



by Jeremy Rabkin

Let Us Study (and Pray)

State aid to religious schools is receiving a real hearing.

Lawyers are fond of Oliver Wendell Holmes's maxim that "hard cases make bad law." If the converse is true, and easy cases make good law, then *Columbia Union College v. Clarke* should lead to a good turn in constitutional interpretation. Now before the Fourth Circuit Court of Appeals, the case could be a blockbuster if it gets to the Supreme Court next year. At its heart is the question of whether the First Amendment's guarantees of Freedom of Speech and Free Exercise of Religion are superseded by the restrictions imputed to the amendment's prohibition of religious Establishment. A sensible decision would allow more state assistance to private schools that happen to be religious. But when it comes to the Establishment clause, nothing is certain.

Columbia Union College, located in Takoma Park, Maryland, is affiliated with the Seventh-day Adventist Church. In 1990 it applied for funds under a Maryland state program providing grants to institutions of higher education. CUC is a fully accredited educational institution, offering degrees in a variety of academic and vocational programs, from computer science to nursing. Yet Maryland authorities refused to make any grant to CUC, on the ground that the institution, for all the training in secular subjects it offered, was still "pervasively sectarian"—that is, too religious. A renewed application by CUC was denied by the Maryland Higher Education Commission in 1997 and the present litigation commenced soon after.

JEREMY RABKIN is a professor of government at Cornell University.

Among the ironies of the case is that the grant program under which CUC sought funding is named for a Catholic priest, Father Joseph Sellinger. Maryland, a state which was founded by Catholics and still has a sizable Catholic population, has no problem with using taxpayer money to assist Catholic colleges. And when critics brought a legal challenge, even the Supreme Court (in *Roemer v. Evans*, 1976) held that Maryland's "Father Sellinger Program" did not transgress the Court's prior rulings against government aid to religion.

So the legal question in CUC is straightforward. Can the government have one policy for Catholic schools and another for Adventist schools? Can the government favor a sect which happens to be numerous and well-respected, while giving the back of its hand to a less popular one? The Free Speech and Free Exercise clauses of the First Amendment have long been interpreted as prohibiting government restrictions or burdens—or denials of benefits—that turn on nothing more than a discriminatory distinction between one religious teaching and another.

Of course, Maryland did not quite assert a right to discriminate. And the federal district court in Maryland, which upheld the state's decision in a ruling last year, was not brazen enough to say that it simply preferred Catholics to Adventists. The state commission insisted that CUC was more "pervasively sectarian" than its Catholic rivals, and the court agreed that giving aid to such an institution would constitute aid to religion, as prohibited by the Establishment clause of the First Amendment.

CUC's appeal makes it hard to sustain Maryland's distinctions. For example, it is

true that more than three-fourths of the students in CUC's day program are Adventists, but similar proportions obtain at Catholic colleges in the state. Counting students in night school, the majority of those receiving CUC degrees are not Adventists. CUC's board of trustees is indeed dominated by Adventists, but at Mount Saint Mary's College in Emmitsburg, the Archbishop of Baltimore is an automatic trustee, and under the College's own rules, at least one-fourth of his fellow trustees must be ordained priests. At Baltimore's College of Notre Dame, one-third of the trustees must be nuns. At Loyola College, also in Baltimore, the president of the college must be a Jesuit and the Board of Trustees is required to "maintain a suitable proportion of Jesuit representation." All of these Catholic institutions receive state aid.

In fact, all the religious schools funded under the Father Sellinger program are Catholic. Maryland maintains that these institutions will restrict state grants to secular uses. But in the view of the state funding commission and the district court, CUC cannot be trusted to keep religion out of the programs (in mathematics, clinical laboratory science, and nursing) for which it requested state grants, since "the college is inherently incapable of separating these programs from religious activity." Yet Maryland found no difficulty accepting the secular bona fides of Mount St. Mary's, which directs its faculty, in their research and teaching, to "follow the normal canons of scholarship... and the Mission of Mount Saint Mary's College." The college's mission statement proclaims that the college "affirms the values and beliefs central to the Catholic vision of the person and society" and its promotional materials promise students that "we combine 'Catholic' with 'liberal arts.'"

There is, to say the least, something unedifying in the spectacle of government bureaucrats sifting through college practices to decide which institutions are too religious to qualify for state assistance — even for instruction in secular subjects — and which are merely nominally religious and therefore eligible for state aid. Such state surveillance is not only un-American but clearly unconstitutional. In over two decades of litigation on church-state issues in higher education, the Supreme Court has never found a single college, whether run by the Baptist Convention or the Dominican Order, to be unqualified for state funding for being too religious.

