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Public Control of Private Sectarian Institutions Receiving Public Funds

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COMMENTS

Public Control of Private Sectarian Institutions Receiving Public Funds

The reluctance of certain important religious denominations to accept federal aid was once, along with the establishment clause of the United States Constitution,¹ a serious restraint on the granting of such aid to private sectarian educational and welfare institutions.² It was feared that grants of federal aid would inevitably lead to federal controls interfering with, or prohibiting altogether, religious observances and functions in private institutions.³ Recently, however, fear of control has been largely outweighed by economic difficulty, especially in the area of primary and secondary education,⁴ leading the Roman Catholic Church and certain Orthodox Jewish groups actively to campaign for inclusion in any plan for federal aid to public schools.⁵

Federal aid to private sectarian institutions is not novel in the American political tradition. Congress has responded to pressure from those private institutions favoring increased federal aid with many programs that benefit both public and private educational and welfare institutions.⁶ Under the Hospital Survey and Construction Act of 1946,⁷ private denominational hospitals receive

1. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I. For a thorough treatment of the establishment clause as an obstacle to federal aid, see generally DRINAN, RELIGION, THE COURTS AND PUBLIC POLICY 165-88 (1963); KURLAND, RELIGION AND THE LAW 80-96 (1962); LANOUE, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 5-44 (1963); PFEFFER, CHURCH, STATE AND FREEDOM 424-94 (1953); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1 (1961); North, *An Exposition and Analysis of Policy Arguments Against Federal Aid to Parochial Schools*, 9 CATHOLIC LAW. 43 (1963); Subcomm. on Education, Senate Comm. on Labor and Public Welfare, *Constitutionality of Federal Aid to Education in its Various Aspects*, S. Doc. No. 29, 87th Cong., 1st Sess. (1961).

2. See PFEFFER, *op. cit. supra* note 1, at 483-84.

3. As late as 1957, Cardinal Cushing warned fellow Catholics of the possibility of public control, stating: "We are not looking for any federal or government aid to build our schools. I would absolutely refuse the offer, for I cannot see how any government or state would build schools without expecting to control them in whole or in part." *Hartford Times*, May 30, 1957.

4. For a summary of the present financial crisis in Catholic primary and secondary schools, see generally *Hearings on Federal Aid to Schools Before a Subcommittee of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 335-61 (1961) (hereinafter cited as *Hearings on Federal Aid*).

5. See, e.g., *id.* at 335, 974; PFEFFER, *op. cit. supra* note 1, at 440-41. Indeed, it has been argued that to exclude parochial schools from any program of federal aid to public schools would be unlawful discrimination. See DRINAN, *op. cit. supra* note 1, at 172.

6. A complete list of federal programs under which institutions with religious affiliation receive grants or loans of federal funds may be found in *Hearings on Federal Aid* 949-54.

7. 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291(d) (1958). A total of 1,608 church-affiliated hospitals had received \$329,780,325 in federal aid by December 1961. DRINAN, *op. cit. supra* note 1, at 37.

substantial federal grants for the construction of new facilities. The National School Lunch Act,⁸ also enacted in 1946, makes inexpensive lunches available to both public and private school children. The federal government is authorized to reimburse private and parochial schools for the education of congressional and Supreme Court pages.⁹ The tuition of Korean War veterans, attending either public or private schools and colleges, is subsidized by the federal government.¹⁰ Under the National Defense Education Act of 1958,¹¹ private schools may obtain loans for the purchase of mathematics, science, or foreign language teaching aids, and eligible students in all colleges may borrow substantial sums from federal scholarship funds. Since 1950, private institutions of higher education have been able to obtain federal loans for the construction of new facilities,¹² and the recent Higher Education Facilities Act of 1963¹³ makes outright grants available to them for construction purposes. The importance of these laws is two-fold. First, the fears that federal control would inevitably follow grants of federal aid have been greatly assuaged by the fact that only a minimal amount of control has been imposed under present programs, usually amounting merely to a duty to account for the use of funds.¹⁴ Second, the passage of acts which benefit private church-affiliated institutions has demonstrated further that the "wall between church and state"¹⁵ is not absolute,¹⁶ adding emphasis and encouragement to the efforts of those lobbying for further federal grants.¹⁷ Yet these same enactments could provide a basis for future judicial and legislative curtailment of religious discrimination, a privilege which private church-affiliated institutions now enjoy. This comment will examine the recent judicial and legislative developments which could result in federal controls limiting religious practices in private sectarian educational and welfare institutions.

