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## The Decline and Fall of the Wall of Separation between Church and State and Its Consequences for the Funding of Public and Private Institutions of Higher Education

F. King Alexander

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# THE DECLINE AND FALL OF THE WALL OF SEPARATION BETWEEN CHURCH AND STATE AND ITS CONSEQUENCES FOR THE FUNDING OF PUBLIC AND PRIVATE INSTITUTIONS OF HIGHER EDUCATION

*F. King Alexander\**

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## I. INTRODUCTION

This article summarizes the evolution of judicial thought concerning the funding of higher education as it pertains to the constitutional concept of separation between church and state. The fiscal consequences of the decline and fall of this wall of separation, as government has increasingly aided private higher education with public resources, are explored. The article notes the ineffectiveness of government student aid policies in providing lower-income students with meaningful choice in pursuing higher education opportunities. The findings presented in this article are not important to higher education alone, but also indicate the probable effects of government funding schemes that aid private and parochial schools and the possible deleterious outcomes for public schools at the elementary and secondary level.

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## II. RATIONALE FOR SEPARATION

The U.S. Supreme Court in *Everson v. Board of Education*<sup>1</sup> defined the Establishment Clause of the First Amendment when it said: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>2</sup> In the Court's reasoning, this definition reflects the intent of the Constitution, as expounded by James Madison and Thomas Jefferson, in the shaping of a new government based on the ideal that civil authority and religion should be kept separate.<sup>3</sup> The Establishment Clause conveys the sentiments of Jefferson as expressed in his "Act for Establishing Religious Freedom"<sup>4</sup> and of Madison in his "Memorial and Remonstrance Against Religious Assessments."<sup>5</sup> Both documents directly address the use of tax funds to support organized religion.<sup>6</sup> Jefferson's "Act" and Madison's "Remonstrance" were written in opposition to Patrick Henry's advocacy of a bill supporting religious organizations with a general tax.<sup>7</sup> The concept of separation was new to government, an untried basic doctrinal exposition of the fledgling nation's rationale for separation of church and state.<sup>8</sup> The "Remonstrance" discloses throughout that Madison opposed every form and degree of official control of religion by civil government.<sup>9</sup> In both Jefferson's and Madison's influential documents, the ideal is advanced that it is sinful and tyrannical for government to compel a person to pay for the propagation of religious opinions that he disbelieves or abhors; that it is wrong to force someone by government taxation to give support to religious teachings that are not of his own persuasion.<sup>10</sup> In this

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

2. *Id.* at 16.

3. *See id.* at 11-14.

4. THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THE COMPLETE JEFFERSON 946, 946-47 (Saul K. Padover ed., 1943). Jefferson's Act was the culmination of a great religious struggle in Virginia, which continued for at least a decade. EVARTS B. GREENE, *RELIGION AND THE STATE: THE MAKING AND TESTING OF AN AMERICAN TRADITION* 85-87 (1959). The problem emanated from issues unresolved in 1776 and concerned whether the Established Church of England in Virginia owned the church lands and whether the Anglican ministers should be paid from state funds as provided by the British Parliament. *See id.* Jefferson's Act was passed in 1786. JEFFERSON, *supra* at 946 n.1.

5. 8 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE PAPERS OF JAMES MADISON 259, 298 (Robert A. Rutland et al. eds., 1973).

6. JEFFERSON, *supra* note 4, at 946; 8 MADISON, *supra* note 5, at 298-99.

7. GREENE, *supra* note 4, at 87.

8. *See id.* at 86-89.

9. 8 MADISON, *supra* note 5, at 295-306; *see* LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 111-14 (1967) (summarizing the fifteen arguments presented in Madison's argument against state financial assistance to churches).

10. JEFFERSON, *supra* note 4, at 946; 8 MADISON, *supra* note 5, at 298-99.

view of history, moral philosophy, and politics, it is evident that the First Amendment forbids any appropriation, directly or indirectly, from public funds to aid or support any and all religious exercises. Despite this rather clear proscription, federal and state policy in funding higher education for nearly three decades has disregarded the doctrine of church and state separation by enacting direct student aid and voucher plans that aid private religious colleges and universities, thereby supporting religious sects, groups, and orders. In addition to the constitutional concerns regarding government establishment of religious institutions are fears that many of these governmental policies are tuition sensitive and therefore, financially favor private and religious institutions over public institutions.<sup>11</sup> There are many constitutional controversies implicit in federal and state direct student aid funding systems and the policy ramifications that these programs have for public and private institutions.