In *Rosenberger v. University of Virginia (1995)* the Supreme Court apparently dismissed the whole question of whether an activity could be “too religious,” when it held that U.Va. could not deny funding to a student magazine devoted to Christian advocacy simply on the grounds that it was “religious” (as it clearly was).¹ Yet if a state agency may fund an avowedly Christian magazine without violating the Constitution, why may it not fund secular instruction at a Christian college?

It is not clear how the CUC litigation will end. Justice Kennedy’s opinion in *Rosenberger*, which brought religious speech under the full protection of the Free Speech clause, did not command a clear majority on the Court. Justice O’Connor’s concurring opinion, which supplied the crucial fifth vote, was a bit of characteristic hand-wringing, preoccupied with questions such as whether the printing costs of the Christian magazine had been paid directly by the state university or by the student group—which had received money from the university to defray its printing costs. Four justices thought it reasonable for a state to fund every other sort of student program or publication (including those of Jewish and Muslim groups) and then refuse to fund a Christian publication on the ground that doing so would constitute an establishment of religion. In other words, nearly a majority of the present Supreme Court thinks it more urgent to avoid appearing to “aid religion” than to avoid appearing to impose special burdens or disqualifications on religious groups. The swing justice is not quite sure.

“

Can government have one policy for Catholic schools and another for Adventist ones?

”

In the background stands a far larger issue. During the 1970’s, the Supreme Court reached a different sort of compromise. Having proclaimed that state aid to parochial schools at the elementary and secondary levels would violate the Establishment clause, the Court turned around and announced that the same strictures would not apply to religious colleges. Chief Justice Burger’s opinion in *Tilton v. Richardson (1976)* explained that “college students are less impressionable and less subject to religious indoctrination” than younger students and that “college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines.” The CUC case tests whether this reasoning is a blanket exemption from Establishment strictures or a mere presumption that states may discount in when they conclude that college students of a particular sect are at greater risk of receiving “sectarian influence.”

If it turns out to be a blanket rule, its arbitrariness will be more obvious. Is it verifiable that religious colleges have less influence than elementary and secondary schools on the faith of their students? To answer that, a social scientist would have to make a lot of questionable assumptions about such terms as “influence” and “faith.” But a fair guess is that a child struggling with multiplication tables or elementary algebra in a parochial school is less likely to notice incidental religious examples (e.g., how many loaves and how many fishes would be necessary to feed 5,000 people?) than is a college student studying St. Thomas Aquinas in a philosophy class at a religious college. It is hard to explain the legitimate state purpose in providing taxpayer assistance for the latter if there is a

high risk of state entanglement with religion in providing assistance for the former.

But logic and empirical evidence may be beside the point. The majority of higher education institutions in the U.S. are private, so if government funds higher education at all, political reality demands state aid to private institutions.

The case is otherwise with elementary and secondary education. By far most students at this level are in public schools and by far most of their private alternatives are religiously affiliated. Existing constitutional doctrine thus seems to be that it is fine to promote private alternatives with tax dollars where there is already a very competitive market, but wrong to do so where state authorities have succeeded in corralling most students into state-run institutions. Supposedly all this is derived from Thomas Jefferson’s warnings about state power.

This constitutional policy may be beginning to crumble, not just because it seems pointlessly punitive toward religion but because more and more doubts have been raised about the wisdom of leaving public school systems with a near-monopoly on elementary and secondary schooling. Over the past decade, the Supreme Court has let state funds go to a wide variety of institutions—in one case, even to a seminary—so long as the money is channeled through the students, rather than the institutions. Relying on such precedents, the Wisconsin Supreme Court earlier this year endorsed a Milwaukee voucher program allowing students to pay tuition at non-public elementary schools, including parochial or religious schools, with state funds. Last year, in an opinion by Justice O’Connor herself, the Court overturned its own 1985 ruling banning public schools from sending remedial reading teachers into parochial schools.

If it gets to the Supreme Court next year, the *Columbia Union College* case will give the Court a chance to reconsider the tangle of confused and mincing doctrines that now distort the meaning of the Establishment clause. The Court might not use the opportunity, but it will have it. O

¹ Both *Rosenberger* and the CUC case have been sponsored by the Washington-based Center for Individual Rights. The Center, which champions a number of important causes, has a new website, www.wdn.com/cir.