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**AN EVALUATION OF THE ARGUMENTS
FOR AND AGAINST TAX EXEMPTION
FOR NON-PROFIT PRIVATE SCHOOLS IN CALIFORNIA**

**A Thesis Presented to the Faculty
of Concordia Seminary, St. Louis,
Department of Practical Theology
in partial fulfillment of the
requirements for the degree of
Bachelor of Divinity**

by

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June 1957

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CHAPTER I

INTRODUCTION

A. Statement of Purpose of Research

The seventy-five Christian Day Schools operated in the State of California by the two districts of The Lutheran Church--Missouri Synod had a unique distinction until late 1956. Out of the nearly 1,400 in the Synod in the United States, these were the only schools that had to pay taxes on their buildings, playgrounds and parking lots. Several times since the constitution of the state was drafted in 1879 attempts had been made to secure exemption from taxation for such non-profit private schools. As in other states, their sponsoring churches were tax exempt since the state was formed.

Especially since the early 1920's, the Roman Catholic Church had been endeavoring to secure tax exempt status for its elementary and secondary schools. Lutherans have been called on for their position, opinion and support (or opposition) each time the issue arose in the legislature or on the ballot. The record shows that Lutherans have been, and still are, aligned on both sides of the issue.

When the California State Legislature in 1951 passed the so-called Waters Bill to exempt the schools, a public furor arose. Missouri Synod clergy and laity were ill prepared and much divided. Numerous opinions were expressed at pastoral conferences, showing varying shades of opinion and prejudice, but little historical judgment and some instances of unsound reasoning. The ensuing five years pointed up the need for an eval-

uation of this church-state problem in the light of Lutheran theology, history and practice.

Thus the specific problem posed for this thesis is "AN EVALUATION OF THE ARGUMENTS FOR AND AGAINST TAX-EXEMPTION FOR NON-PROFIT PRIVATE SCHOOLS IN CALIFORNIA."

B. Limited Scope of the Subject

The development of the thesis will focus on the years 1951 to 1956. The first marks the passage in the California Legislature of the measure exempting from taxation non-profit private schools of less than collegiate grade. In December, 1956, a decision of the United States Federal Supreme Court declared that the California statute presented no substantial federal question. This action, in effect, quashed efforts of opponents of tax-exemption to foil the will of the majority of voters in the state.

All pertinent arguments adduced for and against exemption are treated in the following pages, some very briefly; others, which have far-reaching ramifications for the church and religious liberty, will be treated at length. Ordinarily, the following method will be utilized: the argument will be stated, then the antithesis (if there is one), and thereafter an evaluation of the argument in keeping with historic Lutheran principles.

C. A Validation of the Study

Lutheranism has been accused of "quietism" because of its traditional "hands-off policy" in matters political. However, a survey of books by Lutheran authors, especially since World War II, indicates an increasing awareness of the responsibility Lutheran leaders have toward

the commonwealth, and to provide guidance so that its constituency can act and vote intelligently.

This awakening interest in Lutheran social ethics finds one of its chief foci in the field of education. Both religion and school are interested in and deal with the mind and spirit of man. Here the tension between church and state, each in its role as teacher, becomes evident. Thus an editorial in Lutheran Education, official educational journal of The Lutheran Church--Missouri Synod, speaks of "an awakening concern with social action."¹ The writer of the article states,

Our pastors . . . have an obligation to guide members of the parish in the correct paths of citizenship. We must be interested in good government. We must be interested in the people who hold the offices. We must evaluate their qualifications. We must know what programs they are trying to introduce.

.....

Therefore it is our responsibility to work for a government that shows itself to be a minister for good by being active Christian workers in the kingdom of God and the kingdom of the State.²

The authoritative Lutheran Cyclopedia points out the necessity of proper relations with government in educational matters under the caption, "Legislation Pertaining to Christian Education," where it is stated,

Even in a country that maintains the separation of Church and State, such as the United States, there are a number of areas in the field of Christian education where the interests of Church and State meet, and where legislation is necessary to clarify issues, to insure justice, and to assure an orderly procedure. This legislation deals chiefly with educational standards and supervision . . .³

¹H[erbert] G [ross], Lutheran Education, LXXXIX (February, 1953), 258.

²Ibid.

³W[illiam] A. K[ramer], Lutheran Cyclopedia (St. Louis: Concordia Publishing House, 1954) p. 213.

In our complex day, as the encroachments of pragmatism and secularism press upon the church, and many groups and individuals are challenging some of the basic assumptions of church-state relationships, "there must be eternal vigilance for the cause of political liberty as for the cause of Christian liberty," as Carl S. Meyer wrote in a recent article in Concordia Theological Monthly. He continues, by stating that a

"practical, outspoken application of Holy Scriptures to the condition of a place and time" (to use a phrase applied to Luther) is entirely within the task of the church; "the created orders, the callings of human society, the 'iustitia civilis,' and the law, are themselves the instruments of God's own personal action."⁴

The problem under discussion in this thesis would not merit serious consideration if it were a simple question of whether or not a sovereign state wanted to further narrow its tax base by exempting from taxation church-related schools of less than college level. The problem was complicated by the many issues that have been injected by proponents and opponents. Nor did the final action of the Federal Supreme Court indicate the complexity of the issue.⁵ The court's opinion did not even deal with the church-state problem but merely refused to consider the California Supreme Court's earlier opinion that the tax-exemption statute presented no substantial federal question. Validity of this study lies in the many arguments and counter-arguments that were adduced throughout the years during which the matter was before the legislature, before the people in a referendum at the polls and through three courts.

That the question of tax-exemption for church-related elementary and

⁴Carl S. Meyer, "The Role of the Church in the Political Order," Concordia Theological Monthly, XXVII (December, 1956), 935.

⁵Infra, section D., "History and Present Status of Problem," pp. 8-12.

secondary schools raises a host of kindred questions is indicated by the six-column article by Harold E. Fey in The Christian Century, August 8, 1951. After giving a lengthy account of the part which Archbishop John J. Mitty of San Francisco played in getting the exemption measure through the state legislature, he discusses several of the issues involved when he writes,

The fundamental issue of whether church schools should be taxed troubled many church leaders. If parochial schools are taxed, why exempt colleges and seminaries? And if church schools are taxed, why exempt charitable institutions and the churches themselves? Since parochial schools are exempted in other states, why should they be taxed in California?⁶

However, Mr. Fey is inaccurate when he criticizes action of "Lutherans, Seventh Day Adventists, and others maintaining schools" as "siding with the Roman Catholic Church . . . for financial reasons." He charges that these groups "have not thought out . . . the question whether their schools can rightly claim to have a public function and so be entitled to exemption." In view of the fact that all the other states outside of California extend the privilege of tax-exemption to church-related schools, it is hardly fair of Mr. Fey to state that "Many supporters of Protestant schools have seized the chance to save money by riding the tail of the archbishop's ample robe."⁷ Such charges from the man who since 1956 is editor of The Christian Century, leading liberal Protestant journal, must be seriously considered and answered.

The writer expressed his concern in The American Lutheran shortly

⁶Harold E. Fey, "Should Parochial Schools be Taxed?," Christian Century, (April 8, 1951), reprint.

⁷Ibid.

after the United States Supreme Court's action on the tax-exemption question in the following words,

Some of the burning questions that need study are: Is tax-exemption tantamount to tax support? Is the church freer when it pays taxes "like everyone else," or when it is exempted? Rome has not kept it a secret that she seeks out and out tax support for her schools. At what point should we resist her progress toward that goal? . . . Is there such a thing as "a Lutheran view" of these issues, or must we approach them on an "each man for himself in the light of conscience" basis?

All American Lutherans should be able to combine their scholarship to provide some historical background and supply the answers to some of these questions.⁸

While the issue was burning in California, such a diversity of opinions was expressed by Lutheran pastors, as well as by clergymen of other denominations, that a study of the issues involved is in order.

Further relevance and urgency lie in the declaration by the anti-tax-exemption forces in California that they intend to re-open the matter. This development raises the possibility that the entire issue of exemption for all religious institutions may eventually be called into question.

Another significant factor that should be noted is that approximately five per cent, or about one in twenty of all the non-Roman Catholic parochial schools in the United States are located in California. It is one of five key states where between 850 and 900 of the nations nearly 3,000 parochial schools are located. According to a bulletin issued by the Central Department of Research and Survey of the National Council of Churches of Christ in the U.S.A., "Wisconsin and Illinois each have slightly more than 200 church day schools; Michigan about 175; California and Minnesota from

⁸Robert K. Menzel, "Court Upholds California Tax Exemption," The American Lutheran, XL (February, 1957), 15.

about 125 to about 150. California has by far the largest number of schools other than the Lutheran and Reformed [*italics added*].⁹ With about one-twentieth of all church related schools concentrated in one state, California may well be the state to watch. It could well become the battle-ground for nation-wide efforts to trim the tax exemptions given to religious institutions and properties.

This monograph will attempt to set forth a Lutheran basis for evaluating the arguments and claims relative to the issues raised in connection with the tax-exemption of church-owned properties, in particular to their charitable and educational facilities.

D. History and Present Status of Problem¹⁰

The problem of taxation of non-profit schools was created in the State of California when the state's constitution was adopted in the year 1879. The most stringent action relative to tax-exemptions was taken in the constitutional provision, which reads,

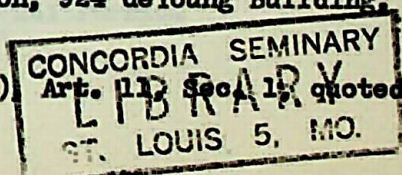
All property in the State, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law.¹¹

Passage of the constitution with the above provision resulted in the imposition of taxes on non-profit private schools, churches, cemeteries, and hospitals. In this regard California's action was unparalleled else-

⁹Religious Day Schools Under Protestant Auspices," Information Service Bulletin, issued by the National Council of Churches of Christ in the U.S.A., XXXI (May 3, 1952), 1.

¹⁰Source for this section was Speakers' Manual and Fact Book (San Francisco: Californians for Justice In Education, 924 deYoung Building, [1952]), lithographed.

¹¹State of California, Constitution (1879) ibid., p. 24.



where in the nation.

By 1914, thirty-five years after adoption of the constitution, and after vigorous campaigns, the people of the state had granted exemptions to Stanford University, University of Santa Clara, University of Southern California, St. Mary's University, and other non-public educational institutions of collegiate grade.

After 1914 only the elementary and high schools of non-profit private character continued to pay taxes.

In 1926 a proposed amendment to the state constitution exempting those non-profit secondary schools accredited to the University of California was defeated by the voters 614,000 to 343,000. In 1933 a proposed amendment to the constitution exempting non-profit schools of less than collegiate grade (including those of elementary level) was defeated by the voters 772,000 to 518,000.¹² In 1937 a similar proposed amendment was refused passage by the senate of the state legislature on the grounds that such a

¹² It is significant that the official Proceedings of the Twenty-Sixth Convention of the California and Nevada District, The Lutheran Church--Missouri Synod, in convention assembled July 6-12, 1926, do not contain any reference to a referendum on the ballot to exempt those non-profit secondary schools accredited to the University of California. This measure would have taken California Concordia College off the tax rolls. The issue was being hotly debated while delegates sat in convention without taking note of it by convention action.

Neither do the Proceedings of the Thirtieth Convention, June 28 to July 1, 1933, make any reference to the proposed amendment to the California Constitution to exempt non-profit schools of less than collegiate grade (including those of elementary level). This measure was being debated publicly at the time.

The Official Proceedings of the Third Annual Convention of the Southern California District, meeting July 10-14, 1933 do not mention the matter either.

A search of the "Theological Observer" section of the Concordia Theological Monthly for the years 1933 and 1934 did not reveal the publication of any news items regarding these developments in California.

measure had been twice rejected by the voters of the state.¹³

In 1944 the voters passed an amendment to the state constitution granting the legislature power to exempt from taxation "all or any portion of property used exclusively for religious, hospital or charitable purposes."¹⁴

Since this section was not self-executing, legislation was required to spell out exactly which properties were to be exempted. The legislature added a section to the Revenue and Taxation Code relating to the so-called "welfare exemption." The following section became effective October 1st, 1949:

Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation . . .¹⁵

Seven provisions follow to assure that no profit accrues to any individual or corporation, and that such property be used only for the intended purpose. The concluding and crucial paragraph reads as follows:

The exemption provided for herein shall be known as the "welfare exemption." This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade [*italics added*].¹⁶

Two years later (the California Legislature meets biennially for legislative session), on March 19, 1951, Assemblyman Laughlin Waters, with fifty-seven co-authors (thus assuring passage in the eighty-man Assembly), intro-

¹³ Handbook for Speakers and Chairmen (San Francisco: California Taxpayers Alliance, 830 Market Street, [1952]), lithographed, p. 3.

¹⁴ State of California, Constitution, Art. 13, sec. 1c.

¹⁵ State of California, Revenue and Taxation Code, sec. 214.

¹⁶ Ibid.

duced Assembly Bill 3383 to amend section 214 as follows:

. . . or to extend an exemption to property held by or used as an educational institution of less than collegiate grade. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section.¹⁷

The amendment exempting private non-profit schools of less than collegiate grade was passed unanimously in the Assembly, and passed with a vote of thirty-three to three in the Senate on April 24, 1951.

However, before the measure became law ninety days after adjournment of the legislature on June 23, 1951, a referendum proceeding was started, and sufficient petition signatures secured to place the issue before the voters.

After a bitterly-waged campaign the measure was approved on November 4, 1952, by a narrow margin of 2,441,055 to 2, 343,528.

The following February, 1953, Alfred J. Lundberg, chairman of the California Taxpayers Alliance, which spearheaded opposition to the measure from the outset, filed a taxpayer's suit in Alameda County Superior Court challenging constitutionality of the law.

Defendants in the suit were the City of Oakland, Alameda County, and the State of California. The Roman Catholic Welfare Corporation, although not mentioned in the Lundberg suit, "intervened" as the most vitally affected party.

On August 17, 1953, a special three-judge Superior Court panel ruled

¹⁷State of California, Revenue and Taxation Code, sec. 214. The quotation is a facsimile of the printed Assembly Bill No. 3383 before its passage. Sections of the bill which change existing statutes are indicated by crossed out letters; new sections are italicized.

by a 2-1 vote that the measure was unconstitutional. The court merely stated that nothing in the State's Constitution as of November, 1952, permitted exemption of non-profit schools. The Court did not even consider the larger charge by Lundberg that the measure violates the Federal Constitution by "providing a subsidy for religious indoctrination by the State."¹⁸

On June 7, 1956, the State Supreme Court, to whom an appeal was made by the Roman Catholic Welfare Council and the previously mentioned civic units, reversed the majority opinion of the County panel. The Supreme Court ruled that the law granting tax exemption to parochial schools is constitutional by a 4-3 decision.¹⁹

The court refused on July 5, 1956, to reconsider its ruling of the previous month.

On December 3, 1956, the Federal Supreme Court dismissed the challenge to the California tax exemption measure by a 6-2 vote, with Justices Black and Frankfurter dissenting.

Next day opponents of the measure said that if no further recourse can be made to the courts they intend to bring the entire issue before the voters of the state again. Earl C. Behrens, political editor of the San Francisco Chronicle, wrote,

The proposed initiative would also ban the state from spending any public funds for these schools. This could stop children from parochial schools from riding in public school buses even when such buses pass the door of private schools.²⁰

¹⁸Oakland Tribune, August 18, 1953, front page.

¹⁹Infra, Appendix C, p. 107.

²⁰San Francisco Chronicle, December 5, 1956, p. 1.

Mr. Behrens further observed,

The entire tax exemption issue might be involved in the proposed initiative. There was speculation that even such universities as Stanford, Southern California and Santa Clara might be hit. Some of those interested in the proposed initiative insist on ending all tax exemptions for all private schools -- from grammar schools through universities.²¹

Names of the sponsors of this new campaign to eliminate the exemption of religious or non-profit private schools from state property taxes were made public on May 1, 1957. The San Francisco Chronicle carried the following news item on May 2nd:

The list, including leaders of Protestant churches and of the Masons, was released in Sacramento after the Attorney General's office . . . announced it had prepared a title as required, for their initiative constitutional amendment.

Sponsoring the campaign is a committee of Californians for Public Schools . . .²²

Evidently the problem will continue to be debated hotly in California for many years to come!

E. Data Employed in Study

Chief sources of information are the voluminous materials circulated by proponents and opponents of the measure, many of which will be referred to specifically in the following pages. These include pamphlets and entire books of background, information, and unveiled propaganda.

A considerable body of information accrued to the writer in the course of a five-year tenure of office as Director of Public Relations for the California and Nevada District of The Lutheran Church--Missouri Synod, in which capacity he participated in numerous conferences and debates on the

²¹Ibid.

²²San Francisco Chronicle, May 2, 1957, p. 6.

subject.

Also included in the data are various legal documents, reports, briefs amici curiae, and correspondence in the writer's files.

To supply the information necessary for a proper evaluation in the light of Lutheran theology, history and practice, the printed works and periodicals listed in the bibliography were consulted.

F. Observation

The believer's life in Christ will provide the motivation for all his endeavor. As St. Paul wrote the Galatian Christians (Chap. 5), "That we may walk in freedom Christ has made us free." This includes spiritual freedom and, by extension, civil liberties as well. It is in the belief that this study will somehow contribute to the preservation of Christian liberty that it was prayerfully undertaken.

CHAPTER II

ARGUMENTS OF THE PROPONENTS OF TAX EXEMPTION

The chief proponents of tax exemption for non-profit private schools are, quite naturally, the operators of such schools. The schools of the Roman Catholic Church in California are the most numerous, with an enrollment of approximately ninety to ninety-five per cent of the total number of pupils attending private schools. Strangely enough, no truly accurate figures on number of schools or number of pupils are available, for the reason stated in Church and State, published by Protestants and Other Americans United (POAU). This organization made a survey of state school laws and standards and discovered that many states leave private schools uncontrolled. Under the heading of California, the survey stated,

Children of compulsory school age must attend public or "full--time day school" taught in English Explaining the lack of "detailed, accurate information" concerning private school enrollments, a state official ascribed it to the state constitution's prohibition of tax support for sectarian institutions.¹

According to an Information Service bulletin issued by the National Council of Churches of Christ in the United States of America, in 1952 (the year the tax-exemption issue was being debated before the public) there were between 125 and 150 Protestant schools of less than collegiate grade. On the basis of national figures in this report, the average size of Protestant schools is about 65. This would place between 8,000 and 10,000 pupils in

¹"State School Laws and Standards--A POAU Survey," Church and State, VII (September, 1954) 5. The introductory paragraph to this survey states, The results . . . reveal that in most instances public authorities do not know the answer because they exercise no effective control over (them).

