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Kent Greenawalt
Columbia Law School, kgreen@law.columbia.edu

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CONSTITUTIONAL LIMITS ON AID TO SECTARIAN UNIVERSITIES*

KENT GREENAWALT**

Because private colleges and universities have more and more difficulty keeping their heads above water financially, the possibility of government support increasingly is becoming a question of survival. Almost certainly the level of public support for private academic institutions will rise in the future, and any doubts about eligibility for this support are of vital concern for affected universities. The major issue regarding eligibility has been the status of sectarian universities. Given the stringent constitutional limits on government aid to religion, can universities that are connected to churches or are otherwise sectarian receive public assistance?

The Supreme Court's latest words on the subject were spoken in 1976 in *Romer v. Board of Public Works of Maryland.*[1] In that case a closely divided court indicated that as far as the federal constitution was concerned, most sectarian universities could participate with private nonsectarian universities in programs of public support, so long as money received was spent for secular purposes. Before examining the implications of that case more carefully, it is helpful to place it in some historical and legal context.

The First Amendment, now applicable as a consequence of the Fourteenth Amendment to activities of state governments as well as the federal government, bars any "law respecting an establishment of religion." The Supreme Court's first serious consideration of the relevance of the Establishment Clause for financial assistance occurred in 1947, in *Everson v. Board of Education.*[2] State taxpayers claimed that public money could not be spent to transport children to parochial schools. A majority of five held that the payments were permissible, analogizing bus transportation to peripheral services like police and fire protection. But in language that also reflected the views of the dissenters, Justice Black wrote for the majority: "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."[3]

This unreceptive attitude toward public assistance of sectarian schools has not altered greatly in the subsequent thirty years. In 1968 the Court did sustain school board "loans" of secular school textbooks to children in parochial schools; and Justice White's majority opinion seemed to give promise that further aid would be allowed.[4] But in succeeding cases one after another form of assistance for elementary and secondary schools was declared unconstitutional. The list of prohibited

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**LL.B. 1963, Columbia. Professor of Law, Columbia University School of Law. Former Deputy Solicitor General of the United States.

[1] 426 U.S. 736 (1976).

[2] 330 U.S. 1 (1947).

[3] *Id.* at 16.

[4] *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968).

forms of aid for parochial education includes: salary supplements to teachers of secular subjects; state reimbursements to schools for salaries, textbooks, instructional materials, testing, record-keeping and maintenance and repair of facilities and equipment; tuition reimbursement and tax relief for parents; state loans to schools of instructional materials, such as maps, and instructional equipment, such as laboratory equipment; and state provision of auxiliary services, such as remedial reading instruction, performed by publicly paid personnel in parochial schools.[5] In late June of 1977 the Supreme Court did uphold some state aids to sectarian schools and their students in addition to textbook loans: standardized tests and scoring services also used in public schools; speech, hearing, and psychological diagnostic services; and thereapeutic guidance and remedial services given in public schools or in units located off the premises of sectarian schools.[6] Nevertheless the permissible forms of assistance remain highly marginal.

The three-part constitutional test which has been developed for these cases has thus far been used largely to defeat the ingenuity of those seeking to channel significant aid by some permissible device. The first requirement for permissible aid is that the purpose of the aid be secular; that aspect has been easily met by the challenged state programs. What have proved fatal have been the two other requirements, that aid not have the primary effect of advancing religion and that the state not become unduly entangled in religious afffairs. As now interpreted an effect may be "primary" even if it is not the main effect; the Court asks only whether an important effect is the advancement of religion. The entanglement prong of the test is composed of two discrete elements. One notion is that continuing political battles over the amount of aid to religious groups are socially divisive and an evil the Framers meant to avoid. The second notion, on which more weight has been placed in most opinions, is that state administration of the law should not entwine the government extensively into religious activities. As far as parochial schools are concerned, the two barriers of "primary effect" and "entanglement" have proved almost as difficult to navigate as the original Scylla and Charybdis. If aid is given for general purposes, the Court has objected that religion would be advanced; if some careful division is made of secular from sectarian activities, the Court has complained that undue entanglement would result from efforts to enforce the division. The government should not, for example, pay teachers who teach from a sectarian point of view but the government should also not be in the business of monitoring the performance of parochial school teachers receiving salary supplements to make sure no sectarian ideas creep into their presentations.

