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BOLICK, ERNEST BERNARD, JR.
A HISTORICAL ACCOUNT OF THE CONTROVERSY OVER
STATE SUPPORT OF CHURCH-RELATED HIGHER
EDUCATION IN THE FIFTY STATES.

THE UNIVERSITY OF NORTH CAROLINA AT
GREENSBORO, ED.D., 1978

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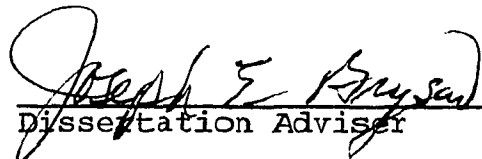
by

Ernest Bernard Bolick, Jr.

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Approved by


Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation
Adviser

Joseph E. Bryson

Committee Members

R. H. Nelson
Franklin Russell
E. W. Ralston
C. L. Sharma

March 29, 1978

Date of Acceptance by Committee

March 29, 1978

Date of Final Oral Examination

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The historical account of a long-standing controversy between church and state has lately emerged in the constitutional question of state support of church-related higher education. A historical-legal study was made of the centuries-long struggle between church and state. The American Constitution provided a solution through the First Amendment, which forbids both interference with and establishment of religion by government.

American higher education began as private, church-related education, which accepted financial aid from any source. Public higher education grew slowly until the twentieth century provided the impetus for rapid growth.

The phenomenon of federal and state aid was not permitted on a large scale until America found herself in a space race with Russia. Tables and other statistical evidence provide a picture of the growth and magnitude of state and federal aid.

A review of the constitutions of the fifty states revealed provisions which forbid religious establishment or aid to private, sectarian institutions from taxation of private citizens. Forty-two states have provided direct or indirect financial aid to private church-related colleges despite constitutional prohibitions. The study revealed

that educators are divided over the question of the effects of financial aid by the states such as: whether aid fosters excessive entanglement of government in religion; whether institutions can separate secular from sectarian use of funds; whether educational diversity is threatened by aid; whether such aid is constitutional; and whether state aid to students constitutes constitutionally permissive aid to the institution.

Participants in the controversy were found to be state and federal governments, private college groups, constitutionalist groups, and concerned individuals who became parties in court action during the 1970's.

In Tilton v. Richardson, the Supreme Court drew a line of demarcation between higher and lower religious education, in that colleges do not necessarily aim at indoctrination. In Hunt v. McNair, indirect assistance of a religious college was constitutional so long as use of facilities purchased through a bond program was identifiably secular.

In Roemer v. Maryland, the Supreme Court concluded students attending church-related colleges in Maryland could receive state aid so long as funds were not used to train ministers or religion teachers. The Court applied the Lemon precedent and made provision to identify and to account for secular use of funds accepted by the schools.

In Smith v. Board of Governors, the United States Supreme Court decided a student attending a sectarian college

may receive aid if the school's primary educational effort is for a secular purpose and no excessive entanglement ensues in the reporting process.

The trend of state and federal court decisions suggests that more might be forthcoming. Colleges are already divesting themselves, in some cases, of their religious mission in order to obtain the secular status which qualifies them for assistance.

ACKNOWLEDGMENTS

The writer extends his gratitude to those who made possible the completion of this research: to Rose, his patient and understanding wife, who encouraged and assisted the writer through the agony and ecstasy of writing; to Dr. Joseph Bryson, who has provided unrelenting, constant encouragement, inspiration, and friendship; to Dr. Roland Nelson, under whose patient, sympathetic guidance the project first gained its shape; to Dr. E. M. Rallings, whose understanding made the work worthwhile; to Dr. Chiranji Sharma, who first introduced the writer to the discipline and realities of educational research; and to Dr. Donald Russell, who inspired the writer to write with his soul; and finally to his typist-editor, Ms. Elizabeth Hunt, whose patience and knowledgeable suggestions have made this work readable and understandable, and therefore worth the time and effort expended.

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CHAPTER I

INTRODUCTION

The writers of the American Constitution stood in an enviable position. Timing was such that at its founding, the constitutional architects perceived two directions. Looking backward into history, they chose principles most consistent with freedom and rejected ideas restrictive and harmful to the dignity of the individual. As an infant democracy took form, constitutional deliberators sought to forestall tyranny for all time. Out of much hard-fought debate and careful compromise emerged the Bill of Rights which spelled out freedoms implicit in the Constitution. Admittedly, the political philosophy expressed was untried. But the governmental form which emerged was free from historical encumbrances, and was heavy with promise of a new departure.

As the nation matured, the United States Supreme Court kept constitutional principles intact, while interpreting laws to meet changing needs and conditions. The early seventies witnessed a frontal attack on a number of safeguards built into the Constitution. Those who would preserve the rights of mankind have successfully drawn upon principles expressed by Thomas Jefferson and James Madison in the main. The constitutional system works. A mass of

litigation in the area of human rights and education has characterized the period. Education has also been the center of a constitutional controversy over financial aid for elementary and secondary church-related schools. In recent years the furor has continued as unanswered questions and unresolved issues continue to plague legislators, educators, churchmen, judges, and parents.

To further complicate matters, the United States Supreme Court has been presented with a variety of litigation regarding state aid to church-related colleges and universities. Decisions resulting from court action have encouraged others to continue legislative pressure designed to increase the flow of government financial support. Efforts are controversial both from the constitutional view and from the effect of institutional competition.

To some, private, church-related schools comprise an element of unneeded competition in the marketplace of prospective students; to others the competition takes the form of one more demand upon the overtaxed public treasury. To others, the financial particulars are secondary to the threats implicit in the schemes that appear to violate the "no establishment" clause in the First Amendment of the Constitution of the United States.

THE PROBLEM

The purpose of this dissertation is to render a historical account of the current controversy concerning

state support of church-related higher education in the fifty states. This study attempts to answer the question: What issues divide educators with respect to the public support of church-related colleges and universities; who are the participants and what arguments are used to support their respective positions?

SIGNIFICANCE OF THE PROBLEM

The issue of state support in church-related higher education in the United States is a persistent and recurring controversy. Higher education is continually in transition. During the past decade, the transition involved, among other perplexities, an alarming threat of economic disaster. The threat of impending insolvency of great numbers of institutions, coupled with the constitutional controversy, produced a spate of news articles, journal articles, books, commentaries, statistical reports, official government studies, conference reports, and legal studies. The period also generated an unprecedented stimulation of legislation and legal action.

The economic picture, though brighter, still persists. The constitutional question clutches tightly to the content of all speculations involving state-derived funding as a solution to a very "sticky" problem. Although present economic fluctuations tend to exacerbate fundamental constitutional issues, the controversy arose out of a long and

violent history that involves legal and philosophical issues of deep and lasting consequence.

As of the date of this research, there is no recent historical compilation of the controversy. Material and literature applicable to the controversy exist in great quantity and in diverse locations. One may be reading some of the material, reach one conclusion, while if one digs deeper into the background, one may come to a different, if not contradictory opinion. It is possible to construct a narrative, following a period of research, sifting and analysis. It would serve little purpose, therefore, to report one facet of the controversy, thereby providing a distorted view of its history. This work is an attempt to arrange into narrative form a concise and usable timely picture of the emergence of the problem as it appears in records, ancient modern, and contemporary.

The literature concerning the controversy presents problems. Accurate appraisal of higher education's vitality has been complicated recently by the publication of information that has been labeled "erroneous and contradictory." Russell I. Thackery, an educational authority, indicated that the findings and recommendations of a variety of public and private groups have provided the subject matter for the controversy. Thackery is concerned that the confusion in the national debate is complicated because "much of it is the result of misuse, mishandling, and

misinterpretation of the statistics."¹ The groups in question are highly reputable private and government-sponsored commissions.

Chester E. Finn and Terry Hartle joined Thackery in criticizing information coming out of these studies as contradictory and advocating that no source supplies data that is consistent or reliable enough to be used for appraisal or decision-making.² Robert Wood in Daedalus adds the opinion that there is a "persistent bias" within the Carnegie Commission in favor of private institutions. Wood said:

Who Benefits, Who Pays? said that the actual 1973 percentage of educational costs of public institutions met by tuition was 17%. It is recommended an increase to 33% by the mid 1980's . . . the March, 1974 supplement acknowledged that more precise information is not that 17%, but 24-27% is paid by tuition.³

Wood expressed concern that a correction would never overtake such fallacious perceptions created by the original error. It is misstatements which tend to distort decisions and to complicate legislation or bias court decisions.

One such critical statistic is a much-discussed report on the attrition rate of private colleges to which

¹Russell I. Thackery, "If You're Confused About Higher Education Statistics, Remember: So Are the People Who Produce Them," Phi Delta Kappan, 61 (February, 1975), 415-419.

²Chester E. Finn, Jr. and Terry W. Hartle, "The Chancy Health of Higher Education," The New Republic, June 12, 1976, pp. 12-14.

³Robert Wood, "Academe Sings the Blues," Daedalus, 104, No. 1 (Winter 1975), 51.

Thackery attributed a false conclusion to a statistical error. The national Commission on Financing Post Secondary Education predicted a forthcoming loss of 120 private colleges in the next decade. The reasoning behind closings is based upon projections of fiscal failure. Thackery noted that statements reported closings, but made no note of openings, nor of variables that account for the unusual rate of closings. In sum, Thackery observed that fiscal problems of many private institutions may be real, but statistical trends based on erroneous information produce faulty predictions.⁴

This research notes that such erroneous statistical data adversely affect the quality of decisions which must rely upon accuracy of data for positive results. All elements of the educational community share in the consequences generated by such controversies which continue to dominate public attention. Beyond constitutional issues, fiscal consequences touch every taxpayer. The quality of planning and decision-making depends upon accuracy of data available. The research underlying this dissertation is undertaken in that interest.

SCOPE AND METHOD OF RESEARCH

This study is an investigation of the controversy over state support of church-related higher education at

⁴Thackery, "Statistics," Kaplan, p. 418.

the state and national levels. Emphasis is placed upon the historical evolution of the controversy. Chapter two provides that background. It is a narration of the development of intellectual positions within the controversy, including ancient historical origins of the legal, educational, and religious institutions. The writer exercised selectivity in the choice of content of the narrative, and emphasized events which had the most influence on emergence of institutions under consideration.

The scope will involve theoretical foundations of church-state relationship; the university; and the philosophical development of political individualism and religious toleration. The entire history of Western civilization has been examined with an eye toward the changing modes of religion and the state and effect of such changes upon the present controversy.

Chapter three commences the narrative where the controversy has its beginnings, in the formulation of the federal Constitution and the state constitutions. In this chapter, issues and participants are defined and characterized, as to respective roles in the controversy.

Chapter four provides a view of the fifty states and portrays each state's respective attempted solutions to the controversy. The constitutional question has proved to be serious enough to warrant a geometric increase in legislation and litigation. State constitutions have usually

shaped the kind of legislation that has emerged from legislatures. Constitutional limits within the states have also provided the occasion for attempts to change the constitution or to by-pass it through court decisions. Thus, a variety of situations prevails, and the scene is constantly changing. In Chapter five a careful study of the statutes that apply in each state, as well as the current status of litigation in progress has been undertaken. The analysis has been conducted in view of the state constitutional provisions, as well as appropriate federal amendments and court decisions in each case. Legal references were searched including:

American Digest System, The College Law Digest, The National Reporter System, American Law Reports, and Corpus Juris Secundum.

In addition to the analyses and the historical narrative, this chapter features a thoroughgoing discourse on the latest Supreme Court decisions and attempts to discern clues which point toward a developing educational policy among the justices.

The final sixth chapter draws the total narrative together through a summary and a conclusion. The research has produced a number of possible directions for future research and for future understanding of this and other similar controversies.

DEFINITION OF TERMS

1. Church-related: The term usually refers to the source from which an institution receives its primary support through funding, enrollments, and structure. Most sources suggest that there are different and varying degrees of church-relatedness. At this point courts have not been sufficiently specific that a narrow definition can be produced. For the purposes of this study, therefore, those institutions which define themselves as "church-related" in The Educational Directory, 1975-76 ed. (published by the Office of Education, U. S. Department of Health, Education and Welfare), will be considered church-related. Others, who consider themselves "independent," will be so considered.

2. The Private Sector: In the context of this study, the term includes both sectarian and non-sectarian higher education. Legislatures and courts often fail to isolate the church-related institution in their literature. It is often use of the general term that jeopardizes state aid plans under constitutional provisions forbidding such aid as "establishment of religion." Because of ambiguity in legislative language, church-related institutions often qualify for funds as "independent," or "private" colleges. In other cases, sectarian institutions frequently divest themselves of the religious aspects which would negate eligibility for funds because of constitutional prohibitions.

CHAPTER II

HISTORICAL FOUNDATIONS

Students of history are familiar with the successive and alternating roles of enmity and alliance which, through the centuries, have been assumed by the institutions of government and religion. Although the term did not receive verbalization until the middle ages, cuius regio eius religio (who rules, his the religion) was a practice derived from antiquity. Church and state have never been structured in such a way that one could ignore the other. The usual arrangement that existed in ancient and some later societies, is the feature of civil and political institutions working in tandem with the religious. This chapter concerns itself with the investigation of how that relationship evolved and functioned in the West until the eve of the American Constitutional Convention in 1787.

ANCIENT INSTITUTIONS

As various civilizations expressed themselves religiously, there appears to have been a literal life and death dependency upon religious leaders. Disputes and wars, covenants and treaties, commerce and agriculture were all expressed in religious terms. The language used was in

recognition of a benevolent deity who was the benefactor of society. Among many, intolerance, narrowness, and dogmatism characterized the logical outcome of such close dependence upon religion in the trivial affairs of men. The earliest records of man's pristine ancestry reveal incipient institutions emerging from functions of god, priest, and king. Historian W. H. McNeill explains the probable reasons for social leadership being centered in the priesthood. Agricultural communities depended upon uncertain fertility of the soil and therefore looked to the priest as mediator between the god of nature and helpless man. Among nomadic peoples a warrior chieftain usually made daily decisions concerning grazing, hunting, and war. The duties of such headmen or patriarchs who are described in early Hebrew literature were priestly, judicial, and military.¹

Law Historian Palmer D. Edmunds describes the slow process of evolution whereby religion and law were separated in function. Using the Egyptian civilization as a point of departure, Professor Edmunds states that: "Religion was their law."² The continuity with modern times has been retained almost completely with some societies, and in all legal systems there remain traces of early association with

¹William H. McNeill, The Rise of the West: A History of the Human Community (Chicago: University of Chicago Press, 1963), pp. 37-38.

²Palmer D. Edmunds, Law and Civilization (Washington, D. C.: Public Affairs Press, 1959), pp. 21-22.

religion. The Bible describes the breakup of the patriarchal role of Moses into the functional divisions of a primitive form of public administration. Although the situation required a period of nomadic wandering, it was undertaken in an organized manner. Joshua became the military commander, while the priestly function was performed by Aaron, Moses' brother. Moses performed the judicial function and even broke that down into divisions.

When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening? And Moses said to his father-in-law, "Because the people come to me . . . when they have a dispute . . . and I decide between a man and his neighbor, and I make them know the statutes of God and his decisions." Moses' father-in-law said to him, "What you are doing is not good . . . you will wear yourselves out . . . you are not able to perform it alone . . . So Moses gave heed to his father-in-law . . . and chose able men out of all Israel, and made them heads over the people And they judged the people at all times. Hard cases they brought to Moses, but any small matter they decided themselves."³

Basic to advanced civilizations are fundamental laws such as the Decalogue or Ten Commandments, that appear to be common to all cultures. The Decalogue, however, proved to be more than a universal fundamental civil code. It was a summary of the acceptable relationships between a covenant people and God. Religion was the law. In the case of the Hebrews, the Law had within it the characteristic of exclusiveness, because it only applied to the covenant people.⁴

³Exodus, 18:14-26.

⁴McNeill, Rise of the West, p. 177.

Once the Hebrews unified and developed into an effective military power, nomadic wanderings culminated in subjugation of Canaanite villages and towns. Nomadic tribesmen adopted agrarian customs, settled into walled cities, and under their king built a magnificent temple for YaHwH, God of Israel.⁵

Professor Edmunds suggests a decline in the level of freedom once nomadic existence was abandoned for civilization. Edmunds observes that prior to the conquering of Canaan, Israel was a "divinely established, perfect republic."⁶ He agrees with the idea in which the commonwealth had a prior claim as proper government for people of God, but wanting to be like other nations, the Hebrews pestered God for a king. The prophet Samuel anointed Saul king.⁷ The move from a theocratic democracy eventuated in the dissolution of Hebrew unity under Solomon, from which Israel never recovered.⁸

Ancestors of the Israelites (Hebrews) had originally lived in the Mesopotamian delta. Some of the earliest tradition of the Hebrews resembles that of the Babylonian epics. The Babylonians were not sophisticated to the point of accepting monotheism, such as led the tribe of Abraham

⁵Joshua; I Kings, 6:1-38.

⁶Edmunds, Law and Civilization, p. 109.

⁷I Samuel 8:19-22; 10:1. ⁸I Kings 11:9-12.

of Ur.⁹ The Sumerian cities along the delta were ruled by godpriests. Every function of the agrarian life was performed for the support of god. The god ruled the city, owned the land, cared for the seasons, and created and preserved the tradition in written and oral language. McNeill writes that the Sumerian temple was literally the house of a god.¹⁰ Priests and other attendants constituted the god's household. Kish, one of the cities on the delta, produced the first separate king. Intercity quarrels and wars necessitated development of military specialists. Walled cities were easily overcome by invaders from the northern mountains.¹¹ Wave after wave of fierce tribesmen conquered and occupied cities on the fertile plain.¹² The flat, rich land was an open invitation to plundering of wandering warrior bands, whose repeated successes produced a civilization of mixed lineage and custom. The Akkadians in the city of Kish developed a system of property management which combined tribal, royal, individual and religious ownership. McNeill notes also, that land reform provided for a divided administration between king and priests.¹³

The most famous king of Babylon, Hammurabi, eventually became ruler over the entire valley. Not only was

⁹ McNeill, Rise of the West, p. 51.

¹⁰ Ibid., p. 51.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid., p. 63.

the realm to revere Hammurabi as king, but the local god in each city was to give preference to Marduk.¹⁴ McNeill attests that the Code of Hammurabi presented a new concept of authority. It was based on the fundamental Mesopotamian belief that rulership derived from the gods. The successful conqueror was one chosen of the gods. In terms of the legal code, Hammurabi produced the basis for law in religion that endured for centuries, thus ending local rule forever.¹⁵

Hammurabi proclaimed:

Hammurabi is ruler, who is father to his subjects, who holds the words of Marduk in reverence, who has achieved conquest for Marduk over the north and south, who rejoices the heart of Marduk, his lord, who has bestowed benefits forever and ever on his subjects, and has established order in the land.¹⁶

Earliest civilizations drew no distinctions between government and religion. Higher learning was a function of the priestly aspects of tribal and city leadership. Educational historian James Bowen provides insight into Babylonian transmission of knowledge as related to religion and government. Dr. Bowen describes two levels of higher learning maintained by the Babylonians. Information considered most important and secret was transmitted orally, and information of less value by writing.¹⁷

¹⁴McNeill, Rise of the West, p. 67.

¹⁵Ibid., p. 66.

¹⁶James Bowen, History of Western Education (New York: St. Martin's Press, 1972), I, 10.

¹⁷Ibid., p. 11.

Esoteric knowledge and taboos characterized all ancient religions. Holy places, relics, names, words, symbols, and numbers abetted the priestly class in its control of the people.¹⁸

In addition, the Babylonian period was one of considerable educational advance. Commerce and communication required that accounts be kept. Therefore, writing and mathematics were developed considerably. Much of this progress was the product of the House of Wisdom, which was the Babylonian model of higher education.¹⁹ Although there is no record indicating a development of abstract theory or philosophy, the period 2000 to 1500 B.C. was filled with intense literary activity. The oral tradition of earlier days was transmitted to stone tablets. The epic of Gilgamesh and other ancient traditions were recorded from oral tradition.²⁰

Antiquity, therefore, had the same human and institutional material, in embryo, that emerged, finally as western civilization. Man's needs have remained basically the same throughout man's history. Psychologists suggest that one's needs move from survival level up an increasingly complex scale to a level called "self-actualization."²¹ That scale can be applied to institutions that man has developed

¹⁸ Bowen, History of Western Education, p. 22.

¹⁹ Ibid. ²⁰ Ibid.

²¹ Abraham H. Maslow, "A Theory of Human Motivation," Psychological Review, 50 (July 1943), 370-396, rpt. in Abraham Maslow, Motivation and Personality (New York: Harper and Row, 1954), pp.

including religious, governmental, legal and educational. Such institutions have served man as needs and times required. Institutional history focuses on a broader view than episodes and personalities.²² Such a view discusses forms, interrelationships, and notes how such modifications are largely results from response to man's needs. How such institutions developed in the face of challenge and response is part and parcel to the history of any controversy involving institutional relationships.

It was the Greek mind that first began to record in logical form man's speculation about himself and the universe. The Greeks invented philosophy.²³ The early philosophers maintained that man lived in a universe governed by natural laws, and not subject to fate or to capricious divine will.²⁴ Although not all questions concerning human existence confronted by Greek philosophy have been solved, speculation concerning nature's laws gave birth to modern science.²⁵

Political philosophers still express ideas in terms and categories laid down by Plato and Aristotle as they analyzed life in those tiny fifth century Aegean

²²Harry Elmer Barnes, A History of Historical Writing, Second Revised Edition (New York: Dover Publications, Inc., 1962), p. 305.

²³McNeill, Rise of the West, p. 232.

²⁴Ibid., p. 233. ²⁵Ibid., pp. 234-35.

towns.²⁶ Religion and political life in Greece were tied together as closely as in other early civilizations. The noted legal and political historian, C. H. McIlwain, declared that to the Greek, his whole life was involved in politics and religion. The two institutions were inseparable.²⁷ According to Professor McIlwain, the Greeks viewed civilization as the entire collective act of its citizens. Therefore, religion tied the Greek citizen to citizenship through gods who watched over both city and fireside.²⁸ No Greek could conceive of Athens without Athena, or vice versa. Almost every activity of life was tied to some form of religious expression. Greeks portrayed gods through art, architecture, and literature; moreover, theater and sports were intimately tied to political thought and religion. Kings and aristocrats were said to have descended from the gods. No one ventured to imagine or express a political structure that separated government from religion. Aristotle, concerned that there be provision for public religion, proposed that priests be paid from the public treasury.²⁹

Congregating in the market place, all citizens participated in selection of officials and discussion of public business. Political philosophers were exposed to a rich history of political experience as:

²⁶C. H. McIlwain, The Growth of Political Thought in the West from the Greeks to the Middle Ages (New York: The MacMillan Co., 1932), p. 3.

²⁷Ibid., pp. 5-8. ²⁸Ibid., p. 8. ²⁹Ibid.

Democracy alternated with aristocracy, oligarchy, despotism, and tyranny. From this rich fund of experience was born systematic political science as set forth in the unwritten speculations of Socrates . . . the Republic of Plato and the Politics of Aristotle³⁰

Plato's speculative city the Republic describes a static society governed by intellectual elite, whose hierarchical structure is topped by a philosopher king. Lower levels of society are occupied by workers and soldiers, who must follow the lead of their intellectual superiors. In the governance of their city, they have no voice. More important to subsequent political thought than the structure, was Plato's concept of justice.³¹ Constitutional historians Alfred Kelly and Winfred A. Harbison advance the suggestion that Plato's Republic tied justice with natural law. They write:

. . . certain eternal principles of law were inherent in the universe, manmade law being a mere affirmation of natural law Plato advanced the conception of an absolute justice which existed whether or not it found expression in any human enactment.³²

Aristotle saw Greece as the society that should be imitated by the remainder of civilization. The philosopher envisioned a community of man, united in brotherhood under

³⁰R. R. Palmer and Joel Coulton, A History of the Modern World, 2nd ed., rev. (New York: Alfred A. Knopf, 1963), p. 5.

³¹Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 3rd ed. (New York: W. W. Norton & Company, 1963), p. 36.

³²Ibid., p. 36.

one law. The flavor of the age required that total society be uniform and conform to the controlling governmental power.³³ Aristotle taught the concept of universality to the great Macedonian, Alexander III. Although influence and example would be the method used for implementation in a free society, Alexander's program to Hellenize the world was begun through military means.³⁴ Although Aristotle, and later the Stoics shared an ideal worthy of the highest aspirations of a free civilization, the implementation of the concept of universal law began with intolerance, which gave rise to coercion through violence and bloodshed.³⁵ Alexander began his move to change the world in 334 B.C. by surprising the world with brilliant military strategy and success. The Macedonian's motivation was deeper than a shallow manifest destiny to conquer. Alexander took pains to consolidate his territory by organizing it with Greek and Macedonian administrators, along Greek patterns of control.³⁶ Upper levels of the newly-formed governments were filled with immigrants from Greece and Macedonia to oversee the Hellenization process. One part of the process involved education, and teachers and physicians were imported to implement the new ways.³⁷

³³ Sir Samuel Dill, Roman Society from Nero to Marcus Aurelius (London: MacMillan & Co., 1904), pp. xii, 639.

³⁴ Ibid. ³⁵ Ibid.

³⁶ McNeill, Rise of the West, p. 305. ³⁷ Ibid., p. 307.

Despite the concerted effort, Greek culture took centuries to coalesce with the host cultures.³⁸ Alexander founded cities, naming them after himself, and afforded citizens special privileges as they became Hellenized. By the time he died at age 33, Alexander had extended his empire and influence as far east as India.³⁹ W. W. Tarn proposes that a subsequent Hellenization process left traces that are present in today's cultures of India, China, and other eastern societies.⁴⁰

Following the death of the emperor, there was a brief period of struggle for control of the newly-conquered empire. The solution that finally resulted was an arbitrary division of the territory among the strongest of Alexander's Macedonian generals. Seleucus became king in western Asia; Ptolemy, ruler over Egypt; and Antigonus consolidated Macedonia and Greece.⁴¹ The Hellenization process was continued but never fully completed in non-Aegean portions of the Empire. In some areas the process permeated the culture, but the Seleucid area generated internal disorders that indicated successful resistance to Hellenization. Among the rebels were the Palestinians.⁴²

³⁸McNeill, Rise of the West, p. 308.

³⁹W. W. Tarn, The Greeks in Bactria and India (Cambridge: Clarendon Press, 1959), pp. 53-57.

⁴⁰Ibid.

⁴¹McNeill, Rise of the West, p. 309. ⁴²Ibid., p. 369.

Past wars and occupations had uprooted the flower of the Hebrew people, causing them to live in servitude far from their homeland.⁴³ Those who remained in Palestine still clung tenaciously to their religion and treasured jealously the enduring symbol of their past, the Temple. Previous conquerors had tolerated their religion without protest and under Alexander's original terms, the Temple in Jerusalem was duly constituted. Hellenization took time, especially in Jerusalem. The Seleucids, in their haste to make Greeks of the Jews, blundered badly when Antiochus, the Seleucid king, appointed a pro-Hellenist high priest to the Temple at Jerusalem. The Jews rebelled against the Greeks and a period of persecution followed:⁴⁴

(1) The walls of the city were torn down; (2) the Temple Treasury was emptied and its constitution abolished; (3) the Temple was desecrated and the statue of Zeus was placed in the Holy of Holies; (4) priority and privilege were given to those Jews who accepted the "honor" of full Hellenization. The measures were met with armed resistance and many Jews died as a result of the persecutions that followed. A leader of the Jews, Judas Maccabaeus, was a genius as a guerilla leader, and he finally forced Antiochus to come to terms. The ban on the Jewish religion was rescinded and

⁴³McNeill, Rise of the West, p. 369.

⁴⁴II Maccabees 4:7-15.

rights of the Temple restored. However, the Maccabees continued military struggles until national independence was won in 143 B.C. and a line of Jewish kings was founded. Later Jewish kings were generally unprincipled and ambitious. Ultimately, in 63 B.C. they were forced by Rome to become one of their provinces thereby losing their independence.⁴⁵

In 146 B.C. Corinth and a number of Greek and Macedonian cities were defeated and sacked by powerful Roman armies.⁴⁶ Expansionist elements in Rome began expanding the perimeter of a growing empire at the expense of the Hellenist world.⁴⁷ Roman legionnaires returned home from the wars bearing a wealth of Greek treasures. McNeill contends that Roman annexation of overseas provinces made Rome an empire at the expense of a receding Hellenist civilization.⁴⁸ He further observes:

As Roman society . . . underwent an extremely rapid economic differentiation To the horror of old-style Romans like Cato, Hellenistic urban styles began to seep into the city on the Tiber The seepage became a flood Thus Rome, having won her first political successes as champion of a rude peasant reaction against the alien corruptions of civilization, was herself finally ensnared Profound irony lay in the fact that Rome's military success against the more civilized . . . peoples of the eastern Mediterranean resulted in the rapid assimilation of the Roman social structure to that of the effete and abject East they so despised.⁴⁹

⁴⁵ K. S. Latourette, A History of Christianity (New York: Harper and Brothers, 1953), pp. 10-11, II Maccabees, Passim.

⁴⁶ McNeill, Rise of the West, p. 344. ⁴⁷ Ibid.

⁴⁸ Ibid. ⁴⁹ Ibid.

Theodor Mommsen placed much emphasis upon the Roman respect for tradition.⁵⁰ In the second century B.C. Romans consistently stood for respect of authority, the state religion and public morality. Tacitus is quoted by Mommsen as saying, "I cannot bear a Greek Rome."⁵¹

Clearly, after 146 B.C. Rome was the most powerful military force of the day. The Roman Republic, for all practical purposes, ceased to exist. The Roman Constitution provided the occasion for capricious change, as powerful men manipulated the state for the purpose of fulfilling private ambitions. Julius Caesar emerged from the smoke and debris of the internal struggle and triumph from abroad and became sole ruler of the Empire. Caesar retained the outward form of the Constitution: the Senate, the Assembly, and the hierarchy of offices that had been developed in the Constitution.⁵² Caesar did not, however, maintain the power of the republican checks and balances. Julius was already Pontifex Maximus, the high priest, and had been elected consul. The final step toward totalitarian rulership was to obtain the title of dictator for life. However, Caesar's ambitions were foreshortened by a group of senators who murdered him on the Ides of March, 44 B.C.⁵³

⁵⁰Theodor Mommsen, The History of Rome (New York: Charles Scribner's Sons, 1895), II, 97.

⁵¹Ibid. ⁵²Ibid. ⁵³Ibid., p. 97ff.

Some senators attempted to turn the direction of the state away from its path toward centralization. The effort failed.⁵⁴ Internal strife continued until Octavian, Caesar's nephew, was named Augustus and became the first Roman Emperor in 27 B.C. Although Caesar had designed the empire's structure, Augustus succeeded brilliantly in consolidating it and creating a system conducive to peace within the territory controlled by Rome: the Pax Romana.⁵⁵ In addition, Professor Latourette sees the achievement as providing the conditions favorable for the spread of religion.⁵⁶ Political unity was facilitated by implementation of an effective hierarchical administration which allowed management of the provinces at long distances. Placed at the top, the emperor ruled downward through various levels and offices.⁵⁷ He presided over the state religious rites, maintained and directed a standing army, and maintained a constant communication with the provincial governors of the empire.⁵⁸

Rome was the hub of the empire. The character of Roman law, the ability of Roman engineers, seas safe from pirates, rapid transportation and communication made a better quality of life for everyone, especially Roman citizens.

⁵⁴M. I. Rostovtzeff, The Social and Economic History of the Roman Empire (Oxford: The Clarendon Press, 1930), pp. xxv, 695.

⁵⁵Latourette, History of Christianity, p. 21.

⁵⁶Ibid. ⁵⁷Ibid. ⁵⁸Ibid.

Communication was simplified by use of only two official languages in commerce and administration.⁵⁹ Roman law could be used to emphasize protection of the interests of the state rather than protection of the rights and privileges of the individual. Equity and natural law survived occasional capricious and barbarous usage (in the Middle Ages), and until today is influential in providing justice in legal systems everywhere.⁶⁰ Stoic philosophy had influence upon the law toward a concept of a universal or natural law applicable to all people.⁶¹ Thus, the source of Rome's pride, "the law," had influence from Greek culture.

The policy of centralization established by Augustus had effect upon political and legal control. But the practical character of the Roman mind invited an accommodation to cultural and religious diversity.⁶² Into this cordial milieu were introduced numerous Eastern cults: Isis, Osiris, and Mithra, in addition to a variety of mystery religions.⁶³ Although the emperors tried to resurrect old Roman religions requiring emperor worship, eastern cults were permitted by a policy of accommodation. McIlwain, however, sees in this policy a contribution to eventual emergence of absolutism.

⁵⁹Crane Brinton, John Christopher, and Robert Lee Wolff, A History of Civilization, Third ed. (New Jersey: Prentice-Hall, Inc., 1967), I, 112.

⁶⁰Ibid. ⁶¹Ibid.

⁶²McIlwain, Political Thought, p. 143. ⁶³Ibid.

In the absolutism of the empire, the religious spirit triumphed over the republican spirit of Rome.⁶⁴

Religious absolutism was in conflict with the exclusive character of both the Jews and Christians, whose religion required that: "Thou shalt have no other gods before me." Such a principle was foreign to the Graeco-Roman intellect. Claiming to be a nation in exile, Jews were limited in their attraction to the people of the empire. However, conditions favored the sect-type Christians who were universal in their religious appeal. Paul, a native of Tarsus, translated the Christian message into Greek terms and thereby created access to the pagan mind.⁶⁵ The sect was thus free to proselytize from other religions and to wage war against so-called "false gods." Because of missionary zeal Christians were recognized as a threat to established empirical religions. The Christians, thereby, ran afoul of Roman law, often falling victim to persecutions at the hands of the emperors who ruled subsequent to Augustus.⁶⁶ Roman law defined failure to worship the emperor as treason. Tiberius made the offense a capital crime and as a consequence, many Christians were executed and their property confiscated by the state.⁶⁷

⁶⁴McIlwain, Political Thought, p. 143.

⁶⁵Edmunds, The Law and Civilization, p. 164.

⁶⁶Ibid. ⁶⁷Ibid., p. 164-165.

To the Roman emperors, Christians appeared to be a subversive organization because of constant refusal to declare allegiance to the pagan religion and to bow to the image of the emperor, or to his person, and confess him as god.⁶⁸ The Roman law was supreme, and as a result, Christians faced severe persecution on account of faith.⁶⁹ Nero, Vespasian and Domitian, first century emperors, persecuted Christians as a matter of imperial policy.⁷⁰ Diocletian, in 303, set about the task of a methodical extermination of the Christians.⁷¹ The emperor issued a decree to destroy church buildings, burn sacred books, demote high-placed Christians, and the enslavement of others.⁷² The persecution included the entire Roman empire from the British Isles in the West to Asia Minor, Palestine, Syria, Egypt, and Rome.⁷³ The persecutions had their greatest concentration in the East, where there were more Christians. The campaign lasted no more than a decade, but the effects were felt throughout the centuries of church history that followed. The persecution of Diocletian was the last great persecution against the Christians by the Roman Empire. The tables soon turned in the opposite direction.⁷⁴

⁶⁸Edmunds, The Law and Civilization, p. 165.

⁶⁹Ibid. ⁷⁰Ibid.

⁷¹Latourette, History of Christianity, p. 90.

⁷²Ibid. ⁷³Ibid. ⁷⁴Ibid.

Instead of the extermination of Christianity, the effect of persecutions was to spread Christianity until the religion triumphed over all persecutors. Authorities generally agree that Christianity would have eventually emerged the victor. But through the person of the emperor, Constantine, the great Roman Empire gave in to the influence of a movement that had only the non-violent weapons of persuasion. But once Christianity was established, all power in the empire was used to assure preeminence. In 313 A.D. Constantine and Licinius issued a joint agreement to grant religious freedom for Christians in the whole empire.⁷⁵ Constantine, however, did not capitulate in the personal sense, for as emperor, he continued to support and endorse formal paganism as well as Christianity until death ended that allegiance. Fulfilling the role of both priest and emperor, he retained the office of Pontifex Maximus, as well as that of emperor throughout the remainder of life. Constantine did not persecute the pagan religions. At his death the Senate declared him a god to take an honored place among imperial predecessors.⁷⁶

Ultimately, through a series of imperial edicts, Constantine's sons made Christianity the state religion and outlawed historic pagan religions in the empire.⁷⁷ The former

⁷⁵Latourette, History of Christianity, pp. 92-93.

⁷⁶Ibid., p. 93.

⁷⁷Edmunds, The Law and Civilization, p. 169.

intolerance of Christians was reversed and turned upon non-Christians and unorthodox Christians.⁷⁸ Latourette calls the victory of Christianity over the imperial leadership and the subsequent establishment something of a defeat. "The victory had been accompanied by compromise . . . with the world . . . a serious peril to the Gospel."⁷⁹ From the point of view of political history, McIlwain sees the reversal as unique in the history of mankind:

For the first time we have established by the state a religion whose claims are exclusive, maintained by an association or society hitherto not only separate in origin and development from the state, but in some ways hostile to it, and forbidden by it, and one whose internal organization had reached a high point of independent development before its recognition and establishment by law The peculiar problem of church and state had definitely emerged for the first time in history For a thousand years after the establishment of Christianity in Rome, political writing of every sort was affected directly or indirectly by this great question . . . the great controversy between the spiritual and secular authority. [Emphasis, the writer's]⁸⁰

The collapse of the Graeco-Roman world climaxed in the early fifth century with the military failure of Rome. The "fall" issued in a period of social turbulence, unrest, and social disintegration. There remains widespread disagreement as to the cause of the breakup of the Roman Empire.⁸¹

⁷⁸Edmunds, The Law and Civilization, p. 169.

⁷⁹Latourette, History of Christianity, p. 108.

⁸⁰McIlwain, Political Thought, pp. 147f.

⁸¹Gordon Leff, Medieval Thought from St. Augustine to Ockham (Baltimore: Penguin Books, Ltd., 1958), p. 24.

The secular empire collapsed, the church did not, which indicates something of the unusual nature of the structure of the church. Diocletian (284-305 A.D.) sought to save the empire by reorganization, but succeeded only in creating a poor imitation of eastern despotism.⁸² Reorganization delayed the western collapse and created two divisions of the empire. The result was to further divide the spheres of influence. One contribution, however, was a reorganization of imperial administration which separated the military from the civilian hierarchy, resulting in the concept of distinctly professional military and civilian administration.

The Pax Romana was no more. Gordon Leff laments the fact that Roman law lost out to feudal custom. The Roman church did not collapse, but retained its structure and appeal to "all people."⁸³ In the same vein, the church had the right to inherit property. Because of this, a great portion of the rich and powerful of Europe bequeathed lands and property to the church. Eventually, "the church became the holder of a large portion of the wealth of Europe."⁸⁴ Leff further suggests that the church hierarchy facilitated communication throughout the Latin West. Despite apparent imitation of the defunct empire, the structure held. "With its

⁸² Brinton, Christopher, and Wolff, History of Civilization, I, 133-134.

⁸³ Leff, Medieval Thought, pp. 25f.

⁸⁴ Edmunds, Law and Civilization, p. 22.

organization it was all that was left, but it was better than no continuity of civilization at all."⁸⁵

EARLY CHRISTIAN MIDDLE AGES

There was no longer an emperor in Rome, and bishops took over the government and public affairs of the city. No bishop reported to any secular power, yet claimed power over all kinds of and degrees of citizens. The research of McIlwain reveals the principle enunciated by Pope Gelasius which expressed the medieval relationship between church and state:

There are two authorities by which principally this world is ruled, the sacred authority of the bishops, and the royal power, and the obligation of the bishops is the heavier of the two in proportion as they shall render account to God for the kings of men themselves.⁸⁶

The same bishop discounted the concept of both powers residing in the same person. They were separated in scripture, but made dependent upon one another for their respective benefits.⁸⁷ Conditions in Rome during the early middle ages required the principle be violated to a degree, which allowed Pope Gregory to govern Rome and Italy as a secular ruler, as well as a religious prelate. Pope Gregory I was a powerful force that provided support to allies who proved

⁸⁵Leff, Medieval Thought, pp. 25-26.

⁸⁶McIlwain, Political Thought, p. 165. ⁸⁷Ibid.

their loyalty toward his policies. Pope Gregory aided Charles Martel, who stopped the invasions of the Mohammedans at the battle of Tours in 732.⁸⁸ He crowned Pippin, Martel's son, King of the Franks.⁸⁹ The coronation was also a feudal covenant to uphold Pippin's rule with both spiritual and temporal power. The act was a precedent that was continued during the early middle ages in varying degrees.⁹⁰ A further step toward the establishment of a strong relationship between the temporal and religious power was taken by Pope Leo III who crowned Charlemagne while celebrating Christmas, in Rome, 800. The coronation of the Frankish king as "Emperor of the Romans" was accepted in the East and West by the respective heads of the church. Latourette speculates that Charlemagne may not have received the coronation with open pleasure.⁹¹ The significance of the act was that of establishment of a precedent requiring papal coronation to be administered upon Charlemagne's successors. The post-Carolingian period was witness to further decline as the Roman Empire moved toward further disintegration and decentralization.⁹²

The church, through so-called "dark ages," held on to the monopoly of learning and literacy, and maintained the

⁸⁸Edmunds, The Law and Civilization, p. 223.

⁸⁹Ibid. ⁹⁰Ibid.

⁹¹Latourette, History of Christianity, pp. 357f.

⁹²Ibid., p. 358.

thin thread of civilization that threatened to be lost in the dimly-remembered past. Leff credits the church as the institution that provided stability of sorts:

Thus in an age which had so few resources of its own the church offered comfort, protection, and leadership. It was indispensable to any ordered state Its great wealth, constantly increasing through endowment, was the first to suffer during a period of unrest. Hence, the most successful attempts at government were those in which king and church cooperated.⁹³

McIlwain regards this period as critical to the long history of church-state relations, for in this period powers were assumed by the church and decisions taken whose effects are still felt today. Yet, the reaction of these great events upon political thought does not come into the open until the eleventh century. Nor do they become more clear until the fourteenth century. At that time the controversy required that the precedents be brought out for discussion, and the conflicting claims of institutional supremacy of Pope or Emperor were evaluated.⁹⁴

Medieval political thought became distinguished from the Graeco-Roman world on two main points. The Latin writers viewed the state as a creation of God, universal and inclusive of the family of man. A second medieval idea expressed was that the state, along with its coercive authority, was God's remedy for original sin.⁹⁵ Bishop Augustine

⁹³Leff, Medieval Thought, p. 29.

⁹⁴McIlwain, Political Thought, p. 178.

⁹⁵Leff, Medieval Thought, p. 29.

of Hippo had expressed both concepts in The City of God (410-430).⁹⁶ Although Augustinian concepts were accepted as an adequate expression of man's condition, for a time, such ideas did not solve the question of the later middle ages: What is the relationship between church and state? It was not until the fourteenth century that man began to look upon church and state as two separate entities. During the "dark ages" the Christian Commonwealth (Respublica Christiana) was made up of two elements derived from the same origin, church and state. They were both of divine origin. The problem was to develop an order of priority between them. Leff's conclusion concerning the period states that partisans for papal primacy, such as Bishop Ambrose and Pope Gregory I, did not prevail over the dualistic Gelasian principle of the "Two Swords." The theory simply reflected the realities of the age, when neither pope nor king could effectively assert authority over the other.⁹⁷

CHURCH REFORM

By the eleventh century, historians observe that a return to unity of the Roman Empire was an impossibility.⁹⁸ By that time the church had lost its ability to influence the fabric of society. Chaotic conditions prevailed throughout

⁹⁶Leff, Medieval Thought, p. 29. ⁹⁷Ibid.

⁹⁸Latourette, History of Christianity, pp. 365-66.

Europe. The fragmented society reverted to a form of tribalism where order was maintained through a powerful local leader, king, count, or duke.⁹⁹ The church is characterized as a creature of its societal surroundings.¹⁰⁰ Although the preservation of learning was assumed by the church, many priests were illiterate, and Christian belief was colored with the old pagan magic and superstition.¹⁰¹ National churches came into being supervised by provincials whose concern with secular matters far often outweighed their ecclesiastical concerns.¹⁰²

The moral character of the priests was largely indistinguishable from the laymen. It was common practice among the clergy to keep mistresses, have children by them, and occasionally marry them.¹⁰³ The children usually received the ecclesiastical position through inheritance from their father.¹⁰⁴ Powerful laymen controlled the appointment and investiture of bishops and priests. The Pope had little influence or attention in the scattered parishes, and further, commanded little respect in Rome.¹⁰⁵ During the tenth century the papacy reached its nadir as it fawned under the control of Rome's landed aristocracy. The most notorious example of the period was Marozia, daughter of Theophylact, a Roman

⁹⁹Latourette, History of Christianity, p. 79.

¹⁰⁰Ibid., p. 370. ¹⁰¹Ibid. ¹⁰²Ibid., pp. 370f.

¹⁰³Ibid., pp. 366f. ¹⁰⁴Ibid. ¹⁰⁵Ibid.

Senator. Marozia bore Pope Sergius III a son who became Pope John XI. However, John XI lost favor with his mother and was later imprisoned. A half-brother, Alberic II, succeeded John XI.¹⁰⁶

It is obvious that with such examples of morality and religion characteristic of those surrounding the Curia, popes could no longer wield the influence established by earlier predecessors. Furthermore, popes were not inclined to reform the church so long as they owed allegiance to powerful sponsors. Unholy alliances produced by abandonment of the Gelasian principle of separation of functions within the Christian community was the primary contributing cause to the decay of church and state.¹⁰⁷

Among the monasteries, there were still some pious souls such as Peter Damian of Ravenna, who became Cardinal Bishop of Ostia.¹⁰⁸ Cardinal Damian's dream was to perform a cleansing reform of the papacy. The German monarch, Henry III, was successful against the Italians, militarily. His additional humiliation of the Romans was to call together a synod to install a new pope.¹⁰⁹ The first two popes (Benedict IX and Damasus II) did not live long, and additional synods were necessary. However, Leo IX proved healthy and a reformer, as well.¹¹⁰ The result of his papacy was the provision for positive reform of the church through the office

¹⁰⁶Latourette, History of Christianity, p. 367.

¹⁰⁷Ibid., p. 366. ¹⁰⁸Ibid., p. 466. ¹⁰⁹Ibid.

¹¹⁰Ibid.

of the papacy. A critical decision in the reform movement occurred when it was determined to elect the pope by the cardinals in Rome.¹¹¹ The succeeding steps would involve the extension of reform over the clerics in the scattered parishes and others in positions of responsibility throughout Christendom.

THE INVESTITURE CONTROVERSY

Edmunds describes a classic study in conflict escalation as he narrates the investiture controversy. Gregory VII became pope in 1073 over the loud protests of the German bishops. The Gregorian view of the papacy, among other things, involved a principle that the pope may depose, transfer, and reinstate bishops.¹¹² The pope alone is entitled to the homage of all princes, and he alone may crown or depose an emperor. In addition, this principle of investiture was based on the inerrancy of the church. The ideas were published in the document Dictatus Papae.¹¹³ Henry IV disregarded the pronouncement and ignored communications by Gregory to remove certain ecclesiastics who were excommunicated in violation of papal injunctions against lay investiture. The next level of escalation produced the appearance

¹¹¹Latourette, History of Christianity, p. 466.

¹¹²Edmunds, The Law and Civilization, p. 225.

¹¹³Ibid.

of papal legates at Gregory's court bearing documents which charged Gregory with crimes against the pope unless he would recant.¹¹⁴

Henry then called a synod of German bishops at Worms.¹¹⁵ The Synod in 1076 deposed Gregory from the papal office. The Pope ignored the Council and published a bull of excommunication with Henry as the object.¹¹⁶ Henry marched out into the winter snows after the Pope to implore his forgiveness. A dramatic confrontation at the fortress of Canossa, with the Emperor in penitent's garb, produced an apparent victory for the Pope.¹¹⁷

At issue was more than the mere cleansing of ecclesiastical decay. The new papal statements and actions were a challenge to the political constitution of the Germans. While Pope Gregory VII was reducing the credibility of the emperor, Henry, and challenging him on the battlefields in Italy, the German princes were gaining independence and freedom from their feudal ties with Gregory. The German princes eliminated the counts, agents of the empire, and soon there were no ties left with the emperor.¹¹⁸

The controversy was the first great struggle over church and state. McIlwain sees the essence of the struggle as:

¹¹⁴Edmunds, The Law and Civilization, p. 225.

¹¹⁵Ibid. ¹¹⁶Ibid. ¹¹⁷Ibid.

¹¹⁸Hajo Holborn, A History of Modern Germany: The Reformation (New York: Alfred A. Knopf, 1967), p. 20.

What each party regarded as essential to their own independence was considered by the other party as fatal to theirs, and therefore, neither antagonist could feel really secure until the duel had resulted in his own supremacy. In such a contest the initial advantage lay with the papalist party for their opponents with very few exceptions were not ready to deny that the spiritual authority was in some sense higher than the temporal.¹¹⁹

Popes and kings held center stage during this and following periods of medieval history. In the name of the unity of religion, coupled with internal selfish ambition, popes and kings initiated wars, with all the misery that followed: blood flowed, men died in battle, or from torture or war-connected disease. Wars plagued the helpless, and neither young, old, male or female was beyond its pitiless scourge. Villages, cities, and countrysides were devastated in the path of war, and nations were decimated because of the single desire to unite all mankind under one faith, that was preached by "the Prince of Peace."

THE CRUSADES

As unity of the West disappeared, and feudalism became the basis of order, the influence of the church was lessened. Along with feudalism came the theology of violence. In 1095 Pope Urban II announced the first Christian Crusade. The crusade was the subject of a sermon by Pope Urban II, calling for Christians from Europe to unite in an attempt to drive the Seljuk Turks from Palestine and other

¹¹⁹McIlwain, Political Thought, p. 206.

areas sacred to Christians.¹²⁰ The result was that for a period of over two hundred years a "warrior spirit" periodically overcame the Christian's "gentle spirit."

It is ironic that during the year that Urban II preached the sermon that initiated the crusades, the Pope also introduced modifications in the practice of war to reduce its effects upon noncombatants. From the Council of Clermont came the concept of the "Truce of God" and the "Peace of God," when put into practice and observed by combatants in war, alleviated to a great degree the sufferings of innocent people and preserved a semblance of order in a harsh and thoughtless period of man's existence. Later, at the Second Lateran Council (1139) the church outlawed jousts and tournaments which were occasions for continuation of feuds and needless shedding of blood.¹²¹ Thus, the church, like all institutions that evolved from needs and desires of mankind, has in its effect, regardless of intent, provided a mixed blessing.

In the meantime, reform of the church continued.¹²² In France and Germany, the hierarchy of Rome regained much lost influence and gradually the nobility gave in to standards established by the Pope and organizational representatives.

¹²⁰Latourette, History of Christianity, p. 410.

¹²¹Ibid., pp. 474-75. ¹²²Ibid., pp. 475-76.

THE ENGLISH, CHURCH AND STATE

In 1066 the invasion of England by the Normans was carried out with knowledge and consent of the Pope. William carried the Pope's colors in battle. Following success, little time was lost in setting up a strong central government. The Monarch was supported by a powerful religious arm. The Archbishop of Canterbury was to serve as the head of the church and second only to the king.¹²³

Constitutional historian Felix Makower characterizes the relationship as one similar to the king and his traditional counsel with an inner circle of nobles. Makower advances no consistent description of the king and the crown's relationship with the church in England because of the personal dominance of the sovereign over events in the country. Professor Makower affirms the Pope had some influence over affairs in England, but ability to bring secular powers to bear was seriously impaired because of the natural sea barrier between England and the mainland.¹²⁴ Since William the Conqueror had enjoyed support of the Pope in his venture, the new king published an ordinance which allowed a limited jurisdiction of ecclesiastical law. Clergy were also admitted to the nobility, in turn for which they would be vassals of

¹²³Latourette, History of Christianity, p. 476.

¹²⁴Felix Makower, Constitutional History of the Church of England (New York: Burt Franklin Publisher, 1895), p. 13.

the king. It is this precedent which ultimately placed clergy in the House of Lords, the chief lawmaking body of England for over eight centuries. Despite the outward cordiality of William to the Pope, William I kept a tight rein on the church of England. Free communication between the Pope and persons in England was not allowed without the cognizance of William.¹²⁵ In addition, the Archbishop of Canterbury reported to William instead of the Pope.¹²⁶

As time passed, English kings dealt variously with religion.¹²⁷ A great struggle between church and state began in England over the investiture of Bishops, in the twelfth century.¹²⁸ Control of the Lords was also a major problem, and the church complicated the constitution.¹²⁹ In an attempt to restore royal authority over the Church of England, Henry II came into direct conflict with Thomas Becket "whom he himself had placed in the Archbishopric of Canterbury."¹³⁰ At issue was the question of whether the state or church would ultimately control the great affairs of England. McIlwain sees the conflict as a "trial between the champions of two rival institutional systems, each of which could expand only at the expense of the other."¹³¹

¹²⁵ Makower, Constitutional History, p. 14. ¹²⁶ Ibid.

¹²⁷ Latourette, History of Christianity, p. 476.

¹²⁸ Ibid. ¹²⁹ Ibid., p. 477. ¹³⁰ Ibid., p. 146.

¹³¹ McIlwain, Political Thought, pp. 226-227.

Six years of struggle was climaxed by the brutal murder of Becket in the Canterbury Cathedral in 1170. Although the king is exonerated by modern historians, the Crown's contemporaries placed blame directly at the feet of King Henry.¹³² Becket was slain by some of Henry's overzealous knights who took the king's ravings about the Archbishop literally. Becket's blood made the possibility of the Pope's presence in England more of a likelihood than the king had desired.¹³³ Some policies toward papal representation in the realm were changed. The Curia was allowed to retain some legal jurisdiction. However, Henry refused to transfer primacy of the English church to the Pope which the English claimed belonged to the secular sovereign. The dispute was summarized within the points set forth in "Constitutions of Clarendon." But strive as he might to advance sovereign claims, the Pope was isolated from England by geography, history, and Roman law. The constricting influence of Roman law made scant inroads against the proud freedoms of English Common Law.¹³⁴

THE RESPUBLICA CHRISTIANA

The medieval pretensions of the church climaxed in the person of Innocent III, who ruled from 1198 through 1216.

¹³²McIlwain, Political Thought, pp. 226-227.

¹³³Makower, Constitutional History, pp. 482-486.

¹³⁴Ibid., pp. 486-487.

Latourette describes Innocent as one who had a high regard for the stature and work of the papacy. Innocent's views were not unique to holders of the office, but he implemented in a vigorous fashion what had been considered theoretically by his predecessors. The Pope's activism caused him to intervene constantly and aggressively in the secular realm.¹³⁵

History contributed to Innocent's program of the pragmatic application of views concerning the nature of the papacy. Monastic movements such as the Franciscans and the Dominicans emerged and asked to be of service to the Church; but movements such as the Waldensians and Cathari, equally sincere, but unorthodox in some of their beliefs, were not only refused authorization, but were persecuted by Innocent and followers.¹³⁶ Economic conditions were improving in Europe, while the actual power of the Holy Roman Empire was declining.¹³⁷ The help of the pope was required in order to prop up a waning secular power. Pope Innocent was first the protector, then guardian of Frederick II of Sicily.¹³⁸ In addition, he helped to forestall the rise of nationalism in Europe through keeping alive the concept of the mythical unity of the church and the artificial semblance of a unified western empire.¹³⁹

In the East, his crusaders, diverted from their stated purpose, sacked Christian Constantinople. Innocent initially

¹³⁵ Latourette, History of Christianity, p. 482.

¹³⁶ Ibid. ¹³⁷ Ibid., p. 483. ¹³⁸ Ibid.

¹³⁹ Ibid.

had not intended that the crusade do violence against Christians while crusading against the Infidel.¹⁴⁰ However, he did not retreat from Constantinople once it fell. Having succeeded in the establishment of an eastern beachhead, he proceeded to set up his administration and to extend his influence into Armenia and Lebanon. The economic principle that wealth brings power was not lost on Innocent III. The Pope required that in Christian dominions, tithes were to take precedence over all other manner of collection.¹⁴¹ Innocent III exerted influence in secular questions of legality and politics and claimed right to review important cases personally.¹⁴²

Religious movements, such as the Franciscans, were included under the umbrella of Christian theology and considered useful to operation and extension of the church. Other ideas Pope Innocent resisted and persecuted as "heretical." The Pope called together the Fourth Lateran Council in 1215. The Council solidified Catholic doctrine and practice more than had been done since The Council of Nicea in the fourth century, or until the Council of Trent in the sixteenth. During the Fourth Lateran Council, (1) Sacraments were defined; (2) required lay participation was clarified; (3) provisions for education were announced; (4) standards

¹⁴⁰ Latourette, History of Christianity, p. 484.

¹⁴¹ Ibid. ¹⁴² Ibid.

for clergy were prescribed; (5) requirements for theological education were standardized; (6) heresies were condemned and machinery was set up for persecution. In 1233, the Dominican friars became officially responsible for the operation of the Inquisition.¹⁴³

Much later concern with church and state relationships found beginnings with Innocent III. Church and state had never actually had such a close relationship, although much had been claimed. At the end of the twelfth century, Innocent III appeared to be bringing heaven to earth--at least from position of church authority. The papal program was one that used the office to bring the Respublica Christiana into a reality defined by Innocent's standards. The Pope intervened in all the affairs of men. At papal word, kings were brought to their knees and many were required to perform as vassal to their lord and pope. Innocent designated political choices over the objections of kings.¹⁴⁴ Innocent III wielded the interdict wherever a ruler was reluctant to accept his terms, and it always proved effective. The Pope chose each emperor and supported the barons against King John of England, which resulted in the Magna Carta.¹⁴⁵ Never again was the papacy so powerful or so potent. Innocent died in 1216, and thereafter it became much more difficult to use

¹⁴³Latourette, History of Christianity, pp. 484-85.

¹⁴⁴Ibid., p. 485. ¹⁴⁵Ibid., p. 486.

papal power politically, as influence of the office declined, despite pretensions to the contrary.¹⁴⁶ Boniface VIII provides an example of the waning of the papal office in 1299. Boniface issued the most powerful claim for the papacy ever expressed in his Bull, Unam Sanctum. He asserted "that it is altogether necessary to salvation for every human creature to be subject to the Roman Pontiff." He attempted to put the claim into effect, but he was impotent to enforce it.¹⁴⁷

Dr. Latourette notes that during the late middle ages, politics was affected by Christianity in the attempt to blunt its "ruthlessness."¹⁴⁸ The period was one characterized by the strong, shrewd, and the powerful. In China and India the most prestigious classes were the scholars and the priests. The western world has traditionally favored the strong, the violent, and the victorious warrior. As clergy became more involved in secular affairs, priests were tempted to imitate military heroes.¹⁴⁹

Political theory, however, was expressed most often in theological terminology. Christian scholars held that the warp and woof of society -- church and state, papacy and emperor -- were divinely founded. Thomas Aquinas tied divine trust held by a monarch to loyalty of his subjects. John of Paris, a Dominican, and Marsilus of Padua asserted that powers of both

¹⁴⁶ Latourette, History of Christianity, p. 486.

