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Financing Faith and Learning: Assessing the Constitutional Implications of Integrating Faith and Learning at the Church-Related College

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Introduction

The past decade has witnessed a growing scholarly interest in the secularization of American church-related higher education.[1] This scholarship has included not only explanations of why secularization has occurred, but also prescriptions for how it might be avoided by colleges that seek to retain a distinctive Christian identity. Much of the discussion has been dominated by academics who argue that the key problem for church-related higher education has been epistemological. In short, they argue that the adoption of an "atmospheric," "two-realms," or "two-spheres" view of knowledge (one that largely separates the religious and secular functions of the educational institution) is much less likely to sustain a vigorous Christian intellectual climate and, ultimately, a Christian institutional identity.[2] Instead they argue that an institution's religious identity will be better preserved if a distinctly Christian worldview were to inform if not permeate the institution's curricular activities. While this "integration of faith and learning" is not new

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[1] See, for example, Robert Benne, *Quality With Soul: How Six Premier Colleges and Universities Keep Faith with Their Religious Traditions* (Grand Rapids, Mich.: Eerdmans, 2001); James Tunstead Burtchaell, *The Dying of the Light: The Disengagement of Colleges and Universities from the Christian Chuches* (Grand Rapids, Mich.: Eerdmans, 2001); Philip Gleason, *Contending with Modernity: Catholic Higher Education in the Twentieth Century* (New York: Oxford University Press, 1995); Richard T. Hughes and William B. Adrian, eds. *Models for Christian Higher Education: Strategies for Success in the Twenty-First Century* (Grand Rapids: Eerdmans, 1997); George Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (Oxford: Oxford University Press, 1994); Douglas Sloan, *Faith and Knowledge: Mainline Protestantism and American Higher Education* (Louisville, Ky.: Westminster/John Knox Press, 1994).

[2] Michael Beaty, Todd Buras, and Larry Lyon, "Christian Higher Education: An Historical and Philosophical Perspective." *Perspectives in Religious Studies* (Summer 1997): 160-61; Sloan, *Faith and Knowledge*, 144.

to many evangelical Christian colleges associated with the Council of Christian Colleges and Universities[3], it has informed the recent discussions and policies of other church-related institutions as they have sought to counter the forces of secularization.[4]

The preponderance of the literature on this subject has addressed theological and philosophical issues related to secularization. Less attention has been given to the role of money, particularly the quest for what became essential government aid, in the ongoing development of church-related higher education. It may be argued, then, that in light of the constitutional prohibition of state subsidization of distinctly religious activities, the adoption of a "two-spheres" view of faith and learning (if not complete secularization) of church-related institutions has been hastened by the desire to receive state or federal funding as much as it has been by the winds intellectual change. As some schools seek to reverse the trend toward secularization and reassert their religious identity, particularly through an intentional integration of faith and learning, they will no doubt face a constitutional conflict. The key question this essay will address, then, is: In light of past U.S. Supreme Court decisions regarding the permissibility of government aid to religiously affiliated higher education, can a church-related school receive government financial assistance and embark upon a program of integrating faith and learning without violating the establishment clause of the First Amendment?

Central to this inquiry will be the ongoing status of the U.S. Supreme Court's "pervasively sectarian" doctrine. This doctrine holds that government aid that supports

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[3] For an overview of the revitalization of post-World War II evangelicalism and its impact on the Council of Christian Colleges and Universities, see James A. Patterson, *Shining Lights: A History of the Council for Christian Colleges and Universities* (Grand Rapids, Mich.: Baker Academic, 2001); perhaps the most influential work on the integration of faith and learning in evangelical Christian circles is Arthur Holmes's *The Idea of a Christian College* (Grand Rapids, Mich.: William B. Eerdmans Publishing Company, 1975).
[4]See, for example, Benne, *Quality With Soul*, 177-215; Stephen Haynes, ed. *Professing in the Postmodern Academy: Faculty and the Future of the Church-Related College* (Waco, Tex.: Baylor University Press, 2002).

the secular educational functions of religiously-affiliated institutions of higher education is permissible as long as the institution is not "pervasively sectarian." In a pervasively sectarian institution, however, the religious and secular aspects of the institution are so closely intertwined it would be impossible to provide funding without advancing the religious mission of the institution in violation of the First Amendment.[5]

Some church-related schools refuse to accept funds beyond student financial aid in order to retain their autonomy and to avoid constitutional conflicts.[6] For those that do accept more direct forms of aid, the pervasively sectarian doctrine creates a constitutional dilemma. On the one hand, institutions adopting a program of integration of faith and learning, with its emphasis on advancing a Christian worldview throughout the curricular and non-curricular programs of the institution, run the risk of becoming pervasively sectarian and inviting legitimate establishment clause challenges. On the other hand, the U.S. Supreme Court has typically upheld aid to church-related institutions of higher education and has been unwilling to declare a school pervasively sectarian. Moreover, in recent years a significant number of justices have declared their opposition to the pervasively sectarian doctrine and the no-aid interpretation of the establishment clause on which it rests. Instead they have suggested that the Court replace the traditional no-aid approach to church-state jurisprudence with an equal treatment or neutrality approach that would allow for more aid to flow from the state to religious institutions as long as the aid was distributed to religious and non-religious entities in a nondiscriminatory fashion.[7]

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[5] The Court's most fully developed pervasively sectarian criteria can be found in Justice Harry Blackmun's plurality opinion in *Roemer* v. *Board of Public Works* 426 U.S. 736 (1976).
[6] Wheaton College, Grove City, and Hillsdale are among the evangelical Christian schools that refuse to take government grants in order to maintain their institutional autonomy; Naomi Schaefer, "Vulnerable Under God: Could Religious Colleges Be the Next Institutions Under Legal Attack?" *American Enterprise* (2002): 4.
[7] See especially Justice Clarence Thomas's plurality opinion in *Mitchell v. Helms* 530 U.S. 793 (2000).

