In the

Supreme Court of the United States

JOHN C. ROEMER, III, et al.,

Appellants

v.

No. 74-730

BOARD OF PUBLIC WORKS OF MARYLAND, et al

Washington, D. C.
February 23, 1976

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Monday, February 23, 1976

The above-entitled matter came on for argument at 10:58 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE S. GREENWALD, ESQ., 1200 Garrett Building, Baltimore, Maryland 21202
For Appellants

GEORGE A. NILSON, ESQ., Assistant Attorney General, Chief, Legislation and Litigation, One South Calvert Building, Baltimore, Maryland 21202
For State Appellees

.....continued

APPEARANCES: ..... continued

PAUL R. CONNOLLY, ESQ., 1000 Hill Building, Washington, D. C. 20006
Attorney for Appellees Loyola College and Mount Saint Mary's College

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-730, John C. Roemer against Board of Public Works of Maryland.

Mr. Greenwald, you may proceed when you are ready.

ORAL ARGUMENT OF LAWRENCE S. GREENWALD, ESQ.

ON BEHALF OF APPELLANTS

MR. GREENWALD: Mr. Chief Justice and may it please the Court:

This is an appeal from the United States District Court of Three Judges for the District of Maryland.

At issue is the constitutionality of a Maryland law which authorizes the direct payment of public aid to church-related and other private colleges.

The Appellants are four Maryland citizens and taxpayers. They contend that this Maryland law violates the Establishment Clause of the First Amendment as applied to the states through the Fourteenth.

The Appellees are four church-related colleges of Maryland as well as the members of the Board of Public Works of Maryland which is charged with administering the statute.

A three-judge panel, which had been convened, upheld the constitutionality of this legislation by a two-to-one vote.

At the outset, I'd like to invite the Court's attention to at least one major distinction between this legislation and other church-state legislation previously considered by the Court.

This legislation provides for a general-purpose grant to be paid directly to church-related colleges. It is not limited, for example, to construction grants such as this Court upheld in 1971 in Tilton versus Richardson.

The act at issue would allow the payment of both capital and operating expenditures with state aid and so the aid could be used for construction, maintenance and repairs of buildings, teachers' salaries, scholarships and virtually any of the myriad of costs which are incurred by church-related colleges.

QUESTION: But there is some limitation.

MR. GREENWALD: The only use-restriction, Mr. Justice Brennan, is found in Section 58-A of the Act, which states that "No money shall be used for sectarian purposes." That is the only use-restriction which is in the act or in the recently-promulgated regulations.

In order for a college to be eligible for aid, it must meet a variety of secular requirements. For example, it must be a non-profit educational institution. It must be private, accredited by the State Board of Education and so forth.

The only eligibility requirement relating to religion is that the institution cannot be one awarding only seminarian or tehological degrees and so an institution such as Mount Saint Mary's College -- one of the Appellees -- which awards both seminarian degrees and liberal arts degrees may be eligible for aid under the Act.

As I indicated earlier, the Act is administered under the State Board of Public Works. The Board of Public Works is assisted by the Council for Higher Education, which undertakes the nuts and bolts, day-to-day administration of the Act.

The administration of the Act includes a three-state process of enforcing the use for sectarian purposes restriction. The first stage is a full expenditure report which is filed annually by the school with the state.

This, according to the recently-promulgated regulations, identifies the purposes for which the aid is intended to be used and includes an affidavit by the Institution that the aid will not be used for sectarian purposes.

The second stage, again, furnished on an annual basis, is a so-called "utilization of funds report." This is a second report furnished by the Institution to the state which describes how the aid, in fact, has been used.

The third stage of enforcement of use

restriction involves necessary follow-up by the states to ascertain that the aid was not used for religious purposes. This follow-up may be in the form of inquiries by the state to the institution for more details as to how the aid was used and may also be in the form of audit, to which these expenditures are subject.

As of the judgment, there were 18 aid recipients in Maryland. Four of these, four appellees, are admittedly church-related institutions.

Now, the Appellees, as I have said, are admittedly church-related and the lower court especially found that they were church-related.

The lower court also found that their predominant mission is the functioning as the secular educational institution.

The lower court also found that it has -- that all of the schools have as secondary objectives the encouragement of spiritual development of the students. This finding as to secondary objectives is plainly supported by the record and by the schools' own perceptions themselves.

For example, Loyola College expressly identifies with the Catholic and Jesuit tradition. The other Appellees have similar expressions of identification.

This Court's decisions have furnished us with a three-fold framework of analysis in establishment clause

questions.

In order for a statute to survive an establishment clause challenge, it must have a secular legislative purpose. Its principal or primary effect must neither advance nor inhibit religion and the statute must not foster excessive government entanglement with religion.

The Appellants here, as below, offer no challenge as to the secular legislative purpose of the statute.

However, the Appellants do challenge the statute on the grounds that it promotes excessive government entanglement with religion and that its primary effect is to advance religion.

I'd like to first turn to the issue of entanglement and running through an analysis of entanglement, according to this --

QUESTION: Mr. Greenwald, would you straighten me out on one thing? Western Maryland College is no longer in the case.

MR. GREENWALD: That is correct, your Honor.

QUESTION: And how and why did they opt out?

MR. GREENWALD: A settlement was reached between Western Maryland College and the Appellants.

QUESTION: Well, how does one settle a case such as this where you are dealing with a state statute?

MR. GREENWALD: Western Maryland College, your

Honor, through the litigation, had taken the position that it was not a church-related college. Yet the lower court plainly found that at least certain vestiges of church-relatedness remained. The settlement was predicated on the removal, by Western Maryland College, of even these vestiges of church-relatedness.

The Appellants agreed to dismiss the appeal if Western Maryland would remove the vestiges of church-relatedness.

QUESTION: Would you describe what the vestiges were?

MR. GREENWALD: I can describe some of them, your Honor. These included religious symbols on the facades of buildings and inside some of the buildings. Western Maryland College agreed to remove them. These included the financial support of a certain council which operated for religious purposes in Western Maryland College.

Financial support was not a major item, but it was there and Western Maryland agreed not to support it. It included a direct tie-in to the sponsoring church and the furnishing of certain reports to that church.

It agreed to remove this.

It included a department of philosophy and religion in which all of the teachers were clerics of the sponsoring order and it agreed with the normal attrition

applicable to these individuals such as through retirement or illness or death or what-not to replace them so that the make-up of that department would not be all clerics of the sponsoring faith.

I don't recall other specific instances, but the settlement agreement also included the general provision that Western Maryland College would remain totally neutral as to the furtherance of spiritual development of students.

QUESTION: Although it continued to give degrees in theology.

MR. GREENWALD: Your Honor, I don't recall whether Western Maryland College gave degrees in theology.

QUESTION: They had courses in theology.

MR. GREENWALD: They had courses.

QUESTION: They had a department.

MR. GREENWALD: They had a department, your Honor, of philosophy and religion which included certain religion courses. They took the position throughout litigation that these religion courses were taught in a strictly academic manner and they agreed that any religion courses that they had would continue to be taught in an academic manner.

I do not know that they had a major in theology. I just don't recall.

QUESTION: But you -- I suppose you would have

accepted that if you -- if you would accept the fact that they teach theological courses, you would accept, if they did, the fact that they gave degrees in theology.

MR. GREENWALD: If by that you mean, would I accept it for purposes of a settlement, I would have accepted that, yes.

I would point out, Mr. Justice White, that I would draw a sharp distinction between the academic teachers of theology and non-academic teaching of theology.

QUESTION: Well, all the schools do, don't they? At least they claim they do.

MR. GREENWALD: They claim to. There is serious question about that and as the lower court expressly found, or expressly did not find, it was unable to characterize exactly how theology was taught at these schools. Theology was the area which I think gave the lower court the most difficulty.

Turning ahead to the issue of entanglement, running through the entanglement analysis, the concept that it is not necessarily actual entanglement which requires the statutes be struck down on establishment clause grounds. Potential entanglement will suffice.

QUESTION: But it must be excessive, not merely entanglement, must it not?

MR. GREENWALD: Yes.

QUESTION: That is the rubber word that is involved here.