¹⁴⁷ Ibid., p. 487. ¹⁴⁸ Ibid., pp. 554-556.

¹⁴⁹ Ibid., p. 554.

sectors--church and state--are based upon the sovereignty of the people.¹⁵⁰

RELIGIOUS PERSECUTION

In the attempt to maintain unity and order conformity to religious beliefs was considered crucial to civilization's survival. Realizations that Christian territories were hemmed about and being pressured by the Mohammed ns, demanded radical measures to suppress unChristian ideas. In the Pope's view, heresy was a form of civil rebellion.¹⁵¹ In Roman Law terms, heresy was "treason." Beginning with Innocent III and continuing through a long line of his successors, the church promoted active repression of heresy. An initial thrust was against occupants of Southern France. Simon De Montfort led the pope's forces against Albigenses heretics, but a primary effect was the attainment of additional territory for the papal cause.¹⁵²

To most observers, the Albigensian crusade took on characteristics of a prolonged massacre. Few inhabitants were safe, not even Christians. There was no easy way to identify the "faithful" and it was considered the best policy

¹⁵⁰Latourette, History of Christianity, pp. 555-56.

¹⁵¹H. C. Lea, The Inquisition of the Middle Ages: Its Organization and Operation (New York: Harper & Row Publishers, 1969), p. 39.

¹⁵²Latourette, History of Christianity, p. 456.

to kill all the unfortunate inhabitants of territories reputed to be heretical. Latourette reports:

It is said that when one of the first cities, Beziers, was entered, and the Papal Legate was asked whether the Catholics should be spared . . . he commanded, "kill them all, for God knows his own!"¹⁵³

The slaughter continued until the Treaty of Paris in 1229. But the treaty failed to stop other forms of persecution. A council was convened to eradicate heresy in the South. Bibles were forbidden to laity, and translations in vernacular also were forbidden.¹⁵⁴ The Bible was a prolific source of new heresy. Military suppression of heresy had been insufficient. It was felt that secret heretics were still a threat to Christianity and the unity of the Respublica Christianum.¹⁵⁵ In order to meet this threat, the church resurrected an instrument from the ancient laws of Rome, the Inquisition. Dr. Latourette recalls that previous heresy trials and executions had been carried out by secular authorities.¹⁵⁶ Until the Council of Toulouse, 1229, there had been no system for the application of sanctions within the church. The Dominicans provided manpower for the Inquisition, though other religious orders provided the support and participation occasionally requested by papal and other church authorities.¹⁵⁷

¹⁵³Latourette, History of Christianity, p. 456.

¹⁵⁴Ibid. ¹⁵⁵Ibid. ¹⁵⁶Ibid., p. 457.

¹⁵⁷Ibid.

THE INQUISITION

Church-state controversies from 1215 to the present are better understood in outline against the dark curtains of the medieval Inquisition. The inquisitory process bore external trappings of court procedure. In the ecclesiastical courts, the accused had the burden of proof. One could be arrested on the thin basis of rumor and was thereafter considered guilty until he proved himself innocent. One had no way of producing evidence, questioning witnesses for his defense, or of cross-examining or confronting of the witnesses against him.¹⁵⁸ Although coercion or torture may have produced the evidence against him, all was admissible. Although trial by ordeal had been ended by Innocent III at the Fourth Lateran Council, no such mercy extended to the souls accused of heresy.¹⁵⁹

The edicts of Honorius III were based on the Lateran Canons and published in a series from 1220-1239.¹⁶⁰ According to the publications, suspected heretics were ordered to "purge themselves" within a year, or be considered a heretic by law.¹⁶¹

Henry Charles Lea summarizes vividly the plight of those singled out for trial before the ecclesiastical tribunal:

¹⁵⁸ Lea, The Inquisition, p. 28.

¹⁵⁹ Ibid., p. 56. ¹⁶⁰ Ibid., p. 71. ¹⁶¹ Ibid.

Heretics of all sects were outlawed; and when condemned as such by the church they were to be delivered to the secular arm to be burned. If, through fear of death, they recanted, they were to be thrust in prison for life, there to perform penance. If they relapsed . . . they were put to death.¹⁶²

Property of a condemned heretic was confiscated. Heirs were disinherited and disqualified for high office for at least two generations succeeding. However, heirs could act as informants and regain their lost birthright.¹⁶³ Similar pressures had been brought to bear by Romans against Christians in early centuries of Christianity. During the thirteenth century Christians were persecuted, by means of harsh Roman Law. The Edict of 1220 was placed in the corpus of practical law taught at the University of Bologna, embodied in civil codes, and in the Corpus Juris as Canon Law. Lea suggests, ". . . technically speaking, they may be regarded as in force to the present day."¹⁶⁴

Carryovers of the inquisitorial process persisted almost to the nineteenth century in continental criminal courts. The process:

. . . as developed for the destruction of heresy, became the customary method of dealing with all who were under accusation (for any crime whatsoever); that the accused was treated as one having no rights, whose guilt was assumed in advance, and from whom confession was to be extorted by guile or force It would be impossible to compute the amount of misery and wrong, inflicted on the defenseless up to the present century, which

¹⁶²Lea, The Inquisition, p. 71.

¹⁶³Ibid., p. 72. ¹⁶⁴Ibid., p. 73.

may be directly traced to the arbitrary and unrestricted methods introduced by the Inquisition and adopted by the jurists who fashioned criminal jurisprudence of the continent.¹⁶⁵ [Emphasis, the writer's]

Sharp accents of Roman Law served to subsume the rights of the individual in favor of the great institutions, the church and state.¹⁶⁶ Medievalists were not individualistic, but wholistic. They considered themselves servants, elements within a world that God made, which allowed them no place in making decisions that would change one's lot in life. Expressions of original thought that occurred occasionally were regarded as heresy and quickly smothered by the Inquisition. R. R. Palmer and Joel Coulton state further:

No one thought that people should be free to believe individually as they chose. No one regarded religion as a mere opinion. For all parties the issue lay between God's true word and abominable misconceptions, and all saw in the church the supreme institution All maintained . . . that in so vital a matter as religion, people who lived together must behave alike.¹⁶⁷

In England, heresy trials were a rarity until the fourteenth century. Inquiry into heresy was the sheriff's responsibility, since heresy was considered a capital crime against temporal law. Increase in persecution occurred as controversy over Wycliffe and the Lollards persisted. The

¹⁶⁵ Lea, The Inquisition, p. 318.

¹⁶⁶ R. R. Palmer and Joel Coulton, A History of the Modern World, 2nd ed. (New York: Alfred A. Knopf, 1963), p. 10.

¹⁶⁷ Ibid., pp. 10-12.

first execution for heresy in England was upon orders of the king in 1401.¹⁶⁸ Under Henry IV in 1414, a number of repressive measures were enacted, including the Roman Law of forfeiture.¹⁶⁹

During the English Reformation, King Henry VIII added requirements that ecclesiastical trials for heresy must be public, and the king's writ would have to be obtained before condemned heretics could be executed.¹⁷⁰ King Edward VI, in 1547, began to repeal all laws concerning "matters of belief." However, the king died before his reforms were completed, and Edward's orthodox Catholic sister, Mary Tudor, reversed Protestant reforms and began to reinstate Catholic laws against heresy and heretics. "Bloody Mary" as head of the Church of England pursued her own Inquisition. Fires at Smithfield were fueled by seared, smoking flesh of the Protestant "faithful." Memory of those Protestant martyrs was celebrated in crude verse:

. . . When Alexander Geche was brent
and with him Elizabeth Launson:
When they with jow did consent,
. . . When these at Ipswich, were put
to death,
We wished for Elizabeth.¹⁷¹

¹⁶⁸ Makower, Constitutional History, pp. 183-192.

¹⁶⁹ Lea, The Inquisition, p. 71.

¹⁷⁰ A. F. Pollard, Factors in Modern History (Boston: Beacon Press, 1960), pp. 284-85.

¹⁷¹ Palmer and Coulton, History, p. 78.

The wish was for more than Elizabeth. The wish was a desire for some semblance of religious stability in the land; Elizabeth would be equal to their dreams, and more. The Elizabethan age ushered in an opening of a New World with all its accompanying promise.¹⁷²

DECLINING POWER OF THE CHURCH

Following the apex of papal power vested in Innocent III, control of church over secular world began to waver.¹⁷³ Some literary evidence exists which indicates the church experienced periods of powerlessness.¹⁷⁴ Occasionally, heretical writings were allowed to stand, undisturbed and unchallenged.¹⁷⁵ Such writers challenged the very foundations of papal power, yet were allowed to live and to die undisturbed. Other writers were not so fortunate; many were arrested, charged with heresy, tried, and burned along with their works.¹⁷⁶

William of Ockham (c. 1349) and Marsilio of Padua (c. 1342) were two critics of the concept of papal absolutism. The former was an English Franciscan from the University of Oxford. Stressing freedom for all Christian believers, William denied the Pope all power in spiritual matters.

¹⁷²Palmer and Coulton, History, p. 78.

¹⁷³Harold J. Grimm, The Reformation Era (New York: The Macmillan Co., 1954), pp. 39-40.

¹⁷⁴Ibid. ¹⁷⁵Ibid., p. 39. ¹⁷⁶Ibid., p. 40.

Concerning the temporal power, Ockham expressed the opinion that the power of the emperor came from the electors who were representatives of the will, not of God, but of all the Germans.¹⁷⁷

Marsilio and John of Jandun, Parisian scholars, composed a two-volume work entitled The Defensor Pacis.¹⁷⁸ The work was a complicated and unusually "radical" collection of concepts. The writings effectively reduced the papacy to a corner in Christendom which was ruled by secular government instead of the papacy.¹⁷⁹ Defensor maintained that secular authority derived from a whole body of citizens and elected monarchs must function for the common good, subject to secular law. Professor McIlwain notes that church-state theories held by each respective sector are considered mutually exclusive. The Defensor Pacis considered the Catholic Church's position as monistic; that of secular government as pluralistic. Marsilio asserted that the Council, composed of laity and clergy and called by the secular arm, was superior to the pope.¹⁸⁰ Furthermore, The Defensor indicated that even if the church confines itself to spiritual matters, the institution has limitations. Some limitations are:

¹⁷⁷Grimm, The Reformation Era, p. 39.

¹⁷⁸Ibid., pp. 39-40.

¹⁷⁹McIlwain, Political Thought, pp. 312-314.

¹⁸⁰Ibid.

(1) All clergy are equal; (2) there is no proof of apostolic succession from Peter; (3) God alone forgives sins; (4) the Bible is sole source of revelation and law; (5) Canon law and traditions do not apply to everyone.¹⁸¹

Marsilio's ideas were to reappear within writings of reformers and humanists during the sixteenth century. There is evidence, also, that Wycliffe and Hus were influenced by these writers, as was Savonarola.¹⁸² Bearers of such novel ideas in a later time were not well-received. Ideas must await their moment in time. An attempt to assert the preeminence of secular power over papal was made at the Council of Constance (1414-1417).¹⁸³ However, the time was not yet ripe. Jan Hus was tried for heresy, after arriving at Constance under the protection of a safe-conduct of the emperor. Hus was found guilty of little more than agreeing with the ideas in the Defensor. Nevertheless, Hus was burned as a heretic.¹⁸⁴ In addition, Constance sought to exterminate Lollardry. Interred bones of Wycliffe were dug up, and tried for heresy. Found guilty, Wycliffe's bones were burned and the ashes strewn over water.¹⁸⁵ Followers of both Hus and of Wycliffe were hunted down and persecuted.

¹⁸¹McIlwain, Political Thought, pp. 312-314.

¹⁸²Grimm, The Reformation Era, pp. 40, 56-57.

¹⁸³Ibid., p. 45. ¹⁸⁴Ibid., p. 44. ¹⁸⁵Ibid., p. 45.

In Germany, however, Hussites were militarily strong; the crusade produced a series of bloody wars. Edmunds' comment on Hus's execution says: "History affords no more emphatic demonstration of the supreme power asserted by the church over life itself."¹⁸⁶

Historians generally designate the period 1350 to 1450, which involved the hundred years war between England and France, as a period of emerging nationalism. Weakening of the papacy and emptiness of empirical power contributed to the fracture of the unity of Christendom.

The Golden Bull of 1356 was a contract between the emperor and the German princes chosen to elect the emperor.¹⁸⁷ The parties to the political contract fulfilled the substance of the Defensor Pacis as representatives of public Germany. Another attempt to apply the conciliar concept was tried at a Council at Basel in 1431. The Pope was reluctant to appear in person, and sent representatives with instructions restricting activities of the Council. The pope's wishes were ignored.¹⁸⁸ Latourette's judgment of Basel is harsh. He says: "The council of Basel failed, and failed conspicuously and lamentably."¹⁸⁹ Although some reform decisions

¹⁸⁶ Edmunds, Law and Civilization, p. 228.

¹⁸⁷ Holborn, Germany: The Reformation, p. 28.

¹⁸⁸ *Ibid.*, p. 27.

¹⁸⁹ Latourette, History of Christianity, p. 634.

were made such as (1) Simony was forbidden, (2) celibacy of clergy enforced, and (3) "churchyard theatricals" forbidden, Basel failed in its central attempt to reunite Latin and Greek wings of the church. There was a "falling-out" with Pope Eugene IV, and the council elected another pope, after deposing Eugene. The new pope did not remain in office very long, and soon resigned. For all practical purposes, the conciliar movement was over.¹⁹⁰

THE NEW LEARNING

Behind new pressures toward more representative government within church and state were a host of Latin scholars. Scholastic ideas were characterized by their consistency with revered Greek philosophers, and by a broadening view of man and his surroundings. Medieval scholars viewed education as primarily a process of preservation and transmission. But new learning provided a creative aspect that had not been previously allowed or considered.¹⁹¹

Church-craft and state-craft were not confined to the political or religious. Since the time of Charlemagne, the cathedrals had been involved in some kind of education.¹⁹² The Fourth Lateran Council had made the cathedral school a

¹⁹⁰Latourette, History of Christianity, p. 634.

¹⁹¹Grimm, Reformation Era, pp. 60-61.

¹⁹²Latourette, History of Christianity, p. 357.

requirement.¹⁹³ The source of the structure of early education began in the craft guilds. The organization, once established, remains the structure of today's university system, especially in the professional sense. Notre-Dame School in Paris produced such great master teachers as William of Champeaux and Peter Abelard. The University of Paris was considered an exemplar of the thirteenth century university. Paris was known for its theology and philosophy all over the world.¹⁹⁴ John Calvin received theological training at the University of Paris.¹⁹⁵

The Universities of Paris and Bologna emerged as intellectual centers during the "Renaissance of the twelfth century." In Italy, Bologna provided a center for revival of the study of Roman Law.¹⁹⁶ The University of Salerno emerged as the first medical university, but it failed to survive the fourteenth century.¹⁹⁷ Control of the university had its relationship to church and state in medieval as well as current times. According to Hastings Rashdall, the pre-eminence of the schools and their development into universities,

¹⁹³ Latourette, History of Christianity, p. 484.

¹⁹⁴ Bowen, History of Western Education, I, 109-10.

¹⁹⁵ Latourette, History of Christianity, pp. 751-752.

¹⁹⁶ Hastings Rashdall, F. M. Powicke, and A. B. Emden, The Universities of Europe in the Middle Ages (Oxford: The Clarendon Press, 1936), I, 17.

¹⁹⁷ Bowen, History of Western Education, II, 110.

to a great measure, depended upon their being licensed by the ecclesiastical authorities. He says:

In the formative period the schools were fostered by the ecclesiastical authority and, like the universities into which some of them developed, depended upon this authority for the right to exercise their activity.¹⁹⁸

History records frequent intervention of secular control in the growth and development of universities. In other cases, the theological weight of the universities sometimes was felt in matters of secular and religious importance. Change in the power and understanding of the relationship between church and state parallels change of patronage in the universities. Rashdall continues:

As time went on, secular princes exercised authority over universities in virtue of their position as founders, or in the public interest, is undoubted . . . the university of Oxford was under the control as well as the patronage of the king of England, and the more so, because the Chancellor was invested with a measure of temporal jurisdiction.¹⁹⁹

Through the chancellor, universities had a powerful and influential figure at court. However, the chancellor's closeness to the king sometimes worked to the advantage of the universities and sometimes to their disadvantage. The rise of the universities, especially during the twelfth century, was partially a result of eager appropriation of pagan learning by Europeans. The Christian West engaged in literary

¹⁹⁸ Rashdall, Universities, I, 20-21n.

¹⁹⁹ Ibid., pp. 23-24.

communication with Arabian scholars in Sicily and Spain.²⁰⁰

The Arabs had translated Greek scientific principles into Arabic and had carried Aristotelian thought and deductive logic to the threshold of scientific thinking. The use of arabic numerals revolutionized mathematics and made scientific computation infinitely simpler. Initial reaction of the clergy to the "New Aristotle" was fear, which invited repression in the universities. Students were required to approach such information with caution, lest they be accused of heresy. The Scholastics began their breakthrough into the study of nature with a step-by-step process. The door was opened by Albert the Great, followed and completed by his pupil, Thomas Aquinas (1225-1274).²⁰¹

The Summa Theologica of Aquinas was a mammoth undertaking, in that he proposed to summarize all knowledge systematically in Aristotelian terms compounded within the acceptable theological categories. The book attempted to demonstrate that faith and reason do not conflict. The value of the work, aside from its specific contents, was that it accomplished the difficult task of fostering an intellectual climate favorable to the utilization of reason without suppression.²⁰²

²⁰⁰Palmer and Coulton, History, p. 37.

²⁰¹Ibid. ²⁰²Ibid., pp. 38-39.

Basic to the concerns herein, is the Thomistic political theory. Aquinas as a man of his time conceived the state primarily in terms of law, not law in terms of the state.²⁰³ The logic of the position is as follows:

If this world is governed by God's providence, then it is manifest that the whole community of the universe is ruled by divine reason: and so the principle of the governance of things, exist in God as the rationale of the universe, has the character of lex; and since divine reason is not of time, but of eternity, we must call this law eternal This is the source of all true law upon earth.²⁰⁴

When finally the teachings of Aquinas were accepted by the Roman hierarchy, the step signalled medieval man's thought processes were giving way to the modern world. Scientific thinking was made possible. By drawing upon Aristotle's principle of universal laws, Aquinas led men to discover their place in the world and in nature.²⁰⁵

THE RENAISSANCE AND REFORMATION

Once the initial breach was made in the universities, the way was opened for the entry of such intellectual pioneers as Sir Francis Bacon, Spinoza, Copernicus, Galileo, and others. In terms of theology, the door was opened in Wittenburg in 1517. There, the Franciscan Monk, Martin Luther, raised the curtain on the modern age with his posting of the

²⁰³McIlwain, Political Thought, p. 326.

²⁰⁴Ibid. ²⁰⁵Ibid.

Ninety-Five Theses.²⁰⁶ Questions posed in the document effectively collapsed the medieval structure so carefully designed by Augustine.²⁰⁷ The scholastic synthesis of faith and reason put forth by Aquinas had reached its peak; humanists were read with delight throughout Europe.²⁰⁸ The fusion between the Greek and the Judaeo-Christian elements of medieval society was split.²⁰⁹ Holborn credits Luther's preaching as the spark that made way for a massive European challenge to the secular power of the church, and created a social and religious revolution. "Following the Reformation, no longer did a common ecclesiastical roof cover western Christendom."²¹⁰

The Peace of Augsburg in 1555 gave the German Princes a choice between Roman Catholic faith and the Augsburg Confession of the Lutherans.²¹¹ The Augsburg treaty was a document of "no return" in that the territorial prince could choose the religion for the inhabitants of his territory, but allowed for no dissent within the realm. Whole nations became Protestant, while others remained Roman Catholic. Initially, there had been no intent to fracture the unity

²⁰⁶Grimm, Reformation Era, p. 109.

²⁰⁷McNeill, Rise of the West, p. 641.

²⁰⁸Ibid. ²⁰⁹Ibid.

²¹⁰Holborn, Germany: The Reformation, p. 87.

²¹¹Edmunds, The Law and Civilization, pp. 228-229.

of Christendom, but results were much different than the reformers expected.²¹²

Failure to provide a monolithic reformed church with everyone in complete agreement provided the door that opened Europe and the world to secularism and science.²¹³ W. H. McNeill suggests that:

The political diversity of Europe thwarted the hearts desire of nearly all of the intellectually sensitive men of the time by making impossible the construction of a single, authoritative, definitive and enforceable codification of truth. Yet, ironically, the failure to construct a world-view commanding general assent was the greatest achievement of the age. Europeans inherited . . . a high seriousness in the pursuit of both knowledge and salvation.²¹⁴

A sober tension was maintained as monarchies gradually lost their absolute power in matters of state and in terms of individual choice of religion or intellectual pursuits. Residue of that tension remained as the medieval church-state struggle continued.

Geographically, the German-based Reformation included northern Europe and moved to the east, while Geneva-based Calvinism moved west.²¹⁵ Theology based on individualistic Biblical interpretation is, by nature, divisive. No consensus, other than territorial, is possible within the

²¹²Edmunds, The Law and Civilization, pp. 228-29.

²¹³McNeill, Rise of the West, p. 642.

²¹⁴Ibid.

²¹⁵Holborn, Germany: The Reformation, p. 110.

Protestant world view. The Geneva of Calvin, tightly structured and ordered as a theocracy, gradually faded. Cromwell's English Commonwealth was an experiment that failed to outlast its founder. Protestantism produced a multiplication of sects and proliferation of reformed leadership, which featured numerous and unique expressions of theological interpretation.²¹⁶ The leadership of Protestant countries allowed some degree of tolerance within their respective states.²¹⁷ Roman Catholic states, because of severe limitations placed upon them by the popes, tended to be more narrowly tolerant.²¹⁸

In a secular sense, beginnings of modern history tipped the balance away from a world view that emphasized the hereafter and toward a new emphasis upon the present dimension. Holborn does not accept the traditional historic view of a unified renaissance civilization. The German historian sees secular culture interwoven with much of the old religion. Also complicating the civilization was residual feudalism, disease and rising nationalism, complicated by the phenomena of recurring strife and wars.²¹⁹

The Protestant reformers set out to achieve a radical sanctification of all human endeavor before God, but in fact, after the lapse of a couple of generations, provoked in parts of Europe a disciplined application to the business of making money such as the world had never seen before; While the Jesuits, who set

²¹⁶ Holborn, Germany: The Reformation, p. 210.

²¹⁷ Ibid., p. 245. ²¹⁸ Ibid., pp. 370-71. ²¹⁹ Ibid., p. 104.

out to win souls for Christ and the pope, found in the Pagan learning of the humanists one of their most effective tools of education . . . both religion and secularism acquired a new energy from their mutual jostling.²²⁰

THE ENGLISH REFORMATION

In the British Isles, the Reformation ultimately affected the American settlements more directly than did German Lutheranism. Henry VIII obtained the title, "Defender of the Faith," as a result of a theological treatise he wrote against Luther. However, Henry found himself at odds with the policies and designs of Rome.²²¹ The English king wished to father a male heir. The desire was such an obsession to Henry that it affected England's foreign and domestic policy. Henry's first wife had not been able to produce a son. A mixture of ego, lust, superstition, and to some degree, theological training, overpowered Henry. The King appealed to Pope Clement VIII to annul the marriage on a theological pretext: Catherine had been his older brother's wife, and an annulment might have been in order because of an obscure Biblical reference to such a union. To complicate matters, Anne Boleyn was pregnant with whom he hoped was a son, and Henry wished to marry in order to legitimize the heir.²²² The succeeding executions, marriages, and more

²²⁰McNeill, Rise of the West, p. 642.

²²¹Latourette, History of Christianity, p. 802.

²²²Ibid., p. 800.

trials and executions are commonplace in history. England, through Henry, ultimately became a Protestant nation, but not without great struggles. The condition of the church following such secular successes is described briefly by McNeill:

Protestant rulers confiscated much ecclesiastical property and often reduced the clergy to the status of salaried employees of the state. Even in Catholic countries where the church retained most of its possessions, the papacy was forced to concede very extensive powers to local rulers in such matters as ecclesiastical appointments, taxing powers over church property, and the judicial authority over clergymen.²²³

Three years after his successful defiance of the pope and takeover of the English church, Henry put Anne, his second wife, to death. In succession Henry VIII married four other wives to further his dynastic dreams. Henry's only success in producing a male heir was the frail Edward, who died after a short reign.

The Henrican Reformation involved a successful defiance of the pope in personal matters, confiscation and dissolution of the monasteries, and confiscation and retention of much church wealth for the Crown. In 1534, Parliament declared Henry VIII Supreme Head of the Church of England, which included royal jurisdiction over ecclesiastical courts of England.²²⁴

²²³Latourette, History of Christianity, p. 645.

²²⁴Edmunds, The Law and Civilization, pp. 229-30.

Henry's and Edward's settlement with the church was overturned by Edward's older sister, Mary, who succeeded him. Mary's upbringing and marriage to a Catholic zealot, Philip of Spain, did not permit reform to continue in England. Mary met strong resistance as she attempted a restoration of Catholicism.²²⁵ The Queen stubbornly escalated measures to suppress the Protestants. The repressive campaign caused great numbers of people to flee to Europe. Among the Marian exiles were men who later effected the Protestant direction of English history. Such men were John Knox and John Ponet, whose ideas were radical concepts of resistance to rulers including regicide.²²⁶

Elizabeth became queen following Mary's death.²²⁷ The virgin queen's immediate task was that of returning the nation's Tudor reforms initiated by Henry and Edward. The young queen was blessed with good health, intelligence, and good advisors. Elizabeth's unusually long reign gave time to fulfill policies and to outlive early mistakes. Elizabeth as sovereign made England secure against Catholicism and foreign invasion. Furthermore, the queen united England's economic and political power behind a fleet of ships manned and captained by daring explorers and courageous seamen.²²⁸

²²⁵ Latourette, History of Christianity, pp. 808-09.

²²⁶ Edmunds, The Law and Civilization, pp. 466-468.

²²⁷ Latourette, History of Christianity, p. 810.

²²⁸ Ibid.

Religious settlement accompanied two acts: (1) Supremacy and (2) Uniformity in 1559.²²⁹ Elizabeth instituted a revival of Edward's Book of Common Prayer, and added a number of articles of belief, which then totaled thirty-nine.²³⁰ Worship was performed in the vernacular. Elizabethan reforms satisfied a majority of Englishmen, but could console neither rabid Catholics nor radical Protestants. Effective reforms were marred by the Admonition Controversy,²³¹ in which the radical Puritans attacked the conservative Reformation. Many reminders of Catholicism remained in the church which were offensive to the Puritans. Most odious of Catholic residue were the outward trappings such as the surplice and the sign of the cross. Elizabeth chose a latitudinarian view of the church which could encompass a majority of contemporary Christian views. The course served Elizabeth well, and England prospered under the Elizabethan settlement.²³²

THE WARS OF RELIGION

The Respublica Christiana concept died only after a protracted European struggle. For almost one hundred years between 1560 and 1648, the central most controversial issue was religion. The "wars of religion" involved in addition

²²⁹Latourette, History of Christianity, p. 810.

²³⁰Ibid., p. 812. ²³¹Ibid., p. 815.

²³²Edmunds, The Law and Civilization, pp. 466-468.

to others, France, England, Spain, and the Holy Roman Empire. During the Hundred Years War, religion emerged as the primary issue. Most wars were fought between Protestants and Catholics for control over territorial space, and from the conflicts emerged a new idea, nationalism. By 1648, thousands had been killed or maimed in the name of the "Prince of Peace."²³³ The Thirty Years War, which was included within the period, is regarded as a major catastrophe. Germany bore the brunt. Most of the war was fought on German territory. Germany was blackened with burned cities and devastated farmland.²³⁴ The population in some areas was decimated; in others, totally gone. Peace came, but not unity. The fabric of Europe was a torn patchwork of nations marked by fortifications along their frontiers. In the Treaty of Westphalia, which marked the end of the struggles, the principle of cuius regio eius religio still had validity. The date 1624, however, became the benchmark defining the concept of toleration between Protestant and Catholic factions. January 1, 1624 was set as the date beyond which no church property was to be appropriated by Protestants. The 1648 treaty pointed to the earlier time as a determining cut-off point with regard to the major religion that would be tolerated within the territory. Although the religious

²³³Holborn, The Reformation, pp. 246, 373.

²³⁴Ibid., pp. 322-324.

settlement was condemned by the Pope, allowance for toleration within territories appeared to be the only workable compromise.²³⁵

In 1566, the Protestant Netherlands revolted against the Spanish king, Philip II, to prevent introduction of the Inquisition.²³⁶ Philip responded with the "Council of Blood," which sentenced thousands to death, levied oppressive taxes, and confiscated valuable property. Protestants united behind William the Silent, to attempt to drive out the hated Spanish.²³⁷

England had a stake in the outcome. Elizabeth was concerned that if Spain had success in the Netherlands, they next would attempt to invade England. Philip succeeded in his aggression on land. However, English and Dutch navies countered on the sea and against Spanish settlements in America. Attacks on treasure ships of the Spanish produced the effect of arousing Philip against the English. He produced a huge armada that included fighting ships as well as transports for the purpose of invading England. In 1588, the magnificent fleet set sail. It was comprised of an armada of 130 ships, 20,000 men, and armed with 2,400 cannons.²³⁸ The fleet first headed for the Netherlands to pick

²³⁵Latourette, History of Christianity, p. 889.

²³⁶Grimm, Reformation Era, pp. 434-435.

²³⁷Ibid., p. 435. ²³⁸Ibid., p. 474.

up the Spanish invasion force, but the English were waiting for the fleet in the Channel under the command of a daring commander, Sir Francis Drake. The English, utilizing fire ships and small vessels, put the armada in disarray. Decisive victory, however, came from the violent wind storm, which the English call "the Protestant wind." It blew the Spanish ships onto rocks, sank others, and effectively put an end to the Catholic threat. Ten years later, Philip was dead, and Spain was a weakened spectator which watched helplessly as the star of England's ascendancy moved toward its zenith.²³⁹

The sixteenth century set the stage for the modern era, during which Europe broke through the boundaries of the sea, opened up science, and was introduced to the beginnings of technology, and established new directions in political philosophy. The Respublica Christiana was left behind like discarded luggage. Some, like Philip II, clung to the anachronism, and it remained a phantom threat to the Protestant cause.

THE RENAISSANCE

The Renaissance of the sixteenth century had been on its way since the twelfth. Even in the sixteenth century the search for knowledge divided attention between concern for truth and concern for one's safety. Both Protestants

²³⁹ Palmer and Coulton, History of the Modern World, pp. 111-112.

and Catholics experienced difficulty with toleration for scientific learning. Humanists in the early part of the century had suggested secularism as a viable third alternative to the religious controversies: learning for learning's sake.²⁴⁰ At times, however, science was attacked by religion as if it were a heretical mystery religion which threatened the existence of theology. New ideas failed to coincide with stated Christian teachings, and often proponents of such "erroneous ideas" were made to face the dreaded Inquisition. The sixteenth century was nearly over, when in 1592, Giordano Bruno was tried by the Roman tribunal and finally burned in 1600.²⁴¹ Galileo's ideas had begun in the sixteenth century, but were carried over into the seventeenth, where they took form and force.²⁴² Jacob Bronowski poignantly relates the series of circumstances that led the church to suppress Galileo's findings. Confident that reason would triumph over religion when he provided the indisputable proof, the naivete of the astronomer rendered him vulnerable in the face of the dreaded Inquisition.²⁴³

In 1616, Galileo was confronted with evidence of his support of the unorthodox Copernican system of the universe.

²⁴⁰Palmer and Coulton, History, pp. 49-56.

²⁴¹Latourette, History of Christianity, p. 425.

²⁴²McNeill, Rise of the West, p. 650.

²⁴³Jacob Bronowski, The Ascent of Man (Boston: Little Brown & Co., 1974), pp. 207-214.

The facts, as revealed through the telescope, in addition to Galileo's calculations, should have been proof enough. Galileo misled himself into thinking he had made headway with the "liberal" Pope, Urban VIII. He maintained that the ultimate test of a theory must be in nature, not scripture.²⁴⁴ In 1632, Galileo published his book, The Dialogue on the Great World Systems, and the Pope was outraged. Galileo was ordered before the Inquisition. The astronomer was nearly seventy years of age, and not able to withstand torture. His interrogators skirted the substance of the book, where he would have been a match for his questioners. Questions were based on technicalities and matters of procedure and form regarding The Dialogue. Threatened twice with torture, he finally recanted on June 22, 1633.²⁴⁵ However, the "remorse" was short-lived. Galileo lived to write another book, The New Sciences, which he finished in 1636. Still forbidden to publish by the Pope, Protestants in the Netherlands printed it for him. That final scientific effort of his life left him almost totally blind by 1638.²⁴⁶ Effects of papal oppression of Galileo forestalled further scientific work in Italy, thus forcing the center of science to the freer climate of northern Europe. In the year 1642 Sir

²⁴⁴Bronowski, The Ascent of Man, pp. 207-214.

²⁴⁵Ibid.

²⁴⁶Ibid.

Isaac Newton was born in England and Galileo, still under house arrest by the Inquisition, died.²⁴⁷

THE PURITANS

The sixteenth and seventeenth centuries were witness to the growth of numerous Protestant splinter groups. Most influential to the development of western democracies were the Puritans. The dissenters were subjected to the English Star Chamber with its practice of compulsory oaths and self-incrimination.²⁴⁸ Early in the seventeenth century the Puritans stood firm against James I and his claims of the divine right of kings.²⁴⁹ Their initial attempt under the new king was called "The Millenary Petition."²⁵⁰ The petition sought to modify those practices held odious to the Puritans that were still practiced by the Church of England. Also, since James was king of Presbyterian Scotland, the Puritans hoped that he would install the Presbyterian system in the Church of England. The monarch chose to rule the church through his bishops.²⁵¹ His concept of divine right, however, could not accommodate the removal of bishops who were

²⁴⁷ Bronowski, The Ascent of Man, pp. 207-214.

²⁴⁸ Palmer and Coulton, History of the Modern World, pp. 62, 145.

²⁴⁹ *Ibid.*, p. 145.

²⁵⁰ Grimm, The Reformation Era, p. 544.

²⁵¹ *Ibid.*, p. 545.

trusted advisors to the king on matters of state as well as religion. At Hampton Court in 1604, the Puritans met him and presented the request. James is quoted as saying, "no bishop, no King." He further warned the Puritans that if they would not conform, he would "harry them out of England."²⁵² The Stuart conviction of divine right prompted James to take the occasion to lecture the Puritans about it, and to remind them that he was answerable only to God and he would make any law he chose.²⁵³

The above scene was important for the settlement of America and the development of its form of government. It was under the reign of James that the Marian exiles and other dissenters were given letters of patent through the London Company to set up a colony in America.²⁵⁴ In 1620, the first successful settlements occurred. In New England, a fundamental document was formulated which framed the basis for the New England form of government.²⁵⁵

The Puritans were angry at James because of his church-state stance. Retention of residual symbols of Catholicism was a constant reminder to Puritans of a strong incompatibility between them and the present government. Puritans were shut off from governmental patronage. Great

²⁵²Grimm, The Reformation Era, p. 545. ²⁵³Ibid.

²⁵⁴Edmunds, The Law and Civilization, p. 232.

²⁵⁵Ibid.

lords of England controlled appointments of churchmen, almost in the manner of twentieth century franchise operations. Absentee clergy collected tithes from the parish while actual services were taken over by humble curates. Puritans were usually better educated than rural English clergy and therefore provided better service. Stuart England proved to be a very interesting and decisive period, deeply affecting both the English constitution, and ultimately the American formulation.²⁵⁶ The Puritan ethic had its effect on church-state relations, education, law, economics, and human relations. One cannot say too much concerning the impact of the confrontation between James at Hampton Court upon the future of the western world. Whether good, or bad, or indifferent, it was a turning point in history.²⁵⁷

THE ENGLISH CIVIL WAR

In the beginning, there were two major groups of Puritans: Presbyterians and Brownists. The Presbyterians adopted the Genevan concept of theocratic representative government. The Brownists, on the other hand, required that each congregation settle on its body of doctrine with each member judging the faith and works of every other. The

²⁵⁶Wallace Notestein, The English People on the Eve of Colonization, 1603-1630 (New York: Harper Brothers, 1954), p. 62.

²⁵⁷Ibid.

minister was not distinct from others in the congregation. English Puritanism was relatively short-lived, as from its original dissenting character emerged other dissenters, among whom were Methodists, Baptists, and Quakers.²⁵⁸

The thread of the church-state controversy leads directly from England to America. The seventeenth century English setting provided the launching pad for the American system of government that forbade the establishment of religion. James' ideas were anachronistic in the post Elizabethan age. Elizabeth's settlement seemed to be leading to more freedom than James was able to understand or appreciate. His was a reactionary government, and the attempt to rid the land of dissent and non-conformity belonged to a pre-Reformation era. When James died, the problems of church and state were in turmoil.²⁵⁹

Charles I, James' son, followed policies that were little better than his father's. By 1629, he was so out of favor with Parliament that he was required to dissolve the body and rule without it.²⁶⁰ In 1642, Parliament adopted the Solemn League and Covenant, under the leadership of the Puritans, which established Presbyterianism as the legal religion of England, Ireland, and Scotland.²⁶¹ In 1649, Charles I, who

²⁵⁸Notestein, The English People, pp. 147-48. ²⁵⁹Ibid.

²⁶⁰Grimm, The Reformation Era, pp. 550-552.

²⁶¹Ibid., p. 563.

had opposed compromise at every turn, was beheaded at the orders of the great praying Puritan revolutionist, Oliver Cromwell.²⁶²

Cromwell had led his new model army of "Bible pounders" and "true believers" to victory over the king's defenders.²⁶³ In Ireland, Oliver subdued the land. His soldiers killed and maimed thousands of priests, and defenseless women and children. The land, once subdued and in the hands of Protestants, was left in the hands of absentee landlords who lived off the rents of their Catholic serfs.²⁶⁴ The great poet and propagandist, John Milton, justified the Puritan cause through the tracts he wrote and published.²⁶⁵

TOLERATION UNDER THE STUART RESTORATION

Cromwell's changes, however, were not etched into the British constitution. Following the Great Commoner's death, England shortly turned its back upon the Puritan constitution and the Parliament restored the monarchy, in the person of Charles II, in 1660.²⁶⁶ Not only was the king restored, but the Church of England was reinstated as well.

²⁶²Grimm, The Reformation Era, p. 564.

²⁶³Ibid., p. 563.

²⁶⁴Palmer and Coulton, History, p. 148.

²⁶⁵Grimm, The Reformation Era, p. 567.

²⁶⁶Palmer and Coulton, History, p. 149.

Charles was a Stuart true to the name. Charles and Parliament were found quickly to be at odds. All across Europe there had been a resurgence of Roman Catholicism, as Protestants returned to the old religion. In England, the feeling was strongly anti-Catholic. The most popular acts of Parliament were those measures passed against "popery."²⁶⁷

Charles had spent much of his exile on the continent and had been influenced by the opulent court of Louis XIV. The French king had the power to exact money from his subjects, but Charles was obliged to turn to Parliament, hat in hand. In one attempt to circumvent Parliament, Charles utilized his prerogative to conduct foreign policy.²⁶⁸

Charles and Louis made a secret treaty at Dover in 1670, successfully circumventing the usual diplomatic channels.²⁶⁹ Although the treaty had been negotiated with the closest security, Charles shared some of the provisions with his inner group of ministers. It was completed on 22 May/1 June, 1670. The treaty required that Louis pay Charles two million francs and furnish six thousand troops to Charles, once Charles announced a restoration of Catholic establishment in the Church of England. The English were also to be an ally of France in a new war against the Dutch. England would be in a financial position to supply a support fleet.

²⁶⁷Palmer and Coulton, History, p. 151.

²⁶⁸Ibid. ²⁶⁹Ibid.

What is appropriate to this research, is the degree of import still remaining with regard to church-state relationships, so late in the seventeenth century.²⁷⁰

Charles went to war against the Dutch, as promised, and he received his money. Parliament became more hostile toward the policies of Charles. When James, the Duke of York, married, he wed a Catholic, and became one himself. Charles issued a declaration of indulgence, which suspended enforcement of penal laws against dissenters, including Catholics. The response from Parliament was swift. They passed the Test Act which required all office holders in England to take Holy Communion in the Church of England at least once a year.²⁷¹ The Test Act held until the early nineteenth century.²⁷² Under the Stuarts the English constitution skated on thin ice with regard toward retention of peace in the face of church-state intrigue.

Effects of Stuart policies were felt in the English colonies. The Dutch war had given New York to the English, thus unifying the English colonies along the eastern seaboard. On the surface, at least, the religious policy of

²⁷⁰ Francois A. M. Mignet, Collection de Documents Inedites sur l'Histoire de France, Negotiations relatives a la Succession d'Espagne Sous Louis XIV (Paris: Imprimerie Royal 1835-42), III, 194.

²⁷¹ T. C. Hansard, Cobbet's Parliamentary History of England (London: 1808), IV, 50-51.

²⁷² Palmer and Coulton, History, p. 151.

Charles in the American colonies seemed to be consistent.

In all the charters issued to the colonies, Charles pursued a policy of toleration. The king's pro-Catholic bias led him to retain a position of tolerance for all faiths.²⁷³

Regardless of his motives, the policy was clear: toleration for all faiths was the rule in the colonies.²⁷⁴ Pennsylvania was one extreme example. Charles had an outstanding debt owed to Penn's father. He extended the charter to William Penn in exchange for the debt's cancellation. The territory was to be a place of settlement for the Quakers who wished to leave England to practice their religion without fear of persecution.²⁷⁵ Grimm says:

So far had religious toleration progressed by the end of the sixteenth century that punishment of heresy with death gradually disappeared. In England only two persons were compelled to die for their faith in the seventeenth century, and on the Continent the usual punishment was banishment or imprisonment.²⁷⁶

Toleration was especially an issue in New England where certain persons were executed for heresy, and others imprisoned, or were awaiting execution. When the situation was reported to the king, he intervened with orders to the colonial authorities for the accused to be sent to England for trial under the laws of the Crown. That kind of

²⁷³Palmer and Coulton, History, p. 151. ²⁷⁴Ibid.

²⁷⁵A. D. Innes, The Maritime and Colonial Expansion Under the Stuarts, 1603-1714 (London: Sampson Low Marston & Co., Ltd., 1931), p. 344.

²⁷⁶Grimm, The Reformation Era, p. 592.

intervention was unwelcome in the colonies, and as a result, Governor Endicott submitted the colonial position:

We were at last constreyned for our own safetie to pass a sentence of banishment against them upon paine of death such was their dangerous and desperate turbulence to religion and to the state civill and ecclesiastical . . . they would not be restrained but by death.²⁷⁷

Although toleration of dissenters was part of the question, another part of the problem lay with determination of legal jurisdiction. The policy of Charles II required that control of the king's courts remain under his centralized jurisdiction, while the colonies were eager to establish laws more appropriate to their ideas and circumstances. Charles remained a Stuart whose pride rested in the personal prerogative, whose power and law extended wherever his subjects flew his flag.

It is evident that Charles was eager to use religion as a means to further his foreign policy. Toleration on the domestic scene meant that Catholics would hold office and assume the dignities and privileges associated with position. The Test Act was a warning to Charles, that he was moving into dangerous territory. The persistent question of religion and the abject fear of the imminent return of Catholicism created much unrest among members of Parliament. Parliament was made up of eyewitnesses to the brutality and

²⁷⁷ Great Britain, Calendar of State Papers Colonial (London: Public Record Office, 1660), pp. 8-10.

bloodshed that comes from religious war and persecution. Any threat to the delicate balance of peace within England aroused the worst fears among the lawmakers. Roland Bainton aptly characterizes the state of mind that prevailed:

Englishmen would not tolerate Catholics because they did not trust Catholics to be tolerant of Protestants, however much a Catholic might aver his tolerance, the suspicion could not be allayed that if he were given power he would revert to the Inquisition . . . and the stake.²⁷⁸

The revelation of a scheme to overthrow the Protestant monarchy, called the "popish plot," served only to reinforce London's worst fears. The plot was a strange fabrication concocted by two "mountebanks" who drew up an authentic looking manuscript which contained details of a Catholic plot to bring down the monarchy of Charles II. The plan played on the worst imaginings of the English, including setting fire to London, an Irish Catholic uprising, and a Protestant massacre. The plausibility of the plot stirred the public mind into a malevolent frenzy. The murder of Sir Edmund Bury Godfrey, who had been assigned to investigate the case, further substantiated the reality of the threatened terror. Catholics, Jesuits and others suspected of Catholic conspiracy, were rounded up and tried. Thirty-five were executed. Titus Oates, the master-mind of

²⁷⁸ Roland Bainton, The Travail of Religious Liberty (Philadelphia, The Westminster Press, 1951), p. 30.

the plot, was rewarded with a lifelong pension for his patriotic performance.²⁷⁹

Parliament produced a resolution, which Charles was obliged to sign, outlawing any Catholics within ten miles of London or Westminster. He also stated to the Parliament: "It shall always be my study to preserve the Protestant religion and to advance and support the interest of my people."²⁸⁰ Charles died in 1685 and James II became king.

Although James II was a Catholic, he never had opportunity to enter into the intrigues of his elder brother. James' pro-Catholic moves were immediately obvious to his enemies. Both his own personality and history betrayed him. James suspended the Test Act and appointed Catholics wherever he pleased. However, the king continued to tolerate dissenters and encouraged their participation in public life.²⁸¹ The king's program was offensive to the high Tories, and the anti-Catholic Whigs as well. The crisis came when James' Catholic wife gave birth to a son, and baptized him as a Catholic. The Whigs and Tories then deserted the king and offered his throne to James' Protestant daughter, Mary, and wife of the Dutch William of Orange.

²⁷⁹ Maurice D. Lee, Jr., The Cabal (Urbana, Ill.: University of Illinois Press, 1965), p. 238.

²⁸⁰ A Collection of the Parliamentary Debates in England 1668-1679 (London: 1739), I, 229.

²⁸¹ Palmer and Coulton, History, p. 152.

The removal of James II from the throne is popularly known as the "Whig Revolution of 1688," although most of Parliament, both Whig and Tory, took part.²⁸² William was a popular and successful Protestant leader of the Dutch against Catholic forces on the Continent. He led an invasion force into England, and James fled the country.²⁸³ The significance of the Whig Revolution of 1688 and the issuance of the Bill of Rights had direct bearing upon the American Revolution and the formulation of the written constitution of the United States of America. The new king, William III, was not concerned with the Stuart obsession toward "divine right," but was more involved with halting French Catholic aggression in Europe.²⁸⁴ He willingly conceded many of the Crown's prerogatives to the "Whig Revolution."²⁸⁵

The Toleration Act of 1689 along with the Bill of Rights comprise the current status of the English Monarchy in terms of religious establishment.²⁸⁶ In addition, in the act of settlement of 1701, no Catholic could be king of England. This unprecedented act effectively spelled the end to the House of Stuart and any possible return to Catholic rule. However, the fears within the populace were not entirely put to rest until the nineteenth century when the Test Act was repealed. Antagonism between Irish and English people,

²⁸²Palmer and Coulton, History, p. 152.

²⁸³Ibid.

²⁸⁴Ibid., p. 153.

²⁸⁵Ibid.

²⁸⁶Ibid.

however, continues to focus upon their respective religions. The current civil strife in Ireland had its beginnings in the seventeenth century under Cromwell. It has cost countless thousands of lives, and currently shows little hope of being solved. The Test Act and Irish problem were dealt with under Queen Victoria and the power of the world empire made the English less fearful of internal takeover by external powers, including the Pope. A strong nation can afford to be tolerant, so long as that toleration is extended to everyone. The bloodless revolution of 1688 proved that a nation could survive with both an established church and a policy of toleration for all faiths, so long as church and state are not excessively entangled within one another's affairs. The example was a bold step toward the establishment of democracy in England, and an experience well-noted by the framers of the American government a century later.

PHILOSOPHICAL BASE

There is some dispute concerning what part John Locke played in the Whig Revolution. Later scholars say his writings were published to justify the act from a philosophical standpoint. At any rate, Locke had great influence upon later historical events, especially in the revolutions in America and France. Locke's Letter Concerning Toleration, which he published in 1667, is said to be his finest expression concerning the separation of church and state. He said:

Liberty of conscience is every man's natural right. . . . Since only God Himself can determine which is the true faith, men must be guided by the light of their own reason and the dictates of their own consciences . . . (. . . not the will of their rulers in the matters of religion.)²⁸⁷

Men, he insists, must save their own souls. Locke held that nothing earthly can compare with the fate of his eternal soul. But Locke denies that fate is of any concern to the government, or that any church can stake a claim to the only route to salvation. Rather, Locke propounded the principle of voluntary association, whereby the religious person would be allowed to freely associate with whatever faith he feels will be most acceptable to God.²⁸⁸ In this Locke broke with the medieval concepts which had been founded on the close interdependence of church and state. From Locke's time forth, the only ruler over a man's allegiance to religion would be reason and the human heart.²⁸⁹

Another work that came to have influence over the American and French view of the state, and as a consequence, the church, was Locke's Second Treatise of Government (1690).²⁹⁰

Basing his concepts on the laws of nature, Locke concluded that there could be a strong justification for revolt against rulers.

²⁸⁷L. J. Macfarlane, Modern Political Theory (New York: Barnes and Noble, 1973), p. 60.

²⁸⁸Ibid. ²⁸⁹Ibid. ²⁹⁰Ibid.

By providing a rational basis for revolt, without reference to the authority of any Church and independent of (although buttressed by) Scriptural texts, Locke unwittingly played an important part in turning the Christian political tradition of natural law into the secular tradition of natural rights, and in changing the emphasis from obligation and submission to authority, to the assertion of rights and the questioning of claims to authority.²⁹¹

Although Locke did not consider his rationalism as inconsistent with Christianity, he opened the way for a type of rationalism to develop which would allow government to be based upon reason, rather than God's will and upon scripture.²⁹² Locke's writings had a singular effect upon the thinking of Thomas Paine, James Madison, and Thomas Jefferson, as well as Jean Jacques Rousseau. There are direct quotations of Locke's terminology in the Declaration of Independence, and his theories are sprinkled liberally in The Federalist, as well as amply incorporated in the Constitution of the United States.²⁹³

On the eve of the first American Constitutional convention in 1787, the European Respublica Christiana had disintegrated in the face of the emerging nation states.²⁹⁴ Some degree of religious conformity continued, based on the historic principle of cuis regio, eus religio.²⁹⁵ The

²⁹¹Macfarlane, Modern Political Theory, p. 60.

²⁹²Latourette, History of Christianity, p. 983.

²⁹³Palmer and Coulton, History, pp. 286-87.

²⁹⁴Grimm, Reformation Era, p. 572.

²⁹⁵Ibid., pp. 590-91.

Augsburg concept became more form than substance as the practice of Toleration began to spread and the secular arm began to rely upon the power of the military and economics. Europe was comprised of a multiple patchwork of religious representation. Toleration as a practice ranged from the coercive rule of the Inquisition in some areas, to the freer air of the Dutch Republic.²⁹⁶ Religious wars became less frequent, but the traditions, memories, and habits of war were transported as painful psychological residue with the luggage of the settlers of the new world.

European strife had its effect upon the inhabitants of the colonies by furnishing a constant flow of immigrants, as well as providing more fuel for supporters of civil and religious liberty. Most observers agree that the European religious climate had a direct influence upon philosophies expressed in the Constitution and Bill of Rights in the United States.²⁹⁷

In a religious sense, the philosophical base was provided with a built-in controversy: establishment versus the principle of voluntarism. The world had never been witness to the manner of civil-religious arrangement that took form in America. The English colonies were mainly Protestant and varieties of extreme Protestantism accurately reflected a

²⁹⁶ Grimm, Reformation Era, p. 591.

²⁹⁷ Palmer and Coulton, History, pp. 285-288; Latour-ette, History of Christianity, pp. 962-963.

diversity of European roots. Rhode Island and Pennsylvania contained more religious liberty than European countries. Toleration was better understood and more freely practiced than religious liberty. "Toleration" was predicated upon the favor of the sovereign, whereas religious liberty presupposed inalienable rights possessed by the citizen. A high philosophical wall between the two concepts had to be breached before intelligent debate could take place concerning civil liberties, most especially freedom of expression. Although the concepts were being aired, there was little application of religious liberty, and there were frequent incidents where the concept of Toleration was in doubt. Latourette indicates that:

In more than half the thirteen colonies one or another church was fully established or given preference . . . but . . . enforcement was weakening. The separation of Church and State was foreshadowed.²⁹⁸

Cleric and political theorist alike seized the opportunity for new beginnings. Men like Jefferson, Madison, and Paine saw in America the opportunity for building the ideal society: "because of its predominantly Reformed rootage, American Protestantism . . . was seeking to build an ideal Christian society."²⁹⁹

Protestant extremism helped to shape the emerging nation, in terms of activism and individualism. The

²⁹⁸Latourette, History of Christianity, p. 962.

²⁹⁹Ibid., p. 963.

Judeo-Christian ethic formed the mold for morals, ideals, and institutions. Before 1750, all higher education was church-related. Theoretical foundations were laid for democracy and the Revolution through the dissemination of the doctrines of radical Protestantism. Latourette continues:

For example, in New England the clergy was preaching the rights which came from nature's God, the theory that all men are born free, the duty of encroachment on those rights, and the popular element in government. While many of the clergy looked askance at pure democracy, the radical Protestantism . . . seeking . . . to carry through the distinctive principles of the Reformation, salvation by the faith of the individual and the priesthood of all believers, underlay and permeated the democracy which characterized the United States.³⁰⁰

Harold Grimm gives a great deal of credit for the philosophical move from Toleration to freedom of religion. Williams concluded that the government had no right to enforce a religious creed and each individual should be free to act in religious matters guided by the dictates of his own conscience.³⁰¹ Grimm continues:

Freedom was for him [Roger Williams] absolutely essential for the spread of the gospel. . . . Because he drew a sharp distinction between the church and the state, maintaining that only the few regenerate belonged to the former [the Church], he advocated complete separation of church and state.

The separation of church and state, in turn hurried the process of the state; and the secularization of the state was accompanied by the secularization of the entire culture of Western civilization. . . .³⁰²

³⁰⁰ Latourette, History of Christianity, p. 963.

³⁰¹ Grimm, Reformation Era, pp. 562f. ³⁰² Ibid.

Robert G. Torbet is more explicit in his claim for the Baptist influence in the Constitution, especially where it touches separation of church and state.³⁰³ However, the record is also clear that they could not have accomplished the goal without the strong support and leadership of liberal Presbyterians and enlightened Anglicans such as Madison and Jefferson. Western civilization also reflects influence by Luther, Zwingli, Calvin, and Loyola.³⁰⁴

Torbet is essentially accurate in his contention that:

The logical corollary of the doctrine of religious liberty is the principle of separation of church and state. As minority groups in the sixteenth, seventeenth, and eighteenth centuries, Anabaptists and Baptists had learned the serious restrictions upon religious liberty which a state can place upon an individual or a congregation. . . .³⁰⁵

The conclusion was finally drawn that complete separation of the church from the state would provide the best opportunity to develop the ideal religious condition. Concurrent with the separatist concept is the absence of any claim by the church upon the state for financial support. Similar thoughts were expressed by Thomas Jefferson as he sought to explain democratic ideas to the Europeans in his

³⁰³ Robert G. Torbet, A History of the Baptists, Revised (Valley Forge: The Judson Press, 1963), p. 489.

³⁰⁴ Grimm, Reformation Era, p. 568.

³⁰⁵ Torbet, A History of the Baptists, p. 489.

Notes on the State of Virginia (1787). His thoughts concerning liberty of the mind form a bridge from Europe to the new world, as he argues against coercion in church-state relationships:

Subject opinion to coercion: whom will you make your inquisitors? . . . and why subject it to coercion? To produce uniformity. . . Difference of opinion is advantageous in religion. The several sects perform the office of a censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children since the introduction of Christianity have been burnt, tortured, fined, imprisoned; Yet we have not advanced one inch toward conformity.³⁰⁶

Jefferson's concern for future generations of Americans who might face the same kind of terror inspired him to head off such a confrontation. Possibly, the states could follow the lead of Pennsylvania and New York, who had devised the practice of "no establishment of religion." He predicted:

The spirit of the times may alter, will alter. Our rulers will become corrupt, our people careless. A single zealot may commence persecutions, and better men be his victims. It can never be too often repeated, that the time for fixing every essential right on a legal basis is while rulers are honest and ourselves united.³⁰⁷

A next logical step would be for the representatives of the states, "honest and united," to formulate a constitution of such endurance that European church-state aberrations might never be repeated in the new nation.

³⁰⁶Thomas Jefferson, Notes on the State of Virginia, ed. William Peden (Chapel Hill: University of North Carolina Press, 1954), p. 160.

³⁰⁷*Ibid.*, p. 161.

Thomas Jefferson and two other Virginians share the credit for the existence of the "establishment clause" in the First Amendment: George Mason and James Madison. Mason, a wealthy Virginia planter, was well-versed in the law. He was said to hold the "clearest understanding" of republican government of anyone in the state. He was clearly the mentor of the two younger legislators.³⁰⁸

Jefferson (1743-1826), son of a prosperous Virginia landowner, received his higher education at the College of William and Mary.³⁰⁹ During adolescence he had spent two years learning Latin and Greek in the home of a Tory clergyman, James Maury. Jefferson's tutor was the plaintiff in the Penny Parsons court case, which demanded more money for the clergy from the state treasury. Patrick Henry was lawyer for the defense who had "lost" when the court had awarded a penny to the plaintiff.³¹⁰ Fawn Brodie contends that the contentious Rev. Maury is probably one of the prime sources for Jefferson's anticlerical stance.³¹¹ Jefferson sought the destruction of the power of the established Anglican

³⁰⁸ Robert A. Rutland, ed., The Papers of George Mason, (1725-1792) (Chapel Hill: University of North Carolina Press, 1970), I, cxix.