Consequently, the constitutionality of a church-related institution receiving government aid will not only depend upon the nature of the aid and the character of the school, but also the tenuous future of the pervasively sectarian doctrine.

"Two Spheres" and the Integration of Faith and Learning

In his study *Faith and Knowledge: Mainline Protestantism and American Higher Education*, Douglas Sloan argues that during the course of the 20th century, mainline Protestants adopted a "two-realm theory of truth" that divided knowledge between knowledge gained through science and empirical reason and knowledge gained through "faith, religious experience, morality, meaning and value." A product of modernity that privileged knowledge rooted in the "quantitative, the mechanical, and the instrumental," this two-spheres view of faith and knowledge would lead to the increasing irrelevance if not elimination of the "theological basis for the church's engagement with higher education."[8] Sloan, then, sees the relationship of faith and knowledge as a key to explaining the secularization of church-related higher education in the United States.

James Burtchaell, Robert Benne, George Marsden, and others have revealed that this tendency to bifurcate faith and knowledge at religious institutions of higher education was not unique to mainline Protestant institutions. They argue that even though many Evangelical and Catholic schools have retained a more vital religious identity than their mainline Protestant counterparts, the adoption by some of a two-spheres model of faith and learning will inevitably lead to an "epistemological crisis" as schools seek and

[8] Sloan, *Faith and Knowledge*, vii-x.

achieve greater academic prestige and cultural recognition.[9] In practice, the two-spheres view leads to an institution that sees its religious faith as a "value-added" quality to the educational experience. In other words, the academic realm of such a university is much like that of its secular counterpart, but is supplemented with a variety of extracurricular religious activities and events to address the spiritual needs of the students. This, many claim, "positions religious commitments poorly and vulnerably in the university setting" and inevitably leads to secularization.[10]

For some commentators, the prescription for this modernist dilemma is to view faith and learning as having a more organic relationship. Affirming the notion that "all truth is God's truth" these advocates assert that separating so-called secular and religious knowledge and pursuits is rooted in a false premise. While they recognize that relating issues of faith to all aspects of intellectual inquiry is not always neat and tidy (particularly in the sciences and mathematics), they claim that a Christian worldview compels the believer to assess all of her academic inquiry in light of the truths of the faith and the Christian intellectual tradition. According to Wheaton College philosopher Arthur Holmes: "The Christian college refuses to compartmentalize religion. It retains a unifying Christian worldview and brings it to bear in the understanding and participating in the various arts and sciences. . . . A Christian college does not exist to combine good education with a protective atmosphere, for Christians believe that the source of evil is

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[9] While crucial, neither Benne nor Marsden would argue that secularization of higher education was driven purely by epistemology. Both identify other sources such as private funding, key personalities, and governance. See Burtchaell, *Dying of the Light*, 819-51; Marsden, "The Soul of the American University," in George Marsden and Bradley J. Longfield, eds. *The Secularization of the Academy* (New York: Oxford University Press, 1992), 34.

[10] Michael Beaty and Larry Lyon, "Religion and Higher Education: A Case Study of Baylor University: A Preliminary Report for Lilly Endowment, Inc." (Waco, Tex.: Baylor University, 1995), 6-7.

ultimately within the heart, not without."[11] The implication of this position, of course, is that the adoption of an educational philosophy rooted in the integration of faith and learning would better protect the Christian institution from the deleterious effects of modern ways of knowing.

Implementation of an integrationist philosophy into a church-related university is one of three components that Robert Benne argues is essential for an institution to retain its religious distinctiveness. According to Benne, "Christianity's articulated account of reality," or what has often been called the Christian worldview, "provides the umbrella of meaning under which all facts of life and learning are gathered and interpreted."[12] A distinctive Christian ethos, for Benne, is likewise crucial. Such an ethos would include shared mores as well as opportunities for Christian practice and worship. Whether through the distinctive role of chapel or through lifestyle regulations, Christian colleges and universities must have and foster a pervasively Christian culture. Finally, Christian colleges must have administrators, staff, faculty, and students sympathetic with the college's mission. Faculty hiring in particular is crucial to Benne:

> If the Christian account is to be publicly relevant to the central task of the school—its education—then the right kind of faculty is indispensable. Faculty members will not only have to be adept at teaching, scholarship, and service, but also at a fourth category: institutional fit.[13]

Thus, the integration of faith and learning is not merely an intellectual exercise, but a pervasive philosophy of the church-related college. From personnel decisions to campus worship, to other opportunities for theological reflection and practice, the advancement of a Christian worldview becomes coterminous with the university itself.

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[11] Holmes, *The Idea of a Christian College*, 45.
[12] Benne, *Quality With Soul*, 6.
[13] Ibid., 191.

Aid to Church-Related Higher Education

While the integrationist philosophy has grown in popularity among some church-related institutions, so has their dependence upon public funding. The second half of the twentieth century witnessed a dramatic growth of the level of both federal and state programs of financial aid for college students. The federal government has become, through Pell Grants, Supplemental Educational Opportunity Grants, and various loan programs, the largest source of student financial aid and, with the rising costs of higher education, an absolutely essential source of funding for most colleges, including religiously-affiliated colleges and universities. As new forms of public support have become available to institutions of higher education, however, church-state conflicts have arisen.

