COMMENTS

CIVIL LAW AND CANON LAW—NEVER THE TWAIN SHALL MEET?

I. INTRODUCTION

On August 18, 1986, the Vatican officially censured the Rev. Charles E. Curran, a theology professor at Catholic University of America in Washington, D.C., and ordered the revocation of his license to teach Catholic theology.[1] The censure was prompted by Curran's liberal writings, which contradict official church policy on matters concerning artificial birth control, homosexuality, and divorce.[2] Curran's suspension reflects the Vatican's willingness, and indeed its intention, to enforce the provisions of a recently-published Vatican document relating to Catholic colleges and universities.[3]

The report, entitled "Proposed Schema for a Pontifical Document on Catholic Universities," was drafted in March, 1986, by the Congregation for Catholic Education, a Vatican agency that oversees Catholic pedagogy.[4] The most controversial aspect of the paper concerns the Vatican's control of the faculties at Catholic colleges and universities. The document provides that "[a]ll teachers who are to be chosen, nominated and promoted in accordance with the statutes are to be distinguished by academic and pedagogic ability as well as by doctrinal in-

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1. N.Y. Times, March 3, 1987, at Y10, col. 1.

2. Curran argues that he has a right to dissent from noninfallible issues. According to Roman Catholic doctrine, infallibility is a privilege awarded by God to the Church, and specifically to the Pope. Doctrine that is deemed promulgated with infallibility must be accepted by all believers as a fundamental matter of faith. The Pope has the power to state that he is speaking infallibly on specific, solemn occasions. Positions generally held by all the Church's bishops together with the Pope are less rigidly considered infallible. Church officials deny that Curran is dissenting from noninfallible teachings, and contend further that these distinctions are moot. Goldman, *Catholicism, Democracy and the Case of Father Curran,* N.Y. Times, Aug. 24, 1986, at E7, col.1; *see generally The Charles Curran Case,* 154 AMERICA 237, (1986); McCormick, *L'Affaire Curran,* 154 AMERICA 261, 264 (1986).

3. Conklin, *A Modest Proposal?,* 15 NOTRE DAME MAG. 7 (1986).

4. *Proposed Schema for a Pontifical Document on Catholic Universities, reprinted in* 32 NAT'L CHRON. OF HIGHER EDUC. 4 (Mar. 26, 1986) [hereinafter *Proposed Schema*]. This report was distributed to the presidents of all Catholic colleges and universities. *See* Conklin, *supra* note 3, at 7.

tegrity and uprightness of life."[5]

More stringently, the discourse urges the use of doctrinal and moral standards when evaluating teachers, and stipulates that professors "who teach theological studies in an institute of higher education must have a mandate from the competent ecclesiastical authority."[6] Analysts agree that, under the Vatican's proposal, a theology professor's mandate is likely to be withdrawn if he or she favors, for example, legal abortion or the use of artificial means of birth control.[7] Moreover, the proposal empowers "competent ecclesiastical authority" to demand a tenured professor's dismissal.[8]

Consequently, American Catholic institutions are trapped between Scylla and Charybdis.[9] On one hand, the institution is bound by civil law, which compels a school to honor a professor's tenure.[10] On the other hand, the Vatican document contains a canonical sanction, which allows the Church to strip a university of its Catholic designation for noncompliance with the document's provisions.[11] Whether motivated by the severity of Rome's sanctions or by sovereign loyalty, Catholic University administrators supported the Vatican's censure by removing Curran from his position on the faculty of the theology department, ignoring the fact that Curran has been a tenured professor since

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5. *Proposed Schema, supra* note 4, at 17. Proponents of the paper view the document as a "move to restore the church's right to ensure that what theologians teach is in harmony with Catholic doctrine. Critics see it as a threat to the principle of academic freedom, especially in American universities that call themselves Catholic." *See* Conklin, *supra* note 3, at 7.

6. *Proposed Schema, supra* note 4, at 18.

7. N.Y. Times, Mar. 28, 1986, at A20, col. 1.

8. *Id.*

9. Scylla and Charybdis represent danger to ships traveling the Straits of Messina in Greek mythology; they are the Greek equivalent to the colloquial "rock and a hard place." *See, e.g.*, THE AENEID OF VIRGIL 73-108 (T. Williams trans. 1908).

10. Tenure is an academic employment contract for which a teacher serves a substantial probationary period in order to demonstrate proficiency in teaching and research. Courts have traditionally viewed tenure as a unilateral contract for lifetime employment terminable only for cause. For a general discussion of tenure as it relates to contract law, see Comment, *Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions*, 62 IOWA L. REV. 481 (1976).

Moreover, it is interesting to note that the university was originally conceived by medieval Christians as a secular institution. These clerics "insisted that their teachers' guild had to be properly independent of civil society on the one hand and ecclesiastical society on the other." *Catholic Universities in the Real World*, 154 AMERICA 313 (1986).

11. N.Y. Times, Mar. 28, 1986, at A20, col. 1. In addition, the schema contrasts with a 1967 statement issued by American Catholic educators called the "Land O'Lakes Statement," which was deemed a declaration of independence for American Catholic higher education. The statement affirmed that "the Catholic university must have a true autonomy and academic freedom in the face of authority of whatever kind, lay or clerical, external to the academic community." Conklin, *supra* note 3, at 7.

1971.[12] Curran filed suit charging that the University breached its employment contract and stifled his "right" to academic freedom.[13]

The Curran case is particularly problematic, because the dispute concerns the relationship between canon law and civil law, ideologically referred to as the separation of church and state. To date, the judiciary has failed to precisely delineate the "high and impregnable" wall[14] that separates the ecclesiastical world from the civil world; indeed the great divide more often resembles a chalky white line than an insurmountable wall.[15] Moreover, the body of law concerning the separation of church and state suffers from the judiciary's increasing use of fact-intensive, case-by-case methods of resolving disputes.[16] The result is not a "body" of law at all, but rather separate pieces of an increasingly disjointed puzzle.[17]

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12. N.Y. Times, March 3, 1987, at Y10, col. 4. All but 7 of America's 235 Catholic universities and colleges were founded by a religious community chartered by the state, and more recently, held in public trust and governed by independent, predominantly lay, boards of trustees. Conklin, *supra* note 3, at 7. Catholic University, however, is one of the seven American schools chartered not by the state, but by the Vatican itself. *Id.* While this juridical relationship implies that the Vatican may only exercise control of the seven Vatican-chartered schools, many American theologians contend that a juridical tie is not determinative. The schema "implies the power of the church to interfere in the matters of *any* American university calling itself Catholic, not just in the few with Vatican-chartered faculties. Under the draft's provisions, what happened at Catholic University . . . could happen at Fordham, Notre Dame or Santa Clara." *Id.*

13. Father Curran filed suit in the Superior Court of the District of Columbia on February 27, 1987. N.Y. Times, March 3, 1987, at Y10, col. 1. Curran argues that his tenure contract includes the right of continuous employment until retirement and that the right of academic freedom without fear of reprisal is one of the integral purposes of the tenure contract. *Id.*

14. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

15. Several justices have contended that the proverbial wall is in fact crumbling. For example, in Lemon v. Kurtzman, 403 U.S. 602. (1971), the majority viewed the separation as "a blurred, indistinct, and variable barrier." *Id.* at 614.