MR. GREENWALD: That is correct. There must be excessive entanglement.

Now, this Court's decisions teach us that an analysis of excessive entanglement necessarily involves an equation with three variables. The three variables are the character and purposes of the institution, the nature of the aid and the resulting relationship between the church and state.

This Court's decisions also teach us that these variables are to be judged on a case-by-case basis and in the final analysis, it is the cumulative effect of variables in any given case which determines whether or not the statute at issue is constitutional.

Turning to the variable, character and purposes of the institution, the lower court expressly held that the schools here conformed, in character and purposes, to those schools which were approved for aid in Tilton versus Richardson in 1971.

However, running through its opinion are, I submit, two distinctions between these schools and the Tilton schools. In Tilton, this Court employed as a foundation the absence of any restriction based upon religion on faculty appointments.

In respect to these schools, the lower court

expressly found that there was a policy or practice, at least in part, of faculty recruitment based upon religion.

More specifically, Loyola College admittedly -- and as the lower court found -- has the policy of attempting to recruit to its faculty two members of the Sisters of Mercy and two members of the Society of Jesus, both of which are sponsoring religious orders.

That is not to say that if Loyola is unable to find members who are qualified, they will not turn to people of other religions and hire them. They will.

Nonetheless, their affirmative policy is to recruit members of these religious orders.

It is Appellants' contention that, to the extent Loyola or any other school has a policy of recruitment, at least in part, based upon religion, it necessarily has the corollary policy of not recruiting people from other religious backgrounds than those of the sponsoring order.

QUESTION: What is the composition overall of the faculty you are describing at Loyola? What percentage were representatives of a particular religious faith?

MR. GREENWALD: I don't know the exact percentage. This information was unavailable at trial. Of course, as I recall, records of each particular individual's religion are simply not kept.

There were, as I recall, approximately 20 to 25

percent of the faculty members who were either Roman Catholic priests or members of the Sisters of Mercy. This information was available since the catalog identified by certain symbols members of these religious orders.

QUESTION: Does the record show whether or not when they taught they were dressed in their clerical clothing to identify their full-time occupation and association?

MR. GREENWALD: The record shows that some were so dressed and others were not. This was something that was left up to the particular teachers. Similarly, some four religious symbols, which is crosses and similarly some classrooms had in them crucifixes for the religious symbols and some did not and I don't know the precise numbers.

QUESTION: Having the affirmative policy you described, that is, recruiting annually two Sisters of Mercy, two members of the Society of Jesus, couldn't you at least know in the case of Loyola what the percentage was of Roman Catholic faculty?

MR. GREENWALD: Well, I --

QUESTION: I understood you just to say you couldn't answer Mr. Justice Powell as to the percentage of the total faculty who were religiously oriented.

MR. GREENWALD: Mr. Justice Brennan, I am able to state that approximately 20 to 25 percent of the

faculty included members of either the Society of Jesus or other Roman Catholic priests.

QUESTION: Each of these are only at Loyola.

At each of these schools.

MR. GREENWALD: No, sir, I am talking now of Loyola College. The percentages did vary. The percentages were greater in St. Joseph College and I have forgotten exactly what the percentage was, but it was something like 60 or 70 percent of the teaching faculty which was made up of members of the sponsoring religious order, the Daughters of Charity and the College of Notre Dame and Mount Saint Mary's College had percentages, as I recall, which were in between, that is, of clergy.

What I said I didn't know was the number of faculty which were Catholic as opposed to some other religion. That, I am not able to identify at all.

Now, the College of Notre Dame and Saint Joseph College, as the lower court found, also have practices of recruiting faculty based on religion.

The lower court found that the reason for this was budgetary. That is, that it involved less expense to the schools involved to invite and receive to their faculties members of these religious orders than independent persons and that was the reason for that.

There is another major distinction between these

institutions and those which were involved in Tilton versus Richardson. In Tilton, this Court pointed out that theology was taught academically but this was based upon a stipulation by the parties to Tilton that theology was, in fact, taught academically.

There was no such stipulation in this case. As I've indicated earlier, the court had considerable difficulty with the whole question of theology.

It found itself unable to characterize one way or the other whether theology was taught academically or religiously. However, it did recognize that given the limited selection of courses at these schools and given that this limited selection was focused upon Christianity and given that the courses were taught primarily and in some cases exclusively by clerics of the sponsoring faith, there existed at least the potential that theology could be used to further the secondary purpose of these institutions, that is, the religious purpose.

QUESTION: Mr. Greenwald, what is the difference between teaching theology academically and teaching it religiously?

MR. GREENWALD: I can only reply in the most general terms, Mr. Justice Rehnquist. I think when you teach about religion, that is, when you teach that at a certain age, certain people believe X, Y and Z and

similarly, other people believed A, B and C -- in other words, you teach the historical evolution and you teach the modern-day beliefs of people, that is teaching about religion. That is academically.

However, when you teach -- purport to teach as a matter of fact that at a given time the Messiah had come and that a certain person, Jesus Christ, was the Messiah and that all members of the Roman Catholic Church, in order to save their souls, must believe these things, that is teaching religiously.

Now, obviously, there are all sorts of shades of grey which one could impose. That is my understanding.

QUESTION: Well, let's take it over to -- suppose it is a philosophy course rather than a religion course and the professor is teaching the history of philosophy and he happens to feel that Kant was right and Hume was wrong, in his notions about epistomology. Now, I take it that in a normal college course the professor is perfectly free -- presenting the subject objectively, but to express a preference for one or the other.

MR. GREENWALD: I think he is.

QUESTION: Or at least not to treat them completely as if they were -- he were dissecting a frog the way you describe the historical teaching of religion or the academic treatment of it.

MR. GREENWALD: Well, the dissection of a frog is the clearest example I could think of for the academic teaching of theology. As I have indicated, Mr. Justice Rehnquist, there are many shades of grey in here.

I think what he says is correct, that a teacher can teach A view is, B view is, my preference is and I think that would be academic teaching.

QUESTION: That would still be academic.

MR. GREENWALD: I would say so.

QUESTION: What he cannot teach is a certain theological tenet is true and everything else is false.

MR. GREENWALD: That is correct.

QUESTION: That is no longer the academic teaching of comparitive religion or the history of religion or something like that, but it is theological propaganda, if you will use that word.

MR. GREENWALD: I think that is correct but Mr. Justice Stewart, I --

QUESTION: In order to inculcate specific theological tenets.

MR. GREENWALD: Well, that is right and that is the key. The inculcation of specific tehological tenets is, I think, largely a matter of degree. It can be done extremely subtly. It doesn't have to be done as blatantly as I just described and so in the continued emphasis in a

theology class about the professors own individual beliefs happen to coincide with the beliefs of the sponsoring order, you at least have the potential that the line or the wall of separation would be abridged in that course and it is that potential against which the establishment clause must guard.

QUESTION: Mr. Greenwald, while we have interrupted you already in your thoughts, is there a distinction between a school which is church-related -- as I understand it, these schools are admited by everyone to be church-related -- and being sectarian. Do those terms mean different things and if so, what is the difference?

MR. GREENWALD: That is a difficult question to answer, Mr. Justice Stevens. I would say that the guidance from this Court's decisions is to date unclear.

In Hunt versus McNair, this Court referred to a sectarian institution as one in which religion is so pervasive that, in effect, its secular and religious functions merged. The one is subsumed with the other.

That, in general terms, given the guidance of Hunt versus McNair, is how I would describe a sectarian institution.

QUESTION: You don't contend these schools meet that standard.

QUESTION: You don't contend these schools would satisfy that standard?

MR. GREENWALD: I did so contend but the lower court expressly ruled that these schools were not pervasively sectarian.

QUESTION: But you are not challenging that finding on appeal, either.

MR. GREENWALD: Yes, I am and I propose to identify three specific factors, any one of which, I submit placed these schools in the pervasively sectarian category. I can do so right now in response to your question, if you like.

QUESTION: Just before you proceed, isn't it true that the vast majority of private colleges and universities are or at least historically were church-related, Harvard, Yale, Princeton, Columbia, Wittenberg, Kenyon.

MR. GREENWALD: It is my understanding that, from a historical point of view, that is correct.