Some important perceptions have undoubtedly influenced the Court's development and application of these tests, perceptions that have occasionally been articulated in the opinions. The Court has recognized that aid to private schools is overwhelmingly aid to parochial schools; and it is predominantly aid to Roman

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[5]*See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975).

[6]*Wolman v. Walter*, ___ U.S. ___, 97 S.Ct. 2593 (1977).

Catholic schools. And it has assumed that education in parochial schools is pervasively sectarian, that there is no neat division between secular and sectarian teaching.

Well before the Supreme Court gave its imprimatur to the theory, it was suggested that the position of the sectarian college and university was different from that of the parochial school. The G.I. bill had long provided tuition assistance for veterans who chose to enroll in sectarian institutions,[7] and in 1961, the Department of Health, Education, and Welfare suggested in response to a Senate inquiry that direct federal aid to sectarian colleges would be appropriate although aid to parochial schools was not:

> . . . the education [is] more specialized, and the role of private institutions vastly more important. There are obvious limitations upon what the Government can hope to accomplish by way of expanding public or other secular educational facilities. If the public purpose is to be achieved at all it can only be achieved by a general expansion of private as well as public colleges, of sectarian as well as secular ones. . . . [I]mportant are the distinctive factors present in American higher education: . . . the fact that free public education is not available to all qualified college students; the desirability of maintaining the widest possible choice of colleges in terms of the student's educational needs in a situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination against, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the collegiate enrollment does not have the power of State compulsion supporting it.[8]

When the Higher Education Facilities Act of 1963[9] authorized federal construction grants to private colleges, it was still unclear whether the participation of sectarian institutions was constitutionally permissible. Similar doubts existed in connection with state programs to assist private colleges which were initiated in the 1960's. The constitutional problems were even more complex for some state programs than for federal ones, because many states have language in their own constitutions that is more explicitly restrictive than the First Amendment. The New York state constitution, for example, provides:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the

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[7] *See* 38 U.S.C. §§*1601 et seq.*

[8] U.S. Dep't Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution Upon Federal Aid to Education* (March 28, 1961), *reprinted in* GEORGETOWN L. J. 349, 380 (1961).

[9] 20 U.S.C. §§*701 et seq.*

> control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.[10]

In order to be eligible for state assistance, an institution would have to hurdle not only the Establishment Clause barrier but also any local constitutional barrier.

In 1966, Maryland's highest court grappled with the federal constitutional issue in adjudging the eligibility of four colleges for state educational grants. By a one vote margin, it held that the First Amendment bars state aid to sectarian colleges even for such secular purposes as eating and sleeping accommodations.[11] The court recognized that most private colleges and universities were created with some kind of church connection and that many of them continued to maintain some special religious tie or characteristic without being significantly religious. On the basis of an extensive record it embarked on the task of characterizing the four colleges as sectarian or nonsectarian. It indicated that the following factors might be relevant in making an overall assessment of the nature of a college: (1) What the college says about itself; its self-description; (2) The composition of the governing board and the manner of its selection; (3) The composition and method of selection of the college's administrative staff, faculty, and student body; (4) The teaching freedom accorded to faculty members; (5) The college's ties with organizations of co-religionists; (6) The extent to which the college is owned by or economically dependent upon a church or its affiliated organs; (7) The nature of the academic and other associations in which the college holds membership; (8) The degree of emphasis upon religious symbols in the college's surroundings; (9) The type of religious observance or activity the college demands, facilitates, or suggests; (10) The college's readiness to present, allow, or encourage on-campus religious activity by groups other than the one with which it has historically been linked; (11) Religion in the curriculum; (12) Extra-curricular programs with a religious flavor; (13) The professional appraisal of the college's program by academic accreditation agencies and other evaluators; (14) The fruits of the college's labors, as reflected in the careers of its graduates; (15) The community's view of the college and what it does.