I. JUDICIAL CONTROL

The judicial threat to religious discrimination in private church-affiliated institutions accepting public funds stems from an expansion of the concept of "state action" under the fifth and fourteenth

8. 60 Stat. 233 (1946), as amended, 42 U.S.C. § 1759 (1958).

9. See 60 Stat. 839 (1946), 2 U.S.C. § 88a (1958).

10. See 72 Stat. 1177 (1958), 38 U.S.C. § 1620 (1958).

11. 72 Stat. 1581-90 (1958), 20 U.S.C. §§ 401-45 (1958).

12. See 64 Stat. 78 (1950), 12 U.S.C. § 1749a (1958).

13. See 77 Stat. 366 (1963), 20 U.S.C.A. § 714 (Supp. 1964).

14. See generally North, *supra* note 1, at 53-56.

15. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

16. See Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55 (1963); and Kauper, *supra* note 1, propounding interpretations of the establishment clause which would allow additional federal aid to sectarian institutions.

17. See, e.g., *Hearings on Federal Aid* 415.

amendments. Mr. Justice Harlan, dissenting in the *Civil Rights Cases*,¹⁸ first asserted the theory that, while any private organization performing a beneficial public service might be encouraged by public money, the resulting publicly supported operation would be considered "state action" under the fifth and fourteenth amendments.¹⁹ This enlargement of the "state-action" concept to include private institutions receiving public funds was accepted by the Court of Appeals for the Fourth Circuit in *Kerr v. Enoch Pratt Free Library*,²⁰ a case involving a library established in 1822 by private donation. By 1944, however, the city of Baltimore supplied ninety-nine per cent of the library's budget, held title to library property, and exercised a considerable degree of control over library expenditures. The court, stressing the volume of financial assistance provided by the municipal government and its control over the library's activities, held that the library's exclusion of a Negro from a library training course was "state action" of a discriminatory nature prohibited by the fourteenth amendment.²¹ Subsequently, in *Norris v. Mayor & City Council*,²² a Negro challenged his exclusion from an art course at the Maryland Institute of Art, which had been organized as a private corporation but had accepted modest appropriations from the city and the state, had leased a building from the city, and had become subject to minimal control by both the city and state governments.²³ The district court dismissed the complaint on the ground that the receipt of public funds must be accompanied by a greater degree of state control before "state action" was present. The court made it quite clear, however, that financial aid plus an unusual degree of state control might properly lead to the characterization of a "private" business or agency as a state operation.²⁴ The question remaining unanswered by the *Norris* and *Kerr* cases is exactly how much control is required to satisfy the "state action" concept.

The United States Supreme Court, in *Burton v. Wilmington Parking Authority*,²⁵ indicated that the required degree of control by a state is slight,²⁶ but stated, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in pri-

18. 109 U.S. 3 (1883).

19. *Id.* at 58-59.

20. 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

21. *Id.* at 219.

22. 78 F. Supp. 451 (D. Md. 1948).

23. The city had the right to examine the course of instruction annually, each councilman of the city and each state senator had the right to appoint one student annually to the school, and an annual report from the Institute to the governor was required.*

24. See *Norris v. Mayor & City Council*, 78 F. Supp. 451, 458-59 (D. Md. 1948).

25. 365 U.S. 715 (1961).