³⁰⁹ Fawn M. Brodie, Thomas Jefferson, An Intimate History (New York: W. W. Norton & Co., Inc., 1974), pp. 55, 129.

³¹⁰ Ibid. ³¹¹ Ibid.

Church as one of his prime goals during the Revolution (1776-1778).³¹² One of his initial acts after he became governor of Virginia (1779-1781) and a member of the Board of Visitors of William and Mary, was to fire the clergy and to place the school in the hands of a more scientific leadership. As a lawyer he was well aware of the English Common Law provisions contained in the Virginia legal code.³¹³

By the time Jefferson was elected to the Virginia Legislature in 1774, his philosophical position had reached the point of recognizing a distinction between "natural rights" which the individual has the capacity to exercise by himself, and another classification of rights which cannot be safely enjoyed without society's protection.³¹⁴ The social compact theory recognized the first rights as reserved to the individual and are inalienable, but the second class of rights are partly given up in return for the security provided by membership within the society. Therefore, the citizen no longer had to surrender his rights to the state; "he remained sovereign in a sovereign society."³¹⁵ Later, as Jefferson was asked to apply his philosophy to the writing of

³¹² Brodie, Thomas Jefferson, pp. 55, 129.

³¹³ Ibid.

³¹⁴ Gilbert Chinard, Thomas Jefferson, the Apostle of Americanism, 2nd. ed. rev. (Boston: Little, Brown and Company, 1939), pp. viii-ix.

³¹⁵ Ibid.

the national constitution, he extended the concept of individual civil liberties to include individual, sovereign states as they form a federal government. In order for the individual state to receive the advantage of more security against potential foreign enemies, it retained its sovereignty, yet yielded certain rights in return.³¹⁶

George Mason lent his voice and considerable influence to the development of philosophical bases that provide foundation for church-state separation. Mason was a scholarly Virginia planter, much in the mold of Jefferson. Little is known of his philosophical background, other than its expression through his concern for human rights, and especially through freedom of religion. In 1784, he supported Madison's attack on state support for "teachers of the Christian Religion."³¹⁷ In 1787, Mason attended the Philadelphia Constitutional Convention, but because the main Constitutional document did not contain a Bill of Rights, he said he would rather chop off his right hand than to sign.³¹⁸ Madison published a pamphlet, "Objections to the Constitution," which contained the specifics of Mason's concern with the first draft. Mason's stand undoubtedly influenced Madison's stance toward support of inclusion of Amendments that were called the Bill of Rights.

³¹⁶Chinard, Thomas Jefferson, p. ix.

³¹⁷Rutland, Papers, pp. cxxiii-cxxiv.

James Madison (1751-1836), born in Orange County, Virginia, was educated at the school later called Princeton. Madison, who served in the Virginia Legislature, was instrumental in the rewording of Article XVI in George Mason's version of the Declaration of Rights. The young lawyer also served in the Continental Congress, the House of Representatives, and drafted the "Memorial and Remonstrance" against the religious assessment bill of 1785. He attended the Virginia ratifying convention in 1788, and supported Jefferson's program. Madison also produced the first Bill of Rights which was presented in the first meeting of Congress, amending the Constitution. According to Meyers:

Madison remained among the finest and firmest American voices of the eighteenth century liberal tradition: the tradition of natural rights and social impact, bills of rights and constitutional government. The prime article of that faith was embodied in the final clause of the Virginia Declaration of Rights and the opening clause of the First Amendment . . . freedom of conscience under nature's distant God.³¹⁹

The same author points to the philosophical ancestors of Madison as Locke, Harrington, Montesquieu, Grotius, Coke, Blackstone, Bacon, Newton, and others.³²⁰ He possessed an excellent liberal education, and had access to a well-chosen library.³²¹ The job of the founders of the nation was to

³¹⁹Marvin Meyers, The Mind of the Founder: Sources of the Political Thought of James Madison (New York: The Bobbs-Merrill Co., Inc., 1973), p. xix.

³²⁰Ibid. ³²¹Ibid.

translate worthy principles into laws and institutions with the materials provided by history.³²²

As Madison and the other Founding Fathers worked through the different aspects of republican government, it occurred to them that power in the hands of the majority could be used to oppress the minority. Madison and the others sought to remove such error from republican form of government and to give it workable structures. Madison thought the key to workability lay in the concept of civil rights. Integral to the concept was his illustration: "In a free government the security for civil rights must be the same as that for religious rights."³²³

Or as Meyers suggests, the resolution in the case of religious rivalries need only be a stand off: "the multiplicity of sects" competing for members and for recognition serves to keep religion out of politics. No sect can have a monopoly on political power, "nor strike out in fear,"³²⁴ so the principle of voluntaryism (of the Baptists) is practical. Meyers suggests that a common core of faith somehow emerges from all the competition and dialogue:

Although it would seem to be enough for Madison-- as for Jefferson--if the political sum of the religious differences were zero, i.e., if private conscience were left strictly free to choose the God of Nature or the

³²² James Madison, The Federalist Papers (New York: The New American Library, Inc., 1961), p. 322.

³²³ Meyers, The Mind of the Founder, p. xxxii.

³²⁴ Ibid.

God of Wrath, twenty gods or none, any moral code consistent with the social order and the equal rights of all. Even absurd or pernicious opinions can be tolerated as long as they are not armed with public power or embodied in acts of violence.³²⁵

In a letter to William Bradford, one of Madison's Princeton colleagues, Madison reveals his changing attitude toward church and state.³²⁶ The letter requests a copy of the Pennsylvania Constitution, and expresses a deep interest in the founding of religious Toleration. He also put forward the question, Is an ecclesiastical establishment absolutely necessary to support civil society in a supreme government? And how far is it hurtful to a dependent state?³²⁷ The letter was the first of a series he wrote as he prepared to shift from the conventional view that government supported religion. He was not yet satisfied with the arguments for free inquiry at the expense of religious truth. His opinions showed a rapid development in his next letter to Bradford, in a little over a month. He said that "Ecclesiastical establishments tend to great ignorance and corruption." In the same letter he reported that in a neighboring county, Culpeper, five or six Baptist ministers had been imprisoned for expressing their religious sentiments. He had made efforts to free them, although he did not share their faith. His

³²⁵ Meyers, The Mind of the Founder, p. xxxii.

³²⁶ Ralph Ketcham, James Madison, A Biography (New York: The Macmillan Co., 1971), pp. 55-56.

³²⁷ Ibid.

immediate concern was with the concept of "liberty of conscience."³²⁸ Ketcham explains in detail:

A Baptist elder had been jailed for praying in a private home and for good measure, his host was committed as well. Elijah Craig . . . had been arrested while "at the plough," jailed and fed rye bread and water. At another time he was arrested in the pulpit If Madison wrote precisely when he spoke of religious Toleration in December 1773, and "liberty of conscience" . . . that his study . . . helped him from the condescending idea of toleration to the more liberal concept he was to implant in the Virginia Bill of Rights in June, 1776.³²⁹

By April, Madison was telling Bradford that the mental capacities of the free colonies were better than those that had established churches. He said, "Religious bondage shackles and debilitates the mind and unfits it for every noble enterprise, every expanded prospect."³³⁰

Madison's mental momentum toward unlimited civil and religious liberty was given further impetus through his careful choice of philosophical and polemical publications. His reading included: Adam Ferguson's An Essay on the History of Civil Society (Edinburgh, 1767); Joseph Priestly's An Essay on the First Principles of Government: and on the Nature of Political, Civil, and Religious Liberty (London, 1768); Josiah Tucker's Tracts; Philip Furneaux's Essay on Toleration. It is believed that these writers helped Madison

³²⁸ Ketcham, James Madison, p. 57.

³²⁹ Ibid., p. 58.

³³⁰ Ibid.

in his intellectual move from a stance of toleration to that of free expression. Furneaux, for example, extends logically the idea of religious liberty to its rational limits by his argument that the state has no right whatever to restrain expressions of conscience.³³¹ Whether the writers led Madison to his liberal position, or merely confirmed him in the notion, he utilized the same arguments as he presented his ideas in 1776, 1785, and in 1780 as he defined freedom of expression.

Madison is often referred to as "the Father of the Constitution." Meyers agrees that he did the most of anyone to prepare what resulted from the Philadelphia Convention. His arguments helped to shape the form the federal union would take in such a way as to preserve the essential sovereignty of the states. His arguments were repeated as the Constitution made its rounds among the state ratifying conventions by way of his contributions to the Federalist Papers. Again, at the Virginia ratifying convention. The Bill of Rights came from his pen with some modification, but through support of the Bill Madison won the trust of many of those who had refused to vote for ratification.³³²

As a legislator, leader, and philosophical scholar James Madison perceived that freedom of thought and expression

³³¹Ketcham, James Madison, p. 66.

³³²Meyers, The Mind of the Founder, pp. 7-8.

could not exist inside the bleak grey walls of the religious establishment. In addition, "the founder" came to realize that religion itself could never be free of the threat of coercion by the state so long as it depended upon the state for its legitimacy and financial support. An enlightened society could attain its highest destiny as a moral and productive civilization only in proportion to its freedom from the shackles of intellectual and religious controls.

CHAPTER III

SHAPE OF THE CONTROVERSY

The conclusion of the Revolutionary War brought to a head need for unification of the former colonies into a single government. The Continental Congress took steps leading to a written constitution. Prominent among issues that emerged from constitutional formulation was separation of church and state. Although the Constitution practically excluded the separation question, the Bill of Rights stated flatly that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."¹ Instead of resolving the church-state question for all time, inclusion in the Bill of Rights assured prominence in the Constitutional debate characteristic of the democratic experience. The controversy became national in 1789.²

THE CONSTITUTIONAL BASIS

Use of a written covenant or compact was customary by early American colonists. Many looked toward Magna Carta

¹U. S., Constitution, Amendments, Article I.

²William Warren Sweet, Religion in the Development of American Culture 1765-1840 (New York: Charles Scribner's Sons, 1952), pp. 50ff.

and the English Bill of Rights for inspiration. John Locke's theories suggested since revolution nullifies previous compacts, men become free to make new ones. Most state constitutions predate the federal constitution and seven state constitutions contained separate bills of rights.³ The Congress had managed to operate during the war under the Articles of Confederation. The articles were a temporary legalization of the Confederacy.⁴

The ad hoc government that served during the Revolution was considered powerless to hold together or administrate the new nation. Congress was given no power to enforce tax collection. It, therefore, had no credibility among the states beyond an advisory status. The states had permitted the loose organization limited status, but enforcement was beyond its scope. To the credit of Congress, it passed enduring and significant educational legislation. The Northwest Land Ordinance of 1785 provided for proceeds of government land sales to be applied to the national debt. One section of each township was set aside for the benefit of public education.⁵ James Madison was appalled that the original draft proposed another section be set aside for the support

³ Alfred H. Kelley and Winfred A. Harbison, The American Constitution (New York: W. W. Norton & Co., Inc., 1963), pp. 95f.

⁴ Ibid., p. 101.

⁵ Thomas A. Bailey, The American Pageant: A History of the Republic (Boston: D. C. Heath & Co., 1967), p. 133.

of the clergy.⁶ The proposal was defeated, but that it was proposed, augured the religious question would emerge a viable political issue.

Without radical revision, Congress, existing under Articles of Confederation, could not function as a national government. At war's conclusion, Congress and the states possessed a revolutionary mandate to provide a structure for governing the nation. A crucial crossroads had been reached prior to call for a convention. The words of Madison reveal the sorry state of the nation's affairs as he wrote to Governor Edmund Randolph of Virginia:

Our situation is becoming every day more and more critical. No money comes into the federal treasury; no respect is paid to the federal authority; and people of reflection unanimously agree that the existing confederacy is tottering to its foundation. Many individuals of weight, particularly in the eastern district are suspected of leaning toward monarchy. Other individuals predict a partition of the states in two or more confederacies. It is pretty certain that if some radical amendment cannot be revised and introduced, one or another of these revolutions . . . will take place.⁷

Pressures catalogued by Mr. Madison produced a call from Congress to the states for representatives to meet for the purpose of revising the Articles of Confederation. On May 25, 1787, fifty-five delegates from thirteen states assembled in Philadelphia and convened the first constitutional

⁶Leo Pfeffer, Church, State & Freedom (Boston: Beacon Press, 1967), p. 120.

⁷Frank Donovan, Mr. Madison's Constitution, the Story Behind the Constitutional Convention (New York: Dodd, Mead & Co., 1965), p. 8.

convention.⁸ In Philadelphia were assembled some of the best minds in America: George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton. Thomas Jefferson was in Europe, with John Adams, but their influence was reflected in the final document.

Early in the proceedings the Articles of Confederation were scrapped in favor of an entirely new constitution. The document emerged after a period of seventeen weeks and was submitted to the states for ratification. As the proposed constitution made its rounds, most recurring of objections to ratification was the absence of a bill of rights. By 1787 most state constitutions embodied specific guarantees for protection of individual liberties. An attempt for a federal bill of rights during the convention by George Mason of Virginia, failed unanimously. The chief argument in justifying the omission was expressed by Alexander Hamilton in The Federalist:

. . . bill of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than granted. For why declare that things should not be done which there is no power to do? [He added]. . . . The Constitution is itself . . . a bill of rights.⁹

⁸ Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 3rd. ed. (New York: W. W. Norton & Co., Inc., 1963), p. 115.

⁹ Alexander Hamilton, The Federalist Papers (New York: The New American Library, Inc., 1961), pp. 513-515.

Hamilton's reasoning rested upon the assumption of the continued control of the government by the people:

"Here in strictness the people surrender nothing; and as they retain everything they have no need of particular reservations."¹⁰ Colleagues Jefferson and Madison did not agree. Jefferson maintained a constant stream of correspondence with Madison from Paris, in which he dealt explicitly with the instrument produced by the constitutional assembly. A point of great concern centered upon failure of the convention to express explicitly:

. . . without the aid of sophisms . . . freedom of religion, freedom of the press. . . the eternal and unremitting force of the habeas corpus laws, and trials by jury. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth.¹¹

Jefferson's subsequent letters dealt with the subject of a bill of rights in more detail. After giving careful thought as to the provisions of a bill of rights, Jefferson offered a seriatim rebuttal to Madison's reasons against inclusion of a bill of rights.¹²

Madison spent months making rounds to ratifying conventions as an observer and participant. In fall of 1787,

¹⁰Hamilton, The Federalist Papers, p. 513.

¹¹To James Madison, Paris, December 20, 1787, The Works of Thomas Jefferson, ed. Paul Leicester Ford (New York: [no publisher listed], 1904), V, 371.

¹²To Madison, Paris, July 31, 1788, *Ibid.*, V, 426; To Madison, Paris, August 28, 1789, *Ibid.*, V, 492.

supporters of the Constitution (the Federalists) saw evidence of hopes for easy passage and early ratification slipping away. State by state Federalists experienced uncertainty. Madison undertook to exercise persuasive powers by defending the Constitution both through personal confrontation and by the pen. Madison visited Mount Vernon and solicited and received the clearly stated support of George Washington on behalf of constitutional passage.¹³

Among others whom Madison successfully persuaded was an influential Baptist, the Reverend John Leland. Leland shared Jefferson's concern for a specifically stated bill of rights, especially for religious freedom. Madison had been concerned during the convention that premature insertion of amendments would effect the scuttling of the entire government. However, Leland secured Madison's agreement to press for an amendment concerning religious freedom in return for the Baptist's considerable support and influence.¹⁴

Madison participated in another campaign tactic which proved effective - The Federalist. A collaborative publication effort on the part of John Jay, Alexander Hamilton, and James Madison, The Federalist Papers produced invaluable commentary on the proposed Constitution. Published in serial

¹³Ralph Ketcham, James Madison, A Biography (New York: Macmillan Co., 1971), pp. 248-50.

¹⁴Ibid., p. 251.

form, the material dealt entirely with the proposed new government, article by article. Appearing under the pseudonym of "Publius," the federalist case was strengthened by a clearly-stated case for ratification. The Federalist was collected into a one-volume edition and circulated prior to the convening of the new Congress.¹⁵

Madison's position underwent a metamorphosis during the campaign for the Constitution's ratification. In the beginning, Madison assumed powers granted in the Constitution were an automatic guarantee of personal liberties. Also he feared too much specificity might lead to the loss or denial of some rights. Madison at last came to advocate passage of a bill of rights.¹⁶

Upon realization that English law was valid to a point, an American Bill of Rights would insure individuals against tyranny of the legislative, as well as the executive. Under British law, however, a bill of rights protected against the executive only. Furthermore, freedoms of speech and of conscience had come to mean more in America than in England.¹⁷ The enlarged concepts were stated in language applicable to the nature of the Republic, which rests upon the people.¹⁸ The bill defined limits of the legislative, and insured that

¹⁵Ketcham, James Madison, p. 239.

¹⁶Ibid., p. 290. ¹⁷Ibid. ¹⁸Ibid.

the rights of the minority were secure against oppression by the majority.¹⁹

Once sufficient states had approved the newly-formed Constitution, the government was organized; an executive was chosen, and a quorum of Congress met in its first session. Congress opened business on April 8, 1789. It was early May, however, before James Madison served notice concerning amendment proposals. Madison proposed amendments sifted from notes and summaries gathered at state ratifying conventions. The amendments were appropriately seasoned with his particular Madisonian philosophy and colored with the rich hues of Jeffersonian idealism.²⁰

States with strong constituencies of established churches were loathe to devise a strong statement setting forth religious freedom:

New Englanders intent on preventing Congressional interference with their state-supported churches, and others who still cherished government assistance to religion in general, sought a clause on religious liberty merely prohibiting establishment of a national religion and restraining Congress from prescribing articles of faith or a mode of worship.²¹

Madison's predilection of writing amendments which had support of a majority of people in the states, made a Bill of Rights a practical reality. Twelve amendments were submitted to the states, and ten were ratified. The Bill of

¹⁹ Ketcham, James Madison, p. 290.

²⁰ Ibid., p. 291. ²¹ Ibid.

Rights, through the approval of two-thirds of the states, was embedded forever in the Constitution. The article concerning religion in the First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.²²

The language fulfilled perfectly the goal of Madison and Jefferson: "Absolute separation of church and state and total exclusion of government aid to religion."²³ Madison's intent is clarified by his words concerning the census of 1790:

As to those who are employed in teaching . . . the duties of religion, there may be some indelicacy in singling them out, as the central government is proscribed from interfering in any matter whatever, in matters respecting religion. . . .²⁴

While serving as President in 1811, Madison vetoed the granting of a parcel of government land to a Baptist Church in Salem, Mississippi. He said in explanation:

The Bill . . . comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies. . . .²⁵

Thomas Jefferson had the most enduring effect upon interpretation of the First Amendment. In a letter to the Danbury, Connecticut Baptists Association, he wrote:

²²Kelley and Harbison, The American Constitution, Appendix 2, p. 1010.

²³Irving Brant, James Madison, Father of the Constitution, 1787-1800 (New York: Bobbs-Merrill Co., Inc., 1950), p.272.

²⁴Ibid. ²⁵Ibid.

Religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or worship, that the legitimate powers of government reach actions only, and not opinion. I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make "no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.²⁶

The final phrase has been picked up by disputants within the controversy and used as a term to describe an actual or an ideal condition or relationship of church and state. Perhaps the most accurate and revealing historical truth lies in the First Amendment as a means of "building" the "wall" between the two institutions of society. There was no solid "wall" at the time of Jefferson's presidency, although a trend toward disestablishment was growing in the states. Insertion of Jefferson's opinion into statements and opinions of twentieth century decisions of the United States Supreme Court tend to magnify the importance of the Founder's ideas. The constitutional principle which lay at the heart of the First Amendment meant simply, freedom of religion, the heart of Jeffersonian philosophy. His words are not to be used as a cudgel against religion or a particular denomination. Dumas Malone sums up Jefferson's motives this way:

He was no Voltaire, no Thomas Paine. If he was ever drawn into an attack on any Church it was not because it was a religious organization, but because

²⁶To Danbury Baptist Association, January 1, 1802, Writings of Thomas Jefferson, Edited by Andrew A. Lipscomb and Albert E. Bergh (Washington: Memorial Edition, 1903-1904), XVI, 281-82.

it had assumed a political character, or because it limited, in some way or another, the freedom of the mind--on which, as he never ceased to believe, the progress of the human species toward happiness depends.²⁷

The history of the controversy over public support of higher education comes to rest at the feet of Jefferson, sharply accenting treatment time has afforded this vital constitutional principle. How one construes "the wall" determines to a great extent the position one assumes in the controversy. Some commentators quote the Jefferson statement as authoritative, others argue discounting it as "metaphor." Other writers ignore the concept altogether.

CONSTITUTIONAL SYNTHESIS

The time span between creation of the Constitution and synthesis into jurisprudence of constituent American states was a lengthy and complex interim. Limited dispute was made over condition of religious freedom in the states through the nineteenth century. Guaranties of the First Amendment were held by courts to apply only to Congress. If James Madison had had his way in the Senate in 1789, the First Amendment would have then been binding on the states. However, pro-establishment forces prevailed. Brant explains:

Consequently the guaranty of religious freedom did not become binding on the states until after the Fourteenth Amendment forbade them to deprive any person of life, liberty, or property without due process of law.

²⁷ Dumas Malone, Jefferson and His Time, Jefferson and the Rights of Man (Boston: Little, Brown, and Company, 1951), II, 111.

Religious liberty, as defined in the First Amendment, was held by the Supreme Court to fall within that protection.²⁸

Both Jefferson and Madison were consistent in their hard-line position for absolute separation of church and state. Their statements undoubtedly had considerable influence upon the states. Eventually, by 1833, total disestablishment was a reality in the states. The influence is evident in the wording of state constitutions of the period, which were more explicit than the national instrument. The Supreme Court acknowledged Jefferson's term, "wall of separation," as "an authoritative declaration of the scope and effect of the amendment."²⁹ The notion of separation was not entirely property of the Founding Fathers. The states assumed themselves to accomplish what had been impossible through Congress. The pattern of disestablishment is clarified somewhat when charted chronologically, as seen in Table 1 (page 117). The chart displays a persistent movement toward disestablishment from 1775 through 1833.³⁰ The figures do not reveal that non-established churches had been allowed right to worship without harassment in most states. Although the public no longer paid taxes for church support, some

²⁸ Brant, James Madison, p. 273.

²⁹ Reynolds v. United States, 98 U.S. 145, 164 (1878).

³⁰ Bailey, The American Pageant, p. 75.

Table 1
Established (Tax-Supported) Churches*
in the Colonies 1775

		When Disestablished
Massachusetts (incl. Maine)	CONGREGATIONAL	1888
Connecticut		1818
New Hampshire		1819
Rhode Island	NONE	
New York	ANGLICAN (in N. Y. City and in three neighboring counties)	1777
New Jersey	NONE	
Delaware		
Pennsylvania		
Maryland	ANGLICAN	1777
Virginia		1786
North Carolina		1776
South Carolina		1778
Georgia		1777

(Note the persistence of the Congregational establishment in New England; also, there was no Roman Catholic Establishment in any of the colonies.)

*Bailey, The American Pageant, is the source of these dates, p. 75.

states retained a religious test for public officials, and all church property was declared tax-exempt.

Disestablishment fulfilled popular sentiment, for until the Fourteenth Amendment was passed in 1868, there was no provision in the Constitution to prevent: (1) re-establishment of a religion, (2) the new establishment, or (3) the limiting of religious expression. Leo Pfeffer attributes movement toward disestablishment to the "unitary principle of separation and freedom."³¹ He maintains that it "was as integral a part of American democracy as republicanism, representative government and freedom of expression."³² He further asserts that by 1868 synthesis between the First Amendment principles and the attitude of the American people toward church and state had been "finally established."³³ Pfeffer's statement makes the point that "separation" had become a basic ingredient in American life. Disestablishment did not, however, end distrust or bigotry, nor draw an end to controversy in religion, or between religions. Pluralistic accommodation which accompanied disestablishment meant that some religions were generally accepted, while others bore the brunt of second-class citizenship. Synthesis would be aided, in time, by the application of the Fourteenth Amendment, but such adjustment was far from complete in 1868.

³¹Leo Pfeffer, Church, State, and Freedom, rev. ed. (Boston: Beacon Press, 1967), p. 142.

³²Ibid. ³³Ibid.

THE CATHOLIC INFLUX

Possibly hastening action of the states toward disestablishment was an incursion of great numbers of Roman Catholics from Ireland and Eastern Europe. Americans were culturally unprepared to welcome Catholics under terms other than those consistent with philosophies found in the Federal Constitution. Those ideas which had molded and colored the American dream, rejected traditions of coercion and repression which many Catholic newcomers and their prelates represented. Immigrants retained customs, languages, and Catholic education in the schools. Immigrant poverty provided concern to the Puritan ethic. Catholics clustered together in ghettos and grew in number.³⁴

Although the First Amendment was not specifically directed against Catholicism, its provisions contradicted a number of Catholic principles. Native-born Americans had certain expectations of the newcomers. Primarily, immigrants were expected to be hard-working, thrifty, honest, and to assimilate democratic ideals. It was thought one could not accomplish all that by keeping to one's self, retaining old customs, old languages; even the old religion was suspect. Catholics were expected to send their children to public

³⁴ Samuel Eliot Morison, Henry Steele Commager, and William E. Leuchtenberg, The Growth of the American Republic (New York: Oxford University Press, 1969), I, 452.

school where the young could be properly indoctrinated with rules of living in a democratic society.³⁵

Early in the century, Bishop John Hughes of New York led a fight for aid to Catholic parochial schools on the basis that public schools were actually Protestant and anti-Catholic in nature. He met with failure and thus began the church's own system of schools, separate from the public school system.³⁶

Anti-Catholicism escalated from the level of paper and pulpit propaganda into violent mob action. Nativists and "Know Nothings" assumed the responsibility for organized resistance to the Vatican in the United States. On August 10, 1834, the Reverend Lyman Beecher preached three anti-Catholic sermons. On the following day a mob burned an Ursuline convent.³⁷ In Philadelphia two Catholic churches were destroyed, and people were killed on both sides, as Christian once again killed Christian. The Civil War provided a temporary lull in the nativist movement, giving way for a time to the abolitionist cause.³⁸

³⁵ Morison, Commager, and Leuchtenberg, The Growth of the American Republic, I, 452.

³⁶ Edwin Scott Gaustad, A Religious History of America (New York: Harper and Row Publishers, 1966), pp. 212-13.

³⁷ Thomas T. McAvoy, C.S.C., A History of the Catholic Church in the United States (Notre Dame, Indiana: University of Notre Dame Press, 1969), p. 134.

³⁸ Gaustad, Religious History, p. 209.

In the political sense, Roman Catholic leadership did little to dispel concerns of Americans. Pope Gregory XVI (1831-1846) published in 1832 an encyclical that added fuel to the pamphleteers' fire. He said:

. . . From that polluted fountain of indifference flows that absurd and erroneous doctrine, or rather raving, in favor and in defense of liberty of conscience, for which most pestilential error the course is opened by the entire and wild liberty of opinion, which is everywhere attempting to overthrow of religious and civil institutions.³⁹

The above words seem directed at philosophies supporting the American and French Revolutions, but to the American whose memories contained the struggle for independence and more recent debates concerning the shape the Republic would take, the Pope exacerbated religious ferment.⁴⁰ As if Gregory's words were not enough, his successor, Pius IX, published in December, 1864, the Syllabus of Errors as a supplement to the encyclical, Quanta Cura.⁴¹ Among the eighty headings were included what the Pope considered the errors of the time.

The Pontiff rejected as error, claims that the church had overreached itself by inserting its influence in secular affairs, and by the utilization of temporal force.

³⁹Elwyn A. Smith, Religious Liberty: The Development of Church and State Thought Since the Revolutionary Era (Philadelphia: Fortress Press, 1972), p. 103.

⁴⁰Ibid.

⁴¹Latourette, A History of Christianity, pp. 1099-1100.

He rejected also the idea that the civil power should have full control over the education of youth even in Christian states; that public schools should be free of the authority of the clergy.⁴² Pius would not accept the concept that church and state should be separated, or that moral and civil codes should be separated from religious authority. Odious to the Pope also was the concept of majority rule--"superiority of numbers." Pius IX saw no reason for disestablishment or toleration, especially where the Roman Church was the established institution.⁴³

Latourette's analysis of the Syllabus helps to place light upon the source of so much disquiet in America, over the pronouncements that came from the Vatican. He says:

. . . it is clear that Pius IX was holding to the position which the Roman Catholic Church had been taking for centuries in its conflict with the state, in its claim to be the sole custodian of saving truth, in its struggle against what it regarded as heresies, and in its efforts to shape youth and direct the lives of Christians. The area of conflict had broadened.⁴⁴

When the Pope's words were translated into actions of local Catholic priests and laymen, it appeared that America's pattern of religious liberty was incompatible with Roman Catholicism.⁴⁵ Papal decrees ultimately took away lay control of church property, and the right for the local

⁴²Latourette, A History of Christianity, pp. 1099-1100.

⁴³Ibid. ⁴⁴Ibid., p. 1101.

⁴⁵Ibid., p. 1098.

congregations to choose their priest. Such tight external control seemed to be tyrannical, and therefore un-American.⁴⁶ Bishops in 1857 reacted to the American viewpoint in a pastoral letter, strongly objecting to Catholic treatment as citizens. Catholic leaders complained about state interference with the Catholic requirement that the bishop, not the trustees, own church property; that priests and nuns were not allowed to teach in public schools; and finally expressed their side of the aid to education question.⁴⁷

They objected to:

The force resorted to compel Catholic children in such (public) institutions to attend Protestant worship and to receive Protestant instruction, and the preventing of such children attending Catholic worship . . . the hardship of compelling Catholics to contribute to the support of free schools which they conscientiously believe bad in system and which are Protestant in their textbooks. . . Compelling Catholics to contribute by tax, to school libraries representing the Catholic religion as false . . . The exclusion of Catholics from being actually represented pro-rata in legislative bodies.⁴⁸

Catholic strategy consistently involved removing Protestant influence from public schools and lobbying for financial support of parochial schools. Nineteenth century Catholics concentrated upon development of a parochial school system. Late in the century the Pope required each parish

⁴⁶ Gaustad, Religious History, p. 211.

⁴⁷ Ibid., p. 1100.

⁴⁸ McAvoy, A History of the Catholic Church, pp. 181-82.

to provide a school which would make Catholic religion the core of their teaching. In opposition, states were obliged to remove all vestiges of religious expression from public schools, thus abandoning them to neutrality, or secularism.⁴⁹

The reason that the issue has endured over the span of a century and a half turns on the core of the matter. Smith's understanding of the difficulty between the participants in the controversy lies in the realm of civil liberties. He says:

The touchstone of Freedom was conscience. If conscience should be taken captive by the spirit of dogma, restrictive education, authoritative rule or coercion, freedom would die. Here was America's precise and most elemental quarrel with Roman Catholicism; in the American view--not solely the Protestant view, much less than that of a tiny band of propagandists--the Catholic conscience, both in principle and in fact was captive to the pope.⁵⁰

It was assumed Protestantism had given birth to republicanism in government; Catholicism reflected the support of the old monarchical tyrannies, and had no understanding or appreciation of civil liberties.⁵¹ It seemed perfectly logical to men like Lyman Beecher that in order for Catholics to understand the meaning of America they should be assimilated in the "common schools."⁵² The Jeffersonian basis for a republic such as the United States depends upon

⁴⁹McAvoy, A History of the Catholic Church, pp. 181-82.

⁵⁰Smith, Religious Liberty, p. 101.

⁵¹Ibid., p. 105. ⁵²Ibid.

an "enlightened" citizenry. Therefore, it is required for the citizens to learn the meaning of great documents, such as the Constitution.⁵³ In addition, they are to be permitted freedom of thought and expression, so that the Republic may continually renew itself.⁵⁴ Reluctance on the part of the Catholics to "mingle" with the natives promoted the suspicion that they were indeed subject politically to a foreign power and therefore could not be trusted to become "good citizens."⁵⁵

BILL OF RIGHTS AND THE STATES

Passage of the Fourteenth Amendment in 1868 provided the first step toward application of the Bill of Rights to states. The amendment was particularly important with regard to the First Amendment. The measure placed limitations upon the states with regard to the securing of the natural rights of citizens through due process. Concern for the rights of the individual (Madison, *supra*, p. 104) surfaced through the new amendment. Though over seventy years passed before the principle of absorption permitted the First Amendment to become legally operative in the several states, application of the test of reasonableness would require that the guaranty of civil freedoms be extended to include religious freedom. The

⁵³Smith, Religious Liberty, p. 101.

⁵⁴Ibid. ⁵⁵Ibid.

critical clause in the Fourteenth Amendment deals with "due process" and "equal protection of the laws." It states:

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; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁶

The Fourteenth Amendment emerged as the product of generations of dispute, controversy, and war over the nature of the Union. The old antifederalist arguments had compacted into states' rights positions. In his final decision, Chief Justice John Marshall ruled the Bill of Rights could not be applied to states. It was the Court's contention that the Constitution was framed for the government of all the people, but did not pertain to the states unless specifically stated.⁵⁷ The result of the decision was to keep such cases in state courts for a considerable portion of the century.

Marshall's successor, Justice Catron, held that in the case of religious liberties against a city ordinance, protection is "left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in respect to the states."⁵⁸

⁵⁶ Kelley and Harbison, The American Constitution, Article XIV, Section 1, p. 1013.

⁵⁷ Barron v. Baltimore

⁵⁸ Permoli v. Municipality No. 1 of New Orleans, 3 Howard (44 U. S.) 589 (1845): 14.

The nation, in 1857, was far different from 1789. Social and political forces began to lay their disputes at the door of the Supreme Court. Retreat to the letter of the Constitution for justification of decisions was becoming more difficult. Although the Dred Scott case may be a poor example of justice, it provides a turning point in the manner in which the Court dealt with the cases that came before it.⁵⁹ Chief Justice Taney based his opinion upon preconceived social and political ideas, instead of the Constitution. In addition to its social philosophy, it vetoed an act of Congress based on that stance. The civil war was fought before the Fourteenth Amendment was passed which rendered the decision null and void.

The Fourteenth Amendment became the instrument whereby the Bill of Rights placed limitations upon states with regard to liberties that had been promised in the founding of the nation. The Amendment became the keystone to the unification of the states under a Constitution consistent with its philosophical foundations.⁶⁰

The first cases that were brought before the Supreme Court, pleading the protections of the Bill of Rights under the due process and free exercise clauses of the Fourteenth

⁵⁹Dred Scott v. Sandford, 19 Howard (393) 1857.

⁶⁰Kelley and Harbison, The American Constitution, p. 504.

Amendment, were rebuffed. In the Slaughterhouse Cases, the Court maintained the historic narrow position of previous years, which denied the application of the Bill of Rights in State matters.⁶¹ Due process, however, experienced a gradual emergence as case after case came before the Justices over the years. The position that the other amendments were absorbed under the Fourteenth came into its own in the mid-twentieth century.⁶²

Attention was focused, for a time, on the First Amendment. In 1876, threat of the emerging strength of Catholics in the East prompted President Grant to speak out against tax support of sectarian schools.⁶³ The House of Representatives moved rapidly under leadership of James G. Blaine to amend the First Amendment to read:

No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto . . . shall ever be under the control of any religious sect. . . nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁶⁴

⁶¹Kelley and Harbison, The American Constitution, pp. 502f.

⁶²Ibid., p. 506.

⁶³Anson Phelps Stokes, Church and State in the United States (New York: Harper and Bros., 1950), Vol. II, p. 722.

⁶⁴U. S., Congressional Record, 44th Cong., 1st Sess., (1876), IV, 5245, 5246, 5595.

The House passed the motion overwhelmingly, but when it reached the Senate, there was insufficient support for passage. The measure died. However, a number of states including New York, adopted the wording in their constitutions, and some of the "Blaines" persist to the present.

One of the laments of those who are encouraging public support of church-related colleges, is that the state constitutions, in many instances, are more specific in the exclusion of public funds for education than is the First Amendment. Public pressure, however, has caused some states to change their Constitutions in recent years, simply for the purpose of allowing aid.⁶⁵

The historical record does little to clarify the original intent of the Fourteenth Amendment. Neither a study of debates which produced it, nor historical narrative, reveal the full intent of its creators. The importance for contemporary America, therefore, lies not in its origins, but in the use to which the courts have assigned it: the implementation of the Bill of Rights in the Constitution of the United States.⁶⁶ The Fourteenth Amendment has made it possible for this nation to utilize an eighteenth century document written in the context of a medieval past, and modify it through interpretations that render it as current as the present moment.

⁶⁵See following chapters four and five.

⁶⁶Michael R. Smith and Joseph E. Bryson, Church-State Relations: The Legality of Using Public Funds for Religious Schools (Topeka, Ka.: National Organization on Legal Problems of Education, 1972), p. 19.

EMERGENCE OF HIGHER EDUCATION

William Warren Sweet sees emergence of higher education as a transition from the ancient Greeks, preserved by the church through the Middle Ages to its apex in the Age of the Universities. From there it came to America by way of Paris, Oxford, and Cambridge.⁶⁷ John S. Brubaker and Willis Rudy describe the phenomenon as a synthesis of the old traditions and the "native American conditions" that emerged as "a unique system of education."⁶⁸ That system democratized an institution that had been previously reserved for the wealthy and titled, and made it available for the first time to the great American middle class.

New England provided the first colleges sponsored by sectarian interests which were primarily concerned with the training of ministers and teachers for the perpetuation of the denomination. The curriculum rigidly emphasized religion and the classics to the exclusion of science until mid-century developments made liberal inroads in the curriculum.

During the colonial era, nine colleges were begun. Table 2 (page 131) displays in chart form the origins and control of the nine. Harvard was the first, with other New

⁶⁷ Sweet, Religion, p. 162.

⁶⁸ John S. Brubaker and Willis Rudy, Higher Education in Transition: A History of American Colleges and Universities 1636-1976 (New York: Harper and Row, Publishers, 1976), p. 3.

Table 2
Colonial Colleges*

Name	Location	Open or Founded	Denomination
Harvard	Cambridge, Mass.	1636	Congregational
William and Mary	Williamsburg, Va.	1693	Anglican
Yale	New Haven, Conn.	1701	Congregational
Princeton (College of New Jersey)	Princeton, N. J.	1746	Presbyterian
Pennsylvania (The Academy)	Philadelphia	1751	Non-sectarian
Columbia (King's College)	New York City	1754	Anglican
Brown (Rhode Island)	Providence, R. I.	1764	Baptist
Rutgers (Queen's College)	New Brunswick, N.J.	1766	Dutch Reformed
Dartmouth	Hanover, N. H.	1769	Congregational

*Bailey, The American Pageant, p. 77.

England sectarian colleges following in rapid succession. In Philadelphia, the Academy (later the University of Pennsylvania) was the lone non-sectarian college of the period. Benjamin Franklin's struggle with the Presbyterians centered about the Academy which he founded.⁶⁹ They were at odds with Franklin concerning the philosophical stance of the Academy. At the outset his intent was to avoid any monopoly of any single religious sect. His emphasis was to be upon science and basic morality, not religion.

Yet, his associates managed to inject religion into the charter of the Academy. . . . He was determined that the school would never suffer from denominationalism and sought out a rector who was an educator and a moralist, rather than a religious partisan.⁷⁰

Harvard, Yale, and Princeton used as prototypes Emmanuel College, Cambridge, "the most Puritan of the Cambridge colleges," and the alma mater of John Harvard.⁷¹ William and Mary began with a royal grant of 12,000£ from its namesakes, King William III and Mary Stuart. Later income was supplemented from taxes on the fur trade and the tobacco industry. Connecticut provided Yale with proceeds from a prize ship, and Massachusetts divided bank taxes among Harvard, Bowdoin, and Williams. In addition, the colonies,

⁶⁹ Melvin H. Buxbaum, Benjamin Franklin and the Zealous Presbyterians (University Park, Pa.: Penn State Press, 1975), p. 156.

⁷⁰ Ibid.

⁷¹ Sweet, Religion, p. 162.

and later states, gave tax exemptions to the colleges, as well as direct financial supplements. Harvard benefited in direct tax grants from the colony of Massachusetts the sum of \$115,797.73.⁷²

There is no controversy concerning that some precedent exists for the receipt of public monies by private and church-controlled colleges and universities. The practice was consistent with initial close ties of education, religion, and government. The tendency persisted as a rare exception. One Catholic partisan, Virgil Blum, S. J., has managed to isolate a list of isolated instances where private education was assisted by government.⁷³ Blum argues that this kind of giving was not unusual throughout the nineteenth century into the early twentieth. He cites the following instances of the trickle of public money falling into the hands of sectarian institutions:⁷⁴

Union (Presbyterian) College received from New York a total of \$350,000 over a period of twenty years, from 1795 through 1815; Columbian (Baptist) College, received land grants in 1832, and in 1833, Georgetown (Catholic) College received a grant of real estate, from the federal government.

⁷²Brubaker and Rudy, Higher Education in Transition, p. 36.

⁷³Virgil C. Blum, Freedom in Education, Federal Aid for All Children (New York: Doubleday & Company, Inc., 1965), p. 103.

⁷⁴Ibid.

New York assisted the Baptists and Unitarians through aid to the colleges of Rochester and St. Lawrence. In 1870, Congress voted a grant to Wilberforce (Methodist) University; and in 1909, McPherson (Lutheran-Baptist) College was the beneficiary of \$62,000 in tax money. The same year, St. Olaf (Lutheran) received \$13,000 in city tax funds.⁷⁵

These gifts reflect a genuine desire on the part of the contributors to encourage, for the public good, the institutions of higher learning. The connection was not always made between assistance of church-related schools and the constitutional prohibition of the establishment of religion.

Private support and tuition was the general source of sustenance for private higher education during the last century. During colonial times, not all tuitions or gifts were paid in currency. It was not unusual to witness a young man riding up to the door of his college on a wagon loaded with sacks of grain, or a bale of cotton. There are records of tuition paid in kind with sheep and pewter. Promissory notes were often signed in lieu of tuition, long before the custom became institutionalized.⁷⁶

The initial growth occurred in the private sector and the pattern persisted throughout the bulk of the nineteenth century. Successive religious revivals coupled with

⁷⁵Blum, Freedom in Education, p. 103.

⁷⁶Brubaker and Rudy, Higher Education in Transition, pp. 36-37.

the westward movement of the population and the advent of industrial growth in the West produced a proliferation of small colleges along the cutting edge of the frontier.⁷⁷

Brubaker depicts the situation of "an oversupply of struggling colleges of meager income and limited curriculums." He goes on to describe conditions of lowered standards as a consequence of the lack of funds and "educational mismanagement." He adds finally the predictable comment, "Mortality was very high."⁷⁸

Contributing to this growth immeasurably was the knowledge by the founders that the college was inviolable from state interference, or takeover. The issue was settled by the Supreme Court of the United States in the Dartmouth case.⁷⁹ Dartmouth was a private church-related college (Congregational) which had been faced with the prospect of a state takeover through a pretext of its charter revocation.⁸⁰ In 1769, King George II had granted trustees of the institution a charter under the English constitution. However, the colonial governor was allowed an ex officio seat on the Board of Trustees. The controversy resulted in revocation of the charter by the State Legislature. The Legislature added a

⁷⁷ Brubaker and Rudy, Higher Education, pp. 36-37.

⁷⁸ Ibid.

⁷⁹ Dartmouth v. Woodward, 4 Wheaton 518 (U.S.1819).

⁸⁰ Ibid.

large number of partisan members to the Board, thereby enabling New Hampshire to control the school. In 1816, the "old trustees," having lost in the state court, appealed to the U. S. Supreme Court. It was the Court's opinion that the charter comprised a proper contract under the Federal Constitution. The Court also held that the Legislature's act converted a "literary institution" controlled by "literary men into a machine entirely subservient to the will of the government. . . ." ⁸¹ Chief Justice Marshall concluded:

. . . The acts of the Legislature of New Hampshire . . . are repugnant to the Constitution of the United States; and the judgement in this verdict ought to have been for the plaintiff. ⁸²

The Court reversed the decision of the New Hampshire Supreme Court in a five to one decision. ⁸³ The question of church-state establishment was not at issue in the case to the degree that the Justices felt obligated to discuss it. However, from the vantage point of educational history, the effect of the case touches on dimensions of freedom of expression, and autonomy of operation, which fall under the First Amendment.

A number of economic effects have been mentioned as resulting from the Dartmouth case. Traditionally, it opened

⁸¹ Dartmouth v. Woodward, 4 Wheaton 518 (U.S. 1819).

⁸² Clark Spurlock, Education and the Supreme Court (Urbana: University of Illinois Press, 1955), p. 26.

⁸³ Ibid.

the way for permanent endowments, as well as encouraged growth in private and church-related colleges. Clark Spurlock, however, maintains that the growth would probably have occurred without the court decision.⁸⁴ He draws his inference from such factors as the beginnings of American industrial growth, the New England Renaissance, and the humanitarian revolt. He also noted the increase in population through birth and immigration.⁸⁵ He says:

So it may be conjectured, with these influences prevailing, there would have been a marked extension of the prevailing denominational and private schools without Chief Justice Marshall's helpful decision.⁸⁶

On top of the economic effects, the traditional statement notes that the decision made the way clear for states to create universities chartered under their own constitutions and supported by and controlled by the public. Again, there is a great deal of evidence to show that despite the development of some state universities, the decision "checked the development of state universities for at least fifty years."⁸⁷

Notable exceptions, however, were the universities of North Carolina and Virginia. North Carolina counts its beginning from the date of its charter of 1774. In Virginia, the doors opened in 1825.⁸⁸

⁸⁴Spurlock, Education, p. 26. ⁸⁵Ibid.

⁸⁶Ibid. ⁸⁷Ibid.

⁸⁸Gilbert Chinard, Thomas Jefferson, The Apostle of Americanism, 2d Ed. Revised (Boston: Little, Brown, and Co., 1939), p. 508.

Thomas Jefferson's dream for education was that the United States be led by people trained as elites in a distinctly American university. He proposed to build such an institution in Virginia. The plan was to be a "broad, liberal, and modern institution which would command public support."⁸⁹ The idea was the capstone of a pyramid of a comprehensive educational system which provided primary, secondary, college, and university levels.⁹⁰ The curriculum balanced languages, literature, mathematics, science, and surveying. Also allotted in the legislation were state scholarships for selected students.⁹¹

Gilbert Chinard points out the significance of the unique institution and observed that:

. . . For the first time in the history of the country, higher education was made independent of the Church, and to a large extent the foundation of the University of Virginia marks the beginning of the secularization of scientific research in America. . . . The man who wished to be remembered as the "father of the University of Virginia" was also, in more than one sense, the father of the State Universities which play such an important part in the education of the American democracy.⁹²

Although Jefferson's plan effectively excluded control of public universities by sectarian interests, most public institutions prior to the Civil War observed ceremonies that closely resembled Protestant worship. Chapel

⁸⁹Chinard, Jefferson, p. 508. ⁹⁰Ibid.

⁹¹Ibid., p. 512. ⁹²Ibid.

attendance was usually required, and it included sermons, Bible-reading and prayers.⁹³ During the same period it was generally accepted that the clergy held most top administrative posts in higher education. The custom continued until the late nineteenth century when the nature of higher education began to require more business expertise.⁹⁴

Brubaker and Rudy note the example of the University of Michigan at the mid-nineteenth century mark.⁹⁵ They quote Henry P. Tappan's description of the school as "neither religious nor political in its character, but purely scientific and literary."⁹⁶ Tappan was noted as one who carried on a "running battle" with sectarian interests over control of higher education. Strict requirements by private foundations in return for their "largess" forced denominational schools into improving their standards, and becoming broader-based institutions. Henry S. Prichett, administrator of the Carnegie wealth, refused to include sectarian institutions in the Carnegie pension plan.⁹⁷ Such institutions had difficulty in passing Prichett's exacting requirements. He was also concerned that some churches planted more colleges than they could financially support, thus lowering standards in the

⁹³Richard Gabel, Public Funds for Church and Private Schools (Washington: The Catholic University of America, 1937), p. 279.

⁹⁴Brubaker and Rudy, Higher Education in Transition, p. 360.

⁹⁵Ibid., p. 361. ⁹⁶Ibid. ⁹⁷Ibid., pp. 361-362.

sectarian sector. The magnetic pull of foundation aid, however, caused many institutions to dilute their loyalties to religion and assume non-sectarian status.⁹⁸

The two Morrill Acts of 1862 and 1890, respectively, were the products of concern by many educators and prominent business leaders over the limitations of the traditional curriculum of higher education.⁹⁹ They found it inadequate to meet the needs of the majority of the masses desiring to apply a post high school education in the changing industrial and agricultural complex. Congress, in 1862, provided for each state which was willing to accept the terms of the act, land or script in lieu of land, in the amount of 30,000 acres for each congressional representative. Property in excess of that utilized by the institutional plant could be sold and the money could be applied to permanent endowment. The "land grant colleges" were to be public institutions which emphasized agriculture and mechanics, as well as the classics, science, and military science.¹⁰⁰

The Morrill Acts were followed in Congress by the Hatch Act of 1887, which set up state agricultural experiment

⁹⁸Brubaker and Rudy, Higher Education in Transition, pp. 361-362.

⁹⁹Act of July 2, 1862, Ch. 130, 2 Statute 503.
Act of August 30, 1890, Ch. 841, 26 Statute 417, 7 U.S.C. Secs. 321-28 (1958).

¹⁰⁰Ibid.

stations; the Smith-Lever Act of 1914 aided agricultural study and home economics; the Smith-Hughes Act of 1917 and the George-Barden Act of 1946 provided funds for vocational education.¹⁰¹

The land grant colleges appeared at a time of great need and change. Living standards had begun to rise, and increasing demands were made upon the private sector to provide permanent endowment, buildings, and better qualified faculty. The three historic ways of support of higher education have been through endowments, taxes, and tuitions.¹⁰² The Morrill acts accomplished establishment of a great number of colleges throughout America. Land, or script was supposed to be sold and converted to stock of at least five per cent yield. Since land was cheap and time was of the essence, transactions were hurried, and receipts were often inadequate. In such cases states stepped in with additional funds.¹⁰³ The one notable exception to the "short fall" was Cornell, whose situation was such that the trustees could afford to hold its script until it reached the value of \$5,000,000.00. Had Cornell's example been typical, public higher education would have had a bright success earlier in its history.¹⁰⁴

¹⁰¹Pfeffer, Church, State and Freedom, p. 581.

¹⁰²Brubaker and Rudy, Higher Education in Transition, p. 376.

¹⁰³Ibid., p. 379. ¹⁰⁴Ibid.

According to Brubaker and Rudy, money has never been equally distributed among institutions of higher education:

. . . By the 1930's twenty universities were receiving 75 per cent of all foundation grants, the remaining 25 per cent going to 310 institutions, leaving 700 others without any subsidy at all. The General Education Board long made it a policy to disburse its funds by making additions to college and university endowments, but as costs mounted faster than additions it came to lose faith in this policy.¹⁰⁵

Sectarian colleges proliferated with shallow financial resources, thus producing a national complex of below-standard colleges. Many land grant colleges were burdened with scant finances, inadequate faculty, and low standards. In the South, public colleges were established for whites and for blacks. Tennessee and Kentucky placed "separate but equal" laws on the books. Later civil rights studies noted that there were "separate," but not "equal" situations all over the country. In the South it was imperative that normal schools be established for the training of teachers for the newly-established public school systems.¹⁰⁶

If the public black colleges had a rocky beginning, private black institutions were faced with geometric amplification of analogous troubles faced by white, church-related schools. The 1960 Federal Civil Rights Commission Report stated that:

¹⁰⁵ Brubaker and Rudy, Higher Education in Transition, pp. 377-379.

¹⁰⁶ United States Commission on Civil Rights, Equal Protection of the Laws in Public Higher Education (Washington, D. C., 1960), pp. 8-11.

The first definitive study of Negro education, published in 1916 found that "hardly a colored college meets the standards set by the Carnegie Foundation and the North Central Association." Only Fisk and Howard Universities and Meharry Medical School were classified as "colleges" at that date. Fifteen private and church-supported institutions are listed as "secondary" and "college" and fifteen others as offering college subjects. All of the latter, except Florida Agricultural and Mechanical College are church supported institutions.¹⁰⁷

With such challenging conditions prevailing in both private and public sectors, in black and white institutions, economic conditions at the turn of the century were crucial to the survival of American higher education. It was during this period that large personal fortunes were made, thus allowing money to be designated for higher learning. Millions of Victorian era dollars were donated in the name of such persons as Cornelius Vanderbilt, Johns Hopkins, Ezra Cornell, Leland Stanford, and James B. Duke.

In the twentieth century, large-scale giving took a different turn. Not millions, but now hundreds of millions of dollars were poured into philanthropic foundations by men like Carnegie, Rockefeller, and Ford. . . . spent their income. . . . not to found new institutions, but to strengthen old ones.¹⁰⁸

Financial development became a perennial part of college and university administration. The president did less and less fund raising, as financial development was placed into the hands of a special officer. In addition to occasional conspicuous gifts, most institutions depended upon

¹⁰⁷United States Commission on Civil Rights, Equal Protection of the Laws, p. 5 (footnote).

¹⁰⁸Brubaker and Rudy, Higher Education in Transition, p. 377.

special fund drives. The purpose for these was usually the endowment fund, and the target for the drives was the loyal alumni.¹⁰⁹

The financial health of the public institutions did not depend upon the donations of private individuals as did private institutions. Typically, one church-related college breaks down its income:

Alumni--27 percent; denominational support and foundations--20 percent; trusts--3 percent; other sources (corporations, foundations, individual church gifts and government)--9 percent.¹¹⁰

In public colleges and universities, the traditional source of support has come from: land grants and other public investments; legislative appropriations; federal research grants and contracts; and nominal student tuition. Conditions in higher education over the past decade have forced revisions in the traditional picture of sources of support whose solutions have created considerable controversy. The trend has been toward greater dependence upon government funding, in spite of its constitutional and political ramifications.

¹⁰⁹ Brubaker and Rudy, Higher Education in Transition, p. 379.

¹¹⁰ Lenoir Rhyne College, 1975 Loyalty Fund (Hickory, N. C.: Development Office, 1975). Promotional Folder.

FEDERAL SUPPORT IN THE ASCENDANT

At the turn of the twentieth century, higher education was typically private and church-related.¹¹¹ Until the early 1930's private higher education was the dominant force. The private sector controlled large endowments, maintained selective enrollments, and enjoyed a good reputation. When the Great Depression arrived, the student market was almost evenly divided between the two sectors.¹¹² Since then, growth in the private sector has slowed proportionately until the mid-1970's when it could control only 25 percent of the market.¹¹³

Most accounts attribute the surge of growth in public institutions to the initiation of federal money going to higher education. Demand for increased educational opportunity was expressed following World War II by returning veterans. A grateful Congress responded with passage of the Serviceman's Readjustment Act of 1943 (GI Bill of Rights).¹¹⁴ The law provided for tuition and other expenses to be paid directly to the college of the student's choice. There was no restriction at first as to payments being made directly to

¹¹¹The National Commission on United Methodist Higher Education, A College-Related Church: United Methodist Perspectives (Nashville, 1976), p. 63.

¹¹²Ibid. ¹¹³Ibid.

¹¹⁴Pfeffer, Church, State, and Freedom, p. 596.

schools, even divinity schools. Following the Everson and McCollum decisions, the law was changed to provide for payment to the veterans, leaving it to them to take care of tuition, and this pattern was followed in respect to Korean veterans.¹¹⁵ At the time of the writing of the law, categorized aid directed toward helping an individual was not considered contrary to the provisions of the First Amendment establishment clause. Other acts were passed during the 1940's and 1950's, such as The National School Lunch Act of 1946, The National Education Defense Act, the College Aid Act, and the Anti-Poverty Act.¹¹⁶ As the precedents were accumulated, Americans were becoming conditioned to accept and expect government assistance in the areas upon which they placed high public priority. This was especially true when threatened with a crisis.

On October 4, 1957, Russia announced the launching of a satellite weighing 184 pounds, which they called Sputnik.¹¹⁷ Russia had entered the space age with America as a humble spectator.¹¹⁸ The American educational system was singled out as the national scapegoat. While Americans concentrated on "frills," Russian schools were turning out

¹¹⁵ Pfeffer, Church, State, and Freedom, p. 596.

¹¹⁶ Ibid.

¹¹⁷ Bailey, The American Pageant, p. 953.

¹¹⁸ Ibid.

scientists and engineers.¹¹⁹ The United States entered itself in the space race through a crash program, and American V-2 rockets soon placed a tiny satellite into orbit about the earth, and the space race had a new contestant.¹²⁰

To the Congressional mentality, national defense was in serious jeopardy and steps must be taken to prevent any more "psychological Pearl Harbors."¹²¹ Consistent with Congressional policy of voting for educational aid only in a crisis, the National Defense Education Act of 1958 was passed.¹²² The rationalization carefully avoided usurpation of state constitutional responsibility for education, but it provided basic ingredients for a national defense based on an army of engineers and scientists.¹²³ Using the argument of national defense, Congress sidestepped the First Amendment question and voted \$887,000,000 in loans for college and university students, research grants, and language instruction. President Eisenhower was not influential enough to overcome Congressional aversion to undergraduate scholarships. No one was going to get a "free ride" on this Congress.¹²⁴ The same Congress, however, gave Korean War veterans opportunity for higher education with the extension of the GI Bill

¹¹⁹ Bailey, The American Pageant, p. 954.

¹²⁰ Ibid. ¹²¹ Ibid., p. 953. ¹²² Ibid., p. 954.

¹²³ Ibid. ¹²⁴ Ibid., pp. 953-54.

of Rights.¹²⁵ The program, begun as an ad hoc measure in 1943, soon began to assume dimensions of permanency.¹²⁶

Higher education, through maintenance of a low profile, managed to avoid much constitutional and political controversy that has characterized discussion over aid to private parochial education. Some of this can be attributed to the nature of the respective levels of the institutions, as well as the different patterns of their development. The lower levels of education formed easily-identifiable divisions: Catholic (primarily), and secular-Protestant.

"Perpetuation of pluralism" has been the watchword of proponents of public support of private colleges. Patrick E. McCarthy, the Chancellor of the Massachusetts Board of Higher Education, speaks of the concept as an initiative for public support. He describes the development of the idea:

Prior to World War II, public and private institutions of higher education moved in totally separate orbits. With the concentration on expanded access, national attitudes shifted to a point at which both public and private institutions were viewed as members of a single system. Such landmark legislation as the G.I. Bill did not discriminate between them and thus foreshadowed changes in federal and state attitudes toward large-scale higher education. A concept of pluralism has emerged from these new attitudes that places a high value on choice as well as on access, thereby producing in recent years an initiative for public financial support for both students and institutions in the private sector.¹²⁷

¹²⁵ Lawrence E. Gladieux and Thomas R. Wolanin, Congress and the Colleges: The National Politics of Higher Education (Lexington, Mass.: D. C. Heath and Co., 1976), p. 8.