Because student aid grants to higher education are a form of voucher that serves as a conduit to direct public funds to private colleges and universities, the higher education experience may serve as a model for voucher initiatives that would provide aid to elementary and secondary schools. Today, Wisconsin, Ohio, Arizona, Vermont, Florida, and Maine are in the midst of important school voucher struggles.<sup>12</sup> To fully understand the applicability of the voucher concept in higher education to secondary education and the significance of the attendant court rulings during the last three decades, it is first necessary to provide a brief historical overview of the relationship between private religious colleges and civil authority at the time of the adoption of the Establishment Clause and the subsequent development of public institutions.

### III. COLONIAL ANTECEDENTS

The United States has a rich history of controversies encompassing state aid in various forms to private religious colleges.<sup>13</sup> A tug-of-war between state governments and private colleges has existed in America since the first

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11. Cost of attendance is an important factor in determining the amount of federal and state aid that students are able to receive. Federal direct student grants and loans differ from most state grant programs in how much weight is given to the cost of attendance in determining student awards.

12. *Jackson v. Benson*, 570 N.W.2d 407 (Ct. App. 1997), *rev'd*, 578 N.W.2d 602 (Wis. 1998). The recent Wisconsin Supreme Court ruling on June 10, 1998 allowing the Milwaukee School Voucher Program to continue provides the rationale and momentum for school voucher advocates to seek expansion of the program to other states. See *Jackson*, 578 N.W. 2d at 607.

13. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 3-20 (1962).

colleges were chartered.<sup>14</sup> Before Madison's drafting of the Bill of Rights, the formal distinction between public and private institutions was irrelevant since church and state were often considered as one.<sup>15</sup> Rather than distinguishing themselves from English practice, colonial governments simply followed the educational precedents of England, where church and state were combined and the sovereign was head of both.<sup>16</sup> In England, public funds were used to establish and endow religious institutions, the most notable examples being the colleges of Oxford and Cambridge.<sup>17</sup> Religious schools and colleges, as Anglican and Catholic Church institutions, routinely received state subsidies.<sup>18</sup> Indelible in the history of England is the massive expenditure of public funds siphoned from the treasury by Chancellor and Cardinal Thomas Wolsey to build Christ Church College at Oxford and King Henry VIII's subsequent construction of Trinity College at Cambridge.<sup>19</sup>

For the American colonial government, it was not unusual to charter private religious colleges with resources and to redress the financial hardships of these institutions.<sup>20</sup> This church and state entanglement often emerged in state charters supporting the creation of independent colleges.<sup>21</sup> Before the American Revolution, public tax support in the colonies for private colleges ran as high as sixty-five percent of their total operating budgets.<sup>22</sup> During this period, it was not uncommon for legislative assistance to be provided to institutions in a variety of forms including the granting of charters with special privileges, the freeing of professors and students from military and jury duty, endowment resources, tax exemptions, land endowments, special tax appropriations, lottery benefits, and special gifts of

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14. R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 20-22 (1953).

15. *Id.* at 14-22.

16. *Id.*

17. VIVIAN HUBERT HOWARD GREEN, THE HISTORY OF OXFORD UNIVERSITY 30-132 (1974); *see also* 3 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES: ENGLISH UNIVERSITIES, STUDENT LIFE (1987) (standard authority).

18. JOHN LAWSON & HAROLD SILVER, A SOCIAL HISTORY OF EDUCATION IN ENGLAND 95-102, 159, 320-23, 370 (1973).

19. GREEN, *supra* note 17, at 37-39.

20. *See* Charles River Bridge v. Warren Bridge, 36 U.S. 420 (11 Pet.) (1837) (discussing a grant by Massachusetts in 1650 to Harvard College of the right to lease the ferry from Charlestown to Boston and the profits therefrom until 1785).

21. CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 105-107 (1994). Private colleges founded during the Colonial period were religiously affiliated. *See* RUDOLPH, *supra* note 13, at 8-18. Early Congregational colleges included Harvard (1636), Yale (1701), and Dartmouth (1769). *Id.* at 11. Anglican colleges included William and Mary (1693), King's College (1754), and Pennsylvania (1755). *Id.* at 7, 16, 18. Brown (1765) was founded by the Baptist Church, and Queen's College was founded by the Dutch Reformed Church. *Id.* at 11.

22. CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, THE STATES AND PRIVATE HIGHER EDUCATION 145 (1977) [hereinafter CARNEGIE COUNCIL].

buildings and sites.<sup>23</sup> As Chambers observed:

At that time no one had conceived of the tax-supported state or municipal college or university in this country. No one supposed that a college could properly be anything other than a private charitable corporation. However, there was no hesitancy in granting tax support on a more or less intermittent basis.<sup>24</sup>

Although many colleges were publicly funded by state and local governments, they remained privately and religiously controlled which would prove to be a significant problem for federal and state governments.

