Journal of Student Financial Aid

Volume 8 | Issue 1 Article 2

2-1-1978

Legal Development of Government Support of Private Higher Education

David W. Forman

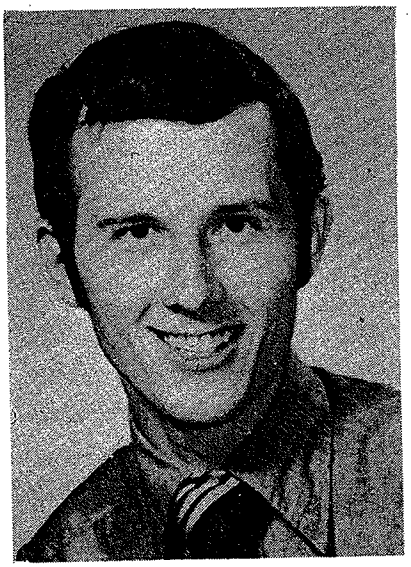
LEGAL DEVELOPMENT OF GOVERNMENT SUPPORT OF PRIVATE HIGHER EDUCATION

By David W. Forman

Clark Spurlock, in *Education and the Supreme Court,* wrote, "Probably the fact that the Constitution does not even mention education was not the result of any kind of compromise or desire to avoid a touchy subject, but rather reflects the then prevailing view that education was a private, or a religious, or a philanthropic function" (1955, p. 15).

Church support was perhaps most important in the foundation and control of much of higher education in America, but public support in the early days was also common. The Dartmouth case established that even the courts of the times did not consider such support to be incompatible with the complete autonomy of the private board of trustees (Keeton, 1971). Furthermore, private control and support of the colleges did not rule out a strong public purpose and identity. As late as 1825, George Ticknor referred to Harvard College as "the oldest of our greater public schools" (Rudolph, 1962, p. 358). For the most part, though, the state was willing to foster and encourage higher education, but not to take primary responsibility for its support and control.

With the disestablishment of the colonial churches and the growing competition among denominations which spawned the boom in private college growth, the American view of public support for education changed. Eventually 38 states enacted rigid legislative prohibitions against grants of public funds to sectarian schools (McFarlane, 1971, p. 93). Only a few states, notably Pennsylvania and Maryland, went counter to this trend by continuing or restarting grants to private colleges.



David W. Forman is Director of Student Financial Aid at Georgetown College in Georgetown, Kentucky, having also served in administrative positions at Campbellsville Baptist College. He holds the B.A. from Georgetown, and is in a doctoral program in Higher Education at the University of Kentucky.

As state systems of higher education grew and as the goal of universal access to higher education took root, state expenditures increased substantially. The states' efforts to relieve some of the financial burden of educational costs have in many cases meant aid to the "private sector" of various kinds. Presently nearly half the states give direct support to private institutions. Adding to this aid to students attending private institutions, it may be found that two-thirds of all the states are supporting private education.

The legal problems involved in aiding private colleges have developed because the Constitution of the United States prohibits Congress from making any laws having to do with "establishment of religion"; and through the Fourteenth Amendment, that restriction is extended to the states. "Efforts to interpret this restriction have led to much litigation, and the guidelines have not always been clear" the Carnegie Commission found (1971, p. 92).

The initial reaction, after a period of adjustment, was for state and federal governments to observe a strict separation interpretation which forbade any kind of monetary contact between the church and state. This view seems really to have begun to take hold in the 1840's, but in 1889 the courts began a reversal of the idea by declaring that not every form of aid to any church-sponsored activity would violate the establishment clause. Because of this concept, a federal construction grant to a hospital operated by a religious order was upheld in the case *Bradfield v Roberts* (Carnegie Commission, 1972).

In 1906, the courts applied *Bradfield* in determining whether Jesuit operated Georgetown University was a "sectarian institution" and whether or not therefore it was eligible for aid. The court said:

> Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or of no organizations at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. . . (The institution would be eligible for aid as long as by its charter it was essentially) . . a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church. . . (McFarlane, 1971, p. 20).

The result was that Georgetown University was ruled eligible for aid on the basis of the secular nature of the institution's charter (*Speer v Colbert*).

A Massachusetts opinion seven years later (*In re opinion of the Justices,* Mass., 1913) held that public money could not be used for the support of parochial common schools, but the justices curiously added the opinion that, "there is no constitutional stipulation prohibiting appropriations for higher educational institutions, societies, or undertakings under sectarian or ecclesastical control" (Johnson, 1948, p. 106.)

Another step toward the later doctrine of "secular purpose" was taken in *State ex rel. Atwood v Johnson* (1920) when the court ordered Wisconsin to make payments to denominational schools under the Educational Bonus Law of 1919, because the payments were limited to actual additional costs incurred by reason of the attendance of World War I veterans. "Mere reimbursement is not aid," the court said (Chambers, 1964, p. 188).