26. *Id.* at 723.

vate conduct be attributed its true significance. . . ."²⁷ In *Burton*, the Parking Authority had constructed a public parking facility in which space was rented to a private restaurant, which subsequently refused service to Negroes. The Supreme Court held that the Parking Authority, in its capacity as landlord, was exercising the requisite degree of financial assistance and control to include the operation of the restaurant within the scope of "state action."

The "state action" concept received further expansive judicial interpretation in the recent case of *Simkins v. Moses H. Cone Memorial Hosp.*²⁸ This was an action brought by Negro physicians, dentists, and patients, on behalf of themselves and other Negro citizens, for declaratory relief against two private hospitals in North Carolina receiving federal aid under the Hospital Construction Act.²⁹ The Court of Appeals for the Fourth Circuit held that private hospitals that participated in such a joint federal-state program were sufficiently involved with "state action" to be within the fifth and fourteenth amendment prohibitions against discrimination.

Although the court admitted that receipt of public funds alone would not make the subsequent operation of the hospitals "state action,"³⁰ the degree of governmental control imposed upon the recipient hospitals was so slight as to indicate that this additional requirement had been almost completely eliminated. Federal involvement in the operation of these hospitals was minimal; the Hospital Construction Act itself provides that, with several minor exceptions, nothing in the act should be construed as giving federal officers or employees any right of supervision or control over recipient hospitals.³¹ The Surgeon General of the United States is given the power to approve or disapprove individual state plans for the construction of new facilities and specific applications for grants.³² In the event of a sale of the hospital to an unqualified owner within twenty years after the completion of a hospital project, a proportionate share of the grant reverts to the federal government.³³ In addition, the state plan must provide facilities without discrimination on the basis of race, creed, or color, although the plan may provide for separate

27. *Id.* at 722.

28. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

29. The court examined that portion of the Hospital Construction Act tolerating "separate-but-equal" facilities, and held such portion unconstitutional under the due process clause of the fifth amendment and the equal protection clause of the fourteenth amendment. See 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291e(f) (1958).

30. The United States, as intervenor, conceded that receipt of a governmental subsidy alone would not convert operation of the hospitals into "state action." *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d at 971.

31. 60 Stat. 1041 (1946), 42 U.S.C. § 291m (1958).

32. See 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291f(b) (1958); 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291h(f) (1958).

33. 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291h(e) (1958).

but equal facilities.³⁴ Once a grant has been made, however, no other continuing right of control or supervision exists under the statute.³⁵ Similarly, the degree of involvement of the State of North Carolina was extremely slight. A statute, passed in 1945 pursuant to the requirements of the Hospital Construction Act,³⁶ authorizes the North Carolina Medical Care Commission to survey and determine the need for hospital facilities and the amount of state aid required by public and nonprofit private hospitals in financing their construction projects.³⁷ The statute also authorizes the Commission to receive such funds as might be appropriated for this purpose by the federal government or the State of North Carolina. In the opinion of the Attorney General of North Carolina, the Commission has no regulatory or supervisory powers over the operations of private nonprofit hospitals by virtue of this statute.³⁸ In short, the degree of control required by the *Simkins* court to constitute "state action" by the federal government under the fifth amendment, and by North Carolina under the fourteenth amendment, is so slight as practically to subject all private institutions receiving federal or state aid to prohibitions against discrimination, since it would be unprecedented for federal and state governments not to retain that minimal degree of control necessary to assure that public funds are properly spent.

The court's alternate theory of "state action" may prove as important as the demise of the state control requirement in its ultimate impact on religious institutions that receive direct grants of federal aid through participation in a joint state-federal plan. The court found that the State of North Carolina, by electing to participate in the Hospital Construction Act, had assumed as a state function the obligation of planning for adequate hospital care. Citing the Supreme Court's decisions in the *White Primary Cases*,³⁹ the court stated that "when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the . . . [institution actually chosen] would otherwise be private; the equal protection guarantee applies."⁴⁰ Under this public func-

34. 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291e(f) (1958). The *Simkins* court had no difficulty in finding the provision of "separate-but-equal" facilities unconstitutional. See note 29 *supra*.

