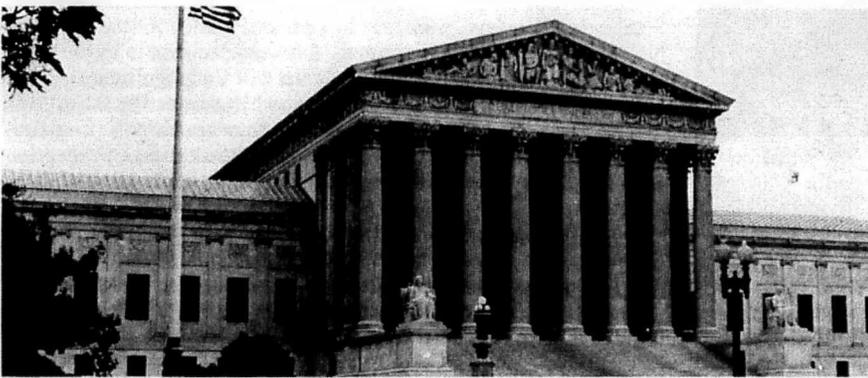


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# Report from the Capital

JULY-  
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The U. S. Supreme Court, which recently concluded its 1975-76 term, took major actions in the areas of church-state relations and human rights which are reviewed in this issue of *Report from the Capital*.

## Court Approves State Funding For Certain Church Colleges

By Stan L. Hasty

WASHINGTON—The U.S. Supreme Court ruled here in a 5-4 decision that states may provide funds for certain private, church-related colleges without violating the First Amendment to the Constitution.

The decision, which will unquestionably affect similar plans in other states, upholds an earlier ruling by a federal district court that Maryland's program of direct aid to sectarian colleges is permissible.

Maryland's plan, in effect since 1971, stipulates that the funds must be used for "secular" but not "sectarian" purposes. That, however, is the only restriction on the aid.

Four individual taxpayers brought suit against the state of Maryland and its Board of Public Works, the agency which administers the program. Four schools, all Roman Catholic, have received funds since the program began. A fifth, Methodist-affiliated Western Maryland College, withdrew from the case earlier, declaring that it

had become a private non-sectarian institution.

The high court's majority, which included Chief Justice Warren E. Burger and Associate Justices Harry A. Blackmun, Lewis F. Powell, Byron R. White, and William H. Rehnquist, held that the Maryland program meets constitutional requirements spelled out in previous actions, particularly in *Lemon v. Kurtzman*, a 1971 decision setting up a three-part test for such aid programs.

Blackmun, who wrote the court's opinion, argued that a "hermetic separation" of church and state is impossible. He went on to point out that in previous decisions, the court has held that providing transportation and textbooks for students attending parochial schools are constitutional.

Blackmun held that the Maryland law does not have the "primary effect" of advancing religion and that "excessive government entanglement with religion" has

(See STATE AID, p. 8)

### Analysis

## High Court Term Marked By Momentous Decisions

By Stan L. Hasty

WASHINGTON—In its just-concluded term, the U.S. Supreme Court took far-reaching actions on a number of major issues in church-state affairs and human rights.

The justices acted on aid to sectarian colleges and universities, internal church disputes, freedom of press and speech, capital punishment, abortion, privacy, sex discrimination, and obscenity, among other areas involving conscience issues.

Without question, the most important decision in the church-state field was the high court's 5-4 ruling that states may help subsidize some institutions of higher learning controlled by churches.

A Maryland plan, in effect since 1971, provides direct financial assistance to private colleges, including church-related schools. The program's only restriction is that such public funds may not be used for sectarian purposes. Opponents of such plans argued unsuccessfully that the restriction is essentially meaningless in that colleges may divert funds from "secular" to "sectarian" purposes. The end result, the argument goes, is the same—religious schools benefit at taxpayers' expense.

The high court's decision seems at least a setback to strict adherents of separation of church and state and appears to contradict the tribunal's reasoning in striking down similar arguments for state funding of elementary and secondary schools. The justices went to great pains to make a distinction between the nature of education at the college level as opposed to the elementary and secondary levels.

This view, although plausible to many church-state observers, leaves unresolved one disturbing question. Does the court's decision in *Roemer v. Board of Public Works* indicate that sometime in the future, perhaps even five to ten years hence, the same "sectarian" and "secular" distinctions might be applied to all schools at every level?

At the same time, caution should be exercised so as not to make too much of the *Roemer* decision. It does not necessarily mean, of course, that state programs such as that presently being contested in Missouri's Supreme Court will be likewise upheld. Missouri's plan involves state aid to stu-

(See COURT TERM, p. 6)

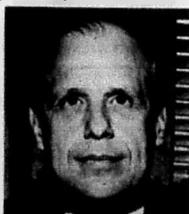
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NASHVILLE, TENNESSEE

## From the Desk of the Executive Director

### Tax Aid and Church Colleges

By James E. Wood, Jr.