During the post-Revolutionary War period, significant changes began to occur in American higher education as the philosophy of the French Enlightenment began to permeate American ideals, influencing the development of civil government.<sup>25</sup> Political and philosophical leaders, such as Jefferson, Madison, and Paine,<sup>26</sup> conceptualized a nation that would separate the prerogatives of the church from those democratic powers granted to the state.<sup>27</sup> Influenced by the French philosophers Condorcet<sup>28</sup> and Diderot, Madison and Jefferson advanced many of the principles that became the laws of the republic, including the untried and idealistic notion that civil authority must be free from religious entanglement.<sup>29</sup> At the time the First Amendment was promulgated, the affairs of state had always been

23. JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* 24-38 (4th ed. 1997).

24. M.M. CHAMBERS, *HIGHER EDUCATION: WHO PAYS? WHO GAINS?* 15 (1968).

25. RUDOLPH, *supra* note 13, at 40-43.

26. Those who consider Paine as a supporter of educational vouchers neglect to point out that he was a deist, who opposed granting any kind of public aid to religious institutions or organizations. See THOMAS PAINE, *RIGHTS OF MAN* (Penguin Books 1984) (1791).

27. Thomas Jefferson, *An Act for Establishing Religious Freedom* (written 1779, enacted 1786), in KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 118-19 (3rd ed. 1992); James Madison, *Memorial and Remonstrance Against Religious Assessments* (Presented to the General Assembly of the State of Virginia, 1785), in ALEXANDER & ALEXANDER, *supra*, at 119-21 (1987); PAINE, *supra* note 26.

28. Condorcet was the chairman of public instruction in France when his plan for a system of state schools was proposed to the revolutionary Legislative Assembly on April 21, 1792. WILL DURANT & ARIEL DURANT, *THE AGE OF NAPOLEON* 127 (1975). In 1793, Condorcet renewed his appeal for the creation of a state system of education that was "common and equal for all French People." *Id.* at 127-28 (citation omitted). On November 17, 1794, the Lakanal Law created the first public common schools in France eliminating a newly created public voucher program that primarily supported Catholic schools and the Catholic Church. ISSER WOLOCH, *THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIL ORDER, 1789-1820S*, at 180-83 (1994).

29. See Jefferson, *supra* note 27, at 118-19; Madison, *supra* note 27, at 119-21; see also JACK FRUCHTMAN, JR., *THOMAS PAINE: APOSTLE OF FREEDOM* 235, 238-39, 249, 261 (1994); 2 DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 15 (1951); CONRAD HENRY MOEHLMAN, *THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 107-08 (1951).

inextricably mingled with those of religion and in no meaningful instance had the church and civil authority been successfully separated. On the contrary, where a church was dominant, state machinery was used to further the imposition of the orthodox religion upon those persons holding minority beliefs. England's mistreatment of Jewish and Catholic worshipers was endemic to its society, as was France's Catholic repression of Protestants. Always, where the power of the state presided over religion, the church was used to support and reinforce the power of the ruling authority.<sup>30</sup>

Weariness with religious controversies was quite evident when the new American republic was created in the summer of 1787. Adams reflected the sentiments of the Continental Congress when he expressed the "hope that Congress will never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year."<sup>31</sup> Despite the explicitness of Madison's intent, it was Paine's revolutionary ideas in the *Rights of Man*,<sup>32</sup> written in response to Burke's *Reflections on the Revolution in France*,<sup>33</sup> that best enunciated the separatist philosophy that was shared by most members of the Continental Congress. Paine, a leader in the revolutions in both America and France, observed that "[p]ersecution is not an original feature in any religion; but it is always the strongly marked feature of all law-religions, or religions established by law."<sup>34</sup> In other words, Paine believed that religious persecution would ultimately result when state-assisted churches promulgated laws to finance and support religion. Paine, in viewing the prospects of the fledgling French republic, observed that "[t]he union of church and state ha[d] impoverished Spain."<sup>35</sup> He further noted that if the National Assembly of France should follow the counsel of the Irishman Burke and the "error of Spain," it would itself fall into such "folly."<sup>36</sup>

Thus, it is apparent that Paine, Madison, Jefferson, and others were well aware of man's difficulty in suppressing one's desire to proselytize, and failing in persuasion, to compel others to adopt and believe one's own religious views. They had concluded that the quest to accomplish this objective has been perhaps the most divisive human force since the deeds of mankind have been recorded.<sup>37</sup>

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30. Madison, *supra* note 27, at 119-21.