¹²⁶ Ibid.

¹²⁷ Patrick E. McCarthy, "Higher Education: Expansion without Growth," Daedalus, 104, No. 1 (Winter 1975), 80.

The private sector was about 50 per cent in enrollments until mid-twentieth century, when it became alarmingly apparent that private education was beginning to decline in numbers. From what had been a virtual monopoly for private higher education, by 1972 it was only 24 per cent of total college enrollment in the United States.¹²⁸

The letter of the Constitution has been observed by Congress in the provision of federal support, not of:

. . . higher education per se, but rather to use it as an instrument to accomplish other purposes, the benefits. . . extended alike to public and private institutions that can accomplish the federal objectives.¹²⁹

Federal policy, therefore, was one of operating in the national interest. Research grants extended through the National Science Foundation, founded in 1950, provided a link between Federal money and higher education which helped develop advanced weapons systems and provide trained manpower for government leadership.¹³⁰ Through these grants the practice of federal aid edged its foot into the door of higher education. The ruse was deemed necessary, because supporters of the aid concept understood that political considerations

¹²⁸Richard Lyman, "In Defense of the Private Sector," Daedalus, 104, No. 1 (Winter 1975), 156.

¹²⁹Gladieux and Wolanin, Congress and Colleges, p. 5.

¹³⁰Martin Meryerson, "After a Decade of the Levelers in Higher Education: Reinforcing Quality While Maintaining Mass Education," Daedalus, 104, No. 1 (Winter 1975), 305.

prohibited direct financial subsidy.¹³¹ In method, supporters of the lower level of financial aid to education followed the indirect route, as well. They usually asked for indirect aid to specific areas such as bus transportation, school lunches, and textbooks.¹³² These areas of indirect aid have had their day in court, and although the flow of tax appropriations has not been completely cut off, there is considerable retardation.¹³³

Catholics resisted as "discriminatory" legislation which would assist public schools and which restricted aid to sectarian schools. Senator Robert Taft of Ohio sponsored a bill (S.472) in March, 1948, which had as its stated purpose:

. . . to authorize the appropriation of funds to assist the States and Territories in financing a minimum foundation education program of public elementary and secondary schools. . . .¹³⁴

Senate Bill 472 contained no specific inclusions or exclusions regarding sectarian aid. Once the bill had been brought to the floor, it was virtually riddled with attacks from opponents of parochial aid.¹³⁵ Senator Donnell of Missouri offered an amendment which effectively killed the bill. It read:

¹³¹Kelly and Harbison, The American Constitution, p. 974.

¹³²Ibid. ¹³³Ibid.

¹³⁴U. S. Congressional Record, 80 Cong., 1st Sess., 94 (1948), 3586.

¹³⁵Ibid., 3587.

That no funds appropriated under this act shall be disbursed in any state for the support or benefit of any sectarian or private school.¹³⁶

The amendment was followed up by the entry into the record of information gathered by the National Education Association and other organizations and individuals who opposed use of public funds in support of sectarian schools.¹³⁷

In the House, Representative Ralph Barden of North Carolina perennially persisted in efforts to pass similar educational bills.¹³⁸ His 1949 effort was bitterly attacked by Cardinal Spellman, who labelled the bill's supporters "bigots" and accused them of "a craven crusade of religious prejudice against Catholic children. . . ."¹³⁹ Barden's support by Mrs. Eleanor Roosevelt in her syndicated newspaper column aroused the ire of the Cardinal, who wrote a scathing letter to her in reply. The letter, released to the press, accused her of anti-Catholic prejudice, ignorance, and of "discrimination unworthy of an American mother." The Cardinal was unprepared for the wave of public reaction that came from all sides. He was forced to apologize to the former First Lady.¹⁴⁰

¹³⁶U. S. Congressional Record (1948), 3587.

¹³⁷Ibid., 3591-3594.

¹³⁸Kelley and Harbison, The American Constitution, p. 974.

¹³⁹U. S. Congressional Record, July 1949, A4855-56.

¹⁴⁰Pfeffer, Church, State, and Freedom, pp. 590-92.

Spellman evidently lost a great deal of influence following the unfortunate exchange. The Prelate did not renew efforts toward gaining assistance for parochial education until February, 1962, after John F. Kennedy was in the White House. Again, the Cardinal was rebuffed, following a bitter confrontation with Kennedy regarding aid to parochial schools.¹⁴¹

The President maintained the previous stand, which was that he believed in an America "where the separation of Church and State is absolute."¹⁴² Milton Konvitz saw irony in the contribution of Kennedy's election toward relaxation of tension between church and state: the election of a Catholic president "shattered an old image."¹⁴³ Certainly, the old image of nineteenth century "Papist Puppet" was belied by the presence of an Irish Catholic President who thought and acted independently of Rome. Konvitz may give too much credit to the Kennedy election for relaxation between Protestants and Catholics as he discusses the Johnson education bills which: "weaken, if they do not violate, the principle of church and state."¹⁴⁴ President Johnson possessed unusual skill and ability in guiding educational legislation through Congress. In addition to his years of experience,

¹⁴¹Milton R. Konvitz, Religious Liberty and Conscience: A Constitutional Inquiry (New York: The Viking Press, 1968), p. 7.

¹⁴²Ibid. ¹⁴³Ibid. ¹⁴⁴Ibid.

Johnson came into his first full term of office from a landslide victory over a weak opponent, and he pushed his "mandate" to the hilt. The irony is in the fact that a Protestant president provided the first blunting of the "wall of separation" rather than a Catholic.¹⁴⁵

President Kennedy's firmly-stated position against aid to parochial schools did not preclude his support of any federal aid to education. His program included substantial aid to elementary and secondary schools, federal loans for higher education facilities construction, and undergraduate scholarships awarded to students on the basis of need.¹⁴⁶ The program ran into immediate difficulty in Congress as it foundered on the twin shoals of religion and race. Although most of the controversy centered on the elementary and secondary level, Kennedy's package included scholarship and construction aid to public and church-related colleges which appeared to be constitutionally questionable. When the 1961 school bill died in the House Rules Committee, the higher education portion of the bill suffered the same fate.¹⁴⁷ In 1962, unencumbered with the "albatross" of public school measures, Congress passed a number of higher education aid

¹⁴⁵ Bailey, The American Pageant, p. 985.

¹⁴⁶ Kelly and Harbison, The American Constitution, p. 975.

¹⁴⁷ Gladieux and Wolanin, Congress and Colleges, p. 10.

bills. The legislation was aimed at providing money for student loans and limited types of construction assistance. Timing proved their undoing, however, as the Supreme Court produced the controversial "prayer decision" (Engle v. Vitale),¹⁴⁸ which called renewed attention to the First Amendment issue and the bill was sent back to committee where it died.¹⁴⁹

President Kennedy proposed in 1963 the National Education Improvements Act of 1963. The Act included a variation of facilities construction and expansion of the NDEA loan and fellowship programs, insured loans, work-study, and federal aid for teacher training. The measure, submitted by Kennedy, was signed by President Lyndon Johnson in 1963, just after his sudden elevation to the presidency.¹⁵⁰

Gradually a new policy in higher education emerged; equality of educational opportunity replaced national defense as a rationale for funding.¹⁵¹ The "Work Study Program" begun in 1964 was one of the first products of the new direction.¹⁵² The legislation initiated a recognizable partnership between the state and federal interests in higher education. Despite strong opposition to the "nondiscrimination

¹⁴⁸Engel v. Vitale, 370 U.S. 421 (1962).

¹⁴⁹Gladioux and Wolanin, Congress and Colleges, p. 11.

¹⁵⁰Daniel P. Moynihan, "The Politics of Higher Education," Daedalus, 104, No. 1 (Winter 1975), 133-34.

¹⁵¹Ibid., p. 133. ¹⁵²Ibid.

between public and private institutions, both were declared eligible. As 1963 drew to a close, a wedge had been driven into the "wall of separation" that opened the way for federal interest in all higher education, from church-related to public.¹⁵³ Gladieux and Wolanin hold that this legislation draws the curtain on any further controversy over church-state principles regarding higher education. They wrote:

The consideration of the 1963 legislation laid the foundation for future enactments. Programs for federally insured loans, work-study, teacher training, and college libraries would reappear in the 1965 legislation. The church-state issue with respect to higher education was largely laid to rest. The emerging concern with educational opportunity would edge closer to the center of federal policy. And the tradition of omnibus higher education bills considered in an atmosphere of muted partisanship would continue to be the hallmark of higher education policy through the 1960s.¹⁵⁴

The passage of the 1963 Higher Education Facilities Act failed to "lay to rest" the church-state controversy.¹⁵⁵ The issue was far from settled. There continued to be resistance in the Congress as later bills were offered, but the center of the controversy was shifted to the courts.¹⁵⁶ Aware that there was resistance to the Higher Education Facilities bill based upon constitutional grounds, sponsors of the measure asked for an opinion from the Secretary of

¹⁵³ Moynihan, "The Politics of Higher Education," Daedalus, pp. 133-34.

¹⁵⁴ Gladieux and Wolanin, Congress and Colleges, p. 11.

¹⁵⁵ Ibid.

¹⁵⁶ See following, Chapter five.

Health, Education, and Welfare.¹⁵⁷ The constitutional question involved the feasibility of federal construction grants being given to sectarian schools and colleges. The Secretary's memorandum supported the Administration's position. He ruled that government grants would be constitutional at the college level. The H.E.W. memorandum introduced the notion that a distinction between lower and higher education depends upon the degree of susceptibility to sectarian persuasion; i.e., the greater sophistication and maturity of the college-age student permits him to be more perceptive and resistant to proselytism.¹⁵⁸

Leo Pfeffer took exception to the Secretary's opinion on the basis of logic. He argued:

(1) The distinction between lower and higher education in respect to the church-state issue appears to be a novel one. . . . (2) The factors listed in the memorandum may well be relevant to a decision on the wisdom or desirability of according governmental aid at the higher level, but hardly to the question of constitutionality. (3) It is particularly difficult to comprehend the relevancy of the argument--often made--that aid at the college level is constitutionally permissible because "college enrollment does not have the power of state compulsion supporting it." If relevant at all, it would seem to point to a directly contrary conclusion. One of the arguments most asserted by Catholic spokesmen in support of their claim to governmental funds for parochial schools is that unless the government makes it financially feasible for Catholic children to

¹⁵⁷ Constitutionality of Federal Aid to Education in Its Various Aspects, Document 29, 87th Congress, 1st sess. (Washington: U. S. Government Printing Office, 1961), p. 6.

¹⁵⁸ Ibid.

attend parochial schools their religious liberty is being violated by being forced against their consciences to attend secular public schools pursuant to compulsory attendance laws. This argument is obviously absent where, as at the college level, there is no compulsion by law to attend.¹⁵⁹

The memorandum was politically effective in the passage of the Higher Education Facilities Act. But its real significance was not apparent until the concept surfaced in two landmark U. S. Supreme Court decisions concerning use of public funds in private educational facilities. The first was the Lemon v. Kurtzman (1971) in which it was determined that salary supplements paid to lower level parochial school teachers were unconstitutional.¹⁶⁰ The other case was Tilton v. Richardson, which was a direct constitutional test of the 1963 Facilities Act.¹⁶¹ In the 5-4 decision Chief Justice Burger's majority opinion drew the same distinction between higher and lower levels of educational understanding as had been expressed in the 1963 H.E.W. memorandum.¹⁶² Mr. Justice Burger contended: "There is substance to the contention that college students are less susceptible to religious indoctrination."¹⁶³

Aside from the constitutional implications, passage of the Facilities Act over constitutional objections, raised

¹⁵⁹ Pfeffer, Church, State and Freedom, p. 598.

¹⁶⁰ Lemon v. Kurtzman, 403 U. S., 602-671 (1971).

¹⁶¹ Tilton v. Richardson, 403 U. S. 672 (1971).

¹⁶² Ibid. ¹⁶³ Ibid.

by Senator Sam Ervin and others, had the effect of diverting such questionable legislation to the courts instead of resolving the difficulties during the legislative process. James Davis, commenting upon the process a decade later (1972), observed:

Congress has struggled for many years to serve two noble causes: to uphold the legal intent of the Constitution to separate the affairs of church and state, and to serve the needs of the public welfare in providing increased opportunity for private higher education of higher quality. In its earliest legislation, Congress expressed its deep concern for finding the proper Constitutional vehicle. In later legislation the need to provide greater Federal support for private institutions qua institutions of higher education has been ascendant, and the Constitutional question has been passed to the courts.¹⁶⁴

Having laid groundwork in 1963 and 1964, President Johnson, in January of 1965, sent his education message to Capitol Hill. In the message, he boldly requested the sum of over one billion dollars for the funding of the educational aid program. The Congress obliged him, and in April the Elementary and Secondary Education Act of 1965 (ESEA) became law.¹⁶⁵ In addition to masterful use of his considerable persuasive powers, which included the neutralization of constitutional opposition and fears of federal intervention,

¹⁶⁴ James R. Davis, "The Higher Education Amendments of 1972: A New Form of Aid for Private Colleges and Universities? Intellect, December 1972, p. 159.

¹⁶⁵ National Education Association, Special Report, "The Elementary-Secondary Education Act of 1965," April 22, 1965, p. 1.

Johnson linked the program to the War on Poverty. Traditional opponents of such programs were persuaded of its sectarian neutrality.¹⁶⁶ To set such fears to rest, the final section included a disclaimer which disallowed any funds for religious worship or instruction.¹⁶⁷

Following close on the heels of the Elementary-Secondary Education Act (E.S.E.A.) was the Higher Education Act of 1965.¹⁶⁸ The program utilized contracts, which allowed public and nonprofit institutions to establish programs for the purpose of encouraging qualified youths considered to be in exceptional financial need into a program leading to completion of "post-secondary" education.¹⁶⁹ Students were given a grant (Equal Opportunity Grant) if they proved need. In addition to student aid, libraries were given help in small colleges ("developing institutions"). The higher education bill was regarded a landmark signifying a national commitment to higher education.¹⁷⁰

Growth, in federal higher education expenditures, from 1954 to the mid-1960s, from a modest \$44 million to \$3.5 billion for all programs, was spread among the universe of American higher education.¹⁷¹ Following this, additional

¹⁶⁶ Bailey, The American Pageant, p. 985.

¹⁶⁷ Public Law 89-329, Section 408.

¹⁶⁸ Gladieux and Wolanin, Congress and the Colleges, p. 12.

¹⁶⁹ Ibid., pp. 12f. ¹⁷⁰ Ibid.

¹⁷¹ Moynihan, "The Politics of Higher Education," Daedalus, p. 129.

funds were committed, new programs devised, and new rationales have been promoted to maintain and enlarge existing programs to number in the billions of dollars.¹⁷²

The Higher Education Amendments of 1972 Bill was signed into law June 23, 1972, by President Richard Nixon. A patchwork of political compromise, the amendments extended most federal programs which were the residue of previous legislation. Some innovations were added, especially concerning assistance for needy students, community colleges, and a form of direct, generalized aid which proved very controversial.¹⁷³ Nixon had proposed in his education message of 1970:

I am also proposing a new National Foundation for Higher Education, funded with \$200 million in its first year, to give grants to colleges in support of excellence and new ideas.¹⁷⁴

Moynihan explained, "The object of the Foundation was to channel 'free' money to institutions of special merit.

In quite disproportionate measure this meant, private institutions."¹⁷⁵

Sponsors of the amendments were required to deal with such diversionary roadblocks as: antibusing amendments; "backlash" from campus activism; and the Administration's order of educational priorities. In 1969 President Nixon vetoed a higher education bill because it had exceeded his

¹⁷²Moynihan, "The Politics of Higher Education," Daedalus, p. 129.

¹⁷³Ibid. ¹⁷⁴Ibid. ¹⁷⁵Ibid.

budget. The primary problem in 1971-72 was to seek out and solve the main issues in higher education. The Amendments of 1972 incorporated the heart of three important studies which concerned higher education: The Carnegie Report;¹⁷⁶ The Rivlin Report;¹⁷⁷ and the Newman Report.¹⁷⁸

The Carnegie Report was the result of a study begun in 1967 to examine all aspects of higher education and to set projections up to the year 2000.¹⁷⁹ Both the Carnegie and Rivlin reports arrived at the primary concept of equal access to education and encouraged federal aid to education to include student tuition grants, work-study programs, and guaranteed loans.¹⁸⁰ The Newman Report was sharply critical of higher education. Still centering its attention upon student support, it asked the question which strongly influenced the Nixon Administration's view, "Will more money solve the problems affecting Postsecondary Education?"¹⁸¹ The

¹⁷⁶ Clark Kerr, Priorities for Action: Final Report of the Carnegie Commission for Higher Education (New York: McGraw-Hill Book Company, 1973).

¹⁷⁷ Alice Rivlin et al., Toward a Long Range Plan for Federal Financial Support of Higher Education (Washington, D. C., Department of Health, Education, and Welfare: U. S. Government Printing Office, 1969), pp. 166-68.

¹⁷⁸ Frank Newman et al., Report on Higher Education (Washington, D. C., Department of Health, Education and Welfare: U. S. Government Printing Office, 1971).

¹⁷⁹ Kerr, Priorities for Action, Passim.

¹⁸⁰ Ibid.; Rivlin, Long Range Plan, Passim.

¹⁸¹ Newman, Report on Higher Education, Passim.

Rivlin Report, released on the eve of the first Nixon Administration, agreed substantially with the Carnegie position on student aid and access. But the study fell short of endorsing institutional aid. According to the report, loans to church-related institutions were to some an acceptable alternative to unrestricted grants. The report duly noted that at the time, a legal and conceptual haze surrounded the question of federal aid to church-affiliated colleges; there is often a distinction drawn between general support of such institutions and categorical support. It is the distinction between "general" and "categorical" that has provided considerable debate between the public and private sectors and their spokesmen. The distinction is drawn in the Rivlin report which says:

Some people regard the distinction as important, feeling that aiding science, education, or language instruction at a church-related college does no violence to the Separation of Church and State since the money cannot be used for religious indoctrination. Others regard this distinction as unrealistic, pointing out that government support of non-religious programs releases institutional funds for other purposes, including religious teaching . . . helping students pay higher tuition fees is also seen as a method of aiding private church-related institutions indirectly without running into any Constitutional problems.¹⁸²

Gladieux observed that there were many candidates for the main issue, depending upon the source of concern: (1) the higher education lobby, representing primarily independent

¹⁸²Rivlin, Long Range Plan, pp. 66-67.

institutions, was concerned about the "financial crisis;" (2) the Administration concentrated upon needs for lower income students; (3) middle income students rated attention according to representatives Edith Green and John Brademas; (4) while Daniel P. Moynihan saw the need to "preserve excellence and to stimulate innovation and reform in higher education."¹⁸³ Hovering in the background of these issues was strong sentiment among some Congressional members to regard the Constitutional issue as primary.

Administration-sponsored provisions for aid to institutions apparently reflected an attempt to circumvent the Constitutional prohibition of aid to religion.¹⁸⁴ However, James R. Davis saw the measure as a "genuine search" for a Constitutional vehicle to aid private colleges.¹⁸⁵

Throughout the Congressional hearings, the Constitutional question remained a viable issue. Congress had a long history of attempting to resolve uncertainty and ambiguity surrounding the First Amendment and church-state legislation. Little had been done, however, to make it possible to allow taxpayer suits to be heard before the Supreme Court, challenging federal legislation on the basis of the First Amendment. In 1966, Senator Sam Ervin of North Carolina introduced

¹⁸³Gladieux and Wolanin, Congress and the Colleges, p. 122.

¹⁸⁴Davis, Intellect, 1972, p. 157. ¹⁸⁵Ibid.

to the Senate Bill S 1097, which had the intent and purpose of providing taxpayers the standing necessary for such legal challenges.¹⁸⁶ The Ervin Bill named explicitly such higher education acts as that of 1963 and 1965 as well as the National Defense Education Act of 1958, and the ESEA bills of 1965.¹⁸⁷

Before the Senate had opportunity to pass a final vote on the matter, in 1968, the Supreme Court handed down its decision in the case of Flast v. Cohen.¹⁸⁸ The landmark case rendered the Ervin bill moot by opening the door for suits against federal or state laws in cases where the statute is alleged to violate the "establishment" or "free exercise" clauses of the First Amendment.¹⁸⁹ Flast overturned a previous attempt to bring a taxpayer suit to court, in a 1923 case, Frothingham. The Court found:

Consequently, we hold that a taxpayer will have standing . . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.¹⁹⁰

The case was important because it placed for the first time the question of federal aid before the United States Supreme

¹⁸⁶ Leo Pfeffer, God, Caesar, and the Constitution (Boston: Beacon Press, 1975), pp. 264-267.

¹⁸⁷ Ibid.

¹⁸⁸ Flast et al. v. Cohen, 392 U. S. 83 (1968).

¹⁸⁹ Ibid. ¹⁹⁰ Ibid.

Court. The House Education Subcommittee chaired by Representative Edith Green was charged with the responsibility of providing a constitutionally-workable plan for aid to higher education. The Green subcommittee was concerned over the constitutional implications of impending legislation, especially in regard to direct, general institutional aid. One session of the hearings was devoted entirely to testimony by Thomas Kauper, Deputy Assistant Attorney from the Office of Legal Counsel. The consultant explained there were still difficulties in determining the weight the Supreme Court placed on the criteria used in the Tilton case. No norms existed to determine the constitutionality of aid as used at a particular school. Kauper expressed the Court's concern over use of federally-financed buildings by church-related schools. Such use approximated Congressional allocation of unrestricted grants of financial aid. He felt that the latter would probably be viewed as unconstitutional, "because once again the possibility exists that the aid will be employed for sectarian purposes."¹⁹¹ The legislators were pervasively nervous about the judicial prospects of their bill.¹⁹² Gladieux and Wolanin report:

Privately, the attitude of some Senators was that if an institution was so weak it could not attract

¹⁹¹Laura C. Ford, "Institutional Aid," Journal of Law and Education, 1, No. 4 (October 1972), 575.

¹⁹²Ibid., pp. 575-76.

sufficient numbers of students to remain solvent, it probably should close down. To guarantee the survival of every college and university in the country they felt, was not an appropriate federal role. . . . Though no one could predict how the courts might rule, the staff [of the Education Subcommittee] held that a [more] defensible constitutional case could be mounted for cost-of-instruction than for general aid to institutions.¹⁹³

Officially, the White House and HEW opposed the initiation of any manner of institutional aid program, on both philosophical and financial grounds. Elliot Richardson, then Secretary of HEW, testified:

It is hard to imagine a mode of financing less suited to alleviating an immediate short-term crisis than general-formula institutional aid. It is much too blunt an instrument for dealing with acute problems of particular institutions, for such aid is addressed to the perceived need for the general strengthening of all post-secondary institutions. It is really a whole new approach to financing higher education involving a major reallocation of responsibilities for support of these institutions.¹⁹⁴

Despite the strong objection of Administration spokesmen and ignoring the warnings of legal and fiscal experts, the House passed a provision for general institutional assistance.¹⁹⁵ Representative John Erlenborn attempted to amend the bill to make it subject to constitutional constraints. The debate that ensued was initiated by Subcommittee chairman, Congresswoman Edith Green:

¹⁹³ Gladieux and Wolanin, Congress and the Colleges, pp. 139-140.

¹⁹⁴ Ford, "Institutional Aid," p. 572.

¹⁹⁵ U. S. Congressional Record, 92nd Cong., 1st Sess. (1971), 117, 10288-10303.

. . . if we really value a dual system of education, with private and public institutions, then we must give some financial aid.¹⁹⁶

Congressman John B. Anderson considered passage of general assistance as initiation of an "addition" to federal aid which could actually undermine the very diversity and autonomy of the institutions that would receive it.¹⁹⁷ The Constitutional issue was met directly, as Congressman Buchanan proposed an amendment to exclude all church-related institutions from receiving benefit from Title VIII-general assistance.¹⁹⁸ The House was in no mood to entertain amendments which would inhibit their determination to aid the private sector, regardless of the constitutionality of their acts. The Buchanan amendment was subsequently defeated, along with a similar motion submitted by Administration spokesman, Congressman Quie.¹⁹⁹

While Davis placed emphasis upon need for survival of the diminishing private sector, federal aid legislation in 1972 expressed intent of avoiding collision with the Constitution through the policy of making student access and student aid the central thrust.²⁰⁰ The Congressional tactic did not guarantee avoidance of Court challenge; however, Congressional planners remained confused or unconvinced from

¹⁹⁶U. S., Congressional Record, 92nd Cong., 1st Sess. (1971), No. 117, 10303.

¹⁹⁷Ibid., 10309. ¹⁹⁸Ibid. ¹⁹⁹Ibid.

²⁰⁰Davis, Intellect, 1972, p. 159.

the testimony of legal "experts" analyzing the Tilton decision. Their actions suggest that they concluded that the Supreme Court alone could rule on the legislation they were in the process of producing, and there was no predicting how the Court would rule. They simply went about the process of legislation and disregarded negative admonitory caveats with regard to possible First Amendment challenges.²⁰¹

Public Law 92-318, or the "Higher Education Amendments of 1972," is a lengthy publication representing a great deal of effort, energy, controversy, and grief. The Carnegie Commission described the Amendments as the "second most important federal legislation affecting higher education in our history."²⁰² The first, they regard as the Morrill Act, which created the land grant colleges and universities. The final form of the bill distributed aid directly to institutions on basis of past experience in providing for assistance of needy students. Other highlights included: (1) continuation of main features of the 1965 Higher Education Act and Basic Opportunity Grants which encouraged equal access to "post-secondary education;"

²⁰¹Gladieux and Wolanin, Congress and the Colleges, p. 140.

²⁰²Carnegie Commission, Institutional Aid: Federal Support to Colleges and Universities (New York: McGraw-Hill Book Co., 1972), p. 7.

(2) loans were made more accessible through warehousing under the Student Loan Marketing Association; and (3) Upward Bound and other related programs were consolidated and revitalized under the Act.²⁰³

The legislative activities of 1972 marked a formidable step toward higher education's enlargement of federal aid programs. The year closed on a euphoric note for most administrators of fiscally-troubled institutions throughout the country. Their mood changed quickly as President Nixon's budget proposals were made public. Congress and the educators felt betrayed by the President's impoundment of funds, his "item vetoes" of programs for which there was provided no line allocation, and the general direction the action seemed to take.²⁰⁴

Using the argument that he was fighting inflation and securing the national defense by holding down taxes, the Administration slashed the "Amendments" beyond recognition. Direct, emergency institutional grants were eliminated, as was \$500 million in occupational education; additional money for veterans' education and a number of state coordination and incentive grants had been left unfunded.²⁰⁵

²⁰³Rufus E. Miles, Jr., The Department of Health, Education and Welfare (New York: Praeger Pub., 1974), p. 154.

²⁰⁴Robert Wood, "Academe Sings the Blues," Daedalus, 104, No. 1 (Winter 1975), 47.

²⁰⁵William L. Turner and Leigh H. Hammond, "Emphasis on Higher Education," Adult Leadership, 22, No. 4 (April 1974), 147.

The budget for fiscal year 1974 signalled a shift of emphasis from categorical and institutional aid to affirmation of student aid through grants and loans.²⁰⁶ Congress tied the Basic Opportunity Grant program to three other programs: Educational Opportunity Grants, Work-Study, and direct low-interest loans (NDSL). The Administration had ignored completely the specifics of the interrelationship of the student aid programs to one-another and had funded \$959 million for Basic Opportunity Grants (BOG) and had allowed nothing for the other three programs. Spokesmen for the Adult Education Amendments reacted by stating the obvious: that "such a blatant move to ignore specific wishes of Congress would lead to widespread Congressional discontent."²⁰⁷ They concluded their evaluation of the 1972 passage of the Higher Education Amendments by the following comment:

. . . the question is still open on the potential impacts of the Education Amendments of 1972. The optimism and enthusiasm of a year ago has been replaced by a feeling of frustration. . . . the full impact . . . must await the outcome of the struggle between the Executive and the Legislative Branches of Government, with final settlement of some issues having to come from the Judicial Branch.²⁰⁸

Victims of the impoundment legislation and other affected parties initiated litigation which challenged the authority of the President to hold back funds authorized by

²⁰⁶Turner and Hammond, "Emphasis on Higher Education," p. 147.

²⁰⁷Ibid. ²⁰⁸Ibid.

Congress.²⁰⁹ The 35 or so suits were far-ranging and covered funding more than for higher education. The Administration lost most of the suits, thus weakening the claim of the Executive over fiscal legislation. The effect was such that by Christmas week, 1973, the President was forced to release the \$1 billion approved for educational and health programs despite his concern to hold down government spending to control inflation.²¹⁰

The impoundment controversy provided the advocates of state aid with an additional, powerful argument to initiate or to enlarge state programs because of the uncertainty and tentativeness of the federal programs. In addition, it was now apparent that the higher education lobby, made up of institutions associated together, could influence federal programs, and subsequent legislation would reflect their influence. Moreover, on the state and national level, the courts were defining the legal boundaries and removing the ambiguities that surrounded the process of legislation on both state and national levels.

In the period between 1972 and 1976, external economic and political forces impinged upon higher education from a number of directions. Emphasis upon student grants continued to progress as student loans lost ground. Efforts

²⁰⁹"The President Yields to Congress," Time, December 24, 1973, 46.

²¹⁰Ibid.

increased to devise a means to provide direct aid to institutions for the purpose of retention of educational diversity, choice, and "centers of excellence." The prevailing assumption was there existed a "depression in higher education" of such magnitude that it would require federal and state aid to bail out the seriously-ailing private sector.²¹¹ Following close behind reports of the "new depression" were revisions suggesting that the crisis probably was overstated, and the cry of "wolf" had made the public and legislatures more amenable to legislation favoring public aid to private institutions.²¹² It did not escape the eyes of some that "erosion in the private sector was a separate matter although the financial crisis sped the process."²¹³ One could conclude that if erosion is not entirely of financial origin, money alone will not provide the cure.

During 1974 the higher education lobby in a rare show of unity urged Congress to provide general institutional support to institutions.²¹⁴ In February 1975, Representative John O'Hara, who replaced Representative Edith Green as

²¹¹Earl Cheit, The New Depression in Higher Education (New York: McGraw-Hill Book Co., 1971), Passim.

²¹²Ernest Bartell, "The Enduring Non-Crisis in Higher Education," Daedalus, 104, No. 1 (Winter 1975), 16-17.

²¹³William D. Hyde, Jr., Student Financial Aid for Higher Education: An Evaluation of Proposed Federal Education, The National Academy of Education, a Legislative Review, 1975 (ERIC Document Reproduction Service No. 097-827), p. 89n.

²¹⁴The Higher Education Chronicle (May 27, 1974), p. 7.

Chairman of the Special Sub-Committee on Education, introduced the Student Financial Act of 1975 to the House for consideration.²¹⁵ He led off by a pointed referral to the tactics of the Nixon and Ford Administrations with regard to educational priorities. He had been especially concerned over the Congressional and Administration practice of the non-funding of direct, general institutional aid. He said:

As with many other parts of the 1972 Amendments, the Nixon-Ford Administration has simply refused to carry out the law. Grants to which the law says institutions are entitled, have never been budgeted by the administration. . . . we in the Congress have made no serious effort . . . either. So the victory of 1972 has been emptied of its content . . . if we have not the will to fund institutional aid, let us stop enacting what we know to be empty words.²¹⁶

Earl Cheit, who had raised the cry of crisis in higher education, noted that legislation such as O'Hara was discussing was "of little value if it could not be put into effect because of insurmountable administrative or constitutional problems."²¹⁷ The attractiveness, he suggested, was in the "supposed ease of administration" that made "federal institutional grants or programs based on general formulas particularly attractive" on all levels of administration.²¹⁸

²¹⁵U. S. Congressional Record (February 20, 1975), Volume 121, No. 25, H1967.

²¹⁶Ibid.

²¹⁷Cheit, The New Depression, p. 89.

²¹⁸Ibid.

The drawback of the general formula approach lies in the fact that "it also runs the greatest risk of being found unconstitutional."²¹⁹ Cheit pointed to two recent Supreme Court decisions as a case in point.

. . . involving governmental financial aid for private education and involving possible First Amendment violations, called into question the constitutionality of some types of institutional grants programs, at least insofar as these programs would provide funds for private institutions with strong religious affiliations.²²⁰

It is not clear why the funding was not forthcoming, but neither the Senate nor the House voted to fund the amendments, authorized since 1972. Fifty million dollars in general aid authorization was attempted through the Byrd-Bayh amendment during the 1975 Congress.²²¹ Some funding akin to institutional aid, however, was included in a House-Senate compromise bill in 1976. The program included funds to upgrade facilities and programs at financially ailing or substandard institutions: (1) the basic program required \$52 million and (2) the Advanced Program, \$58 million.²²² The bill was vetoed by President Gerald Ford on September 29, 1976, but it was easily overridden by both houses of Congress. The total bill (HR 14232) appropriated \$56,618,207,575.00 for

²¹⁹Cheit, The New Depression, pp. 89-90.

²²⁰Ibid.

²²¹Higher Education and National Affairs, 24, No. 25 (June 20, 1975), 1.

²²²"Congress Revamps Aid to Manpower Health Training Programs," Congressional Quarterly, Oct. 2, 1976, p. 2684.

Labor-HEW financing during fiscal 1977.²²³ President Ford charged that the bill was "a perfect example of the triumph of election-year politics over fiscal restraint and responsibility."²²⁴ Congressional leaders, however, claimed they had cut back \$2 billion in programs, rather than providing for program expansion.²²⁵ A controversial amendment to the bill concerning anti-abortion also caused Ford some degree of consternation, since he was on record as favoring a constitutional amendment against legalized abortion.²²⁶ Thus an examination of federal aid in its ascendancy reveals a classic study in the growth of bureaucracy: once programs were legislated, Congress had a tendency to fund them, re-fund old ones, and periodically add or enlarge administrative mechanisms for their administration. More recent legislation has tended to blur the constitutional question through emphasizing political process and the necessity for retention of a strong and viable private sector.²²⁷ Powerful political voices backed by an emerging and more vocal voice of higher education has gradually moved the constitutional question to

²²³Ibid.

²²⁴Ibid.

²²⁵"Red Tape Blues," Newsweek, August 30, 1976, p. 77.

²²⁶Ibid.

²²⁷Moynihan, Daedalus, p. 128.

a "back burner" and has shifted that responsibility to the states and to the courts to sort out.²²⁸ As more and more dependence has developed upon federal aid, the more responsive higher education has become to the shifts in policy and leadership of the government.²²⁹ As political winds shifted, so did the fortunes of higher education. It was no accident there was a strong anti-intellectual current during the Nixon Administration. Students expressed strong opposition to the Administration's Viet Nam policies; politicians overreacted to campus anti-war demonstrations. The period was one of a general tug and pull between the White House and Congress.²³⁰ The events contributed to fiscal uncertainty at those institutions that had grown accustomed to federal largess which were suddenly faced with huge operating deficits.²³¹ But despite the controversy, a great deal of growth has taken place, fiscally, over the past decade in terms of federal aid. Table 3 (page 177) provides an indication of the rate of that growth as well as the effects of an effort to slow the rate of federal involvement in favor of the contributions of the states and private interests in support of higher education.²³²

²²⁸ Moynihan, Daedalus, pp. 130-132.

²²⁹ Ibid., pp. 138-139. ²³⁰ Ibid., pp. 36-37.

²³¹ Ibid., p. 131. ²³² Ibid., p. 129.

Table 3
 Federal Expenditure for Higher Education
 Including Academic Research,
 Fiscal 1965-1975 in Millions of Dollars

1965	\$1,993	1969	\$4,379	1973	\$7,641
1966	2,438	1970	5,142	1974	8,627
1967	3,317	1971	6,153	1975	8,785*
1968	4,363	1972	6,502		

*Moynihan, "Politics of Higher Education," p. 129.

No changes of substance have been made concerning the basic structure of federal aid statutes since their creation.²³³ Although the laws were amended a number of times, particularly in 1967, 1972 and in 1976, the programs remained essentially stable.²³⁴ Basic Opportunity Grants enlarged the application of their progenitor, Educational Opportunity Grants, which are maintained under the appellation Supplemental Opportunity Grants.²³⁵

The Basic Equal Opportunity Grant Program is the most broadly-based federal program, which has as its purpose access to higher education for students from lower income families.²³⁶ Such students must be accepted and attending approved post secondary institutions. The amount of award to a student is based upon a determination of his cost of education.²³⁷ During the 1978-79 academic year the awards are projected to range from \$200 to \$1,600.²³⁸

Briefly, other forms of aid are: "The National Direct Student Loan Program (NDSL) is for students who are enrolled at least half-time in an eligible institution, who need a

²³³Richard L. Tombaugh, Financial Aid Administrator's Handbook (Denver: Educational Methods, Inc., 1976), pp. xiv-5.

²³⁴Ibid. ²³⁵Ibid. ²³⁶Ibid., pp. xiv-6.

²³⁷U. S. Department of Health, Education, and Welfare, HEW Fact Sheet, No. (OE) 78-17907 (Washington: 1978), p. 2.

²³⁸Ibid.

loan to help meet educational costs." Students who qualify may borrow up to (a) \$2,500 if they are enrolled in a vocational program and have not yet completed two years toward their bachelor's degree; (b) or \$5,000 if one has passed the first two years, the first two years inclusive; and an aggregate of (c) \$10,000 for graduate study.²³⁹ The statute requires repayment to begin nine months after graduation, and the three percent loan must be paid back within 10 years. Certain special occupations qualify the graduate for loan cancellations.²⁴⁰

Under certain exceptional conditions the Supplemental Educational Opportunity Grants are awarded. The half-time conditions apply, and the SEOG must not be less than \$200 or more than \$1,500 per year.²⁴¹ The awarding institution must provide the student "with additional financial assistance at least equal to the amount of the grant."²⁴²

The College Work-Study Program (CWS) is a need-based program for students who need to earn a portion of their college costs.²⁴³ Eligibility requirements are the same as for other college-based programs. CWS places the student in jobs on or off campus with a "public or non profit" institution. The plan limits the student to a 40 hour week.²⁴⁴

²³⁹HEW Fact Sheet, No. (OE) 78-17907, p. 2.

²⁴⁰Ibid. ²⁴¹Ibid. ²⁴²Ibid.

²⁴³Ibid. ²⁴⁴Ibid., p. 3.

The institutional financial aid officer determines the student's need for the assistance, the time the student has available, and his health and ability to perform the work. Pay must at least equal minimum wages.²⁴⁵

The Guaranteed Student Loans (GSLP) do not depend upon tax money for their sources. Private lenders, such as banks and building and loans, assist students whose residence and satisfactory progress qualify them for the loans. "Some states and educational institutions also are lenders. The loans are insured by the Federal Government or guaranteed by a state or private nonprofit guarantee agency."²⁴⁶

As with other student loans, a scale of limits is set up, based on the length of time the student attends school. For an undergraduate, the yearly limit is \$2,500 per year; in most states graduate students may borrow up to \$5,000 per year.²⁴⁷ The aggregate limit for undergraduates is \$7,500, while graduate students are limited in debt accumulation to \$15,000. Graduate students in health-related studies may borrow up to \$15,000.²⁴⁸ The loans are non-cancellable, and must ordinarily be repaid within ten years, at 7% interest.²⁴⁹

²⁴⁵HEW Fact Sheet, No. (OE) 78-17907, p. 3.

²⁴⁶Ibid. ²⁴⁷Ibid. ²⁴⁸Ibid.

²⁴⁹Ibid.

Richard Tombaugh, a nationally known consultant in federal aid, is careful to indicate the states' role in the ascendancy of aid to education. He suggests:

Suffice it to say that the emergence of the federal government as a primary provider of student assistance has been paralleled by a similar involvement by state government. State support has been provided primarily through scholarship and student loan programs, most of the latter being provided in association with the Guaranteed Loan Program of the federal government.²⁵⁰

The constitutional and statutory bases for the state programs are briefly outlined in the next chapter, with a special emphasis upon their relationship to the First Amendment. Growth in state aid since 1965 has reached the point that Tombaugh can say: ". . . virtually all states and territories have either established state agency programs or are in the process of doing so."²⁵¹

THE PUBLIC-PRIVATE DISSONANCE

During the late 1960s it was customary for educational commentators to describe the changing relationships between public and private higher education as a "blurring" of their historic distinctions. The predicted consequence would be a "quasi-public" system of education.²⁵² As the

²⁵⁰Tombaugh, Financial Aid Administrator's Handbook, pp. xiv-6.

²⁵¹Ibid., pp. xiv-7.

²⁵²William Kinnison, "Private Higher Education: Demise or Transition?" Educational Record, 50, No. 3 (March 1974), 273.

rate of growth in the public sector increased and the private sector assumed a "steady-state" pattern, ominous statistics sent a shudder throughout the postsecondary world.²⁵³ Enrollments were off, costs were rising, and private support fell off considerably causing many church-related colleges to compromise once-proud principles by asking for government to aid them in their "plight."²⁵⁴ Their arguments were bolstered by a timely national recession and a mass of supportive research garnered by prestigious independent study groups.²⁵⁵ Instinctive reaction from leaders of the public sector was that of antipathy. The private sector wished to obtain a substantial share of public tax resources, thus causing a severe threat to the well-being of the public-supported colleges and universities.²⁵⁶ Polarization was inevitable, and despite attempts to arrive at consensus, higher education has rarely been able to provide a united front as its testimony before Congressional committees bears witness.²⁵⁷

²⁵³Clark Kerr, "What We Might Learn from the Climacteric," Daedalus, 104, No. 1 (Winter 1975), 2.

²⁵⁴Moynihn, Daedalus, pp. 138-139.

²⁵⁵Walter Metzger, "The American Academic Profession in 'Hard Times,'" Daedalus, 104, No. 1 (Winter 1975), 27-41.

²⁵⁶Kerr, Daedalus, pp. 2-3.

²⁵⁷Ibid.

It was early realized by the private higher education community that favorable legislation would be passed at the national level only if a national policy of postsecondary education were devised. Such policy efforts had been completed or were in the process within individual states. On a national scale a profusion of authoritative studies, position papers, and conference reports ensued.²⁵⁸ Literature thus produced, reflected arguments and positions which were emotional, polemical, replete with often-unintelligible logic, repetition, and contradictory conclusions drawn from the same data sources.²⁵⁹

The Education Commission of the States coordinated an effort by the higher education community "to evolve a consensus" to devise better policy and decision making in financing of higher education.²⁶⁰ The study document provides a revealing look at the kinds of problems that tend to polarize the responsible segments of higher education, as well as a chance to examine the exchange of ideas typical of each sector's perception of the problem.²⁶¹ The Conference

²⁵⁸ Robert Wood, "Academe Sings the Blues," Daedalus, 104, No. 1 (Winter 1975), 49.

²⁵⁹ Daedalus, 104, No. 1 (Winter 1975), Passim.

²⁶⁰ Robert F. Corcoran, ed., Financing Postsecondary Education: Policy Development and Decision Making (Denver: Higher Education Services, Education Commission of the States, September, 1974), Passim.

²⁶¹ Ibid.

Workbook provided the springboard for a series of conferences conducted from October, 1974, through January, 1975.²⁶² This researcher observed that although tangible results were not forthcoming from the series of conferences, their historic significance lies in the realm of "possibility" rather than "actuality."²⁶³ The precedent was established within the "higher education community" for discussions leading to political action designed to influence educational policy.²⁶⁴

Reaction to the pre-conference literature was mixed.²⁶⁵ Conclusions forwarded by reports and position papers tended to reflect predilections of their respective constituencies as might be expected:²⁶⁶ i.e., the American Association of State Colleges and Universities did not accept the conclusions of the Carnegie Commission and the CED as "gospel."²⁶⁷ Report conclusions were seen critically as:

. . . not . . . scholarly publications or as objective or scientific approaches to better decision making. Rather, they are viewed as both political and ideological--based heavily on the value judgements. . . held by their sponsors rather than on evidence rising out of the studies--and definitely intended to influence public policy at all levels.²⁶⁸

²⁶²Corcoran, Financing Postsecondary Education, Passim.

²⁶³Ibid. ²⁶⁴Ibid.

²⁶⁵Commentary on The Carnegie and CED Reports, "Financing Reports and the Attack on Low Tuition," American Association of State Colleges and Universities, in Corcoran, Financing Postsecondary Education, p. 24.

²⁶⁶Ibid. ²⁶⁷Ibid. ²⁶⁸Ibid., p. 31.

In this instance, the reports were seen as an effort to "add to existing political and fiscal pressures in the states and at the federal level to raise tuition."²⁶⁹ Included in the pre-conference literature to which participants were requested to react were reports including: (1) The Committee for Economic Development; (2) the Carnegie Commission; (3) The Second Newman Report; (4) The National Board on Graduate Education; and (5) the National Commission on the Financing of Post-secondary Education.²⁷⁰ Emphasized within these reports were compilations of characteristic issues arising from diverse efforts to produce a national policy of "post-secondary education."²⁷¹ Among the issues regarded

²⁶⁹ Commentary on The Carnegie and CED Reports, p. 31.

²⁷⁰ The sources for the reports were cited by editor Robert Corcoran as: Committee for Economic Development, The Management and Financing of Colleges (New York: Committee for Economic Development, 1973); Carnegie Commission on Higher Education, Priorities for Action: Financial Report of the Carnegie Commission on Higher Education (New Jersey: McGraw Hill Book Company, 1973); The Carnegie Commission on Higher Education, The More Effective Use of Resources: An Imperative for Higher Education (New Jersey: McGraw-Hill Book Company, 1972); The Carnegie Commission on Higher Education, Higher Education: Who Pays? Who Benefits? Who Should Pay? (New Jersey: McGraw-Hill Book Company, 1974); Report of a Special Task Force to the Secretary of Health, Education, and Welfare, The Second Newman Report: National Policy and Higher Education (Cambridge: M.I.T. Press, 1973); National Board on Graduate Education, Federal Policy Alternatives Toward Graduate Education, January, 1974; National Board on Graduate Education, Doctorate Manpower Forecasts and Policy, November, 1973; National Board on Graduate Education, Graduate Education: Purposes, Problems, and Potential, November, 1972; National Commission on the Financing of Postsecondary Education, Financing Post-secondary Education in the United States (Washington: U. S. Government Printing Office, 1973).

²⁷¹ Ibid., Passim.

as most controversial were: (1) access; (2) delivery mechanisms; (3) equity; (4) the private sector; (5) federal-state relations; and (6) educational priorities.²⁷²

Each issue relates in some way to the other, and especially to the controversial question of constitutionality. Although initial debate between the public and private sectors hinged about the legal question, more recent literature tends to be centered upon economic and political issues.²⁷³ As a means of providing equity, or general access to the private sector, both the Carnegie Commission and the Committee for Economic Development (CED) urged that public tuition be sharply advanced as a means of reducing the gap between the sectors.²⁷⁴ The suggestion could provide means of favoring the private, church-related college without passing money directly to the institution.

Dr. Carol Van Alstyne suggests that utilization of such schemes of delivering aid to higher education is "a false and oversimplified debate . . . semantic . . . confusing the issue. . . . an interesting political

²⁷²Carol Van Alstyne, "Progress Report on the National Debates about Financing Postsecondary Education: Ten Basic Issues," Corcoran, Financing Postsecondary Education, p. 125.

²⁷³Committee for Economic Development, Report: Corcoran, Financing Postsecondary Education, p. 9; Carnegie Commission on Higher Education, Report: Corcoran, Financing Postsecondary Education, p. 4.

²⁷⁴*Ibid.*, p. 11.

question."²⁷⁵ To the noted economist, there is no actual difference between aid to students and aid to an institution. She further declares that "no means has yet been devised to show how much aid is actually spent for educational purposes."²⁷⁶ Dr. Van Alstyne urges that debate should move past "semantic labels student aid and institutional aid . . . [which] make much more difficult identification of the actual flows of support."²⁷⁷ According to her, direction of support flows in a cycle:

Aid to students is used, in part, for tuition, which is a source of funds for institutions; aid to institutions is used, in part, to offset [cost of] tuitions, which helps students pay for education.²⁷⁸

The controversial "recommendations" forwarded by the National Commission on the Financing of Postsecondary Education were formulated through means of an analytical model, which was the target of severe criticism.²⁷⁹ Spokesmen from the American Association of State Colleges and Universities considered recommendations to raise tuition in public institutions "bad judgment based on erroneous data and dangerous assumptions."²⁸⁰ The model based its conclusions upon the assumptions that student aid would control tuition costs so that no economic group would suffer; that the institution

²⁷⁵Van Alstyne, "Progress Report," Corcoran, Financing Postsecondary Education, pp. 130-131.

²⁷⁶Ibid., p. 130. ²⁷⁷Ibid. ²⁷⁸Ibid.

²⁷⁹AASCU, ". . . Attack on Low Tuition," Corcoran, Financing Postsecondary Education, pp. 33-37.

²⁸⁰Ibid., p. 36.

cost arrangement would predict student reaction accurately; that raising tuition is the only alternative resource remaining that can be expanded.²⁸¹

Public institutions could not accept the model because, in their view, it denies the world of actuality.²⁸² A final disputed assumption was challenged by economists, Howard Bowen and Carol Van Alstyne, who discounted "depression mentality" and predicted a more optimistic future for higher education than either CED or Carnegie in company with the National Commission was able to deduce.²⁸³ More recent reports of improving fiscal and enrollment conditions have appeared, which provide encouragement to those who cling to a more positive viewpoint.²⁸⁴

A recent Carnegie report recognizes that the "depression is lifting."²⁸⁵ It characterizes the state of higher education as in a phase of ". . . continuing, but reduced

²⁸¹AASCU, ". . . Attack on Low Tuition," Corcoran, Financing Postsecondary Education, p. 36.

²⁸²Ibid. ²⁸³Ibid.

²⁸⁴W. John Minter and Howard R. Bowen, Private Higher Education: Third Annual Report on Financial and Educational Trends in the Private Sector of American Higher Education (Washington, D. C.: Association of American Colleges, May 1977).

²⁸⁵The Carnegie Foundation for the Advancement of Teaching, The States and Higher Education: A Proud Past and a Vital Future (San Francisco: Carnegie Foundation, 1976), p. ix.

growth."²⁸⁶ Preservation of the private sector and institutional independence are two of five major concerns expressed by the Commission. Justification for the continued existence and public support of the private sector was reviewed:

(1) The sector has a "special contribution" to make in higher education; (2) reduces burdens on state funds; (3) creates competition; and (4) maintains faculty pay standards and teaching loads at the high standard.²⁸⁷ Carnegie introduced a vital "peril point" concerning the amount a private institution could receive and remain non-public.²⁸⁸ The peril point is reached

...when an average of one-half as much state subsidy, on a per student basis, is given directly or indirectly to support of institutional costs to private as to a comparable public college. The closer a private institution gets to being supported on an equal basis with public institutions, the closer it gets to being made, de facto, a public institution.²⁸⁹

The second concern is closely related to the first.²⁹⁰ As more private institutions receive state and federal aid, they are becoming substantially accountable to both state and federal agencies. Carnegie says:

Guerilla warfare now goes on all across the nation over what belongs to the institution and what belongs to the state. Independence erodes yearly in the face of the greater forces in the hands of the state, and

²⁸⁶ Carnegie Foundation, The States and Higher Education, p. ix.

²⁸⁷ Ibid., p. 10. ²⁸⁸ Ibid. ²⁸⁹ Ibid.

²⁹⁰ Ibid., pp. 18-19.

frustration on both sides grows daily. . . . There is a revulsion across the nation against needless and unwise controls.²⁹¹

Concern over possible incursion of government into church-related higher education has long been a concern of opponents to state aid.²⁹² The Carnegie Commission's expressed concern over problems of independence from government entanglement in education serves to reinforce "excessive entanglement" as an issue in the public debate over state aid.²⁹³

Recent studies by the Association of American Colleges have revealed that despite the harsh realities of fiscal deprivation, "the staying power" of the private sector is "enormous."²⁹⁴ Howard Bowen and John Minter support their conclusions by evidence that shows net worth, assets, and revenues have kept pace with inflation, and no single major college had failed since the onset of the "depression."²⁹⁵

The latest report noted that the competitive position between private and public sectors was very strong,

²⁹¹Carnegie Foundation, The States and Higher Education, pp. 18-19.

²⁹²Ibid., p. 19. ²⁹³Ibid.

²⁹⁴Howard R. Bowen and W. John Minter, Private Higher Education: First Annual Report on Financial and Educational Trends in the Private Sector of American Higher Education (Washington, D. C.: Association of American Colleges, 1975), pp. 78-79.

²⁹⁵Ibid.

especially favoring the private sector.²⁹⁶ In actual dollar figures, the difference between public and private student costs relative to the incomes from which the charges would be paid did not change.²⁹⁷ Student aid, however, plays a vital factor in this "staying power," the researchers noted.²⁹⁸

History has often invested man's institutions with potential or surprising twists and ironic outcomes. The idealist concept of a pluralistic educational system is still in its infancy and predictions of its future are by necessity little more than conjecture. Bowen and Minter voice a real concern:

It would be a hollow victory if the private sector were to survive and even prosper financially at the expense of giving up the characteristics that make their survival important.²⁹⁹

Some church groups are aware of the above possibility as they take a closer look at their educational institutions. A commission studying Methodist higher education chose as its mission identification of archetypes of the church-related Methodist institutions deserving of continued church support:

²⁹⁶Minter and Bowen, Private Higher Education, 1977, pp. 61-67.

²⁹⁷Ibid. ²⁹⁸Ibid.

²⁹⁹Bowen and Minter, Private Higher Education, 1975, p. 79.

The crucial problem is for the United Methodist Church to decide if it values intellectual life sufficiently to continue its responsibilities in higher education.³⁰⁰

The implications are that "marginal" colleges will either be abandoned by the church to state systems or allowed to die.³⁰¹

In 1972, Lutherans developed a policy report closely akin to the Methodists in principle, but it was not nearly as specific in its recommendations. They said:

(5) If the Church wants a church-related college and wants it to perform a unique mission, it must be ready to more adequately provide financial support.
 (6) Church members . . . should concern themselves . . . to the end that the aid . . . do(es) not require compromise of the church's purpose.³⁰²

Despite educational idealism expressed in both studies the pragmatism of the compromise is beginning to hold sway over most institutional policy. Methodist spokesmen indicate that some institutions have already dropped their Methodist affiliation since 1969:

- The University of Chattanooga, to become part of the University of Tennessee. . . in 1969.
- Northwestern University, in 1974.
- Athens College in Georgia, to join the state system in 1975.
- Western Maryland College, in 1975.³⁰³

³⁰⁰ NCUMHE, A College-Related Church, p. 13. ³⁰¹ Ibid.

³⁰² Report of the Lutheran Committee on Public Policy and Church-Related Higher Education (Wagner College, Staten Island, N. Y., January, 1972), p. 4.

³⁰³ Gael M. O'Brien, "United Methodists Debate Changes in College Aid," The Chronicle of Higher Education, July 12, 1976, p. 6.

It is vital under the circumstances that all church-related institutions consider their future with great care. A crucial point was recently raised in a Supreme Court decision, bearing upon the seductive power of state aid to subvert the unique mission of church-related institutions.³⁰⁴ Justice Stevens of the U. S. Supreme Court warned in his dissent in Roemer:

. . . I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it.³⁰⁵

Mary Mullaney could see two options in the Justice's words: church colleges must either ". . . abandon their religious character" in order to get government or state aid, or "refuse to submit to government demands and be forced to close their doors."³⁰⁶ In her summary Mullaney expresses the Roman Catholic view of state aid, which calls for support without government enforcement machinery:

It is in the public interest to support private education yet not to become its master. . . . it is not salutary for federal enforcement agencies to establish themselves on private college campuses.³⁰⁷

³⁰⁴ Roemer et al. v. Board of Public Works of Maryland et al., 96 S. Ct. 2337, 2358 (1976).

³⁰⁵ Ibid.

³⁰⁶ Mary Mullaney, "Religious Discrimination and Higher Education: A Continuing Dilemma," Notre Dame Lawyer, 52 (1977), 165.

³⁰⁷ Ibid.

Public-private dissonance continues caught on the horns of a dilemma. The private sector wishes both to survive and simultaneously to maintain its historical religious character keeping government entanglement at arms length. The school that is adjudged "pervasively sectarian" must either desist from its sectarianism, or do without the aid it maintains is necessary for its survival.³⁰⁸

North Carolina higher education provides an illustration of the classic controversy between public and private sectors. Representative of the private sector is an organization entitled the Association of Independent Colleges and Universities (AICU). The AICU is composed of 39 private church-related colleges and universities. Their non-public character and the fact that they are chiefly church-related, sets them apart from the public sector. They are led by their chief spokesman and president, Dr. Cameron West.

The public sector is represented by the Board of Governors of the University of North Carolina. The entire sixteen public senior institutions of the university system are directed by the Board, which in turn, reports to the Governor and the Legislature. The intricacies of the debate over state aid are further complicated because State law places requests for financial aid from the private sector under the Board of Governors of the University of North Carolina. The statute reads:

³⁰⁸Tilton v. Richardson, 403 U.S. 672 (1971).

The Board of Governors shall assess the contributions and needs of the private colleges and universities of the State and shall give advice and recommendations to the General Assembly to the end that the resources of these institutions may be utilized in the best interest of the State. All requests by private institutions of higher education for state assistance to the institutions or to students attending them shall be submitted first to the Board for review and recommendation before being presented to any other State agency or to the General Assembly.³⁰⁹

The initial purpose of the law was to provide a vehicle for coordination of higher education within the state. The inclusion of both sectors under one board was intended to reduce likelihood of higher education being subjected to political disputes within the General Assembly.³¹⁰ Declining enrollments and subsequent loss of revenue placed the burden of urgency upon proposals toward state assistance to the private sector. Preliminary explorations into the feasibility of tax aid began in 1968.³¹¹ A later report released by the Board of Higher Education in North Carolina reported on conditions of enrollment and fiscal needs in the church-related colleges of the state and adjudged most of them as "distressed."³¹² The impact of

³⁰⁹ General Statutes of North Carolina, 116-11(11).

³¹⁰ Planning for Higher Education in North Carolina (Raleigh: N. C. Board of Higher Education, 1968), 2-68, 261.

³¹¹ Ibid.

