Volume 9
Number 3 *Symposium on Law and the Private School*
*pp.*561-610

Symposium on Law and the Private School

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EMERGING CONSEQUENCES OF FINANCING PRIVATE COLLEGES WITH PUBLIC MONEY

MICHAEL R. SMITH*

INTRODUCTION

Efforts to devise valid statutes to secure aid for elementary and secondary church-related schools will undoubtedly continue. But recent Supreme Court decisions have effectively foreclosed possible plans for obtaining such aid. One obstacle to establishing the constitutionality of state funding may be the acceptance by the Court of writings by religious educators defining their schools as instruments of their affiliated religion. By viewing the schools as integral parts of the churches, aid to the schools may become synonymous with aid to religion. This creates an "insoluble paradox." To avoid conflict with the religious clauses of the first amendment, guarantees of secular usage of public aid are required.[1] However, any such guarantees will probably necessitate such close state surveillance and regulation as to excessively entangle the state with religion.[2]

Much federal aid continues to flow to lower level church-related schools. However, the assistance does not go directly to the schools. Almost all state aid is in the form of fringe-benefits, directed at underprivileged children.[3] These forms require the cooperation of, and administration by, state school authorities. State officials can be by-passed, however, allowing for aid directly from the federal government to private schools. The legality of such action is far from certain. The complexity of federal acts, involving multiple choices of aid combinations, has hampered

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1. *See* note 49 *infra* and accompanying text.

2. Lemon v. Kurtzman, 403 U.S. 602 (1971).

> A comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that these restrictions [on the use of public money] are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. at 619.

3. *E.g.*, Elementary & Secondary Education Act of 1965, *as amended*, 20 U.S.C. § 241 (1974).

the structure of an effective court challenge, especially since taxpayers did not have the standing to attack federal spending programs until 1968.[4] In a recent case, where public school officers were permitted to offer private schools in their district comparable rather than identical forms of federal aid, the Supreme Court declined to decide the legality of such aid.[5] The Court did say that "the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated."[6] In light of the trend of recent decisions against state aid to parochial schools, Justices on each side of the issue expressed surprise at the possible disparity in the majority opinion. Viewing the possibility that federal aid might be upheld, Mr. Justice White declared in his concurring opinion: "If this is the case, I suggest that the Court say so expressly."[7] Dissenting, Mr. Justice Douglas agreed, indicating that if state aid to private schools is unconstitutional, "[w]e should say so now, and save the endless hours and efforts which hopeful people will expend in an effort to constitutionalize what is impossible without a constitutional amendment."[8]

The Court has not held that unrestricted state aid granted directly to private schools is constitutional. It has determined, however, that limited forms of federal and state aid may be constitutionally extended to church-related colleges and universities. These decisions, one in 1971,[9] and the other in 1973,[10] have spurred legislative attempts to release still more aid to private colleges and have heightened interest in the legality of such efforts. The first part of this paper is an analysis of the college-aid question. Following that is the presentation of applicable federal and state supreme court decisions.

AN ANALYSIS OF THE COLLEGE-AID QUESTION

The Historical Situation

Public as well as private colleges are plagued by inflationary troubles. A critical difference between public and private institutions, however, is the extent to which the colleges rely upon

4. *See* Flast v. Cohen, 392 U.S. 83 (1968).
5. Wheeler v. Barrera, 94 S.Ct. 2274 (1974).
6. *Id.* at 2287.
7. *Id.* at 2289 (White, J. concurring).
8. *Id.* at 2290 (Douglas, J., dissenting).
9. Tilton v. Richardson, 403 U.S. 672 (1971).
10. Hunt v. McNair, 413 U.S. 734 (1973).

tuition to cover their expenses. Direct costs to students in private higher educational institutions is currently about sixty percent, as opposed to twenty-three percent in public colleges.[11] As costs rise, public schools look to increased support from tax revenues. Private schools may step up requests for gifts from the limited number of philanthropic sources. If such sources cannot cover higher expenditures, further tuition increases are a must for private colleges to maintain their quality. Therein lies a cruel irony. As tuitions rise, public schools grow proportionately more attractive, and the pool of students from which private school costs must be gathered grows increasingly smaller.

Many believe that only public funds can break the circle. The Carnegie Commission on Higher Education, for example, has identified private colleges as "the institutions now in the greatest financial difficulty" and has called for various forms of state and federal assistance.[12] To defend the call for state aid to private institutions, the Commission cites these institutions' valuable qualities of diversity and ease of implementing innovation.[13] Despite this need for state aid, the history and literature of the problem, as well as state and federal constitutions, offer minimal suggestions for modern solutions.

Little is gained by looking for historical precedents for public aid to private colleges. Schools at all levels, both public and private, initially received considerable public support.[14] Among the many colleges which received early public assistance were Columbia, Cornell, Dartmouth, William and Mary, and Yale. By 1874. Harvard had already accepted more than $500,000 and 46,000 acres of public land.[15] But the need for education was so great that there was little or no competition among denominations for public dollars. "People were only too happy to have any kind of school established that would provide young people with elements of learning."[16]

Equally unprofitable are efforts to identify when or why public assistance began to wane. One author points out that

11. D. HALSTEAD, STATEWIDE PLANNING IN HIGHER EDUCATION 555 (U.S. Government Printing Office 1974) [hereinafter cited as D. HALSTEAD].

12. PRIORITIES FOR ACTION: FINAL REPORT OF THE CARNEGIE COMMISSION ON HIGHER EDUCATION 66 (1973).

13. *Id.*

14. W. MCFARLANE AND C. WHEELER, LEGAL AND POLITICAL ISSUES OF STATE AID FOR PRIVATE HIGHER EDUCATION 10 (1971).

15. *Id.* at 11.

16. M. RYAN, ARE PAROCHIAL SCHOOLS THE ANSWER 4 (1964).

> American higher education began neither as public nor private . . . the distinction between state and private education is, in the history of higher education in our country, a comparatively recent distinction.[17]

Another has observed that,

> immigration as well as schisms in established denominations brought about a proliferation of sects, so that by 1840 the separation of church and state had taken place in every state within the union.[18]

Likewise, writers on each side of the public-aid-to-private-schools question find support in the first amendment. The religious clauses of that amendment command that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[19] That prescription seems simple enough. Yet a case can be made for both sides from history and various writings of the men influencing interpretation of the first amendment. Established churches existed in most of the newly formed states, and there is no evidence that the framers of the first amendment intended to disestablish them. On the other hand, the amendment was heavily influenced by the work of Patrick Henry, champion of religious freedom, author of Virginia's Bill of Rights, and accepted authority on church and state separation. Nor can Madison or Jefferson be overlooked, especially the former's *Remonstrance* against paying even "three pence" in support of another man's religion, and the latter's famous interpretation of the first amendment as "a wall of separation between Church and State."[20]

Attempting to find answers in the fourteenth amendment is a final exercise in futility. The fourteenth amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."[21] Through the fourteenth amend-

17. A. Pfnister, *Developing Relationships between Public and Private Higher Education*, NEW DIRECTIONS IN STATEWIDE HIGHER EDUCATION PLANNING AND COORDINATION 38-39 (Proceedings of the 19th Southern Regional Educational Board Legislative Work Conference 1970).

18. P. Rossi and A. Rossi, *Some Effects of Parochial School Education in America*, in SOCIETY AND EDUCATION: A BOOK OF READINGS 205 (J. Havighurst, B. Neugarten and J. Falk, ed. 1967).

19. U.S. CONST., amend. I.

20. Everson v. Board of Education, 330 U.S. 1, 12 (1946).

21. U.S. CONST., amend. XIV.

ment, the first amendment was made binding on the states in 1940.[22] The first became "absorbed" into the fourteenth amendment—as have most other amendments.[23] But the first is unlike all other amendments. It commands that no law be made *respecting* an establishment of religion. Applying the fourteenth amendment to the first amendment might be considered a violation at the outset. The fourteenth then becomes a law *respecting* religion.

There is evidence suggesting that the framers never intended the fourteenth to incorporate the first amendment. Only seven years after passage of the fourteenth amendment, the Forty-fourth Congress debated a proposal that would have limited the states in the same manner as the first amendment limits Congress. The proposal passed the House, twenty-four members of which had been framers of the fourteenth amendment, but failed in the Senate.[24] However, these points are academic—the fact is that states as well as Congress are now bound by the religious clauses of the first amendment.

Even before the first amendment was made applicable to the states, state supreme courts strictly enforced their own constitutions which prohibited the grant of public funds for religious schools, including colleges.[25] Though in recent years constitutional revisions have in some instances loosened restrictions on public aid to religious institutions,[26] most states have retained their religious-freedom clauses intact. Many specifically bar aid to colleges. For example, South Carolina's constitution prohibits state assistance,

> directly or indirectly, in aid or maintenance of any college . . . which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society, or organization.[27]

Illustrative of early decisions of state supreme courts and the contentions of the parties is an 1891 South Dakota case on tuition payments to Pierre University:

> [L]earned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the

22. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).
23. IN MEMORIAM, HUGO LAFAYETTE BLACK, 92 S. Ct. Preface 21 (1971).
24. 4 CONG. REC. 5189-91 (1875).
25. *E.g.*, Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942). *See* Lemon v. Kurtzman, 403 U.S. 602, 645-47 (1971).
26. *See generally* Lemon v. Kurtzman, 403 U.S. 602, 630 (1971).
27. S.C. CONST., art. XI, § 9.

> benefit of or to aid the university, but in payment for services rendered the state, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the instituion entirely by state funds.[28]

The same line of reasoning runs through other, similar state supreme court decisions.[29] Indeed, Virginia's Supreme Court, as late as 1955, held that grants to pay for the tuition of war veterans' orphans to private religious colleges violated the State Constitution, in that "tuition fees are the very 'life blood' of institutions."[30]

Current Trends

Constitutional considerations notwithstanding, public dollars are finding their way into private colleges.

> Despite constitutional State prohibitions against direct appropriations of tax funds to private or sectarian institutions, at least 34 States support private higher education. All 34 of these States provide some form of financial aid to students attending private colleges and universities and 20 also provide institutional support. State programs supporting private institutions include aid for construction through tax-exempt bond issues or matching grants (12 States); contractual arrangements for educational services and student enrollment (5 States); and direct grants, with or without restrictions (17 States).[31]

These findings were reported in 1972. Since then, the number of court decisions and the extensive media coverage suggest a significant increase in the number of states interested in aiding private colleges.

Forms of aid to private college students largely fall into categories of either low-cost loans or tuition grants. The low-

28. Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891).

29. *See, e.g.*, Cook County v. Industrial School, 125 Ill. 540, 18 N.E. 183 (1888).

30. Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

31. D. HALSTEAD, *supra* note 11, at 594.

cost loans can be repaid by other than monetary methods, such as teaching for five years. Regarding typical operation of the latter, students applying to or enrolled at private colleges petition the state for assistance under the program. Assuming the student qualifies (is a state resident or demonstrates financial need), he is accepted. Acceptance amounts to notifying the student that money will be extended to his private college on his behalf or requiring him to sign a voucher over to his college. Either way, in practice, the student never sees the money. Generally, though not always, participation is restricted to private, academically-oriented, in-state colleges.[32]

Forms of aid to the private colleges include categorical assistance in financing construction projects, "contracts" for educating state residents in special areas, such as dental education, and even outright unrestricted grants. Construction assistance may simply amount to aid in raising revenue, by selling state bonds, to be cancelled by the schools. The advantage of this assistance is the absence of tax on interest paid to bondholders, which results in an interest cost to the college lower than that required by conventional bonds. This form of aid has won the approval of the United States Supreme Court.[33] Another type of aid to private colleges upheld by the United States Supreme Court is federal construction assistance under the Higher Education Facilities Act of 1963.[34]

Both Congress and state legislatures have employed various rationales to support their actions authorizing aid to private institutions. The Higher Education Facilities Act of 1963[35] is defended on national security and general welfare considerations. It may be argued that it is within the state's interest in public welfare to aid private educational institutions.

Frequently stated purposes of state laws aiding students include a willingness to assist students in their selection of a public *or* private school and efforts to save the state money. By financially encouraging students to attend private schools, the state is relieved from costly construction, and from hiring additional faculty members, at public colleges.

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32. *See generally* D. HALSTEAD, *supra* note 11.

33. Hunt v. McNair, 413 U.S. 734 (1973).

34. Act of Dec. 16, 1963, Pub. L. No. 88-204, § 101, 77 Stat. 364. Held constitutional in Tilton v. Richardson, 403 U.S. 672 (1971).

35. *Id.*

If either of the avowed objectives of the states is successfully accomplished, student enrollment at private colleges should at least tend toward stabilization. Whether that result is being realized is largely a matter of conjecture, as definitive studies do not yet exist.[36] However, the Carnegie Commission has revised its predictions about upward enrollment patterns at public and private colleges. Commenting on the drop in student enrollment, as well as the "drastic" drop in the birth rate, the Commission noted,

> we would now caution greater conservation in planning for new campuses or in expanding old campuses or in undertaking new construction than we evidenced in our recommendations even two years ago.[37]

Outlook for the Future

Responsible discussion of future public funding of private colleges must be based on Supreme Court decisions on aid to all levels of private schools and on federal and state court college-aid decisions since 1971. In 1971, the Court rendered its first decision on public assistance to private colleges.[38] At the heart of the issue was the first amendment's applicability to church-related college-aid recipients. The principles or "tests" used by the Court evolved from cases on aid to lower level parochial schools.[39]

Insight on the question of future aid to private colleges can be gained by referring to the chart, *Supreme Court Decisions, The First Amendment and Aid to Church-Related Schools.* This chart shows the types of aid to all private school levels that have

36. By themselves, neither enrollment figures nor data on failing private colleges fairly indicate the impact of state aid on enrollment. The question is what would the picture look like in the absence of state aid.

37. PRIORITIES FOR ACTION: FINAL REPORT OF THE CARNEGIE COMMISSION ON HIGHER EDUCATION 2 (1973).

38. Tilton v. Richardson, 403 U.S. 672 (1971).

39. *Id.* at 685.

SUPREME COURT DECISIONS, THE FIRST AMENDMENT AND AID TO CHURCH-RELATED SCHOOLS*

Level of School	Form of Aid	Direct School	Indirect Students	Indirect Secular Purpose	Direct Sectarian Purpose
Elementary and Secondary: composite profile of relation of church to schools-close integral part.	Transportation		yes	yes	
	Textbooks		yes	yes	
	Sale of secular educational services to state	no	no	no	no
	Tuition reimbursements to parents	no	no	no	no
	Tax credits to parents	no	no	no	no
	Salaries of teachers of secular subjects	no	no	no	no
	Grants for maintenance and repair	no	no	no	no
	Reimbursements to school for state required record-keeping	no	no	no	no
Colleges and Universities: composite profile of relation of church to schools-rejected by Court, as aid has been restricted to limited uses at individual schools	Construction grants	yes		yes	
	Aid in selling bonds for construction purposes	yes		yes	

*"Yes" indicates the rationale under which the form of aid was approved; "no" simply means the aid was found invalid.

been approved or disapproved by the United States Supreme Court. Note the two constitutional forms of assistance at elementary and secondary levels: transportation and textbooks. Both have been approved under the so-called "child-benefit" theory.[40] In addition to limiting aid to students, rather than schools, both forms of assistance were seen as secular—or "indirect aid"—as compared to more direct aid such as teachers' salaries.[41] However, the Court has recently declared that those state aids permitted through the child-benefit rationale approach the "verge of the constitutionally impermissible."[42] Further, though the states *may* provide parochial school students with books and transportation, they are not constitutionally required to do so.[43]

Aid permitted at the college level has also been characterized as secular—though more direct than aid to primary and secondary schools.[44] Assistance to the schools for funding construction is an example. The limited purpose of this type of aid, in addition to the lack of a need for annual reassessments, such as tuition grants require, weighed heavily in the Court's opinion.[45] Further, the Court distinguished the religiously permeated atmosphere of elementary and secondary parochial schools from the collegiate environment. At a distance from individual colleges, the Court reasoned that the age and sophistication of college students, coupled with the academic freedom of professors necessarily produce an environment less permeated with religion than at lower school levels.[46]

Clarity is achieved by viewing the question as a continuum. On the left, is a private-secular institution. On the right, is a church, and adjoining it are its elementary and secondary schools. The state is totally free to achieve its educational ends through secular, private means, but is equally restricted from working through the church. Private church-related colleges, as a class, have been placed a little short of the right side. The more distance *individual* colleges put between themselves and the right side—that is, the more secular they become—the more public aid they might expect.

40. *See* Everson v. Board of Education, 330 U.S. 1 (1947); Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

41. Lemon v. Kurtzman, 403 U.S. 602 (1971).

42. Sloan v. Lemon, 413 U.S. 825 (1973).

43. Luetkemeyer v. Kaufman, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd mem.*, 95 S.Ct. 167 (1974).

44. Tilton v. Richardson, 403 U.S. 672 (1971).

45. *Id.*

46. *Id.*

Directions from Tilton v. Richardson and Hunt v. McNair

The United States Supreme Court has now decided two cases concerning the first amendment and public aid to church-related colleges.[47] Certain inferences can be drawn from these decisions. First, there might not be a wall of separation between the "Church and State" after all. It is doubtful that the wall ever existed. The Court attempts to minimize contacts between religion and government which might lead on the one hand to state support, sponsorship, or active involvement in religion; and on the other, to state suppression of religion. However, church-related colleges are involved with the state on a number of levels and for numerous purposes. Among other things, their very ability to confer degrees depends upon the state. Thus, there is a presumption at the outset of a certain degree of contact between religiously-affiliated colleges and government.

The next two inferences concern a state's ability to achieve its secular educational ends through religiously-affiliated institutions. Firstly, control over an institution by persons all of one faith cannot in itself deter the state from working through it. Prior to the college-aid decisions, it was not clear whether the state could legally achieve its ends in such a religiously homogeneous atmosphere.[48] Secondly, even though aid from the state for secular purposes may allow religiously-affiliated institutions to utilize their own funds for religious ends, the state's ability to work through them is not hampered by that fact *per se*.

Additional inferences may be drawn by examining the "tests" so far used by the Court in determining the constitutionality of acts which aid church-related colleges. First, the purpose for which the aid is used must be a "secular legislative purpose." This standard was established in a case involving lower level parochial schools in 1963.[49] Neither the act in that case, nor any act since—in federal or state courts—has failed to pass this test. Legislators have been careful to include in the drafting of statutes a statement of secular purposes. Second, an act's *primary* effect must neither advance nor inhibit religion.[50] Third, the act may not *foster* excessive governmental entanglement with reli-

47. Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973).

48. *See* Bradfield v. Roberts, 175 U.S. 291 (1899); Speer v. Colbert, 200 U.S. 130 (1906).

49. Abington School District v. Schempp, 374 U.S. 203 (1963).

50. *Id.*

51. Walz v. Tax Commission, 397 U.S. 664 (1970).

gion.[51] Entanglement might be fostered by (1) strict surveillance required to guarantee secular usage of funds;[52] (2) regulations which thrust the state into the everyday affairs of a church-related school;[53] (3) arrangements requiring continuing affiliation between church and state, increasing the likelihood of political divisions along religious lines.[54]

Thus, to pass the second test, and in part the third test, a college may not have a relationship with its affiliated church close enough to permeate all of its functions with religion. If it does, it would be impossible to restrict aid to the college's secular purpose. But for this reason, the party who has challenged acts stated to be restricted to secular purposes has been required to assume the burden of proving the ineligibility of individual colleges.[55]

Certainly statutes should be presumed constitutional, but the task of overturning them ought not be prohibitive. The Court, in rejecting a composite profile of college sectarianism, has distinguished between the role of religion in lower and higher levels of church-related schools.[56] In doing so, the Court relied primarily upon the age and sophisticated minds of college students, the absence of restrictive student admission or faculty hiring policies, the absence of overt indoctrination practices, and upon the presence of academic freedom on college campuses.[57] The fact that the Court's distinction is an acknowledged departure from its previous decisions, coupled with mere fairmindedness, justifies questioning the Court's assumptions.

Perhaps a good beginning is made by asking whether the state should *initiate* a policy of advancing the cumulative cause of any group bound by religious, anti-religious, racial, or any other ideology? Naturally, few colleges openly discriminate among students and faculty on the basis of religion. Honest scholars—students as well as faculty—even of the school's religion, might well be abhorred, and stay away. Such a practice, wherever followed, surely would have damaging consequences for a private school seeking public funds. But the fact is, as the cases show, most church-related colleges do have student bodies and faculties composed predominantly of the affiliated religion. This, of course,

52. Hunt v. McNair, 431 U.S. 734, 747 (1973).
53. *Id.*
54. Tilton v. Richardson, 403 U.S. 672, 688 (1971).
55. Hunt v. McNair, 413 N.S. 734, 746 n.8 (1973).
56. Tilton v. Richardson, 403 U.S. 672, 686-87 (1971).
57. *Id.*

results from individuals, at least in part, choosing to go to a college which is sympathetic to their religious philosophy—a college which is affiliated *by design* with their faith. In such a homogeneous religious environment, it is probable that atheists and persons of markedly different faiths might feel uncomfortable. The state considers these facts when deciding whether or not to allow aid to a church-related school. To emphasize the point, one need only ask whether a state would start afresh a policy of financially supporting a group known to have been drawn together even partly by common ideals regarding anti-religion or race.