In a major church-state decision (*Roemer v. Board of Public Works*), the U.S. Supreme Court on June 21, 1976, for the first time in history, approved direct public subsidies to church schools. In a split decision, 5 to 4, the Court upheld the constitutionality of a Maryland law which authorizes an annual subsidy to private colleges, including church schools, with the one proviso that none of the state funds may be used for "sectarian purposes." Generally lauded by advocates of tax aid to church schools, the decision is deplored by opponents of such aid, as well as by some proponents of parochial aid, as being inconsistent with previous Court decisions in this area.



Wood

The decision of the Court must be viewed as unprecedented in spite of the attempt of the majority to justify the decision as consistent with *Tilton v. Richardson*, handed down five years earlier. In *Tilton* the Court gave qualified approval for the use of federal funds for the construction of church school facilities not used for religious purposes and where the primary purpose of the college was found to be secular, not religious.

In *Tilton*, as in *Roemer*, the Court based its decision on what it found to be the generally secular character of church colleges compared to church elementary and secondary schools. At the same time of the *Tilton* decision in 1971, the Court ruled unanimously in *Lemon v. Kurtzman* and 8 to 1 in *Earley v. DiCenso* that state subsidies to parochial schools are unconstitutional. Any assumption that public funds could be freely granted to church-related colleges, provided simply that the facility constructed was not used for religious or sectarian purposes, certainly is not sustained from a reading of the *Tilton* decision. The Court ruled that tax aid for elementary and secondary schools is unconstitutional on *prima facie* evidence that parochial schools are integrally related to the churches and are church controlled. Therefore, they fail to meet the criterion of being primarily secular in character.

Because of the great variety of church colleges, the Court reasoned that they must be judged on an individual basis as to the nature of their church-relatedness as well as to their religious character. For example, all of the justices agreed in *Tilton* that public funds to a church college could not be justified if the college imposed religious restrictions on the admission of students or required instruction in the tenets of a particular faith. Eight of the justices agreed that aid could not be granted those institutions which required attendance at religious activities, imposed religious restrictions on what could be taught, or regarded the propagation of religion as a primary activity or purpose of the institution. Noting that some church colleges have been declared "ineligible for aid" by federal authorities, five of the justices upheld the Higher Education Facilities Act on the basis that the

four colleges involved in the *Tilton* case did not violate any of the restrictions that characterize "typical sectarian" institutions of higher learning. The Court left no doubt that the primary purpose of church colleges' receiving tax aid must be secular, not religious.

*Tilton* is of particular significance because of its affirmation of the secular character of church colleges as the requisite of eligibility for tax aid. For this reason, and this reason alone, the Higher Education Facilities Act was ruled constitutional with respect to the use of funds for church colleges. Even so, four of the justices dissented, as now in *Roemer*, and the intensity of the minority's dissent in *Tilton* was unmistakable.

#### II

While there must be disappointment, if not dismay, over the *Roemer* decision for the opponents of direct tax aid to church schools, there is significance to be found in the rationale given in the majority opinion. As with the *Everson* decision in 1947, many who deplore the decision of the Court will find significance in the rationale of the decision itself. Thus, while respecting the criteria used by the Court in the *Roemer* case in evaluating the constitutionality of the Maryland statute, one may take strong exception to the conclusions reached by the Court in its application of these criteria.

The requirement that the statute must have a "secular legislative purpose" was found not to be an issue in this case. In fact, the District Court's earlier finding that the purpose of Maryland's aid program was the secular one of supporting private education generally was not challenged by the appellants in *Roemer*.

Furthermore, the Court found that the tax aid provided the four church colleges cited (one of which had become defunct before the Court's ruling) "does not have the primary effect of advancing religion" and, therefore, "does not under the standards set by *Lemon v. Kurtzman* . . . violate the Establishment Clause." Special attention was given the 1972 amendment to the Maryland statute which provides that "none of the moneys payable . . . shall be utilized by the institutions for sectarian purposes." Without this amendment, the Court said, it would have found the original 1971 Maryland Act "to have been unconstitutional." In the light of the First Amendment, the soundness of the principle enunciated here is indisputable, although the Court's application of the principle to the three Maryland Catholic colleges is by no means beyond dispute.

In *Roemer*, the appellants claimed that the institutions were constitutionally ineligible, as church colleges, to receive tax aid for their general academic programs. Even though there may be strong objections, and rightly so, to the Court's conclusions in the *Roemer* case, attention should be given to the rationale of the majority's opinion. The eligibility of tax aid was upheld on the basis that the colleges named were not "pervasively sectarian."