Protestant schools in California.²

According to Harold E. Fey, writing in The Christian Century, quoting from the "state chamber of commerce, California has (in 1951) 2,119,299 students attending public schools, as against 165,000 attending parochial schools."³ Fey comments that this is a ratio of thirteen to one as against a national average of ten children in public schools to every one in parochial schools.

Therefore, only five to ten per cent of the children enrolled in private schools in California are non-Roman Catholic.

Prime proponent of tax exemption, and most active in the efforts to secure it, was the Roman Catholic hierarchy. Annual savings to operators of non-profit private schools through tax-exemption were estimated all the way from \$600,000 (San Francisco Archbishop John J. Mitty's figures) to \$3 to \$6 millions a year (California Taxpayers Alliance). It is impossible to ascertain an exact figure, since a low evaluation has been customarily placed on private schools by county assessors.

Whether the Roman Catholic hierarchy "lobbied" for the measure in the legislature, as the opposing California Taxpayers Alliance contends, or whether the legislature initiated the measure spontaneously, as the Roman Catholic leaders affirmed, cannot be determined conclusively. Probably the full truth lies somewhere between the two.

²"Religious Day Schools Under Protestant Auspices," Information Service Bulletin, issued by the National Council of Churches of Christ in the U.S.A., XXXI (May 3, 1952), 1.

³Harold E. Fey, "Should Parochial Schools Be Taxed?" The Christian Century, LXVIII (August 8, 1951), reprint, p. 3. Fey's figures for parochial school enrollment do not agree with those supplied by proponents of tax-exemption, cf. infra, p. 24. Fey's smaller figure apparently excludes private schools under non-religious auspices.

Although the origins of the tax-exemption measure may lie somewhere in dark political recesses, friends of the measure were revealed in the subsequent debate over it. In addition to the Roman Catholic Welfare Corporation the following groups were active in carrying the measure through the courts:

Pacific Union Conference of Seventh Day Adventists, and the Advisory Council of Christian Schools, representing The Lutheran Church--Missouri Synod, the National Union of the Reformed and Christian Reformed Church, Brethren Churches, Nazarene Churches, the Four Square Church, the Administrative Council of the National Lutheran Council Christian Elementary Schools, the Protestant Episcopal Church, Baptist Schools, Assembly of God Schools and Free Methodist Churches.⁴

Prominent clergymen of several denominations supported the measure, as did the Hon. Adrien J. Falk, San Francisco business executive and a former president of the San Francisco Board of Education.

Most supporters of tax-exemption, it is true, had a "vested interest" in it; however, many professed to be interested solely in securing "Justice in Education," as the slogan of the proponents phrased the issue.

A. Every State in the Union Exempts Private Schools

In another section of this thesis⁵ we shall discuss the practice of exempting properties of religious institutions. In the following paragraphs we shall demonstrate that California was the only state in the United States which had not extended tax-exemption to parochial schools. We shall further demonstrate that this is a practice of such long-standing, and upheld by so many court decisions that it may be considered as normative in church-state relationships in the United States.

⁴Brief Filed Amici Curiae, In the Supreme Court of the State of California, S. F. Number 19026 (Los Angeles: Parker and Sons, Inc., Law Printers), cover. Hereafter referred to as BFAC.

⁵Infra, pp. 37ff.

Anson Phelps Stokes notes that "now churches are everywhere exempted by constitutions or statutes." He states that "there is no standard amount of real estate which is exempted along with the church edifice," but that "Schools are generally exempt" ⁶ However, Stokes does not supply statistics as to the practices in the various states.

Proponents of tax-exemption for parochial schools in California made the claim that California was the only state in the union that did not extend such exemption. Opponents of exemption took exception to the claim and stated flatly, "We do not know that this is a true statement." ⁷

The authority on church law in the United States, Carl Zollmann, ⁸ does not decide the issue, because several states did not take measures to exempt parochial schools from taxation until a number of years after publication of his book, American Church Law, in 1933. ⁹

The majority of American states exempt parochial schools from taxation by constitutional or statutory provisions by directly naming them. ¹⁰ However, in California and several other states the language of the consti-

⁶ Anson Phelps Stokes, Church and State in the United States (New York: Harper and Brothers, 1950), III, 420.

⁷ Handbook for Speakers and Chairmen (San Francisco: California Taxpayers Alliance, 830 Market Street, [1952]), lithographed, p. 16. Hereafter referred to as CTA.

⁸ Carl Zollmann, American Church Law (St. Paul: West Publishing Co., 1933), pp. 358-60.

⁹ CTA, p. 16. "In 1933 when Californians last refused to grant this tax exemption the same argument was proffered We do know that several of the adjacent states . . . passed such exemptions within the last few years."

¹⁰ Cp. Appendix A, p. 104.

tution does not directly name schools or educational institutions as being exempt. In such instances the question of tax-exemption must be decided by the courts, or through legislative enabling acts.

The American states in which the language of constitutional or statutory provisions for tax-exemption do not mention schools or educational institutions by name, as in California, are comparatively few. Included in the list are the States of Iowa, Illinois, Kentucky, Maryland, Minnesota, Massachusetts, New Jersey, Ohio, Pennsylvania, Wisconsin.¹¹

The Brief Filed Amici Curiae in the Supreme Court of California supporting the appeal from the ruling of the Superior Court of Alameda County that the California statute granting exemption to parochial schools was unconstitutional states,

In the states mentioned, numerous cases are cited and quoted from at length, state by state, uniformly holding that schools are exempt from taxation under both statutes and constitutional provisions exempting or authorizing the exemption of "charities," "charitable purposes," and "charitable organizations." California is the only state in the American Union in which non-profit primary schools are not exempted from taxation, either as a result of constitutional provision, legislation or the decisions of the courts. We submit that this is an unenviable and unenlightened position for California to find itself in.¹²

While many prominent members of the Masonic fraternity led the effort to oppose tax-exemption of parochial schools, a national Masonic magazine, The New Age, admitted, "California has the distinction of being the only State in the Union which does not grant tax-exemption to church schools."¹³

¹¹BFAC, passim. Cf. also Speakers' Manual and Fact Book, an educational campaign handbook presenting the case for a "Yes" vote (San Francisco: Californians for Justice in Education, 924 deYoung Building, [1952]), lithographed, passim. Hereafter referred to as YES.

¹²BFAC, p. 3.

¹³N.W., "Tax Exemption for Church Schools Challenge to All," The New Age (March, 1952), quoted in YES, p. 83.

After analyzing the procedures in the states, the Brief comments,

However, it seems to be of the greatest significance that in the overwhelming majority of American States, schools and educational institutions, especially those operated without profit, are specifically mentioned as being tax exempt in the exempting constitutional and statutory provisions. This, of course, is the strongest possible indication of the recognition that such schools should be tax exempt in the pursuance of a wise public policy [italics added].¹⁴

A significant consideration lies in the fact that the States of Wisconsin, Illinois, Michigan, California and Minnesota have the largest number of Protestant or non-Roman Catholic church schools.¹⁵ Of the approximately 3,000 such schools, nearly one-third are located in these states. Each of the above-mentioned five states, with but one exception, are included in the list of ten that do not specifically exempt parochial schools by constitutional or statutory provisions.

In most of these states parochial schools have been tendered tax exemption as charitable institutions or institutions of public charity.

In California exemption for parochial schools was granted by the legislature on the basis of the premise that these schools serve a charitable purpose. This was, furthermore, the basis of the appeals to the courts by the opponents of tax-exemption, namely, that such schools were not in fact charities.

The Amici Curiae Brief quotes section 1c of Chapter XIII of the California State Constitution with reference to the exemption from taxation of

¹⁴BFAC, Appendix A, p. 6.

¹⁵Information Service Bulletin, issued by the National Council of Churches of Christ in the U.S.A., XXXI (May 3, 1952), 1. The data in this Bulletin is taken for the most part from Evangelical Christian School Movement, (Chicago: National Association of Christian Schools, 1952), and Mid-Century Survey; Christian Schools of Evangelical Persuasion, (1950).

"property used exclusively for . . . charitable purposes" ¹⁶ The comment, introducing the legal arguments presented in the document, follows:

It will be noted that the foregoing constitutional language does not include schools or educational institutions eo nomine. The question, therefore, is . . . whether such non-profit schools of less than collegiate grade which otherwise comply with all the requirements of the proposed amendment to . . . the Revenue and Taxation Code are included within the meaning of the words "charitable purposes" appearing in the Constitutional provision and emphasized in the above quotation. ¹⁷

The majority opinion of the California State Supreme Court, which agreed with the argument, stated, "The validity of the statutory exemption depends, first upon whether an educational purpose may be regarded as a charitable purpose" ¹⁸ Later in the opinion the following quotation occurs,

It thus appears that the word charitable has been given a broad construction in tax exemption cases as well as others, and it would seem clear that nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable as defined by our decisions. ¹⁹

There is ample evidence, therefore, to show that the granting of tax-exemption to parochial schools is the accepted practice in all the states of the Union. ²⁰ Tax-exemption is extended to these schools in one of three ways: by constitutional provisions, by statutory regulation, or by ruling that such schools serve a charitable function.

¹⁶ BFAC, Appendix A, p. 2.

¹⁷ Ibid.

¹⁸ The Recorder, The Daily Legal Journal of San Francisco Courts, June 15, 1956, p. 1.

¹⁹ Ibid., June 18, 1956, p. 1.

²⁰ Cf. Appendix B. Therein is listed the court decisions in states where it was necessary to hold that schools are charities in order to exempt them from taxation, from BFAC, pp. 17-41.

B. Do Parochial Schools Serve a Public Function?

Among the chief charges Harold E. Fey raises in The Christian Century article, "Should Parochial Schools Be Taxed?," is that parochial schools can not "rightly claim to have a public function and so be entitled to exemption from paying taxes."²¹ The Protestant groups which maintain schools in California, he contends have not thought out the question as the Roman Catholic Church's leaders have done. He states,

Rome claims the right to control all education because, it says, the church alone fully possesses the truth and only the church is entrusted with the eternal as well as the temporal welfare of men. Consequently only those schools that are conducted according to standards which Rome sets can rightly claim to serve the public welfare.

Few Protestant churches which maintain their own schools would go so far. Like the Roman Church, they conduct schools for their own purposes. Unlike it, they do not claim the right to impose these purposes on the whole of society. Instead they serve an essentially religious, personal and private end. Their schools are not set up to relieve the state of expense So they are logically subject to tax.

. . . California is entitled to tax parochial schools whether other states exempt them or not. It is free to reject the claim, as it has done for a century, that parochial schools serve the public interest in education as well as do the public schools. And it is free to assert that when nonpublic purposes are served by such schools, they must acknowledge their essential character by payment of a tax.²²

Mr. Fey's reasoning in effect limits the value of parochial schools to a mere serving of an "essentially religious, personal and private end." This

²¹Fey, op. cit.

²²Ibid. This section, "Do Parochial Schools Serve a Public Function?," begins with the charge of an opponent of tax-exemption for parochial schools; it is being treated under "Arguments for Exemption" because one of the strongest arguments put forward by the proponents of exemption is that these parochial schools do serve a public function. Of all the critics of tax exemption, Fey makes the most of this argument. The California foes of exemption did not dwell on the "public purpose" argument very strongly.

consideration does not rule out the fact that, while teaching sectarian doctrines, parochial schools are at the same time contributing to the public welfare in the same degree and in the same manner as churches are considered to be contributing to the public welfare.

Supporters of tax-exemption for non-profit private schools in California pointed out that the legislature and the governor acted in the public interest when welfare exemption was acted into law, and that the California exemption is undeniably in the public interest. They stated that the phrase "in the public interest" can only mean that the welfare tax exemption is of direct benefit to more people than those directly interested in non-profit private schools. The welfare tax exemption measure directly benefits all the people of the state. In fact, they stated, the legislature does not have the legal power to grant a tax exemption unless the exemption recognizes a major contribution to the general welfare of all the people of the state.²³

The Supreme Court of the State of California held that the non-profit private school tax-exemption contributes to the public welfare in its decision²⁴ on this question when it stated, that

the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose.²⁵

²³YES, passim.

²⁴Cp. Appendix C.

²⁵The Recorder, The Daily Legal Newspaper for San Francisco Courts, June 19, 1956, p. 1.

The public writings of The Lutheran Church--Missouri Synod emphatically declare that parochial schools conducted by its congregations do indeed contribute to the public welfare. The resolution of the California and Nevada District of the synod, at its Forty-second convention in 1952, stated, "It looks upon such exemptions to church properties as a recognition of the contribution of the church and its agencies to the welfare of the state . . ."26

The President of the California and Nevada District upheld this position when he wrote,

Churches and synagogues are not taxed, because the state feels that it can in such fashion repay its debt for the splendid inculcation of the ethical and moral principles which are vital for good government

But do not church schools exist for the same purpose as churches? . . . They are founded and maintained to teach religion by precept and example. Doesn't America need more of this, not less?²⁷

Many of the statements in Missouri Synod literature relevant to this welfare issue are in connection with the criticism that parochial schools are undemocratic. This charge is treated briefly on p. 51. However, this latter charge was not prominent in the public arguments pro and con regarding the tax-exemption issue.

And editorial in Lutheran Education, official educational journal of the Missouri Synod, states,

We maintain that our schools help and foster the "safety of the state" because we teach "a central conformity in beliefs, loyalties, and practices in order to maintain the integrity of the culture and its social organization as expressed through the state." We use many of the same

²⁶The Lutheran Church--Missouri Synod, Proceedings of the Forty-Second Convention of the California and Nevada District, June 25-26, 1952 (St. Louis: Concordia Publishing House, 1952), p. 57.

²⁷Arthur C. Nitz, "Pulse of the Public," The San Francisco News, August 18, 1952, editorial page.

textbooks in the secular subjects as the public schools. We expect law-abiding behavior from our pupils and teachers. We contribute to the public welfare, growth and development of the community in which we place our school [italics added].²⁸

What public schools can do well in the way of citizenship education Lutheran schools can do even better. As Paul T. Luebke points out in Lutheran Education, "As education in general, so particularly also citizenship education is grounded in moral and spiritual values." He continues, "Christian citizenship education is predicated upon the love for God and fellow men which the Christian possesses as an outgrowth of faith in Christ's redemption."²⁹

Dr. A. C. Stelhorn, Secretary for Schools of the Missouri Synod, has pointed out how the fear and love of God, and the love and respect for one's fellow man are marks of Christian character. This Christian character is, in turn, the basic element of true Americanism. He also notes that Dr. C. F. W. Walther, first president of the Missouri Synod, inculcated deeply in his students the principle that Christians are obligated by God not only to seek the best interests of the Church, but also those of the state and the world. He quotes a portion of one of Dr. Walther's Independence Day sermons where the clergyman stresses education in behalf of civic welfare.³⁰

²⁸J[ohn] F. C[hoitz], editorial, Lutheran Education, LXXXVIII (April, 1953) 371. Quotation in the article is from School Administration, by Arthur B. Moehlman (Boston: Houghton Mifflin Co., 1940), pp. 788 and 90.

²⁹Paul T. Luebke, "Christian Education Builds a Strong Nation," Lutheran Education, LXXXVIII (September, 1953), 28-33.

³⁰A. C. Stelhorn, "Reaching Our Goal in School Enrollment" (St. Louis: Board for Parish Education, 1952), passim, mimeographed.

In the same address Dr. Stelhorn stated that "if good character, conscientious loyalty, and genuine patriotism are the chief traits of a good American citizen, we believe that we are doing the State a great service . . . by maintaining our own schools."³¹

In view of these statements it is difficult to see how Harold Fey's contention that parochial schools do not serve a public function can be supported. Christian day schools do serve a public function and purpose and therefore the tax-exemption extended them by the states is justifiable.

C. Parochial Schools Save the State Money

The Speakers' Manual and Fact Book of the proponents for tax exemption assert that

the private non-profit school directly saves the State and all taxpayers the full amount of the cost of educating each child in the school A dollar spent on the operation and maintenance of a non-profit private school is a tax dollar saved on the costs of the public school system.³²

Figures are then adduced to indicate that the taxpayers of California would be footing an annual bill of more than thirty million dollars in addition to what they are now paying to operate the state's public schools. This figure is arrived at by multiplying the figure 150,608 (the number of children in non-profit private grade schools) by \$202.81, the annual per capita cost for each pupil. A similar accounting shows that an additional eleven million dollars would be needed to educate the

³¹Stelhorn, op. cit.

³²YES, p. 11.

pupils in private schools on the secondary level.

A staggering sum of over 350 million dollars would be required to build schools to accommodate the 182,483 boys and girls in private elementary and secondary schools.³³

Opponents of tax-exemption for parochial schools countered with the argument that parochial schools are not operated to save taxpayers money. They are operated, they say, for the specific purpose of propagating the faith of the particular sponsoring religious group. "Furthermore," their Handbook states, "the estimated 'savings' is based on the premise that no additional pupils can be added to any classes, that a complete new school system would have to be created to absorb these pupils."³⁴

Harold E. Fey, writing in the Christian Century, joins in the observation that "the State of California has not asked the Roman Catholic Church or any other to conduct schools for it."³⁵

There is some exaggeration on the side of the tax-exemption advocates and a rather pious attitude on the other in this matter of saving the taxpayers money.

It must be quite evident that state schools could absorb a large number of pupils enrolled in private schools without causing undue hardship. Furthermore, there is little likelihood that any of the denominations supporting schools would close their schools even if they are taxed.

³³ Ibid., pp. 12-14.

³⁴ CTA, p. 15; op. also Church and State, a monthly review published by Protestants and Other Americans United (POAU), VIII (September, 1955), 2.

³⁵ Fey, op. cit., p. 2.

On the other hand, it is somewhat beside the point to argue that no-one has asked the Roman Catholic Church or any other church or private group to educate the children of the state. The question at issue is only this: an obvious saving accrues to the state because some churches and other groups maintain schools; fairness dictates that they shall not pay taxes on such schools in view of the fact that they serve a public function.

That there are, however, hidden factors involved has been pointed out by a Roman Catholic layman, Joseph E. Cunneen, writing in Commonweal, lay Catholic weekly. Under the title, "Do Parochial Schools Really Save Money?," he writes,

Knowing of the precarious existence of our own schools, we find it hard to realize that public schools themselves need a helping hand these days. The fact is that in many cases the additional parochial school is a threat to the public school, in terms of both economic and moral support. Sometimes this threat is exaggerated

We are too fond of saying that our schools are a saving to the American taxpayer. It is undoubtedly true that in a crowded city whose educational facilities are already strained, pupils can be educated more cheaply in a parochial school. . . . Even here the 'gift' to the city is not as absolute as we often represent it; the hidden economics involved in paying for the parochial school affects the entire community. There is only so much money available for education within a given area; money withdrawn for Catholic schools is being taken out of a potentially common fund. Some economy-minded Catholic members of large-city boards of education make non-Catholics understandably skeptical about our boast of a gift to the taxpayer. Furthermore, in small towns, the addition of a Catholic School may mean a duplication of facilities that in fact is uneconomical.³⁶

This analysis, touching on "hidden economics" as it does, seems to point up a real issue in regard to the reputed savings parochial schools

³⁶Joseph E. Cunneen, "Catholics and Education," Commonweal (August 7, 1953), quoted in Church and State, VI (September, 1953), 2.

represent for the taxpayer. However, we cannot hold to the theory that "there is only so much money available for education within a given area." Supporters of parochial education will continue to provide and maintain their private schools in addition to assessments for public schools.