16. Some analysts contend that the doctrine of *stare decisis* is slowly but surely deteriorating. The doctrine affirms that when a court "has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same." BLACK'S LAW DICTIONARY 1261 (5th ed. 1979). According to these analysts, the doctrine is eroding because courts often misapply the established tests, or carve out exceptions in the interest of "justice." In addition, as social mores and habits evolve, the courts' treatment of established analyses also changes. The establishment clause is particularly prone to either judicial misapplication or malapplication of precedent. *See generally* Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents,* 15 HOUS. L. REV. 783 (1978).

17. When members of the judicial, as well as the executive and legislative branches, equivocate about the line between church and state, the public sector suffers because one does not know when he or she is stepping over that line. This uncertainty naturally leads to increased litigation. The litigation will continue to multiply until the three branches clearly define the separation between the two sectors. For instance, an extreme "separationist" view would have Congress legislate that no church-related

The church and state conflict is rooted in the establishment and free exercise clauses of the first amendment.[18] Theoretically, the two clauses require "that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief."[19] In practice, however, the two clauses inevitably clash.[20] For example, if the Court ultimately honors the free exercise clause by allowing Catholic University to breach its tenure contract with Curran, the Court risks violating the establishment clause since the university is funded with public dollars. Indeed, the tautology continues. If the Court determines that public funds cannot be allocated to Catholic University because of extensive Vatican control, the students may claim a violation of their free exercise of religion. Absent financial assistance, many students will be forced to forego the pursuit of a parochial education for a less expensive public education, partially subsidized through public funds.

The implications of Vatican control of Catholic higher education exhibited in the Curran case are far-reaching, and may well affect the civil law governing the 235 Catholic colleges and universities in the United States.[21] At present, none of these institutions contractually *require* a professor of theology[22] to either practice Catholicism or em-

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school shall receive public funding of any kind. In any event, the Supreme Court must set down workable, objective tests. Furthermore, the Court must adhere to its own law in subsequent church/state controversies. *See generally* Buchanan, *supra* note 16, at 783.

18. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Furthermore, these clauses were held applicable to the states through the fourteenth amendment in Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause), and Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause).

19. School District of Abington v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

20. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947); Lynch v. Donnelly, 465 U.S. 668 (1984).

21. Worldwide, there are 550 colleges and universities sponsored by the Catholic church. Conklin, *supra* note 3, at 7. Opponents of the document assert that the schema is not applicable in the United States since schools are state-chartered and governed by independent boards of trustees. But in a country

> where the government is hostile toward the church—where universities are being nationalized, for example—a document on educational norms from the Vatican could strengthen the fragile position of a Catholic college. Similarly, in the countries where theological studies are largely in the hands of state universities, as in many European nations, it makes sense for the church to regulate theological professors rather than leaving these powers to the state.

Don't Tread on Us—Canon Law & Catholic Colleges, 113 COMMONWEAL 173 (1986) [hereinafter *Don't Tread*].

22. This Comment will confine its scope to the effect the Vatican's schema will

brace its tenets.[23] Nevertheless, if the Vatican compels its United States institutions to dismiss members of theology faculties who dissent from church doctrine, a substantial number of cases could reach the courts via the notion of a constitutional right to academic freedom.[24]

Thus, what began as a purely ecclesiastical issue has spawned critical secular issues: whether Catholic University should be liable to Curran for breach of the employment contract, and if not, whether Catholic University may continue to receive public funding. An affirmative resolution of the former will depend on the courts' willingness to push back the metaphorical wall[25] between church and state, and thereby uphold Curran's claim. In contrast, the courts may exercise judicial restraint by adopting a laissez-faire approach that would allow Catholic University to remain unhampered by state interference. The constitutionality of the university's continued receipt of federal aid depends primarily on policy considerations.[26]

This Comment explores the issues raised by the Curran conflict, which is the first case to challenge a Catholic university's termination of a faculty member for repudiating established Church teaching.[27] Part II evaluates the Curran case in light of the free exercise clause of the first amendment.[28] Specifically, this section discusses whether the University may successfully claim immunity from liability for breach of an employment contract, when the university's breach was based on

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have on professors of theology and philosophy, since the document specifically singles out these departments as requiring tighter Vatican control. It does not follow, however, that the Vatican may not effectively extend its policy to *any* discipline at its schools.

23. For example, in a letter to the Congregation for Catholic Education, Fr. Theodore Hesburgh, then President of the University of Notre Dame, criticized the Vatican agency's document and noted that Notre Dame practiced a "public policy of preferential hiring for Catholic faculty." Conklin, *supra* note 3, at 7.

24. St. Louis Post-Dispatch, Aug. 22, 1986, at Cl, col. 3. Immediately following the first abridgements resulting from the directives outlined in the Vatican's schema, a Vatican official indicated that further "housecleaning" is imminent. *Id.* As of August, 1986, two Vatican-appointed panels were assembled specifically to review Roman Catholic clergy and religious institutions in the United States. *Id.*

25. Thomas Jefferson penned this metaphor in 1802 in a letter to members of the Danbury Baptist Association. Since then, it has been quoted by the Supreme Court on numerous occasions. *See, e.g.*, Reynolds. v. United States, 98 U.S. 145, 164 (1878).

26. *See infra* notes 115-80 and accompanying test.

27. After he was fired from his tenured position on the faculty of the theology department of Catholic University, Curran began administrative proceedings consistent with the bylaws of the University in an attempt to appeal the administration's decision. *See supra* notes 1-3. An appeal of this type, however, ultimately leads to the University's board of trustees, which is dominated by U.S. bishops who are unlikely to disobey the Vatican. In response to this stonewall facing Curran within the academic community, he has instituted proceedings in federal court. *Id.* In these proceedings Curran alleges that the University has an obligation in American civil law to honor his tenure contract.

28. *See supra* note 18 and accompanying text.

a sincerely held religious belief,[29] and despite Curran's claim that any punitive action by the University infringes upon his right to academic freedom. In addition, Part II addresses the propriety of the courts' authority to adjudicate conflicts between a church and its clergy.

Part III considers additional constitutional repercussions, for instance, whether government aid to universities that permit their church sponsors to control administrative matters (such as the composition of their faculties) violates the establishment clause of the first amendment.[30]

II. THE FREE EXERCISE CONFLICT AND THE CURRAN CASE

"O Freedom, what liberties have been taken in your name!"
W.H. Auden

The principle question raised by the free exercise clause is whether Catholic University may breach its civil law contract with Curran under immunity of the free exercise of religion clause. The answer requires an analysis of the purposes and utility of the tests traditionally used to ascertain whether a sectarian organization may remain free of government regulation.