Despite the formal affiliation of the colleges with the Roman Catholic Church, the Court noted that the schools named did not: (1) receive any funds from, or make reports to, the Catholic Church; (2) inject church considerations into college decisions; (3) make the encouragement of spiritual development a primary objective or religious indoctrination a substantial purpose or activity; (4) require attendance at religious services; (5) exert "religious pressures" or hamper an "atmosphere of intellectual freedom"; (6) decide faculty hiring on a religious basis (apart from the religion or theology departments); (7) use public funds to support religion and theology programs; (8) practice religious discrimination in the admission of students; or (9) attempt to indoctrinate.

(See CHURCH COLLEGES, p. 6)

# High Court Voids Portions of Missouri Abortion Law

By Stan L. Haste

WASHINGTON—In a decision aimed at clarifying its position on the volatile subject of abortion, the U.S. Supreme Court struck down several sections of Missouri's anti-abortion law.

The law, enacted after the high court's historic decisions in 1973 holding that the state had only a limited interest in controlling abortion, sought to outlaw the practice in a number of instances not specifically covered in the court's action three years ago.

Missouri's law required that a woman obtain the consent of her husband before seeking an abortion and required parental consent for women under age 18. In addition, the law outlawed the so-called "saline amniocentesis" method of abortion and required physicians, under threat of manslaughter charges, to preserve the life and health of fetuses at every stage of pregnancy.

In its action, a divided Supreme Court struck down those four provisions of the Missouri law.

At the same time, the court unanimously upheld the statute's definition of the "viability" of the fetus, a requirement in the law that a woman give written consent to an abortion, and certain reporting and record-keeping provisions applicable to physicians.

Six of the nine justices agreed that the provisions relating to spousal consent and demands upon physicians to preserve the life of fetuses violate the Constitution. Only five justices, however, voted to strike down the parental consent and saline method provisions.

Justice Harry A. Blackmun, a generally cautious member of the high court, wrote the majority opinion. He also wrote both of the controversial 1973 opinions which have precipitated lively debate over the entire abortion issue. He has been the main target of so-called "pro-life" wrath.

In his new opinion, Blackmun reiterated the Court's findings three years ago that the primary issue in the debate over abortion is a woman's "right of privacy" in such a personal sphere of life.

Blackmun reasserted, however, that such a right is not absolute and that the state therefore has a limited interest in controlling abortion procedures.

Regarding the spousal consent requirement of the Missouri law, the majority held

that although "ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband," a state may not "give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy."

"It is difficult to believe," the court continued, "that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all."

When husband and wife disagree over whether a pregnancy should be terminated, the court noted that "since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor."

Three of the justices, Byron R. White, William H. Rehnquist, and Chief Justice Warren E. Burger, disagreed, saying that "a father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life."

"It is truly surprising," White's dissenting opinion continued, "that the majority finds in the United States Constitution . . . a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child."

In striking down the parental consent portion of the Missouri law, the court's majority ruled "that the State may not impose a blanket provision . . . requiring the consent of a parent" when an unmarried minor seeks an abortion.

Although acknowledging that states may constitutionally regulate certain areas of minors' lives, Blackmun wrote that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

To the argument that the state has a legitimate interest in protecting the family unit, Blackmun said that "it is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit."

"Neither is it likely," he continued,

"that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."

White, Rehnquist, and Burger, joined this time by new Justice John Paul Stevens, again objected to the majority position. Stevens disputed the contention that parents would be hostile to daughters pregnant outside of marriage.

He went on to note that "if there is no parental consent requirement, many minors will submit to the abortion procedures without ever informing their parents."

White, in a separate dissent, argued that the state "is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests."

The court also struck down the section of Missouri's law forbidding the saline method of abortion after the twelfth week of pregnancy. That is the method whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac. It is the method used to terminate about 70 percent of pregnancies through abortion.

Blackmun's opinion stated that the other commonly available methods, hysterotomy and hysterectomy, "are significantly more dangerous and critical for the woman than the saline technique."

In his dissent, White said that the majority's finding that most Missouri women would be unable to obtain a safe abortion after 12 weeks of pregnancy without the availability of the saline method was "wholly unjustifiable."

The other portion of the Missouri law invalidated by the court required physicians to preserve the life and health of fetuses. The statute also provided that manslaughter charges be brought against any doctor who failed to do so.

The court ruled that the provision was too broad and did not acknowledge that it imposed a standard of care upon the physician in spite of the fact that the abortion may occur before "viability."

All nine justices joined in upholding other, less controversial, provisions of the Missouri law.

On the definition of "viability," the (See ABORTION LAW, p. 4)

## High Court Upholds Capital Punishment

WASHINGTON—In a historic decision in five separate cases, the U.S. Supreme Court ruled, 7-2, that the death penalty for murder does not violate the Constitution's prohibition of "cruel and unusual punishment."

The decision means that many of the almost 600 inmates on death rows across the nation have lost their final judicial appeal.

Although the high court ruled in all five cases that capital punishment is not cruel and unusual, it did strike down the mandatory death provisions in two of the five cases—North Carolina and Louisiana—by a 5-4 margin.