35. There are in addition, however, certain administrative controls, prescribed by the Surgeon General pursuant to the Hospital Construction Act, 60 Stat. 1041 (1946), 42 U.S.C. § 291k (1958), providing in detail for the management of hospitals under such general headings as administration, clinical services, auxiliary services, nursing service, and food service.

36. See 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291b (1958).

37. See N.C. GEN. STAT. §§ 131-126.1-.30 (1964).

38. See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d at 972-73.

39. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). *Accord*, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962).

40. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d at 968.

tion theory of "state action," the degree of control exercised by the state government is irrelevant.⁴¹ Further, the public function theory of "state action" would seem equally as applicable to the federal government under the fifth amendment as to the states under the fourteenth amendment.⁴² This would assume significance if the federal government were to give funds directly to private institutions without the use of states as disbursement agencies, as would probably be required under any massive program providing funds to parochial schools since a majority of states prohibit their officials from giving aid to sectarian institutions.⁴³ Presumably, as in the case of states under the fourteenth amendment, it would make no difference that the agency chosen directly to perform a federal function would otherwise be private.

The relevance of the public function theory of "state action" to church-related institutions is amplified by one of the major arguments advanced by those supporting increased federal aid to parochial schools in order to avoid the prohibitions of the "establishment clause." Their argument emphasizes that the public services provided by private church-related institutions, such as hospitals and schools, entitle them to public support, since the state would otherwise have to provide the same services at its own expense.⁴⁴ According to this interpretation of the "establishment clause," government is not required to act as though religion and its private institutions do not exist, but may recognize that they serve a useful public function which may be encouraged by the state, even through direct financial aid.⁴⁵ Indeed, the Hospital Construction Act is often cited as an example of state and federal aid to private church-related institutions that perform a public function.⁴⁶ If church-related institutions are to be given public funds because they perform a public function, it is difficult to see why their public function should be ignored by the courts in determining whether the requirement of

41. For a more thorough treatment of the expansion of "state action" to include private institutions in which the author predicts the demise of the requirement of substantial governmental control, see Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1102-08 (1960).

42. "But the concepts of equal protection [under the fourteenth amendment] and due process [under the fifth amendment], both stemming from our American ideal of fairness, are not mutually exclusive. . . . In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. . . ." *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

43. For a summary of state laws prohibiting officials from distributing aid to private sectarian institutions, see *Hearings on H.R. 6774, H.R. 4253, H.R. 7378 Before a Subcommittee of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 240-54 (1961).

44. See Drinan, *supra* note 16, at 55; Kauper, *supra* note 1.

45. See Kauper, *supra* note 1, at 13.

46. See, e.g., *Hearings on Federal Aid* 340.

"state action" has been met under the fifth or fourteenth amendment.

The importance of fifth and fourteenth amendment prohibitions against discrimination, racial or religious, to church-affiliated institutions receiving federal funds would, of course, vary with the amount of religious discrimination which church groups deemed necessary to uphold their respective religious beliefs. In the case of church-related hospitals receiving aid under the Hospital Construction Act—the most direct application of the concept of "state action" as developed in *Simkins*—examples of religious discrimination are rare. Denominational hospitals that receive public funds usually admit both patients and staff without regard to religious belief.⁴⁷ However, an example of discrimination on religious grounds was provided by St. Francis Hospital, a Roman Catholic institution in New York, which in 1952 required seven visiting physicians to sever their connections with the Planned Parenthood League or be barred from entry.⁴⁸ The hospital's action was defended on the ground that "the courts have always upheld the rights of private institutions to choose their own staffs. . . ."⁴⁹ The *Simkins* case makes it clear, however, that such religious discrimination would no longer be private action, outside the reach of the fifth and fourteenth amendments, but rather would be prohibited "state action." Similarly, a patient whose religious beliefs would permit a therapeutic abortion would be barred from such treatment at many Catholic hospitals solely on religious grounds.⁵⁰ Even the presence of religious symbols in hospital rooms might be considered as having a discriminatory effect on admissions. When the presence of such symbols in hospitals receiving federal-state aid was challenged as a violation of the "establishment clause," a court dismissed the argument as *de minimis non curat lex*.⁵¹ Nevertheless, for purposes of the fifth and fourteenth amendments, it could be argued that the presence of Christian religious symbols, for example, would not be *de minimis* to an Orthodox Jew seeking admission, since merely remaining in a room so adorned would be sinful to him.