A. Sherbert *And Its Application to Curran*

The most impracticable legal challenges to the free exercise clause have arisen not from mere religious beliefs, but in connection with conduct that is assertedly prompted by those beliefs.[31] The Court has repeatedly maintained that while the "freedom to hold religious beliefs and opinions is absolute . . . the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[32]

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29. The Court has traditionally deferred to an institution's contention that the act in question is a result of a sincerely held religious belief. At most, a court will inquire not as to whether the belief is valid, but whether it is a general part of that religion's ideology. A court will look, for instance, to the holy book of a particular religion to find support for a given belief. *See* Miles, *Beyond Bob Jones: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions,* 8 HARV. WOMEN'S L.J. 31, 34 (1985); *see also* United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944).

30. *See supra* note 18 and accompanying text.

31. *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599 (1961) (Court upheld application of state Sunday closing law to Orthodox Jewish merchants); Prince v. Massachusetts, 321 U.S. 158 (1944) (Court upheld statute criminalizing the sale of newspapers by girls under 18 years of age); Reynolds v. United States, 98 U.S. 145 (1878) (Court sustained application of federal law making bigamy a crime in territories where Mormons claimed polygamy as a religious duty).

32. Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

When evaluating a statute challenged as a restraint on the freedom to exercise religion, a court first examines the statute's legislative history.[33] If its purpose "is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."[34] If the statute is not struck down as void on its face, a court will apply a balancing test.[35] If the regulation burdens the exercise of religion, then, absent a state interest "of the highest order," the government must accommodate the religious interest by exempting it from the challenged regulation.[36] A statute is deemed burdensome when less restrictive means of regulation are available to achieve the same end.[37]

For example, in *Sherbert v. Verner*,[38] the Court invalidated a South Carolina statute that denied a Seventh Day Adventist unemployment compensation benefits because she was fired for refusing to work on Saturdays, the Sabbath Day of her faith.[39] The Court emphasized that the challenged statute violated Sherbert's right to the free exercise of religion, because it forced her to choose between receiving benefits and adhering to her religious convictions.[40] The Court struck down the statute because it was discriminatory,[41] and the state was unable to show a compelling interest.[42] On its face, the state's policy discriminated against those whose religious practices dictated that they "rest" on Saturday; Sunday worshipers, however, were not burdened with a similar regulation.[43] The state failed to prove that an exemption for Sabbatarians would prevent the government from achieving its objective of paying benefits only to persons who were involuntarily

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33. *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

34. *Id.* at 607.

35. *See, e.g.*, Thomas v. Review Bd. Indus. Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). *But cf.* United States v. Lee, 455 U.S. 252 (1982) (imposition of taxes on persons who object on religious grounds held constitutional); Braunfeld v. Brown, 366 U.S. 599 (1961) (statute forbidding retail sales on Sundays upheld even though Jewish plaintiffs worshipped on Saturdays).

36. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). Several scholars maintain that the establishment clause is subordinate to the free exercise clause because the burden of proof in the latter cases falls heavily upon the government to establish a compelling state interest. Thus, deference is given to the religious institution and its members. *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Moore, *The Supreme Court and the Relationship between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 196 (1963).

37. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

38. 374 U.S. 398 (1963).

39. *Id.* at 399.

40. *Id.*

41. *Id.* at 406.

42. *Id.* at 409. For a discussion of the *Sherbert* balancing test's application to the Curran case, see *infra* notes 46-52 and accompanying text.

43. *Sherbert*, 374 U.S. at 408.

unemployed.[44]

Sherbert remains valid law. Statutes that effectively bar an individual from acting pursuant to a sincerely held religious belief must be religiously neutral on their face. Second, the statutes must withstand a balancing test, which requires that any inroad on religious autonomy be the least restrictive means of achieving a compelling end.[45]

Free exercise claims follow a characteristic pattern. As in *Sherbert*, the petitioner is typically a member of a religious organization who claims that a particular statute infringes upon the petitioner's free exercise of that religion.[46] The Curran case deviates from this pattern because the aggrieved party—Curran—is challenging not the government, but rather the religious institution itself. Thus, Curran is asking the state to protect him from church action that was premised on the Church's sincere religious belief. The injuries to Curran include damage to his professional reputation, a denial of his expectation of long-term employment with Catholic University, the possible loss or decline of salary, as well as emotional harm.[47] The University, on the other hand, acted pursuant to its sincere belief that its first and overriding duty is obedience to the Catholic Church, represented by the Vatican.[48]

Unlike *Sherbert*, the Curran case does not involve a specific statute; rather it stems from alleged, illegal action—breach of contract. Thus, the "discriminatory purpose test" set forth in *Sherbert* is inapplicable. Furthermore, the Court will have to adjust its formulation of the balancing test to fit the issues raised in the Curran case. For instance, under *Sherbert*, the state must overcome a heavy burden of proof to avoid encroaching on the free exercise of religion; the state interest must be "compelling."[49] If a similar burden were placed on Curran, he would be required to prove that his interest is compelling, as opposed to the University's interest in employing only theology professors who personally ascribe to and teach Catholic doctrine.

Unlike a state, however, an individual is not motivated by a "compelling interest." Instead, an individual is concerned with his fundamental rights as guaranteed by the Constitution.[50] The judiciary has

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44. *Id.* at 407.

45. *Id.* at 406.

46. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Braunfeld v. Brown, 366 U.S. 599 (1961); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

47. *See generally* Comment, *supra* note 10, at 481.

48. *See generally* McCormick, *supra* note 2.

49. *See Sherbert*, 374 U.S. at 400.

50. Fundamental rights are "[t]hose which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." BLACK'S LAW DICTIONARY 607 (5th ed. 1979). The rights expressly laid out in the Constitution are typically found in the Bill of Rights. Implied rights are found in the common law, especially in adjudications concerning substantive due process. *See generally* Griswold

consistently extended tremendous protection to an individual's fundamental rights, much as it has deferred to state legislation that serves a compelling interest.[51] Thus, in order to tip the scale in his favor, Curran must show that he has been deprived of a particular fundamental right. Only then can a court determine whether the University's right to exercise a sincerely held religious belief outweighs the infringement of Currans's specially protected right.[52]

B. *The Right to Exercise Academic Freedom?*

Curran alleges that by suspending his teaching privileges, the University severely restricted, indeed nullified, his "right" to academic freedom.[53] Though this notion of academic freedom as a constitutional right has often persuaded the Court to recognize a violation of that value, the Court has never expressly deemed academic freedom a compelling right tied to a specific provision in the Bill of Rights.[54] Rather, the Court has invoked an *ad hoc* balancing test to determine if some countervailing interest on the part of the University or the government merits the infringement of an individual's "right" to academic freedom.[55]

Indeed, the Court has consistently supported some conception of academic freedom, albeit in dictum.[56] Nevertheless, it remains uncertain whether the Supreme Court "has firmly and unambiguously rested a decision on such a principle."[57] In *Sweezy v. New Hampshire*,[58] the

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v. Connecticut, 381 U.S. 479 (1965).

51. *Id.*

52. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 846 (1978).