The decision marked the first time the Supreme Court has faced the argument, head on, that American jurisprudence has come to the point where the death penalty is excessive and therefore violates the Eighth Amendment's cruel and unusual punishment clause.

The decision has been expected since a 1972 high court action declaring that the death penalty, as it was then being applied in many states, was arbitrary and capricious because of selective application.

That decision, *Furman v. Georgia*, led 35 states and the national Congress to adopt new death penalty statutes aimed at eliminating the constitutional defects present in Georgia's law. All the new laws limit application of the death penalty to offenders convicted of certain types of first degree murder.

In its latest action, the high court struck down death penalty laws in North Carolina and Louisiana because those two states had made execution mandatory for conviction in some categories of first degree murder.

The 5-4 ruling on the North Carolina and Louisiana laws represented the same margin which struck down Georgia's law in 1972.

Death penalty statutes in three other states, Georgia, Texas, and Florida, were upheld in the latest decisions. Those states have capital punishment laws which the court held meet the tests laid down in *Furman* four years ago.

The primary question facing the court in all five cases, however, was the constitutional validity of the death penalty itself. The 7-2 decision likely indicates that that question has now been settled, at least for the foreseeable future.

By its action upholding capital punishment, the court rejected views it heard in oral arguments in March that the death pen-

alty is excessively cruel and that, in spite of the court's 1972 decision, is still being applied unevenly.

During oral arguments, the other side had argued that the high court should abstain from striking down the death penalty and leave any such decision to Congress and the state legislatures.

The court did acknowledge that the argument of whether capital punishment is a deterrent to murder is undecided. It did say, nevertheless, that in some instances of premeditated murder, it may serve as a deterrent factor.

Although seven of the nine justices agreed with the position that the death penalty is constitutional, the majority split into three sections in announcing the decision.

Justice Potter Stewart, joined by Justices Lewis F. Powell and John Paul Stevens, issued the main opinion upholding the death penalty. Another trio, Byron R. White, William H. Rehnquist, and Chief Justice Warren E. Burger, concurred in the judgment in a separate opinion. Justice Harry A. Blackmun, also agreeing with the decision, issued yet another.

On the other side, two justices dissented. William J. Brennan, Jr., who was not present when the decisions were announced, argued that the death penalty should be declared unconstitutional. Justice Thurgood Marshall also dissented, saying that it was incredible that the court would hold that the time has not come for capital punishment to be deemed "cruel and unusual punishment." (BPA)

## Justices Bar Court Action in Church Cases

WASHINGTON—In a major church-state action, the U.S. Supreme Court announced here that civil courts have no right to decide internal ecclesiastical disputes in hierarchical churches.

In a 7-2 decision the high court overturned an earlier ruling by the Illinois Supreme Court in the case of a bishop of the Serbian Eastern Orthodox Church who was defrocked in 1963. In the lengthy legal battle since then, Bishop Dionisije Milivojevic, former head of the church's American-Canadian diocese, had sought to have civil courts reinstate him.

Justice William J. Brennan, Jr., writing for the majority of the court, cited several earlier decisions dating to 1871 in which the tribunal has declined to intervene in internal church disputes.

The new decision announced here states that "where resolution of the (church) dis-

putes cannot be made without extensive inquiry by civil courts into religious law and polity," such courts "shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity."

In addition to the issue of Bishop Milivojevic's defrockment, the court was also faced with the question of who owned church property formerly under the bishop's control. On this dispute, the high court also ruled that the church's authorities must settle ownership questions, not the civil courts.

Two justices, William H. Rehnquist and John Paul Stevens, disagreed, maintaining that some civil jurisdiction over church disputes is inevitable. Rehnquist, who wrote a strongly-worded dissent for himself and Stevens, said that civil courts "must of necessity make some factual inquiry" into such disputes unless they "are to be resolved by brute force."

He elaborated that "if the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness."

The other seven justices argued, however, that when church courts have been created to settle such disputes, "the Constitution requires that civil courts accept their decisions as binding upon them."

The Serbian Eastern Orthodox Church is a hierarchical church whose seat is the patriarchate in Belgrade, Yugoslavia. It dates to the schism of 1054 within Catholicism which resulted in the formation of 14 new bodies.

The church's highest legislative, judicial, and administrative authority rests in its Holy Assembly of Bishops which made the 1963 decision to defrock Bishop Milivojevic. (BPA)

## Abortion Law

(Continued from page 3)

court ruled that "it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period." Because Missouri's definition of viability was sufficiently flexible, the court said, it may stand.

The justices also upheld sections of the law requiring the woman's own written consent before an abortion can be performed and a number of reporting and recordkeeping procedures for physicians and hospitals. (BPA)

# Congress Hears Status Report on Reform Russian Baptists

By W. Barry Garrett

WASHINGTON—Russian Reform Baptists are the best organized dissenting group among the various protest movements in the Soviet Union, according to testimony at a hearing by the House of Representatives' Subcommittee on International Organizations and Political and Military Affairs here.