The National Defense Education Act, which contains provisions for aid to both secondary and higher levels of private nonprofit education, may prove the vehicle by which the *Simkins* analysis of "state action" is made applicable to the field of education, where exclusion of students and faculty on religious grounds is often considered desirable in order to instill youth with the principles of

47. See BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 159 (2d ed. 1958).

48. See N.Y. Times, Feb. 1, 1952, p. 1, col. 6.

49. See America, Feb. 16, 1952, p. 5.

50. DRINAN, *op. cit. supra* note 1, at 178.

51. *Craig v. Mercy Hosp.*, 209 Miss. 427, 45 So. 2d 809 (1950).

a particular faith.⁵² This act provides substantial loan funds for the purchase of science, mathematics, and foreign language teaching aids by private nonprofit secondary schools.⁵³ With the receipt of public funds, these private schools are subject to at least the degree of governmental control held sufficient in *Simkins* to constitute "state action." Comparable to the Hospital Construction Act, the NDEA requires each participating state to submit a detailed plan to the Commissioner of Education for appropriations to public schools,⁵⁴ and the Commissioner has the power to disapprove state plans as well as specific applications by private institutions for loans.⁵⁵ Even if the required degree of state involvement under the fourteenth amendment is found to be absent, direct loans from the Commissioner to private institutions may be subject to enough supervision and control to satisfy the requirement of federal involvement under the fifth amendment. Private, nonprofit schools seeking loans from the Commissioner for equipment must submit applications containing such information as the Commissioner deems necessary, and all loans are subject to those certain conditions required to protect the financial interest of the United States.⁵⁶ Loans to students made through private institutions of higher learning are subject to conditions prescribed by the Commissioner, and the recipient institution itself must abide by eight rather inconsequential conditions.⁵⁷ Although the NDEA does contain an express repudiation of congressional intent to control the operations, curriculum, or personnel of recipient schools, it must be remembered that a similar provision in the Hospital Construction Act did not prevent the *Simkins* court from finding the requisite degree of federal involvement.⁵⁸

The difficulty in applying the *Simkins* analysis of "state action" to private educational institutions receiving aid under the NDEA is that loans to schools for the purchase of equipment and to students do not demonstrate the same degree of financial involvement

52. Information on the extent of discrimination in parochial schools, on religious grounds or otherwise, is scant. However, a recent doctoral dissertation on admissions policies of Catholic high schools in Chicago found evidence of religious, racial, ethnic, economic, and family discrimination. See Pitruzello, *Admissions Policies of Selected Catholic Secondary Schools and the Characteristics of the Students and Parents* (unpublished Ph.D. dissertation, University of Chicago, 1962).

53. 72 Stat. 1590 (1958), 20 U.S.C. § 445 (1958).

54. Compare 72 Stat. 1589 (1958), 20 U.S.C. § 443(a) (1958), with 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291f (1958).

55. Compare 72 Stat. 1589 (1958), 20 U.S.C. 443(b) (1958), with 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291f(b) (1958) and 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291h(f) (1958).

56. 72 Stat. 1590 (1958), 20 U.S.C. § 445 (1958).

57. 72 Stat. 1584 (1958), as amended, 20 U.S.C. § 425 (Supp. IV, 1963).