Hood College was declared to be nonsectarian, despite its professed religious orientation and a prescribed course in religion, its receipt of some funds from church bodies, and the power of these bodies to choose seven of its trustees. Western Maryland, a college with strong Methodist connections, and two Roman Catholic colleges, Notre Dame and St. Joseph, were held to be sectarian and ineligible for public funds. The Supreme Court declined review, thus leaving the federal constitutional issue without authoritative settlement.

Not long after the decision of the *Horace Mann* case, I became directly involved in this subject. Fordham University, particularly concerned about eligibility for general state grants that were authorized to begin in 1969, asked my colleague Walter Gellhorn to undertake a study and indicate what changes by Fordham would enable it to receive public grants. I assisted Professor Gellhorn in the study.

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[10] N.Y. Const. Art. 11, §3.

[11] *Horace Mann League of U.S. v. Board of Public Works of Maryland*, 242 Md. 645, 220 A.2d 51, *appeal dismissed* and *cert. denied*, 385 U.S. 97 (1966).

Although we were uncertain, our best guess was that the Supreme Court would not follow the Maryland Court of Appeals and that Fordham, as then constituted, would be eligible for the federal aid programs then in existence. Since the New York Constitution barred aid to institutions of learning "under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught,"[12] we concluded, however, that if it were to receive state funds, Fordham would have to be viewed as nonsectarian. We had made a farily detailed examination of the university's structure of governance and academic program and made a number of concrete suggestions.[13] Partly as a consequence of our advice and partly for independent reasons, many of these proposed changes were adopted; and the State Education Department has since treated Fordham as nonsectarian and eligible for aid. Many other previously sectarian institutions in New York have subsequently convinced the state authorities that they have also become eligible.

Sectarian colleges and universities in states providing direct funds and possessing a constitution like New York's must still ask themselves the difficult question that Fordham faced: whether they should undergo the kinds of changes necessary to make them essentially "nonsectarian." But eligibility for existing federal programs does not rest on such a characterization, because the United States Supreme Court has accepted the basic approach of the 1961 HEW memorandum rather than the approach of the *Horace Mann* majority.

In 1971, the Court finally passed upon the validity of grants under the Higher Education Facilities Act made to colleges and universities with religious connections. By a 5-4 margin, it upheld the use of federal funds for construction of facilities at four church-related institutions.[14] The act itself forbids expenditures for any facilities to be used for worship or sectarian instruction or for facilities to be used primarily in connection with a divinity school. The grants involved in the case had been for the construction of such facilities as libraries, science buildings, and language laboratories. The crucial issue was whether despite the designated uses of the federal money, which were ostensibly secular, the grants nevertheless impermissibly involved the government in aiding religion because of the character of the four recipient institutions, all Roman Catholic colleges and universities. Five justices decided that they did not.

Tilton was decided on the same day as *Lemon v. Kurtzman*,[15] the case in which the Court held unconstitutional Rhode Island salary supplements for parochial school teachers of secular subjects and Pennsylvania purchases of "secular educational services" through state reimbursements to schools for teachers' salaries, textbooks, and instructional materials. In *Lemon*, Chief Justice Burger wrote the majority opinion, which concluded that the states would be unduly entangled in religious affairs if they tried to ensure that their money was not used for sectarian purposes. The Chief Justice also wrote the plurality opinion in *Tilton*, an opinion which tries to explain why federal construction aid to church-related colleges is not

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[12] N.Y. Const. Art. 11, §3, note 10 *supra*.

[13] *See* W. Gellhorn & K. Greenawalt, *The Sectarian College and The Public Purse* (1970).

[14] *Tilton v. Richardson*, 403 U.S. 672 (1971).