³¹² Private Higher Education in North Carolina: Conditions and Prospects - A Study of Enrollment, Finances, and Related Subjects, 1965-1970 (Raleigh: North Carolina Board of Higher Education, 1971), p. 33.

Earl Cheit's 1971 report worked its sorcery upon the North Carolina Legislature in much the same manner it had influenced Congress. Despite warnings of paying too much attention to dire predictions that often effect a self-fulfilling prophecy, the Cheit report served to abrogate longstanding constitutional objections to public aid of church-related institutions.³¹³ Legislators appeared receptive to economic arguments for an aid plan. Dr. West indicated a considerable drop in enrollments in the private sector, while the public sector kept on growing.³¹⁴ He further lamented a rising "tuition gap" which allowed students to attend public institutions at low tuition, while inflation was driving the cost of a private education out of reach for all but the affluent.³¹⁵ The resulting legislation was founded upon the assumption that the state saves money when it makes use of vacancies in the private sector instead of expanding public facilities.³¹⁶

The 1971 Legislature authorized the plan but did not provide the money.³¹⁷ An institutional aid plan was funded but cost-per-student far exceeded projections and the plan was aborted. The budget for 1972-73 provided a \$26.59

³¹³Private Higher Education in North Carolina, p. 33.

³¹⁴Ibid., p. 6. ³¹⁵Ibid. ³¹⁶Ibid.

³¹⁷The Board of Governors, Private Higher Education in North Carolina: Report and Recommendations (Chapel Hill: The University of North Carolina, 1975), III, 16-17.

per student enrolled in the private sector.³¹⁸ Aid increased in 1973 to \$75.00 per FTE (full-time-equivalent student).³¹⁹ Aggressive lobbying by the AICU raised the level in 1973-74 to \$200 per student,³²⁰ and to \$400 for the 1975-77 bien-nium.³²¹ State allocations grew from \$1,017,000³²² to \$9,200,000 in 1977. AICU spokesmen envision that aid will soon reach \$20,000,000 for church-related higher education.³²³ Concern was expressed that:

. . . while institutional expenditures from other sources to needy North Carolina residents declined by over 50 percent, from \$2,600,000 in 1911 to \$1,180,000 in 1973-74. . . . Thus, although ostensibly a program of aid to students, the legislation in effect also provides institutional aid to private higher education. . . .³²⁴

The implication, therefore, suggests that the aid legislation provides aid to church-related colleges, thus raising serious constitutional questions, which were recently tested in the federal courts.³²⁵ Once the breach had been

³¹⁸The Board of Governors, Private Higher Education, pp. 16-17.

³¹⁹Ibid. ³²⁰Ibid.

³²¹State of North Carolina, Budget, 1975-1977, M-48.

³²²The Board of Governors, Private Higher Education, p. 17.

³²³William D. Snider, Greensboro Daily News (Nov. 18, 1976), Editorial, A-6.

³²⁴The Board of Governors, Private Higher Education, p. 17.

³²⁵Michael Smith v. The Board of Governors of the University of North Carolina et al., (NO. C-C-76-131 (March 1977)).

opened to the state treasury, the way was widened annually as the private sector grasped effective political leverage in each legislative session subsequent to 1971. The momentum continued as the private sector consolidated its forces into a tightly-run group of professional lobbyists, behind Dr. Cameron West.

The statute requiring the private sector to present its fiscal requests to the legislature via the Board of Governors provides assurance that controversy has been substantially blunted before issues reach the stage requiring legislative action.³²⁶ However, the private sector is disquieted over the process and is making an effort to extract their organization from control of the Board of Governors, so that they might deal directly with the Legislature.³²⁷ The spokesmen for the Board see the move as ill-conceived, and possibly disruptive of the whole structure of higher education in the state.³²⁸

Opening salvos in anticipation of the 1977 session of the General Assembly first sounded in fall 1976, between William A. Johnson, Chairman of the Board of Governors, and various spokesmen from the private sector. In an address

³²⁶North Carolina General Statutes, 116-1 to 116-213.

³²⁷Ned Cline, "Private Colleges Seek State Funding Changes," Greensboro Daily News, Feb. 23, 1977, p. B-7.

³²⁸Ibid.

Mr. Johnson delivered at Campbell College, he plead for the retention of the "private senior institutions as a valuable and unique resource which must be preserved."³²⁹ But he warned of the "trend" of the increasing dependence of private institutions upon the public treasury, which has seen a drastic shift in sources of support by the private sector.³³⁰

According to Mr. Johnson, the state is headed for eventual appearance, or possible dominance of a "mutant" sector which he calls the "quasi-public" sector.³³¹ Based upon conclusions drawn from a recent Carnegie Report, the quasi-public growth model (Figure 1, page 200) shows how such a "quasi-public" mutant might emerge.³³² The model depicts three stages of change, although a number of intermediate steps, caused by the intervention of variables, occur between the stages. The three stages simply are: past, present and future.

The "past" status shows two sectors, private and public, appearing to have a true "dual system" of higher education. Size and power appear to be balanced, and sources of support reflect the nature of institutions supported. The public sector is supported primarily by tax monies, low

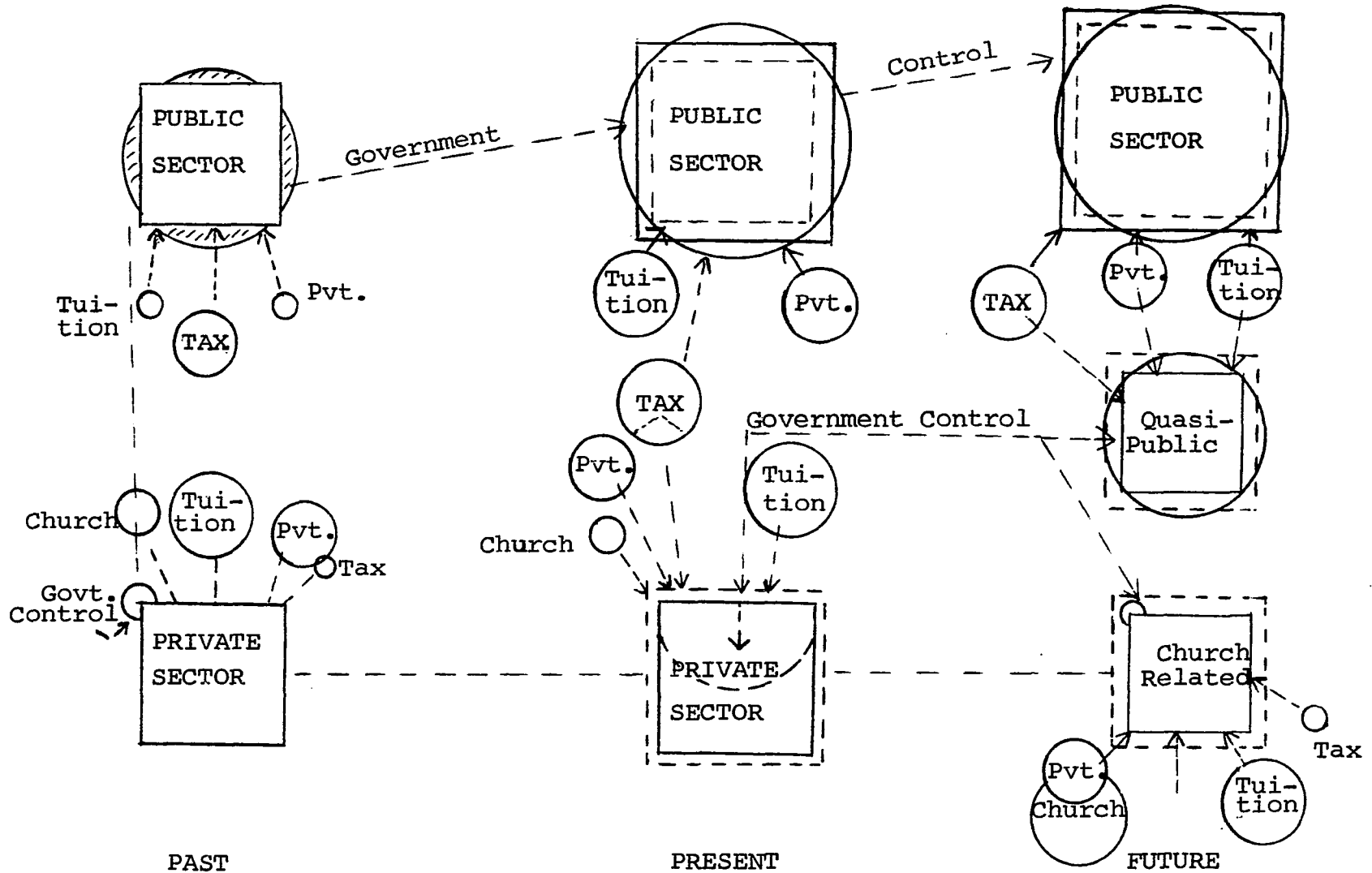
³²⁹William A. Johnson, "State Aid: 'Serious Peril,'" Greensboro Daily News, Oct. 3, 1976, p. D-5.

³³⁰Ibid. ³³¹Ibid.

³³²Carnegie, The States and Higher Education, pp. 9-20, Passim.

Figure 1

Quasi-Public Growth Model



tuition, private revenue and gifts. The public sector is almost completely under regulation of the state and federal governments, while the private sector is traditionally supported by tuition, private gifts and sponsoring church organizations. Government research monies, G.I. loans, federal construction loans, and non-profit exemptions require the accompaniment of government money into the private sector in the nature of standards and audits of reports. The state licensing requirement also places government limits upon the fiscal base of new institutions in the state.³³³

Depiction of the "present status" in the model reveals that a number of changes have taken place which resulted in a modification of the respective size of the two sectors. There is change in the sources of funds for each sector, as inflation has increased tuition costs in both sectors, but public rates remain considerably lower than those in the private sector. Some public institutions are beginning to receive an increasing amount of money from private sources and development programs.

Changes in the private sector reflect the recent national recession, along with a number of other factors that have affected the fiscal health and enrollment of the non-public institutions. Church attendance and giving are "off" and the college percentage has suffered proportionately.

³³³ General Statutes of North Carolina, Section 116.

Since more funds from the private industries and institutions have been directed toward public institutions, many of the church-related schools have suffered as a consequence.³³⁴

As noted above, tuition has increased; some colleges have had to use such increases as a means of meeting current expenses. Taxes show a great increase, as federal aid, student aid, and institutional construction loans have been either added or enlarged relative to the initial stage. In both sectors, governmental control and accountability requirements have increased considerably, indicating the "trend" emphasized by Mr. Johnson.

The debate, however, is not tied to the past, nor do the speakers wish to retain the reputation for being against "progress." The model has its value in depicting one view of what lies ahead for education if the same trend continues to enlarge upon itself. Mr. Johnson is saying there will emerge from the mists of controversy a new sector, not quite public, not quite religious, or not quite private, for its uniqueness will have been eroded, and this he calls "quasi-public." In the "future status" there will eventuate three sectors out of the former two. The private sector

³³⁴In the late fifties, the Minzes family from Rocky Mount, N. C. donated a substantial sum toward a new science building at Lenoir-Rhyne, which was named in their honor. Subsequently, East Carolina University diverted money from the same family toward the construction of Minzes Memorial Football Stadium. All switches of support have not been so dramatic, but telling, nevertheless.

will polarize between the terminals of "church-related" and "quasi-public." The quasi-public sector will divest itself entirely of church support, although it may retain a semblance of church-relatedness. It will couple into the public sector, thereby coming under the same strictures imposed upon public institutions. Its sources of support will blend with those of the public sector and will differ little in the monies derived from private sources, taxes, or tuition.

A tiny remnant of the former private sector will survive. It will be structured much like the "past stage" private sector, maintaining its strong ties with its sponsoring denomination, contributing unique concepts, and innovating novel designs of teaching and learning; in a word, fulfilling the purposes for survival claimed for the "private sector" and its champions. Fiscally, the "church-related" sector remains afloat through reliance upon multiple sources of income: the sponsoring churches, the substantial tuition, private foundations, wills, bequests, minimal state and federal aid, and good business efficiency.

In his words, Mr. Johnson sees the present dual system in "serious peril," threatened primarily by an addiction to tax support of the private church-related college.³³⁵ He says:

³³⁵ Johnson, Greensboro Daily News, p. D-5.

The plea for public aid to private institutions is bottomed on the premises that such aid is necessary to save the private colleges and universities. Perhaps this is true in some cases, however, I argue that it is not enough just to preserve these institutions. They must be preserved as free and independent institutions; otherwise, they shall lose those very attributes and characteristics which make them so unique and so valuable to our system of higher education. And I am convinced that this cannot be done if we continue to pump more and more money into the private higher education machine.

So we are confronted with what appears to be an irreconcilable conflict.³³⁶

In Mr. Johnson's view, the debate turns upon two primary issues:

In one side we have the private institutions who say they should be given increasing sums of public moneys, but at the same time must be left unfettered by state regulation and state accountability so that they will be free to develop and pursue the kind of educational programs they desire, fix tuition and fees as they elect, and pay such faculty salaries and establish such student and faculty standards as they prefer.³³⁷

The other issue involves the questions of the public good. A long-standing constitutional principle requires that public money shall be spent for the general welfare of the public. The question of accountability is properly applied to the second issue also:

On the other side we have the taxpaying public which has the right to determine how public money will be used and this means, of course, the right to exercise some control over the user and to require the user to account.³³⁸

³³⁶Johnson, Greensboro Daily News, p. D-5.

³³⁷Ibid. ³³⁸Ibid.

It is the second point which threatens the church-related private colleges with "excessive entanglement," while the first speaks more to academic freedom.³³⁹ In the long run, both kinds of independence are menaced by the ever-shortening rope between the institution and government.³⁴⁰ If the private sector is asking the question, "How will we survive?" then Mr. Johnson is asking the question containing more critical consequences, "How well will we survive?"³⁴¹

Throughout the fifty states the debate continues with different degrees of intensity, and over similar issues, producing a variety of outcomes. There seems to be no definite resolution to the controversy in legislation or through the courts. The next chapter examines the constitutional status of state support in the states, followed by the outstanding court cases directly bearing upon the controversy.

³³⁹ Johnson, Greensboro Daily News, p. D-5.

³⁴⁰ The Carnegie Foundation, "Actual and Potential Controls over Private Institutions," The States and Higher Education, Supplement (Berkeley: Jossey-Bass Publishers, 1976).

³⁴¹ Johnson, Greensboro Daily News, p. D-5.

CHAPTER IV

CONSTITUTIONAL BASES RELATIVE TO RELIGION AND
HIGHER EDUCATION ASSISTANCE IN THE 50 STATES

State governments have provided student aid in a growth pattern which parallels closely that of growth in federal aid. States have, for the most part, kept away from providing grants to institutions and students. State lawmakers have utilized scholarship and student loan programs. Most of the loans are provided in association with the Federal Guaranteed Loan program.

Historically, the bulk of state government involvement in student assistance has been carried on by a half dozen or so states, most notably the states of New York, Pennsylvania, Illinois, California, New Jersey, and Ohio, which collectively account for more than 75% of the awards and dollars provided by state government. . . the normal expansion of such programs has been escalated by the enactment of the State Government Incentive Program in the Higher Education Amendments of 1972, whereby matching funds were provided by the federal government to states who were willing to begin or expand state grant programs. As a result, virtually all states and territories have either established state agency programs or are in the process of doing so.¹

Growth of all state aid from 1969-70 through 1978 is shown in Table 4 on page 207. A comparison of state funds vs. enrollment costs appears in Figure 2 on page 208.

¹Richard L. Tombaugh, Financial Aid Administrator's Handbook (Denver, Colorado: Educational Methods, Inc., 1976), xiv-6--xiv-7.

Table 4

Growth of State Aid in the
Fifty States and Territories**

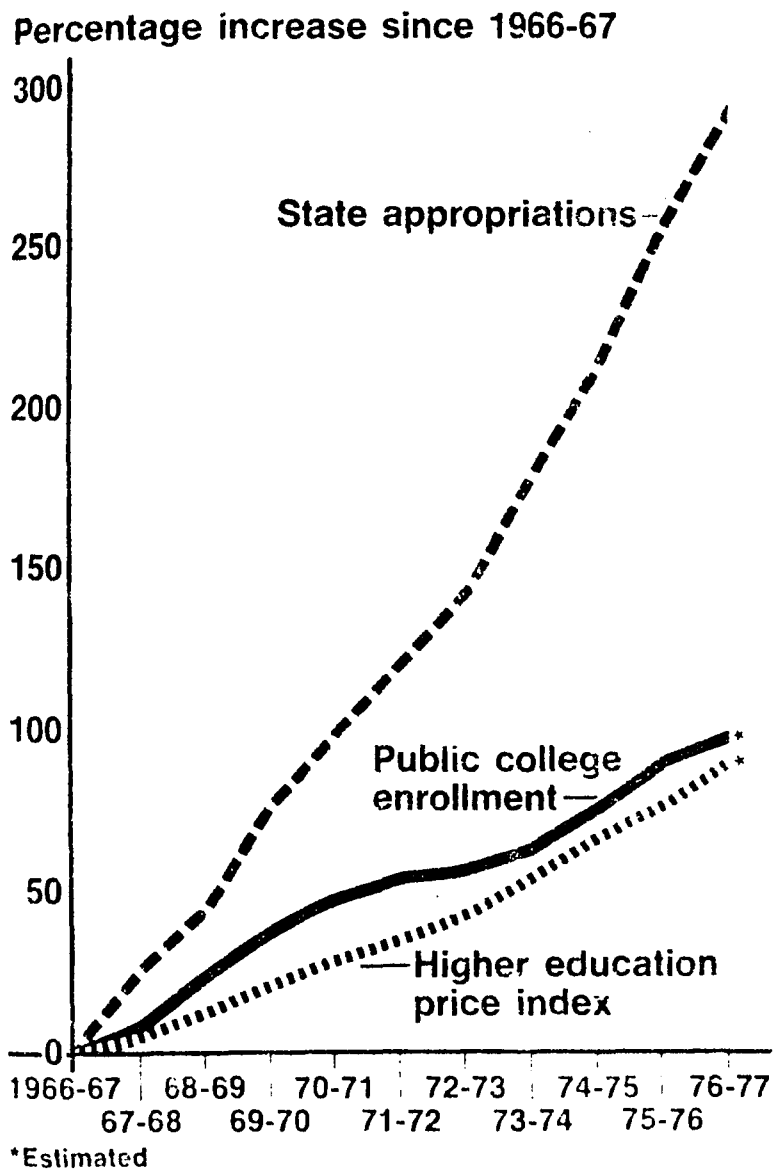
Year	Number of states or territories	Number of enrolled recipients	Dollars awarded in millions
1969-70	19	470,800	\$ 199.9
1970-71	21	535,200	236.3
1971-72	23	604,000	268.6
1972-73	29	661,700	315.5
1973-74	31	733,300	364.2
1974-75	37	813,100	440.8
1975-76	48	901,900	510.2
1976-77*	53	1,095,300	645.4

*Estimated

**Source, The Chronicle of Higher Education Deskbook (Washington: Editorial Projects for Education, Inc., 1977, p. 138.

Figure 2

State Funds vs. Enrollment, Costs**



Increases in state funds for higher education are compared above with enrollment and operating costs.

**Source, M. M. Chambers and W. Kent Halsted, National Center for Educational Statistics, The Chronicle of Higher Education Deskbook, p. 133.

The various state programs which supply aid to private and church-related schools are analyzed in Table 5 on page 210. The rapid growth of aid programs is cause for concern among those who must administer them. Tombaugh observes:

General agreement probably exists that the relatively rapid expansion of financial assistance programs, many of them with a specialized manpower or targeting purpose, has provided us with an excessive number of programs and an inadequate supply of funds to meet the needs of actual and potential participants in post-secondary education. The philosophical and political compromises, the well-intended "safeguards" against abuse, and the absence of definitive purpose, responsibility, or jurisdiction, have given the country a collage of financial assistance effort that is less efficient, and therefore less effective than it might be.²

The variety of financial aid programs among the fifty states may be categorized within five general types. which are analyzed in Tables 5 and 6 on pages 210-213. States provide assistance to medical schools or students, but medical aid differs from other categories in amount of money provided. States are usually generous with aid to institutions and students that are involved in health services. Most of the programs described in Table 6, page 212, have been challenged in state and federal courts, and some have gone to the United States Supreme Court.³ The basic programs which most states enacted are variations on the themes of scholarships, grants or loans. In 1976-1977, there were

²Tombaugh, Aid Administrator's Handbook, pp. xiv-7.

³Chapter V, below.

Table 5

State Aid Programs to Church-Related Colleges

	Student Aid					Institutional Aid			
	GRANTS: Scholarships-- Tuition equalization	LOANS	CONTRACTS	OTHER-- Medical*		Direct GRANTS	CONTRACTS	BONDS	OTHER
Alabama			X			X		X	X
Alaska	X	X	X			X			
Arizona			X						
Arkansas	X	X	X						
California	X		X	X			X	X	
Colorado			X						
Connecticut	X	X	X	X			X		X
Delaware	X	X		X					
Florida	X	X	X	X		X			
Georgia	X	X	X	X					
Hawaii			X	X*					
Idaho	X								
Illinois	X			X		X		X	X
Indiana	X								
Iowa	X	X							X
Kansas	X		X	X*					X
Kentucky	X	X	X	X					
Louisiana	X	X		X		X	X		
Maine	X	X		X					
Maryland	X		X	X*		X		X	
Massachusetts	X	X	X*	X*			X	X	
Michigan	X	X	X*	X*		X	X*	X	X
Minnesota	X	X		X			X	X	X*
Mississippi				X*					
Missouri	X								
Montana	X		X*						
Nebraska		X							
Nevada									

*Medical, dentistry, nursing-assistance to students, institution, or building program, depending upon the category indicated.

Table 5 (continued)

	Student Aid				Institutional Aid			
	GRANTS: Scholarships-- Tuition equalization	LOANS	CONTRACTS	OTHER-- Medical*	Direct GRANTS	CONTRACTS	BONDS	OTHER
New Hampshire		X	X				X	
New Jersey	X	X			X*	X	X	X
New Mexico		X	X		X	X*		
New York	XX	X		X*	X		X	X
North Carolina	X		X*	X		X*		
North Dakota	XX*							
Ohio	X	X	X		X*	X	X	
Oklahoma	X	X						X
Oregon	X	X	X		X	X		
Pennsylvania	X	X		X	X*			
Rhode Island	X	X	X	X	X*	X		
South Carolina	X	X	X		X	X	X	X
South Dakota	X	X		X				
Tennessee	X	X*	X	X		X*		
Texas	X	X	X*		X	X*	X	
Utah								
Vermont	X	X		X		X	X*	
Virginia	X*	X		X		X	X	
Washington			X*					
West Virginia	X		X					X
Wisconsin	X	X	X*	X	X*	X*		
Wyoming						X		

*Medical, dentistry, nursing-assistance to students, institution, or building program, depending upon the category indicated.

Source: Richard M. Millard, Higher Education in the States (Denver: Education Commission of the States, 1976). State Constitutions.

Table 6
Constitutional Prohibitions

	Prohibitions of the use of tax money for, or in support of:		3. Sectarian Higher Education	4. Sectarian Controlled Higher Education	5. Noncategorized Pro- hibitions or Guarantees	Guarantees for the General Welfare:	
	1. Private Corporations	2. Private and/or Sec- tarian Higher Edu- cation				1. State Control of Appropriated Funds	2. Inviolability of State Credit
Alabama	X				X	X	
Alaska			X		X		
Arizona	X	X			X	X	
Arkansas					X	X	
California	X		X	X	X		X
Colorado	X	X	X		X		X
Connecticut			X		X	X	
Delaware						X	X
Florida							X
Georgia					X		X
Hawaii		X			X		X
Idaho			X				X
Illinois				X	X		
Indiana					X		X
Iowa					X		X
Kansas						X	
Kentucky			X				
Louisiana					X		
Maine					X		
Maryland					X	X	
Massachusetts	X				X		X
Michigan					X		
Minnesota				X	X		X
Mississippi	X		X		X		X
Missouri	X			X	X		X
Montana	X	X		X			
Nebraska			X				X

Table 6 (continued)

Prohibitions of the use of tax money for, or in support of:	1. Private Corporations		2. Private and/or Sectarian Higher Education		3. Sectarian Higher Education		4. Sectarian Controlled Higher Education		5. Noncategorized Prohibitions or Guarantees		Guarantees for the General Welfare:	
	1. State Control of Appropriated Funds		2. Inviolability of State Credit									
Nevada									X			
New Hampshire								X	X			
New Jersey	X								X		X	X
New Mexico	X	X	X						X			X
New York	X				X				X			
North Carolina	X								X			
North Dakota			X								X	X
Ohio									X		X	X
Oklahoma									X		X	X
Oregon									X		X	X
Pennsylvania					X				X		X	X
Rhode Island									X		X	
South Carolina							X					
South Dakota					X				X			X
Tennessee												X
Texas									X		X	X
Utah	X						X					
Vermont									X			
Virginia					X		X		X			X
Washington					X		X					X
West Virginia												X
Wisconsin												X
Wyoming			X				X					X

38 states which provided some form of scholarship or student equalization grant to students of both private and public colleges.⁴ Loans to students were provided by 30 states. These loans were either guaranteed by the state, or were included as a part of a revolving fund which theoretically allows for perpetual growth in terms of money available to an increasing student market.⁵ Contracts are made between students and 27 states for specific vocational fields in return for aid money. The money is often paid directly to the institution on the basis of the numbers of students in a certain field.⁶ This latter plan is followed in only 19 states.⁷ Direct grants to institutions, shunned by federal legislation, were utilized by only 17 states to assist institutions in capitalization and construction.⁸ Issuance of construction bonds backed by state credit became a legal, indirect method of funding of colleges by 15 states.⁹ The category of "other" is applied to 12 states and includes such plans as educational tax credits, regional agreements, and grants applicable out-of-state.¹⁰ In the case of all the above plans, they apply to private, church-related colleges, either directly or indirectly.

⁴Table 5, page 210.

⁵Ibid. ⁶Ibid. ⁷Ibid.

⁸Ibid. ⁹Ibid. ¹⁰Ibid.

Constitutional restraints within the fifty states generally forbid direct aid to religion or to religious institutions. State constitutions by and large hold to the consensus that states control tax funds and do not allow for their utilization by religious or private concerns, nor for the use of state credit by such organizations.¹¹

According to the fifty state constitutions, there are 13 which prohibit the use of state tax money in support of private corporations.¹² States which specifically forbid aid to private and/or sectarian higher education are limited to seven.¹³ However, 13 states single out sectarian higher education for non-receipt of aid from the public treasury.¹⁴ Other states draw an even harder line as 11 of them recognize a danger to the state in providing aid to "sectarian controlled" institutions.¹⁵ In 30 states, prohibition or guarantees varied in their expression to the degree that some bear upon the church-state-education issue in an oblique way, or in a unique manner.¹⁶

Guarantees for the general welfare of the people are provided by most states through constitutional control of the governments' taxes and credit. Constitutions of 14 states deem the issue significant enough to express concern in a

¹¹Table 6, page 212.

¹²Ibid. ¹³Ibid. ¹⁴Ibid.

¹⁵Ibid. ¹⁶Ibid.

guarantee within the constitution.¹⁷ Finally, misapplication of state credit by or on behalf of private or sectarian organizations, institutions, groups or individuals is prohibited by 28 states.¹⁸ It should be noted that each state has some form of prohibition which if strictly applied might provide basis for litigation. Chapter five, following, will discuss further how litigation has characterized the church-state controversy, especially as it applies to the fifty states.

The state-by-state account which follows deals with the constitutional references to state support of religion, or religious education. Following the constitutional standard will be noted the most recent legislative programs and appropriations which directly or indirectly serve to support church-related colleges.

ALABAMA

The state constitution forbids the establishment of religion by law, and taxes shall not be used for places of worship or ministerial salaries.¹⁹ More explicit, however, is the provision forbidding appropriations for other than state-controlled educational institutions, unless the state legislature votes with a two-thirds majority to overrule.²⁰

¹⁷Table 6, page 212. ¹⁸Ibid.

¹⁹Alabama, State Constitution, Art. I, Sec. 3.

²⁰Ibid., Art. IV, Sec. 73; see also Table 6.

But the article on education is more explicit, denying the expenditure of monies raised for support of public schools, "for the support of any sectarian . . . school."²¹

In 1971, a proposal was made to revise the constitution in order to make way for a program proposed by the council for the advancement of private colleges in Alabama. The proposal provided for a step-by-step program of financial assistance to students attending all private colleges, including church-related institutions.²²

The Legislature submitted the plan to the Alabama State Supreme Court for an advisory opinion, which held that the unrestricted grant program would violate both the state and federal constitutions through "excessive entanglement."²³

Presently, Alabama does not report appropriations for private colleges or universities. However, some money under the guise of scholarships or other appropriations finds its way to private colleges such as Tuskegee Institute.²⁴

²¹Alabama, State Constitution, Art. XIV, Sec. 263; see also Table 6.

²²Elden T. Smith, A Survey of State Programs of Aid to Independent Colleges and Universities and their Students (Washington, D. C.: National Council of Independent Colleges and Universities, 1971).

²³Alabama, 301, 280 So.2d.547(1973).

²⁴Elden T. Smith, A Survey of State Programs of Aid, p. 4.

ALASKA

Considerable controversy has persisted over the support of private church-related colleges in Alaska. The Alaska Constitution provides essentially the same safeguards as does Alabama with regard to freedom and establishment of religion.²⁵ Schools maintained by the state must be free of sectarian control, and no tax money shall directly "benefit any religious or other private institution."²⁶

However, in 1974, the Legislature passed House Bill 181, which specifies that tuition grants:

. . . may not be in an amount that would result in a student paying less in tuition or fees at a private college or university than would be required for a similar enrollment at the state institution in the same city.²⁷

In a more recent development, Alaska was presented with a proposed constitutional amendment, Proposition No. 4, which would have provided state grants for students attending private, church-related schools. The amendment was rejected by voters, 56.3% to 43.7%, providing a disappointment to administrators at financially shaky Alaska Methodist University.²⁸ The referendum, however, did not affect the scholarship appropriations for 1976-1977, as Chambers reports

²⁵Alaska Statutes, Article 1, Sec. 4; see also Table 6.

²⁶Ibid., Article 7, Sec. 1; see also Table 6.

²⁷Ibid., Article 9, Sec. 14.40.776; see also Table 6.

²⁸"Nebraska, Alaska, Maryland Voters Uphold Separation," Church and State, 29, No. 11 (Nov. 1976), 3.

\$218,000 in student scholarship aid, as well as \$47,768 in "other appropriations."²⁹

In a political sense, however, the popular opinion of the Alaskan public prefers that tax money provide for public, not private or religious educational services. The constitutional requirements were upheld once the voters were given opportunity to express their opinion.

ARIZONA

Under the Arizona Constitution, freedom of conscience involves the restriction of public money and property from aiding "religious worship exercise, or instruction."³⁰ The state constitution furthermore forbids any ". . . tax . . . or appropriation or public money made in aid of any church, or private or sectarian school. . . ." ³¹

No data exists on direct or indirect appropriations supporting private church-related institutions inside the state. However, the Arizona legislature passed in 1976 a measure which allows for placement of Arizona students with other public and private educational institutions and agencies.

²⁹M. M. Chambers, "State Funds for Higher Education, 1976-77," The Chronicle of Higher Education Deskbook (Washington, D. C.: Editorial Projects for Education, Inc.), p. 127.

³⁰Arizona, Constitution, Article II, Sec. 12; also see Table 6.

³¹Ibid., Art. IX, Sec. 10

The legislature authorized "payment of partial or full tuition," not in excess of similar costs within the area covered by the "Compact for Western Regional Cooperation in Higher Education."³²

Such an agreement could eventuate the indirect support of a church-related institution through tuition payments to a student placed outside the compact area. However, under present Supreme Court rulings, excessive entanglement would be difficult to prove.

ARKANSAS

The Declaration of Rights of the State of Arkansas maintains the First Amendment freedoms by saying:

. . . No man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry without his consent.³³

The implication for state support of church-related schools is indirectly noted under the article regarding the Legislative Department:

No state tax shall be allowed, or appropriation of money made except to raise means for payment of the just debts of the State, or defraying the necessary expenses of government, to sustain common schools, to repel

³²Arizona Revised Statutes, Title 15, Ch. 7, Article 4, 15-761.01 amending 15-764 A.R.S.; The Compact includes: California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, Alaska and Hawaii.

³³Arkansas, Constitution, Article II, Sec. 24; also Table 6.

invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly.³⁴

In addition, state control over appropriated funds is maintained in the article on education:

No money or property belonging to the public school fund, or to this state for the benefit of schools or universities, shall ever be used for any other than the respective purposes to which it belongs.³⁵

Arkansas became involved in financing higher education through the necessity of administering federal loans. A state student loan program is funded through the sale of state revenue bonds ". . . not to exceed \$3,000,000.00."³⁶

The Legislature based its actions, which seem to be inconsistent with constitutional mandate, upon an "urgent need" to make loan funds available for more eligible students. An emergency was declared to exist and the article of passage read in part:

. . . and this act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.³⁷

As of 1976-77, state scholarship aid appropriated amounts to \$259,000, and "other appropriations" are \$2,249,000.

³⁴Arkansas, Constitution, Article V, Sec. 31; see Table 6.

³⁵Ibid., Article XIV, Sec. 2; Table 6.

³⁶Arkansas Statutes, Public Laws, Sec. 80-416; 80-341.

³⁷Arkansas Statutes, Revised 1975, No. 884.

It is unclear as to whether the loan funds mentioned above are included.

CALIFORNIA

The California State Constitution provides a sweeping, but specific "no aid" provision. It first says:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools. . . .³⁸

and it continues:

Neither the legislature nor any county shall ever make any appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help support any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination, nor shall any grant or donation . . . ever be made by the state . . . for any religious creed, church, or sectarian purpose whatever.³⁹

The article on education is more to the point:

No public money shall ever be appropriated for the support of any sectarian or denominational schools or any school not under the exclusive control of the officers of the public schools. . . .⁴⁰

The Constitution notwithstanding, California has had a state scholarship program since 1956. The three objectives of the program are to:

³⁸ California, Constitution, Article IV, Sec. 22.

³⁹ Ibid., Article IV, Sec. 30.

⁴⁰ Ibid., Article IX, Sec. 8.

- 1) Provide education for able, but needy students;
- 2) "Divert" students to independent colleges and universities;
- 3) To help, "indirectly, to keep independent institutions strong and vigorous."

Independent college presidents agree that the scholarship program helps their institutions by bringing them outstanding students and by relieving the students and budgets of the colleges.⁴¹

The "Cal Grant" program was formulated by the consolidation of three existing programs into one, and as of 1977, utilized a common application form. Unique to the bill was the provision that allows student aid to go to the part-time students. "The legislation provides for a \$3.5 million expansion of state programs to be financed by Federal State Student Incentive Grant moneys."⁴²

The program paid \$34,003,000 in scholarships in 1974-75, and increased to an estimated \$47,000,000 in 1977.⁴³ The 1976-77 appropriations for student aid totalled \$60,620,000 an increase over a two-year period of 51%.⁴⁴

According to the National Council of Independent Colleges and Universities, the 1975 appropriations provided

⁴¹Elden T. Smith, California State Scholarship Program Since 1956, Los Angeles: Association of Independent California Colleges and Universities, 1974 (ERIC Document Reproduction Service No. 058-853).

⁴²"Congress Ponders Additional Sums for Postsecondary Access," Higher Education and National Affairs (October 17, 1975), vol. XXIV, No. 41, p. 3.

⁴³Ibid. ⁴⁴Ibid., p. 127.

private institutions with 46% of the scholarship award money (\$40,308,585) in 1975-76. Students at independent institutions received 80% of fellowship awards, funded at \$2 million. The independents did not fare so well in occupational education, since 51% of first-year awards must be made in community colleges.⁴⁵

No distinction is made in the distribution of funds to church-related and non-church-related institutions. The schools are generally designated as "independent."⁴⁶

COLORADO

The State Bill of Rights of Colorado effectively seals off sectarian benefits at the expense of the freedoms of the general public.

. . . No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.⁴⁷

The explicit prohibition of the Constitution for support of sectarian schools from public funds offers no hope to church-related institutions seeking tax support, or state assistance of any form.

⁴⁵Elden T. Smith, "Report of State Legislation and Programs Relating to State Aid for Independent Colleges and Universities," (Washington, D. C.: National Council of Independent Colleges and Universities, 1975), p. 5.

⁴⁶Ibid. Passim.

⁴⁷Colorado, Constitution, Article II, Sec. 4; also Table 6.

Neither the General Assembly . . . or other public corporation shall ever . . . pay from any public funds or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose . . . to help support or sustain any school, academy, seminary, college, university . . . controlled by any church of sectarian denomination. . . .⁴⁸

There is a general provision, however, for student aid, and Senate bill 39 in 1974 provided for veterans' aid. The possibility exists that grant money which pays for space contracts outside the compact area, or in other compact states might find its way in the form of tuition into a church-related institution. If such is the case, it is definitely counter to the statutes.⁴⁹

The monies involved in student assistance are considerable. M. M. Chambers of Illinois State University notes that from 1974 to 1977, there has been a 22% increase in student aid, probably as a result of the 1974 special session. The present appropriations are \$14,615,000, in addition to \$2,069,000 for veterans' assistance.⁵⁰

CONNECTICUT

The Constitution of Connecticut is less specific with regard to support of religious education than are the

⁴⁸ Colorado, Constitution, Article IX, Sec. 7;
Table 6.

⁴⁹ Table 5.

⁵⁰ Chambers, The Chronicle of Higher Education,
p. 127.

western states. The Bill of Rights concerns itself with prevention of inequality of privilege or "public emoluments" from the community: Implicit in the statement, however, is the suggestion that no religious group or class of society would be given privileges denied others.⁵¹

The article concerning religion spelled out what was implicit in the first article:

. . . No person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association. No preference shall be given, by law, to any religious society or denomination in the State.⁵²

In the article pertaining to the school fund, Connecticut lawmakers forbade the passage of any law that would divert school monies "to any other use than . . . public schools."⁵³

The Constitution notwithstanding, recent legislation endorsed the policy of public support for private higher education. There was no stated exclusion of sectarian colleges. The expressed purpose was utilitarian in philosophy: the greatest good for the greatest number of people. This was to be accomplished through aid to "independent" colleges in the same way aid was given to public higher education. A complicated formula was derived whereby independent colleges

⁵¹The Constitution of Connecticut, Art. I, Sec. 1.

⁵²Ibid., Art. VII, Sec. 1.

⁵³Ibid., Art. VIII, Sec. 4.

which qualified could fill available spaces with an agreed-upon number of full-time equivalent students. A contract for the payment of use of the places would be drawn up and aid paid to the institution by Connecticut.⁵⁴

Funding in 1975-76 amounted to \$2,968,400. The amount received is limited by the association and appropriation. Each college matches the state aid with an amount equal to 80% of contracted funds.⁵⁵ The state Health and Education Assistance Authority has as its purpose the issuance of "tax exempt bonds for the construction of facilities at public or private institutions." Student aid exists in the form of: State Scholarships, 1975-76, \$1,877,373;⁵⁶ Veterans Scholarships; College Construction Grants, \$218,550 in 1975-76; Work Study and Guaranteed Loan, about \$40,267,000 in 1975-76; and Higher Education grants funded in 1975-76, \$192,600.⁵⁷

The legislature defeated an attempt to require a state audit of all public funds allocated to private institutions.⁵⁸ The desire to provide aid outweighed the traditional pressures for accountability.

⁵⁴Connecticut Statutes, 1975, Vol. 5A, Part IV, Section 10-331a.

⁵⁵Elden T. Smith, NCICU Report, 1975, p. 9.

⁵⁶Chambers, Chronicle of Higher Education, p. 127.

⁵⁷Elden T. Smith, NCICU Report, p. 10.

⁵⁸Connecticut, "Commission for Higher Education, Report, 1974, House Bill 5316 (Code annotated, 1974).

DELAWARE

Delaware, the first state to ratify the federal Constitution, took care in its Declaration of Rights to insure against an establishment of religion.⁵⁹

The prohibition against tax support of sectarian schools is a classical rendition of the Blaine Amendment.

No portion of any fund now existing or which hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to or used by, or in aid of any sectarian church or denominational school⁶⁰

Yet, in direct contradiction to the above article, the General Assembly by majority vote enacted a law providing tax monies for transportation of non-public primary and secondary school children.⁶¹

No report exists relative to private college education in Delaware, except to note that there is a program based on need for those students who are Delaware residents and who are undergraduate students.

GEORGIA

The Georgia Constitution in its Bill of Rights states:

⁵⁹ Delaware, Constitution, Article I, Sec. 1.

⁶⁰ Ibid., Article X, Sec. 3.

⁶¹ Ibid., Article X, Sec. 5.

No money shall ever be taken from the public treasury, directly, or indirectly, in aid of any church, sect, or denomination or religionists, or of any sectarian institution.⁶²

The prohibition seems straightforward enough, but in 1970, Georgia voters saw no inconsistency in voting for the following amendment:

The General Assembly is authorized to provide by law for grants or scholarships to citizens of Georgia who are students attending colleges or universities in this state which are not branches of the University System of Georgia. The General Assembly shall provide the procedures under which such grants or scholarships shall be made and is authorized to provide appropriations for such purposes. . . . Taxes may be levied and public funds expended for such purposes.⁶³

The definition of an "eligible student" requires that one be attending a college "which shall have an academic program not comprised principally of sectarian instruction."⁶⁴

In 1975, the legislature appropriated about \$6 million in tuition grants and \$800,000 in state incentive scholarships. Poor economic conditions kept the authorized \$600 per student level at \$400.⁶⁵ The incentive scholarships increased in 1976-77 to \$1,943, but no firm figure is

⁶²Constitution of Georgia, Article 1, Sec. 1, Par. XIV.

⁶³Ibid., Art. VII, Sec. I, Par. II, Subpar. 9; also Georgia Law, 1970, p. 1140; Acts 1971, pp. 906, 909.

⁶⁴Ibid., Art. VII, Sec. 32-3903.

⁶⁵Elden T. Smith, NCICU Report, p. 9.

available for the tuition grants. The grant program is likely hidden within \$21,274,000 of "other appropriations."⁶⁶

FLORIDA

The Declaration of Rights in the Florida Constitution strictly forbids direct or indirect use of tax money for support of religion.⁶⁷

The state school fund has as its sole purpose the "support and maintenance of free public schools."⁶⁸

Florida has no direct institutional aid programs. There is potential, however, for contracts with the private sector, and indirect aid through student assistance. The Florida program includes scholarship aid for disadvantaged minorities, Indians, student loans, and grants.⁶⁹

In terms of tax money paid out in 1976-77, scholarship programs provided \$7,308.00 for residents, while "other appropriations" were \$7,511,000. The Board of Regents was allotted \$3,907,000 for educational contract purposes.⁷⁰ Those church-related colleges receiving assistance do so only in the "laundering process" of aid to the student.

⁶⁶Chambers, The Chronicle of Higher Education, pp. 127, 135.

⁶⁷Florida, Constitution, Article I, Sec. 3.

⁶⁸Ibid., Article IX, Section 6.

⁶⁹Smith, NCICU Report, p. 8.

⁷⁰Chambers, The Chronicle of Higher Education, p. 127.

Aid to students in private institutions was limited to "forty percent of general revenue payments to the student financial aid trust fund."⁷¹ Another limitation was placed upon students by making receipt of aid contingent upon their attending a Southern Association accredited institution, or one whose credits may be transferable to such a school.⁷²

HAWAII

The state constitution quotes the federal Constitution's establishment clause verbatim in the Bill of Rights.⁷³ The constitution forbids tax monies used for anything but a public purpose.⁷⁴ In addition, aid to parochial or sectarian education is spelled out:

. . . Nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.⁷⁵

No legislation, at present, permits nor condones aid to church-related colleges in Hawaii. There is no indication that Hawaiian tax monies are utilized directly or indirectly by church-related colleges.

⁷¹Florida, State Laws: 239: 672 (1975) at 110.

⁷²Ibid., 239: 715 (1975) at 112.

⁷³Hawaii, Constitution, Article I, Sec. 3.

⁷⁴Ibid., Article V, Sec. 6.

⁷⁵Ibid., Article IX, Sec. 1.

IDAHO

The state constitution forbids the forced attendance or taxation for the support of any religious denomination.⁷⁶ The law also forbids the use of state credit for private individuals or groups.⁷⁷ A carefully-worded section also forbids public corporations from assisting institutions such as:

any school, academy, seminary, college, or other literary or scientific institution controlled by any church, sectarian or religious denomination whatsoever. . . .⁷⁸

Although in 1976-77 the state provided over \$70 million in student and institutional aid, there is no indication that any of it was utilized in an unconstitutional manner by church-related colleges.⁷⁹

ILLINOIS

The state constitution requires that no one be required against his consent to provide support for, or to attend a religious denomination not of his preference.⁸⁰ Public monies are restricted to public use only.⁸¹ The

⁷⁶ Idaho Constitution, Article I, Sec. 4.

⁷⁷ Ibid., Article VIII, Sec. 2.

⁷⁸ Ibid., Article IX, Sec. 5.

⁷⁹ Chambers, The Chronicle of Higher Education, p. 128.

⁸⁰ Illinois, Constitution, Article I, Sec. 3.

⁸¹ Ibid., Article VIII, Sec. 1(a).

article on education, almost a carbon copy of the Blaine Amendment, forbids public corporations from the use of public property or money to support religious education on any educational level.⁸² In 1974, fiscal pressures that affected higher education nationally, inspired a report on state support of private educational institutions.⁸³ The report differed little in its concerns and conclusions from other general reports of the period: (1) concern for retention of diversity for education through educational choice; (2) declining private revenue; and (3) desire for solvency and survival of the private sector. Significant in the report was expressed the need to maintain independence from public control over private education. The report said:

There must be . . . a strong sense of community, unity of purpose, freedom to experiment, challenge, and innovate . . . enhance freedom from political influence and from self-serving social pressures. At the same time, they need to strengthen their capability for providing a productive environment for scholars, for serving as a catalyst for intellectual freedom in other institutions and organizations . . . although some public surveillance will properly be necessary if there is to be assistance from public funds, the private institutions must be held in their own hands, the essential ingredients of final authority.⁸⁴

⁸² Illinois, Constitution, Article X, Sec. 3.

⁸³ Strengthening Higher Education in Illinois: A Report on the State's Role Recommendation for Financial Aid from Public Funds, Illinois: Commission to Study Non-Public Higher Education in Illinois, 1973 (ERIC Document Reproduction Service No. 28745).

⁸⁴ Ibid., pp. 20-21.

The report expressed claims which are echoed in arguments supporting state aid. The frequency and similarity of the statements do not always sound convincing.

The commission has observed that a church relationship per se does not mean church control, nor does the fact that an institution espouses sectarian interests necessarily mean that it is under church control. In some instances, the institution is owned by the church; in others, a majority of the Board of Trustees are clerical or lay members of a church body. But in still others, the connection is less direct, although it may include such aspects as contribution to financial support by the religious body or the linkage of institutional purposes to a particular denomination.⁸⁵

This and other arguments provided the foundation for legislation produced from 1969 through 1973. The original act was entitled the "Illinois Financial Assistance Act for Nonpublic Institutions of Higher Learning."⁸⁶ The act defines the private institution of higher education as: ". . . not owned or controlled by the State . . . which is authorized by law to provide a program of education beyond the high school level. . . ."⁸⁷

The effect of the legislation upon the state budget in 1975-76 produced appropriations of \$13.3 million in direct grants to institutions for distribution as scholarships for state resident students.⁸⁸ More directly than

⁸⁵ Ibid., p. 15.

⁸⁶ Illinois Statutes, 144, Sec. 1331 at 219.

⁸⁷ Ibid., 144, Sec. 1303.07.

⁸⁸ Smith, NCICU Report, p. 10.

grants is the Educational Assistance Authority (established in 1970) for the purpose of the issuance of educational facilities construction at private institutions.⁸⁹ The legislation provides \$21 million for health-allied education. In addition, \$58.8 million was appropriated for student assistance at either public or private institutions. Also, \$84,000 in project grants was appropriated for use in public and private education.⁹⁰ Scholarships increased in 1977 to \$70 million.⁹¹

INDIANA

Indiana's constitution, consistent with the federal Bill of Rights, forbids the compulsion of church attendance or support or maintenance of a ministry without consent.⁹² The Indiana Bill of Rights furthermore denies access of religious or theological institutions to the treasury of the state.⁹³ A court case having bearing upon parochial education also has bearing upon the definition of religious control. The question as to whether a school is public or parochial is determined by the source of its control.⁹⁴

⁸⁹Smith, NCICU Report, p. 10. ⁹⁰Ibid.

⁹¹Chambers, The Chronicle of Higher Education, p. 128.

⁹²Annotated Indiana Statutes, Art. I, Sec. 4.

⁹³Ibid., Art. I, Sec. 6.

⁹⁴Johnson v. Boyd, 217 Ind. 348, 28 N.E. 2d 256 (1955).

Indiana legislation stays close to constitutional limitations by avoiding direct aid to private schools. However, students on the basis of need may qualify for \$1,600,000 in "Freedom of Choice" grants. Tax credits for contributions to public and private institutions of higher learning amounted to \$1,044,901 in 1975-76. An educational grant program in addition to the above program was funded in the amount of \$2,082,894.⁹⁵ The Scholarship Commission was budgeted \$18,393,000 in 1977-78 and other support not specifically assigned to public institutions amounted to \$13,426,000.⁹⁶

IOWA

The Iowa Constitution effectively restates the First Amendment to the federal Constitution with respect to religious establishment and freedom of exercise. It adds a prohibition of compulsion to support religious enterprise.⁹⁷

Tied to religious principle is the constitutional concern to prohibit easy access to the treasury by private concerns, and to restrict state credit from personal or private use.⁹⁸

⁹⁵Smith, NCICU Report, p. 11.

⁹⁶Chambers, The Chronicle of Higher Education, p. 128.

⁹⁷Iowa, Constitution, Art. I, Sec. I, 3.

⁹⁸Ibid., Art. III, Sec. 31; Art. VII, Sec. 1.

In 1965, tuition grants could be awarded to residents of Iowa who could demonstrate attendance at a properly accredited private institution of higher education. Financial need must be established, and amounts of tuition aid awarded vary from \$100 to \$800 per student.⁹⁹

There seems to be a distinction in the awarding of aid to private and church-related colleges. Clearly, if the college is secular, there is no provision to prohibit extension of aid. If aid is to serve a church-related college, it is likely a constitutional challenge would provide that such aid would be contrary to the state constitution. Funding for scholarships has gone from \$300,000 in 1973-74 to \$350,000 in 1977; tuition grants in 1975-76 were funded in the amount of \$9 million.¹⁰⁰

Rationale for the program resembles arguments expressed in the North Carolina legislature. The cost of new facilities and additional staff at state universities would be avoided by diversion of students to independent institutions.

KANSAS

Reference to religion and education is stated succinctly, but the message is clear, nonetheless. The constitution reads:

⁹⁹Iowa Code Annotated, Sec. 261.9; Sec. 261.10.

¹⁰⁰Smith, NCICU Report, p. 12.

. . . nor shall any person be compelled or support any kind of worship. . . . No religious sect or sects shall control any part of the public education funds.¹⁰¹

Legislators ignored the clarity of the message, for subsidies began to flow in the early 70s to students attending independent and church-related colleges. Challenges in federal court against a tuition grant program failed to curtail financial assistance to "needy" students. The constitutionality of the program was upheld, despite five colleges with required religious programs.¹⁰² The "offenders" modified their religious mission, and the state Attorney General recently reinstated them to the program.¹⁰³ Student competitive scholarships in 1975-76 amounted to \$290,000 in addition to federal SSIG funds allocated to the state.¹⁰⁴ A student budget contribution of \$450 must be paid before tuition grants are paid. Funding of this program in 1975-76 was \$2.9 million.¹⁰⁵ It reached \$3,400,000 in 1976-77.¹⁰⁶

Modification of the five colleges' religious role provides the pattern for other colleges to follow in assuming a receptive posture for receipt of public tax assistance.

¹⁰¹Kansas, Constitution, Bill of Rights, Sec. 7; Art. VI, Sec. 6(c).

¹⁰²Americans United for Separation of Church and State v. Bubb, 379 F. Supplement 872-875 (D. Kansas, 1974).

¹⁰³Smith, NCICU Report, p. 13.

¹⁰⁴Ibid. ¹⁰⁵Ibid.

¹⁰⁶Chambers, The Chronicle of Higher Education, p. 135.

KENTUCKY

The Kentucky Bill of Rights allows no payment of tax money to anyone "except in consideration of public services."¹⁰⁷ That is followed by absence of compulsion of anyone to attend any place of worship: erection, (of any place of worship), maintenance, its upkeep, or salary or support of the clergy.¹⁰⁸ In addition to the requirements that the state's money be levied for public purposes only, the article on education requires that:

No portion of any tax or fund now existing, or that hereafter may be raised or levied for educational purposes, shall be appropriated to or used by, or in aid of, any church, sectarian or denominational school.¹⁰⁹

The Kentucky legislature has created a Higher Education Assistance Authority under which the Board of Directors may provide loans, grants, scholarships, and enter into contracts with financial institutions. The money may be received from any source, and is to be utilized by Kentucky citizens who attend eligible institutions.¹¹⁰ Under the rules and regulations it is significant to note that those individuals excluded from assistance are those who:

¹⁰⁷ Kentucky, Constitution, Bill of Rights, Sec. 3.

¹⁰⁸ Ibid., Sec. 5. ¹⁰⁹ Ibid., Education, Sec. 189.

¹¹⁰ Kentucky Revised Statutes, Vol. 7, Chapter 164.740, 164.748.

. . . are not planning to enroll or are not enrolled in a course of study leading to a certificate, diploma or degree in theology, divinity or religious education. . . .¹¹¹

The Authority, however, does encourage the utilization of tuition or fees granted as a supplement to needy students who attend private colleges and universities.¹¹² However, limits imposed on private institutions require that:

The maximum amount shall not exceed 50 per cent of the average state appropriation per full-time equivalent student enrolled in all public institutions of higher education. Such tuition grants are to be calculated annually by the Kentucky Higher Education Assistance Authority.¹¹³

Funding by the Authority in 1975-76 provided students attending private, nonprofit institutions \$500,000 for tuition grants. Through a comprehensive grant program \$1 million in taxes was funded for aid to public, private and proprietary institutions. The federally insured loan program was funded in the amount of \$3 million. In order to qualify for insured loans the student must have previously been denied a loan from other sources before consideration will be given him for a state loan.¹¹⁴ More recent funding shows an increase of 265% in the funding of the Assistance Authority in the amount of \$3,941,000, while

¹¹¹Kentucky Revised Statutes, Vol. 7, Chapter 164.749.

¹¹²Ibid., 164.780; Enact. Acts 1972, Ch. 114, Sec. 1.

¹¹³Ibid., 785; Enact. Acts 1972, Ch. 114, Sec. 2.

¹¹⁴Smith, NCICU Report, p. 14.

there is no change in other appropriations for 1976-77.¹¹⁵
 State scholarship grants increased overall from \$500,000
 in 1974-75 to \$2,622,000 in 1976-77.

LOUISIANA

Although ranked fiftieth in amount of state appropriations for higher education, Louisiana still provides substantial aid in the form of loans and direct subsidies to non-public, church-related colleges. Those named in the statutes to receive such aid are: Centenary College, Dillard University, St. Mary's Dominican College, Holy Cross College, Louisiana College, Loyola University, Tulane University, and Xavier University. In a majority of cases, the names suggest a strongly sectarian flavor to the origin of these institutions.¹¹⁶

Administration of the funds provided in the bill will be effected by the Louisiana Higher Education Assistance Commission.¹¹⁷

The above enactments occurred despite the possibility of there being brought litigation challenging the

¹¹⁵ Chambers, The Chronicle of Higher Education, p. 128.

¹¹⁶ Louisiana Revised Statutes, Subpart D, State Loans to Students, Sec. 1731; "Colleges and Universities--Nonpublic Institutions--Payments for Residents, Act No. 562: R.S. 17: 2053 (1975).

¹¹⁷ Ibid., Act. No. 599, Sec. R.S. 3023.6.

constitutionality of such legislation. The constitution does not specifically prohibit expenditure of funds for private educational institutions. In the Declaration of Rights is stated: "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."¹¹⁸

Concerning revenue and finance, it is stated that: "The power of taxation . . . shall be exercised for public purposes only."¹¹⁹ There does not appear to be a current feeling within the state of concern over religious establishment by way of direct institutional aid.

Smith notes that in 1975-76, private colleges were funded for \$1.6 million, excluding divinity students. In addition, Tulane absorbed the overflow of medical students from Louisiana State University and was subsidized with \$315,000, or \$5,000 per student.¹²⁰ 1976-77 figures reveal that there was no change in the appropriation.¹²¹

MAINE

In terms of constitutional prohibition of state aid to church-related higher education, the article on religion

¹¹⁸ Louisiana Constitution, Art. I, Sec. 8.

¹¹⁹ Ibid., Art. VII, Sec. 1; Art. VII, Sec. 6; Art. VII, Sec. 10(D).

¹²⁰ Smith, NCICU Report, p. 15.

¹²¹ Chambers, The Chronicle of Higher Education, p. 128.

declares that "no subordination nor preference of one sect or denomination to another shall ever be established by law. . . ." ¹²² If all denominational schools and colleges are treated "equally" then no constitutional affront is committed. Instead of prohibitions, the constitution authorizes the legislature to "encourage and suitably endow . . . all academies, colleges, and seminaries of learning within the state. . . ." ¹²³ Furthermore, provision is to be made to make loans to Maine students attending colleges outside the state. ¹²⁴

A state scholarship program was repealed in 1971. ¹²⁵ Students may utilize the loan program provided they attend a "regionally accredited" college, or if they are approved by the state board of education in their state. No limits seem to be placed on private or church-related institutions. ¹²⁶ The public policy statement on higher education in Maine supports the concept that:

. . . each higher education institution in the State of Maine, public and private, shall have control over its education program and related activities within its board of control, and that its faculty shall enjoy the freedoms traditionally accorded higher education

¹²² Maine, Constitution, Art. I, Sec. 3.

¹²³ Ibid., Art. VIII, Par. 1, Sec. 1.

¹²⁴ Ibid., Art. VIII, Par. 1, Sec. 1.

¹²⁵ Maine, Revised Statutes, 20, Sec. 2215-2224.