In determining violations of the establishment clause the U.S. Supreme Court has traditionally made a clear distinction between the constitutionality of aid to elementary and secondary schools and aid to colleges and universities. The Court has been more willing to allow aid to flow from the federal government to religious colleges and universities than elementary and secondary schools because college students are perceived to be "less susceptible" to indoctrination, college courses tend to be less sectarian, and academic freedom prevails more readily at the collegiate level. Stephen Monsma has argued that the Court's greater willingness to uphold aid to church-related colleges and universities than elementary and secondary schools is rooted in two fundamental legal principles. First, the Court has found that the sacred and secular aspects of religiously based colleges are more separable and distinct than in elementary and secondary schools. Second, the Court has concluded that church-related elementary

and secondary schools are more likely to be "pervasively sectarian" than their higher education counterparts.[14] Moreover, federally funded student financial aid used at church-related colleges and universities has never been successfully challenged as a violation of the establishment clause.[15] While federal aid to students attending religiously affiliated colleges has not faced a serious constitutional challenge, other forms of more direct aid, such as federal or state funded construction grants or loans, have led to numerous court challenges over their permissibility.[16]

Tilton, *Roemer*, and the Pervasively Sectarian Test

The key test the U.S. Supreme Court has used to determine violations of the establishment clause in aid cases has been called the pervasively sectarian test. When weighing the constitutional implications of an aid program, the Court has frequently attempted to determine if these institutions "are not so pervasively religious that their secular activities cannot be separated from their sectarian ones."[17] The issue of religious indoctrination permeating the atmosphere of educational institutions goes back at least to the landmark case of *Lemon v. Kurtzman* in 1971.[18] Here the U.S. Supreme Court struck down a Pennsylvania statute that provided the "purchasing" of secular educational services from nonprofit elementary and secondary schools, including religiously affiliated schools. The decision in *Lemon* codified the controversial tripartite "Lemon Test" the Court would subsequently use in establishment clause cases. According to the Lemon

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[14] Stephen v. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, Md.: Rowman and Littlefield Publishers, Inc., 1996), 35-40.
[15] Fernand N. Dutile and Edward M. Gaffney, Jr. *State and Campus: State Regulation of Religiously-Affiliated Higher Education* (South Bend, Ind.: University of Notre Dame Press, 1984), 11.
[16] See also the Court's 2004 decision in *Locke* v. *Davey* 540 U.S. 712 upholding a Washington State constitutional ban on using state funded scholarship program toward the obtaining of a degree in "devotional theology."
[17] *Roemer* v. *Board of Public Works* 426 U.S. 736 (1976) at 755.
[18] *Lemon* v. *Kurtzman* 403 U.S. 602 (1971).

Test, for a statute to satisfy constitutional muster, it must have a secular purpose, a primary effect that neither advances nor inhibits religion, and may not foster an excessive entanglement between church and state. In holding the statute unconstitutional, the Court determined that the religious nature of the school would make it difficult if not impossible to ensure that state aid would not be going to support religious instruction or indoctrination. The "Handbook of School Regulations" governing one of the schools in question stated that "religious formation is not confined to formal courses; nor is it restricted to a single subject."[19] "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her own faith and operated to inculcate its tenets," the Court concluded, "will inevitably experience great difficulty in remaining religiously neutral."[20] The Court further held that to ensure tax funds were not going to subsidize religious instruction, "a comprehensive, discriminating, and continuing state surveillance" would result. This ongoing surveillance would lead to unconstitutional excessive entanglement between church and state.[21]

In subsequent cases involving church-related elementary and secondary schools the Court held that the provision of instructional materials, auxiliary services, and the retaining of public school teachers to assist in secular educational instruction on a part-time basis was unconstitutional. In *Meek v. Pittenger*, for example, the Court struck down several forms of direct aid because of the sectarian nature of the school.[22] Church

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[19] 403 U.S. 602 at 618.
[20] Ibid.
[21] Ibid. at 619-20. The excessive entanglement prong became a particularly stiff barrier to aid. According to the Lemon majority decision, even if the sacred and secular functions of the aid could be separated, the state would still have to engage in continuous surveillance of the institution to insure that no funds went to support religious indoctrination. See Monsma, *When Sacred and Secular Mix*, 32.
[22] "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent devoted to the inculcation of religious values and belief.

governance, required religious exercises, and religious preference in hiring and admissions were key factors in the Court's assessment of the sectarian nature of the schools.[23] Since religion permeated the atmosphere of these institutions, a "symbolic link between religion and government" would result leading to the unconstitutional advancement of religion.[24] Due to the pervasively sectarian nature of the schools, then, most any form of direct aid would run afoul of the establishment clause despite attempts to only utilize secular aid for secular instruction.

Lemon and her progeny provided the contours of the pervasively sectarian test. Yet it was more fully developed in several higher education decisions of the 1970s. In the 1971 case of *Tilton v. Richardson*, the U.S. Supreme Court upheld the constitutionality of federal grants used for the construction or renovation of buildings at four church-related colleges in Connecticut.[25] At issue was Title I of the Higher Education Facilities Act of 1963 that provided federal grants for construction of college facilities as long as the funded buildings were not used for sectarian instruction or worship. Moreover, a twenty-year period had to elapse before the building could be used for religious purposes.

Those challenging the constitutionality of the Act established a "composite profile" of the "typical sectarian" institution. Key characteristics included religious restrictions on hiring and admissions, compulsory attendance at religious exercises, obedience to church doctrine, and continual propagation of the faith. Noting the church

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Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. 349 (1975) at 366.

[23] See *Aguilar v. Felton* 473 U.S. 402 (1985) at 412.

[24] Monsma, *When Sacred and Secular Mix*, 33.