Professor Bohdan Bochiurkiw of the Department of Political Science of Carleton University, Ottawa, Canada, pointed out that the Russian government makes no distinction between religious and other types of dissenters. The Baptist group to which he referred is the dissenting body headed by imprisoned Georgi Vins, executive secretary of the Initiativniki (Reform Baptists), which was formed in 1961 as a protest group opposed to the All-Union Council of Evangelical Christians-Baptists (AUCECB).

The hearing was under the direction of Rep. Donald M. Fraser (D-Minn.), chairman of the Subcommittee on International Organizations. Also participating in the hearing was Rep. John W. Buchanan (R-Ala.), who is a member of the Subcommittee on International Political and Military Affairs. This was the first of two hearings on religious persecution in the Soviet Union.

Other witnesses were Pastor Janis Smit, chairman of the Russian Reform Baptist group and David A. Klassen, a dissenting Russian Baptist who has been a prisoner of conscience in the Soviet Union.

In addition, written testimony was submitted by George Dobezensky, research director of Human Rights Research, Inc.

The testimony by all of these persons indicated that there is a rising tide of dissent of all forms in Russia which is being accompanied by increased religious persecution, political imprisonment, and other forms of resistance by the government.

After the testimonies which described many instances of oppression in the Soviet Union, Fraser asked, "What can the United States Government do most effectively to assist in opening up religious freedom in the USSR and to aid those who are now in prison?"

Professor Bochiurkiw replied that human rights everywhere in the world are a proper concern to be voiced by United States officials. He claimed that oppression and a violation of human rights is not an exclusive internal concern of the Russian government.

Specifically, the professor encouraged the development of a strong public opinion in America against denial of human rights in Russia, asked for continued publicity to be given to the many cases of persecution, deplored "detente" between the Soviet Union and the USA, and urged a Soviet policy that would make it possible for people in the USSR to migrate to places where they can practice their beliefs in freedom.



Smit replied to Fraser's question that Congress should adopt the resolution now before both the House and Senate calling for the release of Georgi Vins from prison. He emphasized that the Western powers should stop their blind attempts to appease the Soviet Union.

The former Latvian pastor said that the Voice of America is heard by the Russian people and that through this source they learn of developments within their own country. However, he cautioned that the VOA is beginning to lose its effectiveness because of the American policy of detente.

Klassen pointed out that during World War II the United States government and President Franklin D. Roosevelt found ways to relieve many forms of oppression in the Soviet Union. He said that the US government can again find ways to do the same thing.

"If Russians can receive wheat to keep from starving, we should be able to receive Bibles," Klassen asserted.

Smit, who left the USSR, Soviet-occupied Latvia on May 25 of this year, told the hearing that he had been deprived of his pastoral activities for the following reasons:

1. "Preaching the New Testament in several Soviet republics and cities other than my parish;
2. "Asking the believers to pray for those in prisons and persecuted; and
3. "Admitting minors below the age of 18 to church activities, in particular, singing in the choir."

Klassen outlined at the hearing seven methods of persecution implemented against the churches in Russia. They are:

1. Physical annihilation. He cited instances in which Christians were torn to pieces by dogs, tongues torn out and branding by hot irons, suffocation and drowning.
2. Psychological tactics. He cited in-

stances of deprivation of parental rights and taking children away from their parents.

3. Trojan war tactics. He said that the ministry of cults "penetrates church communities by smuggling in false preachers who destroy the churches from within."

4. Religious badgering. He cited his experiences of over three years in an experimental camp where members of over 40 religious denominations were harassed.

5. National harassment. He cited an instance where the government forced a member of his church to give testimony against him, threatening to deprive him of his job when he refused to do so.

6. Offering of bribes. Klassen said, "depending on whether the believers remain faithful to the church or prefer to compromise for the sake of material welfare, the believers had to pay a fine of two million rubles for illegal gathering in their own homes for religious purposes."

7. Provocational tactics. He said that "various types of slander and lies are directed at the ignorant masses to provoke anti-Christian feelings."

All three of the witnesses who appeared in person at the hearing attacked churchmen in Russia who cooperate with the government in the officially permissible religious programs.

Professor Bochiurkiw pointed out that the atheistic Soviet government had made some concessions to certain official church leaders. "This leads them to say that there is no religious persecution in Russia," he said. "This is true," he continued, "if people keep their religious views private, but when they speak out openly the government's attitude changes."

Smith claimed that the Reform Baptist movement in Russia under the leadership of Georgi Vins was made necessary because the "state-controlled All-Union Council of Evangelical Christians-Baptists" had refused to call an Extraordinary All-Union Congress since 1944, "the then-leadership of AUCECB blindly carried out the instructions of the atheistic communist government," and that "AUCECB was trying to incite local churches to anti-Christian deeds."