The position of the Missouri Synod is reflected in the resolution of the California and Nevada District at its Forty-second Convention, which stated that it "does not claim the right to demand exemption for its parish schools," but accepts it readily when offered.³⁷

However, the Secretary for Schools of the synod, A. C. Stellhorn, agrees with the claim that its schools do "save the state millions of dollars annually" in his address, "Reaching Our Goal in School Enrollment." He states that "our people . . . are willing to spend upwards of ten millions of dollars annually for their schools, besides supporting the public schools for the purpose for which they are maintained."³⁸

Missouri Synod Lutherans will not press the claim that their parish schools should be tax-exempt because they save the state money. However, they will not hesitate to remind the state that they do. Nor will they refuse to accept such exemptions when they are granted. They will continue to operate Christian day schools, not to save the state money, but because they feel that Christians have obligations to God and children that go far beyond the obligations or capabilities of the state in

³⁷ The Lutheran Church--Missouri Synod, Proceedings of the Forty-Second Convention of the California and Nevada District, June 23-26, 1952 (St. Louis: Concordia Publishing House, 1952), p. 57.

³⁸ Stellhorn, op. cit.

in education. Meanwhile, they will consider it their duty also to support and work for the improvement of the public schools.

D. Similar Schools of College Level Exempted

An issue that merits only passing attention is the claim of "the shocking unfairness involved in exempting similar schools of collegiate grade and not extending the same exemption to elementary and high schools."³⁹

Opponents of tax-exemption countered with the assertion that

Colleges were exempted because our society believes in encouraging higher education and co-incidentally the establishment of institutions providing higher education. There is no free school system supported by taxpayers on the college level comparable to the public elementary and secondary school systems.

In essence, the laws of our state require that all children attend school until they are eighteen or graduate from high school. To enable all parents to comply with the law regardless of financial circumstances, we have a universal free public school system.⁴⁰

The state certainly has the right to determine the extent of its tax-exemption privileges. The preceding objection of the opponents of tax-exemption for private schools seems for the most part valid. If, as the resolution of the Forty-second convention of the California and Nevada District of the Missouri Synod states, the synod "does not claim the right to demand exemption for its parish schools,"⁴¹ it may be assumed that the Missouri Synod would not accuse the state of "shocking unfairness" if the state were to choose to exempt one religious institution while refusing to do so for another. The Church can, however, remind

³⁹YES, p. 27.

⁴⁰CTA, p. 17.

⁴¹Proceedings, op. cit., p. 57.

the state that, if exemptions are granted to colleges in order to encourage higher education, the same argument can be applied to schools of lower grade. No one has ever suggested that church-related colleges will subvert tax-supported state colleges and universities.

E. Crux of the Issue: Double Taxation

The spokesmen of the Roman Catholic Church make much of the claim that parents of parochial school students suffer under the injustice of "double taxation". They pay for the support of the public schools through taxes on their real property; then they must also pay taxes which are levied on the property of the schools which they operate. A portion of the taxes levied on the parochial school in turn applies to the support of the public school. This is the crux of the effort to secure tax-exemption for parochial schools, as proponents of the measure state,

Because the supporter of the non-profit private school is placed in the unenviable and un-democratic position of being taxed twice for educational purposes -- once to support the Public Schools (which he does willingly) and the second time to give the State tax monies for a non-profit private school, for which he otherwise foots the bill.⁴²

The California Taxpayers Alliance, opponents of tax-exemption, flatly deny the validity of this argument, and state,

No such thing as double taxation is involved. The decision to send children to parochial schools is a purely voluntary one and all costs incidental to those schools are assumed voluntarily. Property taxes are not levied on the basis of the number of children or the family status of the owner. Taxes are paid on property as prescribed by standard assessment regulations for the purpose

⁴²CTA, p. 27.

of municipal or other governmental services. One of these services coming from property taxes is the upkeep of the public school system.

. . . no taxes are levied against the schools themselves or the operation of those schools. The taxes are only on the real property owned and occupied by the . . . schools.

Schools . . . require governmental services . . . (which) have a very tangible financial value.⁴³

While some Protestants have also raised this "double taxation" issue, it does not appear in Missouri Synod writings. The Rev. Roy L. Benton, a Seventh Day Adventist clergyman, secretary of the Religious Liberty Association, stated,

While every citizen should be glad to pay taxes to support the government and the public schools, the same citizen should not have to pay an additional tax for the privilege of educating his own children at his own expense⁴⁴

In the interest of fairness, were we to concur that taxation of parochial schools is a form of "double taxation," we should have to ask for exemption only of that portion of the tax which is designated for public schools. We believe that there is justification for such an approach.

However, since The Lutheran Church--Missouri Synod has unequivocally renounced any claims to actual tax support of its schools, one aspect of the "double taxation" argument would seem to be unacceptable to Missouri Synod educators. This lies in the fact that "double taxation" arguments apply equally well to claims for outright tax support of private schools operated by the church. Vermont State Senator Graham S. Newell has pointed this out, as reported in Church and State (POAU), where he is quoted as saying,

⁴³YES, pp. 15f.

⁴⁴CTA, p. 45.

Now what is the logical extension of their argument (that parents of private school children are being doubly taxed)? If equal transportation facilities to private school children are to be provided, then by the same token, why not pay for their books, their teachers' salaries and school buildings since their parents are paying taxes also for these very purposes in the public schools.⁴⁵

That the "double taxation" argument applies to claims for further support of Roman Catholic Schools is seen from the fact that in California the argument was raised on behalf of tax-exemption; in Vermont the issue has been raised in regard to an actual tax grant, i.e., for transportation of parochial school children.

Because there are stronger and more valid reasons to bolster the claim for exemption of Christian day schools from taxation, members of the Missouri Synod will not be disposed toward supporting a principle that could be equally well applied to actual state support of its schools.

To summarize this chapter on "Arguments Set Forth by Proponents of Tax Exemption" for non-profit private schools of less than collegiate grade:

Chief benefit of tax-exemption goes to the Roman Catholic Church, which operates from ninety to ninety-five per cent of the private schools in the state. Therefore, they were most active in seeking the exemption in the first place.

While they were not active in seeking to induce the legislature to grant tax-exemption to private schools, there was wide-spread support from Protestants who operate schools to have the measure upheld when its constitutionality was challenged in the courts.

⁴⁵Graham S. Newell, Church and State, VIII (September, 1955), 2.

Of the arguments advanced in support of exemption, we have considered the following to be in keeping with Lutheran theory:

- a. Every State in the Union exempts parochial schools in some way, so that we may conclude that this policy is in keeping with the ideals of American tradition.
- b. Church-related private schools serve a public function, i.e., to inculcate "good character, conscientious loyalty, and genuine patriotism."⁴⁶

Three other arguments advanced are either unacceptable, or open to wide differences of opinion. These are: (a) Parochial schools save the state money; (b) Because similar schools of college level are exempted, so also should elementary and secondary church-related schools; (c) Parents who support a private religious school are faced with a burden of double taxation.

⁴⁶ Stellhorn, op. cit.

CHAPTER III

ARGUMENTS SET FORTH BY OPPONENTS OF EXEMPTION

Who were the opponents to "Justice in Education?" What were the arguments they adduced to persuade the voters to reject the measure the legislature had passed and the governor signed?

One organization is responsible for the moves aimed at reversing the nearly-unanimous action of the California State Legislature in extending tax-exemption to non-profit private schools of less than collegiate grade. That organization is the California Taxpayers Alliance.

Its literature sets itself forth as the champion of the public schools, the principle of separation of church and state, and of equitable taxation. The Handbook for Speakers and Chairmen, prepared by the California Taxpayers Alliance, speaks of the alliance as "the citizens' organization just formed to oppose the exemption."¹

The letterhead of the CTA gives as its aim, ". . . the Preservation of Equitable Taxation."

By its own admission the CTA was "just formed to oppose the exemption" shows that it is not primarily interested in "equitable taxation." A similar manual prepared by the proponents of tax-exemption for parochial schools suggests that the true aim of the CTA is to oppose the exemption of parochial schools, especially those of the Roman Catholic Church. The

¹Handbook for Speakers and Chairmen (San Francisco: California Taxpayers Alliance, 830 Market Street, [1952]), lithographed, p. 5. This source will be hereafter referred to as CTA in the footnotes and in the body of the thesis.

manual quotes an official of the CTA, who reputedly stated in a public meeting,

The California Taxpayers Alliance is organized to fight on this one issue. It fought against tax relief for non-profit private schools in 1926, and then became dormant. It was reactivated again in 1933 to oppose the same issue. Then it became dormant again. It was reactivated this time to fight on this one issue. The California Taxpayers Alliance has never taken a position on any other tax measure.²

Harold E. Fey states this frankly when he writes,

The organization which is carrying the matter to the people . . . is the California Taxpayers Alliance. The C.T.A. is an organization which has come to life each time this issue has been raised by the Roman Catholic Church or its spokesmen, and has subsided each time it has been settled. It is frankly a device by which an opposition which cuts across party lines can be marshaled. Its manifold support comes from Protestant and Jewish sources. The Monitor, weekly newspaper for the Catholic archdiocese of San Francisco, charges that it is a front for the Masons.³

That the real issue in the debate over tax-exemption for private schools is the Roman Catholic Church is the subject of Chapter IV, "The Real Issue--The Roman Catholic Church."

Leading the Protestant opposition to the tax-exemption measures was the Board of Directors of the Northern California and Western Nevada Council of Churches. The Council authorized its president to express its opposition to the law, and endorsed circulation of a petition for referendum.⁴

²Speakers' Manual and Fact Book (San Francisco: Californians for Justice in Education, 924 deYoung Building, [1952]), lithographed, p. 85, hereafter referred to as YES.

³Harold E. Fey, "Should Parochial Schools Be Taxed?," The Christian Century, LXVIII (August 8, 1951), reprint, p. 2.

⁴"Churches Take Stand on Taxes," Sausalito News (California), August 9, 1951, p. 1.

The following joined the anti-tax-exemption group, or at least endorsed the referendum petition: the Disciples of Christ, the California Synod of the Presbyterian Church, USA. The Methodist Bishop of San Francisco urged the signing of the petition, as did also the Episcopal Bishop of the missionary district of San Joaquin.⁵

Other Protestant groups, according to the CTA, included numerous Church councils. Unitarian ministers were unanimous in opposing the measure. A Clergy Advisory Committee was formed by the CTA to enlist "all our clergy and church laymen . . . in conducting a widespread educational program regarding the issues in this campaign."⁶

A pastor of the United Lutheran Church in America was included in the partial list of the Clergy Advisory Committee. Although his duties included those of the District school superintendent, the Executive Secretary of the California and Nevada District of the Missouri Synod personally opposed the measure. A member of the faculty of California Concordia College, ministerial preparatory school of the Missouri Synod, actively opposed on principle the granting of tax-exemption.

The role of members of the Masonic fraternity is undeniable, although the writer has heard disclaimers from Masons who supported tax-exemption. Earl Warren, who signed the bill as governor, was a Mason at the time. Furthermore, the Monitor's charge that the CTA is "a front" for the Masons is hollow in light of their use of another "front," i.e., Californians for Justice in Education. An article in The New Age, March, 1952, entitled

⁵The Christian Century, LXVIII (August 15, 1951), 932f.

⁶CTA, op. cit., insert.

"Tax Exemption for Church Schools Challenge to All" reflects the thinking of prominent Masons.

A Scottish Rite News Bulletin⁷ notes that Henry C. Clausen, counsel for the CTA, is a thirty-second degree Mason. The same bulletin defends a letter sent out by a Shrine "Trustee Committee" to enlist Shriners' support of the CTA. Although the bulletin states that "sentiments expressed herein do not necessarily carry the endorsement of the Supreme Council," there is no doubt about how strongly the authors of the article are opposed to the tax-exemption measure.

Also included among the opponents of tax-exemption were some public school officials, some teachers, and those who oppose all non-public schools as a matter of principle.

The arguments adduced by these people and organizations in opposing tax-exemption for non-profit private schools are treated in the following pages.

A. Exemption is Tantamount to Tax Support

"We believe tax exemption of parochial schools violates the principle of separation of church and state." This is the primary charge the CTA made in their efforts to lead the voters of the State of California

⁷E.R. & S.W., "California Irish Catholic Paper Attacks the Shriners," Scottish Rite News Bulletin (issued by authority of the Supreme Council, 33rd, Southern Jurisdiction, U.S.A., 1735 Sixteenth Street, N.W., Washington 9, D.C.), reprint.

The new campaign to eliminate the exemption of non-profit private schools, made public on May 2, 1957, includes "leaders of Protestant churches and Masons," according to the San Francisco Chronicle, pg. 6. "Sponsoring the campaign is a committee of Californians for Public Schools, Leon O. Whitsell, Stockton, long a leader in the Masonic order in California, is treasurer,"

to reverse the action of the legislature in granting tax-exemption to non-profit private schools.

Why is tax-exemption for church-related schools such an abridgement of the principle? "This is so," states Henry C. Clausen, San Francisco attorney, "Because the exemption is in effect a state subsidy of church schools. . . . It cannot, therefore, be seriously questioned but that a tax-exemption is a direct or indirect form of state subsidy."⁸

The argument against Proposition Three (to exempt private schools of less than college level) printed in the Official Voters' Handbook on the November 4, 1952, State General Election ballot confronted the citizens of the state with the following charges,

The proposed measure violates the American principle of the separation of church and state.

A tax exemption is the equivalent of a subsidy. It is in principle, and in effect, a grant of public money in aid of a religious sect, and helps support schools controlled and operated by a church or religious denomination.⁹

More than three years later the State Supreme Court upheld the constitutionality of the exemption statute which had been passed by the legislature and ratified by the people of California in the 1952 election. In appealing the Court's decision, former California governor, Culbert Olson, commented that tax-exemption of parochial schools "would commit California to the subsidization of Catholic Church parochial schools, and other

⁸Henry C. Clausen, "Hands Off the Wall," an address printed and distributed by the California Taxpayers Alliance, 830 Market Street, San Francisco.

⁹State of California, Official Voters' Handbook, November 4, 1952 State General Election (Sacramento: State Printing Office, 1952), reprint.

sectarian schools."¹⁰

The Northern California and Western Nevada Council of Churches also charged that "this act is a threat to the principle of the separation of Church and State which is basic in a democracy and which is guaranteed in the First Amendment to the Constitution of the United States." In a weak effort to bolster the charge, the opinion concluded that "The logical end would be complete support of church-sponsored schools."¹¹

Supporters of tax-exemption were quick to discover and point out that the "logical extension" argument can apply in the opposite direction as well. The Santa Ana, California, Register declared in an editorial on October 19, 1953,

If this line of reasoning (that tax relief is in effect a subsidy to religion) is to be written into California jurisprudence--and subsequently into the State Constitution as the litigants averred--it could well mean the end of the tax exemption now given to churches themselves.

To put it simply, how can you distinguish between the church that preaches religion, and the church-supported school that teaches religion?

If tax exemption to a church-supported school is . . . illegal, . . . is also a subsidy to religion . . . illegal?

In an open letter to the Protestant Clergy of California, Dr. W. Clarence Wright, Wilshire Presbyterian Church, Los Angeles, and the Rev. Dr. Charles W. Mayes, First Brethren Church, Long Beach, declared,

the court action is a pistol aimed directly against your church--because it argues that tax relief given to a church is in fact a state subsidy for religion--and thus illegal.

1. If this contention is upheld, and a LEGAL PRECEDENT SET, the

¹⁰"Brief Assails Court Rule on School Tax," San Francisco Chronicle, July 3, 1956, p. 5.

¹¹"Churches Take Stand on Taxes," Sausalito News, August 9, 1951, p. 1.

machinery is automatically set in motion to repeal the tax-exemption on your sanctuary.

2. If tax relief to a school is adjudicated a subsidy, how can we defend ourselves from the atheists who then argue that tax relief to the church also is a subsidy?
3. Legally, it is almost impossible to distinguish between the church that preaches religion and the school that teaches that same religion.

The letter also called attention to an organization known as Constitution Advocates, which announced its intentions to place on the 1954 ballot a measure which would forever deny tax relief to church schools on the basis that such relief is a subsidy to the church. "If this is written into the constitution of the state," Wright and Mayes warn, "We may find ourselves forced to defend the inconsistent premise that tax relief to the school is a subsidy, but tax relief to the church that operates the school is NOT." Fortunately no such measure appeared on the 1954 voters' ballot.

The Advisory Council of Christian Schools, with which both Missouri Synod and National Lutheran Council schools were affiliated, used the same argument.

The Speakers' Manual and Fact Book, prepared by Californians for Justice in Education, presenting the case for a Yes vote on the 1952 referendum measure which would grant tax exemption to church-related schools, denied the validity of the "indirect subsidy" argument:

To call tax-freedom a subsidy is to declare a falsehood. A subsidy is a grant of public money--a gift of some sort. By welfare tax exemption, the Government relieves the exempted school, or the exempted business or anything else exempted, from making direct payments TO the state; relieves the exempted institution, in other words, from actually subsidizing the State!¹²

¹²YES, p. 44.

Both the arguments of the opponents of tax-exemption and the proponents are based on the assumption that dire results will follow the course of action they oppose. Opponents of exemption fear that parochial school tax exemption is another step toward all-out public support of non-public education, and Roman Catholic education in particular. On the other hand, the Protestants quoted in the preceding paragraphs fear that denial of tax-exemption to church-related schools will certainly lead to agitation to abolish exemptions to the churches themselves. Both contentions have some merit. A realistic appraisal, however, will indicate that the electorate of California is not likely to take action toward either extreme.

The fallacy of the pro-exemption contention that "a subsidy is a grant of public money," does not squarely meet the charge of the opponents. The latter contend that, in terms of benefit to a private school, it makes no difference in dollars and cents whether the state grants money to that school, or whether it refrains from taking the same amount by exempting it from taxation. The end result is the same: the state has aided the school. The only difference is that if the state were to provide an actual grant of funds to such a school, constitutional provisions that no public funds are to go to any sectarian agency would be violated. However, a tax exemption is in keeping with established constitutional provisions.

The Roman Catholic contention that welfare tax exemption relieves the exempted school from making direct payments to the state, actually subsidizing the state, is a valid observation. As we shall point out in Chapter V,¹³ the freedom of the church and religious institutions is best

¹³ Infra, pp. 65-9.

safeguarded by permitting them to remain tax exempt, and not required to subsidize the state.