[25] The schools and facilities in question included Sacred Heart University (library); Annhurst College (music, drama, and arts building); Fairfield University (library and science building); Albertus Magnus College (language laboratory); see *Tilton* v. *Richardson* 403 U.S. 672 (1971) at 690.

sponsorship of the college and the fact that doctrine was taught in some of the classes at the university in question, the opponents of the funding argued that the Title I funds had the primary effect of advancing religion.[26]

The Supreme Court disagreed holding that the statute in question did not have a primary effect of advancing religion because it barred the religious instruction, worship, or symbols in the buildings funded by federal grants. The Court rejected the contention that religion "so permeated" the educational environment of the church-related college that one could not distinguish between the secular and religious education provided.[27] This was particularly true since "the schools were characterized by an atmosphere of academic freedom" where faculty taught according to the "academic requirements intrinsic in the subject matter."[28] Since the construction grants were to be used to build libraries, a language laboratory, and a science building, the Court further concluded that "there is no evidence that religion seeps into the use of those facilities."[29]

Despite its ruling in *Lemon*, the Court in *Tilton* drew a constitutional distinction between church-related colleges and their elementary and secondary counterparts. In particular, the Court argued that college students were less impressionable and subject to religious indoctrination. In addition, the Catholic colleges in question admitted non Catholic students, hired non-Catholic faculty, and taught religious courses other than those of the Catholic religion. Fundamentally, the Court determined that the religious schools that received the funds did not have religious indoctrination as a substantial purpose or activity. "In short," the court asserted, "the evidence shows institutions with

[26] 403 U.S. 672 at 682.
[27] Ibid. at 680.
[28] Ibid. at 681.
[29] Ibid.

admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."[30]

The threat of excessive entanglement was further diminished by the "nonideological character of the aid." Unlike the instructional subsidies in *Lemon*, the aid in *Tilton* was a "one-time, single-purpose construction grant" that mitigated against the need for an ongoing or continual oversight by the government.[31] At the same time, the Court struck down the twenty-year time limit for the restricted use of the facilities finding the possible future use of the buildings for religious purposes problematic.

In his dissenting opinion, Justice William O. Douglas challenged the majority's arguments that distinguished *Tilton* from *Lemon*. For Douglas, the grants represented a direct subsidy from the state to a religious institution contrary to the no-aid principle established in the landmark establishment clause case *Everson v. Board of Education*.[32] Douglas further rejected the distinctions the majority sought to make between church-related higher and lower educational institutions. Significantly, Douglas argued that at church-related schools religious and secular teaching are "enmeshed" and that they are "unitary institutions with subtle blending of sectarian and secular instruction." Consequently, continual surveillance by the state would necessarily result.[33]

Two years after *Tilton*, the Court upheld the South Carolina Educational Facilities Act that authorized tax-exempt revenue bonds to be issued to assist in financing of college facilities. While the Act did not exclude religiously affiliated institutions, it expressly prohibited the use of financed facilities for sectarian purposes. At the center of

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[30] 403 U.S. 672 at 687.
[31] Ibid. at 688.
[32] 330 U.S. 1 (1947).
[33] 403 U.S. 672 at 693-94.

the legal dispute was the Baptist College at Charleston which had requested nearly $2 million dollars for a variety of capital projects. Basing its decision on the majority opinion in the *Tilton* case, the U.S. Supreme Court upheld the Baptist college's use of the bonds. Despite the close denominational control of the college, the Court determined that the school was not pervasively sectarian due to the fact non-Baptists served on the faculty and that there was not a religious requirement for admission to the school. The Baptist College at Charleston was comparable to the Catholic colleges in *Tilton* leading the Court to conclude that "there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education."[34]

The Court's most extensive effort at defining a pervasively sectarian institution came in the 1976 case of *Roemer v. Board of Public Works*.[35] Here the state of Maryland authorized payments of non-categorical grants to qualifying institutions of higher education provided the money not be used for sectarian purposes. Institutions that exclusively awarded theological degrees were not eligible to receive funds through the program as well. Administrators at the recipient schools were required to file annual reports attesting to the secular use of the funds. After five church related institutions of higher education received approximately $525,000 from the program, a group of Maryland taxpayers challenged the constitutionality of the Maryland program stating that the limited regulation of the non-stipulated funds violated the Establishment Clause of the First Amendment.[36]

Justice Harry Blackmun wrote the plurality opinion of the Court upholding the Maryland program. "To answer the question whether an institution is so 'pervasively

[34] *Hunt* v. *McNair* 413 U.S. 734 (1973) at 744.
[35] 426 U.S. 736 (1976).
[36] Ibid. at 742-44.

sectarian' that it may not receive direct state aid of any kind," Blackmun opined, "it is necessary to paint a general picture of the institution, composed of many elements." The key elements on which the plurality relied in determining that the Catholic colleges in question were not pervasively sectarian were: a) the colleges enjoyed a significant amount of institutional autonomy from the Catholic church, b) religious indoctrination was not a primary purpose of any of the institutions because attendance at religious exercises was not required; c) while mandatory religion and theology courses were taught by Roman Catholic clergy, they were supplementary to a broader liberal arts curriculum that was governed by the canons of academic freedom; d)classroom prayers were practiced in only a small percentage of classes and were not officially sanctioned; e)faculty hiring decisions, outside of the religion department, were not made on a religious basis and student admissions were not religiously discriminatory as well. As a result, Blackmun concluded that the religious functions of the school can be sufficiently distinguished from the secular ones. In fact, the schools claimed on their own behalf that spiritual concerns were merely a "secondary objective."[37]

Admitting that the question of excessive entanglement between church and state was a difficult one in this case, particularly since the aid was less restricted than in *Tilton*, the Court nevertheless concluded that the nature of the institutions receiving the aid mitigated against the need for ongoing and pervasive surveillance from the state. Relying on the District Court's findings, the plurality asserted that the colleges in question performed "essentially secular educational functions." As a result, "there is no danger, or at least only a substantially reduced danger, than an ostensibly secular activity—the study