31. GREENE, *supra* note 4, at 83 (quoting 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 402 (Little, Brown, and Co. 1854)).

32. PAINE, *supra* note 26.

33. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

34. PAINE, *supra* note 26, at 87.

35. *Id.*

36. *Id.* at 88.

37. See Madison, *supra* note 27, at 119-21; PAINE, *supra* note 26.

#### IV. THE EMERGENCE OF PUBLIC HIGHER EDUCATION

Within a short period after the ratification of the U.S. Constitution, federal and state governments demonstrated a greater interest in distinguishing between public and private colleges. Governmental policies advancing separatist concepts began to emerge due to resource constraints and educational affiliations with religious establishments.<sup>38</sup> As a result, many state governments established nondenominational institutions between 1782 and 1820, beginning with the University of Georgia (1785), the University of North Carolina (1791), and the University of Vermont (1791).<sup>39</sup> This trend marked the early stages of what Rudolph referred to as the "college movement," fueled by a social purpose unlike anything experienced in Europe.<sup>40</sup> The public's purpose in creating these institutions was in fact a national purpose. Rudolph observed: "[A] commitment to the republic became a guiding obligation of the American college. The American people were conducting an experiment in free government of a nature and scope that the world had not yet known. The American college was intended to serve that mission."<sup>41</sup> This new enthusiasm was an early reflection of the public's need for more democratic and secular institutions that espoused no religious dogma and could be held accountable for state needs and objectives.<sup>42</sup> Moreover, these initiatives indicated that higher education was becoming so essential to the public good and social welfare that state governments could not further linger on the periphery of higher education, allowing religiously governed private colleges to dictate the national educational agenda.<sup>43</sup>

As the common school movement took hold in America during the period from 1820 to 1850, education was in the process of becoming a public cause requiring public funds.<sup>44</sup> Legislative bills were designed and submitted that increasingly introduced educational initiatives separately from other internal improvement legislation.<sup>45</sup> During this period, the use of the term "common" evoked a special meaning in both the historical and constitutional context. Common schools were created as institutions where all children, regardless of social position, economic condition, or religious

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38. LUCAS, *supra* note 21, at 129-46; *see* PFEFFER, *supra* note 9, at 91-124.

39. RUDOLPH, *supra* note 13, at 36.

40. *Id.* at 44-67.

41. *Id.* at 61.

42. *See id.* at 63-62.

43. *See id.* at 184-92.

44. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860, at 182-92* (1983).

45. *See id.*



preference, could obtain public instruction free of charge.<sup>46</sup> The intent was to establish state-operated secondary schools and colleges that were free of sectarian religious influence and control.<sup>47</sup> As Alexander and Salmon have observed, the common schools were designed to address three shortcomings in an overwhelmingly private educational system:

(1) The private schools did not constitute a system, but were created and funded through different means by various initiatives for private objectives. There was no system in place, state or otherwise, that could be made more accessible for the vast needs of a new and developing nation.

(2) The private and parochial schools were not normally free of cost. Poor families struggled financially in order to enroll their children.

(3) The private and parochial schools were often motivated by the desire to maintain religious, social, ethnic, economic, and often racial segregation.<sup>48</sup>

The shortcomings of private and parochial primary and secondary education were similar to the problems that government authorities experienced with private institutions of higher education. In the aftermath of the famous case, *Trustees of Dartmouth College v. Woodward*, privately incorporated colleges retained complete control over their own policies and activities.<sup>49</sup> After the *Dartmouth* decision, private colleges grew and flourished throughout the United States and enjoyed unprecedented autonomy.<sup>50</sup> According to Rudolph, the *Dartmouth* decision also “discouraged the friends of strong state-supported and state-controlled institutions; . . . by encouraging [private] college founding and by discouraging public support for higher education, [*Dartmouth*] probably helped to check the development of state universities for half a century.”<sup>51</sup>

Public and private institutional distinctions that were nonexistent in the earlier colonial colleges widened as private institutions chose not to adhere to changing social conditions.<sup>52</sup> State governments demanded that they expand their academic fields of study to include many nontraditional

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46. *See id.* at 104-35.

47. KERN ALEXANDER & RICHARD G. SALMON, PUBLIC SCHOOL FINANCE 2 (1995).

48. *Id.* at 2-3; *see also* ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 164-66 (1947).

49. 17 U.S. 518, 652-54 (4 Wheat. 1819).