The forthright approach to this question of whether tax-exemption is an "indirect subsidy" or not would be to look at it historically without asking, "What will it lead to?" This approach brings one to the conclusion that tax-exemption is, in effect, an indirect subsidy for religious institutions; but that this is precisely what Americans have desired. And, furthermore, it has not "led to" either of the dire extremes visualized by some, as stated in the preceding paragraphs.

Anson Phelps Stokes takes this forthright position in his chapter on "The Exemption from Taxation of Church Property and Other Favors." He states,

That this exemption is an indirect form of subsidy cannot be denied, but it seems a far wiser one than direct financial grants, and has a long history and many sound reasons of public policy to support it.¹⁴

Dr. Stokes suggests that the primary reason that such schools are tax exempt is that the state is saved far more than the amount of taxes that would be collected. That tax-exemption is intended actually to help and assist churches is brought out in the following statement,

The greatest single help given by the State to the Church in this country, other than sympathetic protection, is exemption from taxation. Such exemptions, applied to the schools of all religious denominations alike, stand on an entirely different and far sounder basis that attempts often made by the Roman Catholic Church to secure direct financial help from public funds for their parochial schools [italics added].¹⁵

Stokes states that church schools profit to the extent of more than \$100

¹⁴ Anson Phelps Stokes, Church and State in the United States (New York: Harper and Brothers, 1950), III, 423.

¹⁵ Ibid., pp. 680f.

millions a year through such tax-exemptions.

On the other hand, Stokes points out that the savings to the state "by avoiding the necessity of caring for a larger number of delinquents, as a result of the moral and religious instruction these schools" give is indeterminate.¹⁶ In addition, the savings to the state in not having to provide education for parochial school pupils runs into the billions. From six to eight million pupils are in non-public schools. Some idea of the saving may be gained by multiplying that figure by the percapita cost of education, Stokes says.¹⁷

Considerable encouragement is given to those who contend that "tax exemption is tantamount to tax support" by the dissenting opinion in the United States Supreme Court ruling in the Everson Case. At issue was the question of whether or not the so-called New Jersey bus law, providing for public transportation of parochial school children, was constitutional. Stokes summarizes,

The constitutionality of the law was contested before the New Jersey court by a tax payer, one Arch R. Everson, who challenged the right of the board of education of the township of Ewing to reimburse certain parents of parochial school students. He contended that the statute . . . violated both the state and federal constitutions.¹⁸

The U.S. Supreme Court held that the New Jersey action was not contrary to the state and federal constitutions.

The dissenting opinion was written by Justice Wiley Rutledge, and concurred in by three other justices. Pertinent to our present discussion of the "tantamount" argument, Stokes continues,

¹⁶Ibid., p. 681.

¹⁷World Almanac, 1957, edited by Harry Hansen (New York: New York World Telegram, 1957), p. 246. In 1952 23½ million pupils in 150,000 public schools cost \$7,344,000,000, per capita cost of \$315.00.

¹⁸Stokes, op. cit., II, 702.

Some of his views and historical deductions in the dicta seemed, however, to go too far in its interpretation of the First Amendment, and if applied in other cases, might result in excluding church tax exemptions, . . . and other long-established forms of impartial co-operation between the government and religious bodies.¹⁹

Stokes also notes that "A phrase in the majority opinion that seems seriously questionable is the one that rules out laws 'to aid all religions.'"²⁰ He then warns, "This principle logically carried out would mean the abandonment of such established provisions as exemption of taxation for Churches, Army and Navy chaplaincies, Thanksgiving Day proclamations, etc."²¹

Those who object to the "indirect subsidy" of tax-exemption, and advocate that "tax exemption is tantamount to tax support" are out of step with a century and a half of constitutional judgments, as Stokes points out,

There is nothing unconstitutional about a law merely because it aids all religions, if this is done impartially without preference to any religion, or any denomination. As the three words referred to appeared only in dicta and are inconsistent with the American tradition it seems likely that they may be omitted in future statements by the court defining the scope of the First Amendment [*italics added*].²²

In an effort to evaluate properly the contention that tax-exemption is tantamount to tax support as it relates to the California situation, we shall present in considerable detail the analysis of the Brief Filed Amici Curiae in the Supreme Court of California in support of the tax-exemption statute. The document states,

¹⁹Ibid., p. 707

²⁰Ibid., p. 705

²¹Ibid.

²²Ibid.

At the trial of this case plaintiff sought to introduce certain evidence in support of his indefensible point that the tax exemption created by . . . the Constitution and . . . the Welfare Exemption Code of 1951 was in some way in violation of the 14th Amendment of the Constitution of the United States "and several provisions of the California Constitution." His evidence offered in this connection, . . . was rejected by the trial Court

The Brief continues with the argument by stating,

We would not recognize plaintiff-respondent's argument on this alleged point but for his claim that the tax exemption involved at bar violates Section 8, Article IX and Section 30, Article IV of the State Constitution . . . and would be tantamount to a state "subsidy" or "appropriation" for the benefit of the exempted schools [italics added].²³

According to the Brief, the charge that exemption is really a "grant in aid" or "subsidy" is a novel contention, and without sound legal precedent. The document continues,

We have sought long and diligently for some direct judicial authority that a tax exemption is not an "appropriation," a "subsidy" or "a grant in aid." There is practically no decided case on the subject, which is no doubt due to the absurdity of plaintiff-respondent's contention. If there were any basis for the argument, all religious and church tax exemptions would be unconstitutional under the federal Constitution.²⁴

The last sentence in the previous quotation is another indication that tax-exemption of the property of religious institutions is a fundamental American principle under the constitution. It is also evidence that the California group opposing tax-exemption for parochial schools is

²³ Brief Filed Amici Curiae In the Supreme Court of the State of California, S.F. Number 19026 (Los Angeles: Parker and Son, Inc., Law Printers n.d.), pp. 41-44. The "Friend of the Court" brief was filed on behalf of Pacific Union Conference of Seventh Day Adventists and the Advisory Council of Christian Schools representing the Missouri Synod of the Lutheran Church, the National Union of the Reformed and Christian Reformed Church, Brethren Churches, Nazarene Churches, the Four Square Church, the Administrative Council of the National Lutheran Council Christian Elementary Schools, the Protestant Episcopal Church, Baptist Schools, Assembly of God Schools, and Free Methodist Churches. Cover page.

²⁴ Ibid., p. 41.

endeavoring to establish a court precedent which will challenge the entire tax-exemption structure.

The Brief notes that only one pertinent case has been discovered on the point, which is Williams v. Baldrige (Idaho 1930), 284 Pac. 203. The appellants charged that the Idaho Power Company received state aid by a tax exempting statute. The Court pointed out that the legislature must be presumed not to have intended to violate the constitution, and stated,

We have no hesitation, therefore, in declaring that the statute may be properly assumed by the court as having been intended to promote the public welfare, and that it must be regarded as having that effect, and as a statute for the accomplishment of a public purpose A lawful exemption from taxation cannot, we think, be regarded as a gift or donation to or in aid of the individual, association, or corporation in whose favor the exemption is declared.²⁵

The Brief notes that diligent search was made to find later cases on the subject but without success. The reason that no cases are on record is "that the argument . . . is so obviously fallacious that few lawyers have had the temerity to raise the point."²⁶

Since the days of the Reformation Lutherans have been sensitive to encroachments of the state on the church. But there is no threat to the proper relationship between church and state in the tax-exemption for church properties, including church-related schools. The policy of exempting from taxation all property used exclusively for religious purposes is rooted in American tradition, and supported by many court decisions, as has been demonstrated. The public utterances and writings of the Missouri Synod see in this no violation of the separation principle. Theo.

²⁵Ibid., p. 41.

²⁶Ibid.

Hoyer, in The Abiding Word,²⁷ recognizes the assumption that the state grants exemptions in recognition of the church's contribution to the moral welfare of the state. This contention is treated in detail in Chapter II under our section on the public welfare function of private schools. Regarding the charge that tax-exemption amounts to an indirect subsidy for religious institutions, and therefore is a violation of the principle of the separation of church and state, we hold that

- a. The authentic American tradition, sanctioned by the constitution and upheld by the courts, views tax-exemption as a legitimate means of recognizing the contribution of the churches to the public welfare; that this is, to be sure, an "indirect subsidy"; but that this is the attitude which our government wishes to foster and encourage; and that
- b. The Lutheran view of the separation of Church and State as delineated in Chapter V, infra, encourages tax-exemption of churches and parochial schools as being consistent with this principle.

B. Arguments in Relation to Support of Public Schools

While a thorough treatment of this subject is beyond the scope of this thesis, two arguments posed by the opponents of tax-exemption must be referred to. Both have to do with the private church-related school and its relation to, and effect on, the public school. The opponents of tax-exemption for church schools make two charges: (1) The religious school movement will subvert the public school; and (2) The religious school is an un-democratic competitor of the public school.

The first premise is upheld by the contention that, as more money is

²⁷ Theodore Hoyer, "Church and State," The Abiding Word, Th. Lastsch, editor (St. Louis: Concordia Publishing House, 1947), II, 604. Dr. Hoyer holds to a very passive view when he states, "We should not protest if (the custom of granting tax exemptions) were altogether abolished."

expended on parochial schools, and as the tax base is further narrowed by the removal of parochial school properties from the tax rolls, there will be less money for the support of public schools.

The second premise is that "the parochial school is not a partner, but a competitor of our American system of free public schools; and any aid granted to a parochial school must be to the disadvantage of our public schools."²⁸

The charge is made that schools of the Roman Catholic Church are undemocratic competitors of the public schools. In a printed reply to the Rev. Kenneth W. Cary and Homer J. Aspy of the Advisory Council of Christian Schools, Henry C. Clausen, attorney for the opponents of tax-exemption, quoted excerpts from a lawsuit filed before the State Supreme Court, as follows,

the established Roman Catholic Authority establishes and espouses the Roman Catholic doctrine, . . . and taught in its parochial schools. It has consistently claimed and taught that the American principle of church-state separation is "error." And, that the only "true" governmental concept calls for subordination of the state to the church. Also, that the "true" church concept requires the Roman Catholic ascendancy over any other sect. . . . The primary means toward that end is the indoctrination of children in its parochial schools. . . .²⁹

The question of whether or not Roman Catholic parochial schools are undemocratic goes far beyond the scope of this thesis.

There is no cause to fear that Lutheran parish schools will subvert the public school ideal or foster undemocratic ideals. In an editorial in Lutheran Education, official educational journal of The Lutheran

²⁸State of California, Official Voters' Handbook for the November 4, 1952 State General Election (Sacramento: State Printing Office, 1952).

²⁹Henry C. Clausen, letter to Kenneth W. Cary and Homer J. Aspy, (San Francisco, 315 Montgomery St., n.p., May 14, 1954).

Church--Missouri Synod, John F. Choitz writes, "As citizens we are committed to the financial support of our public schools. As early as 1870 a synodical report stated the position of The Lutheran Church--Missouri Synod."³⁰

The report, from the Western District convention of 1870, states,

Since parents and the Church . . . do not . . . fulfill their obligation toward the children, the establishment and maintenance of our public educational system is a political necessity. . . .

Since the Word of God commands the Christians to meet the requirements of the State and to obey its Laws, Lutheran Christians are obligated to pay the taxes levied by the State for its schools.³¹

The Western District report continues by pointing out that "inasmuch as Lutherans have a political responsibility for the public schools, they should see to it

- a. That Christian-minded persons be employed as teachers in the public schools, even as some State laws now forbid the employment of atheists or other notoriously immoral characters.
- b. That the teachers do not teach, or textbooks contain, anything that contradicts either the natural or the Christian religion.
- c. That a good outward discipline be maintained in these schools.³²

As to the objection that the religious school movement, if it continues to grow, will undermine the public school system, the Rev. Dr. Clarence Peters raises the issue of tax support. He writes,

This objection has weight only on the assumption that sooner or later the churches will demand and receive tax moneys, in which case indeed the public school might be weakened. Lutherans, generally speaking, do not favor the use of tax moneys for the support of the instructional program of religious schools.³³

³⁰ John F. Choitz, "Con on Conant," editorial in Lutheran Education, LXXXVIII (April, 1953), 372.

³¹ Ibid.

³² Ibid.

³³ Clarence Peters, "The Effect of the Trend Toward Religious Schools on Public Schools," Concordia Theological Monthly, XX (May, 1949), 345.

The Lutheran Church--Missouri Synod is clearly on record on this score. The 1941 Synodical Convention instructed the Board of Education to study the question of government aid to churches in the field of education. This resolution recognizes that some functions of state are essential to the nature of the State, without which it cannot be said to exist (e.g., under the constitution of the United States protection of life, liberty, and the pursuit of happiness). These, the report avers, "can be demanded of the State by all citizens and therefore also by the Church."

The report then refers to "Adventitious Services of the State," which the State could refrain from providing without neglecting its fundamental duties. "Chief of these is education. . . ."

The report states that the modern school program has two aspects: (1) The social service, and (2) The teaching program. It concludes with the statement,

Because it is most unwise for the Church to accept such subsidy for its teaching program, even though the right to control has been waived by the State, we as citizens should not agitate for State support but oppose the granting of State funds for sectarian use.⁵⁴

Purely on logical grounds Dr. Peters refutes categorically and conclusively the argument that church schools will undermine the public school system. He points out that in spite of the vast Roman Catholic system of parochial schools, fifty per cent of Roman Catholic children are still enrolled in public schools. As for the Missouri Synod, only thirty per cent of its grade school children are in its Christian day

⁵⁴The Lutheran Church--Missouri Synod, Proceedings of the Thirty-Ninth Synodical Convention, June 21-29, 1944 (St. Louis: Concordia Publishing House, 1944), pp. 132ff.

schools. He points out,

If the day should come when all the churches of America would have schools of their own, there would still be seventy or eighty million people, or half the population of the United States whose children would attend the public school. Moreover, the majority of graduates from religious schools would attend a public high school.³⁵

In the same article Dr. Peters replies to the second stated objection, i.e., that the parochial school is undemocratic. He wrote,

There are those who believe religious schools will interfere with, and even prevent the attainment of the democratic ideal. In the opinion of these people all the youth of the nation should attend one great educational institution of the State that they may learn to live together democratically. A group . . . has expressed the fear that if non-public schools "should become so numerous or so permanent as to constitute an institutionalized rival to the common public schools," they will be "a threat to the democratic process."³⁶

Such "criticism is predicated on the assumption that only the public schools are qualified to teach and to train for the democratic way of life," Peters states. However, he points out that the very opposite is true; that "people who are taught to know the true God, . . . to obey His Word, who are taught to love and to respect their fellow men to be helpful to them, who are taught to respect and to obey their government, are not the people who will be a threat to the democratic way of life."

The strength of a democratic nation lies not in uniformity of schools, but in the "inculcation of the truths of God which are basic for the ideals of democratic living." There must be a certain uniformity in the fundamentals, but that "diversity in a democracy is one of its strong characteristics."³⁷

³⁵Peters, op. cit., p. 345.

³⁶Ibid.

³⁷Ibid.

Lutheran parochial schools will not subvert the public school, but instead actually aid and assist the public school. Peters mentions at least four benefits which come through Christian day schools to the public schools. They are:

- a. Parallel school systems are a safeguard against monopoly and corruption in education.
- b. Religious schools contribute to a higher community morality, and this is certainly of benefit to the public schools.
- c. Religious schools and public schools are mutually helpful in maintaining a high scholastic standard.
- d. Religious schools have been a benefit to the public schools in the matter of providing facilities and also relief from overcrowding.³⁸

Privately, opponents of tax-exemption for parochial schools confided that there would be no problems over the issue if only schools of Protestant churches were involved. Certainly the characterizing of parochial schools as undermining the public school system and as teachers of undemocratic principles, does not apply to schools maintained by The Lutheran Church--Missouri Synod.

C. Parochial Schools Serve No Public Function

We have considered this charge, advanced by Harold E. Fey in The Christian Century, that parochial schools can not "rightly claim to have a public function and so be entitled to exemption from paying taxes"³⁹ under Chapter II.⁴⁰ Fey argues that Protestant, as well as Roman Catholic

³⁸ Ibid., p. 347.

³⁹ Fey, op. cit., p. 3f.

⁴⁰ Supra, pp. 21ff.

schools, "serve an essentially religious, personal and private end."

It has been pointed out in Chapter II that the Roman Catholic Church maintains that the California Legislature would be acting illegally in extending tax-exemption to private schools unless they were convinced that such schools were contributing to the welfare of more persons than only the number of children in the schools.

The opinion of the State Supreme Court, which upheld the constitutionality of the exemption statute, also made it clear that it considered that it was enacted to promote the general welfare through encouraging the education of the young.

The attitude of The Lutheran Church--Missouri Synod is reflected in the resolution of the California and Nevada District of the Synod adopted at its Forty-second Convention in 1952: "It looks upon such exemptions to church properties as a recognition of the contribution of the Church and its agencies to the welfare of the State. . . ."41

Historically tax-exemptions have always been granted to religious institutions primarily because they serve a public welfare function. The exemption of church properties from taxation is rooted in American tradition from the beginning of our nation, and is based on European tradition which goes back to the fourth century. Emperor Constantine the Great (288?-337), after his conversion, gave the Church this privilege.⁴²

⁴¹The Lutheran Church--Missouri Synod, Proceedings of the Forty-second Convention of the California and Nevada District, June 23-26, 1952, (St. Louis: Concordia Publishing House, 1952), p. 57; cf. infra, p. 91.

⁴²Stokes, op. cit., II, 419.

Traditionally the property of non-profit private schools, churches, church schools, cemeteries, and the like, are exempted from taxation in the United States. Such exemptions, according to Stokes, are either required, authorized, or taken for granted in the forty eight states.⁴³

There is common agreement that this exemption is accorded religious institutions because they serve public purposes and serve the public welfare.

Under his chapter on "Tax Exemptions" Carl Zollmann in American Church Law cites numerous court decisions where this principle is clearly stated. For example, the Nebraska Supreme Court said in 1890,

As said by many eminent authorities, exemptions are granted on the hypothesis that the association or organization is of benefit to society, and that it promotes the social and moral welfare, and, to some extent, is bearing burdens that would otherwise be imposed upon the public to be met by taxation.⁴⁴

The Missouri Supreme Court has rendered the opinion:

It is presumed . . . no argument is necessary to show that church purposes are public purposes. . . . To deny that church purposes are public purposes is to argue that the maintenance, support, and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and extend their protection to all in that faith and mode of worship they may choose to adopt.⁴⁵

D. Summary of Chapter

It has been noted in the preceding pages that the California Taxpayers Alliance (CTA) was formed to marshal systematic opposition to tax-exemption

⁴³ Ibid., p. 419.