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[37] Ibid. at 755-59.

of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance."[38]

<u>"Two Spheres" and the Pervasively Sectarian Test</u>

Despite the pervasively sectarian test's creation in the 1970s, the Court has shown an unwillingness to declare a church-related college or university to be pervasively sectarian. This is in part due to the fact that the Court has been willing to accept the notion that the sacred and secular aspects of a religious college were more distinct and separable than at a church-related K-12 school. It could also be argued that the two-spheres view of faith and learning provided for some schools a satisfactory way of retaining their church ties, traditional governance, and Christian missions without running afoul of the pervasively sectarian test. It has been suggested that the Baptist-affiliated Baylor University in Waco, Texas, for example, had implicitly adopted a "two-spheres" understanding of faith and learning since its origins in the nineteenth century. In the early twentieth century this two-spheres approach was explicitly advocated as a defense of the university's existence in light of the growth and competition from state universities. According to Michael Beaty, S. P. Brooks, Baylor's president during the first decades of the twentieth century, contended that Baylor "served two independently defined yet equally important goals." Baylor's academic pursuits, what Brooks called the "material sphere" were essentially no different than what occurred at state universities. However, there was a spiritual dimension to the student's experience that was cultivated

[38] Ibid. at 762-64.

not in the classroom, but in extracurricular activities such as chapel, Bible study, and prayer sessions.[39]

This understanding of the relationship of faith and learning would continue to be advocated by Baylor leaders. In the 1960s, Baylor President Abner McCall found himself at odds with the state Baptist convention when he argued that Baylor should be free to accept new forms of public aid such as state or federal loans. Many pastors in the state believed that the acceptance of such aid would violate the long held Baptist principle of separation of church and state. McCall, known for such quips as "there is no such thing as Christian calculus," argued that Baylor's future depended upon acceptance of state and federal funds in light of the growing costs of higher education. For McCall, the church-state breach was minimal as the grants and loans were available for non-religious aspects of the academic enterprise. Whether McCall's embrace of a two-spheres view of faith and learning was a conscious strategy to justify public funds is uncertain. Yet his most vocal critic among Baptists in Texas, E. S. James editor of the *Baptist Standard*, decried the educational philosophy that justified such aid. In a 26 June 1967 editorial, E. S. James declared: "If any part of a Baptist school is not thoroughly Christian, it has no right to expect Baptist support. If every part is altogether Christian, it has no right to expect compulsory support by non-Baptists."[40]

McCall lost the initial battle over government grants and loans, but as the university has grown in size, complexity, and independence, its contact with and support

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[39] Michael Beaty and Larry Lyon, "Religion and Higher Education: A Case Study of Baylor: A Preliminary Report Prepared for the Lilly Endowment, Inc.," 6. (Published online at www3@baylor.edu/~MichaelBeaty/Lilly _Report.html)

[40] See Leon McBeth Texas Baptists: A Sesquicentennial History (Dallas, Tex.: Baptistway Press, 1998), 312-316; John W. Storey, Texas Baptist Leadership and Social Christianity, 1900-1980 (College Station, Tex.: Texas A&M University Press, 1986), 210-212; and J. David Holcomb, "Texas Baptists and Church-State Issues in the 1960s: The Debate over Aid to Baptist Colleges and Universities," *Journal of Texas Baptist History* (forthcoming).

from the state has increased as well. Today, for example, Baylor receives millions of dollars in state and federal funds.[41] Somewhat paradoxically, the historic "two-spheres" approach to faith and learning has been challenged in recent years by a recent administration that sought to simultaneously transform Baylor into a top-tier research university while becoming more intentional about her Christian identity. These goals have been articulated in the school's "Vision 2012" strategic plan. To that end, the university has sought to bring in top-flight scholars who are also committed and orthodox Christians who seek to impart a Christian worldview in their pedagogy and research. This attempt to transform the university from a "two-spheres" to an integration model has not surprisingly ignited a firestorm at Baylor.[42] Yet Baylor's actions are not unique, particularly among evangelical Christian colleges and universities.

These trends in funding and philosophy at church-related colleges raise a variety of constitutional questions in the least. If, as one integrationist proponent argued, preservation of a church-related school's religious identity is necessarily tied to a claim that "all scholarship, all invention, all discovery, all exploration which is truth—is God's truth,"[43] and that intentional hiring of Christians who are not merely orthodox but bring a particular Christian worldview to bear on their subjects are necessary for a school to retain its religious identity, would not such claims necessarily lead to the creation of a pervasively sectarian institution as characterized by the Court in *Roemer*?

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[41] These include state and federal funds for research grants, sponsored programs, contracted services, and occasional equipment and infrastructure grants.

[42] See Robert Benne, "Crisis of Identity: A Clash Over Faith and Learning," *Christian Century* (27 June 2004): 22-26.

[43] David Dockery, "A Call to Serious Christian Scholarship," Council for Christian Colleges and Universities. (Published online at www.cccu.org/resourcecenter).

