
Abstract

Plaintiffs, four individual Maryland citizens and taxpayers, brought this action challenging the constitutionality of a Maryland statute, granting general state aid to private institutions of higher learning.

KEYWORDS: religion, freedom, Maryland

Plaintiffs, four individual Maryland citizens and taxpayers, brought this action challenging the constitutionality of a Maryland statute granting general state aid to private institutions of higher learning. Because the defendants who received aid were religious colleges, plaintiffs alleged that the statute violated the Establishment Clause of the First Amendment of the United States Constitution by fostering government sup-

1. MD. EDUC. CODE ANN., art. 77A, § 65-69 (1975) authorizes the payment of state funds to any private institution of higher learning that meets certain minimum criteria, and refrains from awarding "only seminarian or theological degrees." The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities, based upon the number of students, excluding those in seminarian or theological academic programs. The grants are not disbursed for any particular purpose, but, under a provision added in 1972 (§ 68-A), they cannot be used for "sectarian purposes." The program is administered by the Maryland Council for Higher Education, which assures that recipient institutions (1) do not award primarily theological or seminary degrees, and (2) do not use the funds for "sectarian purposes." At the end of the year, the recipient institution must make a report and separately specify the nonsectarian expenditures.

2. In addition to the responsible state officials, plaintiffs-appellants joined as defendants five colleges they claimed were constitutionally ineligible for this form of aid. Four were affiliated with the Roman Catholic Church, and one with the Methodist Church. The Methodist affiliate, however, was dismissed as a defendant-appellee, and the Supreme Court dealt only with the four Roman Catholic affiliates. Roemer v. Board of Pub. Works, 96 S.Ct. 2337, 2343-44 (1976).

3. "Congress shall make no law respecting an establishment of religion. . . ."

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,
port of religion. A three-judge federal district court\textsuperscript{4} upheld the statute as not violating the Establishment Clause.\textsuperscript{5} On appeal, the United States Supreme Court\textsuperscript{6} affirmed and HELD, the Maryland statute does not foster state support of religion in contravention of the Establishment Clause.\textsuperscript{7}

In examining the issue of separation of church and state, the Supreme Court has not expected a **"hermetic separation of the two, [recognizing that such a pure distinction] is an impossibility."**\textsuperscript{8} The Court has further described the line of separation as a **"blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."**\textsuperscript{9} The Court has, however, expected and insisted upon State neutrality toward religion.\textsuperscript{10}

To preserve this guarded neutrality,\textsuperscript{11} a three-pronged test is ap-

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  \item To participate in the affairs of any religious organizations or groups and \textit{vice versa}.
  \item In the words of Jefferson, the clause against establishment of religion by law was intended to erect **"a wall of separation between church and State."**
  \item 28 U.S.C. § 2281 (1970) (repealed 1976) and 28 U.S.C. 2284 (1970) (amended 1974) provided for a three-judge district court to hear all cases in which an injunction was sought to restrain the enforcement, operation, or execution of any state statute on the grounds of that statute's unconstitutionality.
  \item 28 U.S.C. § 1253 (1970) allows for direct appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any case required **"by any Act of Congress to be heard and determined by a district court of three judges."**
  96 S.Ct. at 2337 (Brennan, Marshall, Stevens, and Stewart, JJ., dissenting).
  \item \textit{Id.} at 2344.
  It has also approved the lending of secular textbooks to parochial school students. Board of Educ. v. Allen, 392 U.S. 236 (1968). The Court has also rejected the argument that no state aid to religious institutions is permissible because it frees the institution's resources to be put to sectarian ends. 96 S.Ct. at 2345.
  \item 96 S.Ct. at 2345.
  \item The history of governmentally established religion both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon
plied in cases involving Establishment Clause issues. The test first scrutinizes the statute in question to see that it has the necessary, secular legislative purpose. Next, it tests the statute to determine if it has the impermissible primary effect of advancing or inhibiting religion. Finally, it examines the operation of the statute to assure that it does not weave excessive government entanglement with religion. lemon v. Kurtzman, which itself crystallized the three-pronged test, and a subsequent case, Hunt v. McNair, have offered refinements to the basic test.