⁴⁴ Carl Zollmann, American Church Law (St. Paul: West Publishing Co, 1933), p. 328. Y.M.C.A. of Omaha v. Douglas County (1900).

⁴⁵ Ibid., pp. 532f. City of Hannibal v. Draper (1852).

for non-profit private schools of less than collegiate grade. Prominent in the CTA were Protestant clergymen, city and area councils of churches, Unitarians, Jews, and men in civic life who were Masons. Some Lutherans, also of the Missouri Synod, worked against exemption. Some public school administrators and teachers, as well as those who oppose all non-public schools, also joined the ranks to work for defeat of the measure.

The argument was raised that the extension of tax-exemption to parochial schools is a violation of the principle of separation of church and state because tax-exemption is tantamount to support from the public. Therefore, exemption amounts to a subsidization of religion by the state. We have held that tax-exemption is not a "grant" to church schools, but acknowledge that it is, indeed, an indirect subsidy, as the opponents stated. This is, however, the honored practice in America, upheld by many court decisions, in recognition of the contribution the church makes to the welfare of the state.

We conclude that the religious school movement will not subvert the public schools by siphoning off educational funds. Although some doubts are expressed as to the contribution the church makes to the welfare of the state in the case of Roman Catholic Schools, we demonstrated that the Christian day schools operated by The Lutheran Church--Missouri Synod inculcate patriotism and democratic ideals. Lutherans also look upon the support of public schools as part of their God-given responsibility to the state.

CHAPTER IV

THE REAL ISSUE--THE ROMAN CATHOLIC CHURCH

A. Her Public Official Pronouncements: Tax Support

In Chapters III and IV the arguments presented by opponents of tax-exemption were discussed. However, all the arguments raised are somewhat secondary to what is evidently and demonstrably the underlying reason for such opposition. The real underlying issue is "the Roman Catholic Church which, through its California hierarchy, is obeying the orders of the Roman Pope."¹

Most of the propaganda and pamphleteering aimed at the electorate emphasized the cost of the proposed measure to the taxpayer, and suggested that the principle of the separation of church and state would be violated. Of the six reasons advanced in the Official Voters' Handbook, issued by the Secretary of State, under "Arguments Against Proposition 3" in the November 4, 1952, general election only two raised the issues involving the Roman Catholic Church. And they did so in mild terms, as follows,

To exempt only parochial schools is especially objectional for other reasons. . . . The parochial school is not a partner, but a competitor, of our American system of free public schools; and any aid granted to a parochial school must be to the disadvantage of our public schools

The proposed measure violates the American principle of separation of Church and State²

¹"Why Californians Must Again Say No!," a pamphlet printed by the California Taxpayers Alliance, 830 Market Street, San Francisco.

²Official Voters' Handbook, State General Election, November 4, 1952 (Sacramento: California State Printing Office, 1952).

The Roman Catholic Church is not mentioned by name; however, in California "parochial schools" means Roman Catholic schools in the public mind.

Some newspapers felt constrained to point out the real issue, as did the San Rafael Independent-Journal, in the following editorial,

Now it comes out. California Taxpayers Alliance has only one purpose. Defeat the Waters Bill in November. And why? Because this measure . . . exempts Roman Catholic parochial elementary and secondary schools from taxation. It also exempts private schools of other faiths, but the California Taxpayers Alliance apparently is only concerned about Catholic schools. . . . It now stands for what it seemingly really is: Anti-Catholic.³

That Rome was the real target was patently clear in approaches the California Taxpayers Alliance made to clergy of Protestant denominations. A Handbook for Speakers and Chairmen prepared by the Alliance devoted its twenty-two pages almost entirely to the Roman Catholic question. The lithographed booklet charges that the principle of the separation of church and state is at stake, and that parochial schools are in direct competition with the American public school. Another section charges that Roman Catholic leaders palmed a "legislative loophole" in 1944 when the voters of the state added the so-called "Welfare Exemption Amendment" into the constitution, and then "railroaded" enabling legislation through the State Legislature in 1951.⁴ Five other sections of the Handbook report the probable tax loss to the state if schools belonging to churches are exempted.

Even the staid legal document, Brief Filed Amici Curiae in the Supreme

³"What Is Real Purpose of California Taxpayers Alliance?," Independent-Journal (San Rafael, California), April 4, 1952, editorial page.

⁴Cf. supra, Chap. I, section D, "History and Present Status of the Problem," pp. 7ff.

Court of the State of California, filed on behalf of most of the non-Roman Catholic supporters of private schools points out in a separate paragraph entitled "Arguments Based on Religion and Religious Prejudice Have No Proper Place in this Case," which reads,

It is impossible to read plaintiff's briefs without coming to the conclusion that the impulse which motivates his action and his entire argument is a bitter feeling of prejudice and hatred for the Roman Catholic Hierarchy and Catholic "parochial schools." One reading plaintiff's arguments could only conclude that Roman Catholic schools of less than collegiate grade are the only educational institutions, the proprietors of which are interested in the tax exemption here under consideration.⁵

After making a plea for the non-Roman Catholic parochial schools in the state for a careful consideration of their rights, the document concludes with a reference to "the Roman Catholic Hierarchy against which plaintiff's arguments on file in this cause have been so bitterly directed."⁶

It must be recalled to mind that the above-mentioned Brief was independently filed by Protestant churches and organizations.

"One religious organization . . . the Roman Catholic Church, through its California Hierarchy," is fighting to use "public tax money for support of its school system," a pamphlet circulated by the California Taxpayers Alliance charges. Tax exemption is the first step toward the eventual goal of "diversion of public money for the support of their own parochial school system."⁷

⁵ Brief Filed Amici Curiae, in the Supreme Court of the State of California, S.F. Number 19026 (Los Angeles: Parker & Son, Inc., Law Printers, n.d.), p. 45.

⁶ Ibid.

⁷ Why Californians Must Again Say No!, a pamphlet printed by the California Taxpayers Alliance, 830 Market Street, San Francisco.

It is no secret that public support of its schools has been the goal of the Roman Catholic Church. The materials prepared by the California Taxpayers Alliance point out that "Pope Pius XII in September of 1951 called on all democratic countries to adopt legislation giving Roman Catholic schools equal privileges with public schools."⁸

Just how intent the Church is on achieving this objective is open to conjecture. Anson Phelps Stokes points out:

There have been three groups in the Roman Catholic Church with reference to aid from tax funds for parochial schools. The first and largest group, represented in general by the hierarchy and priesthood, and most of the laity, believes that such grants are legitimate and strongly favors them; the second, represented by a small group of liberals, recognizes that such grants are probably unconstitutional under recent opinions of the Supreme Court, . . . ; the third group, also a small but thoughtful one, holds a somewhat intermediate position,⁹

If "the hierarchy and priesthood, along with most of the laity . . . strongly favors" tax support of parochial schools, the conclusion is justified that it is the determination of the Roman Catholic hierarchy to secure tax support for its schools at the earliest possible moment. Stokes sees a hopeful sign in the fact that "the campaign for government aid for parochial schools is now generally conducted in an open way; there is no attempt to hide its purpose."

Stokes notes that a Father Richard J. Gabel conducted a study of state aid to church schools in 1937, and discovered that nearly every state forbids the use of public funds for sectarian purposes. Commenting on Gabel's

⁸Handbook for Speakers and Chairmen (San Francisco: California Taxpayers Alliance, 830 Market Street, [1952]), lithographed, Sec. VI.

⁹Anson Phelps Stokes, Church and State in the United States (New York: Harper and Brothers, 1950), II, 682.

findings Stokes concludes his chapter on "The Present Status of the Movement to Secure State Aid for Parochial Schools," with the comment,

The situation has changed little since this authoritative survey was made more than a decade ago. There has, however, been on the one hand a definite increase of Roman Catholic pressure for direct State financial aid, and on the other more determination on the part of non-Catholic groups that such aid should not be granted to denominational or parochial schools as being both unconstitutional and unwise.¹⁰

The issue is further muddled by seemingly contradictory utterances and apparently inconsistent actions by Roman Catholic leaders. Stokes quotes the Jesuit weekly, America, which stated that "public funds are actually being allocated, in no less than 350 instances, to American parochial schools today."¹¹ But he hastens to add, "But that was in 1947, before the McCollum decision and the interchange of letters between Cardinal Spellman and Mrs. Eleanor Roosevelt."¹²

The spirited exchange between Francis Cardinal Spellman and Mrs. Eleanor Roosevelt points up the observation that we find it difficult to determine exactly what the real Roman Catholic position is. According to Stokes, "Cardinal Spellman was among the members of the hierarchy who had long favored direct Federal aid to parochial schools."¹³ Mrs. Roosevelt took note of his position in her column, "My Day," in the New York World Telegram on June 23, July 8, and July 15, 1949, and defended the position that "public schools . . . are the only schools that are . . . tax-supported schools." The Cardinal, Archbishop of New York, replied angrily, charging that Mrs. Roosevelt has written a "record of anti-Catholicism for all to

¹¹ Ibid., p. 689.

¹² Ibid., p. 690.

¹³ Ibid., p. 746.

see . . . documents of discrimination unworthy of an American mother."

The country was much agitated from the day, July 21, when his letter was published, until the papers on August 6 published a statement by the cardinal, "written in a different temper from that of his letter attacking Mrs. Roosevelt, . . . showing a constructive and constitutional attitude toward the problems involved."¹⁴

The significance of the cardinal's modified position is outlined by Stokes in the following paragraphs,

It was the first time that the hierarchy . . . recognized publicly that direct aid for the support of parochial schools was . . . unconstitutional. Up to this time the church had . . . stated frankly its conviction that parochial schools . . . should share . . . in the distribution of federal funds for direct aid¹⁵

In the second place, the cardinal's statement . . . laid his entire stress on the importance of students in parochial schools receiving the benefit of auxiliary educational services . . . which the Supreme Court by majority vote in the Everson case had declared to be constitutional¹⁶

Faced with the hard fact that "the constitution or statutes of practically every American state prohibit grants from tax money to schools conducted by any religious body,"¹⁷ and the further fact that the Supreme Court of the United States has stated in the Everson and McCollum cases¹⁸ that financial aid to schools under religious auspices is unconstitutional, the Roman Catholic hierarchy has had to accept its temporary setback, and concentrate on so-called "auxiliary services."

¹⁴ Ibid., p. 754.

¹⁵ The Cardinal's statements were made before the Everson and McCollum decisions of the Supreme Court which declared Federal aid to schools under religious auspices unconstitutional. The hierarchy recognized that previously nearly all states forbade sectarian aid from tax funds.

¹⁶ Stokes, op. cit., p. 755.

¹⁷ Ibid., p. 745.

Such services include bus transportation, school lunches, health programs, and provision of certain text books. These are generally interpreted as being services to pupils, and not grants to schools as such. Such aid, according to Stokes, "under certain circumstances, had been considered constitutional in the opinions in both the *Everson* and *McCullum* cases . . . though a strong minority of the court dissented"19

B. Recognizing a Temporary Set-back

A recent official pronouncement by the National Catholic Welfare Conference indicates that the Roman Catholic Church has relaxed its demands, for the time being at least, for actual tax support for its parochial schools. The statement affirms that private schools "are an integral part of the American educational system," and that parents have the primary right to attend to the education of their children. The statement denies that religious education is a "discordant factor in American life," but that Christian training "provides the strongest cement that can possibly bind a nation together."²⁰

Not a word is said of their intention to ask for anything beyond services for children as citizens. The closing paragraph of the statement

¹⁸The *Everson* case: 330 U.S. 1. *Everson v. Board of Education*, involving free bus transportation for parochial school pupils (1947-48). The court held constitutional a New Jersey law permitting free bus transportation for parochial school pupils, and outlined certain essentials of Church-State separation. Cp. Stokes, *op. cit.*, II, 702-16.

The *McCullum* case: 333 U.S. 203, *McCullum v. Board of Education* (1948). Released-time instruction by churches in school buildings was declared unconstitutional. Cp. Stokes, *op. cit.*, II, 515-23.

¹⁹ Stokes, *op. cit.*, p. 755.

²⁰"Public Aid for Private Schools? Catholic and Protestant Views," *U.S. News and World Report*, XXXIX (December 2, 1955), 102-5.

concludes,

The students of these schools have the right to benefit from those measures, grants or aids which are manifestly designed for the health, safety and welfare of American youth, irrespective of the school attended.²¹

The entire statement seems fair, and recognizes the existing attitudes in the United States toward public support of private religious schools. However, in a reply to the statement in the same issue of U.S. News, Glenn L. Archer, executive director of Protestants and Other Americans United (POAU), labels the statement "studied nonsense . . . written for the express purpose of justifying a demand for governmental aid and legal recognition of parochial schools as an integral part of the American education system What the bishops are really asserting is . . . their alleged 'right' to exist at public expense."²²

The outlook at present in this matter is in the direction of less benefits to parochial schools rather than more. On March 18, 1957, under "Periscoping Religion," Newsweek predicted,

You can expect fights over public transportation for parochial school children, like that in Maine, to break out nationwide. Next big battleground is likely to be Connecticut, where twenty-five of 170 school districts already provide such service"²³

It is our conclusion, therefore, that despite the expressions of willingness to take a more constitutional attitude toward parochial school aid, the Roman Catholic hierarchy is as determined as it always has been to work ceaselessly for public support of its schools. The hierarchy has, furthermore, created a strong public reaction against its educational

²¹Ibid., p. 103.

²²Ibid., p. 105.

²³Newsweek, XLIX (March 18, 1957), 89.

policies. This reaction is, in turn, tending to cause a narrower application to be placed upon the principle of the separation of church and state.

These conclusions are warranted in the light of Stokes' observations,

This should mean that in the near future, at least, we are to understand: (1) That the Church will make no attempt to secure direct government aid for the running expenses of parochial schools; and (2) That it will continue to make a determined effort to see that such matters as free bus transportation, (etc.) . . . for pupils in parochial schools are treated exactly the same in the matter of appropriations as for pupils in the public schools.²⁴

Events since Dr. Stokes wrote in 1950 have borne out his predictions.

Not until the Roman Catholic hierarchy disavows all claim to public funds for its parochial schools--an unlikely prospect--will cries of "backdoor assault on the public treasury" cease to be heard at even the slightest attempt to extend public benefits to these schools.

A question which deserves further study in this connection is that of whether the schools of the Roman Catholic Church contribute to the cause of American freedom and democratic ideals. Benefits through "auxiliary services," tax exemption, etc., are granted on the assumption that they do.

²⁴ Stokes, op. cit., II, 757.

CHAPTER V

"UN-LUTHERAN" VIEWS HELD BY LUTHERANS, AND THE HISTORIC LUTHERAN VIEW

The chief difficulty in evaluating, or even in discovering so-called "un-Lutheran" views lies in the fact that the published materials bearing on the subject almost never have given expression to these views. Such views may be discovered in the more or less off-hand expressions or opinions and feelings about church-state relationships which one hears when Lutheran pastors gather. In pastoral conferences, when issues involving the relationship between church and state are presented or referred to, there is usually a lack of interest in them, as if they were outside the sphere of Christian concern; or there is also a tendency to relegate them to the forbidden area of "politics," or to dismiss them with the statement that "we should not mix church and state."

Scope of this thesis does not warrant a thorough perusal of all the official journals, books, and synodical and district convention proceedings, nor of the journals of synods other than The Lutheran Church--Missouri Synod. In the materials listed in the Bibliography no support is lent to what we shall call "un-Lutheran" views of the relationship between church and state.

The "un-Lutheran" views referred to in the following pages stem from at least one of three factors:

1. A misunderstanding of Lutheran theology and practice as it pertains to the relationships between church and state. Essays from The Abiding Word, an anthology of Missouri Synod doctrinal essays,

Vols. I¹ and II² and references to mid-nineteenth century sources³ clarify the Lutheran position regarding the separate functions of church and state.

2. Holding to unrealistic, untenable, and unhistorical views of "absolute" separation of church and state. This question will be discussed in this chapter.⁴
3. The third factor which entered into the issue of tax-exemption for non-profit private schools in California, especially among Lutheran clergymen, is the fear of the Roman Catholic Church's aggression and the extension of its power and influence. This very real factor will be discussed later in the chapter.⁵

A. "We Should Obey the Law, Not Seek to Change It"

When the issue of tax-exemption for private schools was being debated in California, the view was expressed by some that Christians should obey the laws of the state, and should not make any efforts to seek to change the laws or influence the actions of legislators. The state, they contend, is to be governed by reason, whereas the church is governed by revelation and the Gospel. This position, they hold, is indicated by the applications of the Fourth Commandment, which enjoins obedience to constituted authority. An appeal is made to the thirteenth chapter of St. Paul's Letter to the Romans which charges Christians to be subject to the higher powers.

In reply to those who insist on a submissive attitude toward all legislation, and who claim that Christians would be "mixing into politics"

¹ Infra, pp. 66-9.

² Infra, pp. 75f.

³ Infra, pp. 82f.

⁴ Infra, pp. 79-87.

⁵ Infra, pp. 87-90.

if they were to work toward the passage of legislation favorable to the point of view of the church, we must understand what the separation of church and state entails. The literature of The Lutheran Church--Missouri Synod is clear in declaring that this separation has to do with the functions, means and methods of each, as will be pointed out in section D of this chapter.⁶

A reference to the writings of the "fathers" of the Missouri Synod may suffice to dispose of the objection, sometimes voiced, that we should take a submissive attitude toward the law and law-making. In the essay on "Civil Government" in the two-volume set of doctrinal essays, The Abiding Word, Paul F. Siegel summarizes the opinions of theologians in papers delivered at six separate synodical district conventions between the years 1871 and 1909. The consensus of opinion is given in these words,

if the Constitution under which the government operates permits its citizens to seek a change of the existing laws, we may make use of all legal ways and means to effect such a change, to abrogate insufficient, unwise, impractical legislation and substitute for it legislation really serving the best interests and welfare of the community. But as long as a law exists, the citizens of the commonwealth which through its legislators has enacted it must render obedience to it.⁷

This statement goes much further in urging the change of existing laws than many Lutherans are ordinarily ready to go. If a group of Christians combined forces to seek the exemption of private non-profit schools of less than collegiate grade in the belief that such practice really served "the best interests and welfare of the community," there certainly is no sound reason why they should not do so. In the case of tax-exemption

⁶Infra, pp. 79ff.

⁷Paul F. Siegel, "Civil Government," The Abiding Word, edited by Theo. Laetsch (St. Louis: Concordia Publishing House, 1946), II, 519.

for parochial schools, the Lutheran attitude is that such exemptions will be gratefully accepted if a beneficent state will accord us the privilege.