58. Compare 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291m (1958), with 72 Stat. 1582 (1958), 20 U.S.C. § 402 (1958).

as exists under the Hospital Construction Act, which provides outright grants for the construction of new facilities. Recent attempts, however, to expand aid to private sectarian education under the NDEA would partially supply the direct financial involvement in the construction of new facilities. For example, in 1961 the House Education and Labor Committee reported out a bill which contained a provision for 375 million dollars in long-term, low interest loans to be made available to private secondary schools for the construction of classrooms.⁵⁹ Although the bill failed to pass the House, future passage of a similar bill would be analogous to construction grants provided by the Hospital Construction Act, under which "state action" was found in *Simkins*.

Moreover, even if the courts were to find a valid distinction between loans and grants, this distinction would not be helpful to private institutions of higher education that received grants of aid under the Higher Education Facilities Act of 1963.⁶⁰ This act is not only similar to the Hospital Construction Act in its provision for construction grants, but also conditions the receipt of federal funds on the presence of a state plan strikingly similar to that required under the Hospital Construction Act.⁶¹ In addition, the Commissioner of Education is given the same degree of supervision over disbursement of funds as is reserved to the Surgeon General in the Hospital Construction Act.⁶²

Assuming that the degree of federal or state involvement required to constitute "state action" under the fifth and fourteenth amendments would be found by the courts to exist under the NDEA, the Higher Education Facilities Act, or some future act, religious discrimination now practiced by private sectarian schools in admissions, employment, and structuring of the curricula would almost certainly be limited.⁶³ Catholic schools in 1961 employed a total of 62,433 lay teachers at all levels of education.⁶⁴ A competent lay teacher would certainly be entitled to practice his profession in

59. See H.R. 7904, 87th Cong., 2d Sess. (1961).

60. 77 Stat. 366 (1963), 20 U.S.C.A. § 714 (Supp. 1964).

61. Compare 77 Stat. 367 (1963), 20 U.S.C.A. § 715 (Supp. 1964), with 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291b (1958).

62. Compare 77 Stat. 369 (1963), 20 U.S.C.A. § 718 (Supp. 1964), with 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291h(a) (1958).

63. A form of discrimination more subtle than outright exclusion of students on religious grounds is the imposition of obnoxious conditions of admission. Many Protestant and Catholic parochial schools, for example, require students of different faiths to attend denominational services as a condition of admission. LANOUE, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 29-30 (1963). Even the structuring of curricula, sometimes slanted to favor one particular religion, might operate to discriminate against both students and faculty of different faiths. Some of the more extreme examples of slanted curricula in parochial education are collected in LaNoue, *Religious Schools and Secular Subjects*, 32 HARV. EDUC. REV. 255 (1962).

64. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 183 (1963).

buildings constructed by public funds, or with teaching aids provided by public funds, without regard to religious affiliation. Similarly, students should be able to gain admittance, without regard to religious affiliation, to private religious schools whose buildings and equipment are financed by public funds. In summary, the right of selectivity belongs only to the private school, which may discriminate in hiring and admissions practices upon any basis, including religious belief. Accepting government funds under any plan which would give the government some nominal degree of control, however, might turn the private character of sectarian educational operations into "state action," subject to the dictates of *Brown v. Board of Educ.*⁶⁵ prohibiting discrimination on the basis of race, color, or creed.

II. LEGISLATIVE CONTROL

Apart from the possible controls imposed by the judiciary under the fifth and fourteenth amendments upon publicly financed schools and hospitals, there is a less immediate danger of control by the executive and legislative branches of the government. The problem was summarized by Mr. Justice Jackson in *Everson v. Board of Educ.*,⁶⁶ when he stated: "[W]e cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith at all. . . . If the state may aid these religious schools, it may therefore regulate them. . . . Indeed this Court has declared that 'It is hardly a lack of due process for the government to regulate that which it subsidizes. . . .'"⁶⁷

Although Congress may have the power to impose obnoxious controls, it has shown no propensity to do so under a great many enactments giving aid to public and private education. The Hospital Construction Act, the Morrill Act,⁶⁸ the National Defense Education Act, the Higher Education Facilities Act, and the School Lunch Act have endowed private institutions, denominational and otherwise, with large amounts of federal aid unaccompanied by extensive governmental interference with the administrative or religious policies of the recipient institutions. Statutory control has usually amounted to little more than a required accounting to insure that funds are spent for the proper purposes.⁶⁹ While even this

65. 347 U.S. 483 (1954).