In Lemon, the Supreme Court dealt with statutes from two states. One awarded a salary supplement to teachers in private schools, if those teachers agreed only to teach the same courses and use the same materials as those in the public schools, and if they agreed not to teach courses in religion. The other statute authorized state education officials to "purchase" secular educational services from private schools, and to reimburse participating schools for teachers' salaries, textbooks, and materials.

The Court struck down the salary supplement program because it would cause "[the] kind of state inspection and evaluation of the religious content of a religious organization [that] is fraught with the sort of entanglement that the Constitution forbids." The Court struck down the other program because it would foster the same kind of relationship. While applying the third, or excessive government entanglement prong, the Court designated three additional factors for consideration. They include: (1) the character and purpose of the benefited institution, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority.

Hunt, which upheld a state law providing for state participation in the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

13. Id. at 612-13.
14. 403 U.S. 602.
15. 413 U.S. 734 (1973).
17. Id. at 621.
18. Id. at 615.
the issuance of revenue bonds for the benefit of a Baptist College, refined the second, or "primary effect" prong. In its opinion, the Court said:

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.

A third case which heavily influenced the Court in Roemer was Tilton v. Richardson. It involved a federal plan for grants and loans to institutions of higher learning for the construction of academic facilities. The act was drafted to insure that the subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. In upholding this plan, the Court relied on the more mature, sophisticated, and academic atmosphere of a college as opposed to that of an elementary or high school. The Court also favorably considered the non-ideological nature of the aid; that the aid is a one-time single purpose grant, and that cumulatively this would lead to very little potential for political divisiveness.

Applying Lemon's basic test and its complex refinements, the Supreme Court has been able to look at Establishment Clause cases with a focus on all relevant factors. Utilizing such a view, the Court has upheld state aid in cases such as Hunt, Tilton, and now Roemer, where the aid did not appear to further a sectarian mission. However, this cumulative viewpoint has also allowed the Court to strike down aid tainted with the appearance of furthering an institution's sectarian mission.

19. The act excluded any aid to "any facility used or to be used for sectarian instruction or as a place of religious worship [or to] any facility . . . used primarily in connection with any part of the program of a school or department of divinity. . . ." The program was upheld because the Court found the aid not to have a "primary effect" of advancing religion because the institution was not "pervasively sectarian." 413 U.S. at 743, 745 (quoting S.C. CODE § 22-41.2(b) (Supp. 1971).
22. See Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), where the Court struck down aid to elementary and secondary schools which were found to conform to a profile of a substantially religious school, as opposed to the schools involved in Tilton and Hunt. The aid involved (1) direct subsidies for repair of buildings, (2) reimbursement of parents for a percentage of tuition paid, and (3) tax
In considering the present case, the Court acknowledged:

The slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.23

The Supreme Court, in its analysis of *Roemer*, immediately invoked the use of Lemon's three-prong test. The first prong, the purpose of the statute, was briefly discussed and dismissed as not being in issue. The Maryland statute was conceded to have the secular purpose "of supporting private higher education generally, as an economic alternative to a wholly public system."24

Applying the second, or "primary effect" question, the Court described it as the "substantive [question] of what private educational activities, by whatever procedure, may be supported by state funds."25 Recognizing the "primary effect" refinements of *Hunt*,26 the Court concluded, "(1) that no state aid at all [can] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded."27

In applying this test to the Maryland statute,28 the Court relied heavily upon the findings of the federal district court. The lower federal court had found the appellee colleges to be "not 'pervasively sectarian,'"29 and supported that conclusion "with a number of subsidiary findings concerning the role of religion on these campuses."29 These

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breaks for parents. All three were found to have an impermissible "primary effect" of advancing religion. *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973), also struck down a system of aid to elementary and secondary schools that provided for reimbursements for the school's testing and record keeping expenses. It did so because the schools met the same sectarian profile as the schools in *Nyquist*, and there was a "substantial risk" that religious instruction might be included on examinations supported by the state, or that state-funded tests would "be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Id.* at 480.