The Demise of the Pervasively Sectarian Test and the Rise of Neutrality

The second-half of the twentieth century witnessed many colleges and universities loosening their denominational ties or changing their missions in part to receive such funding and/or to avoid costly litigation despite the Court's unwillingness to strike down most forms of aid. According to Kent Weeks: "The secularization of mainline colleges and restructuring of organizational and governance systems by Catholic universities during the last thirty years of the twentieth century created a more favorable climate for public funds and diminished the likelihood of a successful constitutional attack on these institutions' receipt of public benefits."[44] Even Jerry Falwell's Liberty University made policy adjustments in light of its desire to receive $60,000,000 in tax-exempt municipal bonds to refinance its debts. A legal challenge was raised to its request due to the pervasively sectarian nature of the school. Consequently, Liberty eliminated chapel requirements, diluted the references to its religious mission in university publications, relaxed religious requirements for admissions and eliminated some of the required religion courses from its curriculum.[45]

While many colleges and universities have loosened their religious ties to avoid constitutional conflicts, the Court in the last two decades has moved toward a more accommodationist approach to aid cases. The Lemon Test, particularly its excessive entanglement prong that proved to be a key barrier to state aid to religious institutions in the past, has largely been replaced by what has been called a neutrality or equal treatment test. The neutrality test essentially holds that public funding of religious institutions is

[44] Kent Weeks, "State and Local Issues," in Paul J. Dovre, ed. *The Future of Religious Colleges* (Grand Rapids, Mich.: William B. Eerdmans Publishing Company, 2002), 333.
[45] Ralph Mawdsley, "Government Aid and Regulation of Religious Colleges and Universities," in Thomas C. Hunt and James C. Carper *Religious Higher Education in the United States: A Source Book* (New York: Garland, 1996), 6-7.

constitutionally satisfactory as long as "neutral criteria" are used in determining eligibility for the aid. For instance, in *Witters v. Washington Department of Services for the Blind*, the Court ruled that a visually impaired person could not be denied a state vocational rehabilitation grant because he was studying at a Bible college with the ultimate goal of serving in the ministry. Utilizing the neutrality theory, the Court held that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of individuals."[46] Nearly a decade later the Court ruled five-to-four that the University of Virginia's refusal to fund a Christian student publication violated the students' freedom of speech.[47] At the same time, the Court argued that funding of such a publication would not violate the establishment clause. Here again the neutral nature of the criteria used to distribute the aid trumped any establishment clause concerns raised by the religious nature of a particular recipient. "We have held that the guarantee of neutrality is respected, not offended, when the government following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[48]

Following the trend of these higher education cases, the Court has utilized the neutrality test to allow direct aid at the elementary and secondary level as well. For instance, in *Agostini v. Felton*,[49] the court specifically overturned its 1985 decisions in *Aguilar v. Felton* and *Grand Rapids v. Ball*. In upholding the provision of part-time public education teachers and other instructional aid to parochial schools, the Court

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[46] *Witters v. Washington Department of Services for the Blind* 474 U.S. 481 (1986) at 487.
[47] *Rosenberger v. The University of Virginia* 515 U.S. 819 (1995).
[48]Ibid. at 839.
[49] *Agostini* v. *Felton* 521 U.S. 203 (1997).

concluded that "we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid."[50]

Perhaps the most significant blow to the pervasively sectarian test came in the 2000 decision in *Mitchell v. Helms*.[51] Here the Court upheld a federally funded aid program in which state and local agencies purchased educational materials and equipment for public and private elementary and secondary (including religious) schools. While the vote of the Court was six-to-three, there was no majority opinion as Justices Sandra Day O'Connor wrote a separate concurring opinion joined by justice Stephen Breyer. Nonetheless, the plurality opinion emphasized the "neutrality-of-aid" doctrine in addressing whether governmental aid to religious schools necessarily leads to religious indoctrination attributable to the state. At the same time, the plurality attacked the pervasively sectarian test and called for its abandonment by the Court. Since the "religious nature of the recipient should not matter to the constitutional analysis," the pervasively sectarian test led to the "offensive . . . trolling through a person's or institution's religious beliefs." Moreover, the plurality asserted that the pervasively sectarian test conflicted with other decisions that banned discrimination in the distribution of public benefits based upon religious status or sincerity." Consequently, the Court concluded that "nothing in the establishment clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs. . . This doctrine, born of bigotry, should be buried now."[52]

Justices O'Connor and Breyer concurred in the holding of the Court but were not willing to accept that neutrality alone was sufficient to satisfy establishment clause

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[50] Ibid. at 225.
[51] *Mitchell* v. *Helms* 530 U.S. 793 (2000).
[52] Ibid. at 810-19.

concerns in aid cases. Rather, neutrality was one of several factors that the Court should consider as was the ability to divert funds to religious purposes. While O'Connor avoided calling for the burial of the pervasively sectarian test, she too admitted that its presumption of religious inculcation or indoctrination in religious schools had become problematic for establishment clause cases. Instead, O'Connor said the emphasis should be on whether aid has been actually diverted to religious purposes leading to the unconstitutional advancement of religion.[53]

<u>*Locke v. Dave*y and the State Constitutional Question</u>

Mitchell v. Helms essentially overturned several prior cases that had ruled unconstitutional aid to parochial schools. If under the neutrality theory even more forms of direct aid to elementary and secondary church-related schools were being upheld, then surely the death knell had been sounded for the pervasively sectarian test at the collegiate level. Yet, as the recent decision in *Locke v. Davey* [54]suggests, religious schools may find their state constitutions more prohibitive of funds than the current federal Court's interpretation of the establishment clause. The *Locke v. Davey* case involved a Washington State scholarship program that was established to assist academically gifted students with higher education expenses. The regulations of the scholarship program, however, prohibited funds to be used toward the obtaining of a "devotional theology" degree. This was stipulated in light of the Washington State constitution's prohibition of even indirect funding of religious instruction. Joshua Davey, a student at the Assembly of God related Northwest College, was awarded a "Promise Scholarship," but was

[53] 530 U.S. 793 at 857-58l; the neutrality theory was advanced even more clearly two-years later in the decision of *Zelman* v. *Simmons-Harris* 536 U.S. 639 (2002). Here the Court upheld a Cleveland educational voucher program arguing that it offered assistance to a broad class of individuals without respect to religion and that both religious and non-religious schools could participate.
[54] Locke v. Davey 540 U.S. 712 (2004)

subsequently told he could not use it to pursue a degree in pastoral ministries. While not disputing that the pastoral ministries degree was "devotional," Davey filed suit arguing that it violated his free exercise rights since the law was not facially neutral with regard to religion.