In the past half-century, public aid to private institutions has gained steam, developing along three separate but related lines: "excessive entanglement," "child benefit," and "primary secular effect".

Early cases distinguished between private and "sectarian" institutions in determining whether they should rightly receive aid from the state, but in the case *Horace Mann v Board of Public Works* (1966), the court undertook to make a distinction among institutions according to their "religiosity". Of the four colleges under consideration, aid was allowed for one but denied for three others. The criteria to determine eligibility were so vague and difficult to apply that each following case had to be adjudicated on its own. The reasoning attempted to establish a precedent that if an institution was not really very "religious," any aid awarded to that institution could not be said to foster "excessive entanglement" between the governmental unit and organized religion. This doctrine was a basis for decisions in later cases (Carnegie Commission, 1971; also, McFarlane, 1971, and Chambers, 1967).

In *Hunt v McNair* (1970) the court extended the interpretation of the "Mann Decision" to establish that certain kinds of aid did not necessarily foster "excessive entanglement". This decision set forth the proposition that a loan is not really aid. However, this court defined "excessive entanglement" by citing *Lemon v Kurtzman,* a case settled the same year which ruled out state salary subsidies for teachers in parochial schools (Brickman, 1972).

The "child benefit" doctrine was another approach used to justify state aid to private education, although at least two rulings in recent years seem to have repudiated the idea. In a case involving free textbooks to private elementary and secondary students, the courts ruled that "the schools are not beneficiaries of this program. . ." and allowed the aid to continue (*Borden v Louisiana State Board of Education,* (1938), Spurlock, 1955, p. 76).

Further comment on the concept could be found in the "conduit" idea espoused in *Kentucky Building Commission v Effron,* (1949). "It is well settled that a private agency may be utilized as the pipeline through which a public expenditure is made, the test being not who receives the money, but the characacter of the use for which it is expended" (McFarlane, 1971, p. 30).

The combination of these ideas led to a much more widely accepted theory involving the question, "What are the primary purpose and effect of the enactment?" This theory developed in the late 1950's and early 1960's in cases unrelated to the funding of education.

The 1968 case *Board of Education v Allen* held a New York textbook loan law constitutional because its "statutory purpose was secular, as was its effect" (McFarlane, 1971, p. 17), but the landmark case on this theory can be found in *Tilton v Richardson* (1971).

In *Tilton,* the United States Supreme Court ruled that loans made to sectarian institutions under Title I of the Higher Education Facilities Act of 1963 were constitutional, largely on the grounds of "primary purpose". Excerpts from the judicial opinion as it appears in the Carnegie Commission's report *Institutional Aid,* (1972, pp. 257-270) include statements such as the following:

> This appeal presents important constitutional questions as to federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963. . . which provides construction grants for buildings and facilities used exclusively for secular educational purposes (p. 250).....
>
> . . .sustained the constitutionality of the Act, finding that it had neither the purpose nor the effect of promoting religion (p. 260)....
>
> . . . a legitimate secular objective entirely appropriate for governmental action. . .The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion (p. 262).

A recent case involving the same question refers to *Tilton,* and used similar language in upholding Maryland's program of aid to colleges with religious affiliation. In *Roemer v Board of Public Works of Maryland* (1976), the Justices said those institutions receiving the aid "are capable of separating secular and religious functions." Justice White further concluded that "there is no violation of the Establishment clause when, as in the Maryland case, there is a secular legislative purpose and the primary effect of the legislation is neither to advance nor inhibit religion" (*Higher Education and National Affairs,* 1976, p. 3).

Only a few months ago, the Supreme Court denied a request by Americans United for Separation of Church and State to overturn a Missouri Supreme Court ruling which upheld that state's tuition aid plan. Though Americans United contended that 17 colleges approved for the program were "too religious", the Missouri court's decision, which was based on *Roemer,* had said the plan had a secular purpose, did not advance religion, and did not require excessive government supervision, was allowed to stand (*Americans United v Rogers,* 1976, *Student Aid News,* 1977).

So the courts have said that government support of the private sector can be permissable, based on the answers to four questions which must be asked: 1) Will the Act have a secular legislative purpose? 2) Is the primary effect of the Act to advance or inhibit religion? 3) Does it foster excessive government entanglement with religion?, and 4) Will it inhibit the free exercise of religion? (Carnegie Commission, 1972).

With the guidelines apparently established, it is likely that many more publicly financed programs of aid to students in "private" institutions will develop according to the needs and ideas in different states. What effect this will have on the institutions and on state supported colleges and universities will probably be considered extensively in the years to come.