QUESTION: So every -- there may be exceptions, I know of one in Indiana, but the vast majority of private colleges and universities are church-related, are they not?

MR. GREENWALD: Well, at one time they were.

QUESTION: Well, and still are, at least vestigially.

MR. GREENWALD: Given schools have vestiges of church-relatedness. Sure they are. But I would point out that that, in itself, doesn't really answer any question dealing with the establishment clause because, as this Court has taught us, it is the degree of church-relatedness which is an important factor.

QUESTION: So it is -- is it a matter in each case of degree rather than of two separate categories between church-related on the one hand and sectarian -- it is how much church-related, is it not?

MR. GREENWALD: I would say yes. I agree with that, Mr. Justice Stewart, with one exception. I think that there are certain factors which may be applicable to a church-related school which in and of themselves would disqualify those schools from aid.

One of the factors, which I think is present in this case, is the introduction of prayer into the classrooms. Why do I think this is important? The entire premise upon which this Court in the past has permitted state aid or federal aid to church-related institutions is that the religious functions are separable from the so-called secular functions.

With respect to private colleges, the secular functions at bottom is the classroom teaching of given subjects. I submit that there is no more cogent way to

mingle the religious into the secular educational function than by introducing prayer into the class.

Now, in fact, each of the Appellees, as the lower court found, had a practice of prayer in the class. The lower court found this practice to be what the lower court termed "peripheral" to the teaching of the various subjects.

However, prayer was introduced by the teachers in a wide variety of courses. For example, chemistry, mathmatics, business administration, physics, not to leave out, of course, philosophy and theology.

QUESTION: I take it, it wasn't the school policy in any of the schools to have prayer.

MR. GREENWALD: The schools? No, sir, it was not --

QUESTION: But it was permissive. They left it up to the teachers. They just didn't forbid it.

MR. GREENWALD: Exactly. This started as a facet of the teachers' academic freedom.

QUESTION: And also, where it was held it was permissive with the students, wasn't it?

MR. GREENWALD: That's right. The students were not required to stay at prayer. The fact is that many did, but many others did not.

QUESTION: What if you had a biology professor at Harvard who chose to begin his biology courses each

session with prayer? Would that make Harvard an impermissible recipient of governmental aid?

MR. GREENWALD: Well, that, too, Mr. Justice Stewart, is very difficult to answer and I can only answer it this way --

QUESTION: Well, I thought your point was that if there are prayers in a classroom ever, that that is a touchstone, that is a litmus paper test as to whether or not something is impermissibly church-related.

MR. GREENWALD: That is correct and to directly respond to your question, I would say that if Harvard did so permit a prayer in a classroom, it should not receive the state aid. Now, the question --

QUESTION: Harvard prides itself -- at least, the last I knew it did, with being a free institution and if a particular professor decided that -- in zoology or biology that he wanted to open his classes with prayer and any students who wanted to join in could join in, others were free not to or even to arrive late.

Would that in and of itself make Harvard an institutionally-impermissible recipient of government aid?

MR. GREENWALD: Well, as I have answered before, it should. But the question which I think has to be answered -- well, first, we don't reach that question in this case. Here, you don't have one instance of a prayer

in a biology class. You have instances of prayer ranging from 67 courses, roughly, at Loyola College which meant six to eight percent of the courses to an overwhelming majority of the courses at Saint Joseph College, something like 70 percent of the courses.

I acknowledge that it may be possible to draw a line and I am frankly at a loss as to where to draw them. Perhaps one can say that your particular biology class, Mr. Justice Stewart, should not receive the aid, or perhaps the biology department should not receive the aid or perhaps the department of physical sciences should not receive the aid.

I frankly don't know where to draw the line. The litmus paper test which I think makes it easier as to where to draw the line is simply to avoid prayer. I would point out --

QUESTION: Well, what if in a chemistry class at Harvard the professor, a very able chemist, also happened to be a very strong atheist and put into his class each day a couple of minutes of his views propagandizing atheism? Would that make Harvard ineligible as a recipient of public funds?

MR. GREENWALD: Well, I would say that is different.

QUESTION: How? And why?

MR. GREENWALD: Than prayer.

QUESTION: Constitutionally.

MR. GREENWALD: Pardon me?

QUESTION: How and why constitutionally is it different?

MR. GREENWALD: Because prayer by its very nature is religious?

QUESTION: So is atheism by -- under the decisions of this Court. It is equally protected constitutionally.

MR. GREENWALD: I understand it is protected constitutionally but I don't think it rises to the same degree of prayer. Prayer, by its --

QUESTION: Do you think that tax funds could be used to support a center of atheistic teaching without violating the establishment clause?

MR. GREENWALD: I think that under certain circumstances tax funds could be so used if it were clear, as in Tilton, for example, the party stipulated that the teaching of atheism was strictly academic. That, arguably, would be a secular educational function of the institute and under this Court's decisions could be supported by tax aid.

QUESTION: Well, you are making a distinction then, I take it, between teaching atheism, advocating it and teaching about it.

MR. GREENWALD: Yes, sir.

QUESTION: Is that where you draw the line?

MR. GREENWALD: Yes, Mr. Chief Justice, I am making that distinction. I would just like to offer that this Court in Tilton had as one of its touchstones the absence of religious worship which I assume includes prayers in classrooms from the types of facilities which were there permitted.

I'd like to turn now, if I may --

QUESTION: The Court went beyond that a little, didn't it, by cutting off the 20-year limitation?

MR. GREENWALD: That is correct.

QUESTION: So that in effect it could not convert it into a chapel at the end of 20 years, as the original grant conceivably would have permitted.

MR. GREENWALD: That is correct. It did strike down that enforcement provision of the Higher Education Facilities Act in Tilton.

QUESTION: Mr. Greenwald, before you go back to your argument, would you tell us the other two litmus tests of the sectarian institution? One is prayer in the class and what were the other two? It should be shown by this record.

MR. GREENWALD: Yes, sir. Another, I submit, is the recruitment of faculty based upon religion. This, too,

I submit, strikes at the heart of this Court's premise for allowing public aid to church-related schools which is that the secular functions and the religious functions are separable.

When you recruit or even have a policy to recruit faculty based on religion, it seems to me that you necessarily strike at the heart of that premise, even though the policy is partial, even though there are exceptions and it does not extend to the entire faculty recruitment practices at the school.

The third litmus paper test, Mr. Justice Stevens, relates to the granting of scholarships. I would say that where an institution such as the College of Notre Dame in this case bases scholarships at least in part upon religion, that, too, strikes at the heart of this Court's premise that the religious functions of an institution and the academic functions are severable.

The fact is that the College of Notre Dame here automatically awards scholarships to teachers of Catholic parochial schools and to members of the school, Sisters of Notre Dame, which is the sponsoring religious order.

I'd like to, if I may, focus upon one or two critical points of the Appellants' case here. It first relates to nature of the aid.

The lower court specifically held that the

difference between so-called general purpose grants, as are involved in this case, and special purpose grants, as were involved in Tilton versus Richardson, are constitutionally insignificant.

I would only point out that no prior case decided by this Court involved aid in such a broad form as is offered by the State of Maryland. In fact, even the aid which this Court has struck down is far more limited by its very nature than that aid permitted by the State of Maryland.

The basic distinction offered by this Court is that secular, neutral or non-ideological services, facilities and supplies may, under certain circumstances, be permissible.

However, aid which, at least potentially, involves the fostering, the danger of fostering religion, is not.

The distinction at bottom is between aid which is atmospherically indifferent on the score of religion -- in Professor Freund's words -- from aid which potentially fosters religion.

The Maryland aid, insofar as it may extend to virtually anything under the sun short of so-called "sectarian purposes"/to which the school wants to use the aid, is necessarily too broad.

Now, the resulting relationship is the third prong

of the entanglement analysis, the excessive entanglement analysis.

Basically, the teaching by this Court is that guarantees which are comprehensive and continuing will create an aura of excessive entanglement and so in this case, contrary to Tilton versus Richardson, you have annual appropriations and annual payments of the state to the church-related institution.