53. In Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855 (1985), the author defines academic freedom as "[a] term of uncertain scope, generally describing the right of teachers not to be interfered with in connection with their professional duties." *Id.* at 1881. Leff identifies academic freedom as

> the right of a teacher not to be fired or disciplined because what he teaches is politically or ideologically distasteful to his employers. It was, for example, a central complaint about *McCarthyism* that its insistence that teachers be fired if they were communists (or 'reds,' or 'pinkos') was a violation of 'academic freedom.' It is not clear, however, that there are, at least as a matter of constitutional law, any special rights that academics have that are not shared by everyone else.

Id. at 1881-82 (emphasis in original).

54. *See* Comment, *An Academic Freedom Privilege in the Peer Review Context: In re Dinnan and Gray v. Board of Higher Education*, 36 RUTGERS L. REV. 286, 304 (1983) (discussing judicial protection of academic freedom); *see also* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978).

55. *See* Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROBS. 525, 564 (1963).

56. Comment, *supra* note 54, at 301.

57. *Id.* For a discussion of the position that academic freedom has not been incorporated as a constitutional right, see K. ALEXANDER & E. SOLOMON, COLLEGE AND

Court emphasized the importance of ensuring academic freedom in the educational setting.[59] The Court attempted to anchor this prerogative in *Griswold v. Connecticut*,[60] by hinting that academic freedom may be esteemed a peripheral right embraced by the first amendment.[61]

The concept of academic freedom is divided by a dichotomy. On one hand, most commentators and courts recognize academic freedom as a concern relative to the individual, most notably a professor. The nature of the protection afforded the individual "invariably involves some sort of restraint on the academic 'employer' "[62] to maintain a "hands off" attitude toward the professor, enabling him to engage in "free inquiry and experimentation; encouragement of questioning, skepticism, and probing; and the development of a critical attitude not only toward current knowledge and values, but toward authority generally."[63] Thus, Curran may indeed be able to argue that a university should not suppress, exclude, or impose a penalty upon dissenters from university doctrine, since such action is often inimical to the pursuit of truth.[64]

On the other hand, recent cases, most notably *Regents of the University of California v. Bakke*,[65] have analyzed the concept of academic freedom from another perspective, maintaining that as contrasted with the professor's right, "the institution itself is entitled to academic freedom."[66] Justice Powell's dictum in *Bakke* asserts that institutional academic freedom impliedly requires a university to remain

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UNIVERSITY LAW 344 (1972). The opposite view is expressed in Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447 (1963).

58. 354 U.S. 234 (1957). In *Sweezy*, the Court reversed a contempt citation issued to the appellant for his failure to answer questions concerning the content of his classroom lectures and his membership in the Progressive Party. The Court seemed to base its decision on appellant's right to exercise academic freedom as an instructor in his classroom. The Court warned that

> [t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 250.

59. *Id.*

60. 381 U.S. 479 (1965).

61. *Id.* at 482-83.

62. Comment, *supra* note 54, at 290.

63. Emerson & Haber, *supra* note 55, at 548.

64. *See* Comment, *supra* note 54, at 294. "The claim is made that academic freedom requires personal dignity and independence; it is also argued that securing such dignity requires faculty governance of the educational institution." *Id.*

65. 438 U.S. 265 (1978).

66. Comment, *supra* note 54, at 294.

free from governmental intrusion,[67] including judicial inquiry.[68] Thus, Catholic University may ballast its side of the scale by arguing that an individual's freedom is perhaps secondary, or at least limited by, that academic freedom exercised by the University itself.

The individual's "right" to enjoy academic freedom and the institution's parallel "right" are surely conflicting. Indeed, this conflict is reflected in the very nature of a university. Commentators[69] have noted two competing functions of the school—to indoctrinate the students in "existing knowledge and values," and to critically re-examine that knowledge, "with a view to facilitating orderly change in the society."[70] The former function does, in fact, restrain a teacher.[71] Nevertheless, since "the university operates within a pluralist society,"[72] a professor's leash must be lengthened and loosened, allowing the professor to inquire with his students into "the broader values that prevail in the wider and diverse community of civilized men."[73] Thus, the privilege of academic freedom "implies some form of job protection,"[74] although the scope of that protection is uncertain.

Although Curran may be able to cite various abstracts from court dicta and law review articles recognizing some fuzzy and amorphous concept of an individual's academic freedom, the University's position is much more compelling. This conclusion stems from the distinguishable facts contained in most of the case law sustaining a professor's right to exercise academic freedom. For example, *Keyishian v. Board of Regents*,[75] the only opinion in which a majority of the Court endorsed the constitutional protection of academic freedom, overturned state statutes and regulations that cast a "pall of orthodoxy"[76] over the classroom. In the Curran case, however, no statute is involved. Rather, the University itself allegedly impinged upon Curran's academic freedom, ironically in its own pursuit of academic freedom. The professor's right to academic freedom is necessarily subservient to the University's same right. Since

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67. *Id.* at 310.

68. *See, e.g.*, Cooper v. Ross, 472 F. Supp. 802 (1979). The court found this "particularly difficult because it involve[d] a fundamental tension between the academic freedom of the individual teacher to be free from the university administration, and the academic freedom of the university to be free of government, including judicial, interference." *Id.* at 813.

69. Emerson & Haber, *supra* note 55.

70. *Id.* at 547.

71. "The transmission, no matter by what specific pedagogic techniques, of accepted community standards, as well as the training in intellectual discipline and the imparting of an existing body of knowledge, make some demands upon the faculty member to serve as an exemplary teacher and citizen." *Id.*

72. *Id.*

73. *Id.* at 548.

74. Comment, *supra* note 54, at 290.

75. 385 U.S. 589 (1967).

76. *Id.* at 603.

the professor is, in effect, an agent of the university, he possesses only those rights conferred on him by the principal. Logically, it is impossible for a principal to confer rights upon its agent that the principal itself does not already possess.

In *Epperson v. Arkansas*,[77] Justice Black concluded that whatever the definition of academic freedom, a person hired to teach does not assume "a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed."[78] Moreover, Black queried whether academic freedom "permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him."[79] Thus, Catholic University's claim to academic freedom supersedes the claim asserted by Curran as an individual. But for the employer-employee relationship between the University and Curran, the latter would not even have a *limited* right to academic freedom. As it is, Curran's right derives from the University's privilege.

No Court holding explicitly establishes this idea of academic freedom, but "[w]hen courts characterize the freedom of a university to make its own decisions on academic matters, the issue appears to be not academic freedom but a kind of judicial abstention, that is, the courts properly refrain from intervening in the legitimate decisions of educational institutions."[80] This abstention approach reflects both respect for academic freedom and the courts' lack of expertise. Moreover, the Curran case is especially conducive to judicial abstention in light of two related strands of cases. First, courts traditionally abstain from controversies that concern an internal church dispute.[81] Second, courts abstain from arguments between a church and a member of its clergy.[82] The strands intersect in the Curran case.