When the Reform Baptist movement got under way in 1961, Smit said that "a spark of truth and resistance lit the hearts of thousands of believers throughout the whole Soviet Union."

## Court Term

(Continued from page 1)

dents rather than directly to the schools themselves.

One might easily reason that because the court upheld Maryland's far broader plan, it would certainly rule Missouri's constitutional as well. That is not necessarily the case, however, as the court has been most reticent to strike down prohibitions in state constitutions forbidding aid of any kind to sectarian institutions.

What the high court did virtually guarantee by its badly divided *Roemer* decision is that state and federal courts will be increasingly faced with a variety of such plans much on the order of similar programs designed to help church-related elementary and secondary schools.

In the other major church-state case this term, the justices decided that internal church disputes in hierarchical churches must not be decided by civil courts.

The 7-2 decision marked the end of the long struggle by Bishop Dionisije Milivojevic, head of the American-Canadian diocese of the Serbian Eastern Orthodox Church. In 1963, after being defrocked on charges of insubordination, Milivojevic took his case to state courts in Illinois. The Illinois Supreme Court eventually ruled in his favor, holding that procedural irregularities in his church trial invalidated his defrockment.

The U.S. Supreme Court disagreed by citing a long line of similar cases dating to 1871 in which the court has declined to intervene in internal church disputes when hierarchical structures are involved.

The decision may or may not have much bearing on similar cases involving congregational-type churches, including Baptist congregations. The court made a point of noting that its decision applied to churches which have structured into their organizational life judicial processes. Presumably, the high court might well decide

otherwise in the case of a minister whose denomination does not have a judicial structure.

The court also dealt with several other church-state issues this term, but none of them involved major decisions.

The justices agreed to schedule for oral argument next term the case of a Kentucky man who contends he was fired from his job for refusing to work on Saturdays because of his religious convictions about the Sabbath.

Paul Cummins, an employee of the Parker Seal Co. of Berea, Ky., argues that his church, the World Wide Church of God, observes the traditional Sabbath and that he was discharged because of repeated absences on Saturdays. The company argues that to make an exception for Cummins is unfair to other workers, while Cummins holds that he is giving up overtime pay on Saturdays to the benefit of his fellow workers.

The controversy centers around a provi-

## Church Colleges

(Continued from page 2)

students or to proselytize. Rather, the Court held that the tax aid was used only to support the *secular* programs of these colleges which were seen as clearly separated from the sectarian side of these colleges. If one could accept this assumption, then there would be little basis for objection to the decision itself.

Finally, the Court applied the third part of the *Lemon* test of the Establishment Clause and concluded that the Maryland scheme "does not foster an excessive entanglement with religion." The reasoning of the majority, it should be noted, was based on their finding that the colleges are autonomous, neither controlled nor financed by the Catholic Church, and that they perform "essentially secular functions." In the application of this third test, the Court found that the problem of "excessive entanglement" was greatly reduced also because, the majority declared, "the secular and sectarian activities of the college are easily separated."

Thus, in its application of the three-pronged test of the Establishment clause, as delineated in *Lemon*, the Court ruled that the Maryland Act met the requirement of the First Amendment, namely the separation of church and state. In doing so the Court, at least in its own eyes, was not reversing itself with regard to its previous rulings prohibiting tax aid to church schools, but rather found its rulings to be in complete harmony with the rulings of *Lemon v. Kurtzman* (1971), *Committee for PEARL v. Nyquist* (1973), and *Meek v. Pittenger* (1975), all three of which expressly denied tax funds to church elementary and secondary schools.

III

In spite of the Court's stated intention to insure that the principles of *Lemon* and *Meek v. Pittenger* are "faithfully applied" in *Roemer*, the decision nonetheless provides direct tax aid to the general program of three Roman Catholic colleges. The decision itself fails to conform to the criteria enunciated earlier by the Court and allegedly applied here. In this respect, the Court has

violated the very safeguards it has avowed to protect.

The mere exclusion of state funds from being used for salaries of religion faculty members, scholarships of students in religion studies, and the construction and maintenance of buildings used for religious activity does not speak to the religious character or the religious identity of the institutions themselves. In vigorous dissent, therefore, Justice Brennan (joined by Marshall, Stewart, and Stevens) reaffirmed his opinion in *Lemon* that the Establishment Clause forbids tax funds "to sectarian institutions in which the propagation and advancement of a particular religion are a function or purpose of the institution. . . ." For these funds, Justice Brennan wrote, "necessarily aid the proselytizing function of the institution." "The reason is not that religion 'permeates' the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education and religious instruction. When aid flows directly to the institution, both functions benefit."

In *Roemer*, the Court has created the anomaly that an elementary or secondary school cannot be church-related to be eligible for public funds, while affirming that a college can be church-related and still be eligible for tax aid. Any suggestion, however, that the Court has now simply affirmed the constitutionality of tax support for church colleges is specious, to say the least. Clearly, the decision is not compatible with the thinking of those who would on the one hand seek tax aid for church colleges and on the other hand stress the religious dimension of those colleges.