Many of the above considerations also assume that academic freedom, at any reputable college, is a "given." But with a faculty primarily of one faith, or certainly of religious believers, and mainly Christian, the issue of true academic freedom can legitimately be challenged. There cannot be any patent attempt to control a professor's teaching, for again, that would draw the wrath of the entire academic community. But whether by choice, happenstance, or administrative design, a faculty might well fall into a conservative, denominational one-mindedness. The cumulative effect on the student could be opposite of that expected from scholarship free of religious parochialism.

The same line of reasoning might be pursued with respect to the Court's observation about proselytism. A systematic policy of religious indoctrination would not only be resisted by students and faculty, but it would be the worst possible means of inculcation, even if that were a college's objective. As the Court points out, college students are sophisticated, and a blatant policy of indoctrination would be at odds with sophisticated minds.[58] Rather, subtlety would be demanded.

The heaviest part of the burden of proving that a college is infused with religion would lie in identifying those subtleties. Ironically, only those who most need state aid, the students and professors of private schools, are best situated to isolate the subtleties. Copious descriptions of colleges' methods of inculcation, such as those at lower level schools, do not exist. How then could an average citizen come to learn of:

> a) prayer at student and faculty meetings and the extent of informal group pressure on would-be dissenters to accept such prayer;

58. Tilton v. Richardson, 403 U.S. 672 (1971).

b) the percentage of speakers visting the campus who are proponents of the church which is affiliated with the college;

c) limits on student freedom (normally enjoyed by public college students) regarding drinking alcoholic beverages, dormitory or other parietal issues, *i.e.*, the student press;

d) the overall effect of religiously orented pamphlets printed by the college and other such literature;

e) pressures on faculty members to manifest a philosophy or at least a manner of living in keeping with a church-related college.[59]

One is pressed to conclude that garnering such evidence would require the efforts of a person on most intimate terms with a particular college.

The collective force of these and other factors would not equal the level of orientation and inculcation found in church-related elementary schools. But a Christian posture bent in a particular direction is there. At the very least, the church-related college is less of an *omnium-gatherum* than a public college. That this fact varies in degree from one church-related college to the next merely compounds the difficulty of proving it.

Trends in Lower Level Federal Courts and in State Courts

Since the Supreme Court's first decision on public aid to church-related colleges in *Tilton*, there have been decisions on twelve states' statutes which provided public funding of their church-related colleges.[60] *Excluding* the United States Supreme Court decisions, the following picture appears:

59. For a description of such pressures, see Weiss v. O'Brien, 82 Wash. 2d 199, 509 P.2d 973 (1973).

60. For these cases, and the statutes involved in each see notes 133-246, *infra* and accompanying text.

Number of States	Form of Aid	Type of Court	Type of Decision Rendered
2	Student loans	State Supreme	Both valid (one limited repayment options for church-related college students to money or bona fide state service)
2	Bands-state aid in selling for construction funds	State Supreme	Both valid
1	Contract for dental education services	State Supreme	*Invalid*
2	Unrestricted grants to colleges	One State Supreme, one Federal District	Both valid
5	Tuition grants to students	Two Federal District	One *invalid*; one valid in part (depending on the colleges in question)
		Three State Supreme	All *invalid*

Examination of the data reveals keen interest by states in unrestricted grants. Ultimately there is little difference in the effects of the acts of the last seven states. A technical distinction might be that "tuition" grants go to students. But the net result between those grants and grants to colleges amounts to a distinction without a difference, since both types end up in the colleges' coffers. Once the funds are received by the colleges, there are no enforceable restrictions on their usage.[61]

Logic might also dictate that unrestricted grants will have the most appeal and occupy the future time of legislatures and the courts. As noted above, student enrollment is dropping, and that decrease should curtail interest in construction grants. Further depression on building plans is supplied by the increasing significance of post-construction operating costs. But even for surviving construction interests, eleemosynary funds are frequently available, as a building usually bears the name of a benefactor. The unrestricted nature of tuition grants and other grants, similar in effect, creates vulnerability to an effective court challenge. Because funds can be mixed in with a college's general revenues and used for any (including religious) purposes, risk of state support of religion is greater.

All of the courts, regardless of their decisions, were troubled by the absence of restrictions in grant programs. A basic query is whether an unrestricted grant is not in fact an outright gift. The Supreme Court would plainly bar gifts of public taxes for religious purposes.[62] If church-related colleges are free to increase their tuition by the amount of the grants, the effect of tuition grants is cancelled. Does that action convert the funds from assistance to students to gifts for colleges? Some courts indicated that *all* students enrolled in *any* public or private higher education program (not simply academic), in an in-state *or* out-of-state college, ought to be included in the grant program.[63] Others did not agree, but were sensitive to criticism that statutes limited to private (of which most are sectarian) colleges do not have a "secular legislative purpose."[64] Indeed, there exists the very real ques-

61. Some of the acts do include statements directing the colleges to use the funds only for secular purposes. *See* Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282 (D. Md. 1974). Most do not, however, and even with those that do, compliance is based on good faith.

62. *See* Tilton v. Richardson, 403 U.S. 672, 692 (1971).

63. *See, e.g.*, Rogers v. Swanson, 192 Neb. 125, 129, 219 N.W.2d 726, 730 (1974).

64. *See* Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974).

tion of whether acts of unrestricted aid do not *ipso facto* fail that test.

Another recurring concern was the prospect that annual bids for increased aid would embroil the state in squabbles and cause political divisiveness along religious lines. In the Supreme Court decisions upholding aid, the Court noted their anxiety over the possibility of these problems.[65]

A noteworthy occurrence in the most recent federal district court decision,[66] and in the most recent state supreme court decision,[67] was acceptance of an overall profile of sectarianism on church-related campuses. The district court distinguished unrestricted tuition grants from acts upheld by the Supreme Court. In absence of restrictions on aid to the secular functions of individual colleges, the court reasoned, it may be assumed that some of the state's funds will be used to advance religion.[68] The district court did indicate that a tuition grant phrased to limit funds to secular uses might win approval,

> provided that the statute excluded those schools where religious indoctrination so permeated the school that separation of the secular and sectarian functions would be impossible and, further, that the administration of the restrictions would not result in "excessive entanglement."[69]

Perhaps administration of restrictions was as great a concern to most courts as the lack of such restrictions. The Supreme Court has indicated an unwillingness to go along with acts which force state regulating authorities into the role of college administrators.[70] However, acts approved by the Court have provided for surveillance to ensure proper use of funds and for remedies in case of non-compliance or default.[71]

Underlying much of the courts' uneasiness was the possibility of using unrestricted funds to pay teachers' salaries. The Su-

65. Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

66. Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974).

67. State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974).

68. Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714, 721 (M.D. Tenn. 1974).

69. *Id.* at 722 n.9.

70. Hunt v. McNair, 413 U.S. 734, 741 (1973).

71. *Id.* at 741.

preme Court's approval of construction assistance rested, in no small measure, on the nonideological nature of the aid. In fact, the Court stated:

> Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction.[72]

But surveillance of teaching in church-related *colleges* would virtually end academic freedom—one of the distinctions relied upon to justify aid to higher education. At the college level, the concept of academic freedom would probably carry the load of ensuring secular teaching. Even assuming a surveillance enforcement scheme could be devised, how could the state recover the public's money, should sectarian teaching be uncovered?

THE CONSEQUENCES

Trading Religion for Dollars

Aid to church-related colleges has only been recently tested in the courts. State aid was motivated by the federal acts of 1958 and 1963.[73] Congressional spending programs could not be challenged until 1968,[74] and no direction came from state courts until 1966.[75] In an attack on matching grants from the state for construction purposes at private (including church-related) colleges, Maryland was the first state to formulate the issues.[76] Since Maryland has no specific constitutional provision on grants to religious groups, the State's court of appeals attempted to separate sectarian from secular colleges for purposes of these first amendment actions. To decide whether an individual school was secular or sectarian, the following factors were examined:

> (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty and the student body (with considerable importance being placed on the substantiality of religious control over the governing board

72. Tilton v. Richardson, 403 U.S. 672, 687-88 (1971).

73. National Defense Education Act of 1958, 20 U.S.C. §§ 401-602 (1974); Higher Education Facilities Act of 1963, Pub. L. No. 88-204, § 101, 77 Stat. 364.

74. Flast v. Cohen, 392 U.S. 83 (1968).

75. Horace Mann League v. Board of Public Works, 242 Md. 645, 220 A.2d 51 (1966), *cert. denied.*, 385 U.S. 96 (1966).

76. *Id.*

> as a criterion of whether a college is sectarian); (3) the college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs; (5) the result or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community.[77]

Aid to three of the four colleges evaluated in respect to the aforementioned factors would have violated the first amendment's religious clauses. On appeal, the United States Supreme Court declined to review the opinion. The decision stood, but so did confusion over the judicial propriety of the standards. Many still find the standards nebulous and impossible to use.[78] Nonetheless, both state and federal courts at *all* levels have since attempted either to apply them, or those of their own making.

The Maryland court set an impressive precedent. Implications for church-related schools seem to suggest the more religious the college, the less public funds it should expect.[79] This consequence was pointed out by the court. Yet it underscored a dilemma only now beginning to emerge. Parents and students frequently choose a college because of its close ties to a particular religion. As the same college moves in the direction of secularity in quest of public funds, it simultaneously loses those supporters who seek its sectarianism. Thus, the very attraction used as rationale for its existence—diversity—is abandoned. Still, preservation of diversity is perhaps the most fundamental claim for public funding.

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77. *Id.* at 65-66.

78. *Id.*

79. Evidence that colleges have heeded the message is plentiful. *See* W. GELLHORN, THE SECTARIAN COLLEGE AND THE PUBLIC PURSE (1970). Col-

Trading Autonomy for Dollars

The theory of "governmental instrumentalism" imports that whatever is financed by the government sooner or later becomes its instrument. Perhaps a more fitting expression of the doctrine is that of the proverbial truth recently cited by the Supreme Court of Wisconsin: "He who pays the fiddler calls the tune."[80] The trick though, said the court, is to keep the payer from also being the one who "furnishes the sheet music."[81]

That private educators would eschew public controls seems axiomatic. Equally self-evident is the government's reluctance to relinquish its citizens' money without direction over its use. Indeed, it is constitutionally powerless to do so. Until recently, evidence of governmental intrusion into the affairs of publicly-financed private institutions was lacking. Studies as late as 1970 disclosed no loss of private institutional autonomy.[82] Case law on public involvement in various forms of private property offers some indication as to at what point decisions of private administrators become *state action,* and therefore subject to the restrictions stated in the fourteenth amendment.[83] The point for private colleges is beginning to turn on the *degree* to which they are publicly financed or otherwise entangled with the state.