C. *Application of Church Hierarchy Cases to the Curran Controversy*

The courts have historically refrained from becoming embroiled in disputes arising within the hierarchical framework of a church.[83] This policy has been affirmed in a long line of cases beginning with *Watson v. Jones*,[84] in which the Court concluded that the government "has se-

77. 393 U.S. 97 (1968).
78. *Id.* at 113-14 (Black J., concurring).
79. *Id.* at 114.
80. Comment, *supra* note 54, at 310-11.
81. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979).
82. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (brief not timely filed).
83. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 733-34 (1871).
84. 80 U.S. 679 (1871).

cured religious liberty from the invasion of the civil authority,"[85] and culminating in *Jones v. Wolf*,[86] which held that courts should refrain from adjudicating internal church disputes.[87] These rulings reflect the Court's belief that religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government, as well as matters of faith and doctrine.[88] Courts "have forbidden, on free exercise grounds, the involvement of civil courts in disputes which, while superficially civil, require determinations of religious dogma or discipline."[89]

Curran's membership in the clergy is another factor militating against his case. When eliminating illegal or discriminatory practices by a sectarian group, courts are more sypathetic to the public interest than to the possible infringement of free exercise,[90] yet the courts have carved out one consistent exception. "[W]hen the state seeks to investigate or regulate the employment relationship between a church and its clergy . . . the courts have simply refused to allow government involvement."[91]

In *McClure v. Salvation Army*,[92] for example, the court established that the church/clergy relationship must remain immune from governmental scrutiny.[93] In *McClure*, a minister with the Salvation Army contended that she had received lower pay and fewer benefits than her male colleagues.[94] The court maintained that the "relationship between an organized church and its ministers is its lifeblood."[95] Permitting the state to investigate or adjudge the terms and conditions of a minister's employment "could only produce by its coercive effect the very opposite of that separation of church and State contemplated by

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85. *Id.* at 730.

86. 443 U.S. 595 (1979).

87. *Id.* at 609.

88. *Id.* at 603.

89. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1210; *see also* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

90. *See generally* Drennan, Bob Jones University v. United States: *For Whom Will the Bell Toll?*, 29 ST. LOUIS U.L.J. 561 (1985).

Moreover, many scholars concede that the way a court characterizes an issue, (*i.e.*, as an establishment clause or free exercise clause issue), is determinative of the outcome. Courts are more sympathetic to a church's position in free exercise challenges. *See* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

91. Miles, *supra* note 29, at 35; *see also* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

92. 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

93. *See* Miles, *supra* note 29, at 35-37.

94. *McClure*, 460 F.2d at 555.

95. *Id.* at 558.

the First Amendment."[96] In disposing of the free exercise balancing test, the court maintained that because the relationship between a church and its clergy is central to the functioning of that church, no state interest justifies interfering with that relationship.[97] Thus, the vow between the minister and the church occupies a sacred and personal realm, protected against interference from the secular world.

The fact remains, however, that pursuant to direction from the Vatican, Catholic University has most likely breached an employment contract with Father Curran because the only cause for termination—Curran's dissenting views on church policy—existed at the time of the decision to grant his tenure.[98] If Curran were an ordinary man who answered to Mister rather than Father, or if Catholic University were a corporation or a factory or even a public school,[99] justice would dictate that Curran recover for damages suffered as a result of that breach.[100] Curran, however, is not an ordinary man, and the University is juridically linked to one of the largest, most enduring churches of all time.[101]

Furthermore, Curran's claim that his academic freedom has been severely curtailed is a tenuous argument, since that right has not yet been recognized by the Court as fundamental,[102] and since the University may claim a countervailing, and indeed superior, "right" to academic freedom. In addition, Curran's termination is predicated upon an internal church dispute; it follows directly in the wake of the Vatican's decision to strip Curran of his status as a Catholic theologian. Since Curran is a member of the clergy, the Court should abstain from deciding this case, and leave the nature of Curran's relationship with Catholic University to the discretion and providence of those to whom Curran pledged his obedience when he was ordained a Catholic priest.

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96. *Id.* at 560.

97. *Id.*

98. *See supra* notes 1-8 and accompanying text.

99. Employment-related free speech claims depend on the nature of the organization. *Right to Free Speech*, 113 COMMONWEAL 131, 132 (1986). Consider this analogy: X sold cars at a Ford showroom, and after three months with the company he was fired. Rather than endorsing the Ford name by pitching its cars as reliable, sporty and comfortable, he informed potential customers of problems with the brakes, steering, or air conditioning in Ford cars. Moreover, X actually recommended automobiles manufactured by Toyota. In this corporate environment, few would argue that X's termination was unwarranted.

In an ecclesiastical environment, on the other hand, the issue is not as black and white, because conflicts between the employer/church and employee/teacher involve constitutional restraints and protections dictated by the first amendment. *See supra* note 18.

100. *See supra* note 47 and accompanying text.

101. The Catholic Church is 2000 years old, and the American church is made up of 52 million members. St. Louis Post-Dispatch, Aug. 21, 1986, at El, col. 1.

102. *See supra* notes 53-82 and accompanying text.

III. ESTABLISHMENT CLAUSE CONCERNS IN THE CURRAN CASE

> I have drawn the great moral lesson, perhaps the only one of any practical value, to avoid those situations of life which bring our duties into conflict with our interests . . . for it is certain that, in such situations, however sincere our love of virtue, we must, sooner or later, inevitably grow weak.[103]
>
> Jean-Jacques Rousseau

If a court, either through abstentation or explicit holding, permits Catholic University to repudiate its tenure contract with Curran, it in effect grants the Vatican control over the hiring and firing of theology personnel in Catholic institutions.[104] Such a power contradicts the mainstream view that basic decisions affecting academic life in United States colleges and universities be made within the institution itself, according to its own standards.[105] For Catholic schools, these standards have conformed to the proprieties required by civil law in the United States.[106] Most Catholic colleges and universities in the United States "have opened their doors to numerous non-Catholic students and faculty members," some of the latter teaching in theology departments.[107] The external controls envisioned by Rome, and exercised in the Curran case, raise serious establishment clause questions about the accreditation and government funding of Catholic schools.[108]

Specifically, the central issue is whether Vatican control over the composition of theological faculties renders a university so sectarian that public funding violates the establishment clause. This issue is particularly pertinent because more than $500 million in public funds are transferred annually to the 235 Catholic colleges and universities in the United States.[109] If the establishment clause is found to prohibit public funding of Vatican-controlled institutions, then Catholic colleges and universities are faced with a Hobson's choice. A school could cut off its ties with the Vatican, and thereby lose its official claim to "Catholicity," or a school could maintain its ties with the Vatican, give up its

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103. Rousseau, *Confessions*, in 2 THE NORTON ANTHOLOGY OF WORLD MASTERPIECES 343, 346-47 (4th ed. 1979).

104. *Don't Tread*, *supra* note 21, at 173. American educators insist that the judgments underlying private academic decisions in private schools reflect the particular ideological or philosophical bent of their founders, trustees, administrators, and faculties. *See* Note, *Developments—Academic Freedom*, 81 HARV. L. REV. 1045, 1055 (1968).

105. *See generally* notes 53-82 and accompanying text.

