with restrictions to secular use involved "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U.S. 672, 688. He concluded:

> No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government.... 403 U.S. 672, 688.

In the Court's next case involving public aid to sectarian colleges, Hunt v. McNair, supra, the Court again found no excessive entanglement to ensue as the result of a program in which a state agency issued revenue bonds for the construction or renovation of academic buildings on the campus of a Baptist college. In that case, however, the Court placed greatest emphasis on the fact that the defendant college was no "more an instrument of religious indoctrination than were the colleges and universities involved in Tilton."

413 U.S. 734, 746. It also discussed the potential involvement of the state authority in the day-to-day operations of the college should the college ever default on its repayment of the bonds, but found that potential too speculative to render the statute unconstitutional. The Court did not even discuss the nature of the aid program under the entanglement rubric.

In Roemer, the Court again, as in Tilton, concluded on the basis that the colleges were not pervasively sectarian that the need for intrusive state surveillance was reduced. But instead of looking at the other two factors cited in Tilton -- the nature of the aid provided and the nature of the resulting relationship -- and weighing the cumulative impact of all three factors, the opinion by Justice Blackmun ignored the nature of the aid question and reduced the resulting relationship question to the issue of whether the institution was pervasively sectarian:

> . . . what is crucial to a nonentangling aid program [is] the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes. 44 LW 4948.

Thus, for all practical purposes, Justice Blackmun's opinion decided the entanglement question entirely on the basis of whether the recipient institutions were pervasively sectarian. The finding that the colleges were not religion-pervasive meant that the colleges' secular functions could be separated from their religious ones, that the professed secular activities of the colleges could "be taken at face value," and that therefore the government would not need to engage in an active (on-site) surveillance of the use of its aid to assure that only secular activities were benefitted. His opinion did not completely discount the potential importance of the nature of the aid provided in determining whether excessive entanglement would ensue, noting that "no particular use of state funds is before us in this case." 44 LW 4947. But the general and non-

categorical nature of the aid program in question in this case would seem to make that reservation disingenuous. The aid clearly could be used by the recipient colleges for things such as teachers' salaries, which were found by the Court in Lemon to carry the potential for ideological-religious use and thus to necessitate intrusive state surveillance. By ignoring this possibility, the opinion by Justice Blackmun would seem to be saying that so long as the recipient sectarian college is not pervasively sectarian, no entanglement ensues even if the aid is not neutral in nature, that is, even if it carries some potential for religious use. The three tests of Tilton which were to be weighed cumulatively to determine the excessive entanglement question, therefore, again are reduced by Roemer to the single test of pervasive sectarianism, at least at the level of higher education.

The significance of this reductionism would not appear to be great, however. Justice Blackmun's opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist stated that they could see no utility to the entanglement test no matter which way it was formulated. Justices Brennan and Marshall dissented without making any direct reference to the entanglement test on the grounds that any aid to an institution that seeks in whatever degree to propagate a particular faith not only advances religion but, by bringing the government into close proximity with the religious institutions, creates dangers of the "secularization of a creed." Justice Stevens expressed a similar view. Justice Stewart dissented on the primary effect test and did not mention entanglement.

Thus, Justice Blackmun's reformulation of the entanglement test cannot be said to be a sure guide to the constitutional boundaries of future aid programs. But when joined with the views of Justices White and Rehnquist, it does indicate that a majority of the present Court does not see any danger of entanglement as a particularly high barrier to the provision of public aid to sectarian colleges.

Conclusion

In sum, then, prior cases of the Court have established that the establishment of religion clause of the First Amendment does not bar all public aid to sectarian institutions. Such public aid must be limited to the secular functions of such institutions, and must not result either in advancing their religious mission or in excessively entangling the government with the institutions. At the elementary and secondary education level, parochial schools are generally so pervasively sectarian that only very limited forms of non-ideological aid can pass constitutional muster. At the level of higher education, however, sectarian institutions are generally not religion-pervasive, and therefore, their secular functions can easily be distinguished from their religious ones. Consequently, public aid can be channelled to the former without advancing the religious mission of such colleges or entangling the government with the affairs of the institutions. Particular institutions may be found to be pervasively sectarian by such indicia as the absence of academic freedom or the imposition of religious tests on faculty and students, and thus

disqualified for public aid. But, in general, so long as public aid programs are limited to benefitting the secular functions of sectarian colleges, they will be found constitutional.