Writing for a six-member majority, Chief Justice Rehnquist rejected Davey's claim that his free exercise rights were violated. According to Rehnquist, the case involved a "play in the joints" between the two religion clauses in that it "concerns a state action that is permitted by the establishment clause but not required by the free exercise clause." Affirming the Court's previous decisions upholding indirect aid to religious institutions, particularly when the "link between government funds and religious training is broken by the private choice of recipients," Rehnquist conceded that Washington could allow scholarship funds to go to the study of devotional theology. However, he concluded that the free exercise clause did not require the state to do so in light of its own constitutional prohibitions.[55]

Locke v. Davey offers a mixed bag for the central question of this paper. On the one hand, a state may very well restrict the type of aid, both direct and indirect, that goes to religious institutions. On the other hand, the decision affirms that indirect aid may go to pervasively sectarian colleges. According to the majority, Northwest College was clearly a pervasively sectarian school. Yet, theoretically, Davey could have used the Promise Scholarship there if he had chosen a course of study other than pastoral ministries. While Washington's constitution would no doubt prohibit more direct forms of aid, such as was in question in *Tilton* and *Roemer*, the Court's current philosophy

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[55] Ibid. at 712-15.

suggests that such aid would not be prohibited under the establishment clause of the First Amendment.

Indicative of this interpretation was a U.S. Fourth Circuit decision in 2001 involving the Seventh-day Adventist affiliated Columbia Union College in Maryland. Columbia Union had been denied a grant from the state's Sellinger Program that provided public aid to accredited private colleges in the state as long as the money was not used for sectarian purposes. Despite the fact that several Roman Catholic schools had received funds, Columbia Union's request was denied as the Maryland Higher Education Commission determined that the school was pervasively sectarian. Columbia Union filed suit challenging the Commission's decision. The Fourth Circuit ruled in favor of Columbia Union arguing that the school was not pervasively sectarian. It further declared that since the aid was dispersed based upon neutral criteria, "the government risks discriminating against a class of citizens solely because of faith" if it were to deny the aid to Columbia Union.[56]

The appellate court's decision in the Columbia Union case is a detailed analysis of the pervasively sectarian test as it has been applied in higher education cases. According to the decision, Columbia Union was first denied Sellinger Funds in 1990, but was denied funding again in 1992 despite the fact that it satisfied the six criteria laid out by the state for eligibility.[57] In 1995, Columbia Union requested reconsideration in light of the U.S. Supreme Court's greater emphasis on neutrality in aid cases. Nonetheless, the

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[56] *Columbia Union College v. John J. Oliver*, 254 F. 3d 496 (2001) at 510.

[57] The state required that: 1)The college must be a non-profit college or university established in the state of Maryland prior to July 1, 1970. 2) The institution must be approved by the Maryland Higher Education Commission. 3) The institution must be accredited. 4) The institution must have awarded the associate of arts or baccalaureate degrees to at least one graduating class. 5) The college must maintain one or more programs leading to such degrees other than seminarian or theological programs. 6) The institution must submit each new program or major modification of an existing program to the Commission for its approval; Ibid. at 499.

Commission determined that Columbia Union's "nature and practices" had not changed substantially and denied the funds again in 1996. Columbia Union's initial legal challenge was a losing effort in the District Court, but the Fourth Circuit remanded the case in order for the pervasively sectarian nature of the college to be investigated further.[58]

After holding a bench trial and reviewing thousands of pages of evidence, the District Court ruled that Columbia Union was not pervasively sectarian. Relying upon the *Roemer* precedent, the court looked to four key criteria in determining the religious nature of the college. First, while mandatory worship was a practice at the college, the policy only applied to a minority of the students. Second, in reviewing course syllabi, catalogs, and other documents, the court determined that the primary purpose of the curriculum was not religious indoctrination. Third, while a preference was given to Seventh-day Adventists in admissions and hiring, this factor alone did not rise to the level of making Columbia Union a pervasively sectarian institution. Fourth, the denominational control over the governance of the institution did not meet the pervasively sectarian threshold.[59]

In affirming the district court's findings, the fourth circuit reasserted the fact that the U.S. Supreme Court had never found a college to be pervasively sectarian. In looking back at the *Tilton*, *Roemer*, and *Hunt* cases, the court suggested that the colleges in question were similar in many ways to Columbia Union. In *Tilton* and *Roemer*, for example, the Catholic Colleges revealed a preference for Catholics in hiring and admission, there were certain religious restrictions on the curriculum, and there were

[58] Ibid.
[59] Ibid. at 508.

required theology classes. Likewise in *Hunt*, the South Carolina Baptist Convention closely governed the institution and the "advancement of a particular religion" was a purpose of the Baptist College at Charleston. Thus, the court concluded that "looking at all the evidence, we fail to see any disqualifying differences between Columbia Union and the colleges in *Roemer*, *Hunt* and *Tilton*.[60]

Despite this assessment of the pervasively sectarian test, the circuit court concluded that Columbia Union was entitled to the Sellinger funds without having to consider the pervasively sectarian nature of the school. Utilizing the first two prongs of the Lemon Test, the court ruled that the secular purpose of the Sellinger program is clear and that the neutral criteria used in distributing the aid mitigated against the unconstitutional advancement of religion. Further arguments for constitutionality included the safeguards used to insure funds were not being diverted for religious purposes and that the funds were going to institutions of higher education rather than secondary schools. Thus, the court concluded that "Columbia Union's receipts of Sellinger funds is not only consistent with the 'neutrality plus' formula of Justice O'Connor's concurrence, it is a stronger case than *Mitchell* due to the fact that Columbia Union is a college."[61]

Integration, Neutrality, and the Church-Related College

As stated above, the trends on the Court seemingly bode well for proponents of the integration of faith and learning who also seek government funding for their institutions. With the pervasively sectarian test virtually laid to rest and at least a plurality of the nation's highest court accepting the direct funding of religious institutions

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[60] 254 F. 3rd 496 at 510.
[61] Ibid. at 507.