23. 96 S.Ct. at 2348.
24. *Id.* at 2348-49.
25. *Id.* at 2349.
26. See text accompanying note 20, *supra*.
27. 96 S.Ct. at 2349.
29. 96 S.Ct. at 2349.
subsidiary findings produced several salient features about the schools, the more important ones being: the existence of “institutional autonomy” from the Roman Catholic Church;30 the absence of religious indoctrination as a substantive purpose of any defendant;31 the existence of “an atmosphere of intellectual freedom [free from] religious pressures”;32 the classification of classroom prayer as “peripheral to the subject of religious permeation”;33 and a system of faculty hiring and student acceptance not determined on a religious basis.34 Hinting to the critical issue of the case,35 the Court acknowledged that the district court’s findings had described religious institutions similar in almost all respects to those considered in Tilton and Hunt.36 The Court found no difference between the institutions, thereby holding that the Catholic colleges were not pervasively sectarian.37

30. Id.
31. Id.
32. Id.
33. Id. at 2349, 2350.
34. Id. at 2350.
35. In analyzing the third-prong of Lemon’s test (excessive entanglement), the Court revealed that it considers the character of the aided institution as more important than the nature of the aid itself. Therefore it found this case more closely aligned with Tilton and Hunt than with Lemon, Nyquist, or Levitt. 96 S.Ct. at 2353. In its analysis, the Court relied heavily on descriptive profiles of the schools in question. The profile of the Lemon, Nyquist, and Levitt schools revealed 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 restrictions on what or how the faculty may teach.

Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 767-68. The profile of the Tilton, Hunt schools, however, proved that:

[N]on-Catholics were admitted as students and given faculty appointments. Not one . . . require[d] its students to attend religious services. . . . [theology courses] are not limited to courses about the Roman Catholic religion. The schools . . . made no attempt to indoctrinate students or to proselytize. Finally . . . these four schools subscribe to a well-established set of principles of academic freedom. . . .

Tilton v. Richardson, 403 U.S. 672, 686-87 (1971). The Court, once convinced that the colleges affected by the Maryland statute fit the profile of Tilton, began to move toward a holding consistent with that case. 96 S.Ct. at 2354.

36. 96 S.Ct. at 2350-51.
37. Id. at 2351.
Continuing with the requirements of Hunt, the Court next considered whether aid was in fact only extended to the "secular side." The Court again agreed with the finding of the district court that the extension of aid only to the secular side was assured "by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition through the [Maryland] Council for Higher Education." As if to urge and assure compliance with the statutory safeguards, the Court said it would expect the Council and the colleges to avoid any "specifically religious activity," and minimize any constitutional questions.

Having examined the purpose of the statute and its primary effect, the Supreme Court next considered the difficult question of "excessive entanglement." If the "primary effect" question was termed to be substantive, this was described as a procedural one. Did the operation of the statute, by its requirements of school application and Council approval, report submission and administrative review of expenditures, entwine the religious institutions into an excessive entanglement with government? In this analysis of the entanglement test, the additional three factors mentioned in Lemon were given significant emphasis. Since the schools were found to be not "pervasively sectarian" under the second prong of the test, the Court felt that the "character of the aided institutions" was such that the "secular activities could be taken at face value. . . . The need for close surveillance of purportedly secular activities is correspondingly reduced."

The second factor in Lemon's refinement of the entanglement test, namely, the "form of the aid," was passed over and included in the third factor, the "resulting relationship" of secular and religious authority. Initially, the Court disposed of what might be considered a very entan-

38. See text accompanying note 27, supra.
39. 96 S.Ct. at 2351. "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." MD. EDUC. CODE ANN. art. 77A, § 68A.
40. 96 S.Ct. at 2351.
41. Id. at 2352.
42. See text accompanying note 18, supra.
43. In looking at this "character-of-institution" factor, the Court used its profile analysis already determined in the consideration of whether or not the colleges were "pervasively sectarian." See text accompanying notes 30-34 supra. The colleges were found to perform "essentially secular educational functions . . . that are distinct and separable from religious activity." 96 S.Ct. at 2352.
44. Id.
gling element of the aid: that it was to be granted on an annual basis. The annual nature of the aid was not considered fatal to the program, 45 "in . . . light of the character of the aided institutions, and the resulting absence of any need 'to investigate the conduct of particular classes.' "46