The four member dissenting opinion in *Tilton* has sounded the warning note:

> Once these schools become federally funded they become bound by federal standards. . . . That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of the parochial school.[84]

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leges in New York have fairly well financed a new science—that of reducing religion in religious courses to "acceptable levels."

80. State *ex rel.* Warren v. Nusbaum, 55 Wis. 2d 316, 322, 198 N.W. 2d 650, 656 (1972).

81. *Id.*

82. E. Palola, *A Challenge for Statewide Planners,* 5 THE RESEARCH REPORTER 3 (Berkeley Center for Research and Development in Higher Education 1970).

83. *See* Moose Lodge v. Irvis, 407 U.S. 163 (1972); Central Hardware Company v. NLRB, 407 U.S. 539 (1972); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

84. Tilton v. Richardson, 403 U.S. 672, 693-94 (1971) (Douglas, J., dissenting).

In *Tilton*, the issue was religion. Fourteen years earlier the issue was race, but the question was identical.[85] At what point does public involvement in a private college convert private discrimination to state action? The majority of the Court held that although Gerald College was private (and totally privately financed), city administration of the school constituted state action and brought the college under the fourteenth amendment.[86]

In 1961, a federal court of appeals ruled that where a city merely allowed a private university to use surplus city buildings and land, the city's involvement constituted sufficient state action to bring the fourteenth amendment into play.[87] By 1968, another court of appeals ruling extended fourteenth amendment due process protection to students expelled from Alfred University, a private institution.[88] The Dean of Student's decision expelling the students for refusal to obey his instructions was state action, in that the students were from the University's School of Ceramics which was financed by the state. Two years later (1971), a New York Supreme Court, Tenth Judicial District, reinstated a student expelled without due process by the Dean of Students at Hofstra University.[89] The rationale: public funding at Hofstra had made the Dean's decision state action. For identical reasons, a 1973 federal district court opinion restored two students to Boston University's ice hockey team.[90] The students had been declared ineligible by the private school for their former "professional" activities. The last two cases are well worth further scrutiny.

Ryan v. Hofstra University[91]

Hofstra University considers itself a private institution. The Dean of Students at Hofstra expelled "completely and permanently" a student for throwing rocks through windows of campus facilities. Prior to expulsion, the student was given the type and degree of administrative review deemed appropriate by Hofstra's college officials. The court was asked to find Hofstra's actions

85. Pennsylvania v. Board of Directors of City Trustees of the City of Philadelphia, 343 U.S. 230 (1957).

86. *Id.*

87. Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1961).

88. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

89. Ryan v. Hofstra University, 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup. Ct., Special Term 1971).

90. Buckton v. National Collegiate Athletic Assn., 366 F. Supp. 1152 (D. Mass. 1973).

91. 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup. Ct., Special Term 1971).

arbitrary in that they fell short of providing due process under law as required by the fourteenth amendment and to reinstate the student. Hofstra University maintained that the fourteenth amendment protects individuals from *state* action; that Hofstra, being a private institution, was not legally obliged to meet the fourteenth amendment's due process standard. The court disagreed.

Normally, the court concluded, a citizen can compel a private organization to honor the terms of a contract. But when terms between colleges and students are merely *implied,* such as the implication that fundamental fairness will be followed in case of disciplinary actions, enforcement is all but precluded. More to the point, the Justices asked "in what pragmatic sense is Hofstra 'private'?"

To determine the answer to its question, the University was measured by a dominance-of-support test, and by the degree to which it was entwined with government policies and impregnated with a governmental character. These were the findings:

> 1. Hofstra is franchised by the State, controlled in its degree requirements by the State, and subject to State visitation. [It] discharges a public function for the State, as part of a State policy of mobilizing higher education resources.[92]
>
> 2. The University is replete with public interest, requirement and supervision. The University is in the most real comparable sense a public trust for the rendition of education. It is only for this reason that so much public wealth and effort has been supplied to it.[93]
>
> 3. Financial support accrues to Hofstra in various ways: government grants, and tuition scholarship awards go into its operating budget; federal construction grants; exemption from real estate tax status; operation of government programs on campus; benefits under the build-lease-and-reconvey arrangement of the New York Dormitory Authority . . . [all inure to it].[94]

Regarding the aid mentioned in number three, the court observed that because of this type of entanglement with the state, the Dor-

92. *Id.* at 669, 324 N.Y.S.2d at 982.
93. *Id.* at 668, 324 N.Y.S.2d at 981.
94. *Id.* at 667, 324 N.Y.S.2d at 980.

mitory Authority has the power to make and enforce rules regarding the use or misuse of its facilities. The rock-throwing incident occurred on Dormitory Authority property. Measured by these standards:

> Hofstra students must receive equal protection of the laws. This means that there can be no distinction of legal treatment between Hofstra students themselves, and that Hofstra students must get no less protection of the laws than that the State affords students at other schools of conceded state action, except by legislative classification.[95]

Buckton v. National Collegiate Athletic Association[96]

Two students were declared ineligible to participate on their college ice hockey team. The students had attended high school in Canada. There, they had played for what amounted to a junior professional team. They received no salary, but did accept reimbursement for personal expenses. United States high school students can accept the same reimbursements from their *schools*. However, in Canada few schools can afford organized ice hockey teams. Thus, if young men are to play, they must do so on one of the "junior professional" teams. Yet, if and when they attend American colleges, they run afoul of athletic association rules. These regulations with their unequal effects on Canadian and American boys, were the subject of this suit against the National Collegiate Athletic Association and Boston University.

Boston University is a private school. This fact seemed to make little difference to the court, however. A substantial amount of precedent (including *Ryan v. Hofstra University*) compelled the conclusion that "government financial support has been held to bring a private beneficiary within the strictures of the 14th Amendment."[97] Since Boston University had, in 1973 alone, received over 18 million dollars in public funds, and was accepting additional funds at the time of the decision, it too was brought "within the strictures of the 14th Amendment." The athletic rules violated the equal protection clause of the fourteenth amendment.[98]

Though none of the cases involved private administrative decisions on academic issues, Mr. Justice Douglas has recently said:

95. *Id.* at 670, 324 N.Y.S.2d at 983.
96. 366 F. Supp. 1152 (D. Mass. 1973).
97. *Id.* at 1156.
98. *Id.* at 1157.

> No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools also, if through the devise of financing or other umbilical cords they become instrumentalities of the State.[99]

It would also be hard to imagine a deeper thrust at the autonomy of a church-related college than a lessening of its control over ideologies.[100] Any attempt by the state to ensure secular teaching would also be clearly subject to challenge on academic freedom grounds.

Subjecting schools to public standards and finding state action when private colleges are publicly financed, could create a "parade of horribles." The American Association of State Colleges and Universities has resolved,

> that any State providing funds to private colleges should require "fiscal accountability to the State"; that funds be allocated among public and private institutions "on the basis of an agreed-upon standard for space utilization and faculty-student ratio"; and that to qualify for State funds, all institutions be "subject to common standards" except for distinctions based on academic ability and other "student factors."[101]

New legislation on the control of student records affects private college federal-aid-recipients with force equal to that at public schools. The so-called Buckley Amendment[102] has widespread regulating potential, and it provides for a cutoff of federal funds for schools found in violation of the Act.

In sum, the use of public money to finance private colleges has many potential effects. History admits no possibility that the full range of those effects—National Labor Relations Board, Civil Rights Act provisions, *ad infinitum*—will spare publicly financed

99. Board of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting).

100. The theory of the governmental instrumentalism is developing on a wide front, particularly in areas of quasi-public corporations, such as utilities. *See* Evans v. Newton, 382 U.S. 296 (1966); United States v. Guest, 383 U.S. 745 (1966); Turner v. Memphis, 369 U.S. 350 (1962); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

101. D. HALSTEAD, *supra* note 11.

102. 20 U.S.C. § 1232 (1974).

colleges. It is conceivable that statutes aiding church-related colleges might be structured to escape constitutional strictures. In fact, a careful reading of the cases ought to provide a blueprint of sorts. It is the *emerging consequences* that cannot possibly be avoided. Church-related colleges might hope to gain public funds. The price will be lessening of church affiliation and autonomy. States may hope to gain education for their citizens at a cost saving or to aid citizens in choice of schools. The trade-off will be unwanted state involvement in private affairs and annual embroilments with public and private college competitors for more tax dollars.

Consequences follow decisions. In the background the consequences frequently become overshadowed by the necessity and urgency of the action at hand. But they always come to the forefront eventually. Private, especially church-related colleges, *and* states ought to focus *now* on the consequences.

THE COLLEGE-AID CASES

Decisions of the United States Supreme Court

A. *Tilton v. Richardson*[103]

The issue in this case was the constitutionality of a federal Act[104] which provided colleges and universities loans of up to fifty-percent of the cost for constructing facilities. Recipients could be public or private institutions. No facility financed under the Act could be used for *any* religious purpose for a twenty year period. Although striking down the twenty year limitation, the Court upheld the Act.

Four members of the Court agreed on the plurality opinion;[105] one agreed in the result,[106] but issued a separate opinion; four members dissented.[107] By this decision federal aid in the form of construction grants to church-related colleges was sustained.

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103. 403 U.S. 672 (1971).

104. Act of Dec. 16, 1963, Pub. L. No. 88-204, § 101, 77 Stat. 364.

105. The Chief Justice, joined by Justices Harlan, Stewart & Blackmun constituted the plurality.

106. Significantly, the concurring justice along with the dissenting justices failed to see the distinction, though he would have upheld aid to all levels of schools. 403 U.S. 672 (1971) (White, J., concurring).

107. The dissenting justices could not reconcile the decision with the Court's simultaneous rulings against statutes granting aid to lower level church-related schools. Tilton v. Richardson, 403 U.S. 672, 693 (1971) (Douglas, J., dissenting).

Excepting the twenty year limitation on religious activities, the Act was declared valid primarily on the basis of numerous distinctions drawn between education at higher and lower levels. In the process, tests were used to assess the hazards of governmental sponsorship, or financial support of religion, or the active involvement of the sovereign in religious activity. To be sustained, the Act had to reflect a secular legislative purpose, have a primary effect that neither advanced nor inhibited religion, avoid fostering excessive government entanglement with religion, and exert no inhibition on the free exercise of religion by its implementation.[108]

The Higher Education Facilities Act of 1963 is grounded in the National Defense Education Act of 1958.[109] The latter, and therefore this Act, was founded on the principle of defense—security and general welfare—"a secular objective entirely appropriate for governmental action."[110]

Whether the primary effect advanced religion was answered by examining the terms of the Act. Funds were expressly restricted to *secular* purposes at each recipient institution. The proper use or misuse could only be evaluated by observing the application of funds at *individual* schools. Consistency demanded that a composite profile of typical sectarianism at all schools be rejected. But, the Court added:

> Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.[111]

By "these characteristics," the Court meant a relationship between the school and its affiliated religion close enough to foster an excessive entanglement between the aid-recipient and the government agency administering the Act. Regarding the schools in question, several factors were noted:

> All were colleges, with students "less impressionable and less susceptible to religious indoctrination."[112]
>
> All admitted students and faculty of various religious faiths. None required attendance at religious serv-

108. *Id.* at 678.
109. 20 U.S.C. §§ 401-602 (1974).
110. Tilton v. Richardson, 403 U.S. 672, 679 (1971).
111. *Id.* at 682.
112. *Id.* at 686.

