

The Burger Court Opinion Writing Database

Roemer v. Board of Public Works of Maryland

426 U.S. 736 (1976)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University in St. Louis

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1976

Re: 74-730 - Roemer v. Board of Public Works
of Maryland

MEMORANDUM TO THE CONFERENCE:

At Conference I passed on my vote. I have
now concluded to affirm.

Regards,

WEB

*Pass vote
in vote book*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

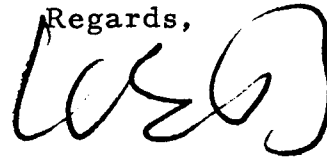
June 16, 1976

Re: 74-730 - Roemer v. Board of Public Works
of Maryland

Dear Harry:

I join your June 3 proposed opinion.

Regards,



Mr. Justice Blackmun

Copies to the Conference

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 74-730-Roemer v. Bd. of Public Works

MR. JUSTICE BRENNAN, dissenting.

From: Mr. Justice Brennan

I agree with Judge Bryan, dissenting from the judgment under 6/7/76

Recirculated: _____

review, that the Maryland Act ". . . in these instances does in truth

offend the Constitution by its provisions of funds, in that it exposes

state money for use in advancing religion, no matter the vigilance to

avoid it." 387 F. Supp. at 1298 . Each of the institutions is a church-

affiliated or church-related body. The subsidiary findings concerning

the role of religion on each of the campuses, summarized by the Court,

ante, at 17-20, conclusively establish that fact. In that circumstance, I

"Of telling

agree with Judge Bryan that/decisiveness here is the payment of the

grants directly to the colleges unmarked in purpose . . . presently the

Act is simply a blunderbuss discharge of public funds to a church-affiliated

or church-related college." Ibid. In other words, the Act pro-

vides for payment of general subsidies to religious institutions from public

funds and I have heretofore expressed my view that "General subsidies of

religious activities would of course constitute impermissible state involvement

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Brennan
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/8/76

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of Maryland et al.	
	States District Court for the District of Maryland.

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

I agree with Judge Bryan, dissenting from the judgment under review, that the Maryland Act "... *in these instances* does in truth offend the Constitution by its provision of funds, in that it exposes state money for use in advancing religion, no matter the vigilance to avoid it." 387 F. Supp., at 1298. Each of the institutions is a church-affiliated or church-related body. The subsidiary findings concerning the role of religion on each of the campuses, summarized by the Court, *ante*, at 17-20, conclusively establish that fact. In that circumstance, I agree with Judge Bryan that "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose . . . presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college." *Ibid*. In other words, the Act provides for payment of general subsidies to religious institutions from public funds and I have heretofore expressed by view that "General subsidies of religious activities would of course constitute impermissible state involvement with religion." *Walz v. Tax Commission*, 397 U. S. 664, 690 (1970) (BRENNAN, J., concurring). This is because general subsidies "tend to promote that type of interdependence between religion and

Page 1.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,

Appellants,

v.

Board of Public Works of
Maryland et al.On Appeal from the United
States District Court for
the District of Maryland.

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

I agree with Judge Bryan, dissenting from the judgment under review, that the Maryland Act "... *in these instances* does in truth offend the Constitution by its provision of funds, in that it exposes state money for use in advancing religion, no matter the vigilance to avoid it." 387 F. Supp., at 1298. Each of the institutions is a church-affiliated or church-related body. The subsidiary findings concerning the role of religion on each of the campuses, summarized by the plurality opinion, *ante*, at 17-20, conclusively establish that fact. In that circumstance, I agree with Judge Bryan that "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose ... presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college." *Ibid*. In other words, the Act provides for payment of general subsidies to religious institutions from public funds and I have heretofore expressed my view that "General subsidies of religious activities would of course constitute impermissible state involvement with religion." *Walz v. Tax Commission*, 397 U. S. 664, 690 (1970) (BRENNAN, J., concurring). This is because general subsidies "tend to promote that type of interdependence between religion and

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: JUN 4 1976

Unpublished: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of	
Maryland et al.	the District of Maryland.

[June —, 1976]

MR. JUSTICE STEWART, dissenting.

In my view, the decisive differences between this case and *Tilton v. Richardson*, 403 U. S. 672, lie in the nature of the theology courses that are a compulsory part of the curriculum at each of the appellee institutions and the type of governmental assistance provided to these church-affiliated colleges. In *Tilton* the Court emphasized that the theology courses were taught as academic subjects.

"Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to academic requirements of the subject matter and the teacher's concept of professional standards. The parties also have stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis." *Id.*, at 686-687.

Here, by contrast, the District Court was unable to find

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1976

Re: No. 74-730 - Roemer v. Bd of Public Works

Dear Harry:

I shall write separately in this case.

Sincerely,



Mr. Justice Blackmun,

Copies to Conference

10: The Chief Justice
 Mr. Justice Brennan
~~Mr. Justice Stewart~~
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Brennan
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-15-74

Recirculated: _____

No. 74-730 - Roemer v. Board of Public Works

Mr. Justice White, concurring in the judgment.