[15] 403 U.S. 602 (1971).

governed by the same rule as state aid to parochial schools. In considering whether federal aid for ostensible secular purposes had a primary effect of advancing religion, Chief Justice Burger put the relevant question as whether "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable."[16] This way of casting the issue avoided the necessity of deciding whether an institution was sectarian or nonsectarian. It called instead for an evaluation of whether a college's secular program was independent of its religious one. The plurality found no evidence that religion had seeped into use of the facilities aided by federal funds. Despite institutional documents stating religious restrictions on what might be taught, the opinion asserted that the schools were in fact characterized by an atmosphere of academic freedom and were all subscribers to the 1940 Statement of Principles on Academic Freedom and Tenure endoresed by the American Association of University Professors and the Association of American Colleges.[17] In response to the argument that many sectarian colleges do everything they can to propagate a particular religion, the Court conceded that this might be true of some institutions, and it noted that some colleges had been declared ineligible for aid by authorities administering the Act. But the plurality considered the possible ineligibility of pervasively sectarian colleges to be irrelevant, since there was no evidence that the four institutions involved were of this character.[18]

The plurality did hold invalid one limited aspect of the legislation, that part implying that religious use of facilities would be permissible after twenty years. Chief Justice Burger made it clear that the limitation to secular use would have to be permanent.[19]

The opinion then turned to the issue of entanglement. In *Lemon*, Chief Justice Burger had written that in order to determine if entanglement was excessive the Court had to examine "the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."[20] In *Tilton*, he wrote that three factors made the extent and potential danger of the entanglement less under the federal act than the state programs held invalid in *Lemon*. First, the inculcation of religious values was a more pervasive purpose of parochial schools than church-related colleges. College students are "less impressionable and less susceptible to religious indoctrination,"[21] and there is less attempt at indoctrination, both because many church-related institutions value academic freedom and encourage critical student thought and because the internal disciplines of college and graduate courses limit the opportunities for sectarian influence. Focusing on the four institutions involved in the case, the plurality discerned that "religious indoctrination is not a substantial purpose or activity."[22] It placed considerable weight on the stipulation of the parties that required theology courses "are taught according to the academic re-

[16] *Tilton v. Richardson*, 403 U.S. at 680.
[17] *Id.* at 681-82.
[18] *Id.* at 682.
[19] *Id.* at 683.
[20] *Lemon v. Kurtzman*, 403 U.S. at 615.
[21] *Tilton v. Richardson*, 403 U.S. at 686.
[22] *Id.* at 687.

quirements of the subject matter and the teacher's concept of professional standards."[23] Because the risk that government aid would be used for religious purposes was perceived to be less than the risk associated with parochial schools, less intensive surveillance would be needed and resulting entanglements would be diminished.

The second factor distinguishing the aid involved in *Tilton* from that in *Lemon* was that buildings and other funded facilities were inherently nonideological, whereas teachers whose salaries were supplemented might not be religiously neutral.[24] The third factor was that a one-time, single-purpose construction grant would require less continuing surveillance than the repeated payments to be made under the state programs.[25] Cumulatively, the opinion concluded, these factors "shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes."[26] The opinion also suggested that the potential political diviseness is much less when universities with dispersed constituencies are aided than when the question is how much aid is to be given to essentially local schools.[27]

Other opinions were quick to point out some weaknesses in the plurality's analysis. Although buildings might be nonideological and constructed at one time, it was their use that had to be monitored, and this might require continuing surveillance of teaching every bit as much as periodic salary payments to secular teachers. The crucial part of the plurality's reasoning appeared to be the basic distinction between parochial schools and church-related colleges, not the particular form of aid given. On this point only four of nine justices were persuaded. The four dissenters believed that no aid could go to sectarian colleges. Three apparently thought the institutions involved in the case were plainly sectarian;[28] Justice Brennan would have remanded for a finding on that issue.[29] Justice White also perceived no constitutional difference between the challenged state and federal programs. But he alone voted to uphold the state aids to parochial schools, so he did not need to find distinguishing features in order to approve the federal construction grants.[30]