106. *Id.*

107. *Id.*

108. "The Congregation's proposals show little understanding or appreciation of the ways in which Catholic higher education has adjusted to America's church-state separation." *Id.* at 173.

109. Conklin, *supra* note 3, at 8.

federal aid packages, and face the unpleasant economic consequences.

In the long run, these consequences may precipitate the demise of Catholic universities. Absent public funding, a school would be forced to raise money solely from private sources; even then, tuition would undoubtedly skyrocket, resulting in lower enrollment. Also, the inability to pay competitive faculty salaries would discourage the most aspiring professors from seeking tenure at these universities.[110] Thus, economically and academically, the loss of federal funding would have an extremely detrimental effect on these schools. On the other hand, a clear separation between church and state would give institutions greater control over their teachers, students, and curricula; schools would no longer be forced to present a secular face to the civil world.[111]

Establishment clause analyses, however, are fraught with difficulties. The judiciary, led by the Supreme Court, has demonstrated inconsistent and unpredictable application of the establishment clause tests.[112] Furthermore, courts often appear to "back into" their holdings.[113] That is, whether for policy reasons or under the guise of administration of justice, courts subjectively apply the tests laid down in prior cases to reach a desired results.[114] Predicting the outcome of the establishment clause challenge in the Curran case, therefore, requires an examination of the Court's historical approach to similar violations.

A. *The Historical Context of the Parochial Aid Conflict*

The Court has traditionally applied a three-prong test to financial aid programs challenged under the establishment clause.[115] This test was first outlined in *Lemon v. Kurtzman*,[116] in which the Court struck down Rhode Island and Pennsylvania statutes that provided "state aid

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110. *See generally supra* note 10.

111. *See generally* McCormick, *supra* note 2.

112. *See* Simon, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499 (1986); *see also* Lynch v. Donnelly, 465 U.S. 668 (1984); Mosk, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

113. *See supra* note 90.

114. *Id.*

115. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

116. 403 U.S. 602 (1971). The three-pronged test detailed in *Lemon* reflects an incorporation of tests applied by the Court in two prior cases. The first, School Dist. of Abington v. Schempp, 374 U.S. 203 (1963), established the first two prongs of the *Lemon* test. In *Schempp*, the Court maintained that to survive an establishment clause challenge, an activity must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222. The second case, Walz v. Tax Comm'n, 397 U.S. 664 (1970), enunciated the third prong incorporated into the *Lemon* test. The challenged program must not foster "excessive governmental entanglement with religion." *Id.* at 674.

to church-related elementary and secondary schools."[117] Moreover, the Pennsylvania statute authorized the state to reimburse nonpublic schools directly for expenditures relating to teachers' salaries, textbooks, and assorted instructional material.[118] This reimbursement, however, was limited to expenditures that related to certain secular subjects which were also taught in the public schools.[119] Officials at the private school were required to maintain detailed accounting records identifying the cost components of the secular as opposed to the nonsecular educational services. The state was responsible for auditing these reports.[120]

The first prong of the *Lemon* test requires that the statute in question have a secular legislative purpose.[121] In *Lemon*, the Court dealt with this issue summarily, by pointing out that neither plan had as its primary purpose the advancement of religion.[122] Furthermore, in subsequent cases this "secular purpose" test has proven to be the least restrictive of the Court's tests.[123] Since the test was first articulated,[124] the Court has consistently found it to be met in parochial aid cases.[125] Thus, the Court accepts at face value legislative statements of purpose.[126]

The second prong of the test requires that the statute's primary effect must neither advance nor inhibit religion.[127] Without stipulating a reason, the Court passed over this prong in its analysis of the facts in *Lemon*, and instead based its holding on the third prong.[128]

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117. *Lemon*, 403 U.S. at 606.

118. *Id.* at 609.

119. *Id.* at 609-10.

120. *Id.* at 610.

121. *Id.; see also* School Dist. of Abington v. Schempp, 374 U.S. 203, 205 (1963).

122. *Lemon*, 403 U.S. at 613.

123. *See generally* Ackerman, *Constitutionality of Various Forms of Public Subsidy of the Costs of Sectarian Elementary and Secondary Schools*, Congressional Research Service, The Library of Congress 85-918 EPW (Aug. 30, 1985).

124. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

125. *See* Ackerman, *supra* note 123.

126. In Mueller v. Allen, 463 U.S. 388 (1983), the Court upheld a Minnesota statute that permitted parents of both public and private school children to deduct the costs of tuition, textbooks, and transportation from their gross income in computing state income tax. The Court appeared to substantially broaden the types of public aid that may be granted to sectarian schools under the parameters of the Constitution. *See* Ackerman, *Summary and Preliminary Analysis of Mueller v. Allen: The Constitutionality of Tuition Tax Credits Under the First Amendment*, Congressional Research Service, The Library of Congress (July 8, 1983).

127. *Lemon*, 403 U.S. at 612.

128. The Court's increased disuse of the *Lemon* test, and particularly the "effect" prong of the test, indicates that the Court is moving toward renouncing the test. *See* Note, *The Supreme Court Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219 (1985).

This final hurdle requires that the statute not foster "an excessive government entanglement with religion."[129] Based on this prong of the test, the Court struck down the Rhode Island and Pennsylvania statutes.[130] In reaching its conclusion, the majority examined the nature and purpose of the benefited institutions, the type of aid provided by the state, and the nature of the relationship between the government and the religious body resulting from enactment of the statutes.[131]

According to the Court, the programs outlined by the statutes would produce an "intimate and continuing relationship between church and state"[132] since the audit process might require "comprehensive measures of surveillance and controls" by the government.[133] This surveillance, according to the Court, would constitute an "excessive and enduring entanglement between the church and state."[134]

Lemon and its progeny,[135] however, dealt with aid to parochial elementary and secondary schools. A court is more likely to strike down aid programs aimed at these schools than to strike down aid programs targeted for sectarian colleges and universities.[136] In *Tilton v. Richardson*,[137] the Court outlined what it perceived as the significant differences between college and precollege education: "[C]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level."[138] Thus, although courts continue to apply the *Lemon* three-prong test to cases challenging aid to nonpublic higher education, this test is more easily met than in a precollege context.[139]

Roemer v. Maryland Public Works Board[140] is the most recent Supreme Court ruling on financial aid to nonpublic higher education. In *Roemer* the Court upheld a scheme that provided subsidies to private colleges, including sectarian institutions. Although the funds could not be expended for "sectarian purposes," neither were they restricted to particular uses.[141] In reaching its decision, the Court stressed the

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129. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).
130. *Lemon*, 403 U.S. at 616, 624-25.
131. *Id.* at 615.
132. *Id.* at 622.
133. *Id.* at 621.
134. *Id.* at 619.
135. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).
136. *See, e.g.*, Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).
137. *Lemon*, 403 U.S. 672 (1971).
138. *Roemer*, 426 U.S. at 750 (paraphrasing *Tilton*, 403 U.S. 686).
139. *Id.*
140. 426 U.S. 736 (1976).
141. *Id.* at 739-40.