While I join in the judgment of the Court, I am unable to concur in the plurality opinion substantially for the reasons set forth in my opinions in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I) and Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). I am no more reconciled now to Lemon I than I was when it was decided. See Nyquist, supra, at 820 (opinion of White, J.). The three-fold test of Lemon I imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing "when the State's involvement with religion passes the peril point" for First Amendment purposes. Nyquist, supra.

"It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." Lemon I, supra, at 664 (opinion of White, J.). As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 ✓ ~~Mr.~~ Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6/17/76

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of	
Maryland et al.	States District Court for the District of Maryland,

[June —, 1976]

MR. JUSTICE WHITE, concurring in the judgment.

with whom Mr.
Justice
Rehnquist joins,

While I join in the judgment of the Court, I am unable to concur in the plurality opinion substantially for the reasons set forth in my opinions in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (*Lemon I*), and *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973). I am no more reconciled now to *Lemon I* than I was when it was decided. See *Nyquist, supra*, at 820 (opinion of WHITE, J.). The threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing "when the State's involvement with religion passes the peril point" for First Amendment purposes. *Nyquist, supra*.

"It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." *Lemon I, supra*, at 664 (opinion of WHITE, J.). As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason—particularly in light of the "sparse language of the Establishment Clause," *Committee for Public Education v. Nyquist, supra*, at 820—to take the constitutional inquiry further. See

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1976

Re: No. 74-730 -- John C. Roemer, III v. Board of
Public Works of Maryland

Dear Bill:

Please join me.

Sincerely,

T.M.
T. M

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 6/3/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of	
Maryland et al.	States District Court for the District of Maryland.

[June —, 1976]

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE _____ and MR. JUSTICE _____ joined.

We are asked once again to police the constitutional boundary between church and state. Maryland, this time, is the alleged trespasser. It has enacted a statute which, as amended, provides for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for "sectarian purposes." A three-judge District Court, by a divided vote, refused to enjoin the operation of the statute, 387 F. Supp. 1282 (Md. 1974), and a direct appeal has been taken to this Court pursuant to 28 U. S. C. § 1253.

I

The challenged grant program was instituted by Laws of 1971, c. 626, and is now embodied in Md. Ann. Code, Art. 77A, §§ 65-69 (1975). It provides funding for "any private institution of higher learning within the State of Maryland," provided the institution is accredited by the State Department of Education, was established in Maryland prior to July 1, 1970, maintains one or more "associ-

STYLISTIC CHANGES

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 6/17/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of	
Maryland et al.	States District Court for the District of Maryland.

[June —, 1976]

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which ~~Mr. Justice POWELL~~ and MR. JUSTICE Powell joined.

The Chief Justice

We are asked once again to police the constitutional boundary between church and state. Maryland, this time, is the alleged trespasser. It has enacted a statute which, as amended, provides for annual noncategorical grants to private colleges, among them religiously affiliated institutions, subject only to the restrictions that the funds not be used for "sectarian purposes." A three-judge District Court, by a divided vote, refused to enjoin the operation of the statute, 387 F. Supp. 1282 (Md. 1974), and a direct appeal has been taken to this Court pursuant to 28 U. S. C. § 1253.

I

The challenged grant program was instituted by Laws of 1971, c. 626, and is now embodied in Md. Ann. Code, Art. 77A, §§ 65-69 (1975). It provides funding for "any private institution of higher learning within the State of Maryland," provided the institution is accredited by the State Department of Education, was established in Maryland prior to July 1, 1970, maintains one or more "associ-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1976

No. 74-730 Roemer v. Board of Public
Works of Maryland

Dear Harry:

Please insert my name into one of the blank spaces
on the first page of your fine opinion.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1976

Re: No.74-730 - Roemer v. Board of Public Works

Dear Harry:

I am undoubtedly with you in the result in this case; as you perceptively indicated in the leaving of blanks for joiners, I am awaiting Byron's writing because of our minority views in Meek and Nyquist.

Sincerely,

win

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1976

Re: No. 74-730 - Roemer v. Board of Public Works

Dear Byron:

Please join me in your separate concurrence in this case.

Sincerely,



Mr. Justice White

Copies to the Conference

✓
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

No. 74-730 - John C. Roemer, III, et al. v. Board of Public Works of Maryland, et al. From: Mr. Justice Stevens
Circulated: 6/8/76

Recirculated: _____

MR. JUSTICE STEVENS, dissenting.

My views are substantially those expressed by Mr. Justice Brennan. However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.

✓

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: **JUN 10 1976**

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-730

John C. Roemer, III, et al.,	} On Appeal from the United
Appellants,	
v.	
Board of Public Works of Maryland et al.	
	States District Court for the District of Maryland.

[June —, 1976]

MR. JUSTICE STEVENS, dissenting.

My views are substantially those expressed by Mr. JUSTICE BRENNAN. However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.