The Court has adhered to the basic approach of the plurality in *Tilton* but it has continued to be sharply divided. In *Hunt v. McNair*,[31] it followed *Tilton* and upheld a complicated state program to assist sectarian colleges, among others, by revenue bonds which effectively allowed colleges to borrow money for purely secular facilities at a lower rate of interest than would otherwise be possible. Justice Powell wrote for the majority that "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."[32] Since the college involved had not been shown to be "pervasively sectarian," the assistance did not have a primary effect of aiding religion. The Court

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[23] *Id.* at 686.
[24] *Id.* at 687-88.
[25] *Id.* at 688.
[26] *Id.*
[27] *Id.* at 688-89.
[28] *Id.* at 689 (Douglas, J., dissenting).
[29] 403 U.S. at 642 (Brennan, J., dissenting).
[30] 403 U.S. at 661 (White, J., concurring).
[31] 413 U.S. 734 (1973).
[32] *Id.* at 743.

also concluded that no excessive entanglement was present and that therefore the bond program was constitutionally acceptable. The three remaining dissenters from *Tilton* again dissented.

In *Roemer v. Board of Public Works,*[33] the Supreme Court considered Maryland's program for assisting private colleges and universities by noncategorical grants. These grants could be spent for whatever purposes the recipient institution wished so long as the purposes were not sectarian. Taxpayers challenged grants to four Catholic colleges and to Western Maryland, which was affiliated with the Methodist Church. By the time the case reached the Supreme Court, Western Maryland had been dismissed as a defendant, so only the grants to the Catholic colleges remained in issue.

Unlike the construction grants in *Tilton*, these grants were made on a yearly basis and they were not made for a sharply limited purpose. And, as to some of the institutions whose receipt of funds was challenged, the district court was unable to find that compulsory religion courses were taught as an academic discipline rather than for purposes of indoctrination. Nevertheless, despite these differences five members of the Supreme Court approved the Maryland program. Justice White again reiterated his own view that state financing of separable secular functions is permissible, whether the recipient is a sectarian college or parochial school. He was joined by Justice Rehnquist.[34] Justice Blackmun, joined by the Chief Justice and Justice Powell, wrote the plurality opinion, which applied the threefold test of purpose, effect, and entanglement.

As usual, secular purpose was not an issue. The "primary effect" question was put in terms of whether an institution is so "pervasively sectarian" that its secular activities cannot be separated from its sectarian ones. The plurality accepted the district court's judgment that the institutions involved were not pervasively sectarian. Despite formal Catholic affiliation, the colleges were "characterized by a high-degree of institutional autonomy."[35] Although Roman Catholic services were held on campus, attendance was not required. Mandatory theology courses were taught but they supplemented a broad liberal arts curriculum in which nontheological courses were taught without religious pressures. Although there was no college policy encouraging the practice, some classes began with prayers, and some classrooms had religious symbols. But courses were taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards."[36] Apart from theology departments, faculty hiring decisions were not made on a religious basis. Although "budgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary,"[37] the district court had determined that academic quality was the principal hiring criterion. Most students were Roman Catholic but students were chosen without regard to religion.

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[33]426 U.S. 736 (1976).

[34]*Roemer v. Board of Public Works of Maryland,* 426 U.S. at 767-770 (White, J., concurring in judgment).

[35]426 U.S. at 755.

[36]*Id.* at 757.