Contrary to Tilton versus Richardson, you have at least two reports, the pre-expenditure report and the post-expenditure report, submitted by the school to the church-related institution.

Contrary to Tilton, the state analyzes each of these reports each year to determine whether or not the expenditure was religious or secular.

Contrary to Tilton, the schools here have their expenditures subjected to annual audit.

Contrary --

QUESTION: Mr. Greenwald, would you agree -- or do you know whether in Maryland the annual reports of church-related schools are analyzed to see if they are teaching the proper amount of reading, writing, arithmetic, have certain hours and that sort of thing? Is that sort of an audit done?

MR. GREENWALD: Well --

QUESTION: For all private schools?

MR. GREENWALD: Information is furnished to the Maryland Council of Higher Education dealing with that sort of thing. I don't know if it specifically deals with the proper amount of reading, writing and arithmetic but --

QUESTION: Well, does Maryland have a certain minimum requirement as to what a private school must do to be a surrogate for the public school system?

MR. GREENWALD: In order to become accredited, yes, sir, they do and --

QUESTION: Well, some must, at least, try to determine whether they are teaching children to read.

MR. GREENWALD: Well, from the reports I read about Maryland schools, I am not so sure that they do but there are at least minimal standards which are observed by the state through the collection of information from these church-related institutions.

QUESTION: So the fact that there is a surveillance standing alone is not dispositive of these issues, is it?

MR. GREENWALD: No, not at all, but it is the degree of surveillance, your Honor, which, I submit, is dispositive of these issues.

The surveillance here, I submit, involves precisely those kinds of surveillance struck down in Lemon versus Kurtzman and those kinds of surveillance upon

which the Court in Tilton distinguished Lemon versus Kurzman.

In Tilton you have a one-time, single-purpose construction grant. This was an important cornerstone of the Court's decision. Here, under the Maryland aid, you have no such thing and that is what creates excessive entanglement.

QUESTION: What exactly is the form of audit that is performed? Does this involve simply examining the reports of the expenditures to see if, as reported, it reflected on the books or does it require some kind of surveillance at the institution itself by how many people and that sort of thing?

MR. GREENWALD: That is undefined, your Honor, both in the statute and --

QUESTION: But do we know anything? Does the record show what the practice has been?

MR. GREENWALD: Well, there has been no practice reported. There was, however, testimony -- and the lower court found that the audits would be quick and non-judgmental.

QUESTION: What does that mean?

MR. GREENWALD: Well, that is a good question. I submit that if an audit is non-judgmental it can't very well be very much good to enable the state to enforce its --

QUESTION: Now, what is the state organization that performs the audit?

MR. GREENWALD: Well, it performs at the behest of the Maryland Council of Higher Education, which, I believe, contacts the state auditors office to perform that function.

QUESTION: Well, is there an organization of so many people charged with the responsibility of performing these audits?

MR. GREENWALD: Well, I don't know the answer. I don't know specifically how many people would perform that. I do know that an analysis of sectarian as opposed to secular use would be made perpetually by the Council of Higher Education for the State of Maryland.

QUESTION: Well, is it fundamentally any different from the processes of surveillance for accreditation?

MR. GREENWALD: Yes, I think it is significantly different, your Honor, because here under this aid program, the state expressly analyzes religious use of aid funds as opposed to secular use and this is a rather involved sort of analysis. It is a continuing sort of analysis, both of which are diametrically opposed to the type of analyses which were required in Tilton versus Richardson.

QUESTION: And you suggest that in and of itself that constitutes impermissible entanglement?

MR. GREENWALD: No, sir. Again, entanglement is really an equation with three variables. I am contending that the cumulative effect of one, the character and purposes of the institution, two, the broad, broadest possible nature of the aid here, and three, the prophylactic measures which have to be taken in order to enforce the ban against sectarian use, together, cumulatively.

QUESTION: I think you suggested earlier that there has to be an annual legislative appropriation?

MR. GREENWALD: There is an annual appropriation, yes, sir.

QUESTION: Are you making any point of what that involves?

MR. GREENWALD: Well, that leads to the question of a so-called political entanglement. There is the potential for political entanglement. The record shows that at least one president of one institution here who is a Roman Catholic priest, has been on the political scene advocating greater state aid to these church-related and other private schools.

I'd like to close, if I may, since my --

QUESTION: Could I ask just one more question, Mr. Greenwald?

MR. GREENWALD: Yes, sir.

QUESTION: Does the record tell us whether there is a follow-up audit with respect to the 14 schools that are not church-related?

MR. GREENWALD: I don't think the record addresses it in those terms. However, the regulations which are applicable to both church-related and non-church-related schools provide for necessary follow-up including audit so I would say, an audit could be applied to these other schools.

QUESTION: It could be, or does the regulation contemplate that it will be?

MR. GREENWALD: The regulations don't mandate that there be an audit. They make it available. Funds are subject to audit.

In Tilton versus Richardson, this Court, for the first time, permitted payment of direct aid to church-related institutions. It did so under expressed narrow constraints and later cases have upheld the narrowness of these constraints.

Appellants would urge the Court not to effectively abandon these restraints because to do so would breach Jefferson's wall of separation and we submit would be an unconstitutional establishment of religion.

Thank you.

MR. CHIEF JUSTICE BURGER: Now, your clients were the moving parties, the Plaintiffs in this case.

MR. GREENWALD: That is correct, your Honor.

MR. CHIEF JUSTICE BURGER: So that on them rested the burden of making whatever record needs to be made to determine these issues. Is that not so?

MR. GREENWALD: That is correct. The Plaintiffs here have the burden of proof, one which I would submit, for purposes of this case, has been satisfied both by the decision of the court below and by the rather large trial record.

I'd like to reserve whatever time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Nilson.

ORAL ARGUMENT OF GEORGE A NILSON, ESQ.

ON BEHALF OF APPELLEES

MR. NILSON: Mr. Chief Justice and may it please the Court:

On behalf of the State of Maryland, I will speak to the history, the nature and the importance of the Maryland aid program at issue in this case.

In doing so, I will necessarily deal with the primary effect element of the establishment clause as well as the counterweight part of that test, the requirement

that the state avoid excessive entanglement with religion.

I will not be dealing in any depth with the particular details of the Tilton-type colleges involved in this case, but will leave that to Mr. Connolly, who represents all of the Appellee colleges here.

He will use the remaining thirty minutes of our time to discuss in depth the nature and character of these colleges and the importance of that character to the issues presented and to speak in further detail to the primary effect and entanglement issues.

The State of Maryland does not have a program of aid to private elementary and secondary schools. The grant program at issue here, as Mr. Greenwald has pointed out, involves aid to institutions of higher learning.

QUESTION: Do you think there is a fundamental difference at those levels?

MR. NILSON: I think there is at least a difference in the way church-related institutions that operate at those levels have dealt with the education of students in the two different environments and the way that that has evolved. I think there is also a significant difference wholly apart from the way the institutions have approached it because of the age and the maturity and the intellectual freedom, the sense of academic freedom on the part of the student bodies that I think makes the two

backgrounds and the two settings substantially different and I think that was explicitly recognized in this Court's plurality opinion in Tilton and later in the opinion in Hunt.

In Maryland, less than one-third of the institutions receiving aid under the program are church-related and have been found by the lower courts to conform closely to the colleges considered by this Court in Tilton versus Richardson.

The original version of our statute was passed by the state legislature in early 1971 in obvious response to the growing financial needs of private colleges and universities.

In establishing a grant program that was not limited to one particular type of aid, such as capital grants for bricks and mortar but rather, permitted flexibility, the state was codifying and funding a sound educational policy that remains extremely important to the state as well as the colleges today, a policy which recognizes the different institutions have different financial needs from year to year and that the state should respond to those needs as they evolve rather than locking all colleges in to a particular type of aid which may be artificially and unsoundly applied to satisfy contrived rather than real needs.

Shortly following the original enactment of Maryland's program in 1971, this Court decided Tilton v. Richardson, upholding the Federal Capital Facilities Grant Program there at issue but holding that any funds paid to such colleges were constitutionally required to be paid subject to an explicit and permanent prohibition against sectarian useage.