"primary effect" prong of *Lemon's* tripartite test.[142] Before an aid program passes the "primary effect" test,[143] the state must first show that no aid is granted to institutions in which secular activities cannot be separated from sectarian ones.[144] Second, only the secular activities can be funded.[145]

Based on several factors, the Court determined that the schools in question were *not* pervasively sectarian.[146] For instance, the colleges appeared to be autonomous and free from church control.[147] Also, attendance at church functions was not mandatory at the colleges, nor were faculty hiring decisions made on a religious basis.[148] Thus, the primary effect prong of the *Lemon* test was successfully satisfied.

In applying the third prong of the *Lemon* test, the Court examined whether the relationship created between the government and the schools by the rendition of aid would be characterized as one of excessive entanglement. In *Lemon*, the Court considered three factors: the character of the aided schools,[149] the process by which the aid was disbursed,[150] and whether the aid resulted in "political divisiveness."[151]

Based on the Court's previous determination that the school in question provided essentially secular services,[152] the majority reasoned that there was less danger "that an ostensibly secular activity—the study of biology, the learning of a foreign language or an athletic event—will be actually infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced."[153]

In addition, the funds in *Roemer* were distributed annually, which diminished the level of entanglement, because surveillance would be limited to "occasional audits."[154] Finally, "the substantial autonomy" of the colleges mitigated the risk of "political divisiveness" since the Church itself was not likely to get involved in the fiscal aspects of the school.[155]

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142. *Id.* at 754-55.
143. *Id.* at 755.
144. *Id.* Such institutions are regarded as "pervasively sectarian," and would include, for example, a seminary or school of divinity. *Id.*
145. *Hunt v. McNair*, 413 U.S. 734, 744 (1973).
146. *Roemer*, 426 U.S. at 755.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 763.
151. *Id.* at 765.
152. *Id.*
153. *Id.* at 762.
154. *Id.* at 763-64.
155. *Id.* The Court also noted that programs assisting private colleges typically direct a smaller percentage of benefits to sectarian schools than programs assisting lower education. Thus, the Court reasoned that, overall, such a program is more likely

Overall, the *Roemer* Court considered these factors cumulatively, giving "dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions."[156] The Court maintained that unlike church-related elementary and secondary schools, the colleges performed secular educational functions.[157] Finally, the ban on the use of subsidies for sectarian purposes could be enforced without on-site inspections or other close surveillance that might be construed as excessive entanglement.[158]

B. *Application of* Roemer *to the Curran Case*

When applied to the Curran controversy, the *Roemer* opinion strikes several nerves. In *Roemer*, the Court relied on the fact that the schools could be easily segregated into secular and sectarian parts, thus ensuring that secular subjects would not be "infused" with religion.[159] Nevertheless, by allowing Vatican control of theology faculties, the Church may actually be taking the first step to restoring a more "Catholic" environment on its campuses. Indeed, Church officials have explicitly recognized this goal as a primary objective for the remainder of the twentieth century.[160] Current Church policy, therefore, clearly anticipates greater Vatican control over Catholic universities.

The holding in *Roemer* also turned on the assumption that "controversies surrounding the aid program are not likely to involve the Catholic Church itself, or even the religious character of the schools," but only their fiscal arrangements.[161] In the Curran case, however, the dispute is a *direct* result of "interference" or involvement by the Catholic Church. Until the Curran controversy arose, the University received public aid consistent with *Roemer*.

The issue in *Roemer* concerned the nature of the aid *qua* aid. The Court considered, for example, the procedures used to distribute the aid, the accounting necessary to validate the aid, and the frequency of the payments. The Curran case, in contrast, concerns not a change in the nature of an aid program, but a change in the nature of the Church's relationship with the University. But for Vatican intervention, the aid would not be questioned.

Moreover, *Roemer* underscores the subjective nature of the entanglement test. "[B]y requiring the Justices to predict the probability of an unconstitutional effect, the entanglement test has introduced an ab-

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to have a secular effect. *Id.*

156. *Id.* at 766.
157. *Id.*
158. *Id.* at 764.
159. *Id.*
160. St. Louis Post-Dispatch, Aug. 22, 1986, at C1, col. 3.
161. *Roemer*, 426 U.S. at 765.

normally high degree of judicial subjectivity into the Court's assessment of the nature of religious institutions and of the relationships that those institutions develop with governmental entities. The degree of entanglement deemed 'excessive' often appears to be the product of personal judgments."[162] Most cases, in fact, apply the entanglement test by hypothecating what *might* happen; how the government *might* get involved.

Thus, in *Roemer*, the Court donned rose-colored glasses to view prospective entanglement, while in *Lemon*, *Hunt*, and even *Tilton* it adopted a "worst case scenario" test. While *Tilton* held that *any* state audit or *any* reporting requirement resulted in excessive entanglement, *Roemer* rationalized that although "[o]ccasional audits are possible here . . . they would be quick and non-judgmental."[163] *Roemer* essentially disregarded *Tilton*, claiming that where higher education is concerned, a couple of state audits and a couple of annual school reports to the state do not entanglement make.[164]

Further arbitrary rationale employed in *Roemer*, and indeed in *Tilton*, is the distinction between precollege and college education. "The mere fact that colleges and universities expose a student to broader humanitarian subjects, such as philosophy and the sciences, does not mean that the other classes do not inject a certain sectarian flavor into the daily curriculum. The test for excessive entanglement in higher education should be just as stringent as that for lower education."[165] Moreover, by limiting members of the theology faculties to those who espouse views consistent with Catholicism, a university loses that "academic freedom of inquiry" which the Court noted as the differentiating factor between higher and lower education.[166]

The distinctions between *Roemer* and the Curran case suggest that the distribution of federal funds to Catholic University falls outside the acceptable limits discussed in *Roemer*. However, *Roemer* also intimates that, as a matter of policy, the Court favors public aid to higher education, even education that is sectarian in nature.[167] Had the Court in *Roemer* strictly applied the three-prong *Lemon* test, as well as the double-edged primary effect test, it probably would have struck

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162. Ripple, *supra* note 89, at 1216.

163. *Roemer*, 426 U.S. at 764.

164. *Id.* at 766.

165. Telephone interview with Albert Menendez, Director of Research for Americans United for the Separation of Church and State, in Washington D.C. (Aug. 14, 1986).

166. For a discussion of the related "academic freedom" issues, see *The Charles Curran Case*, 154 AMERICA 237 (1986); *see also supra* notes 53-82 and accompanying text; *Right To Free Speech*, 113 COMMONWEAL 131 (1986); Note, *supra* note 83, at 1049.

167. *See generally* Curry, *Aid To Catholic Education: Do We Know What We Are Asking For?*, 154 *America* 277-78 (1986).

down the aid program.[168]

Therefore, the Court appears to hold that, exempting extreme sectarian schools,[169] religiously affiliated colleges and universities should receive some form of public aid. Yet this blanket ideal reflected in *Roemer*, which overtly manipulates the established tests in order to uphold the aid, should not be established via court adjudications. Rather, the determination of whether public dollars should be allocated to sectarian colleges and universities is best left to the legislature. The political overtones of this issue render it more appropriate for the popular vote than for the courtroom.