50. RUDOLPH, *supra* note 13, at 211.

51. *Id.*

52. LUCAS, *supra* note 21, at 131, 142; RUDOLPH, *supra* note 13, at 112-114; *see* ALEXANDER & SALMON, *supra* note 47, at 2-3.

disciplines and students from a broader range of socioeconomic classes.<sup>53</sup> Pressure increased on private colleges as many institutions retained public assistance in a variety of ways while providing educational opportunities to only selected students of particular economic and religious classes.<sup>54</sup> An illustration of the rising state discontent with private institutions' exclusivity transpired in Kentucky in 1825, when the state's governor denounced the tradition of providing state support for Transylvania College, a thriving religious institution in what was in the West at that time.<sup>55</sup> He declared: "The State has lavished her money for the benefit of the rich, to the exclusion of the poor; . . . the only result is to add to the aristocracy of wealth, the advantage of superior knowledge.'"<sup>56</sup> As a result, legal questions began to emerge concerning the constitutionality of providing public aid to privately incorporated institutions and to religious colleges.<sup>57</sup> It became increasingly apparent in most states that governments could no longer justify funding private institutions.<sup>58</sup> Distinctions had to be made between those institutions that were capable of responding to societal needs and those that continued to follow traditional educational practices established over a century ago.

#### V. STATE CONSTITUTIONAL RESTRICTIONS EMERGE

Throughout this developmental period of colleges and universities, most of the instances that created tension between the public and private sectors involved governmental attempts to regulate private colleges and most related to state requirements pursuant to appropriations and taxation.<sup>59</sup> As public versus private controversies intensified during the early and mid-1800s, state constitutions adopted strict provisions that expanded on the intent of the federal Establishment Clause.<sup>60</sup> Early interpretations of these provisions

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53. LUCAS, *supra* note 21, at 132-37; RUDOLPH, *supra* note 13, at 237-39, 262. This shift in perspective was challenged in the Yale Report of 1828, authored chiefly by Yale President Jeremiah Day and was a defense of the traditional college and the classic liberal arts curriculum against the inclusion of newer and more professional disciplines. RUDOLPH, *supra* note 13, at 130-35. The Yale Report was supported by many private colleges and stated that professional preparation should be nonspecific and general in character. *Id.*

54. RUDOLPH, *supra* note 13, at 205.

55. *Id.* at 206.

56. *Id.* (alteration in original) (citation omitted).

57. *Id.* at 208-10 (discussing the Supreme Court's decision in *Dartmouth*).

58. *See id.* at 212.

59. David W. Breneman & Chester E. Finn, *An Uncertain Future, in PUBLIC POLICY AND PRIVATE HIGHER EDUCATION* 40 (David W. Breneman & Chester E. Finn eds., 1978); Amy Goldstein, *Md. Seeking More Control Over Private Colleges*, WASH. POST, Feb. 24, 1988, at B1, B3.

60. Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1, 4-9 (1997); *see also* ALEXANDER & ALEXANDER, *supra* note 27, at 113-17, 121-22 (discussing

restricted allocations of public aid to sectarian and privately incorporated colleges.<sup>61</sup> For example, these precedents influenced West Virginia's constitutional guarantee of religious freedom and its prohibitions on state entanglement with religious institutions in 1863.<sup>62</sup>

Most religious freedom provisions in state constitutions made it much more difficult for religious schools and colleges to obtain state aid.<sup>63</sup> As a result, despite recurrent and more permissive amendments to state constitutions that have been made,<sup>64</sup> only a few states have attempted to directly appropriate funds for assisting religiously affiliated private colleges.<sup>65</sup> In 1918, the Iowa Supreme Court ruled that

direct payment of public monies to religious colleges would violate article I, section 3 of the state constitution prohibiting [the] enactment of any law "respecting an establishment of religion" and any [other] law requiring persons to "pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."<sup>66</sup>

Yet, while direct institutional aid to private religious colleges was largely prohibited, indirect assistance in the form of vouchers, grants, scholarships, and tuition reimbursements to students became a more contentious issue resulting in a profusion of litigation. Early court decisions tended to conclude that any form of aid, whether it was given directly to schools or channeled through indirect student aid devices, resulted in funding of the religious institution.<sup>67</sup>

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the separation of church and state in colonial America and in the Constitution).

61. Kemerer, *supra* note 60, at 4-9; see KERN ALEXANDER & ERWIN S. SOLOMON, COLLEGE AND UNIVERSITY LAW 118 (1972).

62. A.E. DICK HOWARD, STATE AID TO PRIVATE HIGHER EDUCATION 934-35 (1977).

63. ALEXANDER & ALEXANDER, *supra* note 27, at 157-60; see Kemerer, *supra* note 60, at 15.

64. For example, since the Civil War, Alabama has had three constitutions. ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING, 1938-1968, at 11 (1970). The constitution adopted in 1901 has been amended over 300 times in the intervening years. *Id.* Constitutional revisions adopted during the 1960s often resulted in shorter, less restrictive constitutions. *Id.* at 15.