APPENDIX

Text of Statute

AID TO NONPUBLIC INSTITUTIONS OF HIGHER EDUCATION

§ 65. Board of Public Works authorized to make payments.

The Board of Public Works is authorized to apportion for each fiscal year, commencing with July 1, 1971, and to pay to any private institution of higher education within the State of Maryland which meets the requirements set forth in § 66 of this subtitle, upon application by the institution, such amounts of State aid as are authorized to be paid by § 67 of this subtitle. (1971, ch. 626.)

Constitutionality of aid. — See American Civil Liberties Union v. Board of Pub. Works, 357 F. Supp. 877 (D. Md. 1972).

§ 66. Qualifications for aid.

In order to qualify for State aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements:

(a) The institution must be a nonprofit private college or university which has been accredited by the State Department of Education;

(b) The institution must have been established in this State prior to July 1, 1970;

(c) The institution must maintain one or more earned degree programs, culminating in an associate of arts or baccalaureate degree;

(d) The institution cannot be one awarding only seminarian or theological degrees;

(e) The institution shall submit all new programs and major alterations of programs to the Maryland Council for Higher Education for its review and recommendation regarding their initiation. (1971, ch. 626; 1972, ch. 483; 1974, ch. 585, § 1.)

Effect of amendment. — The 1974 amendment added paragraph (e).

§ 67. Computation of amount.

For fiscal year 1976 and succeeding fiscal years, the amount of the annual apportionment to each institution meeting the requirements of § 66 of this article shall be computed by multiplying (1) the number of full-time equivalent students enrolled by the institution during the fall semester of the fiscal year next preceding the fiscal year for which the apportionment is made, as determined by the Maryland Council for Higher Education, by (2) an amount equal to 15 percent of the State's general fund per full-time equivalent pupil appropriation to the four year public colleges in Maryland for the preceding fiscal year. Full-time equivalent students enrolled in seminarian or theological academic programs shall be excluded from the computation. (1971, ch. 626; 1973, ch. 716; 1974, ch. 585, §§ 2, 3.)

Effect of amendments. — The 1974 amendment rewrote the section and no explanation of the changes made by the 1973 amendment is now practical.

Editor's note. — Section 4, ch. 585, Acts 1974, provides that "for fiscal year 1975, the apportionment shall be as follows: First, the apportionment shall be calculated in accordance with § 67 of Article 77A of the Annotated Code, as added by § 3 of this act; second, the amount apportioned to each institution shall be adjusted by the same proportion that the total apportionment, as so calculated, is to $2,914,900; third, the apportionment shall be calculated in accordance with § 67 of Article 77A as repealed by § 2 of this act. The apportionment for fiscal year 1975 shall be that calculated in accordance with § 67 as added by § 3 of this act, with the adjustments set forth above. However, to the extent additional funds are provided in the State budget for fiscal year 1975, no institution shall receive less than it received for fiscal year 1974 under § 67, as repealed by § 2 of this act."

§ 68. Administration of program.

The Board of Public Works assisted by the Maryland Council for Higher Education shall adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program provided for by this subtitle, including but not limited to criteria and procedures for the submission of applications for aid under this subtitle, for the verification of degrees conferred by the applicant private institutions of higher education, for the submission of reports or data concerning the utilization of these moneys by such institutions, and for the method and times during the fiscal year for paying the aid provided for by this subtitle. (1971, ch. 626; 1972, ch. 534.)

§ 68A. Money not to be used for sectarian purposes.

None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. (1972, ch. 534.)

§ 69. Severability.

If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to the remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable. (1971, ch. 626.)