No amount of rhetoric or economic arguments can obscure the danger of the *Roemer* decision to the future of Christian higher education and to the principle of church-state separation. As Justice Stevens warned in his dissent, tax subsidies carry with them "the pernicious tendency . . . to tempt religious schools to compromise their religious vision." For the churches the real issue that remains is not whether church schools should accept public funds or not, but whether or not these schools should claim a religious identity or remain church-related and church controlled. It is the determination of this question which is the crucial one with regard to the future course of tax aid and church colleges.

sion in the Civil Rights Act of 1964 forbidding discrimination by employers on religious grounds unless they can demonstrate that making "reasonable accommodations" to the religious needs of employees causes "undue hardship."

The high court continued to stand by its landmark decisions of 1962 and 1963 forbidding prescribed prayer and Bible reading in the public schools by rejecting an appeal from a Massachusetts woman who wanted her daughter to conduct public prayer meetings at her school with school officials' blessing.

Rita F. Warren, a Brockton, Mass., woman who has long opposed the court's controversial decisions on prayer and Bible reading, asked school officials to grant her daughter permission to pray orally in the classroom or, as an alternative, to designate a "non-denominational chapel" in the school where students could voluntarily worship.

The court also declined to hear another case which permitted a Roman Catholic priest to continue celebrating Mass in a student dormitory at the University of Delaware.

The religious services have been conducted in a commons area on the university campus in spite of an order by school officials to discontinue them. The Delaware Supreme Court ruled, however, that the university violated students' free exercise of religion by banning the services and that the practice did not unconstitutionally establish religion.

In other important First Amendment actions, the Supreme Court ruled that judges may not forbid the press from covering the pretrial portions of a criminal case, held that military base officials may prohibit political candidates from making campaign speeches, and upheld Illinois' flag desecration law.

The court unanimously decided that a gag rule imposed on the press by a Nebraska state judge in 1975 following a widely publicized mass murder violates the free press provision of the First Amendment.

Considered a major test by the news media, the case was an example of a classic confrontation of two constitutionally guaranteed rights—freedom of the press and the right to a fair trial.

What the high court decided was that the free press right takes precedence over a judge's decision to bar newsmen from covering the crucial pretrial stage of a criminal case. Chief Justice Warren E. Burger, however, did allow for the possibility of criminal cases where judges might, in extreme circumstances, impose a gag order.

The free speech case involved four candidates for president and vice-president, including Dr. Benjamin Spock, who were denied permission in 1972 to make campaign speeches and distribute literature at Fort Dix, N.J., a military base. Two lower federal courts had earlier ruled on their behalf.

The Supreme Court overturned those decisions in a 7-2 ruling, holding that military officials have no obligation to provide a political forum for candidates.

In the Illinois flag desecration case, the high court declined to hear an appeal for three women convicted in Rock Island, Ill. of burning an American flag near the federal building there. They were protesting American involvement in Vietnam and the deaths of four students at Kent State University in 1970.

Easily the most publicized decision by the court in its past term was its holding that the death penalty does not constitute "cruel and unusual punishment" in violation of the Constitution's Eighth Amendment.

In a complex series of opinions, the justices, by a 7-2 margin, declared that capital punishment is still desired by a majority of the American people, as evidenced by the fact that 35 state legislatures and Congress have written new death penalty laws since 1972. That year the high court ruled that the death penalty as it was then being imposed was "arbitrary" and "capricious" and therefore involved cruel and unusual punishment.

Three state laws were upheld entirely by the court's latest actions. Georgia, Texas, and Florida were said to have met the court's 1972 requirements. But two other states, North Carolina and Louisiana, had their mandatory death penalty statutes invalidated by a slim 5-4 margin of the court.

What the decision means is that those states which give juries and judges no options for mercy must enact new laws which include such provisions. But those states which pass the newest constitutional guidelines may now proceed to execute convicted first degree murderers in those categories covered by their laws. Many of the 592 inmates on death row before the new decision have now lost their final appeal.

In another major decision announced during the court's last week of the term, the justices broadened their 1973 abortion ruling by holding that neither husbands nor parents may be given veto power over the decision of a woman in consultation with her physician to have an abortion.

The Missouri case involved a sweeping state law enacted in the wake of the 1973 action which held that states may not forbid

a woman from obtaining an abortion within the first three months of pregnancy but may impose certain regulations over the last six months.

The decision is really a logical extension of the earlier actions in that the court has now reaffirmed that government has only a limited interest in the matter. The justices continued to avoid deciding the question most often raised by anti-abortionists of when life begins, saying again that such a question is medical and theological rather than legal.

The court did uphold portions of the Missouri law, including a written consent requirement by the woman and certain recordkeeping regulations for physicians and hospitals. But the key portions of Missouri's anti-abortion law were struck down.