> ices. Each did require courses in theology, but the courses followed principles of academic freedom. And no school attempted to indoctrinate students or to proselytize.[113]

Thus, (1) consideration of the character of the institutions together with (2) the nonideological nature of the aid, and (3) the one-time, single-purpose, limited-contact structure of the Act, cumulatively "shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*."[114] Possibly, the Court surmised, the same reasons accounted for the lack of political division along religious lines. At any rate, no one had documented "any continuing religious aggravation on this matter in the political process."[115] Free exercise claims were discounted in the absence of any identifiable "coercion directed at the practice or exercise of their (appellants) religious beliefs."[116]

The dissenting opinion, in which four justices joined, was written by Justice Douglas. Dissatisfaction with apparent inconsistencies between the Court's earlier and present decisions is evident in the following passage:

> The majority's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *DiCenso*) while a huge violation occurring only once is *de minimus*. I cannot agree with such sophistry.[117]

The dissent went on to suggest that something ominous lurks within the majority's opinion, something that will eventually affect the character and academic freedom of church-related colleges. "Once these schools become federally funded they become bound by federal standards. . . ."[118]

B. *Hunt v. McNair*[119]

South Carolina's Act authorizing an Educational Facilities Authority to issue bonds to assist colleges in construction projects

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113. *Id.* at 686-87.

114. *Id.* at 688. In Lemon v. Kurtzman, 403 U.S. 602 (1971), aid to lower level church-related schools failed to win the Court's approval for essentially the same reasons the aid here passed.

115. Tilton v. Richardson, 403 U.S. 672, 688 (1971).

116. *Id.* at 689.

117. *Id.* at 693 (Douglas, J., dissenting).

118. *Id.*

119. 413 U.S. 734 (1973).

was challenged.'[120] Advantages accrue to recipient colleges since interest paid to bondholders on obligations of state is not subject to state or federal income taxes.'[121] Bonds can be sold at lower than conventional rates of interest to a ready market. No state revenues are involved in cancellation of either principal or interest, nor are any expenses incurred in marketing the bonds. In operation, the Authority retains title to any project financed by bond proceeds; a college-recipient leases the project until repayment is complete, whereupon the Authority reconveys the project title to the college. The recipient in *Hunt* was a church-related college.

The Court's decision which was divided six to three, upheld this form of state aid to church-affiliated colleges.'[122] Standards used to measure the *Tilton* case—purpose, effect, and entanglement—were also used here. In finding the purpose secular, it was noted that benefits of the Act are available to all colleges, public and private.

As to the primary effect, not unlike *Tilton*, the Act placed restrictions upon conducting religious activities in projects so funded. In addition, the Authority could inspect individual schools to ensure adherence to the restrictions—both prior to and after reconveyance of the project title. Again, there was an absence of evidence closely linking the *particular* school to its affiliated church. The Court quoted from *Tilton:* "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients. . . ."'[123] As a guide to such individual evaluation, the following remarks were offered:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in

120. S.C. CODE ANN. § 22-41 (Supp. 1973).

121. South Carolina's statute expressly states that the bonds can in no way, directly or indirectly, be considered an obligation of the state. The income from the bonds nevertheless qualifies for tax exemption, despite the fact that the Internal Revenue Code of 1954, 26 U.S.C. § 103(a)(1) (1967), limits interest income which is not considered gross income for federal tax purposes to interest on "the *obligations* of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing . . . ." (emphasis added).

122. Dissenting Justices Brennan, Douglas and Marshall, it should be recognized, also dissented in *Tilton*. Justice Black, the other dissenter in *Tilton*, died prior to the decision of *Hunt*.

123. 413 U.S. 734, 743 (1973), *quoting* Tilton v. Richardson, 403 U.S. 672, 682 (1971).

> which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[124]

But "appellant has introduced no evidence in the present case placing the College in such a category."[125]

Such evidence, if offered and found insufficient to demonstrate the college's primary purpose as that of advancing religion, would not necessarily meet the excessive entanglement test. That standard might fail on the basis of state regulations for administering the Act. South Carolina's regulations were "sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant."[126] The Authority was even empowered to set rules governing charges and fees made by a college, in order to ensure repayment of bonds, should a college default.[127] This power, if exercised, might be inconsistent with the establishment clause, the majority said, "but we do not now have that situation before us."[128]

The dissenting opinion written by Mr. Justice Brennan, recognized a distinction between *Tilton* and *Hunt*. In *Tilton*, the majority found "no significant intrusions into the everyday affairs of sectarian educational institutions."[129] However, "under the South Carolina scheme, 'continuing financial relationships or dependencies,' 'annual audits,' 'government analysis,' and 'regulation and surveillance' are the core features of the arrangement."[130]

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124. 413 U.S. 734, 743 (1973).
125. *Id.*
126. *Id.* at 747.
127. The Authority is empowered by the Act:
(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof; (h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education . . .
S.C. CODE ANN. §§ 22-41.4 (Supp. 1973).
128. 413 U.S. 734, 749 (1973).
129. *Id.* at 753-54 (Brennan, J., dissenting).
130. *Id.* at 754 (Brennan, J., dissenting).

> The conclusion is compelled that this involves the State in the "essentially religious activities of religious institutions" and "employs the organs of government for essentially religious purposes."[131]

The Supreme Court's rulings in favor of a very limited form of noncontinuous federal aid, and an even more severely restricted type of state aid to church-related colleges, is conservative by any standard. The effects have been predictively cataclysmic. Besides stimulating additional state legislation in aid of private colleges, the Court's decisions have encouraged careful judicial review of state laws under the religious clauses of the first amendment.

Post-Tilton Federal and State Supreme Court Decisions

State courts have the responsibility of reviewing legislation under federal as well as state law. A court may uphold or strike down a legislative act under its own state constitution unless the subject of the act is proscribed or guaranteed by the Federal Constitution. Similarly, an act might be prohibited by a state constitution, even though allowable (assuming it is not guaranteed) under the United States Constitution. But a state may never permit continuation of an act which, though valid under state law, contradicts the United States Constitution. Clear standards or so-called "tests" for deciding the federal constitutionality of state aid to private, church-related colleges emerged only with the United States Supreme Court's rulings.[132] Implementation of those guidelines has created a paramount distinction between pre- and post-1971 state court decisions.

The Federal Decisions

A. *Americans United for Separation of Church and State v. Bubb.*[133]

Kansas law provides students enrolled in private institutions with tuition grants.[134] In operation, individual students are notified that an amount has been awarded in their name, but payment is made to the private college in which a student is enrolled.[135]

131. *Id.* at 755 (Brennan, J., dissenting).

132. The United States Supreme Court will decide next term the constitutionality of Tennessee's Tuition Grant Act. Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974), *prob. juris. noted,* 95 S. Ct. 1114 (1975). That Act was found unconstitutional at the district court level.

133. 379 F. Supp. 872 (D. Kan. 1974).

134. KAN. STAT. ANN. § 72-6107 (1972).

135. KAN. STAT. ANN. § 72-6110 (1972).

The college is required by the Act to be private, to be accredited by a regional association, and to admit students without regard for race, sex, religion, creed or national origin.

At the time of the suit all colleges involved (nineteen) were church-related. The Act was challenged on the fourteenth amendment equal protection grounds, and under the establishment and free exercise clauses of the first amendment.

Those who challenged the Act argued that since private college students alone could benefit, public college students were not afforded equal treatment. Private students presumably choose their school for the advantage it offers over public schools, and thus the state subsidizes that advantage. The court held that the student enrolled in a public institution already receives state aid in the form of his largely publicly-financed education.[136] Assuming *arguendo* that unequal treatment did exist, the court reviewed the Act by the loose standard: so long as the state's objectives in establishing the Act are legitimate, its policies—if they are reasonably related to the objective—will be in harmony with the fourteenth amendment.[137]

Turning to the establishment clause challenge, the Act was found to have a secular purpose. The officially stated purposes were to save the state money by using facilities and faculties of private colleges, and to offer students assistance needed to attend colleges of their choice.[138]

The primary effect of the Act was evaluated for each college separately by scrutinizing the nature of the individual institution. Eight standards were used to measure the religious entanglement of the schools.[139]

1. *Religious restrictions on student admission*—Though all had religiously homogeneous student bodies, no restrictive polices were evident, and only one college

136. Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 885 (D. Kan. 1974).

137. *Id.* at 885-86.

138. A note of interest is that reasons for the Act were recorded, one of which was to reduce the number of students who are forced to choose public over private colleges because of intolerable tuition increases in private schools. Yet, oddly, evidence was offered by the defendants to show that of 500 student-aid-recipients questioned, 250 said that without tuition grants they would not have chosen to attend *any* Kansas college. Alternatives of the other respondents were not mentioned.

139. *Id.* at 892-93.

gave preference to applicants of a particular religion. However, all applicants were required to submit a pastor's evaluation of themselves. This factor, coupled with the homogeneous nature of the institution made the college ineligible.

2. *Explicitly or implicitly required attendance of students at religious activities*—Three colleges were excluded on this ground. None of the three explicitly required attendance, rather, students were pressured in various subtle ways to attend religious functions.

3. *Required obedience by students to specific doctrines or dogmas*—One college failed this test. It required oral examinations in which a student's spiritual development and philosophy could be explored.

4. *Required attendance in theological or sectarian courses*—All colleges required attendance in religious courses, but the court found the courses objective and neutral.

5. *Degree to which the colleges were a part of their respective sponsoring denomination*—All colleges had religious reasons for their existence, but none attempted to proselytize or inculcate students with their faith.

6. *Extent to which the colleges sought to indoctrinate students with their religious values*—No college was held to have an interest in inculcation as a substantial purpose.

7. *Imposition of religious restrictions on faculty appointments*—Though all colleges had religiously homogeneous faculties, no restrictive hiring policies were evident.

8. *Religious restrictions on what or how the faculties taught*—All colleges followed accepted standards of academic freedom.

The court noted that the five colleges barred from participation could again become eligible by eliminating their particular infirmities.

Consideration was next given to the possibility of excessive entanglement of church and state—entanglement resulting from

surveillance and from political discord.[140] Because the Act granted tuition directly to students for secular education, the *Bubb* court saw little risk of administrative entanglements. Further, the statute did not require surveillance as it did not specify or limit usage of funds in the accounts of colleges. The diversity of students and faiths represented on all campuses were credited as factors likely to lessen political dissention for religious aid.