Maryland responded immediately by amending its statute to include such provisions and by conferring certain responsibilities and powers in connection with the administration of our program upon the Maryland Council for Higher Education, a body already charged with substantial responsibilities and information-gathering functions in the field of higher education.

As Mr. Greenwald has mentioned in his argument, the Establishment Clause in cases such as this breaks down into a three-part test:

The secular legislative purpose served by the statute about which there is no question.

The primary effect test.

And, thirdly, the requirement that the government avoid excessive entanglement with religion.

There is an inevitable tension between the primary effect and the excessive entanglement restrictions, a tension of which, we submit, the state and the Maryland Council are

very much aware.

In essence, it is necessary for the state to avoid the payment of aid to a sectarian institution or to assist a specifically-religious activity in an otherwise secular setting, to use the words of this Court in Hunt and to do so without involving itself in an excessively entangling relationship with religion.

Where a school is pervasively sectarian, as has generally been the case with the primary and secondary schools which have been before the Court, a guarantee of no advancement of religion is required and almost invariably, the difficulty of separating the secular from the sectarian both makes it impossible to avoid aiding religion and requires a quantum of oversight which is necessarily excessively entangling.

But where an institution such as the institutions involved in this case are not pervasively sectarian and are generally characterized by strong elements of academic freedom and discipline rather than religious indoctrination, limited sectarian activities can be separated from the dominant secular element and the problems of avoiding aid to the sectarian part are greatly simplified.

This, I would submit, is far more likely to occur at the college level.

QUESTION: How do you make that separation with

respect to funds which go into the general receipts of the college and may be used for the payroll, salaries of teachers?

MR. NILSON: For the payroll of teachers, the Maryland Council presently requires that any institution which uses funds for salaries identify the area of the institution in which those faculty members are working.

Following the district court opinion below -- and I might add that this has been applied not only with respect to these institutions but also with respect to all colleges throughout Maryland, no payments are permitted towards the salary of any faculty member who is in a religion or theology department.

If an institution is using state funds to pay teachers in its home economics department, that, as far as the Maryland Council is concerned, is perfectly permissible. But it would not be permissible for the institution to use funds for a teacher in the religion department.

QUESTION: How many of the faculty members are clerics who are being paid directly by state funds?

MR. NILSON: In terms of percentages of faculty members at these particular institutions who are clerics, the percentages vary. To my knowledge, and I put aside the first year of the program because as I indicated, during the first year of the program, there was no sectarian

useage prohibition.

Those of the church-related Appellee institutions, to my knowledge, have never -- and this is not in the record because there had been no actual experience under the current program but none of the Appellee institutions have ever used state monies to pay other than lay faculty is my understanding.

QUESTION: Does the record in this case -- has any examination been made as to whether or not any money has been paid to clerics or not?

MR. NILSON: Mr. Justice Marshall --

QUESTION: Or is there just a blank in the records?

MR. NILSON: -- I have to again reiterate that the posture in which this case was tried below, the statute had operated for a one-year period of time.

When it did not have a sectarian useage prohibition and the Maryland Council had not been given responsibility, the statute was significantly changed at the end of that one-year period.

This lawsuit was filed at the time that statutory change was pending, very shortly before it had been enacted by the General Assembly. When the lawsuit was filed, the state voluntarily determined to escrow all funds that were being awarded to these Appellee colleges and those funds were held in escrow pending the outcome of this case before

the district court.

As a consequence, at the time of the trial below, no money had been paid by the State of Maryland under this aid program to, as far as the record is concerned, any church-related college and certainly not to any of these colleges so that the record is simply silent on that question.

QUESTION: Well, is there anything in the order of the district court that would prevent all of this money going to clerics?

MR. NILSON: There is nothing to prevent all of this money going to clerics, but there is certainly something in the district court's opinion which is being followed by the state which would prevent this money from going to pay the salary of faculty members teaching in the religion and theology departments and that prohibition is an explicit part of the regulations which the council has since adopted.

QUESTION: If the entire faculty of the school of business administration, if there is such a thing for clerics, these monies, so far as the order of the lower court is concerned, could be used to pay their salaries , couldn't they?

MR. NILSON: That is absolutely correct. But I --

QUESTION: That now would be restrained by the

statute.

MR. NILSON: Pardon me?

QUESTION: That now would be subject to the restraint of the statute.

MR. NILSON: No, it would not be subject to the restraint of the statute, if -- certainly, based on the findings of the lower court, which is that these courses are not predominantly sectarian, are basically academic institutions, that there is nothing to indicate that courses anywhere outside of the religion or theology departments are taught in other than a purely academic fashion, I don't perceive that there would be any constitutional prohibition against the state paying the salary of a faculty member who happened to be teaching in the school of business administration.

As a practical matter, I can tell you that I don't believe the applications have been made but as far as I am concerned, that person is first and foremost, based on the findings of the District Court, a teacher, a faculty member who is teaching a subject in an academic manner.

QUESTION: You have told us, though, that none of these funds go to pay any part of the salary of any teacher who is also a member of the clergy.

MR. NILSON: Now, Mr. Chief Justice, what I said was that to my knowledge, no funds have been devoted to

that purpose. I don't believe that any applications -- and this is because the applications which have come in since the trial in this case --

QUESTION: Yes, but so far as the lower court order is concerned, as I understand you, except to the extent that there is a prohibition against paying the salaries of anyone teaching in the school of theology, any cleric teaching in the school of business administration or medical school or anything else could be paid with these funds.

Isn't that right?

MR. NILSON: That is correct, as far as the lower court's order is concerned.

QUESTION: Then could he be paid for holding prayers?

MR. NILSON: Well, he wouldn't be paid for holding prayers, Mr. Justice Marshall. He would be paid for teaching.

QUESTION: What if a clergyman runs for Congress. Do you think there is anything to prevent the Treasury from paying his salary as a Congressman?

MR. NILSON: Well, I can think of at least one Congressman who might be very disturbed at the present time if that were the case and I know that, for example, the State of Maryland has a provision in its Constitution which goes back many years which prohibited any minister or

clergyman from running and that provision was recently stricken down by the district court of Maryland as violating the Constitution.

And I think the answer is that absolutely, if a clergyman runs for Congress, that his salary can be paid, the same as any other Congressman.

QUESTION: Am I stating this correctly, as to what this law and the district court judgment permits and authorizes. Let's assume that every single teacher in all of these institutions in courses in theology and religion is, in fact, a lay person. Nonetheless, the law as construed by the district court does not permit the public subsidy of their salaries. Is that correct?

MR. NILSON: That is correct.

QUESTION: No matter if they are all lay people and on the other hand, let's assume that all of the faculty in all of the other areas and courses in these institutions, mathematics, biology, zoology, astronomy, home economics, foreign languages and English and history and the rest of it, are all clergymen or clergywomen.

This law and the court's decree permits public taxpayer subsidies of all their salaries, does it not?

MR. NILSON: That is correct so long as none of them are serving -- and this I am reading from the regulations -- "serve as a chaplain or director of the

campus ministry or administers or supervises any program of religious activities."

QUESTION: Right. Well, that's -- yes.

MR. NILSON: Right. If they are there teaching in the science department and they happen to be clerics, there is nothing in the district court's opinion that would specifically prohibit their salaries being paid.

QUESTION: Yes, that was my understanding.

QUESTION: On the basis of the district court opinion you referred to in Maryland, I assume you meant a federal district court, it would violate the First Amendment if there was a prohibition for the payment of salaries, would it not?

MR. NILSON: I think that would be a very, very strong argument. Again, these individuals are serving and are being paid as teachers and they are --

QUESTION: It is what they do rather than what they are, isn't it?

MR. NILSON: That is exactly correct. That is what they are being paid for. They are being paid for being teachers, not for being clerics. They simply happen to be clerics.

QUESTION: Yes.

QUESTION: Is it possible that payment to these teachers frees up other funds for paying the people who

teach religion?

MR. NILSON: That is always possible, Mr. Justice Stevens and it happens --

QUESTION: What is really the difference, whether they go in the general funds and are paid directly or indirectly?

MR. NILSON: Well, it is a difference which has been developed by this Court and articulated in Walz and Hunt versus McNair and many other cases.