After dealing with this superficial flaw in the Maryland program, the Supreme Court indicated what it considered to be the essential reason for upholding the aid in question. Although a "one-time, single-purpose" construction grant, as in Tilton, was preferable over the type created by the Maryland program, 47 Tilton was considered to be controlling, even though the form of the aid was readily distinguishable. 48

The Court narrowed its analysis of the aid program before it to one fundamental question: Is it distinguishable from Tilton by the form-of-aid, or by the character-of-institution? It held the difference to be form-of-aid only and of questionable importance. 49 This case's character-of-institution difference with Lemon, however, was held to be "most impressive." 50 In contrast to the factual situation in Lemon, 51 where pervasively sectarian elementary and secondary schools were involved, the Maryland Council for Higher Education could supervise the program without entanglement because the "secular and sectarian activities of the college are easily separated." 52 Any contacts between the Council and the colleges were "not likely to be any more entangling than the inspections and audits incident to the normal process of the college's

45. Id. at 2352, 2353.
46. Id. at 2352 (quoting language from the district court).
47. Id. at 2353.
48. Id.
49. Id.
50. Id. Since Nyquist and Levitt fell in line with Lemon, this case's difference with Lemon automatically prevented it from falling in line with Nyquist and Levitt, as appellants urged. 96 S.Ct. at 2354.
51. Repeating the elements of its important "profile," the Court looked at the characteristics of the schools in Lemon. Elementary and secondary schooling comes at an impressionable age; the schools were supervised by the Catholic diocese; each had a local Catholic parish that assumed ultimate financial responsibility for it; principals were appointed by religious authorities; religion pervaded the school system, and teachers were instructed that religious formation is neither confined to formal courses nor restricted to a simple subject area. These things made impossible what is crucial to a non-entangling aid program: 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.
96 S.Ct. at 2353 (quoting the opinion from Lemon v. Kurtzman, 403 U.S. at 617, 618).
52. Id.
accreditation by the State." Such inspections could not be done so innocuously with the schools in *Lemon*.

A concern voiced in *Lemon* that government-religion entanglement could lead to "political divisiveness" was also dismissed by the Court on the grounds that the student population of a college, unlike the parents of elementary or secondary school students, is diverse and widely dispersed, thus creating no local political power base from which to lobby and seek more aid for their respective institutions.

The Court admitted the obvious when it said: "There is no exact science in gauging the entanglement of church and state." The only hint offered was that all relevant factors identified by the three-pronged test of *Lemon* and its refinements must be considered "cumulatively" in judging the degree of entanglement." The Court did, however, specifically agree with the importance given by the district court "to the character of the aided institutions," and with the lower court's findings that the colleges "are capable of separating secular and religious functions." In so affirming, the Supreme Court upheld its commitment not to refine further the existing test of *Lemon* and its probing factors, but it did give valuable insight into how the test is to be applied, and which factual matters it considered critical.

Few would argue that government cannot be kept antiseptically free from religion. Fewer still would want such a situation. Even Justice Douglas, who ardently supported a clean separation of church and state, acknowledged that it would be undesirable to insist on such total separation that government became hostile to religion:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make

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53. *Id.*
54. *Id.* at 2353, 2354. In *Lemon* the Court said that annual subsidies would create a relationship of dependence between the state and the institutions, and that increased demand and dependence for state funds would create a danger of political fragmentation along religious lines. 403 U.S. at 623.
55. 96 S.Ct. at 2354.
56. *Id.*
57. *Id.*
58. *Id.* at 2348.
59. See text accompanying notes 8-9, *supra*.
60. 403 U.S. at 697 (Douglas, J., dissenting): "I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost." (The majority had upheld federal construction grants to institutions of higher learning).
room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.61

Falling in line with some of Douglas' language are cases which have allowed aid on the grounds that government cannot refrain from making available to religious institutions what it makes available to all.62 In fact, in Walz v. Tax Commission,63 aid in the form of property tax exemptions was extended to church properties in order to assure that government and religion could minimize their frictional contacts.