An equally justifiable attitude is, "Exemption serves the best interests and welfare of the community. It is in keeping with the historic traditions of our nation, which has carefully sheltered and nurtured Religious freedom. We shall seek exemption for the schools of our churches."⁸

A concise definition of the proper relationship between church and state is found in an essay by Carl S. Mundinger.⁹ He points out that the separation of these two is in the areas of purposes, means and methods, and these two sets of purposes, means and methods are to be kept separate in our thinking. Since government has taken over many duties and functions in the past decades, many church-state problems will increase. He writes,

We of the Missouri Synod have an additional set of problems, arising from the fact that . . . for the past twenty-five years we have gradually ceased being an immigrant Church. For about seventy-five years we had relatively little to do with church-state relationships. . . . Furthermore, many believed that outside of obeying the laws and paying their taxes Christians should have little to do with government. The danger of mixing Church and State was ever present in the thinking of our fathers. It was at times a convenient excuse for non-participation in governmental affairs[italics added].¹⁰

Now that the situation has changed, and our people will be more and more affected by American thinking, he asks,

What can the church do? The church must ever enlighten the conscience of her members on troublesome public questions. Keeping strictly within her sphere, the church must put forth every effort that the

⁸Th. Hoyer writes, "We should not protest if (tax exemptions) were altogether abolished." The Abiding Word (St. Louis: Concordia Publishing House, 1946), II, 604.

⁹Carl S. Mundinger, "Dangers Confronting the Church Today," edited by Th. Laetsch, The Abiding Word (St. Louis: Concordia Publishing House, 1946), I, 502.

¹⁰Ibid.

¹¹Ibid.

a nation within whose boundaries she exists become more and more permeated with the principles of righteousness, of justice¹¹

There is no justification found in the writings of the Missouri Synod "fathers" for views that would consign the law-making functions of the state solely to unenlightened reason.

B. "Churches and Their Schools Should Pay Taxes"

Another viewpoint frequently expressed is to the effect that "to be truly free the church should pay taxes like everyone else." To indicate that this view is seriously entertained in the Missouri Synod we refer to a letter addressed to the Public Relations Department of the California and Nevada District by the Rev. Prof. Richard T. duBrau, professor at California Concordia College, Oakland. He took issue with the director of the department in 1952 for espousing the cause of tax-exemption for parochial schools. He wrote of the "viciousness of the measure," and observed that "after all, our people are Christians who don't want to go to Caesar to beg him for his bounty." He concluded,

That we see the sorry spectacle before us today of Lutheran pastors campaigning for MATERIAL gain, merely goes to show a trend in the church to put dollars above principle, money above faith, In my Bible . . . Christ says, "Pay your taxes."¹²

A pastoral conference in the Evangelical Lutheran Church went on record to affirm the same position. In June, 1947, the Southern Minnesota District of the Evangelical Lutheran Church questioned the wisdom of tax-exemption for churches. The district represented about 140,000 members. They declared the world developments make "it imperative that the Christian

¹¹ Ibid.

¹² Quoted with Dr. duBrau's permission.

religion, and all religions make themselves completely free of all obligations of debt, except that of service, to any state or government."¹³

However, according to Stokes, this view is supported chiefly by "radical organizations and . . . a few church leaders. It has never gained much public support, . . ."¹⁴

Chief advocate of the abolition of tax-exemption to churches was Charles Clayton Morrison, editor for many years of The Christian Century. In a long editorial on April 9, 1947, entitled "Churches Should Pay Taxes," the journal stated flatly that "the present system of tax exemption for churches is wrong. . . . We hold that churches should pay taxes on their church property and that Protestants should lead the way in demanding a law abolishing for all churches the subsidy the state now gives them."¹⁵

The reasons given to bolster the premise are as follows:

1. Churches should pay their own way.
2. The accumulation of church property adds a burden to taxpayers.
3. The State uses its taxing power to compel citizens to support churches they do not approve of.
4. It encourages political power through property holdings.
5. The Roman Catholic Church will overshadow Protestantism.
6. Exemption tends to multiply churches by making ownership of property unduly attractive.
7. There is little difference between subsidy and tax exemption.

Dr. Stoke's observation that this position is "receiving little Church support" is bolstered by the fact that in The Christian Century of April

¹³ The Christian Century, LXIV, July 9, 1947.

¹⁴ Anson Phelps Stokes, Church and State in the United States (New York: Harper and Brothers, 1950) III, 421.

¹⁵ The Christian Century, LXIV (April 9, 1947), 454-6.

30, 1947, four letters from readers were printed, three of which disagreed with the editorial.¹⁶ (We are assuming that the periodical follows customary editorial procedure of publishing a sampling of letters according to the ratio of total letters received.) Apparently the late Paul Hutchinson, who followed Morrison as editor, and the present editor, Harold E. Fey, do not hold to Dr. Morrison's extreme views, since the position taken in the 1947 editorial has not been pressed in the last ten years. Both Hutchinson and Fey were staff members in 1947.

The typical Roman Catholic view was articulated in an editorial in Commonweal, Roman Catholic lay journal, which stated,

On the question of tax-exemption, the reason behind it seems to us in the best American tradition, rather than the reverse. We live in a pluralistic society, with a government of delegated powers. Tax-exemption for educational, charitable and religious ventures supports the American ideal by encouraging various non-governmental groups and organizations to carry out such activities rather than leave them to a potentially all-powerful state.¹⁷

Of particular significance to the Protestant viewpoint is the recent statement of the prominent religious educator, George Huntston Williams, who wrote in Religious Education,

The second level (of aid to schools under the auspices of organized religions) is tax-exemption of parochial school properties. It is not now under debate, and I do not think that it should be. Custom and the legal doctrine of stare decisis are against upsetting an immemorial practice without which churches and synagogues could never maintain themselves in the strategic centers of population. To introduce taxation of ecclesiastical properties would bring the whole problem into the arena of bitter political debate and precipitate exactly that kind of social turmoil and reprisals that the principle of separation of church and state originally sought to obviate [emphasis added].¹⁸

¹⁶ Ibid., LXIV (April 30, 1947) 601.

¹⁷ "Churches and Tax-Exemption," Commonweal, LXV (December 28, 1956), 324f., editorial.

¹⁸ George Huntston Williams, "Church-State Separation and Religion in the Schools of our Democracy," Religious Education, LI (September—October, 1956), 373.

Williams concludes his observations on tax-exemption for church properties by pointing out that the constitutional provisions of separationism should not be called upon "as long as government refrains from exploiting tax-exemption as a means of exercising a political pressure on religion, and so long as organized religion . . . remains content with tax relief"19

Dr. Theodore Hoyer gives the concensus of opinion in The Lutheran Church--Missouri Synod, dating aback as far as 1866, in The Abiding Word, where he states,

Without violation of the principle of separation the State may grant the Church certain privileges, because it recognizes the moral value of the Church in the community and so its service to the State. That is the reason why most generally church property is tax-free in our land.²⁰

This view, expressed by Prof. Hoyer, reflects Synodical Reports from nine district conventions, and two articles in Theological Quarterly by William Dallmann.²¹

Specific application to Christian day school tax-exemption issue is to be found in our treatment of the public welfare function of these schools in Chapter II.²²

The entire question of tax-exemption for all religious institutions will be under close scrutiny in coming years. The writer stated in The American Lutheran, on the basis of statements of the opponents of parochial school

¹⁹Ibid.

²⁰Hoyer, op cit., p. 604.

²¹Ibid., p. 775.

²²Supra, pp. 21ff.

school tax-exemption in California that they are going to continue to fight, that "sooner or later the whole principle of tax exemptions for religious and charitable institutions is to be called into question."²³

Anson Phelps Stokes writes in the same vein,

In view of the antichurch movement in various parts of the world, the temper of the times, and the need for additional public revenue, it is not unlikely that the whole question of tax exemption for religious and educational institutions will come to the front in other parts of the country in the not far distant future.²⁴

However, he does not believe it will affect the churches, but some schools.²⁵

These observations give further significance to the issues in California, where the parochial school battle is being waged. California might well become the arena in which a contest of national significance over tax-exemption for religious institutions will be waged.²⁶

C. Missouri Synod Does Not Want Tax Support

The California and Nevada District of The Lutheran Church--Missouri Synod acted in a manner consistent with the synod's expressed practice when it declared at its Forty-second convention that "it looks upon such exemptions to church properties as a recognition of the contribution of the Church . . . to the welfare of the State"²⁷

However, acceptance of exemption from taxation is as far as the Synod

²³Robert K. Menzel, "Supreme Court Upholds California Law," The American Lutheran, XL (February, 1957), 15.

²⁴Stokes, op. cit., III, 427.

²⁵Ibid.

²⁶Cp. Appendix IV.

²⁷The Lutheran Church--Missouri Synod, Proceedings of the Forty-second Convention of the California and Nevada District, June 23-26, 1952 (St. Louis: Concordia Publishing House, 1952), p. 57.

will go in accepting aid from the government. The California and Nevada District resolution disavows any further aid from the state when it states, that "it does not . . . seek tax support for them (its parish schools)" ²⁸

Among the characteristics of the Missouri Synod's school system which Stokes calls attention to he notes the synod's "dependence entirely on self-support and the unwillingness of the Church to ask for any support from public funds. . . . In this respect there is a striking difference between the supporters of the Roman Catholic and the Lutheran schools." ²⁹

A pronouncement made by the Missouri Synod at its twenty-first convention in 1890 stated that

since God has in this country vouchsafed unto us the precious boon of religious liberty . . . we . . . condemn all demands upon the public funds for the erection or maintenance of parochial schools. ³⁰

In an essay on "Church and State," Dr. Hoyer asks, "Is it mixing of church and state if the State extends aid to such institutions?" Drawing on Missouri Synod sources in synodical essays and theological journals listed in the bibliography of The Abiding Word, he draws the conclusion that "there seems to be no cause for objection when the State grants facilities for religious teaching, rooms, etc. . . ." But he concludes, "Opinions differ . . . on such questions as granting . . . financial support to religious schools." ³¹ Dr. Hoyer is looking at the question in the

²⁸ Ibid.

²⁹ Stokes, op. cit., II, 673.

³⁰ Albert G. Merckens, The Policies of the Missouri Synod with Regard to Elementary Education by Means of Christian Day-Schools (St. Louis: Concordia Publishing House, 1935), Appendix III, p. 43.

³¹ Hoyer, op. cit., p. 601.

preceding words from the viewpoint of the state, where many differing views are entertained. His argument from the viewpoint of the church follows shortly thereafter.

From the side of the state, this question has been settled by Supreme Court decisions since The Abiding Word was published in 1946. That answer has been given in the dicta in both the Everson and McCullum cases in the Federal Supreme Court. Stokes declares,

In both the Everson and McCullum cases (the Court) had clearly excluded all financial aid to such schools from public funds--an opinion shared by eight of the nine justices in the McCullum decision.³²

The preceding quotation from Stokes occurs in a context of a discussion of attempts to include Catholic schools in proposed programs of federal aid to education. Stokes declares,

If, therefore, this . . . becomes law it is likely to be voided by the Court as unconstitutional. . . . The general policy of the Federal government is neither to make nor permit grants from public funds for any denominational religious purpose. Exceptions to this rule are trifling."³³

Hoyer then goes on to state that as far as the church is concerned, it is not advisable for it to take grants from the government for its schools. He writes,

Every help that the State offers to schools beyond that given to all citizens entitles the State to expect a certain measure of participation in the management of the school. . . . It pays to recall the lesson of history that government officials are very often anxious to extend their rights and powers; and even if . . . these grants . . . are safeguarded by all kinds of promises, they can at least cause trouble all out of proportion to the benefit received. . . . Any grant from tax funds for any church purpose really gives officials the right of examination of how the money is spent and so a voice in the management of the institution, which may at any time

³² Stokes, op. cit., II, 730. Cp. also Supra, footnote 18, p. 62.

³³ Ibid.

have serious results.³⁴

The value of the Hoyer statements lies in the fact that this essay on "Church and State" appears in the two-volume work, The Abiding Word, "a close study of the doctrinal essays . . . based on the writings of the fathers and founders of our Synod."³⁵ His summary, then, may be considered to be a comprehensive statement of the long-standing position of the Missouri Synod on the question of money aid to its schools. While the synod has not been too concerned, apparently, with whether or not money grants were a violation of the church-state separation principle from the state's side, they were very positive that it would be poor business from the church's viewpoint.

The definitive statement of the policy of The Lutheran Church--Missouri Synod in the matter of state aid to its parochial schools was made by the thirty-ninth convention in 1944. Since it represents the Synod's attempt to answer the question of financial aid, substantial portions of the report follow:

Twofold Aspect of the State's School Program

The modern school program of the State has two aspects: (1) The social service program (library services, etc. . . .); and (2) The teaching program (curriculum, teaching, etc. . . .).

A vital difference exists between these two programs. . . . The social service program is administered through the schools because the schools offer the easiest access to the children.³⁶

³⁴Hoyer, op. cit., p. 601.

³⁵Theo. Laetsch, editor, The Abiding Word (St. Louis: Concordia Publishing House, 1946), II, Preface.

³⁶The Lutheran Church--Missouri Synod, Proceedings of the Thirty-Ninth Convention, June 21-29, 1944 (St. Louis: Concordia Publishing House, 1944), pp. 132ff.

Under the heading, "Social Service Program," the writers of the report point out that the social service program is available to all school children irrespective of their school. When the state renders these services it is not promoting the tenets of a church. Neither sovereignty on the part of the state nor sacrifice of principle on the part of the church is involved.

The report continues with an analysis of the second aspect of the state's school program, the teaching program, by stating,

In the teaching program character-forming precepts, motives of action, and principles of life are necessarily in the foreground Hence the Church may not subject its teaching program to the supervision, control, and direction of the State. . . .

. . . When, however, the State contributes tax money, it has the right to control the expenditures. . . . However, the Church should not ask the State for a subsidy for the teaching program of its schools, for it cannot, without becoming unfaithful to the charge . . . given it, permit its teaching program to be subjected to the supervision . . . of the State, because this would inevitably open the way for demands that the teaching in the church schools accord with the philosophy of education in the State³⁷

If the state should offer subsidy "without any strings attached," the report continues, the church might accept it without criticism. But there would be decided disadvantages at best. These drawbacks are referred to in the report in the following words,

(a) The State has the right at any time to exercise the control of the expenditures of tax money; (b) The State has the right at any time to withdraw its subsidy.

In either case disastrous results may follow Our congregations, having expanded their school system under State aid, may suddenly find themselves unable to carry on upon the withdrawal of the State funds. This has in the early history of our country caused the collapse of church schools in some sections of the country.

The argument that the State is not being asked to subsidize the religious teaching of sectarian schools, but only the teaching of the

³⁷ Ibid.

secular branches is specious and invalid, for all teaching of church schools--also the teaching of the secular--becomes a part of the teaching program (curriculum, teaching, and philosophy of education of the Church). Secular branches are taught in the light of the religious tenets of the Church.

Because it is most unwise for the Church to accept such subsidy for its teaching program, even though the right to control has been waived by the State, we as citizens should not agitate for State support, but oppose the granting of State funds for sectarian use [italics added].³⁸

The Committee for Parish Education of the California and Nevada

District of The Lutheran Church--Missouri Synod is also squarely on record as opposing a program of federal aid to parochial schools. The Board of Directors of the district of synod accepted the Committee's viewpoint as the official position of the denomination. Three preliminary statements take note of the controversy over federal aid to education in the Congress of the United States, of the Roman Catholic declarations to seek such support for its parochial schools, and of the probability that such aid would be contrary to the principle of separation of church and state. The text of the resolution follows:

RESOLVED, that we, the teachers of the California and Nevada District of The Lutheran Church--Missouri Synod . . . do hereby declare ourselves opposed to a program of federal aid which includes parochial or private schools.

Our reasons for the above recommendation are:

1. We do not feel that the government (state or federal) has any obligation toward the support of parochial or private education.
2. Furthermore, we feel that our sovereignty would necessarily and justifiably be jeopardized should we accept public funds for private or parochial education.
3. However, we feel that accepting certain services falls into the

³⁸ Ibid.

realm of services to the children as citizens, and not as pupils of a particular school. Hence, we feel that acceptance of such free services does not constitute federal aid to schools.³⁹

Whereas the Roman Catholic position is clearly one that seeks support for the church's schools, the Missouri Synod has always and consistently disclaimed any and all tax support for its schools. However, it has just as consistently accepted grants for auxiliary social services as well as tax-exemption for its schools..

D. "Absolute Separation of Church and State"

Although we have not been able to discover from any responsible source in Missouri Synod writings anyone who holds to a so-called "absolute" separation of church and state, the phrase is frequently heard in pastoral conferences and in informal discussions among church folk.

There are ample evidences, however, of writers outside the Missouri Synod who advocate a very strict separation. For example, R. Freeman Butts rejects the idea of cooperation between church and state. He does not agree that the state is free to encourage all churches just so long as it treats them all impartially and fairly. Butts develops the thesis that Supreme Court decisions of the past fifty years point to a strict interpretation of the separation principle. He declares,

Despite the clarity of the principle of separation of church and state as expressed in this authentic historical tradition, there have been many practices continued which are in effect holdovers from pre-separation days of the seventeenth and eighteenth centuries. These practices include religious phraseology in several state constitutions, . . . tax exemptions for religious institutions, . . . (etc.). The weight of evidence indicates that these practices are

³⁹The Lutheran Church--Missouri Synod, resolution from the minutes of the Board of Directors of the California and Nevada District, January 24, 1956 (unpublished).

exceptions to the principle . . . rather than practices which prove the principle of "cooperation" between church and state. The principle is clearly "separation" and not "cooperation."⁴⁰

That there is confusion about the principle in The Missouri Synod is demonstrated by the action of the Western Pastoral Conference and the Upper Michigan Pastoral Conference of the North Wisconsin District of The Lutheran Church--Missouri Synod on September 18-19, 1945. The pastoral conference resolved to oppose the transportation of parochial school children at state expense, because "the transportation of parochial school children at State expense is a violation of the constitutional and American principle of the separation of Church and State."⁴¹

The writer of the article which reports the conference action, the Rev. Roland Dede, begs the question by quoting the Syllabus of Errors of Pope Pius IX which says, "It is an error to say, 'The Church ought to be separated from the state.'" Mr. Dede treats it as a "fact" that provision of bus transportation for parochial school pupils is a violation of the separation principle.

Arnold C. Mueller of the Board for Parish Education of the Missouri Synod replied in the April, 1946 issue of The American Lutheran. He wrote,

We must not permit the threat of Roman Catholic aggression to carry us to an extreme position that even can be assailed and perhaps overthrown. . . . They (the Wisconsin pastors) believe that legislation giving parochial school pupils the right to ride in public busses is a violation of the Constitution.

Meanwhile, the Lutherans in the state of Missouri have rallied their

⁴⁰ R. Freeman Butts, The American Tradition in Religion and Education, (Boston: Beacon Press, 1950), p. 108. Butts quotes President Madison in support of his view, op. cit., p. 97. Cp. also supra, p. 41.