QUESTION: Well, Walz didn't involve a subsidy, did it?

MR. NILSON: No, but the Court very clearly indicated in Walz and again reiterated in Hunt and has in other cases that the mere fact that one form of payment to a secular activity of a religious institution frees up other monies for that institution to be spent for other purposes which may be not --

QUESTION: Has it ever so held with respect to a general distribution of funds?

MR. NILSON: Pardon me.

QUESTION: Has it ever so held with respect to a general distribution of -- an unrestricted distribution of funds?

MR. NILSON: No, I don't think that this Court has ever indicated that the state or the Federal

Government should simply release money outright to a religious institution or to these colleges with no strings and just say, put it in your general funds.

QUESTION: What is the string here? What is the string here?

MR. NILSON: This grant here is a release, is a payment of funds which can be used for various purposes but which may not be used for sectarian purposes. It may not be used to build a chapel. It may not be used to maintain a chapel. It may not be used to pay the chaplain.

It may not, according to the district court, be used to pay the salaries of facutly members in the religion or theology department so it is a restricted grant program in that sense.

Now, a number of questions were asked earlier during Mr. Greenwald's presentation on the way in which the program is administered and I'd like to just touch briefly on that.

As Mr. Greenwald pointed out, following initial eligibility determinations -- and I might add that there have been some institutions disqualified on a degree basis otherwise for being primarily religious.

There is a pre and post expenditure affidavit requirement. These are filed under oath by the chief executive officer of the institution and I submit do not

involve the state in any excessive entanglements.

The council has large amounts of detail available to it from its other duties and the process of analyzing and scrutinizing these reports is not entangling.

The audits are not annual audits. As far as the record is concerned they have never been performed. The lower court found that they are quick. They can be done speedily, given the kind of fund accounting system that is set up.

QUESTION: Exactly what are they? Exactly what form do the audits take?

MR. NILSON: Well, the audits would only come into play if the state had reason to believe that a particular item may not have been spent for what it was described as being spent for.

QUESTION: As reported.

MR. NILSON: As reported.

QUESTION: I see.

MR. NILSON: What they would do first, and the testimony indicates, is that they might call upon the institution to have its own auditor provide a report.

If the state still wasn't satisfied then, and only then might they send a state auditor out to the institution.

QUESTION: And what would he do if he went to

the institution.

MR. NILSON: He would go out and he would analyze the special revenue fund account which is required by the regulations.

QUESTION: In other words, just the financial r ecords.

MR. NILSON: That is correct.

QUESTION: He wouldn't go in the classrooms or --

MR. NILSON: That is correct.

QUESTION: Could he go into classrooms?

MR. NILSON: Well, certainly, if the state were to send anybody out to the classrooms, we wouldn't send the state auditor. We could send somebody else. That, we of course, as your Honor indicated by the questions to Mr. Greenwald, we do have a certification and accreditation system. We do have periodic reviews of these institutions generally in other areas. That could be done.

The council is very much aware on a continuing basis of the nature of these institions and would be aware of any change in emphasis.

QUESTION: Well, then, you are telling us that Maryland does have a surveillance of primary and secondary schools to see whether they are teaching them a minimum number of hours of reading, writing and arithmetic, et cetera.

MR. NILSON: That is correct and we have to be kept aware of what is going on with the private colleges all the time because we have to plan for our public colleges so this information is available to us.

Again, before yielding to Mr. Connolly, I would like to reiterate that the state is attempting to administer a reasonable and realistic program. It has demonstrated sensitivity to the First Amendment issues in its day-to-day administration of the program in the adoption of the '72 amendment and in the adoption of the regulations.

We urge this Court to let the state continue to give money to these colleges and others.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nilson.

Mr. Connolly, we'll not ask you to gragment your argument with about one minute left. We'll let you begin at one o'clock.

[Whereupon, at 11:59 o'clock a.m., a recess was taken for luncheon until 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Connolly, you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL R. CONNOLLY, ESQ.

ON BEHALF OF APPELLEES

MR. CONNOLLY: Mr. Chief Justice and may it please the Court:

The role of colleges insofar as the future is concerned in this case are reduced now to three.

Now, as was disclosed this morning before lunch, Western Maryland College, which was the Methodist-church-related college settled. One of the four Catholic colleges is now in the process of liquidation so if we speak to the future, we have merely three Appellees, Loyola College of Baltimore, Mount Saint Mary's College of Emmitsburg, Maryland, Notre Dame of Maryland, which is predominantly a women's college in Baltimore.

If it please the Court, I think that the Plaintiffs case here has two main failures. One, his entire brief and largely his argument this morning except in response to questions of Mr. Justice Blackmun failed to distinguish between the type of school systems who are the beneficiaries of state aid.

This Court, in the last five years, has written opinions in eight cases with respect to governmental attempts

to provide aid to private school systems. In six of those cases, it has found aid in all its forms impermissible.

Every one of those cases showed as a fact that the beneficiaries of that aid were large parochial school systems which the discrict court in DiCenso found to be an integral part of the religious mission of the Catholic church and in Nyquist found that they practiced restrictions on admissions, restrictions on faculty hiring, that they were under the control of the governing bishop of the community.

These colleges are not. These are independent schools. They respond to no ecclesiastical authority. The evidence is clear with respect to this.

The second thing that the plaintiffs in this case do, is they largely ignore the very detailed findings of fact which were made in the district court.

This was not a case that comes to this Court on an abbreviated record. The plaintiffs used the full panoply of the discovery powers of the Federal Rules of Civil Procedure.

Hearings were conducted over a sixs-weeks period of time. Over 2,000 pages of testimony were taken. Proposed findings of fact were submitted. The district judge assigned to gather the facts published tentative findings of fact, heard arguments again, then made findings of fact which were

adopted by the three-judge court including the dissenter.

So we have had plenty of due process insofar as fact-finding is concerned and if Rule 52 of the Federal Rules of Civil Procedure have any meaning, I think it should mean that these findings should be respected on appeal unless found to be clearly erroneous and I think there has been no attempt to do that before this Court or in the briefs and, as Mr. Justice Brennan pointed out and Mr. Greenwald agreed with it, there was an obligation on the part of the Plaintiffs to carry their burden of proof.

I think it is instructive if we remember that this Court's plurality opinion, which I think has become the majority opinion in Hunt, developed several criteria for testing whether or not the schools which were the beneficiaries of the federal aid program in Tilton were pervasively sectarian or had a predominant secular mission.

And these, gentlemen, are the findings of the district court with respect to these colleges:

One, not only has there been no showing that religion slants the conduct of classes at the Defendants' institutions, this litigation has demonstrated the opposite to be true.

Two, none of these facts respecting prayer impairs the clear and convincing evidence that courses at each defendant institution are taught according to the academic

requirements intrinsic to the subject matter and the individual teacher's concepts of professional standards.

Three, there was "potent evidence," the Court's words, "of academic secularity" in the uncontroverted testimony of numerous members of the faculty of each defendant. They feel no religious pressures by anyone on their classroom presentation or their selection of texts and course materials.

Each defendant subscribes to the 1940 statement of principles on academic freedom of the American Association of University professors and each, obviously abides by it.

Four, while the district court did not make any finding as to the student attitude, there was no evidence to contradict the Tilton observation about the maturity and skepticism of the average college student.

Indeed, there was much testimony to support it. One of the professors of theology said, "The kind of questions, if you want to meet unbelievers, come and talk to my students."

Five, the Court said, "Thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion."

QUESTION: In context, Mr. Connolly, how would you interpret that response? Unbelievers in what this particular

professor's --

MR. CONNOLLY: Questioning.

QUESTION: -- theology was or unbelievers generally?

MR. CONNOLLY: Unbelievers generally, questioning everything. He was talking about how they have a response and it is a Socratic method that they use in which teacher poses proposition, student responds and he was saying that they question everything. They bring a healthy questioning attitude and skepticism to the class is what he was talking about, the context, and the record --

QUESTION: On the scholarship point, Mr. Connolly, didn't Mr. Greenwald say that Notre Dame had some kind of policy of giving the Roman Catholics --

MR. CONNOLLY: Yes, your Honor.

QUESTION: Is that true or false?