¹²⁶ Ibid., 20, Sec. 2208.

institutions in teaching, research and expression of opinions and that such faculty shall be consulted in the formulation of academic policies pertaining to it.¹²⁷

Aid to disadvantaged minorities (Indians) was funded in 1974-75 in the amount of \$60,000 in scholarships. In 1975-76, the Tuition Equalization Program for students attending private schools was funded at \$432,000. The program, based on need, allowed up to \$900.00 per year, per student, from families with incomes under \$13,000. Scholarships for families of deceased or disabled veterans was funded in 1975-76 at \$50,000. The limit was placed at \$300 per student, per year.¹²⁸ 1976-77 noted no substantial change in the funding.¹²⁹

MARYLAND

The Constitution of Maryland forbids the compulsion of attendance at or financial support of any place or ministry. Religious establishment and freedom from sectarian control over a person's conscience or personal fortune seems to coincide with the First Amendment.¹³⁰

¹²⁷Maine, Revised Statutes, "Education," 20, Sec. 2251 (2).

¹²⁸Smith, NCICU Report, p. 16.

¹²⁹Chambers, The Chronicle of Higher Education, p. 128.

¹³⁰Maryland Constitution, Declaration of Rights.

The constitution refers also to the state retention of its credit, and other obligations, resting the power of the General Assembly.¹³¹ The article on education places tight control over the state school fund and the purposes of education.¹³²

The Board of Public Works of Maryland in 1974 administered and approved a broad scope of aid to private, church-related colleges. This includes direct institutional aid, student assistance, and authority to provide facilities assistance to such institutions.¹³³

Direct aid to state-accredited private institutions was funded in 1974-75 in the amount of \$3 million. The plan involved the distribution of 15% of the state general fund per FTE (full-time student equivalent) at public colleges and universities, based on the previous enrollment.¹³⁴

Student aid involved a number of programs, among which are general state scholarships, war orphan grants, and Senatorial scholarships, all totalling \$4,093,400 in 1974-75.¹³⁵ Students attending public or private schools

¹³¹ Maryland Constitution, Art. III, Sec. 34; Sec. 54.

¹³² Ibid., Art. VIII, Sec. 3.

¹³³ Annotated Code of Maryland (1975), Art. 77A, Sec. 14-61A.

¹³⁴ Smith, NCICU Report, p. 17.

¹³⁵ Ibid.

are entitled to the assistance. Following Roemer in May, 1976, aid to private colleges increased 101% to \$5,500,000, and state scholarships rose 11% in the 1976-77 budget.¹³⁶

MASSACHUSETTS

The Massachusetts Constitution contains amendments which forbid the establishment of religion and permit its free exercise:

. . . No subordination of any one sect or denomination to another shall ever be established by law. . . . No law shall be passed prohibiting the free exercise of religion.¹³⁷

However, the constitution, in November, 1974, was amended to allow grants in aid by the state to "private higher educational institutions or to students or parents or guardians of students attending such institutions."¹³⁸ The amendment opened the doors for direct financial aid to both students and institutions. The Legislature created the Massachusetts Educational and Health Facilities Authority for the purpose of issuance of tax-exempt construction bonds for private institutions. Health-related scholarships and contracts with private colleges and universities were

¹³⁶Chambers, The Chronicle of Higher Education, p. 128.

¹³⁷Massachusetts, Constitution, Art. XI (Articles of Amendment); Art. XLVI, Sec. 1 (Articles of Amendment).

¹³⁸Ibid., Art. XLVI, Sec. 2 (Articles of Amendment).

funded at \$1,150,000 in 1975-76.¹³⁹ For general education, including graduate study, the state allotted to the private sector 80% of a \$10.5 million scholarship fund. Massachusetts students may use the scholarships anywhere in the United States at regionally accredited institutions.¹⁴⁰ The reason for this unusual ratio rests with the fact that Massachusetts is the only state in the United States where private higher educational institutions outnumber public institutions.¹⁴¹

The scholarship fund increased to \$12,425,000 in 1976-77. Among these are the more prestigious institutions in America, whose sectarian ties have long been sublimated to a more independent, scientific academic posture.¹⁴² However, some institutions of the private sector remain closely tied to religious foundations and purpose to promote a sectarian heritage.¹⁴³ The change in the constitution would not have been required if all the private sector had abandoned the sectarian mission. The question persists, therefore:

¹³⁹Smith, NCICU Report, p. 18.

¹⁴⁰Ibid., p. 18.

¹⁴¹Chambers, The Chronicle of Higher Education, p. 128.

¹⁴²John S. Brubacher and Willis Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636-1976 (New York: Harper & Row, Publishers, 1976), pp. 8-10.

¹⁴³Ibid., p. 145.

does the Massachusetts State Constitution contain within it a contradiction of its own establishment clause, as well as that of the national Constitution?

The question does not necessarily apply to the private secular institutions, because governmental intrusion does not involve religious establishment, nor neutralize academic freedom. The question becomes viable with those colleges that still consider themselves church-related, with a mission to Christianize society, and yet to maintain a vitality without sacrificing autonomy and neutralizing their Christian influence.

MICHIGAN

Compulsion to attend or contribute to religion is unconstitutional in Michigan. In addition, "no money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary. . . ." ¹⁴⁴ A two-thirds vote in the legislature, however, can provide money for "local or private purposes." ¹⁴⁵ At this time, however, the constitution still forbids extension of credit to private or public corporations. ¹⁴⁶

¹⁴⁴Michigan, Constitution, Art. I, Sec. 4 (Bill of Rights).

¹⁴⁵Ibid., Art. IV, Sec. 30.

¹⁴⁶Ibid., Art. IX, Sec. 18.

Despite the above constitutional prohibitions the State Legislature enacted a student scholarship program in 1964.¹⁴⁷ Another piece of legislation enacted in 1966 provided for specific grants to Michigan residents enrolled full-time at private, non-profit institutions. Limitations as to the religious character of the institution were placed in the act:

. . . whose instructional programs are not comprised solely of instructional programs in sectarian or religious worship and which otherwise approved by the state board of education.¹⁴⁸

Despite the above prohibitions, the State Legislature enacted the Higher Education Loan Authority in 1975, which does the following:

. . . for the purpose of providing loans to eligible students; to prescribe its powers and duties; to authorize the authority to borrow money and issue bonds and to provide for the disposition of those funds; to exempt the bonds from taxation; and to authorize persons, corporations, and associations to make gifts to the authority.¹⁴⁹

The loans to students apply to those enrolled at either a public or private institution.¹⁵⁰

¹⁴⁷Michigan Statutes Annotated (Act 208, 1964), Sec. 15.2097 (31).

¹⁴⁸Ibid. (Act 313, 1966), Sec. 152097 (81); Sec. 15.2097 (83).

¹⁴⁹Ibid. (Act 222, 1975), Cum. Supp., Sec. 15.20961 (1).

¹⁵⁰Ibid.; Sec. 15.2096(12).

The language determining the amount of grant and placing limits on the nature of religious studies leaves room for ambiguous conclusions concerning eligibility. The act states:

No grant shall be made under this act to any student who is enrolled in a course of study leading to a degree in theology, divinity, or religious education, or who is a religious aspirant.¹⁵¹

The 1974 Legislature approved a funding of direct grants to private institutions based on the number of graduates they produced.¹⁵² The amount budgeted was \$1.97 million in 1975-76. One of the specific requirements for reimbursement was to "maintain and make available for inspection records necessary for administration of this act."¹⁵³ The provision simply drives one more nail into the construct of accountability which accompanies any receipt of tax funds.

Appropriations for health-related student assistance involving contracts and reimbursements for degrees earned at private colleges and universities totalled \$843,000 in 1974-75.¹⁵⁴ Student assistance involved both tuition grants and competitive scholarships. From a funding of \$11 million in 1975-76, private college students qualified for 22% of the

¹⁵¹Michigan Statutes Annotated (Act 222, 1975), Cum. Supp., Sec. 15.2097(84) (2).

¹⁵²Ibid., Sec. 15.2097(202).

¹⁵³Smith, NCICU Report, p. 19.

¹⁵⁴Michigan Statutes Annotated (Act 222, 1975), Cum. Supp., Sec. 15.2097(202).

scholarships and 44% of the funds. Tuition grant funding was based entirely upon need, and the budget for grants was \$9,850,000.¹⁵⁵ Chambers reports no change over the two-year period of 1976-77, under the totals of "student aid" at \$27 million. He reports scholarships at \$13 million and tuition grants at \$12,200,000.¹⁵⁶

MINNESOTA

The Minnesota Constitution is more explicit than most state constitutions in its concern that the public treasury not be drawn upon to further religious societies or educational institutions.¹⁵⁷

However, Stanley Weinberg noted in 1969 that changes were taking place in terms of attitude toward aid to higher education in the Minnesota Legislature. Weinberg says:

As recently as the 1955 and 1957 sessions of the Minnesota State Legislature, state scholarship bills were killed in committee because, it was argued, such legislation represented a deliberate attempt to bypass constitutional requirements separating church and state. We had advanced to the point in 1967 that, without dissenting vote, the Minnesota legislature adopted a state scholarship program that not only excludes disadvantageous distinctions between public and private education, but also includes accelerated subsidies for students attending private institutions.¹⁵⁸

¹⁵⁵ Smith, NCICU Report, p. 19.

¹⁵⁶ Chambers, The Chronicle of Higher Education, pp. 129, 136.

¹⁵⁷ Minnesota, Constitution, Arts. I, Sec. 16; VIII, Sec. 2; IX, Sec. 10.

¹⁵⁸ Stanley J. Weinberg, "Private Higher Education in America Today," School & Society, Nov. 1969, pp. 439-441.

The issuance of tax-exempt bonds for the purpose of refinancing debt-ridden private church-related colleges that were building secular educational facilities did not contravene the State Constitution, according to a 1975 case, Minnesota v. Hawk.¹⁵⁹ However, it is clearly stated that such funds are not to be used to construct:

. . . any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of a school or department of divinity for any religious denomination.¹⁶⁰

The point has been raised, however, that such aid releases other funds for the construction of such facilities, which can be construed as indirect subsidization of religion.¹⁶¹

Under contractual arrangements for education of Minnesota residents, private colleges must not require sectarian Bible study, or be specifically preparatory for the ministry or religious education.¹⁶²

Contracts in 1976 were funded at \$3.2 million, and in 1977 at \$4 million. Health education assistance totalled \$1,200,000 in 1976, and \$1,224,000 for 1977. The medical student loan program was funded through revenue bonds at

¹⁵⁹ Minnesota Higher Education Facilities Authority v. Hawk, 1975, 232 N.W. 2d. 106.

¹⁶⁰ Minnesota Statutes Annotated, Sec. 136A.28.

¹⁶¹ Tilton v. Richardson, 403 U.S. 672, 676 (1971).

¹⁶² Minnesota Statutes Annotated, Sec. 136A.19, Subd. 4.

\$17,550 in 1976, with \$27,300 in reserve for 1977. General student assistance, of which one half was based on need, provided a total of \$10,750,000 in 1976-77, which was reserved for the top 25% academically.¹⁶³

The Grant-in-Aid program is based on needs and applies in either public or private institutions. The amount totalled \$17,900,000 in 1976-77. The state student loan program is financed up to \$90 million in revenue bonds for attendance at either public or private institutions. In 1976, \$500,000 was funded for work-study, and \$1,250,000 has been allotted for 1977.¹⁶⁴

MISSISSIPPI

Six articles in the constitution of Mississippi apply to the prohibition of financial aid to religion and the use of tax monies for other than public purposes.¹⁶⁵ The article on education specifically states that:

No religious or other sect or sects shall ever control any part of the school or other educational funds be appropriated toward the support of any sectarian schools. . . .¹⁶⁶

Attempts to provide tuition equalization have died in committee in past legislative sessions. No state money

¹⁶³Chambers, NCICU Report, pp. 20-21.

¹⁶⁴Ibid.

¹⁶⁵Mississippi, Constitution, Arts. III, Sec. 18; IV, Sec. 66; IV, Sec. 90; IV, Sec. 95.

¹⁶⁶Ibid., Art. VIII (Education), Sec. 208.

is presently utilized by private colleges, either through direct loans or grants, nor indirectly through aid to students attending private colleges.

MISSOURI

Under Missouri's Bill of Rights, religious freedom is guaranteed through the prohibition of state establishment or financial support of sectarian traditions or institutions.¹⁶⁷ According to the revised January, 1976, Constitution, public support of denominational schools was clearly unconstitutional. The article entitled "Education" says:

Neither the General Assembly, nor any county, city, town, township, school district, or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church, or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state or any county, city, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.¹⁶⁸

The state legislature, however, ignored the constitution and established the Student Tuition Awards Program in 1972.¹⁶⁹ The program proposed that assistance be given to "full-time students to receive nonreligious educational

¹⁶⁷ Missouri, Constitution, Article I (Bill of Rights), Sec. 6.

¹⁶⁸ Ibid., Art. IX (Education), Sec. 8.

¹⁶⁹ Missouri Citations, Vol. II, 173.200.

services in a public or private institution of higher education of their choice."¹⁷⁰

United States Law Week summarized the program which passed muster in the Missouri Supreme Court in July, 1976.¹⁷¹

The program's main features are as follows:

. . . payments are made by individual checks payable solely to student recipients. The checks are sent to the institutions, and they, in turn notify the students that their checks are available. At the time the checks are received by the students, they are expected to take care of . . . educational expenses. . . . Students attending public or private institutions of higher education are eligible, but no grants are permitted to students who enroll in courses leading to theology or divinity degrees.¹⁷²

The tuition assistance program provided in 1974-75 a funding of \$3.5 million. Awards are based on academic ability and needs, and provide up to half of tuition and fees, or up to \$900.00 per year.¹⁷³ Chambers reported no increase or decrease in funding for 1976-77.¹⁷⁴

¹⁷⁰Missouri Citations, Laws 1972, p. 763, Sec. 1.

¹⁷¹Americans United v. Rogers, 538 S.W. 2d 711 (1976).

¹⁷²"First Amendment No Bar to Missouri's Tuition Aid Program," U. S. Law Week, 45 (August 3, 1976) 1019. Also: Americans United v. Rogers, 7/26/76, LW 2056.

¹⁷³Smith, NCICU Report, p. 23.

¹⁷⁴Chambers, The Chronicle of Higher Education, p. 129.

MONTANA

Montana's constitution clearly states that there will be no forced attendance or support of religion.¹⁷⁵ In addition, the constitution expressly forbids direct or indirect support or aid of any:

. . . church, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect or denomination.¹⁷⁶

There is no program, thus prohibited, in the state of Montana, and the legislature is prohibited by the constitution from appropriation of funds for such a program.¹⁷⁷

NEBRASKA

The Bill of Rights in the Nebraska Constitution rules out any establishment of religion.¹⁷⁸ Under Education, the constitution specifically denies financial aid to any educational institution "not exclusively owned and controlled by the State or a governmental division thereof. . . ."¹⁷⁹

A program of tuition aid grants to assist full-time student residents at Nebraska private colleges was declared

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¹⁷⁶Ibid., Art. X (Education and Public Lands), Sec. 6.

¹⁷⁷Ibid., Art. V (legislative department), Sec. 11 (5).

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¹⁷⁹Ibid., Art. VII (Education), Sec. 11.

unconstitutional by the State Supreme Court, and has been discontinued.¹⁸⁰

NEVADA

Although the constitution has no reference to religious freedom or establishment, it states the following concerning education:

No public funds of any kind or character whatever, State, county, or municipal, shall be used for sectarian purposes.¹⁸¹

NEW HAMPSHIRE

Consistent with other early colonial constitutions, the state has a strong statement concerning religious establishment.¹⁸² The constitution provides a very strong statement in support of educational institutions of all kinds. However, it provides:

. . . nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of any religious sect or denomination. . . .¹⁸³

The constitution seems to be working, for currently, no money, such as is forbidden by the state document, is presently utilized in assistance to such institutions.

¹⁸⁰ Smith, NCICU Reports, p. 25.

¹⁸¹ Nevada, Constitution, Art. XI (Education), Sec. 10.

¹⁸² New Hampshire, Constitution, Part I (Bill of Rights), Art. 6.

¹⁸³ Ibid., Part III, Art. 83.

NEW JERSEY

The constitution deals with religious freedom, and states that, "there shall be no establishment of one religious sect in preference to another."¹⁸⁴ Under taxation and finance, money for public schools is designated for that purpose alone. However, the constitution does presently permit transportation of children between the ages of five and eighteen to and from "any school."¹⁸⁵

The state legislature in 1968 provided for tuition aid grants.¹⁸⁶ The New Jersey program for educational assistance to higher education is comprehensive. A portion of funding goes toward contracts with independent colleges and universities. This was funded in 1975 at \$6 million, with a consideration of \$8 million in 1976. Direct institutional aid was funded that same period at \$3.3 million. New Jersey devised a program to aid disadvantaged students providing \$1.3 million for students in private institutions. In addition the private sector received a \$2.5 million share of the state scholarship program, a large portion of the \$2.2 million incentive grants, and an additional \$2.8 million of grants

¹⁸⁴ New Jersey, Constitution, Article I, Par. 3, Par. 4.

¹⁸⁵ Ibid., Art. VIII, Sec. 4, Par. 2 and 3.

¹⁸⁶ New Jersey Statutes Annotated, 1976, Education, Subtitle 12. Financial Assistance for Higher Education, Chapter 71, Art. 5, State Tuition Grants (new) 18A:71-41.

based on student financial need.¹⁸⁷ Private college contracts dropped back to \$6 million, while an increase of 10% in student grants raised the total to about \$28 million in all student aid in 1976-77.¹⁸⁸

NEW MEXICO

The New Mexico Constitution provides for religious freedom, and requires that no preference be given any denomination or mode of worship.¹⁸⁹ Concerning education, the state constitution places public schools and colleges under control of the state and excludes utilization of public tax monies or land from "support of any sectarian, denominational, or private school college, or university."¹⁹⁰

New Mexico has no plan of financial assistance to students within private colleges in the state. However, by virtue of its membership in the western regional educational program, New Mexico indirectly assists private institutions in other states.¹⁹¹ No other program has emerged from the legislature.

¹⁸⁷Smith, NCICU Report, p. 25.

¹⁸⁸Chambers, The Chronicle of Higher Education, p. 129.

¹⁸⁹New Mexico, Constitution, Article II (Bill of Rights), Sec. 11.

¹⁹⁰Ibid., Art. XII (Education), Sec. 3.

¹⁹¹Smith, NCICU Report, p. 26.

NEW YORK

Free exercise of religion is guaranteed by the state constitution.¹⁹² A very strong amendment exists with regard to education. But despite it, the state has devised a way to assist private, church-related higher education. The article 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, other than for examination or inspection, of any school or institution wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.¹⁹³

A dissertation by Michael B. Freedman examined the development of a state policy toward financial aid of the state's private and independent institutions of higher learning. The beginning of indirect aid in New York goes back to the Heald Report of 1960. Freedman notes that support for private colleges must come from a Republican legislature, since New York Democrats historically lean toward public higher education.¹⁹⁴

In June, 1972, New York legislators received a report entitled: 1972 Statewide Master Plan for Private Colleges

¹⁹²New York, Constitution, Article I (Bill of Rights), Sec. 3.

¹⁹³Ibid., Art. XI (Education), Sec. 3.

¹⁹⁴Michael B. Friedman, "Public Support for Private Higher Education in New York State: A Study of Strategies Employed," Dissertation Abstracts International, State University of New York at Albany (1971), 1876-A.

and Universities. It reaffirmed that the state system of indirect institutional aid, called the "Bundy Plan" be reaffirmed so as to see the private sector through its financial crisis. The report asked that private junior colleges also be included in the Bund program. The Legislature listened and continues to utilize the system of indirect assistance to the private sector. A Higher Education Omnibus Bill provided for the needs of the private sector in a comprehensive manner that disregards any concern about constitutional conflict. Indeed, most of the aid plans in the states utilizing indirect aid received inspiration from the Bundy mechanism.¹⁹⁵

The private sector became the beneficiary of direct institutional aid in 1975-76 at the level of \$57.4 million, and Polytechnic Institute of New York was granted emergency aid of \$750,000 in 1974-75. Disadvantaged minorities at New York private colleges in 1975-76 received \$7.6 million in aid. The New York Legislature provided medical-related scholarships, stipends, and grants at the level of \$14,650,000. Student aid was allotted the lion's share of the budget in the form of scholarships, grants, and guaranteed loans. The budgeted figure was \$301 million. Private institutions benefited through the conduit of their students' needs.¹⁹⁶

¹⁹⁵ John W. Chandler, Statewide Master Plan for Colleges and Universities, New York: Commission on Independent Colleges and Universities, State of New York, 1972 (ERIC Document Reproduction Service No. ED078-757), Passim.

¹⁹⁶ Smith, NCICU Report, pp. 27, 28.

The amounts for aid to private colleges during 1976-77 increased to \$59,880,000; to private medical and dental schools, \$18,916,000 or 113%; and private college SEEK, \$7,591,000 (a new program of aid); tuition assistance \$172,400,000.¹⁹⁷ The state of New York continues to enlarge its appropriations toward aid to private colleges. In no other state is there such a huge public commitment to support of the private sector.¹⁹⁸ The question emerges, with such huge fiscal commitments to the private sector, how much actual academic and religious autonomy do the schools enjoy? The push toward accountability may eventually prove to be an unbearable con- striction on the private sector, especially toward the church- related college.¹⁹⁹

NORTH CAROLINA

Instructions to constitutional conventions in North Carolina included positions against the establishment of religion or support of denominations by taxes or duties. In December, 1776, the North Carolina Provincial Congress adopted and placed in its constitution the following:²⁰⁰

¹⁹⁷ Chambers, The Chronicle of Higher Education, p. 129.

¹⁹⁸ Ibid.

¹⁹⁹ The Carnegie Foundation, The States and Higher Education: A Proud Past and a Vital Future (San Francisco: Jossey-Bass Publishers, 1976), p. 19.

²⁰⁰ Stephen Beauregard Weeks, "Church and State in North Carolina," in Johns Hopkins University Studies in Historical and Political Science, ed. Herbert Adams (1893; rpt. New York: Johns Hopkins Press, 1956), p. 56.

That there shall be no Establishment of any one religious Church or Denomination in this State in preference to any other, neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship contrary to his own Faith or Judgment, or be obliged to pay for the purchase of any Glebe, or the building of any House of Worship, or for the Maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform, but all persons shall be at liberty to exercise their own mode of worship. Provided that nothing herein contained shall be construed to exempt preachers of treasonable and seditious Discourses, from legal trials and Punishment.²⁰¹

North Carolina's present constitution is not concerned with the specifics of the earlier version. More recently, lawmakers were contented with a guarantee for liberty of conscience.²⁰² However, the state still falls under the umbrella of the First Amendment of the Constitution of the United States. The present constitution does not forbid the utilization of tax monies for private schools and colleges. However, limits are placed upon the use of revenues of the public treasury for public benefit only, unless directly voted by a majority of qualified voters of the state.²⁰³ The constitution provides one of the weakest arguments for separation of church and state within the fifty states. Any challenge to state aid plans must base its primary case upon the Federal Constitution, not the State constitution.

²⁰¹North Carolina Constitution, Art. XXXIV.

²⁰²North Carolina Statutes, Constitution, Art. I (Declaration of Rights), Sec. 13.

²⁰³North Carolina Constitution, Art. V, Sec. 2, Part I; Sec. 2, Part 7; Sec. 3, Part 2.

The article on education simply establishes in the state "a system of free public schools" financed by money collected for the purposes of education.²⁰⁴ The article does not exclude the possibility of using state money for support of private education so long as the public schools are maintained. This interpretation does not, however, answer the question of competition; i.e., where the drain of tax monies becomes so large that it deprives the constitutionally mandated public sector from badly needed revenues. All members of the North Carolina Association of Independent Colleges and Universities are, to some degree, church-related.²⁰⁵

Much of the North Carolina program of state aid is discussed in a previous chapter. The program involves contracts to allow private church-related colleges to administer state scholarships to state students on the basis of need. The funding in 1975-76 was \$9.2 million, and in 1976-77, was projected at \$18 million. Contracts between the State and the schools provide tax money at the budget level of over

²⁰⁴North Carolina, Constitution, Art. IX, Sec. 6.

²⁰⁵Constant H. Jacquet, Jr., Editor, Yearbook of American and Canadian Churches 1975 (New York: Abingdon Press, 1975), pp. 188-201. Note: The listing of church-related colleges and universities is derived from a variety of official sources. "Of the 635 colleges and universities listed . . . approximately 80 per cent were identified as church-related in reports to the U. S. Office of Education. The remaining 20 per cent did not report it but have been identified as church-related in varying degrees."

\$4 million annually in grants and loans. In general education, state incentive grants amount to a half million dollars, matched by federal funds. College Foundation, Inc. administers \$6 million in a guaranteed loan program which supports itself through sale of revenue bonds. The most controversial of the aid plans are the State Education Assistance Authority Tuition offset grants, which were funded in 1975-76 in the amount of \$4.2 million.²⁰⁶

These plans were the subject of recent federal litigation, Smith v. Board of Governors, which was recently appealed to the United States Supreme Court.²⁰⁷ The next chapter will deal with the suit in detail.

NORTH DAKOTA

Like North Carolina, North Dakota does not deal with freedom of religion in its constitution. Concerned with lands provided by the Morrill Acts, the lawmakers restricted such monies to public education.²⁰⁸ Another article restricted public debt to public welfare and purpose.²⁰⁹

²⁰⁶ Smith, NCICU Report, p. 29.

²⁰⁷ Smith v. Board of Governors, US, No. C-C-76-131 (March 1977).

²⁰⁸ North Dakota, Constitution, Art. VIII (Education), Sec. 152.

²⁰⁹ Ibid., Art. XII (Public Debt and Public Works), Sec. 185.

A limited program of financial aid provided that students with established need could receive aid of about \$300 per student at any accredited post-secondary institution in the state.²¹⁰ In 1974-75, funds were provided in the amount of \$248,000, and in 1976-77, approximately \$297,000 was provided.²¹¹

OHIO

The state constitution insures the individual freedom against religious constraint through forced worship or financial support.²¹² Although the legislature is enjoined to "provide a system of common schools throughout the state, access to, or control of any part of the school funds of the state is denied to religious sect, or sects."²¹³

Ohio, however, has made provision within the constitution to allow the state to guarantee loans made to students in higher education.²¹⁴ Under the Ohio Student Loan Commission, loans to students were made available under the above constitutional provision. The law became effective in

²¹⁰Smith, NCICU Report, p. 30; North Dakota Century Code Annotated, Chap. 15-10, Higher Education.

²¹¹Chambers, The Chronicle of Higher Education, p. 136.

²¹²Ohio, Constitution, Art. I (Bill of Rights), Sec. 7.

²¹³Ibid., Art. VI, Sec. 2.

²¹⁴Ibid., Art. VI, Sec. 5.

November, 1973.²¹⁵ Under the Higher Educational Facility Commission, the private sector may seek assistance in construction of new facilities except for structures "used for sectarian instruction or study or as a place for devotional activities or religious worship."²¹⁶ No limits are placed on the nature of the education gained by the loans, other than the student is to be an Ohio resident enrolled full-time at an eligible institution. No mention is made as to his religious intent or "aspirations" to study religion.²¹⁷ Funding for health-related education in 1974-75 went to Case Western University in the amount of \$10,465,779. Student assistance under the Guaranteed Loan Program for 1975 totalled \$27,859,542. Grants for in-state private institutions were funded at \$40 million.²¹⁸

OKLAHOMA

The Oklahoma Constitution forbids in its Bill of Rights the utilization of public money or property, directly or indirectly for support of a sect or religious teacher, or sectarian institution.²¹⁹

²¹⁵ Ohio Revised Code Annotated, Title 33, Ch. 3351: Sec. 3351.05; H207, eff. 6-1-73.

²¹⁶ Ibid., Ch. 3377: Sec. 3377.01.

²¹⁷ Ibid., Ch. 3377: Sec. 3351.08(A) (1), (2), (3).

²¹⁸ Smith, NCICU Report, p. 31.

²¹⁹ Oklahoma, Constitution, Sec. 3206; Art. II (Bill of Rights), Sec. 5.

Another article agrees with the above statement and requires that no sale of public lands, or income be utilized for the support of any religious or sectarian school, college, or university.²²⁰ But a new amendment allows the coordination of "private, denominational, and other institutions of higher learning," with the state system, under the Oklahoma State Regents for higher education.²²¹

Within the Higher Education Code, it is clear that "no such institution, however, shall receive any financial aid out of any appropriations made by the Legislature and over which the State Regents may have control."²²²

Private in-state institutions benefit indirectly from tuition aid grants given to full-time Oklahoma student residents. Allowance and distribution is made on the basis of need. The plan was funded in 1974-75 at \$300,000,²²³ and in 1976-77 at \$1,196,000.²²⁴ The maximum grant is \$500, but cannot exceed 50% of tuition and/or fees.²²⁵ The Regents are

²²⁰Oklahoma, Constitution, Sec. 3206; Art. XI, Sec. 5.

²²¹Ibid., Art. XIII-A, Sec. 4.

²²²Oklahoma Statutes Annotated, Div. 5, Higher Education, Ch. 70, Sec. 3212; Laws, 1965, C. 396, Sec. 212.

²²³Smith, NCICU Report, p. 32.

²²⁴Chambers, The Chronicle of Higher Education, p. 136.

²²⁵Oklahoma Statutes Annotated, Higher Education Code 70, Sec. 3211 (a), (b).

authorized to oversee the "Revolving Loan Fund of the Oklahoma State Regents for Higher Education." The fund is to provide loans ". . . to any of the State institutions or Educational institutions under their jurisdiction. . . ." ²²⁶ Disbursement of the money is placed under the control of the president of each receiving institution. The fund is restricted by statute to expenditure only for the purpose "said fund was specifically collected." ²²⁷

The ambiguity of the statutes allows for loans, direct and indirect, which have the potential of collision with the constitution, especially in terms of "indirect aid" to a religious sect, or sectarian institution.

OREGON

The Oregon Bill of Rights appears to effectively close off withdrawal of money for religious or theological institutions, or payment of a legislative chaplain. ²²⁸ However, constitutional provision was made for higher education building projects up to, and not in excess of \$25 million,

to construct, improve, repair, equip, and to purchase or improve sites therefore . . . for higher

²²⁶ Oklahoma Statutes Annotated, Higher Education Code 70, Sec. 3210 (g).

²²⁷ Ibid.

²²⁸ Oregon, Constitution, Art. I (Bill of Rights), Sec. 5.

higher education institutions and activities; and
 (b) \$5 million . . . for Community Colleges.²²⁹

The building project supersedes the restriction in the article on taxation and finance which sets the state debt limit at \$50,000.²³⁰

Ostensibly, the changes merely bring the constitution in line with inflation, but in reality, precedent has been established which could allow direct payments and assistance to private, church-related institutions. There has not been any activity relative to the financing of building projects on private college campuses. Instead, the legislature studied their policy toward private institutions.

The policy takes note of the significant part private higher education takes in contributing to post-secondary education in Oregon. In addition, it is considered an obligation of the state to support "nonsectarian educational" objectives achieved through nonpublic post-secondary institutions. Encouraging the formulation of such policy, it was noted that many private and independent institutions faced serious financial difficulties, which could shift a heavy burden to the state institutions. They concluded:

Such hazards may be substantially reduced and all education in the state improved through the purchase of

²²⁹ Oregon, Constitution, Art. XI-G (Higher Education Building Project), Sec. I, Par. 1, XI.F (1), Higher Education Building Project), Sec. 1.

²³⁰ Ibid., Art. XI (Taxation and Finance), Sec. 7.

nonsectarian educational services from Oregon's private and independent institutions.²³¹

In the attempt to be consistent with the First Amendment, the State Scholarship Commission could only purchase instruction in secular subjects. The statutes define "secular subjects" as:

. . . any course which is presented in the curriculum of a private and independent institution of higher education and which does not advocate the religious teachings or the morals or forms of worship of any sect.²³²

The plan provides for the entering into contracts for nonsectarian educational services for Oregon students. No mention is made of tax monies being utilized for this purpose. However,

The commission may accept grants, gifts, bequests, and devises of real and personal property to carry out the purposes of ORS 352.710 to 352.760.²³³

It is also noted that if funds are not adequate, then the dollar amount utilized will be reduced in proportion, so as to satisfy the contracts committed for.²³⁴ The contracts in 1975-77 were funded substantially at \$4.3 million. Under the contract in 1975-76, the state paid the private colleges \$425 for every forty-five quarter hours completed, and it was increased to \$500 for 1976-77.²³⁵

²³¹Oregon Revised Statutes, Vol. 3, Sec. 352.710.

²³²Ibid., ORS 352.720 (4). ²³³Ibid., ORS 352.730.

²³⁴Ibid., ORS 352.740.

²³⁵Smith, NCICU Report, p. 33.

Under another program, need grant awards based on financial need and academic achievement were provided to students attending any qualified institution in Oregon. Need grants only were funded at \$4,574,080 in 1975-77, while awards based on need and academic achievement were funded at \$689,256.²³⁶ The Scholarship Commission was funded at \$5,194,000 in 1976-77, an increase of 32%.²³⁷

PENNSYLVANIA

Constitutional provisions concerning freedom of religion and prevention of establishment are stated by the Declaration of Rights of Pennsylvania.

. . . no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent . . . and no preference shall ever be given by law to any religious establishments or modes of worship.²³⁸

But more on point was the constitutional prohibition directed at the legislative branch:

No money raised for the support of the public schools of the commonwealth shall be appropriated or used for the support of any sectarian school.²³⁹

Further commentary is made by the constitution which appears to allow some assistance to private education:

²³⁶Smith, NCICU Report, p. 33.

²³⁷Chambers, The Chronicle of Higher Education, p. 130.

²³⁸Pennsylvania, Constitution, Art. I (Declaration), Sec. 3.

²³⁹Ibid., Art. III (Legislative), Sec. 15.

. . . provided that appropriations may be made . . . in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants, or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.²⁴⁰

In 1971, a Master Plan for Higher Education provided a number of programs of student aid, direct institutional aid and contracts for the awarding of equal opportunity program grants. As of 1976, there was no funding of the contract program.²⁴¹

Direct institutional aid, traditional and medical-related programs are provided to twelve private and church-related institutions. The funding in 1974-75 was \$31,380,000,²⁴² and increased to \$36,716,000 in 1976-77, a growth of 17%.²⁴³ Institutional aid to the private sector was also provided for disadvantaged minorities, by a funding in 1975-76 of \$2,995,000.²⁴⁴

The Pennsylvania Higher Education Assistance Agency in 1974-75 funded a state scholarship program for use at in-state or out-of-state public or private institutions and

²⁴⁰ Pennsylvania, Constitution, Art. III (Legislative), Sec. 30.

²⁴¹ Purdon's Pennsylvania Statutes Annotated, Education, 1976-77, Title 24, Sec. 2510-302, 304, 305.

²⁴² Smith, NCICU Report, p. 34.

²⁴³ Chambers, The Chronicle of Higher Education, p. 130.

²⁴⁴ Ibid.

trade schools. The program was based on need with a maximum award of \$1,200 in-state, and \$800 out-of-state. The formula requires that 50% of need is met for families with less than \$8,000 annual income, while one-third of the need is met if income exceeds \$8,000. Of the total \$68.4 million allotted in 1974-75, students utilized \$24.5 million at private schools.²⁴⁵ Total funding for the scholarship program advanced to \$77,056,000 in 1976-77, as institutional grants rose to \$12,000,000 in the same period.²⁴⁶

RHODE ISLAND

The State Constitution complies with the Federal establishment clause in that:

. . . no man shall be compelled to frequent or to support any religious worship, place, or ministry, except in fulfillment of his own voluntary contract.²⁴⁷

Other constitutional articles provide for a two-thirds majority of the General Assembly on money bills and the setting up of a permanent public school fund, to be used exclusively for that purpose.²⁴⁸ Rhode Island is not reported as having a plan to provide aid to private, or church-related higher education.

²⁴⁵Smith, NCICU Report, p. 34. ²⁴⁶Ibid.

²⁴⁷Rhode Island, Constitution, Art. I (Declaration of Certain Constitutional Rights and Privileges), Sec. 3.

²⁴⁸Ibid., Art. IV (Legislative Department), Sec. 14; Art. XII (Education), Secs. 2 and 4.

SOUTH CAROLINA

Apparently utilizing the First Amendment of the federal Constitution as a model, the South Carolina Constitution includes in its Bill of Rights the following:

The General Assembly shall make no law establishing religion or prohibiting the free exercise thereof. . . .²⁴⁹

The article on finance and taxation prohibits the use of the credit of the state for the benefit of other than educational purposes.²⁵⁰

The article on education denies the utilization of the property or credit of the state, or other public corporation, or any public money for direct aid or maintenance of any college, school, hospital, orphan house, etc., "which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society, or organization."²⁵¹ The original reading of the article was "directly or indirectly", but following a hard-fought court case (Durham v. McLeod) the constitution was amended and "indirectly" was struck from the article.²⁵² Thus, the state was permitted to go ahead with its assistance

²⁴⁹South Carolina, Constitution, Art. I (Bill of Rights), Sec. 4.

²⁵⁰Ibid., Art. X (Finance and Taxation), Sec. 6.

²⁵¹Ibid., Art. XI (Education), Sec. 9.

²⁵²Durham v. McLeod, 192 S.E. 2d 202 (1972).

of institutions and student aid through the process of using the state's credit to market revenue bonds.

In 1974-75, funding for teacher training under state contract was provided for private colleges. Direct institutional aid in the form of practice teaching fees to compensate supervisors of teacher practicums amounted to \$87,870.²⁵³ The Educational Facilities Authority provided the occasion for a landmark case regarding construction of private church-related college facilities through state-backed bonds.²⁵⁴

Student assistance through a tuition grants program based on merit and need was funded in 1975-77 at \$7,341,047. The State Education Assistance Authority also survived litigation, thus enabling the state to provide guaranteed loans at all schools. A further prerequisite allotted private higher education is the authority granted the schools to purchase on state contract, thus providing another means of indirect support of church-related colleges.²⁵⁵

SOUTH DAKOTA

In the Bill of Rights, South Dakota's constitution effectively covers freedom of worship, establishment and in

²⁵³Smith, NCICU Report, p. 35.

²⁵⁴Hunt v. McNair, 258 S.C. 97, 197 S.E. 2d645 (1972), aff'd., 413 U.S. 734, 93 S. Ct. 2868, 37 L.Ed. 2d 923 (1973).

²⁵⁵Smith, NCICU Report, p. 35.

the same article precludes any utilization of state money for the benefit of any sectarian or religious society or institution.²⁵⁶

The article on education also forbids the

. . . appropriation of lands, money or other property or credits to aid any sectarian school . . . and no sectarian instruction shall be allowed in any school in the state.²⁵⁷

The Board of Regents, within the restraints of South Dakota's constitution, is charged to administrate such funds as are necessary to facilitate the education of state citizens at any public or private colleges.²⁵⁸

The Student Incentive Grants program was found by the Legislature to be "in the public interest."²⁵⁹ Based on "financial need," qualified students enrolled at eligible institutions, including private colleges, could receive aid up to \$1,000.²⁶⁰

The health professions presently enjoy strong public support. Loans for medical training can be obtained easier than for other professions. The funding in South Dakota in 1974-75 amounted to \$350,000. The state incentive grant

²⁵⁶ South Dakota, Constitution, Art. VI (Bill of Rights), Sec. 3.

²⁵⁷ Ibid., Art. VIII (Education and School Lands), Sec. 16.

²⁵⁸ South Dakota Compiled Laws, Vol. 5, 1975, Revised Edition, 13-56A-1.

²⁵⁹ SDCL, 13-55A-1. ²⁶⁰ SDCL, 13-ffa-2.

program in 1975-76 was funded at \$250,000 and was limited to first year South Dakota resident students.²⁶¹

TENNESSEE

The Tennessee Constitution pinpoints the consent of the citizen as the crux of religious freedom, and that no semblance of establishment will be made legal in the state.²⁶² No mention is made of education, but loaning state credit or entering into corporate business ventures is outside the purview of state legislative responsibility.²⁶³

In 1974-75, Vanderbilt University and Meharry Medical College were recipients of \$229,100 in contract funds in order to increase Tennessee medical student enrollment. A loan-scholarship program was instituted in order to draw graduates into shortage areas. This was funded at \$300,000. Students may borrow a maximum of \$15,000 during their medical school career.²⁶⁴

The controversial tuition grant program, which applied to public or private institutions, was funded in 1974-75 at \$3.4 million. Students could receive grants in aid up to \$1,000 each, which were limited in application to payment of tuition and fees.²⁶⁵ In 1976-77, Chambers reports the total

²⁶¹Smith, NCICU Report, p. 36.

²⁶²Tennessee, Constitution, Art. I (Declaration of Rights), Sec. 3.

²⁶³Ibid., Art. II (Distribution of Powers), Sec. 31.

²⁶⁴Smith, NCICU Report, p. 37. ²⁶⁵Ibid.

of all aid programs as \$1,500,000, and of that, no funding for grants is listed.²⁶⁶

In 1974, a three-judge federal court found the tuition grant program unconstitutional.²⁶⁷ The state appealed to the Supreme Court and continued to dispense monies. The case is discussed in Chapter V.

TEXAS

The Bill of Rights of Texas forbids the compulsion of church attendance or support, and guarantees against preference by the state of any particular denomination or mode of worship. Furthermore, money from the state's treasury cannot be used to benefit theological or religious education.²⁶⁷ The legislative article forbids the lending of credit of the state to individuals or corporations.²⁶⁸ However, the sub-article which follows amends the prohibition by making possible student loans provided for through the sale of general obligation bonds with a debt limit of \$85 million at a 4% interest. The utilization of money thus raised is as follows:

. . . deposited in a fund hereby created in the State Treasury to be known as the Texas Opportunity Plan Fund to be administered by the Coordinating Board, Texas College and University System, or its successor

²⁶⁶Chambers, The Chronicle of Higher Education, p. 137.

²⁶⁷Americans United v. Dunn, 384 F. Supp. 714 (M. D. Tenn. 1974).

²⁶⁸Texas, Constitution, Art. I (Bill of Rights), Sec. 6; Art. III (Legislative), Sec. 50.

or successors to make loans to students who have been admitted to attend any institution of higher education within the State of Texas, public or private.²⁶⁹

In the 1971 legislative session, a bill was passed authorizing a Coordinating Board which would make tuition equalization grants, not to exceed \$600 annually to Texas resident students attending non-public colleges in the state. The program was the result of a strong lobbying on the part of the Independent Colleges and Universities of Texas (ICUT). The effort had the support of the governor and other key figures.²⁷⁰ The program continued, but was repealed in 1975 to make way for new legislation.²⁷¹ The 1975 plan included contracts, facilities assistance, and a new tuition equalization grant program.²⁷²

The Texas policy is based on the argument that the economic and social potential of the state can be sustained only by removal of social and educational barriers. The legislature therefore acted to establish financial programs that would enable qualified students to receive a higher education.²⁷³ The program is entitled the Texas Assistance

²⁶⁹Texas, Constitution, Art. III, Sec. 50-b(b).

²⁷⁰Vernon's Texas Codes Annotated, Vol. 2, Education Code, Chapter 55.

²⁷¹Vernon's Texas Codes Annotated, Vol. 2, Education Code, Chap. 55, Sub-Chap. C, Tuition Scholarships (Repealed), Secs. 54.101, 54.102. Repealed by Acts 1975, 64th Leg., p. 2326, Ch. 720, Sec. 2, eff. Sect. 1, 1975.

²⁷²Ibid., Chapter 56, Secs. 56.001-56.038; Acts 1975, 64th Leg., p. 2323, Ch. 720, Sec. 1.

²⁷³Ibid., Sec. 56.002, Declaration of Policy.

Grants Program,²⁷⁴ and the purpose is "to provide a program to supply grants of money enabling students to attend post-secondary educational institutions, public or private, of their choice in Texas."²⁷⁵ Among limitations placed on the new program was that the student ". . . be enrolled in an approved post-secondary educational institution in other than a theology or religious degree program."²⁷⁶ The Texas Assistance Grant is based on need, and cannot exceed \$600 per fiscal year,²⁷⁷ and it is to be paid to the student through the enrolling institution.²⁷⁸

The program was funded in 1975-76 at \$7.5 million and in 1976-77 at \$9 million. In addition, contracts with Baylor (Baptist) University for medical and dental training were funded at \$16 million per year in 1975-77. Texas College of Osteopathic Medicine also received funding of \$3 million for 1975-76, and \$3.3 million for 1976-77.²⁷⁹ The same legislature provided for higher education authorities in Texas which may issue tax exempt bonds for federal guaranteed student loans.²⁸⁰

²⁷⁴Vernon's Texas Codes Annotated, Sub-Chap. B, Texas Assistance Grants, Sec. 56.010.

²⁷⁵Ibid., Sec. 56.011, Purpose.

²⁷⁶Ibid., Sec. 56.013(b). ²⁷⁷Ibid., Sec. 61.227.

²⁷⁸Ibid., Sec. 56.015(a), (1); (b).

²⁷⁹Smith, NCICU Report, p. 38; Vernon's Texas Codes, Sec. 61.096; Sec. 105.80.

²⁸⁰Smith, Ibid.

The note regarding constitutional validity follows as an opinion of the attorney general of Texas:

Vernon's Ann. Civ. St. Art. 2654h(repealed), providing for tuition equalization grants, states a primary purpose to provide the maximum possible use of existing resources and facilities in this state and therefore does not violate the separation of church and state doctrine of Const. Art. 1, Sec. 7 or of the prohibition of grants of public funds to individuals of Const. Art. 3, Sec. 51.²⁸¹

The note continues, drawing upon federal interpretations:

The Establishment Clause of the U. S. Constitution as recently interpreted by the United States Supreme Court will not bar all aid to church-sponsored institutions and their students, so long as the aid has a proper secular purpose, does not significantly advance or hinder religion, and does not result in excessive entanglements of government in religion.²⁸²

The appropriation made for tuition equalization grants which appears as item 16 of the appropriations to the Coordinating Board, Texas College and University System, and based upon Acts 1971, 62nd Leg., p. 2529, Ch. 828, is constitutional.²⁸³

In general:

Where an institution of higher education requires an established fixed policy that all of its trustees, officers, faculty and staff members acknowledge belief in and adhere to particular and detailed religious doctrines and refuses to hire a person as a staff member because of the person's religious beliefs, it would be

²⁸¹Op. Atty. Gen., 1971, No. M-861.

²⁸²Op. Atty. Gen., 1973, No. H-66.

²⁸³Op. Atty. Gen., 1973, No. LA-47.

an abuse of discretion for the Coordinating Board, Texas College and University System, to find the institution qualified to participate in the tuition equalization grant program as a non-sectarian institution.²⁸⁴

The new legislation did not differ substantially from that which was repealed, and it has not faced court test other than attorney general opinion.

UTAH

The Utah State Constitution effectively provides for the prevention of the use of public money and property for the support of religious institutions.²⁸⁵ It is especially strong in its education article as it denies appropriations or aid in support of "any school, seminary, college, university, or other institutions controlled in whole, or in part by any church, sect, or denomination whatever."²⁸⁶

Although the state could very well have announced for an established church (Mormon) in years past, there does not appear to be any move toward utilization of tax money for support of Mormon or other religious institutions of higher education.

²⁸⁴Op. Atty. Gen., 1974, No. H-203.

²⁸⁵Utah, Constitution, Art. I (Bill of Rights), Sec. 4.

²⁸⁶Ibid., Art. X (Education), Sec. 13.

VERMONT

Vermont echoes the New England concern with religious freedom and ties it with freedom of conscience in opposition to the establishment of a particular denomination.²⁸⁷

No plan of state support of private higher education presently exists.

VIRGINIA

In previous narrative it is reported that the primary influence for the First Amendment's "establishment-free exercise" couplet is derived from Thomas Jefferson's interest in freedom of expression by an enlightened electorate. It is not surprising, therefore, to read in the Virginia Bill of Rights that:

No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever. . . . And the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination. . . .²⁸⁸

The early constitutionalists most likely felt they had adequately blocked further inroads of sectarianism into government through the denial of powers to the General Assembly to:

²⁸⁷Vermont, Constitution, Art. I.

²⁸⁸Virginia, Constitution, Art. I (Bill of Rights), Sec. 16.

make any appropriation of public funds, or personal property, or of any real estate, to any church, or sectarian society, association or institution of any kind whatever, which is entirely or partly directly, or indirectly controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth.²⁸⁹

The Articles on Education

The articles on education reflect the changing conditions and attitudes of the people of Virginia since Jefferson's time. The founder concerned himself with the notion that education should be pursued in an atmosphere of free scientific inquiry unlimited by sectarian interference.²⁹⁰

Before 1956, the constitution was considered to forbid the appropriation for tuition and fees at private schools.²⁹¹ The changes came about because of an attempt to prevent integration in Virginia schools through the withholding of public funds, which was found unconstitutional.²⁹² In 1956, the constitution was amended by the state to aid students to go to schools other than public through the appropriation of funds for that purpose.²⁹³ However, it was

²⁸⁹Virginia, Constitution, Art. IV, Sec. 16.

²⁹⁰Brubacher and Rudy, Higher Education in Transition, p. 149.

²⁹¹Virginia, Constitution, Art. VIII, Sec. 10.

²⁹²Ibid., Art. VIII, Sec. 1; Harrison v. Day, 200 Va. 439, 106 S.E. 2d 636(1959).

²⁹³Almond v. Day, 197 Va. 419, 89 S.E. 2d 851(1955), Virginia Law Review 42 (1956), 1157.

ruled that direct institutional aid was contrary to the Constitution of the United States.²⁹⁴

The constitutional limitations proved to be too restrictive in the face of straitened circumstances within the church-related college community. A series of proposals passed the legislature in 1973 and 1974. The following words, upon being accepted in 1974 by popular vote, became a constitutional amendment:

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. The General Assembly may also provide for a State agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing.²⁹⁵

Under the College Scholarship Assistance Act, which passage of the above amendment made possible, assistance was allowed any Virginia resident freshman attending public or private colleges, who could demonstrate financial need. On November 5, 1974, an amendment was ratified to this section which inserted "and grants to or on behalf of" following "loans to" near the beginning of the first sentence and added to the last sentence of the section.²⁹⁶

²⁹⁴Griffin v. State Bd. of Education, 296 F. Supp. 1178 (E.D. Va., 1969).

²⁹⁵Code of Virginia, 1976 Cumulative Supplement, Constitution, Article VIII, Sec. 11, At 17.

²⁹⁶Ibid., At. 18.

The program now reads:

There is hereby established, from funds provided by law, a program of tuition assistance in the form of grants and loans, as hereinafter provided, to or on behalf of bonafide residents of Virginia who attend private, accredited and nonprofit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious education or theological education. Unless otherwise indicated, as used in this chapter "accredited" means any institution approved to confer degrees pursuant to Sec. 23-9 of the Code of Virginia. (1972, c.18; 1973, c.2; 1975, c.400)²⁹⁷

Financial aid has subsequently been budgeted for health-related purposes at \$205,500 in 1974-75. State teacher scholarships are primarily allotted to public institutions, while about 5% goes to private "nonsectarian" college students. The Tuition Assistance Program for private institutions of higher learning was funded in 1974-75 at \$4,071,200.²⁹⁸ The category of "student aid" in Virginia dropped 35% in 1976-77 appropriations.²⁹⁹ The need-based College Scholarship Assistance Program was funded at \$1,425,000,³⁰⁰ and paid out \$1,897,000 in 1976-77, which was matched by Federal SSIG funds.³⁰¹

²⁹⁷ Code of Virginia, 1976 Cumulative Supplement, Constitution, Article VIII, Sec. 23-38.12.

²⁹⁸ Smith, NCICU Report, p. 39.

²⁹⁹ Chambers, The Chronicle of Higher Education, p. 131.

³⁰⁰ Smith, NCICU Report, p. 39.

³⁰¹ Chambers, The Chronicle of Higher Education, p. 137.

The wall of separation in terms of the Virginia Constitution was not breached, according to a series of court decisions, which are discussed in the following chapter.

WASHINGTON

The constitution of the state of Washington has effectively limited distribution of tax money to private higher education. The three related articles in the Constitution read as follows:

First: . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . .³⁰²

Second: . . . The credit of the State shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation. . . .³⁰³

Third: All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.³⁰⁴

In an attempt to circumvent the above requirements and to provide assistance to students in attendance at private church-related institutions the Legislature enacted a program of assistance which included:

(1) a need-based student aid program, which was funded in 1973-75 at \$4,600,000, part of which was transferred

³⁰² Washington, Constitution, Art. I, Sec. 11.

³⁰³ Ibid., Art. VIII, Sec. 5. ³⁰⁴ Ibid., IX, Sec. 4.

from the tuition supplement, declared unconstitutional in May, 1973.³⁰⁵

(2) The establishment of the Higher Education Assistance Authority, which was devised to purchase student loans in private and public universities. It was funded in 1973-74 at \$250,000 for an initial administrative start-up budget.³⁰⁶

(3) A work-study program, similar to one in California, provides that half-time students in any accredited higher education institution will receive aid the same as full-time students.³⁰⁷

Clarifying legislation was enacted in 1973, to further define tax-exempt status of private, non-profit colleges and universities. One county tax assessor had attempted to collect taxes from two private colleges, on student housing, food services, student unions, athletic field houses, etc. Had the move been successful, millions of dollars in taxes would have begun to flow from the colleges to all levels of government.³⁰⁸

³⁰⁵Smith, NCICU Report, p. 41.

³⁰⁶Washington, Revised Statutes, Chap. 28B.17.

³⁰⁷Ibid., Chap. 28B.12.

³⁰⁸Alternatives in State Government Financing of Higher Education Wash., D. C.: Academy for Educational Development, Inc., Feb., 1973 (ERIC Document Reproduction Service No. 077 406), p. 46.

The Biennial Appropriations of 1975-77 show that student aid was increased by 37% to \$7,052,000 and the grant program was funded at \$3,010,000.³⁰⁹

On November 4, 1975, the citizens of the State of Washington voted down an amendment which would have allowed unlimited tax aid for private church-related education on all levels. House Joint Resolution 19 was defeated in a 60-40 vote.

The proposed amendment read:

To the extent permitted by the Constitution of the United States and notwithstanding any other provision of the Constitution of the State of Washington to the contrary, the legislature may provide assistance for students of public and private schools, and for students of public and private institutions for post-secondary or higher education for the purpose of advancing their education, regardless of the creed or religious affiliation, influence, or nature of the educational entity which they attend.³¹⁰

Strong appeals for passage of the amendment were made by political leaders in the state, as well as Roman Catholic support and strong media encouragement. Opponents clearly fought an uphill battle against what had appeared certain victory for the amendment's supporters.³¹¹

In July, 1974, the Washington State Supreme Court, in a 5-3 decision, ruled that the state cannot be forced to

³⁰⁹Chambers, The Chronicle of Higher Education, pp. 131 and 137.

³¹⁰"Washington Voters Trounce Parochialism," Church and State, Vol. 28, No. 11, p. 8(192).

³¹¹Ibid., pp. 3-11.

recover \$845,455 which had been received by ten church-colleges and universities in tuition supplements, later declared unconstitutional. The case turned on the point that at the time the money was distributed, the law was assumed to be constitutional, and although no more money could be paid through the program, no recovery could be made.³¹²

WEST VIRGINIA

West Virginians may not, according to their constitution, be compelled to attend or to support any religion or ministry, nor may the state legislature tax the people to support the establishment of religion.³¹³ The founding fathers of West Virginia also prohibited the extension of credit to extra-governmental bodies, individuals, private corporations or companies "for any purpose whatever."³¹⁴

The 1975-76 Budget provided \$1,650,000 for a state scholarship program for undergraduate students, based on the nebulous requirement of ". . . satisfactory academic standing . . . normal progress toward completion of the course of study and continued eligibility, as determined by the commission."³¹⁵ In addition, the legislature provides that

³¹²"Washington's Religious Liberty Referendum," Church and State, 28, 4 (April 1975), pp. 3; 12; Washington State Higher Education Assistance Authority v. Graham, 529 P. 2d 1051, 1054 (1974).

³¹³West Virginia Constitution, Art. III, Sec. 15.

³¹⁴Ibid., Art. X, Sec. 6.

³¹⁵West Virginia Code, 1975 Cum. Supp. 7, Art. 22B; Sec. 18-22B6.

payment of the scholarship must be made directly to the institution, a practice that has been studiously avoided in most all recent financial aid legislation due to the possibility of excessive entanglement with religion.³¹⁶

The legislature in 1974 voted to extend state aid to students attending Greenbrier College of Osteopathic Medicine. But according to the Attorney General, the plan was in violation of Article X, Sec. 6 of the West Virginia Constitution, in that the program provided state funds for a private purpose.³¹⁷

WISCONSIN

The Constitution of Wisconsin clearly prohibits the coerced support of its citizenry of religion through either attendance or taxation. Neither is money permitted to be drawn from the treasury of the state to support or benefit religious institutions.³¹⁸

Constitutional foundations do not permit the credit of the state to be given or utilized in the assistance of any individual association or corporation.³¹⁹ Almost all the fifty state constitutions forbid this practice, yet it is almost universally true that both state and federal credit

³¹⁶West Virginia Code, 1975 Cum. Supp. 7, Art. 22B; Sec. 18-22B6.

³¹⁷Ibid., Art. 22 c.

³¹⁸Wisconsin, Constitution, Art. I., Sec. 18.

³¹⁹Ibid., Art. VIII., Sec. 3.

is extended in the loan programs administered on college campuses in Wisconsin and the other 49 states. It is to be noted that contrary to the majority approach, Wisconsin only administers federal loans, and provides direct grants in all cases of aid administered to students and to institutions.³²⁰

The Wisconsin Higher Education Aids Board has the power under the constitution and by statute to distribute the state's tax money in the form of grants within a number of separate categories. Indian students who are able to demonstrate need are aided from a budget of \$1.7 million.³²¹ A talent incentive grant program to provide for the disadvantaged was funded at \$1,600,000, and provides matching funds for the federal-state scholarship incentive grant program.³²²

Health programs involve both direct grants to the Medical College of Wisconsin, a non-public institution, and for contracts in dental education for state residents at Marquette University. The program at M.C.W. was funded in 1975 at \$2,247,600,³²³ and in 1977 it increased to \$3,194,000.³²⁴ Marquette's dental school received \$2,667,000 (or \$3,000 for each student resident enrolled) in 1973-75. A tuition offset program, based on need, is the largest single

³²⁰Wisconsin, Constitution, Art. VIII., Sec. 3.