[37]*Id.*

Having accepted the district court's conclusion that the colleges were not pervasively sectarian, the plurality assumed that the colleges could spend their grant money for nonreligious purposes and thus avoid any primary effect of advancing religion. As in *Tilton*, the nature of the colleges was again given emphasis when the plurality considered entanglement. Since secular activities could, "for the most," be "taken at face value,"[38] close surveillance of the conduct of classes would not be needed. The fact that annual review would be required was not enough to distinguish this case from *Tilton*, since the degree of review would not be so great it would constitute "excessive entanglement." In discussing political divisiveness, Justice Blackmun noted that more than two-thirds of the private colleges benefiting under Maryland's program were nonsectarian and that the prospects of divisions along religious lines were much less than when virtually all recipients were Roman Catholic parochial schools.[39] In sum, the case was found to be much closer to *Tilton* than to the parochial school cases and the necessary auditing of the use of state funds was held not to constitute an excessive entanglement.

Justices Brennan and Marshall, the two remaining dissenters from *Tilton*, continued to regard aid to church-related colleges as unconstitutional.[40] Justice Stevens expressed substantial agreement with Justice Brennan, adding "emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."[41] Justice Stewart was the fourth dissenter. He had joined the plurality in *Tilton*, but regarded the approach to the theology courses of the colleges in *Roemer* as crucially different. The institutions in *Tilton* had not tried to inculcate the religious beliefs of the affiliated church. But, according to the district court in this case, the compulsory theology courses may be "devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline."[42]

This survey of the opinions in *Roemer* and the preceding cases allows us to formulate the relevant constitutional principles governing public aid to church-related and other sectarian colleges and universities. No private institution can receive public aid for sectarian uses, such as the operation of a seminary, chapel construction, religious teaching, or the support of student religious societies. Each institution must be careful that buildings erected with the support of public funds are not subsequently used by it for religious purposes.

So long as an institution is not pervasively sectarian, so long as its secular functions can be distinguished from religious ones, it is, as far as the federal Constitution is concerned, eligible for aid to its secular activities. A further condition of eligibility is that the government be able to administer a division between secular and sectarian activities without "excessive entanglement," but a majority of the present Court is not anxious to strike down aid to higher education on entanglement grounds. Like the colleges in *Roemer*, an institution can have significant religious connections and purposes without being designated pervasively sectarian. It is unclear exactly how

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[38] *Id.* at 762.

[39] *Id.* at 765-66.

[40] *Id.* at 770-773 (Brennan, J., dissenting).

[41] *Id.* at 775 (Stevens, J., dissenting).

[42] *Id.* (Stewart, J., dissenting).

much more religiosity it would take for one of the *Roemer* majority to find that a college is pervasively sectarian and ineligible for aid.

Officials of the Department of Health, Education, and Welfare indicate that relatively few institutional applicants have been turned away by it on the ground that they are too sectarian. (Some institutions other than theological seminaries have been classified as schools of divinity and therefore ineligible for assistance, because they train students mainly for religious vocations.) Probably a college that was designedly devoted to inculcating a particular religious doctrine would be held to be pervasively sectarian. Practices like compulsory chapel and religious discrimination in admissions might point in the direction of pervasive sectarianism, although either practice alone might not necessarily result in that categorization.

Universities are not eligible for completely unrestricted grants unless they are nonsectarian, since the federal Constitution does bar aid that may go for religious purposes. In some states, like New York, the state constitution may bar any direct state aid to sectarian institutions, even if it is restricted. Barring such a local constitution, ineligibility for unrestricted secular aid should not be a serious problem for those colleges and universities that are "sectarian" without being "pervasively sectarian." Federal grants have been limited to specific purposes and probably will be so limited in the foreseeable future. State programs of aid can without difficulty be formulated in terms of secular uses of funds. In states undertaking such programs, sectarian institutions would do well to see that a prohibition on sectarian uses is included. Such a prohibition does mean a slight increase in bookkeeping inconvenience, but it safeguards against constitutional challenges.

Given the present division of the Court, it is, of course, not certain that the principles that now prevail will continue to do so. It is possible that new appointees would join the present dissenters and more sharply restrict aid to sectarian colleges. Then, many more colleges and universities might be forced to make the hard choice whether to forego some of their religious character in order to be eligible for public funds. But at present, under federal constitutional law, that choice must be faced only by the few institutions that are "pervasively sectarian."