65. Kemerer, *supra* note 60, at 20-22 (discussing the outcome of various court cases challenging public funding allotted to private schools).

66. *Id.* at 31 (quoting IOWA CONST. art. I, § 3) (citing Knowlton v. Baumhower, 166 N.W. 202 (Iowa 1918)).

67. Synod of Dakota v. State, 50 N.W. 632, 635 (S.D. 1891). In 1891, the court found that indirect payments to students in South Dakota to attend Pierre University, a private Presbyterian university, violated the state constitution. *Id.* Article 6, Section 3, of the South Dakota Constitution stated that "'no money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.'" *Id.* (quoting SOUTH DAKOTA CONST. art. 6, § 3 (1891)). The court further stated: "The pay[ment] of the

Despite early sporadic attempts by states to provide direct aid to private and religious institutions, or to route funds through the conduit of indirect student aid, for example, voucher-type programs, barriers in state constitutions generally held firm and prohibited such appropriations.<sup>68</sup> This held true for most litigation in the 1800s and through the mid-1900s.<sup>69</sup> However, as higher education enrollments began to increase in the post-World War II era, the judicial commitment to Jefferson's "wall of separation" began to rapidly dissipate at both the federal and state level.

## VI. FEDERAL INFLUENCE ON STATE LAW AND POLICY

Perhaps the most significant federal development in higher education during the 1960s was the rapid adoption of student aid instead of institutional aid as the primary vehicle for providing more postsecondary education opportunities. This was not the first time that the student aid debate had surfaced in Washington. In 1944, a defining policy event occurred when soldiers returning from World War II were granted student aid vouchers to attend the college of their choice.<sup>70</sup> The Serviceman's Readjustment Act, or as it is more commonly known, "The G. I. Bill," allowed students to receive federal funds for use in public and private colleges and universities throughout the United States.<sup>71</sup> These tuition grants to veterans could even be used at theological seminaries.<sup>72</sup> The Act represented the first comprehensive governmental voucher program in higher education in the United States.

Nearly two decades later, after the wave of G. I. Bill recipients had

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tuition of pupils in the Pierre University to the plaintiff [Synod of Dakota] in this case will, in our opinion, be for the benefit of or to aid such school or institution, and is clearly within the prohibition of the constitution." *Id.*

In a later case, *Almond v. Day*, the Virginia Supreme Court of Appeals struck down a state appropriation act that provided tuition for orphans of soldiers, sailors, and marines to attend the educational or training institution of their choice. 89 S.E.2d 851, 857 (Va. 1955). Defenders of the appropriation act claimed that the institutions were not the beneficiaries of the funds, instead that "[t]he school children and the state alone [we]re the beneficiaries," a defense that would prove effective in numerous future state cases. *Id.* at 856.

68. See generally Kemerer, *supra* note 60 (discussing early state constitutional challenges pertaining to public funding of private schools).

69. See HOWARD, *supra* note 62, at 14-16; Kemerer, *supra* note 60, at 7-20; see also *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Collins v. Kephart*, 117 A. 440 (1921).

70. Walter Gellhorn & R. Kent Greenawalt, *Public Support and the Sectarian University*, 38 *FORDHAM L. REV.* 395, 426 (1970).

71. *Id.*; 38 U.S.C. § 3452(c) (defining "education institution" to include public and private colleges and universities).

72. Gellhorn & Greenawalt, *supra* note 70, at 426; see 38 U.S.C. § 3452(f) (defining "institution of higher learning" to include any institution similar to a college or university that is empowered by the state to grant an associate or higher degree, which would include many seminaries).

subsidized, extraordinary changes began to take place in federal policy regarding public and private higher education. In 1963, Congress passed the Higher Education Facilities Act, which provided public funds for facility construction on public and private campuses.<sup>73</sup> This Act was a major breakthrough for federal financing of higher education, particularly for church-related colleges and universities.<sup>74</sup> The only limitation imposed on religious colleges was that the facilities constructed with these funds could not be “‘used for sectarian instruction or as a place for religious worship, or . . . [for] a school or department of divinity.’”<sup>75</sup> In the Senate debates, before the passage of the Higher Education Facilities Act, Senator Sam Ervin proposed an amendment that would have barred aid to church-related colleges.<sup>76</sup> After considerable discussion Ervin’s motion failed leaving church-related and other private institutions with full access to these federal tax resources.