Finally, the court could find no basis for a free exercise challenge.[141] Simply being a taxpayer is not enough, the court noted; one must show "the coercive effect of the enactment as it operates against him in the practice of his religion."[142]

B. *Roemer v. Board of Public Works of the State of Maryland*[143]

Maryland provides eligible private colleges with government grants—unspecified as to purpose.[144] Institutions which award *only* theological degrees are ineligible. A further restriction is that no moneys paid under the Act are to be used for sectarian purposes. Formulas for allocating aid have been revised almost annually, and "each change in the statutory formula has resulted in a significant increase in public aid to the recipient institutions."[145] Since five of the recipients were church-related colleges, the Act was challenged under the establishment clause of the first amendment.

A three-judge panel upheld the statute by a 2-1 decision, Senior Circuit Judge Bryan dissenting. Since then, the case has been appealed.[146] The decision was based solely upon the court's own findings of fact, which are part of the opinion. Among the findings were these:

1. Each college afforded its faculty a high degree of academic freedom.

2. All of the defendent colleges, except one, followed, to

140. *Id.* at 894.
141. *Id.* at 895.
142. *Id.*
143. 387 F. Supp. 1282 (D. Md. 1974).
144. MD. ANN. CODE art. 77A, § 65 (Supp. 1971).
145. Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282, 1285 (D. Md. 1974).
146. It may be worth noting that two of the recipients were earlier involved in a case where they were declared by a Maryland court of appeals to be "sectarian" and aid to them violative of the first amendment. Horace Mann League v. Board of Public Works, 242 Md. 645, 220 A.2d 51 (1966). *See* note 75 *supra* and accompanying text.

various degrees, the practice of opening classes with prayer.

3. To some extent, each college examined—except one—considered religion in hiring faculty members. However, the court found no complaints from any faculty indicating an attempt by administrators "to stack its faculty with members of a particular faith."[147]

4. All colleges had "vigorous" theology departments, staffed chiefly or totally with clerics of their affiliated church. Students were required to take courses in theology. Although principles of academic freedom guided the courses, the court cautioned that one ought not conclude that the courses "have no overtones of indoctrination."[148]

5. With the exception of one college, all had religiously based quotas for membership on their governing boards.

6. The majority religion of students at each school was compatible with that of the affiliated church, though admission was not restricted by religion.

7. No follow-up policy existed to ensure that past or contemporary grants were not later diverted to sectarian uses.

8. Each college had a voluntary chaplain program with each chaplain a member of the affiliated church.

9. Each defendant college had as a secondary objective the encouragement of spiritual development with its students.[149]

The decision was derived by looking at the court's findings of facts in light of the United States Supreme Court's three-pronged test: a secular legislative purpose, a neutral primary effect, and a relationship between church and state that does not foster excessive entanglement.[150] In *Tilton,* aid in the form of one-time

147. Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282, 1293 (D. Md. 1974).
148. *Id.* at 1293.
149. *Id.* at 1293-94.
150. *Id.* at 1286.

construction grants to church-related colleges had passed the test. Maryland's continuous, non-categorial grants were likened to *Tilton* throughout the decision.

Except for the use of funds for theological courses, the Act passed each part of the test. The legislative purpose was found secular. The Act was a legitimate effort to save tax money. The primary effect was neutral in that each school was seen as performing an essentially secular educational function, no school required attendance at religious services, each school had hired faculty who were not members of the affiliated church, and the "atmosphere of academic freedom prevailed on each campus."[151] Academic freedom and the essentially secular functions of the colleges were also cited as primary factors reducing the risk of excessive entanglement. Additional determinants here included the Act's exemption of strictly theological schools and prohibition against use of funds for sectarian purposes. The president of each college was required to verify biannually that the terms of the Act had been adhered to.

It should be noted that the court recognized two significant differences between its case and *Tilton*. In *Tilton*, buildings for secular use were at issue. Here, funds could be used for teaching salaries. The court stated "clearly the distinction does not rise to constitutional dimensions."[152] Academic freedom could be relied upon to monitor teaching, making state surveillance unnecessary. And in *Tilton*, the funds were not of an ongoing nature. The Maryland Act called for "annual appropriations, and the recipient schools are likely to request additional aid."[153] But the judges added, "Political conflict over the size of allocations or the scope of programs in Maryland are not likely to involve the affiliated churches to a major degree in the political controversy."[154]

The dissenting judge disagreed with his two colleagues, finding that "the Act *in these instances* does in truth offend the Constitution. . . ."[155] Also guided by *Tilton*, he noted the Supreme Court's disapproval of a rule banning sectarian activity in publicly financed buildings for only 20 years (as opposed to the life of the building). "This decision," said Judge Bryan, "trenchantly

151. *Id.* at 1287.
152. *Id.* at 1289.
153. *Id.* at 1291.
154. *Id.*
155. *Id.* at 1298 (emphasis in original).

confirms that possible utilization of public property in advancing religion is *ipso facto* inhibited."[156] The *potential* misuse of moneys, the reasonable opportunity for sectarian misapplication, became the judge's test.

He characterized the Act before him as a "blunderbuss discharge of public funds to a church-affiliated or church-related college."[157] However, the fact that nothing in the Act or the majority's decision prohibits the colleges from hiring chaplains with the state's money bolstered his observations. The dissenter concluded, "research discloses to me no comparable *carte blanche* power of expenditure permissibly conferred by a State upon church-affiliated or church-related institutions."[158]

C. *Americans United for the Separation of Church and State v. Dunn*[159]

Tennessee's Tuition Grant Program[160] was found to violate the establishment clause of the first amendment. The Act purported to provide state funds to students enrolled in either public or private schools in order to foster free choices between private and public colleges. In reality, the schools received the money. Eighty-five percent of funds disbursed to private schools went to church-related colleges.

The district court began by noting the Supreme Court's discussion of the main concerns which the establishment clause protects against: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[161] Then it recognized the three-pronged test which has emerged from the Supreme Court's decisions: a secular legislative purpose, a neutral primary effect, and absence of excessive entanglement of church and state.[162] But at this point, it distinguished the case before it by two factors: (1) the Supreme Court has never heard a case involving *unrestricted* funds to a church-related college,[163] and (2) the defendants had tried to bend the Court's tests to fit the needs of

156. *Id.* at 1299.
157. *Id.*
158. *Id.*
159. 384 F. Supp. 714 (M.D. Tenn. 1974).
160. Ch. 265, §§ 1-9, 1971 Tenn. Acts (repealed 1974).
161. Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714, 719 (M.D. Tenn. 1974), *quoting* Walz v. Tax Commission, 397 U.S. 664, 668 (1970).
162. *Id.* at 719. *See* notes 49-54 *supra* and accompanying text.
163. *Id.*

their cause, notwithstanding the differences.[164] Or, in the court's words, they had "obfuscated" the issue.[165]

To determine the Act's legality, other tests were needed. First examined and applied as a test was aid allowed by the Supreme Court to students (as opposed to schools).[166] All forms of such benefits have been strictly limited in various ways. The Court has said that neither unrestricted tuition reimbursements, or tax deductions may be used as a reward or incentive for choosing a private school. Child benefit acts, properly restricted, only incidentally benefit religions: they are not even forms of aid as determined by the first amendment according to the *Dunn* court.[167] Tennessee's Act failed this standard, as the grants to students were without restrictions.[168]

The second type of aid which had been upheld by the Supreme Court and could thus be used as a guideline is aid to schools for secular (as opposed to sectarian) functions.[169] All forms of aid at all school levels, elementary through college, have been restricted to secular uses. Tennessee's Act did not limit colleges' use of the funds; thus, there was no occasion for determining the law's legality according to its application.

But it was because of the statute's lack of restrictions that it failed the third hurdle, the possibility of excessive entanglement.[170] Colleges were totally free to use their states' funds for any purpose, religious included. Again, *Dunn* was distinguished from those cases reviewed by the Supreme Court. Moreover, this distinguishing factor, the lack of restriction to secular use, obviated the need to examine *individual schools* to ensure that purpose. Alternatively, it legitimized claims based on the *overall profile* of the church-related schools.

Evidence suggested that the degree of religious activity in the church-related colleges was "something more than formal denominational control and something less than permeation of religious indoctrination."[171]

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164. *Id.*
165. *Id.*
166. *Id.* at 719-20.
167. *Id.* at 720.
168. In this context, and particularly where the students did not receive the money anyway, it is difficult to conceive of how the statute might have been restructured.
169. *Id.*
170. *Id.* at 721.
171. *Id.* at 721 n.8.

> Given the presence of such activity at certain of the eligible schools and the absence of restrictions in the statute, the only conclusions are that the statute permits the use of State funds for religious activity and therefore, that the statute is unconstitutional as violative of the Establishment Clause of the First Amendment.[172]

The State Supreme Court Decisions

A. *Iona College v. Nyquist*[173]

New York's Education Laws[174] allows public moneys to be paid to private, including church-related, but excluding sectarian, institutions. The Commissioner of Education determines eligibility and a college is ineligible if aid would be violative of either the first amendment, or New York's Constitution. The Blaine Amendment to the New York Constitution reads:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used directly or indirectly in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught.[175]

One method used by the Commissioner in his determination is a questionnaire, completed and returned by the applicant institution. In the case of Iona, the college was found ineligible in that: (1) it characterized itself as a "Catholic Institution"; (2) the catalog and other publications of the institution evidenced "a strong religious commitment"; (3) members of the Board of Trustees, the president, and a significant number of other administrators were of the sponsoring religious order; and (4) the student handbook reflected an activity program "resting on a philosophy which is 'Christian in inspiration.'"[176] The Commissioner's findings were upheld by the court.

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172. *Id.* at 721.

173. 65 Misc. 2d 329, 316 N.Y.S.2d 139 (1970). This is a pre-*Tilton* case, but is presented as a contrast to other similar New York cases.