MR. CONNOLLY: Well, so far as it goes, it is true. Let me tell you about that.

QUESTION: Thank you.

MR. CONNOLLY: First of all, it is our position that state funds cannot be used for scholarships that fund -- scholarships that are awarded on a religious bias. What the evidence shows is that postulants of the teaching order and parochial school teachers are permitted to attend Notre Dame at a reduced rate. It is not an absolute scholarship, it is a tuition-forgiveness program.

Obviously, since that is a test that you be a parochial school teacher or you be a member of the sponsoring religious group, these state funds should not be used for that purpose and there is no evidence that that ever took place. The only school that ever gave scholarships was not Notre Dame of Maryland but was Loyola College and there is some confusion in the Plaintiffs' brief. If you read it too quickly, you think that the scholarship program is the scholarship program that favored members of the religious groups. That is not so.

Again, the district court said, "At no defendant was there such cominance on the faculty by one religious group that hiring bias would escape the attention of members of other religious groups. The faculty members impressed the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education."

If there were an effort to stack its faculty with members of a particular religious group, it could not have escaped the attention of the present faculty, who would have made complaint to the local chapter of the Association of University Professors.

Questions were asked this morning about the composition of the faculty. We cannot tell with respect to Mount Saint Mary's because Mount Saint Mary's keeps absolutely no records whatsoever that would identify the religion of

its faculty members.

Loyola faculty, of its full-time faculty,60 percent are Catholic. Of its part-time faculty, 50 percent are Catholic and the overall faculty average is 56 percent. It is in the same range, although I am not as familiar with the figures as respect to the other college, Notre Dame.

The Court continued, "The district court, with respect to these colleges, no aspect of the student conduct code at any defendant institution has any religious contents. None of the defendants require attendance at any religious exercise."

Finally,"at none of the defendants is religious indoctrination a substantial purpose or activity. While each maintains a chaplaincy program that serves to encourage spiritual development of the student -- which is admittedly a secondary objective of each defendant -- in none does this encouragement go beyond providing the opportunities or occasions for religious experience," a most important observation by the district court.

Because the Plaintiff's brief in this case is larded with references that the secondary objective of these schools is to provide religious encouragement and development to these students.

My friend neglects to add the qualifying language made by the district court, namely, that in no instance does

this go beyond making religious services available to the students at their willingness to attend.

Only in one respect, if the Court please, do the district court findings in this case depart from Tilton and that is with respect to the teaching of theology and religion. In the Tilton case, there was a stipulation which I think will be impossible to obtain in the future because of the prominence that the observation was given in the Court's opinion.

There was a stipulation that the theology courses at the four Connecticut colleges were taught as an academic discipline and not with the purpose of inculcating religious values. No such stipulation was obtained here.

Extensive evidence was taken with respect to it.

The district court said that it was unable to determine how theology was taught. That determination was based on two factors. He said he did not think it was legally permissible for him to make such a determination, perhaps referring to this Court's prior opinion in United States versus Ballard where this Court should not interfere with the theological views that are being expressed within various religious bodies.

He said he was also generally unable to make that determination.

For whatever reason we don't know but we -- why

he avoided making that finding. Clearly, he made a specific finding that he was not making a finding that it was taught in a sectarian manner.

But having, as many district judges do have, an ability to accommodate their judgment to the practical necessities of the time, this Court -- the fact-finding judge recommended and the three-judge court ordered that theology and religion courses be carved out of the state program.

In other words, it sustained the constitutionality of the state program providing that no funds were used to support the department of religion and theology.

Mr. Justice Rehnquist and Mr. Greenwald had a coloquy this morning about how theology can be taught academically. It may be a difficult question. We don't agree with the district court's finding in this respect but we can live with it. It certainly is a nice accommodation to the entanglement point. It obviates the necessity for any class monitors sitting in a class of religion or theology if you cut theology and the religion program out of the course, as was done in this instance.

The district court found, as a conclusory fact, that religious indoctrination is not a purpose of these institutions. Although each school has, as a secondary purpose, the encouragement of the spiritual development of

the students, at none of these schools does this encouragement go beyond providing opportunity for religious experience.

The religious programs at each school are separable from the secular programs and the latter are the only beneficiaries of state aid.

That led the district court immediately to the next point of the opinion, namely, the question of entanglement.

QUESTION: Before you get to that, Mr. Connolly, are you suggesting by your discussion of these findings and conclusions that were drawn from them that the secondary purpose of the colleges here is essentially the same or nearly the same as the service academies of the United States' Government, West Point, Annapolis and the others providing a chapel and chaplains?

MR. CONNOLLY: I certainly do, your Honor and I would hope that most of the private colleges of this country also have as a secondary objective improving the spiritual development of the students who attend those schools. The question, of course, is whether it is done in an indoctrinating way, whether these institutions become pervasively religious, nothing but teaching arms of a church. The district court -- excuse me --

QUESTION: Most of them have chaplains of all different faiths. They don't just have one.

MR. CONNOLLY: So do these schools, your Honor.

QUESTION: Isn't that right?

MR. CONNOLLY: Yes, your Honor. So do these schools.

QUESTION: Oh, they do?

MR. CONNOLLY: Yes.

QUESTION: Does the record show that?

MR. CONNOLLY: Yes, your Honor.

QUESTION: Thank you.

QUESTION: Mr. Connolly, just to --

MR. CONNOLLY: The majority -- to be honest about it, the majority, the great majority of them are Catholic.

QUESTION: Does Notre Dame have all kinds?

MR. CONNOLLY: I am not sure about Notre Dame.

QUESTION: It would have to change its name, wouldn't it?

MR. CONNOLLY: I don't think so. Loyola College, for example, has a jewish rabbi on its theology faculty and who counsels with jewish students. As a matter of fact, students of the rabbi's seminary --

QUESTION: I am just talking about Notre Dame that is in Baltimore. I know a little bit about Baltimore.

QUESTION: Mr. Connolly, the reference to West Point raised this question in my mind. Do you contend that these institutions are so secular in character that

the State of Maryland could pay 100 percent of the costs of running the institution?

MR. CONNOLLY: No, your Honor.

QUESTION: Why not?

MR. CONNOLLY: Because some of the activities, some of the funds of these schools are spent for frank religious activities. All of them have chapels.

QUESTION: That is what the Chief Justice's question has just suggested, that Annapolis, West Point and the Air Force Academy and other places --

MR. CONNOLLY: I don't want to argue that.

QUESTION: It is factually true.

MR. CONNOLLY: That is true and it may be that someone someday will bring a case, arguing that that is impermissible. That is not my case and I don't care to take that burden at the moment.

QUESTION: Does the record show how large the total budget of these schools is? To get about $100,000 a year from Maryland, I gather.

MR. CONNOLLY: No, your Honor, but we have a key. The formula, you see, for payment to these schools is 15 percent of what it costs the State of Maryland to keep a full-time attendee at a public school so perhaps the private colleges can be operated a little more cheaply than the state schools but that gives you at least a guide at

any rate.

I was arriving at the entanglement point. By virtue of those findings, the district court said, "Because of the nature of the recipient schools there is no necessity for state officials to investigate the conduct of particular classes or educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education."

Now, that, I think, is quite obvious because, you see, one of the reasons I think the Plaintiffs have so assiduously avoided talking about the college system against the parochial school system is, again, the language of the district court which said, "What would be impermissible in an institution staffed by members of a particular faith administratively controlled by a religious body and dedicated to the inculcation of particular faith may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit where academic freedom prevails and where courses are taught in accordance with the requirements of an academic discipline."

It is our submission, if the Court please, that despite the articulation by this Court of the three-part test to determine whether or not governmental aid programs may include among their beneficiaries church-related schools that all of them really reduce themselves to a single

one, what is the basic nature of the institution involved?

Obviously, as the questioning brought out this morning, there is a rather extensive relationship between state and schools, not only in the State of Maryland but, indeed, in every state. Each of these schools must pass accreditation procedures, both for the state and by other quasi-governmental bodies.