In addition, the high court ruled on several other privacy questions. Another 7-2 decision declared that the conviction of a Maryland attorney for defrauding a client in the purchase of a piece of real estate is valid despite the fact that some of the evidence used against him at his trial had been seized by police who entered his office without a warrant for all the items taken.

The court's holding means that police must be given wider discretion than in the past to search for evidence and may seize documents not directly related to the charge without violating the Constitution's ban on "unreasonable searches and seizures."

Another privacy case, this one from Louisville, Ky., was also decided in favor of police power and against individual rights. By 6-3, the high court rejected the appeal of an accused shoplifter who complained that publication of his photograph on a police flyer warning merchants of active shoplifters before he had been convicted violated due process of law. The court ruled, however, that since the accused could not demonstrate sufficient "liberty" or "property" interests, his claim was invalid.

The high court was active also in the field of sex discrimination, although it decided to hold over until its next term the key current case in the field. Despite hearing oral arguments last fall that the General Electric Co. discriminates against women by excluding pregnant women from an employee disability income protection plan, the court announced without explanation that the case will be reargued next term.

In another case, the court likewise reversed its field by announcing that it will not hear a Mississippi school board's argument that it should be allowed to deny employment to unwed mothers. The court.

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## State Aid

(Continued from page 1)

not been proven in its administration by state officials.

Regarding the "primary effect" question, Blackmun said that none of the four colleges received funds from nor reports to the Roman Catholic Church, that religious indoctrination is not a primary purpose, that courses in religion and theology comprise only a small part of the curriculum, and that faculty hiring and student recruitment programs are not based on religious tests.

Blackmun also held while there is "no exact science in gauging" the "excessive entanglement" question, the Maryland program contains the necessary safeguards to insure against it.

He also pointed to the "essentially secular educational functions" of the four schools in contrast to the religious character of parochial elementary and secondary schools.

Blackmun said further that the fact that the state appropriation is an annual one "does not necessarily" mean that excessive entanglement results.

Referring to yet another test applied in previous decisions, Blackmun stated that "political divisiveness" over the question of state aid to sectarian institutions is less in the case of a college than in that of an elementary or secondary school.

While agreeing with Blackmun's position upholding the Maryland plan, Justices White and Rehnquist stated in a separate opinion that the court need not bother with the "excessive entanglement" question. White, who has repeatedly objected to that portion of the *Lemon* test, wrote that all the court needs to establish is the secular nature of the program at stake and to ascertain that its primary effect is not to advance religion.

On the other side, three dissenting opinions were filed. Speaking for himself and Justice Thurgood Marshall, William J. Brennan, Jr. objected to the "payment of general subsidies to religious institutions from public funds." Citing an earlier opinion he wrote in 1963, Brennan said that such subsidies "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."

Brennan, the court's senior member, stated further that "the discreet interests of government and religion are mutually best served when each avoids too close a proximity to the other."

Justice Potter Stewart, in a separate dissent, objected to the fact that all four sectarian colleges receiving the aid require com-

pulsory religion courses which may or may not include efforts to proselytize. He insisted that such courses ought to be taught as an "academic discipline."

The high court's newest member, John Paul Stevens, also dissented, saying that state subsidies carry with them the "pernicious tendency . . . to tempt religious schools to compromise their religious mission."

Only twice before has the Supreme Court dealt with aid to higher education. In 1971 it held that federal construction grants for church-related colleges are permissible if they are used for purely secular purposes (*Tilton v. Richardson*).

And in 1973, in a case involving Baptist College of Charleston, S.C., the court held that state revenue bonds may be issued for construction of secular facilities on church-related college campuses, even though sectarian colleges benefit in repaying the money because of their tax-exempt status. (BPA)

## Court Term

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had earlier said the case would be given a full hearing. The action means that all women, including unwed mothers, must be given equal consideration by school boards in compliance with Title IX of the Education Amendments of 1972 passed by Congress.

In other sex discrimination actions, the court let stand a lower ruling that an insurance company may pay women accountants less than men in similar positions but likewise upheld another lower court's decision that a Houston, Tex. firm violated women custodians' rights by paying them less than their male counterparts.

In another area where litigation has flourished, the high court by and large stood by its 1973 decision to allow local communities to define standards of obscenity. The tribunal's newest justice, John Paul Stevens, announced that he would not join three of his colleagues on the court who want the court to restudy the whole obscenity field. Four of the nine justices must agree before any case can be heard.

In other cases relating to sexual questions, the high court upheld the right of states to prohibit sodomy, said the states may not prevent underage youth from obtaining birth control information without parental approval, upheld the federal Mann Act forbidding transportation of women across state lines for immoral purposes, and refused to review California's sex education program for public schools.

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# Report from the Capital

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Editor: James E. Wood, Jr  
Managing Editor: Stan L. Haste  
Contributing Editors: John W. Baker  
W. Barry Garrett

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(202) 544-4226