174. N.Y. EDUC. LAW § 6401 (McKinney 1972).

175. N.Y. CONST. art. XI, § 3.

176. Iona College v. Nyquist, 65 Misc. 2d 329, 334 n.1. 316 N.Y.S.2d 139, 144 n.1.

B. *Canisius College v. Nyquist*[177]

The same statute and state constitutional provision were scrutinized in the instant case and in *Iona College*.[178] In finding Canisius College ineligible for funds under the Act, the Commissioner pointed to facts which collectively conveyed to him his understanding of the college as a whole:

> I have noted that the College states, in its current catalog, that "The Commitment of Canisius College to the pursuit of wisdom involves finally strong religious convictions, a dedication to Christ and His teachings"; five of the twelve trustees, the president of the College, one-third of the administrative officers and twenty percent of the faculty are members of the sponsoring religious order; all students who profess adherence to the Roman Catholic faith are required to complete twelve credit hours in courses in religious studies; college-sponsored religious services are exclusively Roman Catholic in style, all college chaplains are members of the sponsoring religious order, and the two religious organizations on campus are Roman Catholic related.[179]

Notwithstanding, the Commissioner based his decision on the narrow phrase proscribing aid to institutions "in which any denominational tenet or doctrine is taught."[180] That limited question was reviewed by a state supreme court (third district), and the majority found the Commissioner's decision arbitrary and capricious.[181]

The court refused to literally interpret the phrase "any . . . institution . . . in which *any* denominational tenet or doctrine is taught."[182] Rather, the reasonable interpretation, the court said, would be that aid should not be granted to institutions teaching *particular* tenets and doctrines to the exclusion of others. In its interpretation, the court's decision was founded upon the variety in course offerings and in denominational backgrounds of the

177. 36 App. Div. 2d 340, 320 N.Y.S.2d 652 (1971). This case was decided after *Tilton* was argued, but prior to the actual decision.

178. *See* notes 174, 175 *supra*.

179. Canisius College v. Nyquist, 36 App. Div. 2d 340, 342, 320 N.Y.S.2d 652, 654 (1971).

180. *Id.* at 343, 320 N.Y.S.2d at 655.

181. *Id.* The "control" provision of the Blaine amendment was not raised by the Commissioner or the court.

182. *Id.* at 344, 320 N.Y.S.2d at 656.

faculty, and upon the academic freedom allowed the faculty in their teaching.[183]

Finally, the court noted the secular purpose and neutral effect of the New York Act. It compared the law with forms of aid previously allowed by the United States Supreme Court, and found it consistent with the first amendment.[184]

C. *College of New Rochelle v. Nyquist*[185]

This case is similar to the preceding New York cases with respect to the central issue, but is distinguished in that it was rendered after the *Tilton* decision.

The Commissioner had found the college ineligible for funds under the state's constitution (as in *Canisius*), but not on the basis of *either* of the passages of the Blaine Amendment. Rather, he found it violative of *both* passages, according to his "understanding of the institution as a whole."[186]

The court began by considering the second clause, which included any school or institution "in which any denominational tenet or doctrine is taught."[187] The decision in *Canisius* was quoted.[188] Like *Canisius*, and for identical reasons, New Rochelle College was held not to teach particular doctrines to the exclusion of all others.[189]

Having passed muster under the second clause, consideration turned to the clause which stated no aid can be allowed to "any school or institution of learning wholly or in part under the control or direction of any religious denomination." Again, the court chose a non-literal interpretation of the constitution. Agreeing that the college was denominationally *sponsored*, it nonetheless refused to equate that with *control* and *direction*. To do so, it said, would require a simplistic type of reasoning, long rejected.[190]

The question upon which the court decided the issue was whether the college was managed by a denomination in such a manner as to inculcate its own brand of faith. The *manner* of

183. *Id.* at 343, 320 N.Y.S.2d at 655.
184. *Id.* at 345-46, 320 N.Y.S.2d at 657-58.
185. 37 App. Div. 2d 461, 326 N.Y.S.2d 765 (1971).
186. *Id.* at 464, 326 N.Y.S.2d at 768.
187. *Id.*
188. *Id.* at 466, 326 N.Y.S.2d at 770.
189. *Id.*
190. *Id.* at 467, 326 N.Y.S.2d at 771.

sponsorship determined control or direction.[191] Following an analysis of the record, "considering the totality of the circumstances," New Rochelle College was held to pass the test.[192]

On the strength of its opinion relative to state law, the court quickly found the Act constitutional, that is, secular in its purpose and effect, under federal law. The question of excessive entanglement (then recently raised by the United States Supreme Court in *Tilton*) was also successfully resolved, but with greater difficulty. Under that test, the Supreme Court had struck down forms of unrestricted aid to elementary and secondary parochial schools, but supported a form of limited aid to private colleges and universities. The New York court seemed to position its case somewhere in between:

> Although there are factors in *Tilton* which distinguish it from the present case (*e.g.*, we do not here have a one-time, single purpose grant), there are fewer and less significant entanglements between religion and government present here than were present in *Lemon* and *DiCenso*.[193]

D. *Hartness v. Paterson*[194]

South Carolina's program of tuition grants[195] to students of private colleges, except those taking degrees in theology, divinity or religious education, was declared in violation of the state's constitution. South Carolina's Constitution provides that:

> the property or credit of the State of South Carolina . . . or any public money, from whatever source derived, shall not . . . be used, directly or indirectly, in aid or maintenance of any college . . . which is wholly or in part under the direction or control of any church or religious or sectarian denomination, society or organization.[196]

The court rejected arguments that the grants only pay for part of the tuition cost, since if part of the payment of tuition

191. *Id.* at 468, 326 N.Y.S.2d at 772.
192. *Id.*
193. *Id.* at 471, 326 N.Y.S.2d at 775. *See* Lemon v. Kurtzman, 403 U.S. 603 (1971).
194. 255 S.C. 503, 179 S.E.2d 907 (1971). This case was decided after *Tilton* was argued, but before it was decided.
195. Act No. 1191, 1970 Acts of the General Assembly, 56 S.C. Stat. 2579.
196. S.C. CONST. art. XI, § 9.

by such grants were legal, "all could just as legally be paid, resulting in the support of such institutions entirely with State funds."[197] Also rejected was the notion that grants to students, where restricted to use by schools, are not grants to the schools. The court concluded that under South Carolina's Constitution, indirect aid was as unconstitutional as direct aid.[198]

E. *Clayton v. Kerrick*[199]

This New Jersey case involved an Act[200] authorizing a state authority to sell bonds to provide funds for construction of facilities at public and private colleges. It was upheld under the Federal Constitution after the *Tilton* decision (but prior to *Hunt*, the object of a similar act), and on appeal the United States Supreme Court vacated the state court's ruling and remanded the case for reconsideration in light of *Tilton*.

Upon reconsideration, the New Jersey Supreme Court upheld its earlier decision. The basis for its decision was that unlike the grants involved in *Tilton*, only loans were involved in the instant case.[201] The loans were self-sustaining (no tax money was involved), and the state was not obligated for repayment. Further, public *and* private institutions were eligible. No private institution could use funds for facilities to be used for sectarian instruction or religious worship. And any facility built with the funds could *never* be used for religious purposes.

The court likened the inexpensive loans to other services rendered at a savings by the state, such as water and electricity—in which a degree of contractual or financial entanglement exists. Nothing, the court thought, in the first amendment requires states to refuse such services to otherwise indistinguishable sectarian institutions.[202] In addition, nothing in the record could convince the court that the institutions were too religiously dominated.

F. *State ex rel. Warren v. Nusbaum*[203]

Wisconsin law[204] authorized the state to contract with church-related Marquette University to provide citizens with dental edu-

197. Hartness v. Patterson, 255 S.C. 503, 505, 179 S.E.2d 907, 909 (1971).
198. *Id.* at 504, 179 S.E.2d at 908.
199. 59 N.J. 583, 285 A.2d 11 (1971).
200. N.J. STAT. ANN. § 18A: 72A-1 (1968).
201. Clayton v. Kerrick, 59 N.J. 583, 589, 285 A.2d 11, 17 (1971).
202. *Id.* at 585, 285 A.2d at 13.
203. 55 Wis. 2d 316, 198 N.W.2d 650 (1972).
204. Law of June 6, 1971, ch. 44, § 4, 1971 Wis. Laws (repealed 1973).

cation. Marquette has the state's only school of dentistry. The law provided an amount of money for each student enrolled. Use of the funds was not restricted to the dental school, but could be applied to operating expenses of the University as a whole, and this was the facet of the Act challenged under the state's constitution, which reads:

> The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious theological seminaries.[205]

Wisconsin's Supreme Court, however, observed that the Act could not stand even if it were valid under the state's constitution if it violated the Federal Constitution. Thus it reviewed the latter question first. As to the "secular legislative purpose" standard, the court could find no "Catholic way to pull a tooth."[206] Regarding "excessive entanglement," nothing about the state's interest in secular dental education called for *surveillance,* which the court defined as the *instrument* of entanglement.[207] The decision did indicate, though, that the justices would have preferred that the statute provide that no courses in religion *ever* be required of dental students.[208]

The Act failed in two respects. It had the primary effect of advancing religion in that money was not restricted to the secular school of dentistry. But the most serious defect was the Act's primary effect on the free exercise clause. Not only did the statute require the dental school to conform to accepted academic and professional standards, and to give preference in its admission policies to in-state applicants, but it barred the University as a whole from discriminating among employees and students on the basis of sex, race, *religion,* color, or national origin.[209]

Under those standards, the court said that the University might be obligated to "open the opportunity to be university pres-

205. WIS. CONST. art. I, § 18. The court did not touch on the possibility of the University shifting funds normally used in dentistry to other religious purposes. That did not trouble it. Rather, it sought to ensure that the state did not assist in this end by failing to restrict funds to the secular school of dentistry.

206. State *ex rel.* Warren v. Nusbaum, 55 Wis. 2d 316, 320, 198 N.W.2d 650, 654 (1972).

207. *Id.* at 323, 198 N.W.2d at 657.

208. *Id.* at 324, 198 N.W.2d at 658.

209. *Id.* at 322, 198 N.W.2d at 656.

ident to others than members of the Jesuit Order."[210] A proverb was quoted, "He who pays the fiddler calls the tune."[211] But, the majority cautioned,

> In this sensitive area, it cannot be permitted to develop that, "He who pays the fiddler furnishes the sheet music," at least not beyond the specific and limited area involved in the contract. Guidelines and standards too easily become halter and harness.[212]

G. *Durham v. McLeod*[213]

An Act providing loans to college students was upheld by the South Carolina Supreme Court, both as to Article XI, section 9 of the South Carolina Constitution, and the United States Constitution.[214] Funds for the loans came from grants to the administering loan authority, federal sources, earnings by the authority, and from loan repayments. No tax money was involved, nor was the state obligated for repayment.

Loans were made to residents of South Carolina desiring higher education. The education could be of any type, at any college—public or private, and in the state or out. The court likened the loan to that which can be secured at the local bank. It noted that the state is not required to deliberately place church-related schools at a disadvantage by making them ineligible to compete for loan funds.[215]

H. *Weiss v. O'Brien*[216]

Washington's College Tuition Supplement Program[217] was declared to violate both the Washington and United States Constitutions. The Washington Constitution states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[218]

The court first found the Act to support, in part, the schools

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210. *Id.*
211. *Id.*
212. *Id.*
213. 259 S.C. 409, 192 S.E.2d 202 (1972).
214. Act of June 15, 1971, 57 S.C. Stat. 775, was the statute involved. For relevant provisions of the state constitution, *see* note 196 *supra* and accompanying text.
215. Durham v. McLeod, 259 S.C. 409, 411, 192 S.E.2d 202, 204 (1972).
216. 82 Wash. 2d 199, 509 P.2d 973 (1973).
217. Ch. 155, § 10, [1972] Wash. Laws 1st Ex. Sess. 494.
218. WASH. CONST. art. 9, § 4.

for which it was intended.[219] The Act limited funds to nonpublic students. Students signed application cards, ensuring their eligibility and assigning their grants to their college. A collective voucher, equal to the sum of the students' grants, was sent to each participating college.