⁴¹ Roland A. Dede, "Shall the Little Kids Ride or Walk?," The American Lutheran, LXIX (January, 1946), 11ff.

forces to defeat legislation which would deprive Lutheran and Catholic pupils of the privilege of riding to school in public school busses,"⁴²

Mueller then refers to the report of the thirty-ninth convention of the Missouri Synod,⁴³ which included bus transportation in the list of allowable "social services" that the State may render to all children irrespective of their school association. After showing that provision of bus transportation is simple justice, Mr. Mueller concludes, "After reading Pastor Dede's article I was forced to the conviction that there has not been enough clear thinking on the subject [*italics added*]."⁴⁴

He points out that "the opponents of legislation in favor of transporting parochial school pupils in public school busses have to prove that such legislation is a violation of the principle of Church and State separation."⁴⁵

Present-day viewpoints on the relationship between church and state are based to some extent on the Lutheran confessions. Ernest B. Koenker discussed the relevance of the confessions to the American situation in an article in the Concordia Theological Monthly. After reminding his readers that "the Confessions were not originally addressed to such a situation" where the state is looked upon as the highest authority on earth, "Yet their interests and guiding lines should guide our thinking . . . today."⁴⁶

^{42A} C. Mueller, "Shall Parochial School Pupils Ride in Public School Buses?," The American Lutheran, XXIX (April, 1946), 102-3.

⁴³ Supra, pp. 76ff.

⁴⁴ Mueller, op. cit.

⁴⁵ Ibid.

⁴⁶ Ernest B. Koenker, "The Two Realms and the Separation of Church and State," Concordia Theological Monthly, XXVII (January, 1956), 9.

Koenker points out that the confessions certainly do not anticipate by centuries Jefferson's phrase of a "wall of separation." He calls attention to the fact that "when the Anabaptists of the Reformation period advocated the absolute separation of church and state, the Lutherans in their Confessions explicitly rejected their idea."⁴⁷

The reference given is to the Augsburg Confession, the pertinent portion of which states,

They condemn also the Anabaptists who forbid these civil offices to Christians.

They condemn also those who do not place evangelical perfection in the fear of God and in faith, but in forsaking civil offices; Meanwhile, it does not destroy the State or the family, but very much requires that they be preserved as ordinances of God, and that charity be practiced in such ordinances. . . .⁴⁸

Koenker continues,

Although exact parallels to the American situation cannot be found in the Confessions, it cannot be denied that the symbols are relevant to our problems. The Augsburg Confession distinguishes more sharply between the state and the church than did the mediaeval theory of co-operating organisms in the corpus Christianum. The steps taken toward disestablishment in the American experience represent a progression in this development.⁴⁹

No support for a view of the "absolute" separation of church and state is found in the early official writings of the Missouri Synod. Views generally held throughout what was then The Evangelical Lutheran Synod of Missouri, Ohio, and Other States are summarized in the Homiletisches Reallexikon.⁵⁰ Under the caption, "The United States," after referring to the situation in the early colonies, the situation as of about 1900 is set

⁴⁷ Ibid.

⁴⁸ Augsburg Confession, "Of Civil Affairs," Concordia Triglot (St. Louis: Concordia Publishing House, 1921), Article XVI.

⁴⁹ Koenker, op cit.

⁵⁰ Homiletisches Reallexikon, (St. Louis: Success Printing Co., 1910), Vol. H-I, 741-59.

forth in the following statement,

1. Die Gemeinden ordnen ihre Angelegenheiten selbst.
2. Kinder werden nicht in die religionslose Staatschule gezwungen.⁵¹

The term used above, religionslose, is neutral in intent; i.e., simply "religion-less," schools where religion is omitted. The adjective "godless" is not applied here.

The founders and second generation leaders of the Missouri Synod were clear in their statements that "grants out of the State's treasury for churchly institutes, institutions, schools" is a mixture of church and state. "Church-related institutions should not be subsidized by the state."⁵²

According to the views summarized in the Reallexikon the church and the state should serve one another in a harmonious mutual relationship. The state serves the church when it grants the church exemption from taxation for its property. The state does this in our land, because churches and schools foster education, make for peace, safeguard the welfare and contribute to the prosperity of the country, and increase the value of adjoining properties.⁵³

Under another section with the caption, "The Church should serve the State," the fathers of the Missouri Synod held that this is done "durch christliche Schulen werden gute Buerger erzogen." This conclusion is documented by essays presented to five district conventions prior to the turn

⁵¹ Ibid., p. 753.

⁵² Ibid., p. 755.

⁵³ Ibid., p. 758.

of the century.⁵⁴

The church serves the state by producing good citizens who as "individual members of the church exert a powerful and salutary influence on the life of the state, provided they are fulfilling their obligation as citizens."⁵⁵

Of this reciprocal, helpful relationship between church and state Carl S. Munding wrote,

The fact that they have two separate and distinct spheres of influence does not imply that they should assume an attitude of complete indifference toward each other; on the contrary, a mutual friendly recognition and a readiness on the part of each (within the limitations of its own scope and sphere) to aid and serve the other is indispensable to the peace and prosperity of both.⁵⁶

Ernest B. Koenker notes that the term "principle of separation of church and state" has come to assume almost Constitutional status. "It is the First Amendment to the Constitution that forms the ground for the questions in our area," he states.⁵⁷ According to Koenker, Thomas Jefferson interpreted the First Amendment in terms of "separation of church and state." He quotes Arthur E. Sutherland in the Harvard Law Review, who states,

The wall of separation is a very satisfying metaphor. It has a fine, tangible, firm sound. No one can doubt where a stone wall is. But a metaphor is generally more effective as a slogan than usable as a definition; and "agreement in the abstract," as Mr. Justice Frankfurter said, "that the First Amendment was designed to erect a 'wall of separation between church and state,' does not preclude a clash of views as to what the wall separates."⁵⁸

⁵⁴ Ibid., p. 758.

⁵⁵ Ibid.

⁵⁶ Munding, op. cit. pp. 503f.

⁵⁷ Koenker, op. cit., p. 9.

⁵⁸ Ibid.

The church should be grateful for its privileged position. Dr. Koener points this out by stating,

We must acknowledge with gratitude the opportunities granted by the Bill of Rights for churches and the state to interact constructively on one another. If they were separated in every respect one would have reason to fear a weakening of the churches as well as of the state. At present the church enjoys a privileged position as far as conscription is concerned, tax exemption [italics added], chaplaincies, . . .⁵⁹

He concludes by telling of the adverse effect that would result from such an "absolute separation of church and state," by saying,

An absolute separation . . . would deny any participation of the Christian in political affairs. This would open the door to the completely secular state, which would inculcate its own--possibly anti-Christian--ideology in the public schools; it would require a religious devotion to itself, as is not entirely without evidence even now among spokesmen for the public schools and for democracy.⁶⁰

"Absolute separation" is non-existent. Rather, the American plan "might be termed benevolent separation," as Stokes describes it.⁶¹ A recent study document prepared by theologians of three Lutheran synods stated that "separation of Church and State in America does not have the 'absolute' connotation that has sometimes been attributed to it." The document also noted that the Bill of Rights does not prescribe separation in the rigid and absolute sense. The statement called for interaction between Church and State.⁶²

The decision of the Federal Supreme Court on the Zorach case on April 28, 1952, upheld the constitutional right of the New York City

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Stokes, op. cit., I, 47.

⁶² "Lutherans Hit Separation of Church, State," San Francisco Monitor, April 24, 1953, p. 4.

schools to release pupils during school hours for religious instruction in the churches. It was a sequel to the McCollum case in 1948, in which the Champaign, Illinois, system of religious education classes in school buildings under church auspices was declared unconstitutional.

The Zorach decision represented a shift in viewpoint on the relation between Church and State, especially since the Everson decision involving bus transportation of parochial school pupils in New Jersey. In the latter decision the Court's majority opinion included the phrase, "Neither a state nor the Federal Government can set up a church (nor) can pass laws which aid one religion, aid all religions" Stokes observes that the last phrase ("aid all religions") in this majority opinion . . . seems seriously questionable.⁶³ He fears that if this principle were carried out such established provisions as exemption of taxation for churches, chaplaincies, etc., would have to be abandoned.

The concept seemed to be building up that the attitude of government toward religion would be one of strict neutrality. But in the Zorach decision the majority of the court went on record to state that the government should encourage the practice of religion. It said in part,

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

The opinion of the court continues by making the following statement,

The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it

⁶³Stokes, op. cit., II, 705.

studiously defines the manner, the specific ways, in which there shall be no concert or union or dependence one on the other.⁶⁴

The preceding paragraphs do not by any means begin to explore the questions of the degree of "cooperation" possible, permissible and desirable; but it will serve to point out the basic fallacy of holding to a so-called "absolute separation of church and state."

Dr. G. Elson Ruff adapts Jefferson's simile to express his hope that the idea of an "absolute" separation of church and state will not gain widespread support when he observes, ". . . the wall has not yet been tightly cemented shut."⁶⁵ It would be a disastrous day for both the church and the state if it were!

E. Between the Horns of a Dilemma

In California the question of tax-exemption for church-related schools of less than collegiate grade was complicated by the fact that such exemptions would benefit the Roman Catholic Church primarily, as has been pointed out in a preceding chapter.⁶⁶ The opponents of tax-exemption were moved to take action as they did largely because of this factor.⁶⁷

Lutherans who accept this as a valid reason for opposing tax-exemption for parochial schools fail to realize that they are thrown between the horns of a dilemma. Failing to see a threat of danger from another quarter,

⁶⁴"Supreme Court Upholds Release of Pupils for Religious Education," San Francisco Examiner, (Associated Press), April 30, 1952.

⁶⁵G. Elson Ruff, The Dilemma of Church and State (Philadelphia: Muhlenberg Press, 1954), p. 101.

⁶⁶Supra, Chap. IV, pp. 56ff.

⁶⁷Supra, Chap. III, pp. 34ff.

they oppose any measures that will in any way aid the Roman Catholic Church. In his book, The Dilemma of Church and State, G. Elson Ruff describes the situation when he writes,

Most American Christians are unaware of the extreme contradiction between the secular culture in which we are immersed and the Christian truth regarding our early life. We Protestants respond promptly when we learn of Roman Catholic plans to extend the influence of their church by means of the political machinery, but are hardly conscious of the more serious danger of subversion of our church by pagan secularism.⁶⁸

Dr. Ruff places the Roman Catholic Church on one side of a triangle; Rome is "skilled in attempts to capture the state's power for its advancement as 'the one true church.'"⁶⁹ Protestants, he points out, are along a second side of the triangle, and should resist the maneuvers of the Catholic Church as they did at the time of the Reformers. On the third side of the triangle are the secularists, whom Ruff describes as the "armies of the kingdom of No-God. When they attempt to wall off the Church from its mission of nurturing a nation in a faith relevant to the social situation they too must be resisted."⁷⁰

Ruff, who is also editor of The Lutheran, periodical of the United Lutheran Church in America, continues by pointing out the nature of the confusion which results in the encounter of Protestants with the forces on the other two sides of the triangle. He writes,

Sometimes Protestants are allied with Roman Catholics against No-God, as in the struggle with communism or in securing a released-time foothold for religious instruction in public schools. Sometimes

⁶⁸ Ruff, op. cit., p. 87.

⁶⁹ Ibid.

⁷⁰ Ibid.

Protestants are on a common front with secularists who resist Roman Catholic encroachment, as in the Vatican embassy affair. Protestants understand the Catholic problem because it has been serious and out in the open since Protestantism began. But we do not understand the secularist problem because it appears in a new form, and because it is hidden within our own hearts.⁷¹

Ruff criticizes Protestants who, in their opposition to the Roman Catholic Church, are taking a position with the secularists who would rule out all religious elements from public education and political life. He writes,

Lack of understanding of this problem is evident in the warm applause given by Protestants to Paul Blanshard for his public addresses and books such as American Freedom and Catholic Power (1949). Mr. Blanshard has presented important information regarding Catholic influence in American life, but he writes primarily from the point of view of the secularist who wishes to banish all churches from public affairs.⁷²

Because Protestants and Other Americans United for the Separation of Church and State (POAU) adopts "the secularist position on exclusion of religion from the public schools," they are objects of Ruff's criticism.⁷³ He concludes his analysis of the Protestant-Catholic-secularist triangle by observing that the triangle

is not eternal, but is likely to continue for a long while. We must be keenly aware of it, and consider it as a normal complication among the many which have developed in various shapes throughout the centuries, and will develop so long as we live in--at the same time--the city of God and the city of man. We cannot seek escape either in the direction of daydreaming or the direction of despair. The church, in some form or other, will continue to be God's instrument to proclaim

⁷¹ Ibid., p. 88.

⁷² Ibid. Of Paul Blanshard's book referred to above (Boston: Beacon Press, 1949), Anson Phelps Stokes says, "The writer's facts on the history of the Church, canon law, and traditions are basically sound, but owing to his one-sided selection of material, unsympathetic interpretations, and failure to appreciate adequately the cultural, moral, and spiritual contributions of the Church to American life, the over-all effect, though containing much truth, is not wholly fair." Stokes, op. cit., III, p. 778.

⁷³ Ruff, op. cit., p. 88.

His kingdom in a world where it has already come and yet is still to be.⁷⁴

The Lutheran Church has taken a middle course between extremes frequently, e.g., in liturgical practices, and in other matters of adiaphora. In the matter of tax-exemption for parochial schools the action of the California and Nevada District of The Lutheran Church--Missouri Synod and of the advisory council of National Lutheran Council schools took a mediating course which had historical sanction:

1. The Lutherans disclaimed, on the one hand, "the right to demand exemption for . . . parish schools," and "tax support for them," thus repudiating the position of the Roman Catholic Church;
2. They took issue with those who charge that tax-exemption of parochial schools violates the principle of the separation of church and state; and
3. They upheld the validity of the claim that tax-exemptions are properly extended to church properties "as a recognition of the contribution of the Church and its agencies to the welfare of the State."⁷⁵

The Lutheran Church can continue to make its contribution to a proper understanding of church-state relationships by being true to its theology and its history.

F. The Action of the Two California Districts

Assembled in convention June 23-26, 1952, the California and Nevada District of The Lutheran Church--Missouri Synod took action on the issue of tax-exemption of non-profit private schools. In 1927 and again in 1933, when the issue was before the people of California, the district convention

⁷⁴ Ibid.

⁷⁵ The Lutheran Church--Missouri Synod, Proceedings of the Forty-second Convention of the California and Nevada District, June 23-26, 1952 (St. Louis: Concordia Publishing House, 1952) p. 57. Cp. infra, p. 91.

held in those years took no action; at any rate the issue is not mentioned in the Proceedings. The entire memorial, as adopted by the Convention, is as follows:

WHEREAS, The State Legislature has by an overwhelming majority passed the Waters Bill exempting non-profit private schools from taxation; and

Whereas, The measure to exempt private non-profit schools has been suspended by referendum petition and will be submitted to the voters of California in November; therefore be it

Resolved, That the California and Nevada District of The Lutheran Church--Missouri Synod express the following as its attitude on the question of private non-profit school tax exemption;

While the California and Nevada District of The Lutheran Church--Missouri Synod does not claim the right to demand exemption for its parish schools, nor seek tax support for them, it looks upon such exemptions to church properties as a recognition of the contribution of the Church and its agencies to the welfare of the State; and

That, furthermore, if the State should grant tax exemption to non-profit private schools, the California and Nevada District of The Lutheran Church--Missouri Synod would not consider this a violation of the principle of separation of Church and State, any more than it would regard the exemption of other church property to be a violation; and

That, finally, it regards the almost unanimous action of the Legislature in passing the Waters Bill as being consistent with the above principles; and be it further

Resolved, that the California and Nevada District of The Lutheran Church--Missouri Synod affirm that the above-stated principles recognize the right of the individual members to vote according to their convictions in the matter.⁷⁶

Because the issue was being debated by the public, the above action received wide-spread coverage in the press of the state. But it was variously interpreted, depending on the bias of the persons or organizations reporting the action.

The official newspaper of the Roman Catholic Archdiocese of San

⁷⁶ Ibid.

Francisco, The Monitor, on July 4, 1952 carried the headline, "Lutherans Ask Yes on No. 3." The caption, together with the sub-heading, "Missouri Synod Group Backs Tax Exemption," misrepresented the Lutherans' action. The convention had found the Waters Bill "consistent with the . . . principles of the synod," but they had not come out openly in support of the referendum measure on the ballot.

The secular press headlines more accurately reflected the clear intent of the convention resolution. For example, The Oakland Tribune on June 25, 1952 carried the lead, "Lutherans OK Religious School Tax Exemption."

The Lutheran Pastoral Conference of Greater Los Angeles (embracing a large majority of the area included in the Southern California District of the Missouri Synod) on November 14, 1951 passed a resolution in essential agreement with that of the Northern California district. The resolution was not to be considered binding on the consciences of members of the synod, but affirms that exempting from taxation private schools operated by churches does not violate the principle of separation of church and state any more than does the exempting of churches, hospitals, etc. The southern California pastors opposed support of religious schools by tax funds, and expressed it as their view that "tax exemption . . . is not giving them support inasmuch as these schools effect a . . . saving to the State." The northern district's assertion that it "does not claim the right to demand exemption"⁷⁷ is reflected in the southern document's declaration that it is "inadvisable for The Lutheran Church--Missouri Synod to join in any mass agitation either for or against the issue." The Los Angeles pastoral conference resolution records its disagreement with "any

⁷⁷ Ibid.

religious organization which holds large land-holding ambitions," on the one hand, and "with those groups . . . that would attempt to throttle all private religious education by excessive taxation or other means."⁷⁸

The resolutions of the California and Nevada District and the Greater Los Angeles Pastoral Conference of The Lutheran Church--Missouri Synod reflect the viewpoints held in common by most members of the Synod as set forth in official pronouncements and public writings from the 1890's down to the present.

G. The Unitary Concept of Education Calls for Equal Consideration of Churches and Church-Related Schools

As has been demonstrated previously, the policy of exempting church property from taxation is deeply rooted in American tradition, and has been supported by numerous state and federal Supreme Court decisions.⁷⁹ The reason for this exemption, as has been stated, is that churches contribute to the public welfare. It has also been stated that the church's freedom is best maintained and safeguarded when it is not expected to pay taxes to the state.⁸⁰

To conclude this chapter on "The Lutheran View" we shall relate the Christian day schools of the Missouri Synod to these conclusions regarding church exemptions. The Rev. Arthur C. Nits, president of the California and Nevada District, stated the case when he wrote,

⁷⁸The Lutheran Church--Missouri Synod, "Resolution Regarding 'Waters Bill,'" in the minutes of the Lutheran Pastoral Conference of Greater Los Angeles, Southern California District, November 14, 1951 (unpublished).

⁷⁹Supra, pp. 17ff.

⁸⁰Supra, pp. 69ff.