Where then does Roemer fit in balancing these solemn interests—the integrity of the "Establishment Clause" and the necessity that government not discriminate against religion? Roemer's holding has been described as a "hairline crack in the wall between church and state."64 This reaction fails to note, however, that the wall was never

61. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). In this case, Douglas joined in affirming a New York program which allowed public schools to release students, during school hours, on written requests of their parents, so that they may leave the school buildings and grounds and go to religious centers for religious instruction or devotional exercises. Contra McCollum v. Board of Educ., 333 U.S. 203 (1948).
62. See Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 392 U.S. 236 (1968); Meek v. Pittenger, 421 U.S. 349 (1975). In Meek, a textbook program was upheld on the authority of Allen. Two other forms of aid, however, involving (1) instructional material and equipment, and (2) a supply of professional staff, were struck down as having an impermissible primary effect of establishing religion because of the predominately religious character of the schools. A discussion of Meek is noted in The Supreme Court, 1974 Term, 89 HARV. L. REV. 47, 104 (1975).
64. Miami Herald, June 23, 1976 (Editorial) at 6, High Court Ruling Shakes
absolute. Confined by its facts, Roemer serves to lucidly guide state legislatures in drafting legislation that refrains from "quarantining religious institutions," and, at the same time, refrains from unconstitutionally supporting them.

Noting the importance of the differing character-of-institutions profiles between the schools in Roemer, Tilton, and Hunt, and those in Lemon, Nyquist, and Levitt, it seems that aid to religious elementary and secondary schools will have a difficult time passing constitutional scrutiny. It is likely that these schools will be found to be "pervasively sectarian," which necessarily will create "entanglement" problems, as the state seeks to monitor the aid and insure that it is put only to secular uses.

For institutions fitting the profile of Roemer, however, aid to their secular functions should not fall on constitutional grounds. As long as the aid originates from a statute having a secular legislative purpose, and the state is financing a separable secular function of overriding importance, it should stand. The holding in Roemer assures religious institutions that they will not be denied secular aid simply because it

Separation of Church, State.

65. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614.

66. Clearly, Roemer's holding applies only to religious institutions engaging in the art of educating, and educating in a secular manner within an atmosphere of intellectual freedom. Also, it is concerned only with state aid to those institutions. Roemer does not deal with issues such as prayer in public schools or Sunday closing laws.

67. 96 S.Ct. at 2344.

68. This does not, however, totally discount "the form of the aid" consideration. See Meek v. Pittenger, 421 U.S. 349 (1975). There the court upheld aid to elementary and parochial schools in the form of a textbook loan program. Although these schools were considered religion-pervasive, the textbook program was upheld because the secular content of a textbook could be readily ascertained, whereas what a teacher teaches cannot be.

69. But see Hunt v. McNair, 413 U.S. at 753 (Brennan, J., dissenting):
   I do not see any significant difference . . . in telling the sectarian university not to teach any nonsecular subjects in a certain building, and . . . telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university.

70. 96 S.Ct. at 2355 (White, J., with Rehnquist, J., concurring). Brennan, J., in his dissent, said that "the Establishment Clause . . . forbids the government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution." Id. at 2356.
incidentally aids them in their sectarian functions. It also assures them, however, that state aid will not be available to further their efforts in proselytizing, or pursuing their sectarian mission. The "blurry and indistinct" wall separating government from religion before Roemer stands intact after Roemer. It remains up to the states, if they value private education as an economic alternative to a wholly public system, to draft legislation with a careful eye on the character of the recipient institution in mind. For it seems that once the institution fits the profile of Tilton, Hunt, and Roemer, the other judicial requirements are easily met.

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