Next, the court found the schools to be sectarian, thus violative of the state constitution.[220] Each school was analyzed for evidence of sectarianism. All varied in degree, but each evidenced a religious character which is represented in these illustrative findings:

> *Manner of governance*—statements restricting governing board actions to doctrines and standards consistent with the affiliated church;[221]
> *Faculty*—high degrees of academic freedom, but caveats to faculty members about maintaining standards of life and conduct consistent with the philosophy and objectives of the institution;[222]
> *Budget*—minimal direct church support (an average of less than 12 percent), but much voluntary service from members of affiliated churches;[223]
> *Religion in the Curriculum*—requirements of one or more courses in religion for a bachelor's degree; majors in pre-Christian education.[224]

As to the first amendment, the Act failed the entanglement test—but not on administrative grounds, since "[t]he council makes no audit to insure that the funds will be used for nonreligious purposes, not to see that the disbursement is actually applied to students' tuition."[225] Rather, political entanglements were seen as intrinsic in the plan. "Greater and greater appropriations are likely each year, thus splitting the candidates and the electorate along religious lines."[226]

I. *Miller v. Ayers*[227]

The revised constitution of Virginia permits (1) unrestricted

219. Weiss v. O'Brien, 82 Wash. 2d 199, 204, 509 P.2d 973, 978 (1973).
220. *Id.* at 206-07, 509 P.2d at 980-81.
221. *Id.* at 214, 509 P.2d at 988.
222. *Id.* at 215, 509 P.2d at 989.
223. *Id.*
224. *Id.*
225. *Id.* at 217, 509 P.2d at 991.
226. *Id.*
227. 214 Va. 171, 198 S.E.2d 634 (1973).

public aid to nonsectarian private schools, and (2) loans (repayable in money or service to the state) to church-related colleges whose primary purpose is not religious training or theological education.

> The General Assembly may appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning. . . .[228]
> The General Assembly may provide for loans to students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.[229]

Also permitted for church-related colleges is aid in borrowing money for construction of college facilities.

Virginia's Tuition Assistance Loan Act[230] had previously allowed repayment (by student recipients at church-related colleges) to be effected by money or satisfactory yearly academic progress. That amounted to *grants*, however, and was found to run afoul of the Virginia Constitution in an earlier case.[231] That same decision upheld the Act under the Federal Constitution.

A revised Act,[232] the object of this case, made repayment possible in several ways. The first monetary alternative was required residence in Virginia plus service to the state. The other choices amounted to mere residence in the state. The court limited repayment alternatives for church-related college students to money or service to the state.

The earlier decision, respecting the Act's legality under the Federal Constitution, was reviewed in light of the principles of *Tilton* and *Hunt*. Again it was upheld. Two factors were especially useful: (1) the secular atmosphere of the colleges, as opposed to elementary and secondary church-related schools,[233] and (2) failure of the record to show that Virginia's church-related

228. VA. CONST. art. VIII, § 10.
229. VA. CONST. art. VIII, § 11.
230. Ch. 18-19, [1972] Va. Acts (repealed 1973).
231. Miller v. Ayers, 213 Va. 149, 191 S.E.2d 261 (1972).
232. VA. CODE ANN. § 23-38.12 (Supp. 1974).
233. Miller v. Ayers, 214 Va. 171, 180, 198 S.E.2d 634, 643 (1973).

college recipients were any more religiously oriented than those of *Tilton* or *Hunt*.[234]

J. *Opinion of the Justices*[235]

In response to a request for an advisory opinion, submitted by the Alabama legislature, that state's supreme court held that an unrestricted tuition grant plan would violate the state and Federal Constitutions. The plan would have released funds to *all* college students, but the decision revolved around student recipients at church-related colleges.[236]

The state's constitution says: "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school."[237]

The court said:

> [T]he cumulative impact of the relationship between the State and church related institutions which is provided for in H.B. 247, involves "an excessive entanglement" between the State and religion and would therefore be unconstitutional under the Religion Clauses of the First Amendment to the Federal Constitution, as well as its Alabama counterpart, Article 14, Section 263.[238]

K. *State ex rel. Rogers v. Swanson*[239]

Tuition grants to students of private colleges were declared, by a majority (5-2 decision) of Nebraska's Supreme Court, to violate the state and Federal Constitutions.

The majority quoted the provisions of the state constitution it thought pertinent, including:

> The Legislature shall not pass . . . special laws . . . granting to any corporation, association, or individual any special or exclusive privileges; immunity, or franchise . . . where a general law can be made applicable. . . .[240]

> The state Legislature shall not make any appropriation

234. *Id.* at 179, 198 S.E.2d at 642.
235. 291 Ala. 301, 280 So. 2d 547 (1973).
236. *Id.* at 306, 280 So. 2d at 552.
237. ALA. CONST. art. 14, § 263.
238. Opinion of the Justices, 291 Ala. 301, 307, 280 So. 2d 547, 553 (1973).
239. 192 Neb. 125, 219 N.W.2d 726 (1974).
240. NEB. CONST. art. III, § 18.

> from any public fund . . . in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state.[241]

According to the Act[242] itself, the legislative intent was to relieve the strain on public colleges and to aid students in freely choosing qualified institutions of higher learning.[243] The Act was declared inconsistent with state law because it limited benefits to students choosing only *academic* higher education, within strictly private institutions, and within the state. A natural class of citizens (students) was split in order to arbitrarily direct benefits at a special group.[244]

Also noted was the Act's lack of restrictions. Funds could be used for religious purposes, so the Act breached federal law, as well.

> There is no restriction in the act that the proceeds received through these grants be limited to secular subjects, so obviously in some institutions these tuition grants finance sectarian subjects. This alone shows secular and sectarian subjects are so intertwined in and supported by the tuition grants that L.B. 1171 violates the Establishment Clause.[245]

L. *California Education Facilities Authority v. Priest*[246]

The California Supreme Court held that an Act providing for the issuance of revenue bonds, and the use of the proceeds therefrom to aid in the construction or rehabilitation of educational facilities at private colleges and universities, violated neither the Federal nor California Constitution.

Synopsis of the Forms of Aid

The decisions on college aid since and including *Tilton* involve six forms of aid to private colleges: assistance in selling bonds, student loans, contracts for special educational services, grants restricted to construction purposes, grants unrestricted in nature, and tuition grants. It would be helpful to categorize the

241. *Id.*
242. NEB. REV. STAT. § 85-701 (Supp. 1972).
243. Rogers v. Swanson, 192 Neb. 125, 129, 219 N.W.2d 726, 730 (1974).
244. *Id.* at 132-33, 219 N.W.2d at 733-34.
245. *Id.* at 134, 219 N.W.2d at 735.
246. 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr. 361 (1974).

state statutes to determine any patterns which are emerging out of the state courts.

A. *Assistance in selling bonds*

Acts of South Carolina, New Jersey and California providing state assistance in the selling of bonds, the proceeds of which inure to private colleges, have all been found valid. In no instance were there state revenues used or obligated.[247]

B. *Student loans*

The provision of low cost state loans to students of higher education (including private colleges) has been upheld in South Carolina and Virginia. In South Carolina no state money was involved or obligated. In Virginia repayment options for church-related college students are limited to bonafide service to the state or money.[248]

C. *Contracts for special educational services*

Wisconsin's Act to contract with a church-related college for the provision of dentistry education for the state's residents violated the Federal Constitution. State payment for services under the Act released funds to the general revenues of the college. The most serious defect noted was the intrusion of the state into the affairs of the college through regulating stipulations.[249]

D. *Grants restricted to construction purposes*

Federal funds for construction purposes at private, church-related colleges were approved. No evidence was offered on the sectarian nature of individual college recipients; the aid was ideologically neutral; of a one-time, single-purpose, limited contact nature; and provided for a limited and narrow relationship between church and state.[250]

E. *Grants unrestricted in nature*

Maryland's unrestricted grants to private, church-related colleges were held, by a federal district court, not to violate the

247. Hunt v. McNair, 413 U.S. 784 (1973); California Education Facilities Authority v. Priest, 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr. 361 (1974); Clayton v. Kerrick, 59 N.J. 583, 285 A.2d 11 (1971)—decided after *Tilton*, but prior to *Hunt*.

248. Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972); Miller v. Ayers, 214 Va. 171, 198 S.E.2d 634 (1973).

249. Warren v. Nusbaum, 55 Wis. 2d 316, 198 N.W.2d 650 (1972).

250. Tilton v. Richardson, 403 U.S. 672 (1971).

United States Constitution. The court cited as reasons academic freedom at the colleges, the Act's exemption of theological schools and prohibition against usage of funds for sectarian purposes, and requirements that college presidents verify biannually that the terms of the Act were adhered to.

In New York unrestricted grants to the College of New Rochelle were approved under the state and the Federal Constitution. New York's Act provides for review of the degree of sectarianism of individual colleges.[251]

F. *Tuition grants*

Supreme courts of Washington, Alabama and Nebraska have held tuition grants for private, church-related college students to violate their state constitutions and the Federal Constitution. A federal district court has held a Kansas Act valid and invalid, depending upon the degree of sectarianism present at individual colleges. And a federal district court has held Tennessee's Act unconstitutional. This decision has been accepted for review by the United States Supreme Court, and should provide some strongly needed guidelines for state grants to private, religiously-affiliated colleges or their students.[252]

251. Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282 (D.Md. 1974); College of New Rochelle v. Nyquist, 37 App. Div. 2d 461, 326 N.Y.S.2d 765 (1971). *See also* Canisius College v. Nyquist, 36 App. Div. 2d 340, 320 N.Y.S.2d 652 (1971); Iona College v. Nyquist, 65 Misc. 2d 329, 316 N.Y.S.2d 139 (1970).

252. Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974); Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974); Opinion of the Justices, 291 Ala. 301, 280 So. 2d 547 (1973); State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974); Weiss v. O'Brien, 82 Wash. 2d 199, 509 P.2d 973 (1973). In addition, the Supreme Court of South Carolina held a tuition grant act invalid under the state constitution. The case was decided after *Tilton* was argued, but prior to the decision. *See* Hartness v. Patterson, 255 S.C. 503, 197 S.E.2d 907 (1971).

Valparaiso University Law Review

Volume 9 | Spring 1975 | Number 3

Published by Valparaiso University School of Law, Valparaiso, Indiana