But do not church schools exist for the same purpose as churches? Certainly they are not supported at great cost because such parents as have their children enrolled are dissatisfied with the way the public school teaches "the three R's." They are founded and maintained to teach religion by precept and example. Doesn't America need more of this, not less?⁸¹

Members of The Lutheran Church--Missouri Synod build and support Christian day schools for the same reasons and purposes for which they build churches and provide for the ministry. Dr. Clarence Peters wrote in the Concordia Theological Monthly,

Churches maintain fulltime religious schools at considerable expense because they recognize the unitary nature of education. They are convinced that it is pedagogically unsound to exclude religious instruction from the child's schooling and to relegate it to after school hours or Sunday morning. . . . Thus religion undergirds the whole of life.⁸²

When religion is taught only in the church and not in the school and home, it can hardly be expected that the child will have an integrated and properly balanced view of religion in its life.⁸²

Further historical grounds for the unitary concept of education, which predicates churches with schools, is suggested by Anson Phelps Stokes, who writes,

Indeed it (the Lutheran Church, which has nearly approximated the Roman Catholic parochial-school system) may be considered as in many ways the effective founder of the modern parochial-school system of general education under religious auspices, having adopted it before the Council of Trent. . . . It was the early Lutherans, confronted by their special problems in northern Europe, who most clearly emphasized the parish unit as the basis for humanistic education in addition to religious training. Therefore since Luther's time the parochial school has been a characteristic Lutheran institution.

⁸¹ Arthur C. Nitz, "Pastor Challenges Stand of Club on School Tax," San Francisco News, August 18, 1952, "Letters to the Editor" page.

⁸² Clarence Peters, "The Effect of the Trend toward Religious Schools on Public Schools," Concordia Theological Monthly, XI (May, 1949), 340.

When the Germans began to settle in the American colonies in considerable numbers during the eighteenth century they always emphasized the schooling of their children. All the German sects, which were particularly strong in Pennsylvania, had their parochial schools, that is, schools including the ordinary branches of education in addition to religion. . . . By 1750 all the congregations in Pennsylvania but one reported flourishing schools. . . . By 1820 there were 206 of these parochial schools and eighty-four congregations.⁸³

Dr. Stokes then takes note of the fact that, when the Pennsylvania Legislature first took steps to introduce public schools, the Pennsylvania Ministerium actually opposed them, fearing that the plan might injure their educational system. However, by mid-nineteenth century the absence of a teacher-training school, the growth of free public schools, and the shift from German to English in the homes marked the decline of these parochial schools.

That the founders of the Missouri Synod possessed a unitary concept of the nature of education is demonstrated by Article III of their first Constitution, adopted in 1847. One of its purposes was to be "The training of teachers . . . the publication of school books . . . the furtherance of Christian parochial schools."⁸⁴

The Missouri Synod's founder and first president, Dr. Carl F. W. Walther, stated that "next to the public ministry the chief means of preserving and spreading our Church is the solicitous promotion of our parochial schools system."⁸⁵ The synod has acted on this premise ever since. By 1857 there were 114 schools with 5,561 students. By the end of 1955 the

⁸³ Stokes, op. cit., II, 671.

⁸⁴ Lutheran Cyclopedia, Erwin L. Laeker, editor (St. Louis: Concordia Publishing House, 1954), p. 610.

⁸⁵ A. C. Stellhorn, A Century of Lutheran Schools in America (St. Louis: Concordia Publishing House, 1938), p. 11.

the synod's congregations supported 1,195 Christian day schools with an enrollment of 119,179 pupils and 3,975 teachers.⁸⁶ Certainly the Missouri Synod has translated the unitary principle of Christian education from theory into practice through its parochial schools.⁸⁷

A further evidence that The Lutheran Church--Missouri Synod adheres to the unitary concept of Christian education is alluded to by Stokes, when he notes as a characteristic of the Lutheran school system "The providing of instruction at low cost, or free, at the expense of the congregation."⁸⁸ It is the general practice for congregations of the Missouri Synod to include the parochial school in the regular congregational budget; it is thus evidently considered as much a part of the congregation's responsibility as the pastor's salary, building the church, paying off the debts, and conducting the Sunday School.

Albert G. Merckens states the policy of the Missouri Synod in the matter of charges for pupils who attend parochial schools as follows,

As a rule, the congregational schools are maintained by the voluntary contributions on the part of the members. However, the means of maintaining them used to be, and in some instances still are, secured by tuition, payable monthly in advance. About twenty-five

⁸⁶ The Lutheran Church--Missouri Synod, Statistical Year Book, 1955, (St. Louis: Concordia Publishing House, 1956), p. 172.

⁸⁷ In this connection Stokes makes two erroneous statements in one paragraph of his second volume, op. cit., p. 672. He omits entirely the information that the Missouri Synod operates a teacher training college in Seward, Nebraska, referring only to the school at River Forest, Illinois. The other mis-statement is that "Most Lutherans belonging to the synod have been students in these (parochial grade) schools." The current goal of The Board for Parish Education of the synod is to enroll one-half of its school age children in its parochial schools. In 1954 thirty-three percent attended. Dr. A. C. Stelhorn, synod's Secretary for Schools, states that it is his opinion that about forty per cent of the communicant members of the synod have attended parochial school.

⁸⁸ Stokes, II, 673.

per cent of the schools in the Synod charge tuition. The tuition fees, usually very low, having hardly ever sufficed to defray the expenses of the school, and the deficit is made up by members of the congregation through voluntary contributions. The Synod discourages the charging of tuition-fees and encourages its members, whether they have children or not, to support the school as a missionary enterprise.⁸⁹

As Clarence Peters states, "The Lutheran Church--Missouri Synod has maintained its own elementary schools since it was founded in 1847, because of the unitary concept of education which is basic in the Lutheran philosophy of education."⁹⁰ For the same reasons that validate the tax-exemption of churches the parochial schools of the church may lay claim to tax-exemption.

In the present chapter we have stated that certain "un-Lutheran" views are held by many in the church although they are not to be found in the printed materials of The Lutheran Church--Missouri Synod. These include the idea that the Fourth Commandment demands that the church should not take any action to change laws affecting churches and religion, and the related idea of an "absolute" separation of church and state. We have demonstrated that historically the relationship between church and state has been and should be one of friendly cooperation, while both remain strictly apart in function and method.

More prevalent seems to be the opinion that churches and their agencies should pay taxes, whereas Lutheran history and practice indicate a middle course: while accepting tax-exemption gratefully, the church seeks

⁸⁹ Albert G. Merckens, op. cit., p. 5, quoting Statistical Year-book of the Missouri Synod for 1932, p. 163, and Proceedings of the Thirtieth Convention of the Evangelical Lutheran Synod of Missouri, Ohio, and Other States (1917), p. 50.

⁹⁰ Peters, op. cit., p. 348.

no actual tax support for its institutions.

While remaining vigilant against the encroachments of the Roman Catholic Church on religious liberty and the extensions of its power, the church should beware of throwing in its lot with the secularists. The Lutheran Church--Missouri Synod has officially walked this middle way, and the two districts of the synod in California have followed the same course in their resolutions regarding the measures which exempt their Christian day schools from taxation.

Finally, the unitary concept of education, which underlies the Missouri Synod's determination to maintain parochial schools, suggests that the political theory which justifies exemption of churches from taxation applies equally to the schools of the churches.

CHAPTER VI

SUMMARY AND CONCLUSIONS

The most significant decisions of the Federal Supreme Court in the area of church-state relationships in the past decade have dealt with the problem of the amount and nature of aid certain political units may extend to religious education. These decisions have dealt with transportation of parochial school pupils at public expense and with released-time religious education on and off school premises. Relevant to our study was the Federal Court opinion which, in effect, upheld the constitutionality of a California statute exempting non-profit private schools of less than collegiate grade from taxation. This study was justified because there was a great deal of confusion and variety of opinion among Lutherans, also of the Missouri Synod over the issue from 1951 until late 1956. Looking to the future, this study is further justified by the certainty of continuing tension and debate over the question of direct or indirect aid to religion. One of the foci of continuing debate will be the question of tax-exemptions.

Our task was to discover, describe and evaluate the arguments posed for and against the extension of tax-exemption to parochial grade and high schools in the State of California. This evaluation was made in the light of historic Lutheran theology, principles and practices, and through the application of newer insights that spring from a greater consciousness of the obligations of the church toward society

The arguments adduced for or against tax-exemption of parochial schools came from three directions: (a) From an alliance of Protestants, Jews, Masons, secularists, public school people, and opponents of a further

narrowing of the tax base, all of whom were joined by a common bond of opposition to the Roman Catholic school system; (b) From the central apparatus of the Roman Catholic hierarchy; and (c) From the operators of non-Catholic Christian day schools, largely Lutheran and other theological "conservatives."

Our conclusions are as follows:

1. A major portion of our study was devoted to the chief charge levelled by the opponents of tax-exemption, viz., that such exemption is in fact a violation of the principle of the separation of church and state. This opinion is held because of their contention that exemption from taxation is, in effect, a subsidy of religion by the state.

2. Semantically it may be possible to distinguish between a direct grant of funds and tax-exemption, i.e., relief from the necessity of paying money to the state. However, it should be recognized and readily admitted that tax-exemption is, in fact, "an indirect subsidy."

3. In the view of those who hold to an "absolute" separation of church and state tax-exemption of churches as well as of church-related schools logically would be considered a violation of the principle of the separation of church and state. We have demonstrated that an "absolute" separation of the two realms is unwise, impossible and contrary to the American tradition as sustained by the courts.

4. This history of the American courts up to and including the decision of the California State and the Federal Supreme Courts relative to the California tax-exemption statute, demonstrates that the state is to encourage the practice of religion. The state is not hostile, nor even neutral, but cooperative with the church. The American plan "might be

termed benevolent separation."¹

5. Consistent with this friendly spirit toward religion, tax-exemption for parochial schools is normative in American history, and is now the practice in all forty-eight states.

6. In addition to the fact that parochial schools qualify for tax-exemption because of their integration with the church, there is the further consideration that they serve a public welfare function. Education of children is for the public benefit, and thus these schools qualify as "charitable institutions" under tax-exemption statutes as is the case in California.

7. The view that churches and their related institutions should pay taxes, as advocated by some Lutheran spokesmen, is contrary to the American tradition for nearly two hundred years, and does not properly recognize the principles alluded to in the preceding two paragraphs.

8. Although the church does not have the right to demand considerations from the state, it should not on the other hand adopt a passive attitude toward the laws and legislatures of the state. Rather, the church should encourage the legislature to act to promote the spirit of cooperation between church and state, and to recognize in every possible constitutional way the public welfare functions of the church. The leadership of the church should, therefore, take a more active role in shaping the convictions of its members as Christian citizens.

9. Specifically, in the case of tax-exemption for parochial schools, the Lutheran attitude has been shown to be that exemption from taxation is gratefully accepted if the beneficent state accords the privilege. However,

¹Anson Phelps Stokes, Church and State in the United States (New York: Harper and Brothers, 1950), I, 47.

we have demonstrated that the basis for tax-exemption lies in the fact that religion contributes to the public welfare; that tax-exemption is part of the "benevolent separation" practice of the United States government; and that the Lutheran Church's "unitary concept of Christian education" underlies its support of parochial schools. For these reasons the church should not continue to take a passive or submissive attitude toward such "indirect subsidy," but should rather work to maintain tax-exempt status where it is challenged and to seek it where it is not extended.

10. Since the days of Martin Luther the Lutheran Church has recognized the nature of the tension with the Roman Catholic Church, particularly on doctrinal grounds. However, in opposing the Roman Catholic Church there is a grave danger that Lutherans may adopt the secularistic attitudes and programs in the area of church-state relationships. The former may teach false doctrines in their schools and espouse a broader idea of the role the church should play in the state; the latter would rule out all religious elements from public education and political life. The Lutheran Church must continue to be alert to dangers arising from both sides.

11. Certain applications of the tax-exemption principle will be questioned in the future, and certain cases of this nature will be brought before the courts. But there will be no disposition on the part of the supreme courts to alter the general principle of tax-exemption for religious institutions. However, there will be those who will continue to question the validity of the well-established principle. The church should not hesitate to defend its tax-exempt status wherever it is called into question.

Numerous questions have remained unanswered and many related problems present themselves for further study. Among these are the following:

1. A thorough study of the prevalence of "un-Lutheran" views of the relationship between church and state. Such a study would include the official journals and writings of the several synods in America, and a controlled survey of the rank and file clergy and laity of the Lutheran Church in America as well as the leaders.

2. The excessive acquisition of property by the Roman Catholic Church is a question which was scarcely touched on in the arguments advanced by the opponents of parochial school tax-exemption in California. However, in a larger study of tax-exemption for churches and church-related institutions such an analysis should be undertaken.

3. The charge is frequently made that "parochial schools of the Roman Catholic Church are un-democratic competitors of the public school." We have demonstrated briefly that Lutheran schools could not be viewed as un-democratic nor subversive to the public school. However, the subject as it relates to Roman Catholic schools invites exploration.

APPENDIX A

Exemption Procedures--State by State¹

1. States with "self-executing" Constitutional Exemptions:

Alabama, Arkansas, Florida, Kansas, Kentucky, Louisiana, Minnesota, New Mexico, New York, Oklahoma, South Carolina, Virginia

2. States where Constitution gives Legislature option to exempt such property if it sees fit to do so:

Delaware, Idaho, Washington, Wyoming

3. States where Constitution is silent on tax-exemption and matter is vested in Legislature:

Connecticut, Iowa, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, Oregon, Rhode Island, Vermont, Wisconsin.

4. States where Constitution authorizes exemption but legislation is necessary to implement Constitutional provisions:

Arizona, Colorado, Georgia, Illinois, Indiana, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia

¹Compiled by Californians for Justice in Education, Speakers' Manual and Fact Book (San Francisco: 924 deYoung Building, [1952]), lithographed, pp. 82f.

APPENDIX B

A Listing of Court Decisions in States where It was Necessary to Hold that Schools Are Charities in Order to Exempt them from Taxation¹

a. Massachusetts:

Board of Assessors of Boston v. Garland School of Home Making,
Mass. 6 N.E. 2d 374. (1937)

Assessors of Boston v. World-Wide Broadcasting Foundation (Mass.),
59 N.E. 188 (1945).

b. Minnesota:

In re Grace (Minn.), 8 N.W. 761. (1881)

c. Ohio:

Gerke et al. v. Purcell, 25 Ohio State Rep. 229. (1874)

College Preparatory School for Girls of Cincinnati v. Evatt,
Tax Commissioner (Ohio) 59 N.E. 2d 142. (1945)

d. Maryland:

Tax Court of Baltimore City v. St. Peters Academy, 50 Md. 321.
(1878)

e. Pennsylvania:

Burd v. School District, 90 Pa. 21. (1879)

Northampton County v. Lafayette (Pa.) 18 Atl. 516. (1889)

Barnes Foundation v. Keely (Pa.), 164 Atl. 117. (n.d.)

Barnes Foundation v. Keely (Pa.), 171 Atl. 267. (n.d.)

¹Brief Filed Amici Curiae. In the Supreme Court of the State of California, S.F. Number 19026, (Los Angeles: Parker and Sons, Inc., Law Printers, 1955), cover page, and pp. 17-41.

f. Kentucky:

Morgan v. Presbyterian Church (Ky.), 101 S.W. 338. (n.d.)

g. Illinois:

School of Domestic Arts and Sciences v. Carr, County Collector (Ill.), 153 N.E. 669.

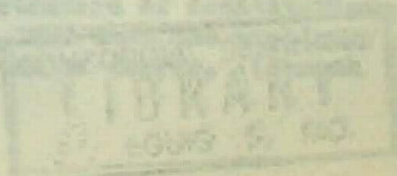
h. New Jersey:

State v. Johnston, Collector (N.J.), 46 Atl. 776.

State v. Brakesley (N.J.), 50 Atl. 589.

i. New York:

People v. Barton, 71 NYS, 933.



APPENDIX C

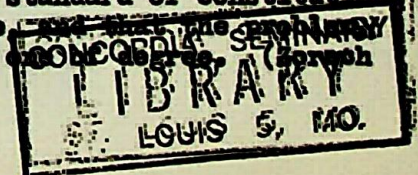
Portion of the Majority Opinion
of the Supreme Court of the State of California in the
Tax Exemption Issue, 1956

The major portion of the majority opinion of the Supreme Court of the State of California dealing with the First Amendment of the United States Constitution is included herein, since the record of the opinion may not be easily accessible to the student of church-state relations. The opinion stated, in part,

The validity of the exemption is also challenged on the theory that it contravenes that portion of the First Amendment of the federal Constitution which forbids the enactment of laws respecting the establishment of religion. . . .

In the first place, it is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose. An analagous situation was presented in *Everson v. Board of Education*, 330 U.S. 1, where . . . the court reasoned that the statute (to furnish transportation to parochial school children) was designed to promote the general welfare . . . and that the First Amendment does not require that government be hostile to religion.

Secondly, even if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. . . . No case has been found holding that the granting of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and, where the matter has been raised, the exemptions have been upheld The United States Supreme Court, in discussing the prohibition of laws respecting the establishment of religion, recently stated that the standard of constitutionality is the separation of church and state. . . . like many others in constitutional law, is



v. Clauson, 343 U.C. 306, 314)

The principle of separation of church and state is not impaired by granting tax exemptions to religious groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions. Accordingly, an exemption of property used for educational purposes may validly be applied to school property owned and operated by various religious organizations.¹

¹ The Recorder, Daily Legal Journal for San Francisco Courts, June 19, 1956, p. 1.

APPENDIX D

Action of Opponents of Tax-Exemption as of May 1, 1957

(The body of the thesis was completed on May 1, 1957 when it was announced in Sacramento that a committee of Californians for Public Schools was formed to present an initiative measure to the electors to eliminate the present exemption of religious or non-profit private schools from property taxes. By the end of the first week in May the Committee had mailed a letter and copies of the petition to qualify the measure for a place on the ballot to every clergyman on the mailing list of the Northern California and Nevada Council of Churches.)

Following are the pertinent portions of the "Initiative Measure to be Submitted Directly to the Electors" as stated on the petition to be circulated for qualifying signatures:

TAXATION OF SCHOOL PROPERTY OF RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS. INITIATIVE CONSTITUTIONAL AMENDMENT. Amends section 1c of Article XIII of the State Constitution by providing that the property authorized by said section to be exempted from taxation shall not include any property used or owned, directly or indirectly, in whole or in part, for any religious or other school or school purposes of less than collegiate grade, unless such property shall be used, owned and held exclusively for the blind, mentally retarded or physically handicapped. Does not affect exemptions granted by other sections of the Constitution.

The change in Section 1c is as follows:

As used in this section: "property used exclusively for religious, hospital or charitable purposes" shall not include any property used, held or owned, . . . for any parochial, sectarian, denominational, or other school or school purposes of less than collegiate grade, . . .

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