Nevertheless, while the courts are guilty of inconsistency, so too is the Catholic Church. On the one hand, Catholic schools pledge to provide a religious atmosphere and culture aimed at permeating the school environment.[170] On the other hand, these organizations have supported and even proposed public aid packages "premised on the assumption that the religious aspects of the schools and the secular educational tasks they perform are clearly separable."[171]

For instance, in *NLRB v. Catholic Bishop of Chicago*,[172] the National Labor Relations Board (NLRB) asserted jurisdiction over the teachers in Catholic schools.[173] In the teachers' defense, the Church insisted that religion permeates every aspect of Catholic education, and asserted that a government agency which supervised the teachers of secular subjects would inevitably and unjustifiably become involved in religious questions.[174] Yet, at the same time, these schools were receiving aid packages based on the premise that the secular remained distinctly separable from the sectarian.[175]

The present Justices in favor of assistance to nonpublic schools, in fact, harbor a completely different definition and conception of the schools than the educators and religious bodies themselves.[176] For example, Justice Byron White, a consistent supporter of parochial aid, "has noted specifically that parochial schools receiving public aid could not blend secular and religious instruction."[177] In fact, he believes "that the schools are willing to separate themselves into secular and religious entities."[178] This reasoning should alarm any religious school which is

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168. *See generally* Ripple, *supra* note 89, at 1210.

169. For example, a school of divinity is considered a pervasively sectarian school, which renders it ineligible for public aid. *See Roemer*, 426 U.S. at 756.

170. *See* Schroth, *Tough Choices On Campus*, 113 COMMONWEAL 170 (1986).

171. Curry, *supra* note 167, at 277.

172. 440 U.S. 490 (1979).

173. *Id.* at 492-93.

174. *Id.*

175. *See* Curry, *supra* note 167, at 278.

176. *Id.*

177. *Id.* at 277-78.

178. *Id.*

unwilling to segregate its curriculum. The schools cannot be private when it comes to government control, and public when it comes to financing. Thus, religious institutions must "face the dual issues of how much they are willing to take from the Government and how much they are willing to concede it in return."[179]

This conflict in establishment clause litigation boils down to a definitional problem. The religious institutions are placed in the compromising position of having to misrepresent or mitigate their roles in the educational process. The judiciary has generally accepted this facade, and continues to aid these schools under a false assumption. For the schools, the aid may be a double-edged sword. As funding and its associated government control increase, the sectarian aspects of the schools will decrease, until the schools are religiously affiliated in name only—a veritable "sheep in wolf's clothing."[180]

The manipulation of the entanglement test in *Roemer* reveals the Court's sympathy for the financial plight of Catholic colleges and universities. If a court decides to permit Congress to continue funding Catholic University and other Catholic schools under similar heavy-handed Vatican control, further judicial manipulation of these tests is likely. For instance, a school could assert that only the theology and perhaps philosophy departments are affected, and thus the sectarian and secular aspects of the school are not *yet* in danger of merging.

The tension between the church and state in the area of public aid is rooted in miscommunication and misunderstanding. Though the courts are not, and cannot, be attuned to the internal goals, objectives, and concerns of the Church, likewise church administrators are not trained or legally sophisticated enough to fully appreciate the constitutional constraints that democracy in the United States imposes, even on its churches, for the protection of its citizens.

Although the separation of church and state makes for eloquent rhetoric, this particular conflict aptly demonstrates the need for the two bodies to join forces and *communicate*. The first step is for the church to decide just how much control it will cede to the government, and the precise manner with which it will represent sectarian issues to the public. Thus, the Church should define the limits of its concession to ensure that its efforts to acquire aid do not lead to a slow but sure degeneration to secularism. Once the Church affirms that it will not compromise the essential nature of its schools, and provides the government with some guidelines outlining acceptable public assistance, the

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179. *Id.*

180. One case study performed in 1978 concluded that "since Catholicity can only be an educational reality if the faculty and staff, to a sufficient extent, constitute a community of shared values, given recent hiring and tenure decisions" many Catholic institutions in the United States "will lose [their] distinctive Catholic character by 1998." Schroth, *supra* note 170, at 170.

legislature can develop a more realistic, tailored and, ultimately, constitutional public aid package.

IV. CONCLUSION

The dispute between Charles Curran and Catholic University is circular. Critics of the Vatican document charge that the Church should exempt its colleges and universities in the United States from the Vatican control outlined in the schema. This "supremacy" view connotes that civil law supersedes canon law, that the Church should somehow tailor its laws to the needs of a particular country. Under this reasoning, might not United States Catholics also request an exemption from, for example, the constrictions of the sixth commandment, claiming it does not fit our society any longer? These are issues the Church must answer; it is not the place of the United States government to impose its laws on American affiliates of the Catholic Church. Such government action would, in effect, force the Church to carve out exceptions for American members, an action prohibited by the religion clauses of the first amendment.[181] While breach of contract is reprehensible under our civil law, to the Church it is a means of establishing the veracity of its teaching. Denying the Church this alternative would propel the judiciary into church affairs in which it has little or no expertise.

On the other hand, the Church must recognize that in order to receive the benefits of democracy in the United States, such as public aid to its schools, it must allow certain concessions, such as the use of textbooks that omit references to God, or removal of crucifixes from mathematics classrooms.[182] Or, Catholic schools may remain independent of the government and retain their sectarian flavor. Either way, the decision belongs to the Church, not the government. Under the current system, funded institutions have reacted rather than acted. They have conformed as new precedent is handed down. Perhaps the Vatican hopes to send a message to these schools, warning them to adhere to their original mission. At the risk of losing millions of dollars, Catholic schools would gain religious integrity and credibility by refusing aid that comes only with strings attached. Although the quantity of students educated by these sectarian schools may decrease, the quality of the religious convictions instilled in the students will surely increase.

The courts will most likely abstain in the Charles Curran/Catholic University controversy, because it stems from an internal hierarchical dispute and because Curran is a member of the clergy. In addition, many of the issues fall within the rubric of academic freedom, an area in which courts typically defer to the expertise of the institution. Fur-

181. *See supra* note 18.
182. *See* Curry, *supra* note 167, at 277.

thermore, based on its desire for plurality in education, the government will probably continue granting public aid to Catholic University despite establishment clause concerns that Vatican control of the faculty yields a "pervasively sectarian" school.[183]

In the final analysis, the Curran case will certainly affect more than just the man and the University. On a larger sphere, the relationship between the two represents the relationship between civil law and canon law, once deemed divided by a mighty wall. The Curran case exposes that "wall" as an unrealistic and impractical metaphor. Charles Curran himself symbolizes the union of civil law and canon law. On one hand he is a priest, a member of an ecclesiastical society; on the other hand he is a citizen of the United States wronged by a breach of contract. In this case, however, Charles the man must bow to Father Curran the priest.

MARY PATRICIA GOLDEN

183. *See supra* text accompanying notes 116-58.