(provided the aid was based upon neutral criteria), it would seem that a church-related college could enhance its religious distinctiveness while receiving grants, loans, and other forms of state aid. The rationale for this development is that now religious institutions will be treated equally with their secular counterparts and, with barriers to public aid removed, will be able to flourish economically without having to become more secular.

Such optimism may be challenged in a variety of ways. First, the emergence of the neutrality test notwithstanding, a slim majority of the Court remains opposed to direct funding of religious activities as inconsistent with the fundamental principles of the establishment clause. In her *Mitchell v. Helms* concurring opinion, for example, Justice O'Connor argued that a neutral aid program may allow for the diverting of funds to religious purposes. This, according to O'Connor, could not be reconciled with the prohibition against the advancement of religion. Accordingly, O'Connor would approve of indirect and direct funds from a neutral state or federal program going to church-related institutions as long as there were sufficient safeguards that the funds would not be diverted to religious activities. O'Connor's position, however, rests upon the notion that the sacred and secular functions of religious institutions can be distinguished.[62] For that matter, the sacred/secular distinction proved crucial in upholding funding in the *Tilton*, *Hunt*, and *Roemer* cases as well. The problem lies in the fact the integrationist philosophy makes the sacred/secular distinction largely irrelevant.[63] If faith concerns and the Christian worldview permeate all aspects of the academic enterprise, then schools

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[62] It is uncertain if this concern regarding the diverting of funds from secular to religious functions will be shared by either the new Chief Justice John Roberts or Justice O'Connor's replacement, Judge Samuel A. Alito, Jr.

[63] For example, the Gordon College website declares that "Almost all Christian colleges put strong emphasis on behavioral expectations, chapel attendance, prayer before classes, etc. Gordon goes beyond this. Every professor integrates Christian thought and assumptions into classroom study."

adopting the integrationist philosophy that receive aid may find themselves vulnerable to constitutional challenge even under the neutrality test.

Second, as new and increasing funds find their way into the hands of church-related colleges and universities, conflicts over the accompanying federal regulations will no doubt follow. While a detailed assessment of federal regulations of church-related colleges is beyond the scope of this paper, there is no doubt that conflicts over religious discrimination in hiring in taxpayer- supported institutions, for example, will arise. Challenges will be raised over a pervasively sectarian or integrationist institution's exemptions from anti-discrimination laws while it receives government largesse.

Third, the ability to discriminate on the basis of religion in hiring (seen as crucial for a school wanting to integrate faith and learning) cuts at the fundamental rationale of the neutrality or equal treatment doctrine itself. As Alan Brownstein has argued in his analysis of Charitable Choice legislation: "They (advocates of aid) insist on 'equal' opportunities for funding on the one hand while providing for 'unequal' rights to discriminate and 'unequal' immunity from regulation on the other."[64] Such a claim no doubt speaks to the heart of the policies governing hiring at church-related colleges as well.

This leads to a fourth and final contention that the move toward integration of faith and learning while simultaneously loosening the government's purse strings may unintentionally lead to greater secularization of these institutions. As aid becomes more available, the insatiable desire for funding will outstrip the desire for sustaining an institution's religious intensity—especially at institutions seeking greater academic

[64] Alan Brownstein, "Constitutional Questions About Charitable Choice," in Derek Davis and Barry Hankins, eds. *Welfare Reform and Faith-Based Organizations* (Waco, Tex.: J.M. Dawson Institute of Church-State Studies, 1999), 246.

prestige and notoriety. Moreover, history has proven that government funding unalterably leads to dependence and loss of religious vitality. "Religion with its hand out . . . will acquiesce to government requirements in order to insure its continued funding," Derek Davis has opined, "and it will become . . . more secular in its ideology in order to compete with the organizations with which it is 'classed'".[65]

Conclusion

While the Court's attempt to determine what constitutes a pervasively sectarian institution has been ill-defined, it may be argued that a school with an integration of faith and learning philosophy would fit at least the general contours of such a designation. Under the *Tilton*, *Hunt*, *Roemer* analysis, this would place such institutions in a constitutional dilemma if they seek state or federal financial support beyond aid given directly to students. Yet the Court's more recent establishment clause cases involving government aid have shifted to a neutrality approach that would make the religious character of an institution less crucial. Such a development would seemingly allow the church-related college to "have its cake and eat it too." However, neither the neutrality test nor the integrationist philosophy are in and of themselves assured defenses against state constitutional prohibitions, increased litigation, and the forces of secularization. The obvious way to avoid these problems is for a school to forgo public aid beyond indirect student financial aid. With the skyrocketing costs of higher education, though, the temptation to feed at the public trough may be too great.

[65] Derek H. Davis, "Editorial: The U.S. Supreme Court as Moral Physician: *Mitchell v. Helms* and the Constitutional Revolution to Reduce Restrictions on Government Aid to Religion," *Journal of Church and State* 43 (Spring 2001): 231.