66. 330 U.S. 1 (1947).

67. *Id.* at 27-28 (Jackson, J., dissenting).

68. 12 Stat. 503 (1862), 7 U.S.C. § 301 (1958), and 26 Stat. 419 (1890), 7 U.S.C. § 321 (1958).

69. See notes 31-35, 54-57, and 61-62 *supra* and accompanying text. The Morrill Act authorizes grants upon the assent by the participating states to several rather minor

slight degree of control might be enough to subject private recipients to prohibitions against discrimination under the fifth and fourteenth amendments,⁷⁰ the controls themselves are neither offensive, nor novel. Most colleges and universities already account to governmental agencies for funds received under a myriad of federal grants for research. The government may demand accreditation by schools before making future loans or grants, as is required by the National Defense Education Act and the School Lunch Act,⁷¹ but most private schools would seek accreditation in any event to assure the acceptance of their graduates in colleges and universities.

In spite of the restraint exercised by the government under present programs aiding denominational institutions, conditions forbidding racial or religious discrimination have been attached to a few federal grants. Church-related groups that borrow money for housing construction from the Federal Housing and Home Finance Agency are forbidden by administrative order to discriminate by religion in admissions or to enforce sectarian rules upon residents.⁷² This policy was recently buttressed by an executive order barring racial and religious discrimination in federally owned or financed housing.⁷³ It would appear that the order will apply to colleges that receive federal funds for dormitory construction. Another example of governmental control that goes much further in curtailing religious practices in federally financed education is in an agreement between the United States and Columbia under the Alliance for Progress Program.⁷⁴ Columbia, whose educational system has long

conditions, chief of which is the requirement of an annual report on the progress of each college. 12 Stat. 504 (1862), as amended, 7 U.S.C. § 305 (1958). In addition, racial discrimination by colleges is restricted by 26 Stat. 417 (1890), 7 U.S.C. § 323 (1958). The School Lunch Act requires participating schools to keep such accounts and records as are necessary to determine if the provisions of the act are being complied with, but expressly prohibits the establishment of any administrative requirement with respect to teaching personnel, curriculum, instructions, methods of instruction, and materials of instruction in any school. See 60 Stat. 233 (1946), as amended, 42 U.S.C. § 1760 (1958).

70. See notes 30, 37-38 *supra* and accompanying text.

71. See 72 Stat. 1582 (1958), as amended, 20 U.S.C. § 403 (Supp. IV, 1963); 60 Stat. 233 (1946), as amended, 42 U.S.C. § 1759 (1958).

72. See LANOUÉ, *op. cit. supra* note 63, at 40.

73. "I hereby direct all departments and agencies in the executive branch of the Federal Government . . . to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin—

(a) in the sale, leasing, rental, or other disposition of residential property, . . . or in the use or occupancy thereof, if such property (is) . . . (i) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government. . . ." Exec. Order No. 11063, 27 Fed. Reg. 11,527 (1962).

74. The United States in 1961 granted, on a government-to-government basis, \$3,770,000 to the Colombian Government, of which approximately \$2,435,000 was for public primary school construction. These funds have helped to finance the construction of about four thousand classrooms. United States Dep't of State, Agency for International Development, United States Aid to Education in Colombia, July 24, 1964.

been supervised by the Catholic Church, has given assurances that in schools financed by United States aid there will be no discrimination in admissions on religious grounds; non-Catholic students will not be required to attend Catholic religious functions; all textbooks will be selected by public officials; and no religious qualification will be imposed on teachers.⁷⁵ Although it is doubtful that such conditions would be attached to massive federal aid to parochial schools in the United States, the due process clause would afford scant protection for institutions accepting substantial federal assistance were such conditions to be applied.⁷⁶