³²¹Smith, NCICU Report, p. 44. ³²²Ibid. ³²³Ibid.

³²⁴Chambers, The Chronicle of Higher Education, p. 131.

funding provided by the Board. In 1973-75 it was funded at \$9.9 million.³²⁵ The honor scholarship award program provides financial scholarships to the top 10% of high school graduating classes, and students have the choice of using the grants at either public or private church-related institutions in Wisconsin. Funding in 1973-75 was \$1.1 million for this last program.³²⁶ Education Manpower grants in 1973-75 were funded at \$600,000 for courses leading to employment in a "critical" occupation within the state.³²⁷ The total money funded for the Higher Education Aids Board in 1976-77 was \$20,429,000.³²⁸

WYOMING

The constitution of Wyoming provides for freedom of religion, and non-establishment through its Bill of Rights which forbids extension of state money to any sectarian society or institution.³²⁹ Forbidden by the same document are appropriations for any organization not under absolute control of the state, and this includes denominational or sectarian organizations, institutions and associations.³³⁰

³²⁵Smith, NCICU Report, p. 44. ³²⁶Ibid.

³²⁷Chambers, The Chronicle of Higher Education, p. 131.

³²⁸Ibid.

³²⁹Wyoming, Constitution, Art. I (Bill of Rights), Sec. 19.

³³⁰Ibid., Art. III (Legislative Department), Sec. 36.

No part of

. . . any public school fund [might] ever be used to support or assist any private school . . . college or other institution of learning controlled by any . . . religious denomination whatsoever.³³¹

In addition, the credit of the state is restricted to purposes for the state, and not to be used on behalf of associations or individuals.³³²

The research reveals no unconstitutional plan to assist church-related institutions as are forbidden in the Wyoming constitution, the statutes, nor is there any such plan being contemplated by the legislature.

The constitutional base in the fifty states has proved decisive in a number of court cases dealing with the attempt to breach the wall of separation. In recent cases the Supreme Court of the United States has permitted a number of states to provide tax monies, under certain circumstances, to church-related colleges. The first line of defense has historically been the state's own constitution as it was viewed in the light of the First and Fourteenth Amendments of the Federal Constitution. Consistency of legal opinion has not characterized this question in the past two hundred years of the Republic, nor have recent court decisions done very much toward clarifying for institutional administrators constitutional delimitations regarding the incursion

³³¹ Wyoming, Constitution, Art. VII (Education), Sec. 8.

³³² Ibid., Art. XVI (Public Indebtedness), Sec. 6.

of state and federal money into the fiscal processes of the church-related campus.

In order that state laws might not be in conflict with the constitutions, some legislators have succeeded in persuading citizens to change their constitutions to permit the aid. In 1973-74 the attempt was made in the state of Washington, unsuccessfully.³³³ The same attempts at change have been turned back in New York (1967); in Nebraska in 1966 and in 1970; and in Oregon and Idaho in 1972.³³⁴

³³³Weiss v. O'Brien, 509 P.2d 973 (1973); Washington State Higher Education Assistance Authority v. Graham, 529, P.2d 1051, 1054 (1974).

³³⁴Church and State, 28, 4 (April 1975), p. 12.

CHAPTER V

LITIGATION: UNITED STATES SUPREME COURT,
FEDERAL, AND STATE

Financial aid to all levels of education must stand or fall before the historic measure of state and federal constitutions. Aid plans which scar the landscape as failures of the past; others which are contemplated for the future; and those that are presently operative must have the sanction of the courts in order to begin or continue. Court decisions are not made in a vacuum. The historical narrative in the preceding chapters comprises a necessary background if recent and current aid controversies are to be viewed properly in their context.

A dearth of higher education precedent forced the attention of lawmakers to look to lower-level education cases for benchmarks upon which to refer in higher education questions. A plethora of twentieth century litigation at primary and secondary school levels provided a rich data base for jurists on all levels of adjudication. A summary of the most influential cases will be presented, in order that selected higher education litigation might be presented in a wider context.

SELECTED INFLUENTIAL EDUCATION DECISIONS¹

(1) Bradfield v. Roberts,² although frequently mentioned as a precedent in educational cases, was not directly concerned with the question of public support of religious schools. Rather, the question arose as to whether the District of Columbia could use tax funds to assist a Catholic hospital in the construction of a facility.³ Bradfield, the plaintiff, brought a taxpayer suit against the United States Treasurer, Roberts.

Bradfield argued that such public assistance was unconstitutional in that it consisted of direct tax support of a religious society and would therefore be an establishment of religion.⁴ The United States Supreme Court held, however,

¹Edward C. Bolmeier, School in the Legal Structure, 2nd Ed. (Cincinnati: W. H. Anderson Co., 1973), pp. 54-80; Richard E. Morgan, The Supreme Court and Religion (New York: The Free Press, 1972), pp. 60-107; Leo Pfeffer, God, Caesar, and the Constitution: The Court as Referee in Church-State Confrontation (Boston: Beacon Press, 1975), pp. 182-296; Leo Pfeffer, Church, State and Freedom, Revised Edition (Boston: Beacon Press, 1967), pp. 514-603; Michael R. Smith and Joseph E. Bryson, Church-State Relations: The Legality of Using Public Funds for Religious Schools, No. 1, Legal Aspects of School Administration (Topeka: National Organization on Legal Problems of Education, 1972), pp. 39-40; Frank J. Sorauf, The Wall of Separation: The Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976), pp. 231-276, 274, 341, 371-380.

²Bradfield v. Roberts, 175 U.S. 291 (1899).

³Bradfield v. Roberts, at 293.

⁴Ibid., at 297.

that Providence Hospital was a legal secular, non-sectarian corporation.⁵ Leo Pfeffer says of Bradfield:

If the only rationale . . . was the fact of legal incorporation, . . . parochial schools could easily [use] the same device. . . . There is, however, a major difference between hospitals and schools. Providence Hospital, the beneficiary of federal funds in the Bradfield case, neither taught nor practiced religion; it taught nothing and practiced only medicine.⁶

Religious motivation is not a consideration which relates to the establishment of religion, but education "is inherently more closely related to the propagation and practice of religion."⁷ Pfeffer concludes:

. . . a governmental subsidy to a religious educational institution is a use of tax money which directly supports an institution formed and operating for . . . religious education rather than merely for the secular function of healing the sick.⁸

(2) Quick Bear v. Leupp (1908)⁹ was the first education case regarding federal funds to reach the Supreme Court. The question revolved around a trust fund which was being managed by the government for the Indians. The money was in reality a private fund, and

. . . the question was whether these monies could be disbursed to pay for the education of Indians at schools run by the Bureau of Catholic Indian Missions. The answer was an easy yes, since the money was in law and fact, private.¹⁰

⁵Bradfield v. Roberts, at 291.

⁶Pfeffer, God, Caesar, and the Constitution, p. 318.

⁷Ibid., p. 318. ⁸Ibid.

⁹Quick Bear v. Leupp, 210 U.S. 50(1908).

¹⁰Morgan, The Supreme Court and Religion, p. 79.

Smith and Bryson note that despite the facts and outcome of the case, Quick Bear continues to be used "as a precedent for the legal use of public funds for religious purposes."¹¹

(3) Meyer v. Nebraska (1923)¹² pivoted about a state statute which read in part:

No person, individually or as a teacher, shall in any private denominational, parochial or public school, teach any subject to any person in any language other than the English language. . . . Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade. . . .¹³

The statute had emerged from the dual context of anti German feeling following World War I and anti-Catholic prejudice during the same period. The age limitation was directed at the very existence of parochial and catechical instruction. German Lutherans and Catholics took great pride in learning the Catechism in German. To Meyer, his freedom to teach was at stake, and he contended the statute was undue interference upon his First Amendment liberties.¹⁴ Meyer, a teacher in an Evangelical Lutheran Parochial school, was arrested, tried, and convicted for the "crime" of teaching a juvenile a non-English language. The Nebraska State Supreme Court upheld Meyer's conviction, but his appeal to the United States Supreme Court vindicated his stand.¹⁵

¹¹Smith and Bryson, Church-State Relations, p. 42.

¹²Meyer v. Nebraska, 262 U.S. 390(1923).

¹³Ibid., at 397. ¹⁴Ibid. ¹⁵Ibid., at 400.

Morgan noted, however, that Meyer was decided upon the question of "due process" rather than First Amendment grounds.¹⁶ He reports that Justice John McReynolds in his opinion:

. . . did not attack what the states had done on First Amendment grounds. It was neither speech nor religion which was being constitutionally interfered with. . . but the freedom to contract. . . . Property was the value which McReynolds saw at stake; . . . the teacher-plaintiff had a property interest in his capacity to teach German . . . to interfere with the right of educators to sell their services and parents to buy them was an unacceptable restriction on economic activity.¹⁷

It is Morgan's contention that neither Meyer, nor the case which follows, Pierce v. Society of Sisters, is proper precedent for the "Constitutional right" to establish church-related schools.¹⁸ Also he casts doubt upon a second "logical" conclusion that:

. . . if the economics of running such schools become so difficult that survival is in doubt, then governmental support must be forthcoming or government is operationally depriving persons of the right . . . to use Meyer and Pierce to support [the argument] . . . radically mistakes their meaning. These decisions are prime examples of what Philip Kurland has called the "apocrypha" of church-state law.¹⁹

Apocryphal or not, the utilization of the cases by the courts in subsequent decisions justify their inclusion in a history of the state-aid controversy.

¹⁶U. S., Constitution, Amendment XIV.

¹⁷Morgan, The Supreme Court and Religion, pp. 77-78.

¹⁸Ibid., p. 78. ¹⁹Ibid.,

(4) In Oregon, a move by the Scottish Rite Masons to have outlawed Catholic parochial education failed to get past the United States Supreme Court. The occasion was the case of Pierce v. Society of Sisters.²⁰ The late Dr. Edward C. Bolmeier of Duke called the case "one of the most influential decisions in perpetuating nonpublic schools that was handed down by the United States Supreme Court."²¹

At issue was an Oregon statute requiring all children between the ages of eight and sixteen to be sent to public school.²² The Society of Sisters successfully argued that the statute interfered with parental freedom of choice and with the private school's right to continue the enterprise of education. The Court emphasized the second right, that of the maintenance of the school as a corporation. As with Meyer, above, the Court stressed the "due process" aspect more than the First Amendment in its conclusion. However, Bolmeier correctly concludes that the historical value of the decision lies in the "classic statement of the Court" which allows freedom of choice.²³ Mr. Justice McReynolds wrote in Pierce:

The fundamental theory of liberty . . . excludes any general power of the state to standardize its children by forcing them to accept instruction from public

²⁰Pierce v. Society of Sisters, 262 U.S. 510(1925).

²¹Edward C. Bolmeier, School in the Legal Structure, p. 62.

²²Pierce v. Society of Sisters, at 530.

²³Bolmeier, School in the Legal Structure, p. 62.

teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . to . . . prepare him for additional obligations.²⁴

(5) Cochran v. Louisiana State Board of Education²⁵ was occasioned by a 1928 law whereby textbooks on secular subjects were supplied free to all children, including those attending parochial schools.²⁶ The case was not challenged on establishment grounds, rather that the purchase of textbooks for non-public schools was without a public purpose. Dr. Bolmeier ties Cochran to Borden v. Louisiana State Board of Education,²⁷ and the Cochran decision applied to both cases. The United States Supreme Court agreed with the State of Louisiana which argued: (a) purchase and ownership of the textbooks by church schools was not in the law; (b) because all children of the state were loaned textbooks it benefitted the state; (c) the state and the students benefitted by the law. The state decision was upheld by the United States Supreme Court.²⁸

The Court's opinion expressed what has been known as "the child benefit theory."²⁹ It concludes:

²⁴Pierce v. Society of Sisters, at 510.

²⁵Cochran v. Louisiana State Board of Education, 281 U.S. 370(1930).

²⁶Ibid., at 374.

²⁷Borden v. Louisiana State Board of Education, 123 So 655(1930) N. Bolmeier, School in the Legal Structure, p. 63.

²⁸Ibid. ²⁹Ibid.

The taxing power of the state is exerted for a public purpose. The legislature does not segregate private schools or their pupils, as its beneficiaries. . . . Its interest is education, Individual interests are aided only as the common interest is safeguarded.³⁰

Richard Morgan notes that the question of establishment of religion is not confronted by the Court. He says:

All the Court said in Cochran was that to provide textbooks was in aid of public purpose; it did not speak in any way to the question of whether Louisiana's arrangement constituted an establishment of religion.³¹

(6) In 1947 the first case concerning state aid to education as related to the First Amendment reached the United States Supreme Court. Everson v. Board of Education (1947)³² was concerned with a New Jersey statute which provided for reimbursement of parents for expenses incurred in the transportation of their children to and from school. The plan did not exclude parochial school children in its consideration. Ewing School District in the form of a resolution put the plan into effect which authorized a reimbursement of parents for fares paid for transportation by public buses of students who were attending both public and Catholic schools.³³

The plaintiff took the Board of Education of Ewing Township to court and argued that the statute utilized his property

³⁰Cochran v. Louisiana, at 374.

³¹Morgan, The Supreme Court and Religion, p. 80.

³²Everson v. Board of Education, 330 U.S. 1(1947).

³³Ibid., at 15.

(taxes) without his consent, and thereby violated due process; also, such use of tax monies effectively established religion. Thus, he argued that both the First and Fourteenth Amendments were violated. The United States Supreme Court upheld the defendants in a 5-4 decision.³⁴

The Supreme Court relied on Cochran's child benefit theory to dispense with Everson's first concern, the violation of due process. The Court contended that the aid benefited the public because it provided safety for the children of the public. Mr. Justice Hugo Black continued the majority opinion by recalling what Sorauf calls "the language of the most absolute doctrine of the separation of church and state."³⁵

Any account of Everson is incomplete without the eloquence of Justice Black, who for the first time in the Court's history recalled the words of Thomas Jefferson, and thus drew the metaphorical concept of the founders into the context of twentieth century jurisprudence. Justice Black wrote:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished

³⁴ Everson v. Board of Education, at 15 (see Note 36).

³⁵ Sorauf, The Wall of Separation, p. 19.

for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."³⁶

However, in the New Jersey case, the Court did not consider the "wall" breached. The decision was to allow the transportation reimbursement.³⁷ Although the decision went against the separationists, the above opinion provides a telling constitutional argument against the levying of taxes to aid church-related schools on any level.

(7) Cantwell v. Connecticut³⁸ is significant in that for the first time in history the religious aspects of the First Amendment are held binding on the states through the absorption mechanism of the Fourteenth Amendment.³⁹

Newton Cantwell, a Jehovah Witness, was convicted in New Haven, Connecticut, in violation of the state statute forbidding public solicitation for a religious or philanthropic cause without a state license. The playing of

³⁶Everson v. Board of Education, 330 U.S. 1 at 15 (1947).

³⁷Ibid.

³⁸Cantwell v. Connecticut, 310 U.S. 296 (1940).

³⁹Morgan, The Supreme Court and Religion, p. 62.

phonograph records critical of Catholicism had aroused Catholics against them. One of Newton's sons, Jesse, had been convicted of disturbing the peace. Once the cases were taken to the Supreme Court, the convictions were overturned on the basis of the First Amendment clause on free exercise. Justice Forst Roberts, in speaking for the majority, enunciated the principle that not only freedom of speech, but freedom of religion, operated through the Fourteenth Amendment. He wrote:

. . . The First Amendment declared that Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the States as incompetent as Congress to enact such laws. . . . Thus the amendment embraces two concepts--freedom to believe and freedom to act. . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.⁴⁰

(8) Following hard upon Cantwell was McCullum v. Board of Education,⁴¹ "released time" case. The case revolved around the question of whether the Champaign County, Illinois, Board of Education could constitutionally allow religious education to take place in public school buildings.⁴² The plan allowed students who so desired opportunity to attend religious instruction, while those who did not take

⁴⁰Cantwell v. Connecticut, at 303-304.

⁴¹Illinois ex rel. McCullum v. Board of Education, 333 U.S. 203 (1948).

⁴²Ibid.

advantage of the sectarian training to continue their secular pursuits.

Pfeffer describes the plan and its effects:

In 1940, an interfaith council . . . was formed. . . . At the beginning of each term the public school teachers distributed to the children cards on which parents could indicate their consent to the enrollment of their children in the religious instruction classes. Children who obtained such consent were released . . . for a period of thirty minutes each week in the elementary school and forty-five minutes in the junior high school. . . . Theoretically, enrollment . . . was to be entirely voluntary but both teacher and peer pressures operated to assure 100% enrollment in many classes . . . Terry McCollum, an 11-year-old fifth-grader was placed at a desk in the hall outside the classroom. . . . Passing schoolmates teased him, believing he was being punished for being an atheist. . . .⁴³

The youth was shuttled from place to place until his mother, Vashti McCollum, entered suit to halt the plan in the Champaign public school system. The state courts ruled against Mrs. McCollum, but in 1948 the United States Supreme Court ruled with the plaintiff. The case is considered a "landmark" in both American constitutional history and public education.⁴⁴

In the Supreme Court, Mrs. McCollum overcame three major arguments advanced by the Board of Education: (1) that she had no case as the First Amendment applied only to Congress, not to a school board; but the Everson precedent allowed that through the action of the Fourteenth Amendment. The First Amendment could apply to the states as well as to

⁴³Pfeffer, God, Caesar, and the Constitution, pp. 182-4.

⁴⁴Ibid., p. 184.

Congress; (2) that this case showed no preferential treatment of one faith over another, but the Court relied on the Everson precedent which ruled that the Establishment Clause outlawed aid to all religions; (3) that free exercise was not infringed upon because of the voluntary characteristics within the plan. Once more, the Court relied upon Everson to point out that coercive or not, religion was aided, and therefore forbidden under the First Amendment. The decision was 8 to 1.⁴⁵

Mr. Justice Hugo Black wrote the concurring opinion, the heart of which follows:

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faiths. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted in Everson v. Board of Education. . . . Here not only are the State's tax supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery. This is not separation of Church and State.⁴⁶

Sorauf suggests the reasons behind the Supreme Court's approach to McCollum might go beyond the obvious Constitutional establishment causes. He recalls that:

The Court struck down the released-time religious education program in the cities of Champaign and Urbana, Illinois, because they drew too directly and heavily on the resources of the public schools. The classes were held in the public schools, teachers were certified by

⁴⁵ Pfeffer, God, Caesar, and the Constitution, pp. 184-5.

⁴⁶ McCollum v. Board of Education, at 210.

the schools, and most of the administrative details were handled by public school personnel.⁴⁷

It remained for a later Supreme Court decision to provide the term "excessive entanglement" for what Sorauf so effectively describes as drainage on public resources.

(9) Zorach v. Clausen⁴⁸ provided the answer to those who asked for students to be released during school hours to attend off-campus religious instruction.⁴⁹ The New York plan allowed students who were not released to remain in their classrooms for secular instruction. Attendance reports were kept by the churches and regular reporting was done in order that truancy did not occur.⁵⁰ The plan seemingly answered the chief objections expressed in McCullum. There were no state buildings or personnel involved, and students were released upon written request by their parents.⁵¹

The Supreme Court in a 6 to 3 decision, and with Justice William O. Douglas writing the majority opinion, affirmed that released-time programs are constitutional so long as no coercion is used, that school personnel and buildings are not utilized. Leo Pfeffer continues to question the practice on the basis that "releasing children to enroll for religious instruction and not other children would seem to serve no purpose other than to advance religion. Mr. Justice

⁴⁷ Sorauf, The Wall of Separation, p. 316.

⁴⁸ Zorach et al. v. Clausen, 343 U.S. 306 (1952).

⁴⁹ Ibid. ⁵⁰ Ibid. ⁵¹ Ibid.

⁵² Pfeffer, God, Caesar, and the Constitution, p. 193.

Jackson viewed the retention of those children not released to a church as temporarily in "jail", or as "governmental constraint in support of religion."⁵³

(10) Engel v. Vitale.⁵⁴ In an attempt to inculcate a higher view of ethics and patriotism, the New York Board of Regents in the early sixties produced the following prescribed prayer for use in the public schools:

Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country.⁵⁵

The use of the prayer was challenged in Hyde Park by parents and the New York Civil Liberties Union. In New York courts, the plaintiffs had no success, but when placed before the United States Supreme Court, the majority held that the prayer's use was unconstitutional as advancement of religion.⁵⁶

In June 1962 Justice Hugo Black handed down the majority opinion in favor of the plaintiffs. Leo Pfeffer comments:

. . . The only issue before the Court was whether the invocation of God's blessings as prescribed in the regents' prayer was a religious activity. As to this there could be no question; it was a solemn avowal of divine faith and supplication for the blessings of the Almighty. Caesar may not involve himself in God's affairs.⁵⁷

Justice Black continued by recounting that the First Amendment strictly forbids religious establishment:

⁵³Pfeffer, God, Caesar, and the Constitution, p. 324.

⁵⁴Engel v. Vitale, 370 U.S. 421 (1962).

⁵⁵Ibid., at 422. ⁵⁶Ibid.

⁵⁷Pfeffer, God, Caesar, and the Constitution, p. 20

. . . The constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.⁵⁸

The decision went against the grain of popular American feeling, but it has never been overturned, nor has Congress enacted legislation which would require or allow prayer in schools as a prescribed order or ceremony.

(11) Abington School District v. Schempp⁵⁹ and a companion case, Murray v. Curlett,⁶⁰ dealt with Bible reading and the Lord's Prayer as a prescribed daily activity. Students were not required by law to participate. Schempp was the Pennsylvania case, while Murray was brought in Maryland. The issues were similar in each case.

The Supreme Court (8-1) found the Pennsylvania statute to be unconstitutional. Mr. Justice Brennan said:

. . . The exercises are held in public school buildings, conducted by and under the authority of local school officials. Since the law requires the reading of the Holy Bible, it prefers the Christian religion.⁶¹

The value which Schempp has for higher education decisions yet to come rests upon the term, "primary effect," which emerged in the Court's comments which refer to a "test" of constitutionality:

⁵⁸Engel v. Vitale, at 431.

⁵⁹Abington School District v. Schempp, 374 U.S. 203 (1963).

⁶⁰Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

⁶¹Abington School District v. Schempp, at 222.

The test may be stated as follows: What are the purposes and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.⁶²

The Schempp case effectively concluded Mrs. Murray's litigation. The conclusion in both cases was that: Bible reading and recitation of the Lord's Prayer as prescribed school exercises are unconstitutional violations of the First Amendment. The decision was reached 8-1, with Justice Potter Stewart in the minority.⁶³

Engel, Schempp and Murray reflected the Warren Court's concern for minority rights, as well as the preservation of liberties in the First Amendment. Minority oppression by the majority was a danger foreseen by James Madison during the critical days of constitutional formulation.⁶⁴ The Jewish, atheist, or nonconformist minority need not be required to undergo embarrassment or coercion because of religious coercion in the context of public education. The Court places, through the above decisions, religion and government in a respectful but distinct relationship.

⁶² Abington School District v. Schempp, at 222.

⁶³ Ibid.

⁶⁴ Marvin Meyers, The Mind of the Founder: Sources of the Political Thought of James Madison (New York: The Bobbs-Merrill Co., Inc., 1973), p. xxxii.

(12) Flast et al. v. Cohen.⁶⁵ The passage of the Elementary and Secondary Education Act of 1965 (ESEA) presented a thorny set of constitutional problems. Although legislation was being considered to allow taxpayers to test federal programs in court, "it was universally taken for granted that there was no way to challenge the constitutionality of a Federal law, other than by a suit brought initially in a Federal court."⁶⁶

However, a long list of taxpayers sponsored by the American Jewish Congress, The American Civil Liberties Union, and others sought an injunction in New York for judgment against the section of the Elementary and Secondary Education Act of 1965 which included financial aid to parochial schools. The New York Court used Frothingham v. Mellon⁶⁷ as a precedent and ruled that the plaintiffs had no standing to sue. The case then went to the United States Supreme Court and in June, 1968, vindicated, through a favorable landmark decision, the taxpayer's right to challenge federal and state laws.⁶⁸

The older Frothingham case had involved a taxpayer who claimed that a federal law establishing a maternity care program injured her because of a resulting higher tax bill.

⁶⁵Flast et al. v. Cohen, 392 U.S. 83 (1968).

⁶⁶Pfeffer, God, Caesar, and the Constitution, p. 266.

⁶⁷Frothingham v. Mellon, 262 U.S. 447 (1923).

⁶⁸Flast v. Cohen, 392 U.S. 83 (1968).

The Court had ruled against her because there was no legal protection of citizens against higher taxes. The logic of Frothingham escaped the Court. There appeared to be no means of connecting taxes a person paid into a vast treasury with the use made of that money, and as a result:

. . . The Supreme Court threw her case out on the ground that while a person who was directly affected by a law could sue to have it declared unconstitutional, such a suit could not be brought by one whose only relationship to the law lay in the fact she paid taxes. . . .⁶⁹

In Flast a relationship was expressed directly between taxpayer and legislation, allowing one to bring suit in the federal courts to challenge expenditure of federal tax revenues which may be in violation of the First Amendment.⁷⁰

The Supreme Court said:

We hold that a taxpayer will have standing . . . to invoke judicial power when he alleges that Congressional action under the taxing and spending clause is in derogation of those Constitutional provisions which operate to restrict the exercise of the taxing and spending power.⁷¹

The trigger which provides control over legislative spending power in Flast was the religious clause of the First Amendment. The Flast decision became the occasion for Mr. Justice William O. Douglas to express views concerning aid to parochial schools which carried beyond Flast and which included a challenge to the child benefit theory.

⁶⁹ Pfeffer, God, Caesar and the Constitution, p. 265.

⁷⁰ Flast v. Cohen, 392 U.S. 83 (1968).

⁷¹ Ibid.

Justice Douglas said of tuition grants:

The idea here is that the parent receives the money, carries it to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the Constitutional prohibition against government money for religion. . . . Another . . . [subterfuge] is the "authority." The state may not grant aid directly to church schools. But . . . the state could give the money to the authority which . . . could channel it into the church schools. Yet another . . . is "child benefit." Government may not aid church schools, but it may aid the children in the schools. . . . Government could even build church school classrooms, under this theory, because it would benefit the children to have nice rooms. . . .⁷²

Despite their being branded "subterfuges" by the Court, as was presented in Chapter IV, states have utilized higher education assistance plans based on grants administered by higher education authorities for the "benefit" of the student.

(13) Walz v. Tax Commissioner.⁷³ The First Amendment was central in a very important New York tax case. A property owner, Frederick Walz, had purchased some property for \$25.00. The city valued the property at \$100.00, or four times what Walz paid for it. The \$5.24 tax bill so aroused Mr. Walz that Walz sued the city on the basis of the First Amendment.

The plaintiff maintained that because the city exempted churches from paying property taxes, this had the effect of causing his taxes to increase, thereby making him an unwilling

⁷²Flast v. Cohen, at 113.

⁷³Walz v. Tax Commissioner of New York City, 397 U.S. 664 (1970).

supporter of the establishment of religion. The test claimed the attention of the three major religions who filed amicus curia briefs to maintain their exemption on the basis of the Free Exercise Clause of the First Amendment.⁷⁴

The Court made the point that churches were exempt not as a matter of "right," but as a matter of "grace." The point does not escape Pfeffer that "what the state gives, the state can take away. . . the First Amendment will not stand in the way [to limit exemption]. . . ." ⁷⁵ Walz lost his battle in the New York courts in 1969, but the United States Supreme Court agreed to hear his appeal.⁷⁶ Out of Walz came the term "excessive entanglement." The term was used by Chief Justice Warren Burger who, in speaking for the majority in the Walz case, explained that for the government to involve itself by placing value upon church property for tax purposes would create a situation of governmental involvement in religious matters. Mr. Justice Burger observed:

. . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement. . . .⁷⁷

⁷⁴ Pfeffer, God, Caesar, and the Constitution, p. 68.

⁷⁵ Ibid., p. 70.

⁷⁶ Walz v. Tax Commissioner of New York City, 397 U.S. 664 (1970).

⁷⁷ Ibid.

Chief Justice Burger maintained in Walz that absolute separation of church and state is not possible. The twin clauses of Free Exercise and Establishment are extremes between which "there is room for play in the joints productive of a benevolent neutrality."⁷⁸ The Chief Justice suggests that "the very existence of the Religion Clauses is an involvement of sorts--one that seeks to mark boundaries to avoid excessive entanglement."⁷⁹ Justice Burger tied the concept of excessive entanglement to tax exemptions:

The legislative purpose of tax exemptions is not aimed at establishing, sponsoring, or supporting religion [; it] does not end the inquiry, however. We must also be sure that the end result--the effect--is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemptions would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations that follow in the train of these legal processes.⁸⁰

THE TRIPARTITE TEST

With the Walz decision the Supreme Court conceived the third of what is known as the tripartite test. The three indices now applied to First Amendment cases are: (1) the legislative purpose; (2) primary effect; and (3) excessive

⁷⁸Walz v. Tax Commissioner of New York City, at 669.

⁷⁹Ibid., at 670.

⁸⁰Ibid.

entanglement. The tripartite test figured prominently in Lemon v. Kurtzman⁸¹ and Tilton v. Richardson.⁸²

The Lemon decision actually consisted of three cases: Lemon, Earley v. Di Censo, and Robinson v. Di Censo. Lemon involved a Pennsylvania statute which provided for state purchase of secular educational services from church schools. Contracts called for payment for teachers' salaries, texts, and other educational materials.⁸³

Efforts were made by the Pennsylvania legislature to insure a strict limitation of religious expression upon the subjects involved in the aid. The plan passed the test before a three-judge federal court.⁸⁴

Salary supplements were utilized as a device with which teachers in religious schools, who taught secular subjects, were paid with tax monies. Although the teachers were restricted from teaching religion, salary supplements were paid only to Roman Catholic school teachers.⁸⁵

On the basis of "excessive entanglement," a three-judge federal court ruled that the law was unconstitutional.⁸⁶ The United States Supreme Court agreed with the decision of the District Court. Declaring the "cumulative criteria,"

⁸¹Lemon v. Kurtzman, 403 U.S. 602 (1971).

⁸²Tilton v. Richardson, 403 U.S. 672 (1971).

⁸³Lemon v. Kurtzman, 403 U.S. 602 (1971). The contract scheme amounted to one of Justice Douglas' "subterfuges." The purpose and effect were secular.

⁸⁴Ibid., at 611. ⁸⁵Ibid., at 607-609. ⁸⁶Ibid.

(tripartite test) as the starting point for the examination of the Establishment Clause, Chief Justice Burger, writing the majority opinion, effectively declared "excessive entanglement" to be central in all such cases.⁸⁷ "Entanglement", as defined by the Chief Justice, contains three basics: (1) the nature and purpose of recipient institutions; (2) the nature of state aid; and (3) the ensuing affiliation between church and state. The tripartite test developed out of a conscious attempt to draw together "criteria with which to give concrete meaning to the establishment clause."⁸⁸ The prayer cases discussed above marked the beginning of the early development of the so-called "Tripartite Test."⁸⁹

Schempp provided the source of "purpose-primary effect" of governmental legislation. For the measure to be considered Constitutional in view of the Establishment Clause, "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁹⁰ The Walz case added a somewhat arbitrary test which attempted to determine whether the final outcome of the legislation, regardless of the level of purpose, produced "excessive government entanglement with religion."⁹¹ Sorauf emphasizes

⁸⁷Lemon v. Kurtzman, at 607-609.

⁸⁸Sorauf, The Wall of Separation, p. 24. ⁸⁹Ibid.

⁹⁰Schempp v. School District of Abingdon Township, at 222.

⁹¹Walz v. Tax Commission, at 674.

that the entanglement must exceed "mere aid; it must include a range of possible effects as marked as the setting of state standards in religious schools or the exacerbation of church-state conflict in American politics."⁹²

The Court utilized the two tests until Tilton v. Richardson, where Chief Justice Warren Burger combined them into the tripartite test, and added another as a bonus. The Chief Justice summarized the test in this order:

. . . First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the Administration of the Act foster an excessive entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?⁹³

The tests had emerged from a period of uncertainty and confusion on the Court concerning the meaning of the establishment clause. Sorauf speaks of the decade of the 60's as "full of judicial hand-wringing over the difficulties of giving concrete meaning to the clause."⁹⁴

Beginning with the 70's the tripartite test is applied to higher education legislation with mixed results. The following cases from the United States Supreme Court, the United States District Courts, and the state courts demonstrate the seriousness of the questions which remain with regard to the meaning of state aid and the First Amendment.

⁹²Sorauf, The Wall of Separation, p. 24.

⁹³Tilton v. Richardson, at 678.

⁹⁴Sorauf, The Wall of Separation, p. 25.

THE HIGHER EDUCATION CASES

Tilton v. Richardson⁹⁵

Though Tilton v. Richardson was decided on the same day as Lemon, the case forms a line of demarcation by its being the first to be decided on the basis of the tripartite test, and because it was the first higher education aid case to reach the United States Supreme Court.

Tilton challenged Title I of the 1963 Higher Education Facilities Act which provided federal construction grants for college and university facilities.⁹⁶ The grant had explicitly forbidden such facilities to be used for religious or sectarian activities for a period of 20 years. The appellants argued that four Connecticut, church-related colleges were sectarian and therefore were in violation of the legislation on the basis of the First Amendment. The colleges responded by claiming they were in compliance with the statute on the basis of evidence that purported to demonstrate how their religious ties did not hinder their secular educational functions. The Court found the act to be constitutional, and that the church-related schools could receive the grants provided there was no religious use of the facilities constructed by the tax funds for 20 years.⁹⁷ The Court rescinded its own decision by stating that the facilities

⁹⁵Tilton et al. v. Richardson, at 675.

⁹⁶Ibid., at 672. ⁹⁷Ibid.

could never be used for religious purposes.⁹⁸ The limitation of the "federal interest" in the facilities to 20 years would violate the religious clauses of the First Amendment because, they concluded, the unrestricted use of valuable property by church colleges would in effect be a contribution to a religious body.⁹⁹

The suit was brought by taxpayers and residents of Connecticut against Mr. Elliot Richardson, Secretary of Health, Education and Welfare, and the four defendant colleges: Sacred Heart University, Annhurst College, Fairfield University, and Albertus Magnus College. The projects included a library building, a fine arts building, a science building, and a language laboratory.¹⁰⁰ Science buildings are neutral, the use of them can be changed from their original intent over time. The issue turned on the possibility that the present secular interest might ultimately become sectarian in use.

Chief Justice Burger wrote:

We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Congress defined "institutions of higher education," which are eligible to receive aid under the Act, in broad and inclusive terms. . . . But the Act makes no reference to religious affiliation or non-affiliation. Under these circumstances "institutions of higher education" must be taken to include church-related colleges and universities.¹⁰¹

⁹⁸Tilton v. Richardson, at 682-684.

⁹⁹Ibid. ¹⁰⁰Ibid., at 676. ¹⁰¹Ibid., at 677.

Justice Burger acknowledged the "risks" of treating criteria for judgment as "tests" since constitutional law is not mathematically precise.¹⁰² The four "guidelines" were outlined above (p. 321). Applying the four tests to Tilton, Justice Burger concludes the following: the stated legislative purpose appears in the preamble, in which it is stated that because of the security and welfare of the United States, higher education should be supported and encouraged.¹⁰³ Bradfield was cited as the precedent which removes the primary effect of assistance to church-related institutions from conflict with the First Amendment.¹⁰⁴ "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."¹⁰⁵

The purpose of the act was not to advance religion and Justice Burger emphasized that academic facilities would be for specific secular usage and the measure prohibited use of the loans for religious training and worship. One undesirable by-product was mentioned in passing, its importance quietly ignored in the face of increased financial demand.

¹⁰²Tilton v. Richardson, at 678.

¹⁰³Ibid. N. 20 U.S.C. § 701. ¹⁰⁴Ibid., at 679.

¹⁰⁵Ibid.

The Court noted that the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them.¹⁰⁶

The process of "secularization" of church-related institutions is reported as far back as 1966. A number of church-related colleges sought to divest themselves of sectarian attributes. Sorauf reports:

The major activity came in New York State, as religious schools attempted to qualify for state grants under the state's strict constitutional limitations. The U. S. and New York Catholic Conferences hosted conferences for their officials and officers of Catholic colleges and universities on the problems of qualifying for the grants.¹⁰⁷

Catholic columnist William Buckley was critical of the clergy in a New Yorker article.¹⁰⁸ Fordham University did such a good job that the school was certified by the state commission as "nonsectarian" and was therefore eligible for state aid.¹⁰⁹

Tilton was not excluded from the discussion, and perhaps Justice Berger was made aware of the procedures alleged to have been suggested by Attorney Edward Bennett Williams. Sorauf says "there were signs that the attorney for the four defendant colleges . . . put them through some process of secularization as he prepared from

¹⁰⁶Tilton v. Richardson, at 670.

¹⁰⁷Sorauf, The Wall of Separation, p. 319.

¹⁰⁸William Buckley, "Cruising Speed," August 21, 1977, as noted by Sorauf, The Wall of Separation, p. 319 n.

¹⁰⁹Sorauf, The Wall of Separation, pp. 319-320.

that case."¹¹⁰ The process included removal of crucifixes from classrooms, for example.¹¹¹ The aftershock of the litigation continued to force schools away from traditional religious ties. Sorauf notes:

The changes in Catholic higher education continued long past the litigation. . . . Indeed the claims of nonreligious control made by the defendants in the Tilton case were authenticated less than half a year after its decision in the Supreme Court. The board of trustees of Fairfield University . . . overruled the Catholic president's attempt to dismiss a faculty member who had left both the Jesuit order and the Roman Catholic faith.¹¹²

Testimony from the above Fairfield incident was also quoted in Tilton. In Tilton there was some disagreement as to the degree of academic freedom in the schools.¹¹³ The Court felt there was evidence to justify the statement: "That the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."¹¹⁴

The appellants drew a "composite profile" of a "typical sectarian" institution of higher education. Such an institution was said to impose religious restrictions on admissions, required attendance at religious activities (chapel, etc.), uses compulsion to obedience to tenets of faith, required religious instruction in theological doctrine,

¹¹⁰ Sorauf, The Wall of Separation, p. 320.

¹¹¹ Ibid. ¹¹² Ibid. ¹¹³ Ibid., p. 320n.

¹¹⁴ Tilton v. Richardson, at 681.

and expends a great deal of effort in the propagation of a particular religion.¹¹⁵

The Court was not persuaded that the four defendant colleges fit the mold. It was also suggested that proper evaluation in such cases must be based on evidence that: "the institution does in fact possess these characteristics."¹¹⁶ The Court concluded that they could not, however, strike down an Act of Congress on the basis of a hypothetical "profile."¹¹⁷

Continuing the argument the Court wished to clarify that advancement of religion could occur ". . . if a recipient violates any of the statutory restrictions on the use of a federally financed facility."¹¹⁸ Violation of this aspect, however, did not require the Court to invalidate the entire act. As proof, the Court cited two previous cases in which partial judgment was rendered:

" . . . The unconstitutionality of a part of an act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."¹¹⁹

The Court found no such problems with the .¹²⁰

¹¹⁵ Tilton

¹¹⁶ Ibid. ¹¹⁷ Ibid. ¹¹⁸ Ibid., at 682.

¹¹⁹ Ibid., at 684. ¹²⁰ Ibid.

The question of excessive entanglements in the act provided the Court with a more subtle problem. Referring to Walz, Lemon, and Robinson v. DiCenso, the question of excessive entanglement was elevated to an independent measure of constitutionality under the First Amendment.

In DiCenso and Lemon, the Court found strong evidence of excessive entanglement. It is at this point Chief Justice Burger injects a list of educational philosophy regarding the levels of religious influence on different levels of education. Justice Burger says: "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools."¹²¹

In this case, there is not provided evidence of the accuracy of the above concept beyond "common observation" and the fact that Professor Paul A. Freund of the Harvard Law School said it first: "Institutions of higher learning present quite a different question, mainly because church support is likely to involve indoctrination and conformity at that level of instruction."¹²²

From Freund's brief observation in a 1968 address, Chief Justice Burger initiated a judicial principle with

¹²¹Tilton et al. v. Richardson, at 685 n. 2; see Freund, Comments, Public Aid to Parochial Schools, Harvard Law Review 82 (1969), 1680, 1691.

¹²²Paul A. Freund, Comments, Public Aid to Parochial Schools, Harvard Law Review 82 (1969), 1680.

far-reaching implications. The Court argued that it is the "policy" of "pre-college" church schools "to assure future adherents to a particular faith by having control of their total education at an early age. . . ." ¹²³ College students are less impressionable and less susceptible to religious indoctrination.

Justice Burger said:

Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the Congressional objectives and limitations. . . . The record here would not support a conclusion that any of these four institutions departed from this general pattern. ¹²⁴

The strongest point made by the Court was that the schools subscribed to a "well-established set of principles of academic freedom," and there was no proof in the record to the contrary. ¹²⁵

Once the above concept is assumed, it follows that danger of religious indoctrination is lessened at church-related colleges and universities and the risk is correspondingly reduced that taxes will support religion. The next step in the Court's progression of logic produces the claim:

The necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as

¹²³ Freund, "Comments, Public Aid to Parochial Schools," p. 1691.

¹²⁴ Tilton v. Richardson, at 686.

¹²⁵ Ibid., at 687.

may be necessary to ascertain that the facilities are devoted to secular education is minimal.¹²⁶

"Entanglement" is lessened also because of the form of aid: "secular, neutral, or non-ideological services, facilities or materials that are supplied to all students."¹²⁷

The question of free exercise was raised by taxpayers because they are compelled to pay taxes for a program with which they disagree because it finances and supports a religion alien to their own theology. The Court denied, however, that the appellants are unable to identify any coercion directed at the practice or exercise of their religious beliefs.¹²⁸

The decision was a 6-3 decision, with Justices Douglas, Black, and Marshall dissenting from the decision.

The counter-opinion was written by Mr. Justice William O. Douglas, who argued that:

The Federal Government is giving religious schools a block grant to build certain facilities. . . it is hardly impressive that rather than giving a smaller amount of money annually over a long period of years, Congress . . . gives a large amount all at once. The plurality'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 minimis. I cannot agree with such sophistry.¹²⁹

Counter to Justice Burger's distinction between Lemon and Tilton, Justice Douglas sees no distinction between

¹²⁶Tilton v. Richardson, at 688.

¹²⁷Ibid., at 688. ¹²⁸Ibid., at 689.

¹²⁹Ibid., at 693.

higher and lower levels of education. The principle is parochial education supported by tax money.¹³⁰ Justice Douglas said:

A parochial school operates on one budget. Money not spent for one purpose becomes available for other purposes. Thus the fact that there are no religious observances in federally financed facilities is not controlling because required religious observances will take place in other buildings.¹³¹

Federal funding of any part of the school would mean a conclusion to required religious exercises. To insure the nonsectarian nature of a college would require strict surveillance and control which would become "obnoxious" to the clergy.¹³²

Mr. Justice Douglas declares that such surveillance "creates an entanglement of government and religion which the First Amendment was designed to avoid."¹³³

The spectre of an ever-present government agent hovering in the background to insure satisfactory course content was raised by Mr. Justice Douglas. He pictured it this way:

The price of the subsidy under the Act is a violation of the Free Exercise Clause. Could a course in the History of Methodism be taught in a federally-financed building? Would a religiously slanted version of the Reformation or Quebec politics under Duplessis be permissible? How can the Government know what is taught in the federally-financed building without a continuous auditing of classroom instruction? Yet both the Free Exercise Clause and academic freedom are violated when the Government agent must be present.¹³⁴

¹³⁰Tilton v. Richardson, at 688.

¹³¹Ibid. ¹³²Ibid., at 694. ¹³³Ibid.

¹³⁴Ibid.

The decision has been designated one of "landmark" proportions. Whether the landmark bodes good or ill depends upon one's point of view.

Mr. Justice Douglas closed by explaining that his dissent was "not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost."¹³⁵

The attention given Tilton has been necessary because of the precedents and principles expressed in the case. The tripartite test was expressed and applied with emphasis upon "excessive entanglement." The sharp distinction which was drawn between the vulnerability of lower-level students to religious indoctrination and the "skepticism" of the college student, introduced a philosophical element into the decision. It was upon that philosophical distinction that the majority based its case. The minority missed an opportunity in its dissent to challenge the source of the concept. It appears to be an assumption based upon what the Chief Justice called "common observation."¹³⁶

Tilton marks the beginning of the higher education cases which reach the United States Supreme Court. It is upon the principles and conclusions of this case that

¹³⁵Tilton v. Richardson, at 697.

¹³⁶Ibid., at 686.

subsequent cases have been decided. The Tilton case was the opening battle of the higher education controversy in Washington. Federal funds were the issue, and the federal Constitution alone was interpreted. Subsequent tests before the Court involve state as well as federal constitutional issues.

Hunt v. McNair¹³⁷

A bond program at Baptist College, Charleston, South Carolina, was the instrument by which principles expressed by the Supreme Court in Tilton were extended.¹³⁸ The question revolved about a South Carolina law which allowed the Educational Facilities Authority to issue tax exempt bonds to church-related colleges for construction of buildings.¹³⁹ One portion of the law, as in the Higher Education Facilities Act, prohibited the new buildings from being used for sectarian instruction or worship.¹⁴⁰ The state was not involved in the sale of the bonds and their credit was not directly involved. The Authority loaned the money raised by bond sales to the college. The college conveyed title of the buildings to the Authority, and the Authority leased the

¹³⁷Hunt v. McNair, 413 U.S. 734 (1973); 403 U.S. 945 (1971); 177 S. E. 2d 362 (1966).

¹³⁸Ibid., 413 U.S. 734 (1973).

¹³⁹S. C. Code Ann. §§ 22-41 (Supp. 1973).

¹⁴⁰Ibid.

facilities back to the college. The lease is to continue until the bonds or loan is paid in full. The college will then regain full title to the facility.¹⁴¹

The Supreme Court first considered Hunt in 1971, and returned it to the South Carolina Supreme Court for consideration in the light of Tilton and Lemon I.¹⁴² The case was a "friendly" case staged to determine the constitutionality of the statute. Sorauf explains:

. . . It was the bonding attorneys who ordered the litigation so that they could certify the legality and constitutionality of the bond issues. Without that certification, of course, a bond issue will not sell. The bonding attorneys not only dictate the need for constitutional clarification, but they dictate as well the extent of clarification necessary.¹⁴³

On a split decision, 6 to 3, the Supreme Court found that the primary purpose of the state plan was secular. The application of the tripartite tests of purpose, effect and entanglement failed to convince the Court of the plan's unconstitutionality.¹⁴⁴

The plan had provided safeguards against unconstitutional use of the building as well as for inspection of the premises to insure compliance. In commenting upon

¹⁴¹ S. C. Code Ann. §§ 22-41 (Supp. 1973).

¹⁴² Hunt v. McNair, 403 U.S. 945 (1971).

¹⁴³ Sorauf, The Wall of Separation, pp. 258-259.

¹⁴⁴ Ibid.

primary effect the Court came near to defining pervasive sectarian activity:

. . . [A]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in 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.¹⁴⁵

The Court did not find the South Carolina plan guilty of providing aid in a pervasively-religious setting.

In order to emphasize the Court's stand, the Tilton tests were applied, not only to the state plan, but to the context in which the plan would be put into effect. Baptist College, in Charleston, South Carolina, was analyzed to determine if the plan would involve excessive entanglement of government with religion.

Information provided the Court revealed the following:

(1) Despite the Baptist relationship of the college, only 60 percent of the student body were of that denomination (roughly reflecting the religious composition of the area served by the institution).

(2) Neither student enrollment nor faculty-staff qualifications revealed sectarian bias.¹⁴⁶

Sorauf interprets the Court's analysis as placing emphasis upon the "religious nature of the college rather

¹⁴⁵ Hunt v. McNair, at 743.

¹⁴⁶ Ibid.

than the force of the policy."¹⁴⁷ He concludes, ". . . with colleges and universities becoming less and less religious in fact, it seemed more and more doubtful that aid to them [the colleges] might advance the cause of religion."¹⁴⁸

Dr. James L. Underwood, Professor of Law at the University of South Carolina, was dissatisfied with the cursory examination of Baptist College. He could not agree with the findings that no impermissible entanglement existed at the school. He suggested the reasoning behind the Court's conclusion made in Hunt was due to a new direction by the Supreme Court:

The Court appears to be testing the waters of a new standard under which it would find that the likelihood of excessive entanglement . . . is sharply reduced when government assistance . . . does not involve the use of government funds. . . . This readiness of the Court to find that religion does not permeate college level institutions, compared with its more careful scrutiny of lower-level schools is one of the peculiarities of this tentative new standard.¹⁴⁹

Underwood's view of the Supreme Court's bi-polar use of the entanglement doctrine appears worth repeating, in that higher education cases of recent vintage usually stand or fall on findings relative to the religious nature of the college. Dr. Underwood suggests the reluctance on the part of the Court to discover excessive entanglement appears when:

¹⁴⁷Sorauf, The Wall of Separation, p. 367. ¹⁴⁸Ibid.

¹⁴⁹James L. Underwood, "Permissible Entanglements under the Establishment Clause," Emory Law Journal, 25 (1976), 17.

(1) the recipient of the aid, usually a college level school, is found to be not pervasively religious though it is sponsored by a religious organization; (2) state funds are not transferred to the recipient and the program is designed to help the institution help itself rather than as a mass subsidy; and (3) the absence of state funds supposedly results in a reduced need for surveillance.¹⁵⁰

Underwood does not imply that elimination of one of these factors automatically results in impermissible entanglement. However, when the factors are present it is difficult to charge an institution with the level of deficiency necessary to place it outside the pale of constitutionality.¹⁵¹

Professor Underwood is supported in his opinion by the eminent attorney, Leo Pfeffer, who says of Hunt and Tilton:

. . . the present posture of the Supreme Court seems to indicate that it will strike down any law granting aid to parochial elementary and secondary schools beyond the narrow confines of bus transportation and book loans, but will require proof of sectarianism in each particular case in which a challenge is made to aid, at least in the form of construction grants or loans, to a church-related college or university. The difference in treatment is based on the assumption that there is not much difference between parochial schools, but that church-related colleges and universities vary substantially among themselves and each must be judged individually in determining whether it is sufficiently secular to qualify for governmental aid under the Establishment Clause.¹⁵²

The possibility still exists, however, that when colleges and universities are scrutinized on an individual

¹⁵⁰ Hunt v. McNair, 413 U.S. 734, 736-49 (1973).

¹⁵¹ Underwood, "Permissible Entanglements," p. 25.

¹⁵² Pfeffer, God, Caesar, and the Constitution, pp. 296-297.

basis, that there are cases where pervasive sectarianism exists and can be proven. The Duke Law Journal warns state legislators against assuming that the "effect" and "entanglement" portions of the Tilton test "do not pose a threat to the constitutionality of aid to higher education statutes."¹⁵³ The tripartite test is not a "mechanical formula."¹⁵⁴ Resolution of "aid-to-private education plans" is a "delicate" task.¹⁵⁵ It is with this knowledge that higher education cases have recently made their way to the Supreme Court. One Catholic writer, Mary Mullaney, sees Hunt as a realistic recognition that religious schools, particularly colleges and universities, are able to and do in fact separate secular academics from sectarian indoctrination.¹⁵⁶ On the other hand, institutions which, in their eagerness to comply for government money, in divesting themselves of their religious identity may save their existence but may face "pernicious consequences."¹⁵⁷

¹⁵³ Franklin T. Caudell, Keith Hunsaker, and Francis H. Morrison III, Eds., Note and Comment, "Private Colleges, State Aid, and the Establishment Clause," Duke Law Journal (1975), 976-989.

¹⁵⁴ Ibid., p. 985. ¹⁵⁵ Ibid.

¹⁵⁶ Mary Mullaney, "Religious Discrimination and Higher Education: A Continuing Dilemma," Notre Dame Lawyer, 152, (1976), 159.

¹⁵⁷ Ibid., p. 165.

Roemer v. Maryland¹⁵⁸

In 1971 the Maryland Legislature enacted a college aid program designed to provide \$5.3 million a year in noncategorical grants.¹⁵⁹ The law requires the school to meet certain minimum criteria. The money must be applied to non-religious education, and colleges are ineligible that offer "only seminary or theological degrees."¹⁶⁰ The money was to be administered by the Maryland Council for Higher Education, which would determine the eligibility and verify compliance of participating institutions. Four of the participating institutions were church-related, Roman Catholic colleges. A taxpayer suit of four Maryland citizens challenged the statute as "violative of the Establishment Clause of the First Amendment," and therefore not eligible to receive the grants.¹⁶¹

The United States Supreme Court, in a split, 5-4 decision, ruled in favor of the Maryland plan.¹⁶² Mr. Justice Blackmun wrote the majority opinion in which Chief Justice Burger and Powell joined. A concurring opinion was filed by Mr. Justice White, in which Mr. Justice Rehnquist joined.¹⁶³

¹⁵⁸Roemer v. Board of Public Works of Maryland, 96 S. Ct. 2337 (1976) Fed. Supp. 1282 (D. Md. 1974).

¹⁵⁹ Ibid.

¹⁶⁰Roemer v. Board of Public Works of Maryland, at 2341. Also: Md. Ann. Code Art. 77A, SS 65-69 (1975).

¹⁶¹ Ibid., at 2337. ¹⁶² Ibid., at 2340. ¹⁶³ Ibid.

Dissenting opinions were by Justices Brennan, Marshall, Stewart and Stevens.¹⁶⁴

The plan possessed a number of restrictive requirements designed to insure identification of funds from the point of receipt throughout their application in the institution:

The Council performs . . . a "two-step screening process to insure compliance. . . ." First, it determines whether an institution applying for aid is eligible at all. . . . Several applicants have been disqualified at this stage of the process. Second, the Council requires that those institutions that are eligible for funds not put them to any sectarian use. . . . By the end of the fiscal year the institution must file a "utilization of funds report" describing and itemizing the use of the funds. The chief executive officer must certify the report and also file his own "Post-expenditure Affidavit."¹⁶⁵

The institution must provide identifiable separate bank accounts for the funds received, as well as to itemize in the budget the application of the funds. The plan requires the institution:

. . . to retain "sufficient documentation of the State funds expended to permit verification by the Council that funds were not spent for sectarian purposes."¹⁶⁶

If there is a question regarding the accuracy of the accounting procedure, an audit may be taken, involving a day or less.¹⁶⁷

¹⁶⁴ Roemer v. Maryland, at 2340.

¹⁶⁵ Ibid., at 2343-2344. ¹⁶⁶ Ibid., at 2344.

¹⁶⁷ Ibid.

The colleges involved in the suit were Western Maryland College, College of Notre Dame, Mount Saint Mary's College, Saint Joseph College, and Loyola College.¹⁶⁸ Western Maryland divested itself of all Methodist ties and the four remaining schools were Roman Catholic affiliated.¹⁶⁹

Mr. Justice Herbert Blackmun does not agree with Jefferson's wall of separation. He contends:

. . . a hermetic separation of the two is an impossibility it [the Court] has never required. . . . The Court has permitted the state to supply transportation for children to . . . church-related schools. Everson¹⁷⁰

He argues further that:

The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the state frees the institution's resources to be put to sectarian ends. . . .¹⁷¹

This leads to the concept of neutrality:

The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.¹⁷²

In Tilton, the Court noted that it was possible to separate the religious and secular functions of the defendant

¹⁶⁸ Roemer v. Maryland, at 2346.

¹⁶⁹ Ibid., at 2346. ¹⁷⁰ Ibid., at 2348. ¹⁷¹ Ibid.

¹⁷² Ibid., at 2349.

colleges in such a way as to prevent sectarian use of facilities constructed with federal money.¹⁷³

As Roemer faced the question of excessive entanglement, the Court considered the character of the institutions in question. Once more, "general differences" between college and pre-college education remove higher education from susceptibility to previous parochial school decisions. The character of the colleges in Roemer were considered to be not different from those in Tilton and Hunt; using the same criteria of evaluation, the Court found no excessive entanglement in Roemer.¹⁷⁴

The Court was in no mood to innovate nor to set new directions in Roemer. If anything, it could only see the Maryland case as an opportunity to apply the judicial patterns of the recent past.¹⁷⁵ The Justices stated:

So the slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.¹⁷⁶

The focus of the debate in Roemer was upon "the primary effect of advancing religion, and excessive church-state entanglement."¹⁷⁷ The District Court's findings were

¹⁷³Roemer et al. v. Board of Public Works of Maryland et al., at 2352.

¹⁷⁴Ibid., at 2353. ¹⁷⁵Ibid., at 2356.

¹⁷⁶Ibid. ¹⁷⁷Ibid.

convincing enough to the majority in the Court to find no "pervasive sectarianism" in the schools and it chose not to "second guess" the District Court on that point.¹⁷⁸

Another concern "posed by Hunt": whether aid was in fact extended only to "the secular side."¹⁷⁹ The question posed no problem because much emphasis was placed upon the delimitation concerning "secular use."¹⁸⁰

The question of entanglement exposed the thinnest support of the legislation. The way with which the statute must assure the government of proper primary effect depends upon an annual audit.¹⁸¹ The District Court had found that "excessive-entanglement" did not result from the annual audit.¹⁸² The Court concluded that the annual audits "are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditation by the State."¹⁸³

The Court defined what is necessary for a "nonentangling" aid program:

. . . The ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes.¹⁸⁴

The Court did not claim perfection with regard to its application of the Tilton tests. The conclusion of the

¹⁷⁸ Roemer et al. v. Board of Public Works of Maryland et al., at 2360.

¹⁷⁹ Ibid., at 2361. ¹⁸⁰ Ibid. ¹⁸¹ Ibid., at 2363.

¹⁸² Ibid., at 2365. ¹⁸³ Ibid., at 2366. ¹⁸⁴ Ibid.

majority was based upon the character of the institutions in question, which found them capable of discerning between secular and religious functions in the process of education.¹⁸⁵

Roemer was not a unanimous decision. Mr. Justice Brennan insisted the plan "offended" the Constitution by using state money for the advancement of religion despite the "vigilance to avoid it."¹⁸⁶

Another objection was that the act provides for payment of general subsidies (non-categorical) to religious institutions. Justice Brennan recalled from his Walz opinion that general subsidies of religious activities "constitute impermissible state involvement with religion."¹⁸⁷ The general subsidy, he maintains, "promotes" the kind of "interdependence between religion and state which the First Amendment was designed to prevent.