Indeed, the record shows in this very case that, in alluding to the prayer issue, that Saint Josephs College was actually monitored for its religious content by a state accreditation agency. It wanted to see whether the nursing school there was sufficiently professional to merit accreditation and they sat in the class and noticed no religious content in the subject matter that was taught.

At any rate, there is an extensive relationship that just goes on all the time between educational institutions and the state agencies.

There is absolutely nothing wrong with this if these institutions are educational and not religious.

As we read this Court's prior opinion, the excessive entanglement test is not to be applied just because an institution has some church connection. It is an interference with the religious aspects of a church-related institution.

All of us are obviously familiar with the

extensive use of Hill-Burton funds that go to the nation's hospitals, many of which are run by sectarian -- are sectarian in nature.

There is an ongoing relationship between state health authorities, state certifying authorities in that institution. It is not that the state has a contact with a religious institution, it is whether the state has a contact with a religious aspect of that institution and as long as you have institutions as these are, which are found to be secular, which are found to have a religious dichotomy to them where the religious aspects are separable and can be perceived to be separate, then the fact that the state has some oversight with respect to them is not entanglement. Likewise, when we --

QUESTION: Mr. Connolly, can I ask you another question?

MR. CONNOLLY: Certainly.

QUESTION: Is there any danger in a program like this that the university or the college will curtail its religious activity in order to be sure it is eligible for the state donation?

MR. CONNOLLY: I think not and I think if your Honor would read the testimony of the administrators and the faculty members at this school, you will see that they were churchmen and proud of it and they didn't attempt

at all to modify their positions.

And they made it very clear that whatever the perception was in the past, that no longer is there attempt to inculcate religious values in the academic aspects here.

QUESTION: Well, but that cuts the other way in answer to my question. If they are avoiding inculcating religious values in order to qualify for the funds, isn't that perhaps --

MR. CONNOLLY: I think -- no, I think you will find no inhibitions in this at all. As one example --

QUESTION: What you are saying is, these people run the schools precisely as they would run them were there no state programs.

MR. CONNOLLY: Yes, your Honor. I think there is one bad example, in all frankness --

QUESTION: The one that is settled.

MR. CONNOLLY: -- and that is the settlement.

QUESTION: Yes.

QUESTION: And that was what?

MR. CONNOLLY: That is the settlement that was made by Western --

QUESTION: Yes, I was going to ask whether --

QUESTION: That stipulation of settlement is in the Court's records and I invite the Court's attention to read it. I cannot imagine trustees entering that kind

of a stipulation, but they did. They turned over the administration of the school to the Plaintiffs and that is unfortunate. But they did it. But that is not a necessity, especially as long as this Court sits and can look at the record that was made in this Court and apply the principles that we say have already been articulated in the two cases.

When we come to the question of primary effect, again we see that the real test is the nature of the institution. Aid really is of two kinds. Some aid is frankly religious, a chapel, a chaplaincy program, religious books and tracts, these schools cannot use state money for that, but neither can Johns Hopkins or Hood or Washington College or the other schools.

They must account to the state and show the state that they are not using it for that purpose.

Other aid, however, becomes religious or assumes a religious coloration only by virtue of the environment in which it is placed and then when we look at the environment, if we see the environment is a predominantly secular one for the inculcation of religious values, it is not the purpose of the institution, then, it seems to me, that the aid then becomes neutral. My --

QUESTION: Mr. Connolly, did the plaintiff or did anyone in this case undertake to put anything in the record by way of either a contest or comparison with institutions

like American University which is frankly and openly sponsored by the Methodist Church but, from all I am aware of, is not the kind of religious institution as to which public money grants are barred. Is there anything put in the record to make these comparisons?

MR. CONNOLLY: There was a Dr. McGill, who was called as a witness by the Defendants, who is an expert educator. He is one of the officers of the American Association of Colleges who testified to the practice of private colleges throughout the country in conducting religious programs and conducting courses in religious studies and theology.

Interestingly enough, we found that the better class schools, if you would rate them on the Cass and Beerembohm scale of selectivity, that there is an absolute correlation, really, between the better schools and those that have religious studies and theology programs in them and he testified that the religious programs and the courses in theology and religious studies that they are taught at these schools did not differ at all from those of the great majority of American private colleges throughout the country.

This is a program that has bit of genius in it. Maryland has elected to give a general purpose grant program.

Of course, the grant is not general once it is

issued. The school must make application for it, must tell what it is for.

The chief executive officer must take an oath that he will use it in that way and then after it is received and expended he must take an oath that it was used in that way.

Maryland, I think,has done a better job than most. It has not left the selectivity of aid programs to the legislature. It has left it in terms of dialog, the ongoing dialog which takes place between the state agency, the Council on Higher Education and the school so that these programs can be flexible and can meet the needs of the individual schools.

The record does not show the state has been insensitive to administering this; we now have a set of written rules and regulations which have lately been filed with the Clerk by the Attorney General's Office. I commend it to your reading. You may see that these are simple rules, easy to administer.

One thing I think needs to be said with respect to audits. The schools are admonished to apply what is called "fund accounting."

Fund accounting is well-known to colleges and universities because colleges and universities for years have had to account for trust funds and for endowments.

They need to have funds earmarked for specific purposes.

The state admonishes these schools to treat the aid funds in the same way as endowment funds so that -- and to leave an audit trail with a readily identifiable audit can be shown as the purpose for which these funds were used.

We think this is a sensible program. It is starting. There has been no showing of abuse. We think it is responsive to the needs of these schools. It does not constitute an establishment of religion.

We ask that this Court give it a chance to work.

Thank you.

QUESTION: Mr. Connolly, what degrees are awarded by these three colleges?

MR. CONNOLLY: Loyola College gives -- is principally an undergraduate school. It does give doctorates, principally in education. It has a very large evening school that trains a number of teachers of the Baltimore Public School System for Master's degrees. It also gives degrees in what is called "special education," that is, studies for training of people dealing with deprived children.

Mount Saint Mary's is Master's degrees in the arts and sciences. I don't think they have any doctorate programs.

Notre Dame of Maryland is primarily an undergraduate school.

QUESTION: Does either one give a degree in divinity?

MR. CONNOLLY: No.

QUESTION: They do have --

MR. CONNOLLY: And there are no majors allowed in those subjects in any of these three schools.

QUESTION: Does the University of Maryland have a major in religion?

MR. CONNOLLY: I can't answer that.

QUESTION: Most universities do, don't they?

MR. CONNOLLY: I can't answer that. I think they do, most of them do. But none of them have a major in these -- none of these schools have a major in those subjects.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Connolly.

You have about one minute left, Mr. Greenwald.

REBUTTAL ARGUMENT OF LAWRENCE S. GREENWALD, ESQ.

MR. GREENWALD: Thank you, Mr. Chief Justice.

In that one minute, I'd like to respond to a question earlier asked by the Court. That is, the number of clergy in respective schools. I believe the record indicates that at Loyola, approximately 25 percent of the administration and faculty are clerics.

At Mount Saint Mary's, approximately 20 percent of the teaching faculty are clerics in the college and 80 percent in the Seminary.

Again, Mount Saint mary's College is a corporation operating both a seminary for the training of Roman Catholic priests and a liberal arts college.

In Notre Dame, the figure is 50 percent.

In Saint Joseph College, the figure is approximately two-thirds of the teaching faculty.

QUESTION: Mr. Greenwald --

MR. GREENWALD: Yes, sir.

QUESTION: -- what percentage of the population of the City of Baltimore is Catholic?

MR. GREENWALD: I can't answer that, your Honor. I don't know.

QUESTION: Would it be 25 percent?

MR. GREENWALD: I really don't know.

QUESTION: I'll ask the same question of the State of Maryland.

MR. GREENWALD: I don't know that, either, your Honor.

QUESTION: Well, if those percentages approximated some of the other percentages that have been presented here, might not that comparison have some significance?

MR. GREENWALD: Not in the context of the number

of clergy which belong to the faculty.

These percentages apply to clergy on the faculty, not to Catholics on the faculty, your Honor, and so --

QUESTION: Well, it certainly would have some significance as compared with the religious preferences of the student body, wouldn't it?

MR. GREENWALD: Yes, it would have that.

My time has expired.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:30 o'clock p.m., the case was submitted.]