III. METHODS OF AVOIDING CONTROL

Once the problem of public control has been recognized, it might still be possible for private church-related institutions to receive substantial grants of federal aid without substantial federal control. First, it is not at all certain that the present Supreme Court will go as far as the court did in the *Simkins* case in finding "state action" under the fifth and fourteenth amendments.⁷⁷ Since the Supreme Court indicated in *Burton* that whether the required degree of state or federal involvement exists depends upon the facts and circumstances of each case,⁷⁸ a method of avoiding judicial control might be to diminish those factors the courts consider relevant in finding "state action." One such factor is the amount of federal assistance received by an institution.⁷⁹ The present forms of assistance to sectarian education also help diminish the degree of federal financial involvement. There is less financial involvement with loans than outright grants, as is also true with "fringe benefits" such as free milk, lunches, transportation, textbooks, and medical services. Moreover, the degree of involvement sufficient for "state action" purposes when racial discrimination is present might not satisfy a court in cases of morally less offensive religious discrimination in a separate system of institutions established solely for religious reasons and with a long history of private financing and control.⁸⁰

75. These assurances are contained in an exchange of letters between former Ambassador Fulton Freeman and former Colombian Minister of Education Dr. Jaime Pasoda, dated January 17, 1962 and March 30, 1962, respectively, and later confirmed in an exchange of letters between Mr. Henry Dearborn, Charge d'Affairs, a.i., of the American Embassy and the Colombian Minister of Education, Dr. Pedro Gomez Valderama, dated October 2, 1962 and November 5, 1962, respectively.

76. See note 67 *supra* and accompanying text.

77. The Supreme Court declined review of the *Simkins* case. 376 U.S. 938 (1964).

78. See notes 25-27 *supra* and accompanying text.

79. The *Simkins* case expressly stated that "massive use of public funds . . ." was a key factor in finding "state action." See 323 F.2d 959, 967.

80. It should be noted, however, that a long history of private financing and control did not avail the two hospitals whose racial policies were attacked in the *Simkins* case.

Second, some of the plans suggested to circumvent the "establishment clause" are also useful in avoiding the necessary degree of government involvement for "state action" purposes. The best plan for avoiding "state action" is patterned after the Korean War Orphans Assistance Act,⁸¹ which provided that the federal government appropriate a certain amount of money for each schoolchild, the parents being given a certificate to be used as tuition in schools of their choice, whether public or private.⁸² Under this plan, the individual parents would be the recipients of the financial grant, and the institution chosen by them would be entirely free of public control. The difficulty with such a plan is that several states have been using a similar scheme specifically designed to avoid the Supreme Court's holding in *Brown v. Board of Educ.* With regard to racial discrimination, the Supreme Court's recent holding in *Griffin v. County School Board*⁸³ indicates that a scheme whereby public schools are closed and tuition grants given by the state to children attending private segregated schools is "state action" in violation of the fourteenth amendment. While the general intent to continue racial segregation as a state policy may have been decisive in *Griffin*,⁸⁴ religious discrimination in private institutions financed by a similar tuition plan might not be distinguished.

Many sectarian colleges and universities practice no discrimination toward students or faculty members of different religious beliefs.⁸⁵ These institutions, by accepting federal aid, stand to lose only the unexercised right of a private institution to engage in such discriminatory practices. However, the larger sectarian institutions of higher learning, which are generally the most free of religious discrimination, are also the institutions which least need federal money to survive. As to primary and secondary education, where religious discrimination is considered a desirable means of indoctrinating children in an atmosphere free of divergent religious beliefs, the financial need is greatest. It is here that the decision whether to accept public assistance, in view of possible legislative and judicial controls, must be made.

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81. 72 Stat. 1197 (1958), 38 U.S.C. § 1731 (1958).

82. See *Hearings on Federal Aid* 362-63.

83. 377 U.S. 218 (1964).

84. See *id.* at 227.

85. *E.g.*, "Students not of the Catholic faith are excused from attending classes in religion and from chapel exercises. . . ." Georgetown Univ. Catalog 1961-62, p. 7.