Mr. Justice Brennan sees in Roemer an example of "a direct subsidy from public funds for activities carried on by sectarian educational institutions."¹⁸⁸ He quoted himself in Lemon I, where he stated:

I believe that the Establishment Clause forbids . . . government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution. . . . I reach this conclusion for these [reasons]. . . : the necessarily deep involvement of government in the religious activities of such an institution through the policing of restrictions, and the fact that subsidies

¹⁸⁵ Roemer et al. v. Board of Public Works of Maryland et al., at 2368.

¹⁸⁶ Ibid., at 2373. ¹⁸⁷ Ibid. ¹⁸⁸ Ibid., at 2374.

of tax monies directly to a sectarian institution necessarily aid the proselytizing function of the institution. . . .

I do not believe that [direct] grants to such a sectarian institution are permissible. The reason is not that religion "permeates" the secular education that is provided. Rather, it is that the secular education is provided with the environment of religion; the institution is dedicated to two goals, secular education and religious instruction. When aid flows directly to the institution, both functions benefit. (Emphasis in original) ¹⁸⁹

Justice Brennan depended a great deal upon Lemon I for his dissenting opinion. He also drew upon Lemon II ¹⁹⁰ for support of the appellant's motion that the institutions be made to refund all payments made to them. He quoted Justice William O. Douglas, who wrote:

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year or next year. . . .

Whether the grant is for . . . last year or at the present time, taxpayers are forced to contribute to sectarian schools as a part of their tax dollars. ¹⁹¹

Additional dissent was expressed from Mr. Justice Potter Stewart who perceived a "decisive" difference between Roemer and Tilton. ¹⁹² The problem lies in the nature of the required theology courses taught at the dependent colleges. "In Tilton the Court emphasized that the theology courses

¹⁸⁹ Roemer et al. v. Board of Public Works of Maryland et al., at 23474-2375; Lemon v. Kurtzman, 403 U.S. 602, 659-660 (1971).

¹⁹⁰ Lemon v. Kurtzman, 411 U.S. 192, 209 (1973).

¹⁹¹ Roemer et al. v. Board of Public Works of Maryland et al., at 2375; Lemon v. Kurtzman, 411, 192, 209 (1973).

¹⁹² Ibid., at 2377; Tilton v. Richardson 403 U.S. 672 (1971).

were taught as academic subjects."¹⁹³ In Roemer, however, there was no evidence that theology was being taught as an "academic discipline."¹⁹⁴

Justice Brennan does not agree that there is "no constitutionally significant distinction" between the colleges in Tilton and those in Roemer.¹⁹⁵

In the present case, by contrast, the compulsory theology courses may be "devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline."¹⁹⁶

The majority did not provide evidence to the contrary, and the Brennan dissent on the above and other counts did not weigh heavily enough to sway the Court's decision.

Mr. Justice Stevens had little to add to the dissent expressed by Mr. Justice Brennan, except for the following emphatic expression of concern for the "turn" such assistance gives to religious commitment of the recipient schools.¹⁹⁷

He stated:

I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.¹⁹⁸

¹⁹³Roemer et al. v. Board of Public Works of Maryland et al., at 2377; Tilton v. Richardson, at 686, 687.

¹⁹⁴Ibid., at 2378. ¹⁹⁵Ibid., at 2378. ¹⁹⁶Ibid.

¹⁹⁷Ibid., at 2380. ¹⁹⁸Ibid. Note: It should be noted that the Court's concern over excessive entanglement

With the Roemer decision of 1976, New York University law professor James C. Kirby, Jr. acknowledged the Supreme Court's completion of "a process of validating substantial state financial aid to church-related higher education."¹⁹⁹ In an attempt to write a conclusion to the continuing controversy, the professor suggests that a "practical detente" may have become possible through Roemer and Meek v. Pittinger,²⁰⁰ a lower education case.²⁰¹ His conclusions concerning Roemer are of interest in view of the lack of success of subsequent, similar appeals to the United States Supreme Court. He says:

Taken with Roemer's approval of more substantial aid to higher education, the detente appears not to be ungenerous to religious education as a whole. Detente is not defeat.

The result is a mosaic of inconsistencies, but a net combination that permits some aid to religion, but not too much. Along with other positive involvements

lies with the possibility that government could eventually control operations of church-related schools. Excessive entanglement caused by financial aid to religious groups was a possibility noted by French historian Alexis de Tocqueville who said: "In America religion is perhaps less powerful than it has been at certain periods and among certain nations, but its influence is more lasting. It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control." Alexis De Tocqueville, Democracy in America, ed. Phillips Bradley, trans. Henry Reeve (New York: Harper & Row, Publishers, 1966), I, 323.

¹⁹⁹James C. Kirby, "Everson to Meek and Roemer: From Separation to Detente in Church-State Relations." 55 N.C.L.R. 563 (1977).

²⁰⁰Meek v. Pittinger, 421 U.S. 349 (1975).

²⁰¹Ibid.

of government with religion, this detente should help to preserve our religiously pluralistic society. . . . It is hoped that excessive concern for entanglement will not endanger this pluralism, in which both division and divisiveness must necessarily inhere. . . .²⁰²

Kirby's concept of First Amendment detente is an attempt to reconcile the historic contributions of Roger Williams, Thomas Jefferson, and James Madison to the early formulation of the Constitution.²⁰³ In the professor's opinion:

Walz, Meek and Roemer may prove to be major achievements of the Burger Court and key elements in our new wall of separation, which has come more to resemble an artful latticework.²⁰⁴

Kirby's "latticework" is intriguing. However, as the present study demonstrates, there is much more complexity to the history of college aid and the First Amendment. Roemer is important because it has applied the Tilton and Lemon tests to non-categorical grants furnished church-affiliated colleges. Knowledgeable observers, such as attorney-newsman Carl Stern, suggested that results of Roemer would "open the flood gates" of schools moving away from their religious identities, to comply, thus opening a new "round" of legislation and litigation.²⁰⁵ Mr. Stern summed up the constitutional

²⁰²Meek v. Pittinger, at 575. ²⁰³Ibid.

²⁰⁴Ibid.

²⁰⁵Carl Stern, N.B.C. T.V. News. Notes made by researcher from the news analysis, June 21, 1976.

effect upon the First Amendment "Wall of Separation," as a "reduction" in the amount of separation.²⁰⁶

Smith v. Board of Governors²⁰⁷

Smith v. Board of Governors has been working its way through the federal courts since April, 1976.²⁰⁸ Dr. Michael Smith, a former professor at Pfeiffer College and a North Carolina resident, entered suit challenging the constitutionality of the use of state tax money in support of church-related colleges.²⁰⁹ The two named colleges were considered representative of a total of 38 independent church-related colleges which are licensed to grant degrees by the Board of Governors of the University of North Carolina.²¹⁰ Belmont Abbey was founded, and is still closely associated with Benedictine Monks and the Roman Catholic Church. Pfeiffer is a United Methodist-related institution.²¹¹

The case initially was presented before a three-judge federal Court in Charlotte, North Carolina.²¹² Smith contended that the First Amendment Establishment Clause was

²⁰⁶Carl Stern, N.B.C. T.V. News.

²⁰⁷U.S.L.W., 77-84 at 3162 (1977).

²⁰⁸Smith v. Board of Governors, NO. C-C-76-131 (March 1977).

²⁰⁹Ibid. ²¹⁰Ibid. ²¹¹Ibid., at 2.

²¹²Ibid.

violated through utilization of public funds "for sectarian purposes" at the two campuses.²¹³

Three state programs of aid were challenged as to their constitutionality, on grounds of religious establishment:²¹⁴

(1) A \$300 credit for in-state students attending private colleges, exclusive of public or proprietary colleges. Known as the North Carolina Legislative Tuition Grant Program, students, regardless of need receive the \$300 tuition offset grant. Students attending public or proprietary colleges are not eligible to receive the subsidy.²¹⁵

(2) Needy students who qualified otherwise would receive a maximum of \$200 per year under a contract arrangement with the state and institution.²¹⁶

(3) The North Carolina student incentive grants did not exclude public and proprietary schools. However, monies also were directed toward church-related college students.²¹⁷

Smith, referring to Lemon and Tilton, held that the defendant colleges, as well as 36 private colleges and

²¹³ Smith v. Board of Governors, at p. 3.

²¹⁴ North Carolina 1975 Session Laws, Ch. 875 Sec. 30; Second Sess. Ch. 983, Sec. 54; North Carolina G.S. 116-201--116-209.23.

²¹⁵ Ibid.

²¹⁶ North Carolina Gen. Stats. Sec. 116-119, et seq.

²¹⁷ North Carolina, 1975 Session Laws, Ch. 875, Sec. 30.

and universities in the state, are church-related.²¹⁸ Smith's brief said that to provide students with state money who attend such colleges, provides the college with students that might go elsewhere, and therefore the school receives support it might not obtain otherwise.²¹⁹ The primary effect, he argued, is to encourage "students to attend colleges where they will be influenced to become or remain religious."²²⁰ The requirement of religion as a subject presence of religious symbols, clerical garb, and the holding of worship services in the buildings to which students must attend, were used as evidence to prove that the schools are "pervasively sectarian."²²¹

Smith's argument that the funneling of such aid to the schools would result in "entanglement" of religion and government, met with little success.

The Western District Court in Charlotte regarded Smith and the question of primary effect in the light of Hunt v. McNair:

That aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . .²²²

²¹⁸North Carolina 1975 Session Laws, Ch. 875, Sec. 30, p. 2.

²¹⁹Ibid. ²²⁰Ibid.

²²¹Smith v. Board of Governors, NO. C-C-76-131 (March 1977), at p. 8.

²²²Ibid., at 14.

Furthermore, the Court said: "the colleges here seem to be indistinguishable from . . . Roemer."²²³ Despite the fact that two of the three federal judges held the personal opinion that the state plans were in violation, Roemer weighed heavily in their consideration of Smith.²²⁴

Justice Woodrow Jones, Chief Judge wrote:

As I have advised you heretofore, I was of the personal opinion that the North Carolina statutes violate the establishment clause but in view of the recent Supreme Court decisions of Hunt v. McNair [sic] and particularly of Romer [sic] v. Board of Public Works of Maryland, we have no choice other than to hold the statutes valid.²²⁵

Judge James B. McMillan sustained similar private misgivings concerning the North Carolina statutes, and prefaced his concurring opinion with the following:

If we were writing on a clean slate, I would hold the challenged programs to be invalid as contrary to the First Amendment . . . , unfortunately the Roemer decision requires lower courts to make adjustments as to how much religion a school actually practices; if the school atmosphere is essentially secular, i.e., not "pervasively sectarian," the state can subsidize its students at will.²²⁶

Of considerable significance was the appellation "landmark" designated to Roemer by Mr. Justice McMillan.²²⁷ He elaborated by saying:

²²³ Smith v. Board of Governors of University of North Carolina, NO C-C-86-131, at 14.

²²⁴ Woodrow W. Jones, U. S. District Court, Western District of North Carolina, Smith v. Board of Governors, U.S.D.C. UNC C-C-76-131 (1977).

²²⁵ Ibid., at 1. ²²⁶ Ibid. ²²⁷ Ibid.

Whether state aid tends to establish or disestablish religion is not material. The far-sighted framers of the First Amendment were fresh witnesses to the dangers of dominion of church over state or of state over church, and wanted America to have none of either.

In other words, Justice McMillan has said that in consideration of church-state aid to church colleges, the First Amendment no longer applies except when religious practices exceed the as yet undefined standards alluded to in Roemer.²²⁸

The decision of the federal district court was appealed to the United States Supreme Court by Dr. Michael Smith and Americans United for Separation of Church and State.²²⁹ The Court consented to consider Smith²³⁰ and the Tennessee case (Americans United v. Dunn) together.²³¹ The appeal was filed in July, 1977.²³² The brief to the Supreme Court asked the following:

(1) Are tuition and scholarship grants to students under North Carolina tuition and scholarship assistance programs aid to college? (2) If so, does such aid have primary effect of advancing religion in following respects: (a) State's failure to guarantee that state and federal funds will not be used for sectarian purposes by student, and (b) State's failure to guarantee that state and federal funds will not be used for sectarian purposes after becoming part of general funds of

²²⁸ Smith v. Board of Governors, at 1.

²²⁹ Smith et al. v. Board of Governors University of North Carolina, 77-84, 46 U.S.L.W. at 3162 (1977).

²³⁰ Ibid.

²³¹ Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974).

²³² Smith v. Board of Governors, U.S.L.W., at 3162.

college? (3) May state make tuition funds available to private non-public college students without making same funds available to public college students?²³³

At the time the suit was instituted (1976), the state was providing \$9 million in aid to private colleges, but by the October 1977 decision, the amount had increased to \$11 million for the 38 church-related colleges and universities.²³⁴ The ruling by the Court of the 1977 Smith decision was 6-3, while the Roemer case in 1976 drew a 5-4 decision.²³⁵ Smith lost the support of Justice Potter Stewart, and retained that of Justices Brennan, Marshall and Stevens, who maintained the case merited review before the final decision.²³⁶ A summary of the opinion follows:

North Carolina's free scholarship and tuition assistance programs, which have admitted secular purpose, do not violate First Amendment [sic] as applied to Belmont Abbey College and Pfeiffer College, which are not pervasively sectarian in actual operation, being liberal arts colleges functioning in liberal arts tradition and not engaged in proselytizing students or anyone else.²³⁷

Americans United v. Dunn²³⁸

Americans United for the Separation of Church and State v. Dunn was appealed to the Supreme Court

²³³ Smith v. Board of Governors, U.S.L.W., at 3162.

²³⁴ Greensboro Daily News, p. 1 (October 4, 1977).

²³⁵ Ibid. ²³⁶ Ibid.

²³⁷ Smith v. Board of Governors, 46 U.S.L.W. at 3162 (1977).

²³⁸ Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974).

simultaneously with the Smith v. Board of Governors decision.²³⁹ Dunn was brought to the United States Supreme Court on appeal from a decision by the District Court for the Middle District of Tennessee.²⁴⁰ The District Court had found a student aid plan to be unconstitutional because of the primary effect of establishment of religion.²⁴¹ Dunn claims special attention because the district judges ignored the Burger Court's Lemon criteria because they "obfuscated, rather than sharpened" the consideration of the Tennessee aid plan.²⁴²

The District Court formulated its own "tripartite test," based on previous Establishment Clause decisions by the Supreme Court.²⁴³ The three considerations followed by the Court were: (1) who actually receives the money?; (2) can the aid be applied only to the secular function of the institutions in question;²⁴⁴ (3) the third is similar to the second, in that the substance of the aid program is critical.²⁴⁵ Since the question of primary effect and the consideration of entanglement were included, "purpose" was unquestioned.

²³⁹Smith v. Board of Governors, 46 U.S.L.W. at 3162 (1977).

²⁴⁰Ibid. ²⁴¹Ibid., at 720-21.

²⁴²Ibid., at 721; Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

²⁴³Ibid., at 719. ²⁴⁴Ibid., at 721. ²⁴⁵Ibid.

Smith and Dunn were identical in that, although students did not actually see the aid money, students were the assigned beneficiaries.²⁴⁶ Concern also was expressed by Americans United in both the Tennessee case and the North Carolina case, that it was not the student who benefit so much as the institution.²⁴⁷ The District Court in Dunn stated:

The sovereign may not confer a "special benefit on any group of students who have chosen to support religious schools . . . ; financial assistance to students must not provide an incentive for attendance at church-related schools . . . ; and direct aid in whatever form, to church-related schools is invalid if no restrictions are placed thereon.²⁴⁸

The problem of effect, therefore, was dealt with, for there were no restrictions mentioned. Instead all Tennessee students would benefit, public and church-related alike.²⁴⁹

The problem of entanglement was considered by the Court on the basis of the ability of the parties involved to discern and separate the secular from the sectarian functions within the operation of the schools. The Court wrote:

Direct . . . aid to church-related schools is not unconstitutional if the aid is exclusively restricted to the secular function of those schools, provided

²⁴⁶ Smith v. Board of Governors, at 717; Smith v. Board of Governors, 46 U.S.L.W. at 3162 (1977).

²⁴⁷ Ibid., at 720-21; Smith et al. v. Board of Governors 46 U.S.L.W. at 3162 (1977).

²⁴⁸ Ibid., at 720. ²⁴⁹ Ibid., at 717.

that the two functions can be separated and that enforcement of the restrictions does not "involve" or "entangle" the sovereign in religious activity.²⁵⁰

The United States Supreme Court found no cause to agree with Americans United in either Smith or Dunn. In a 6-3 vote in October 1977 the respective state plans were validated by the Court.²⁵¹

Americans United v. Rogers²⁵²

A Missouri statute permitting direct financial aid to students attending private church-related institutions was upheld by the Missouri Supreme Court in 1977.²⁵³ The justices looked to Roemer for precedent, and "could find no First Amendment problems with Missouri's tuition grant program (Americans United v. Rogers 7/26/76)."²⁵⁴

The plan included payment by individual checks made payable directly to the "student recipient."²⁵⁵ In much the same pattern as under the G. I. Bill, the checks are sent in bulk to the financial aid offices of the college, who in turn notifies the student. The college or university has first claim against the check for any balance outstanding against

²⁵⁰Smith v. Board of Governors, at 721.

²⁵¹Greensboro Daily News, p. 1 (October 4, 1977).

²⁵²Americans United for Separation of Church and State v. Rogers, MO Sup. Ct., 538 S.W. 2d 711, 45 L.W. 2056 (1977).

²⁵³Ibid. ²⁵⁴45 U.S.L.W. 1019 (1976).

²⁵⁵Ibid.

the student. If the ledger is clear, the student may walk away with the entire check.²⁵⁶ There was no restriction on the nature of the college involved, only to those students who were considered pre-theological or divinity students.²⁵⁷

The State Supreme Court noted that "excessive entanglement is avoided" because the Missouri plan requires only of the institution that it verify student attendance.²⁵⁸ "This, the Missouri court concludes, entangles state and church less than the reporting requirements of the Maryland Statute (Page 2056)."²⁵⁹

The United States Supreme Court was presented with an appeal by Americans United, which asked:

Does Missouri statutory scheme that provides college tuition grants to students attending sectarian colleges and contains no restrictions on sectarian use of such funds by colleges violate First and Fourteenth Amendments?²⁶⁰

The ruling was simply in agreement with the State Supreme Court of Missouri, that the statute did not violate the Establishment Clause.²⁶¹

UNITED STATES DISTRICT COURT CASES

Prior to the United States Supreme Court's decision in Flast v. Cohen (1968), standing to sue and direct access

²⁵⁶45 U.S.L.W. 1019 (1976). ²⁵⁷Ibid.

²⁵⁸Ibid., at 1020. ²⁵⁹Ibid.

²⁶⁰45 U.S.L.W., at 3354 (1977). ²⁶¹Ibid.

to federal courts was extremely limited.²⁶² Sorauf suggests that although in civil rights cases the appellants were received favorably in federal courts, the rule did not hold true in the case of church-state separation. He notes:

The majority of attorneys and groups . . . would appear to favor the federal courts. Especially for groups whose goal is constitutional precedent it is the surest and fastest route to the U. S. Supreme Court. . . . The choice of the federal forum also obviates the problem of the state court deciding on a state constitutional ground and thereby effectively cutting off access to the U. S. Supreme Court. And with most objectionable public policies being national--or at least common to a number of states--it is the single nationwide precedent that is sought.²⁶³

There were situations, however, that called for state court action, where quick action is sometimes an advantage, or the state constitution is more restrictive than the federal. Sorauf says of the choice:

. . . the chief criteria are clear: sympathy of the judges, relationship of the relevant constitution to the goals of the litigation, and speed of access to both trial and appellate courts.²⁶⁴

The following district court cases were all appealed to the United States Supreme Court: Roemer v. Board of Public Works of Maryland;²⁶⁵ Americans United for Separation of

²⁶² Flast v. Cohen, 392 U.S. 83 (1968).

²⁶³ Sorauf, The Wall of Separation, p. 112.

²⁶⁴ Ibid., p. 113.

²⁶⁵ Roemer v. Board of Public Works of the State of Maryland, 426 U.S. 736 (1966); 96 S. Ct. 2344 (1976); 387 F. Supp. 1282 (D. Md. 1974).

v. Bubb;²⁶⁶ Americans United v. Dunn;²⁶⁷ and Smith v. Board of Governors.²⁶⁸

Roemer v. Maryland²⁶⁹

A tuition assistance plan was upheld, before a three-judge federal district court, in Roemer. The decision was 2-1, Judge Bryan dissenting. The case was appealed to the United States Supreme Court, where the decision was once again to uphold the Maryland plan of aid to church-related colleges.

Americans United v. Bubb²⁷⁰

Americans United v. Bubb was a case which was originally filed in the state district court in Topeka. The judge ruled that Americans United had no standing to sue; that Flast v. Cohen²⁷¹ did not apply in a state court. An appeal went to the Supreme Court, but was dropped. Americans United then filed suit in the Federal District Court.

When the suit was filed, the law involved nineteen church-related colleges. The plaintiffs argued that the

²⁶⁶ Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974).

²⁶⁷ 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).

²⁶⁸ Michael Smith v. Board of Governors University of North Carolina, U.S.D.C. W.N.C. C-C-76-131 (1977).

²⁶⁹ Roemer v. Maryland, 426 U.S. 736.

²⁷⁰ Americans United v. Bubb, 379 F. Supp. 872 (D. Kan. 1974).

²⁷¹ Flast v. Cohen, 392 U.S. 83 (1968).

First Amendment was jeopardized on the basis of establishment of religion. The act provided aid for private colleges only.

The Lemon-Tilton test was applied to the Kansas legislation which included a secular purpose, primary effect, and excessive entanglement.²⁷² Since the secular purpose was to save the state money and to allow student choice, that criterion was met. The primary effect was applied individually to each institution; five of nineteen failed to "pass muster."²⁷³ Excessive entanglement and political discord were considered by the Court, but there were no violations cited. The Court suggested that those colleges which did not qualify could do so by divesting themselves of their particular sectarian identities.²⁷⁴

Americans United v. Dunn²⁷⁵

Americans United v. Dunn reached the United States Supreme Court in 1977. The District Court, however, questioned the constitutionality of using the device of student tuition grants to supply indirect aid to a religious institution. The Tennessee plan posed no restriction on the use of the funds once received.²⁷⁶ Because there was no separation

²⁷²Americans United v. Bubb, 379 F. Supp. 872 (D. Kan. 1974).

²⁷³Ibid., at 139-93. ²⁷⁴Ibid.

²⁷⁵Americans United v. Dunn, 384 F. Supp. 714, 719 (M.D. Tenn. 1974).

²⁷⁶Ibid., at 720.

of secular use from sectarian, the statute failed the test of entanglement.²⁷⁷ Thus, the three-judge federal court found the plan unconstitutional.²⁷⁸ A later appeal took it to the United States Supreme Court but the plan was modified to comply.²⁷⁹

Smith v. Board of Governors²⁸⁰

Smith v. Board of Governors originated in the United States District Court of the Western District of North Carolina. The suit (discussed supra) was taken to the U. S. Supreme Court, and on the basis of Roemer, the appellants lost a 6-3 decision. The effect of the decision in North Carolina is to perpetuate three contested plans of assistance to 38 church-related institutions. The controversy in the state continues, however, because with each legislature, the dollar demands of the private colleges tend to increase in size.

STATE CASES

Horace Mann v. Maryland²⁸¹

Horace Mann v. Maryland challenged Maryland statutes, Chapter 66 of the Acts of the 1962 and Chapter 545 of the 1963 as unconstitutional and invalid. The highest

²⁷⁷Americans United v. Dunn, at 720.

²⁷⁸Ibid.

²⁷⁹Smith v. Board of Governors, 46 U.S.L.W. at 3162 (1977)

²⁸⁰Ibid.

²⁸¹Horace Mann League v. Board of Public Works, 242 Md. 645 op. dis. and cert. don., 385 U.S. 97 (1966).

court in Maryland, the State Court of Appeals, heard the case.²⁸² The case was the first higher education case to use all the classic church-state arguments.²⁸³ The plaintiffs presented a historic sketch of church-state relationships, and the defense was featured by the arguments from precedent, which were meant to justify aid to church-related colleges.²⁸⁴

The Horace-Mann League was backed by Americans United and the American Jewish Congress.²⁸⁵ At issue was the question of the constitutionality of legislation which provided grants to four church-related Maryland colleges. The colleges were Hood College, Western Maryland, Notre Dame College, and St. Joseph.²⁸⁶ All but one of the colleges (Hood College) failed the test of constitutionality.²⁸⁷

The question foremost in the mind of the court was to determine whether the defendant colleges were religious or sectarian. Perhaps foreshadowing a later attempt to form criteria for judgment, the Appellate Court applied the following standards to the individual colleges:

- (1) the stated purposes of the college;
- (2) the college personnel . . . governing board . . . administrative officers . . . faculty . . . and student body (with considerable stress being laid

²⁸²Horace Mann League v. Board of Public Works, 242 Md. 645 op. dis. and cert. don., 385 U.S. 97 (1966).

²⁸³*Ibid.*, pp. 2-8. ²⁸⁴*Ibid.*, pp. 17-20.

²⁸⁵*Ibid.*, p. 1 ²⁸⁶*Ibid.*, pp. 9-17.

²⁸⁷*Ibid.*, pp. 10-11.

- on . . .) religious control over the governing board as a criterion of whether a college is sectarian;
- (3) the college's relationship with religious organizations and groups . . . its sponsoring church;
 - (4) the place of religion in the college's program, which includes the extent of religious manifestation . . . required participation for any or all students . . . place of religion in the curriculum and in extra-curricular programs;
 - (5) the result or "outcome" of the college program . . .
 - (6) the work and image of the college in the community.²⁸⁸

The United States Supreme Court declined to consider the Horace Mann case, leaving Horace Mann as the model until Lemon and Tilton in 1971.²⁸⁹ Richard E. Morgan calls the stand taken by the Court of Appeals "a fairly tough separationist line."²⁹⁰

The roll call of cases which have had effect upon recent constitutional opinion is limited and includes those cases originating in the states that have eventually reached the Supreme Court. The narrative also is selective in its choice of cases considered significant to the question of the research question only. Cases currently moving through state courts are not considered to be within the scope of this study.

In 1975 Leo Pfeffer characterized the Supreme Court as ready to find unconstitutional most elementary and

²⁸⁸ Horace Mann League v. Board of Public Works, 242 Md. 645 op. dis. and cert. don., 385 U.S. 97 (1966).

²⁸⁹ Horace Mann League v. Board of Public Works of Maryland, 385 U.S. 97 (1966).

²⁹⁰ Richard E. Morgan, The Supreme Court and Religion, p. 108.

secondary parochial aid without very much data. Yet the same Court requires the burden of proof to rest upon a plaintiff who challenges college aid.²⁹¹ Pfeffer says:

The difference in treatment is based on the assumption that there is not much difference between parochial schools, but that church-related colleges and universities vary substantially among themselves and each must therefore be judged individually in determining whether it is sufficiently secular to qualify for governmental aid under the Establishment Clause.²⁹²

Minnesota C.L.U. v. Minnesota²⁹³

The Minnesota Civil Liberties Union successfully challenged legislation which provided tax exempt bonds for construction of buildings at church-related colleges.²⁹⁴ But on an appeal to the State Supreme Court, the Court held that bonds could be issued "by a state agency to refinance the indebtedness of private religious affiliated colleges in the construction of secular educational facilities."²⁹⁵ The Court insisted that the plan violated neither the state constitution (Art. 13, Sec. 2) nor the Establishment Clause of the First Amendment.²⁹⁶

²⁹¹ Pfeffer, God, Caesar and the Constitution, pp. 696f.

²⁹² Ibid.

²⁹³ Minnesota CLU v. Minnesota, 224 N.W. 2d 344 (1974).

²⁹⁴ Ibid.

²⁹⁵ Minnesota Higher Educational Facilities Authority v. Hawk, 232 N.W. 2d 106 (1973).

²⁹⁶ Ibid.

State ex. rel. Rogers v. Swanson²⁹⁷

Nebraska statutes which provided tuition grants to students of church-related colleges were declared unconstitutional because benefits were directed to a specific group. The plan was held to violate both the state and federal constitutions.²⁹⁸ The First Amendment Establishment Clause was jeopardized in the Federal Constitution; the specific article in the state constitution cited by the Court was Article III, Sec. 18.²⁹⁹

Almond v. Day³⁰⁰

Virginia's constitution has been persistently embattled over the question of support for church-related higher education.³⁰¹ The statute included a provision for "debt forgiveness" which proved too similar to direct grants to be acceptable constitutionally.³⁰² The program was challenged successfully in Almond v. Day.³⁰³ The Virginia State Supreme Court identified the primary flaw in the plan in its "natural and reasonable effect."³⁰⁴ The court maintained that Section 141 of the state constitution, as well as the First

²⁹⁷State ex. rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W. 2d 726 (1974).

²⁹⁸Ibid. ²⁹⁹Ibid.

³⁰⁰Almond v. Day, S.E. 2d 851, 857 (1955).

³⁰¹Ibid. ³⁰²Ibid. ³⁰³Ibid.

³⁰⁴Ibid.

Amendment of the Federal Constitution were violated in terms of the guarantees of religious freedom.³⁰⁵

In 1956 the State of Virginia amended its constitution to accommodate the funding of sectarian schools. In 1964 the United States Supreme Court ruled that state schools were segregationist in nature because public funds were prohibited to private schools on an elementary and secondary level.³⁰⁶ Another revision of the constitution was necessary in 1971 because by that time social change had brought about new legislation which legalized aid, on all levels, for non-sectarian schools.³⁰⁷ Another provision permitted non-theological and schools not "pervasively sectarian" to receive state monies in the form of loans.³⁰⁸ It was this couplet of constitutional connivance which initiated the litigation involved in Miller v. Ayers.³⁰⁹

In 1972, the Tuition Assistance Program was established to provide loans which could be paid back in the form of work of money.³¹⁰ A suit was filed by the Comptroller to

³⁰⁵Almond v. Day, S.E. 851, 857 (1955).

³⁰⁶Griffin v. County School Board, 377 U.S. 218 (1964).

³⁰⁷Virginia, Constitution, Sec. 141, Art. VIII, Sec. 10.

³⁰⁸Ibid., Art. VIII, Sec. 11.

³⁰⁹Miller v. Ayers, 191 S.E. 2d 261, 267 (1972).

³¹⁰Ibid., 198 S.E. 2d 634, 639 (1973).

determine constitutionality of the plan. The Virginia Supreme Court concluded that most of the statute did not violate the state and federal constitutions, especially in the light of the Lemon tripartite tests.³¹¹ However, a portion of the legislation which "forgave" the loans based on minimal requirements appeared suspiciously close to outright grants. The term "normal" progress could not in any sense benefit the public, but would directly benefit sectarian colleges in violation of the Establishment Clause of the First Amendment.³¹² The result is that Virginia presently has an aid program within constitutional bounds, which provides aid to church-related colleges.³¹³

Washington state's legislature has had limited success in providing constitutionally permissible aid to higher education. In 1958, the Tattersall case³¹⁴ awarded Washington students an opportunity to participate in the Western Interstate Compact in Higher Education (WICHE). A taxpayer plaintiff objected to legislation on the issue of the state obligating its credit in violation of Article VIII, Sec. 5 of the constitution.³¹⁵ The court found that public purpose would be served through WICHE as an agent of the state.³¹⁶

³¹¹Miller v. Ayers, 198 S.E. 2d 634, 639 (1973).

³¹²Ibid. ³¹³Ibid.

³¹⁴State ex rel. Tattersall v. Yelle, 329 P. 2d 841, 845-846 (1958).

³¹⁵Ibid. ³¹⁶Ibid.

The appropriation and allocation of state tax revenues for the support of church-related colleges and universities was allowed, according to the Attorney General, in 1958.³¹⁷ The concept of need was the key to the opinion. However, no such monies could be used for the establishment of scholarships, loans, or free tuition and fees, but it would be permissible to provide grants or loans directly to needy students at such institutions.³¹⁸

In 1973, a legislative plan was devised which provided Washington state students attending church-related colleges with financial aid.³¹⁹ The money was not paid directly to the student, but was credited to an individual's tuition account. The institution actually received the money from the state; the student saw evidence of the receipt on paper.³²⁰ After a review the State Supreme Court found the program to be unconstitutional on the basis of "clear prohibition" in Article IX, Sec. 4.³²¹ The Court outlined a set of criteria which resemble the Maryland requirements for clear establishment of the secular purpose of an institution: (1) history and current facts; (2) stated purposes; (3) governance; (4) faculty; (5) student body composition;

³¹⁷ Washington, Attorney General Opinion, 57-58, No. 226, p. 104 (1958).

³¹⁸ Ibid.

³¹⁹ Weiss v. O'Brien, 509 P. 2d 973 (1973). ³²⁰ Ibid.

³²¹ Ibid.

(6) academic freedom; (7) property ownership; (8) prominence of religion in the institution; (9) affiliations; (10) curriculum; and (11) control.³²²

The criteria were applied to a sampling of church-related institutions benefitting from the aid plan. The Court said:

. . . in differing degrees, all of these institutions were founded upon and continue to be dedicated to some elements of sectarian purpose and influence. . . . Their efforts and principles should not be diluted by the temporary gain of money diverted from the public treasury, since an inevitable by-product of this effort would be a weakening of such devotion and dedication.³²³

The Washington program was turned down by the Supreme Court because the "principal and primary effect enhanced sectarian interests," and the "possibility of excessive entanglement was not ruled out."³²⁴ Furthermore, "no guarantees were written in the law which would prevent sectarian instruction," as had been provided in Tilton and Hunt.³²⁵

An authority established to market student loans was set up in 1973. But the Washington Supreme Court pointed out that state credit would be used impermissibly by individuals, and sectarian institutions would also be supported.³²⁶ Pointing to the Weiss precedent which prohibited indirect assistance, the Justices said:

³²²Weiss v. O'Brien, 509 . 2d 973 (1973).

³²³Ibid., p. 990. ³²⁴Ibid. ³²⁵Ibid.

³²⁶Washington State Higher Education Assistance Authority v. Graham, 529 P. 2d 1051, 1054 (1974).

Part of the loaned funds will most certainly be used to pay tuition and the remainder will benefit the college in many ways by assisting the student to stay in school. In short, the form is different from Weiss, but the substance is in no way different.³²⁷

Both the courts and the voters have consistently resisted further inroads into the constitutional prohibition of aid to religiously affiliated institutions.³²⁸

The child benefit theory, as well as public welfare, are not seen by the Court as receiving the primary advantage. Instead, Washington's Supreme Court interpretation has been: "that benefit accrues in an impermissible manner to church-related colleges."³²⁹

The Massachusetts Constitution effectively provides the same safeguards as Washington, at least that is the position of the State Supreme Court Justices.³³⁰ Attempts to provide direct aid to church-related colleges have repeatedly failed in the legislature. In 1922, it was ruled by the Attorney General that public purpose cannot be served by aiding private colleges.³³¹

In 1968, the Massachusetts Senate requested of the Supreme Court an opinion as to the constitutionality of a proposed statute:

³²⁷Washington State Higher Education Assistance Authority v. Graham, 529 . 2d 1051, 1054 (1974).

³²⁸Ibid. ³²⁹Ibid.

³³⁰Opinions of the Attorney General of Mass., VI, 1921-22 (1922), pp. 648, 653-654.

³³¹Ibid.

. . . which would create authority to assist institution for higher learning in construction, financing, and re-financing of projects and which would provides [sic] that any borrowing by authority shall not involve a pledge of credit of commonwealth would not violate prohibition against pledge of commonwealth's credit except upon vote of two thirds of each house of General Court.³³²

The Court understood that most of the plan fulfilled secular legislative purpose, but the effect of the plan would be violative of both state and federal constitutions. The Court was unanimous in its opinion.³³³

Alabama courts have successfully prevented inroads into the constitution. In 1971 and 1973, tuition grants programs were ruled unconstitutional by the opinion of the justices.³³⁴ The Alabama House of Representatives requested a ruling on a tuition grants-in-aid program, which was directed toward resident, full-time students attending sectarian schools.³³⁵ The Supreme Court Justices insisted that state funds used either directly or indirectly to provide tuition grants to all students, including those attending church-related colleges, was unconstitutional:

. . . the cumulative impact of the relationship between the State and Church related institutions which is provided for in H.B. 247 involves "an excessive

³³²Opinion of the Justices, 236 N.E. 2d 523 (1968).

³³³Ibid., at 528.

³³⁴Opinion of the Justices, 291 Ala. 301, 280 So. 2d 547 (1973).

³³⁵Ibid.

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 263.³³⁶

Hartness v. Patterson³³⁷

Hartness, referred to as a "friendly suit," was contrived in order to test the constitutionality of South Carolina's State Education Assistance Act. The program established a tuition grant program and a student loan program.³³⁸ Speaking to the question of such assistance, the South Carolina Supreme Court found:

. . . The property or credit of the State of South Carolina . . . shall not . . . be used directly or indirectly, in aid or maintenance of any college . . . which is . . . under the direction or control of any church or religious or sectarian denomination.³³⁹

The fact that only a portion of the tuition costs are covered by the grants from the State affects the matter only in degree. If State funds can be used to provide a portion of the tuition costs for attendance at religious schools, all could just as legally be paid, resulting in the support of such institutions entirely with state funds.³⁴⁰

Turning to the device used successfully in Hunt, the State Education Assistance Act established a student loan

³³⁶Opinion of the Justices, 291 Ala. 301, 280 So. 2d 547 (1973).

³³⁷Hartness v. Patterson, 179 S.E. 2d 907, 909 (1971).

³³⁸Ibid.

³³⁹S. C. Art. XI, Sec. 9.

³⁴⁰Hartness v. Patterson, 179 S.E. 2d 907, 909 (1971).

fund, whose credit was backed by the issuance of bonds, payable solely from loan repayments, grants, and other non-public sources.³⁴¹ No state money or credit was involved. The policy passed constitutional muster in much the same way as Hunt.³⁴²

Utilizing its extensive influence, the South Carolina Foundation was instrumental in persuading citizens in 1972 to amend the state constitution.³⁴³ The element replaced was a specific prohibition of "all direct and indirect" aids to religious institutions with a more general statement outlawing direct aid.³⁴⁴ The effect allowed leeway for a more elaborate and generous program of assistance which would not be affected by further rulings such as was provided in Hartness.³⁴⁵

Bob Jones University v. Johnson

The most recent ruling in South Carolina litigation was Bob Jones v. Johnson, which only indirectly touched on financial aid. Bob Jones University is a conservative Protestant college which accepts students who utilize veterans benefits. The federal courts ruled that the Veterans Administration program violates neither the Establishment nor the Free Exercise Clauses of the First Amendment.³⁴⁶

³⁴¹ Hartness v. Patterson, 179 S.E. 2d 907, 909 (1971).

³⁴² Ibid. ³⁴³ Sorauf, The Wall of Separation, p. 309.

³⁴⁴ Ibid. ³⁴⁵ Ibid.

³⁴⁶ Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974).

Iona College v. Nyquist³⁴⁷

In New York, the Bundy Plan of state assistance to education was challenged in three higher education cases. The first, Iona,³⁴⁸ entered court in order to claim the right to receive state subsidy. Guidelines drawn up by the state Commissioner of Education, effectively defined the school as sectarian, and ineligible for the money.³⁴⁹ Unwilling to accept the conditions, which appeared to be arbitrary and discriminatory, the school filed suit. The New York State Supreme Court found the college not in compliance with the restrictions written in the legislation and refused to allow the funds to be funneled to the school. A complicated questionnaire method of qualifying for aid overlapped into the post-Tilton period where similar criteria continued to determine the pervasive sectarianism of colleges.

Canisius College of Buffalo v. Nyquist³⁵⁰

Canisius College in New York, also a Catholic school, initiated legal action. Although initially the courts denied Canisius the privilege of state aid, by the utilization of

³⁴⁷ Iona College v. Nyquist, 65 Misc. 2d. 329, 316, NYS 2d 139, 144 (1970).

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Canisius College of Buffalo v. Nyquist, 36 App. Div. 2d 340, 342, 320 N.Y.S. 2d 652, 654 (1971).

the Iona precedent, the Lemon emphasis upon secular purpose became the dominant theme upon which this case hinged.³⁵¹ Although the question was raised concerning "excessive entanglement," the New York State Supreme Court laid its emphasis upon the primary purpose of higher education as a delivery system for secular education.³⁵² With that emphasis, any allusion to "entanglement" was lost in the positive provisions of its secular mission.³⁵³

College of New Rochelle v. Nyquist³⁵⁴

In the third New York case, the question of sectarian control became the central issue. Although the eligibility of the College of New Rochelle was denied by the Commissioner on the identical basis of the first two denials, the Supreme Court Justices could not establish that the educational process was necessarily exclusively Catholic in doctrine.³⁵⁵ Nor were the Ursuline Nuns necessarily "robots" acting under the control of any religious denomination.³⁵⁶

³⁵¹Cansius College of Buffalo v. Nyquist, 36 App. Div. 2d 340, 342, 320 N.Y.S. 2d 652, 654 (1971).

³⁵²Ibid.

³⁵³Ibid.

³⁵⁴College of New Rochelle v. Nyquist, 326 N.Y.S. 2d 765, 771 (1971).

³⁵⁵Ibid.

³⁵⁶Ibid.

"Entanglement" was seen in this case as less a threat than it had been in Lemon and Dicenso.³⁵⁷ The State Supreme Court permitted the College of New Rochelle to receive the aid:

. . . 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.³⁵⁸

State ex rel. Warren v. Reuter³⁵⁹

As was recounted in a previous chapter many states have circumvented provisions of state constitutions by utilization of contracts for services. The practice was challenged in the Wisconsin State Supreme Court in 1969,³⁶⁰ and again in 1972.³⁶¹ In question was a contractual provision whereby state assistance could be provided to the Marquette School of Medicine during and following transition from existence as a medical arm of church-related Marquette

³⁵⁷ College of New Rochelle v. Nyquist, 326 N.Y.S. 2d 765, 771 (1971).

³⁵⁸ Ibid. at 471, N.Y.S. 2d at 775; Lemon v. Kurtzman 403 U.S. 603 (1971).

³⁵⁹ State ex rel. Warren v. Reuter, 170 N.W. 2d 790 (1969).

³⁶⁰ Ibid.

³⁶¹ Warren v. Nusbaum, 198 N.W. 2d 650 (1972).

University to independent status.³⁶² A modification was made in the composition of the Board of Directors (trustees). In keeping with constitutional necessity, the recipient institution was severed from the university.³⁶³ The need for doctors and nurses was critical in the state and the legislature moved to provide financial support through contracts for service. A list of five constitutionally questionable practices was cited in Warren v. Reuter,³⁶⁴ all of which centered upon tax money accruing to the church-related university.³⁶⁵ The State Supreme Court, however, ruled that the primary effect was secular despite some advantage enjoyed by Marquette; the people of the state would benefit more. ". . . The primary effect of the legislation is not the advancement of religion, but the advancement of the health of Wisconsin residents."³⁶⁶

Warren v. Nusbaum³⁶⁷

The Reuter case was closely followed by Warren v. Nusbaum, a case where the issue concerned a dental school at Marquette.³⁶⁸ The dental school received aid through a

³⁶²State ex rel. Warren v. Reuter, 1170 N.W. 2d 790 (1969).

³⁶³Ibid. ³⁶⁴Ibid. ³⁶⁵Ibid., at 802.

³⁶⁶Ibid.

³⁶⁷Warren v. Nusbaum, 198 N.W. 2d 650 (1972).

³⁶⁸Ibid.

system of contractual agreements. Wisconsin Higher Education Aids Board paid a specific stipend for each student enrolled. The constitutional question occurred over the inability of the plan to limit application of the funds to the dental school. The funds could be applied to the general operational budget of the university. The specific provision of the state constitution appeared to be in violation:

. . . 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.³⁷¹

The Wisconsin Supreme Court ruled that the plan did stand as to "purpose" as it could find no "Catholic way to pull a tooth."³⁷² Entanglement was not found to be a problem, but free exercise was affected, and the money was not limited to the dental school.³⁷³ The plan was struck down.³⁷⁴

Clayton v. Kerrick³⁷⁵

A New Jersey statute created a state authority which was authorized to sell bonds in a manner similar to the Hunt

³⁷¹Wisconsin, Constitution, Art. I, Sec. 18.

³⁷²State ex rel. Warren v. Nusbaum, 55 Wisc. 2d 316, 320; 198 N.W. 2d 650, 654 (1972).

³⁷³Ibid., at 322; 198 N. W. 2d at 656.

³⁷⁴Ibid.

³⁷⁵Clayton v. Kerrick, 59 N.J. 583, 589, 285 A2d 11, 17 (1971).

plan.³⁷⁶ The New Jersey State Supreme Court upheld the plan initially, following Tilton. An appeal to the United States Supreme Court resulted in the plan being returned for reconsideration.³⁷⁷

The result was similar to that in Hunt. There were no grants involved as had been true of Tilton, and the revolving feature of the loans eliminated the use of state tax money.³⁷⁸

The ruling allowed both public and private church-related colleges to participate. However, as in Tilton, none of the facilities could ever be used for religious purposes.³⁷⁹

Neither religious purpose nor excessive entanglement was proven and the plan was held constitutional.³⁸⁰

Americans United v. Rogers³⁸¹

The issue of the Missouri case revolved about the constitutionality of a grant program which allowed church-related colleges to benefit indirectly from student aid.³⁸² The state grant program provided for tuition grants to be

³⁷⁶ N. J. Statutes Annotated Sec. 18A: 72A-1 (1968).

³⁷⁷ Clayton v. Kerrick, 59 N.J. 583, 589, 285.A 2d 11, 17 (1971).

³⁷⁸ Ibid. ³⁷⁹ Ibid. ³⁸⁰ Ibid.

³⁸¹ Americans United v. Rogers, 538 S.W. 2d 711 (1977).

³⁸² Ibid.

supplied to students who attend both public and private colleges and utilized a scheme of payments directly to the students, who endorsed the check over to the institution in payment of their tuition.³⁸³

Concern was expressed that the plan had a primary effect of advancement of religion and would cause excessive entanglement of religion.³⁸⁴

Circuit Judge Robert G. J. Hoester declared the Missouri financial assistance program unconstitutional.³⁸⁵ The state Coordinating Board for Higher Education and a number of independent colleges and universities appealed the decision to the Missouri State Supreme Court.³⁸⁶

The Lemon tests were applied to the scheme:

In order for grant of state aid to be upheld against First Amendment separation of church and state challenge, the state aid must have a secular legislative purpose, it must have a primary effect other than the advancement of religion, and it must have no tendency to entangle the state excessively in church affairs.³⁸⁷

The majority of the court did not find the statutes violative of the First Amendment and reversed Judge Hoester's decision.³⁸⁸

³⁸³ Missouri Rev. Statutes, Secs. 173.200 to 173.235.

³⁸⁴ Americans United v. Rogers, 538 S.W. 2d 711.

³⁸⁵ Ibid. ³⁸⁶ Ibid.

³⁸⁷ Ibid.; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Hunt v. McNair, 413 U.S. 734, 743 (1973).

³⁸⁸ Americans United v. Rogers, at 722.

The Chief Justice, Seiler, filed a dissenting opinion which questioned the majority's findings that there was no violation of Article IX, Sec. 8 of the state constitution, "on the basis that the aid is to the student, not the school."³⁸⁹ Justice Seiler said further:

I do not see how the granting of \$900 of public funds to a student can be treated a grant to the people of the state so as to avoid being a grant to a private person and also at the same be treated as a direct grant to the student so as to avoid being an appropriation in aid of any religious creed, church, or sectarian purpose of a private college.³⁹⁰

The Chief Justice noted that in Roemer there had been a "meticulous" effort to see to it that "state funds would not be used for sectarian purposes."³⁹¹ According to testimony by the colleges, of the fifteen colleges in question "eight of which have . . . a close relationship with various Protestant denominations and seven with the Catholic Church."³⁹²

Chief Justice Seiler's final concern was the "effect" of the grant program:³⁹³

[I]t is not even arguable that giving a grant to a student is not a form of public aid to the college. Beyond question, the student is going to use the grant to help pay his college expenses, including tuition. . . . Tuition is the lifeblood of a private college and anything that helps the student pay tuition helps the

³⁸⁹Americans United v. Rogers, at 723.

³⁹⁰Ibid., at 724. ³⁹¹Ibid. ³⁹²Ibid.

³⁹³Ibid., at 725-726.

college to that extent. . . . In the case before us, the student is merely the conduit of the grant through whom the state aid is transmitted to the school. . . . [Emphasis the writer's] As we have often held . . . our constitution prohibits aid, either directly or indirectly. . . . [Emphasis, added] There is no such provision in the First Amendment.³⁹⁴

Another dissenter, Justice Donnelly, added his voice of concern to the "indirect" argument by describing the plan as "a classic example of indirect aid to denominations of religion."³⁹⁵

The Missouri Supreme Court, however, reversed the decision of the lower court on the basis that the plan did not violate the state or federal constitutions. The court held also, in its effect, the plan served a public purpose, did not establish religion, and there was no basis for finding excessive entanglement.³⁹⁶

The majority opinion written by Judge Morgan ended with a comment on church-state separation. He said:

[W]e should comment on the subtle suggestion that approval here will open the gates to further efforts to breach the constitutional "wall" between the state and the church. Although finding the "wall" is perplexing, it is not for the courts to shy so far from the same as to do disservice to those whose interests fall on one side or the other.³⁹⁷

³⁹⁴ Americans United v. Rogers, at 726.

³⁹⁵ Ibid., at 727. ³⁹⁶ Ibid., at 713-723.

³⁹⁷ Ibid., at 722.

California Educational Facilities Authority v. Priest³⁹⁸

In California v. Priest, the state treasurer, Ivey Baker Priest, refused on the question of constitutionality to issue bonds for the California Educational Facilities Authority.³⁹⁹ The Authority took the issue to the California State Supreme Court, on the grounds that the established the "Authority" as "a public instrumentality" performing "an essential public function."⁴⁰⁰

The bonds were for the purpose of:

. . . [p]roviding private institutions of higher education within the state with an additional means by which to expand, enlarge, and establish dormitory, academic and related facilities, to finance such facilities, and to refinance existing facilities. (Sec. 30301) [Education Code]⁴⁰¹

The state treasurer argued that the institutions involved which were "affiliated with, or governed by, a religious organization impermissibly advances religion."⁴⁰²

The State Supreme Court held with the statute and concluded: "The Act here challenged is constitutional."⁴⁰³ The treasurer was ordered to issue the bonds as a "ministerial act."⁴⁰⁴

At this writing, the federal and state court decisions have approved plans which include direct payments of

³⁹⁸ California v. Priest, 12 Cal. 3d 593, 526 P. 2d 513, 116 Cal. Rptr. 361 (1974).

³⁹⁹ Ibid., at 362. ⁴⁰⁰ Ibid. ⁴⁰¹ Ibid., at 363.

⁴⁰² Ibid., at 362-3. ⁴⁰³ Ibid., at 370. ⁴⁰⁴ Ibid.

aid to students at colleges, indirect aid, bond issue plans, contracts for services, for educational services, and student loan plans. The two preceding chapters have provided an outline of how these plans relate to the constitutional provisions within the respective states, and how the plans have been interpreted by three levels of court opinion.

CHAPTER VI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

The stream of history does not flow gently as the isolation of the historian's ivory tower might sometimes suggest. The tracing of religious and educational institutions is also the presentation of events in the lives of men. It is from these lives that the achievements and ideas emerged, possibly synthesized from great conflicts between institutions, but certainly emergent from the fertile loam of the interchange of minds. Out of conflict and interchange of ideas, the democratic experiment has emerged. Like a frail canoe shooting the rapids in the river of history, it has charted the course for those who would follow. The Constitution is not a map but has been provided from the mistakes of the past, a collection of those experiences in an attempt to prevent their needless repetition.

One of those concerns is the dual concept, religious establishment, and religious freedom. The Founding Fathers went to great lengths to insure this duality in the First Amendment to the Constitution. Perpetuation of the Establishment Clause in its highest purpose has inspired this research. The first chapter has provided an account of events which may serve as a primer on the question of church and state throughout history from the beginning to the

present day. It has been purposefully selective. Comprehensive coverage is not within the scope of this work. In the later chapters the account is narrowed to the controversy over church and state in American education. The research is finally applied even more narrowly to the controversy over state support of church-related colleges in the fifty states. State aid and programs which the states have instituted to attempt to circumvent the states' own constitutions, in many cases consist of such devices as grants, scholarships, loans, contracts for student spaces, for training in medical-related fields, devices for providing for facilities loans and bond programs, and other uncategorized programs of assistance.

In addition to the states, the federal government has led the way in providing a program that now involves \$15 billion in financial aid of all kinds. Educational aid is a major budget item which presently requires a great deal of attention of lawmakers on all levels of government. It is the concern of a great many people that such funds are rapidly causing higher education to lose its traditional autonomy.

The church-state controversy has played a large part in all this new growth. Fears have been advanced that church-related institutions benefiting from such aid are willingly accepting tax money in order to advance the cause of their particular sect. In all these states have in the majority of cases constitutions which forbid the utilization of tax

monies for the furtherance of sects, individuals, or educational institutions sponsored and controlled by sects.

When the state goes against its own constitution, it becomes open to challenge from taxpayers who have been ready to enter suit.

Within the realm of higher education, the courts have been reluctant to declare state plans unconstitutional. The few suits that have been brought to the Supreme Court with higher education programs as the issue have seemed to further the cause of those who seek possible ways to use tax money to lend stability to their own institutional lives. The same has held true with most federal district courts and most state supreme courts.

In the seventies, the Lemon and Tilton cases provided the landmarks where federal and state programs took their comfort. Hunt provided a possible means for church-related colleges to finance construction without risk to their own credit. Direct subsidy has long been the dream of the aid advocate, who has visions of a never-ending stream of federal and state money, with few strings attached, flowing into the coffers of the institutions, allowing for new and unusual programs, better faculty, and an end to fears of institutional demise.

Since Tilton there have been other cases that involve attempts to provide aid to church colleges. What generally has occurred is a compromise by the colleges in question,

toward their original and historic mission. Some of these have come about by the natural, and gradual shift toward secularization. However, in other cases there are changes that appear suspiciously like opportunism. Some have modified their programs in order to appear less sectarian, and have begun to place greater emphasis upon their secular instrumentality.

However, much of this has been duly noted by the courts and individual lawsuits have been moving through the courts, testing these programs all the way to the United States Supreme Court. The controversy does not end with the justices, for even there opinion is sharply divided. In almost every case, the majority opinion has proceeded to provide controversial reasons for its position. The dissenting justices constantly reiterate the warning that grave dangers lie ahead for the future of the church college and possibly for church-state relations.

Conclusions

1. The historical record reveals that during the period from 325 to 1517, attempts to keep church and state merged resulted in difficulties and bloodshed throughout Western Europe.

2. The founders of the United States Constitution, aware of the lessons of history, sought to prevent church and state from being united as provided for in the First Amendment of the Constitution.

3. All fifty states originally provided for some measure of exclusion from state support of religion.

4. Forty-two states have provided for direct or indirect financial aid to private church-related colleges which circumvent the constitutional prohibitions.

5. The study answered the question: What issues divide educators with respect to the public support of church-related colleges and universities? It was concluded that educators are divided over:

(a) whether increased aid affects institutional autonomy, so that excessive entanglement of government in religion is the result;

(b) whether colleges have the technology and disposition to refrain from use of tax-derived money for sectarian purposes at church-related institutions;

(c) whether there is an actual threat to educational diversity because of a financial crisis in higher education or whether there is a threat of institutional demise?

(d) whether direct or indirect state and federal aid to church-related colleges is constitutional; and

(e) whether state aid to students constitutes constitutionally permissive aid to the institution.

6. Who are the participants? The participants in the controversy are:

(a) state and federal governmental agencies;

(b) private church-related colleges and groups to which they belong;

(c) concerned constitutionalist groups such as Americans United for Separation of Church and State, the American Jewish Congress, and the American Civil Liberties Union; and

(d) concerned individual taxpayers who have instituted court action.

7. The respective positions are best revealed in the issues raised through litigation which has emerged from the controversy.

8. State aid legislation within the states has been encouraged and facilitated through a number of significant Supreme Court decisions.

9. The United States Supreme Court drew from a number of lower court education decisions in order to devise a set of criteria for determining the constitutionality of higher education aid plans. The criteria were called the "Tripartite Test," which was used in Lemon v. Kurtzman and Tilton v. Richardson. The criteria require that in order for a law to be ruled constitutional it must:

(a) reflect a secular legislative purpose;

(b) neither advance nor retard religion; and

(c) not create an excessive entanglement with religion.

10. In Tilton v. Richardson, the United States Supreme Court decided that aid to religious higher education contains

an essential difference from the question of aid to parochial education. The Court concluded that since religious indoctrination is not the primary purpose of church colleges, state aid to such institutions must be viewed in a less restrictive sense. State aid to building construction on church college campuses must not assist the building of structures to be used for sectarian purposes.

11. In Hunt v. McNair, the United States Supreme Court concluded that indirect aid in the form of bonds may be rendered to a church-related college by a state if the resulting building is not used for sectarian purposes.

12. In Roemer v. Maryland, the Supreme Court concluded that a state may provide aid to a church-related college, so long as the institution meets the Tripartite Test of Lemon, and if the funds are identifiably not applied to sectarian use.

13. In Smith v. Board of Governors, the United States Supreme Court decided that students who attend sectarian colleges, which provide primarily secular education, may constitutionally be allowed to be beneficiaries of state tuition aid.

14. The trend of state and federal court decisions suggests that an increase in the number and magnitude of state aid programs is probable in the near future.

15. A growing number of church-related colleges have modified their high religious profile in order to qualify

for state and federal money. Some have abandoned their religious ties altogether and continue as a quasi-public institution.

Recommendations

1. It is this researcher's recommendation that further research be made into the distinction that has been made, since the Tilton case, concerning a difference in susceptibility of secondary and primary students to religious pressures, as distinct from that of more sophisticated college students. It is recommended that further investigation be made into the position of the Supreme Court that there is a difference between pre-college and college-age students' susceptibility to religious influence.

2. Another question lingers regarding the criteria for judging whether a college is "pervasively sectarian." It might be helpful to college administrators, judges, and those contemplating suits to be able to compile precisely the measurement utilized by the courts to determine this very ambiguous term concerning church-state relationships on the college campus.

3. As was expressed by the Carnegie Commission, once money begins to flow from government, there is likely to follow a loss in institutional autonomy and subsequently academic freedom. The question persists, has this been the case? With the increased requirements of accountability and reporting, has the presence of government auditing and the

requirement for increased reporting become a problem to the church-related institution? Have changes on the church-related campus become so thorough-going that such colleges are becoming indistinguishable from secular institutions? If so, where will higher education look for its historic plurality and diversity?

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