Before enacting the Higher Education Facilities Act, the Senate requested an opinion by the Secretary of Health, Education, and Welfare (HEW) regarding the potential constitutionality of providing loans for construction purposes to private and parochial schools.<sup>77</sup> In responding to the Senate’s request, several conditions were identified under which sectarian aid would be unconstitutional.<sup>78</sup> First, across-the-board grants to church schools are not permitted.<sup>79</sup> Second, across-the-board loans to church schools also are invalid.<sup>80</sup> Third, tuition payments for all church pupils are invalid because they accomplish indirectly what grants do directly.<sup>81</sup> From this beginning, which referred to elementary and secondary education, the HEW opinion moved on to higher education.<sup>82</sup> The opinion reasoned that elementary and secondary education restrictions did not apply to higher education and that there should exist two standards of scrutiny.<sup>83</sup> This dualistic treatment of education was justified on the presumption that college attendance is voluntary and pupils are much older and more mature, and that federal aid,

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73. Pub. L. No. 88-204, 77 Stat. 363 (1963); LAWRENCE E. GLADIEUX & THOMAS R. WOLANIN, CONGRESS AND THE COLLEGES: THE NATIONAL POLITICS OF HIGHER EDUCATION 11 (1976); Gellhorn & Greenawalt, *supra* note 70, at 427.

74. Gellhorn & Greenawalt, *supra* note 70, at 427.

75. *Id.* (quoting 20 U.S.C. § 751 (2) (Supp. IV 1969)).

76. *Id.* (citing 109 Cong. Rec. 19467-504 (1963)).

77. PUBLIC HEARINGS ON PUBLIC SCHOOL ASSISTANCE ACT OF 1961, DOC. NO. 109-110 (1961).

78. CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN ITS VARIOUS ASPECTS, DOC. NO. 87-29, at 6 (1st Sess. 1961).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 24.

83. *Id.* at 25.

either grants or loans, to sectarian colleges and universities are within constitutional limits.<sup>84</sup>

The congressional discourse surrounding this Act was a precursor to the debates that would come to dominate discussion on higher education for the next decade. Originally, in addition to facilities construction aid, the Higher Education Facilities Act was to include a scholarship and loan program for undergraduate students based on academic merit and financial need, much like a proposal that emerged but was not passed in the National Defense Education Act five years earlier.<sup>85</sup> However, this undergraduate aid was controversial because under the provisions, scholarships and construction aid were to be allocated to private, church-related institutions.<sup>86</sup> Accordingly, a compromise was reached between the House of Representatives and the Senate that limited federal aid to matching grants and loans to states for construction of undergraduate and graduate facilities.<sup>87</sup> The Act provided for eligibility of both public and private institutions, declaring that states could not allocate public funds in a discriminatory manner.<sup>88</sup> This compromise addressed decades of controversy over public resource allocation for private colleges and universities and established a precedent for future federal involvement in higher education.<sup>89</sup>

It is interesting to note that in his dissent in *Board of Education v. Allen*, Supreme Court Justice Black cited the Higher Education Facilities Act of 1963 as an example of the unconstitutional use of government funds.<sup>90</sup> Justice Black stated: “[T]hat there are already efforts to have government supply the money to erect buildings for sectarian religious schools is shown by a recent Act of Congress which apparently allows for precisely that.”<sup>91</sup>

Two years after the passage of the Higher Education Facilities Act, Congress enacted the Higher Education Act of 1965, which adopted two approaches to federal support of higher education: aid to states and institutions for construction of academic facilities along with support for a variety of academic activities, and direct student aid to needy students.<sup>92</sup> The Higher Education Act of 1965 did not draw distinctions between public, private, and religious institutions, reflecting the intent of the decision

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84. *Id.* at 25-26.

85. GLADIEUX & WOLANIN, *supra* note 73, at 11.

86. *Id.* at 10-11.

87. *Id.*

88. Pub. L. No. 88-204, 77 Stat. 363 (1963) (repealed in part); GLADIEUX & WOLANIN, *supra* note 73, at 10-11.

89. *See* GLADIEUX & WOLANIN, *supra* note 73, at 10-11.

90. 396 U.S. 236, 253-54 (1968) (Black, J., dissenting).

91. *Id.* (Black, J., dissenting).

92. Higher Education Act of 1965, 20 U.S.C. §§ 1001-1147 (1994); GLADIEUX & WOLANIN, *supra* note 73, at 12.

rendered in the Higher Education Facilities Act in 1963.<sup>93</sup> Widespread opposition to passage of the 1965 Act was advanced by the public higher education sector because it was concerned that these programs possessed the potential to escalate tuition and would do little to expand educational opportunity.<sup>94</sup> Chambers summarized public sector objections to direct aid to students as follows: (1) the Act was conceived to aggrandize the private sector, and (2) its tendency is to restrict rather than expand the opportunities available to all, because it shifts the major part of the costs of higher education onto the students and their families, reversing the modern policy of having largely tax-supported higher education accessible to all at only nominal tuition or free of costs.<sup>95</sup>

At the same time that Congress was chipping away at Jefferson's "wall of separation" by enacting laws that aided private religious institutions, indirectly through their students, state courts were entertaining legal battles addressing more restrictive state constitutional provisions that appeared to prohibit direct and indirect aid of private campuses. Of all the state court decisions involving state aid to religious colleges and universities, the most influential at the time was *Horace Mann League v. Board of Public Works* in Maryland.<sup>96</sup> At issue was whether it was constitutional for Maryland to provide \$2.5 million in outright matching grants for construction of buildings at four private colleges.<sup>97</sup> This situation was unique because the legislature in Maryland was attempting to give direct financial assistance to religious institutions.<sup>98</sup> The case was also important because the legal definition of what constitutes a church-related or religious sectarian college, as opposed to a merely private college, was examined by the court.<sup>99</sup> To resolve both issues, the state court identified six significant factors for testing whether an institution is religious (sectarian) or merely private:<sup>100</sup>

- (1) the stated purpose of the college;
- (2) the religious affiliation of college personnel, including the governing board, administrative officers, faculty, and the student body;
- (3) the college's relationship to a church or religious organization;

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93. GLADIEUX & WOLANIN, *supra* note 73, at 12.

94. CHAMBERS, *supra* note 24, at 96-98 (summarizing argument presented by major public colleges and university lobbying organizations).

95. *Id.* at 96-97.

96. 220 A.2d 51 (Md. 1966).

97. *Id.* at 53. The state legislature in Maryland had provided four private colleges with \$2.5 million in matching construction grants. *Id.*

98. *Id.*

99. *Id.* at 65.

100. *Id.* at 65-66.

- (4) the place of religion in the college's programs;
- (5) the result or "outcome" of the college's program, for example, accreditation and alumni activities; and
- (6) the work and image of the college in the community.<sup>101</sup>

Upon applying these criteria to the four private colleges in question, the court held that three of the colleges transgressed the First Amendment of the Constitution.<sup>102</sup>

However, not all state courts followed this reasoning. In 1969, the Vermont Supreme Court observed that so long as the general public is the primary interest served by state educational aid programs, then it is not unconstitutional when private institutions are the recipients of state assistance.<sup>103</sup> The cases in Maryland and Vermont reflected the rising tide of legislation at the federal and state levels to legalize aid to religious institutions. As the federal government continued to set policy and establish legal precedents regarding both higher education and elementary and secondary education, student aid policies based on the "student choice concept" began to flourish.<sup>104</sup> Prior to the Higher Education Act of 1965 only five states had initiated policies that aided students directly in attending public or private colleges and universities.<sup>105</sup> Nearly all state constitutions prohibited appropriations of public money to private institutions not under state control.<sup>106</sup> After enactment of the Higher Education Facilities Act and the federal government's policy in 1965 to aid private institutions through capital funding and direct student aid policies, nine more states had implemented direct student aid policies by 1970.<sup>107</sup>

## VII. THE STUDENT CHOICE CONCEPT

The rationale supporting the federal and state government policy shift to student aid or vouchers for higher education was advanced in the student choice concept. This concept was promulgated by Milton Friedman in the

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101. *Id.*

102. *Id.* at 67-73; see ALEXANDER & SOLOMON, *supra* note 61, at 121-27.

103. Vermont Educ. Bldgs. Fin. Agency v. Mann, 247 A.2d 68, 71 (Vt. 1968), *appeal dismissed*, 396 U.S. 801 (1969); see Kemerer, *supra* note 60, at 22-23.

104. HOWARD, *supra* note 62, at 16-19.

105. NATIONAL ASS'N OF STATE STUDENT GRANT AND AID PROGRAMS (NASSGAP), THE 28TH ANNUAL REPORT 1996-97 (New York Higher Educ. Serv., March 1997) [hereinafter NASSGAP] (NASSGAP releases an annual report each year.). Only five states had direct student aid policies in 1965: California (1956), Illinois (1958), New York (1962), Michigan (1964), and West Virginia for teachers only (1957). *Id.* at 13-22.

106. M.M. CHAMBERS, FINANCING HIGHER EDUCATION 38 (1963).

107. NASSGAP, *supra* note 105, at 13-22 (Massachusetts, Vermont, Ohio, Wisconsin, Pennsylvania, Minnesota, Iowa, Texas, and Nebraska); see HOWARD, *supra* note 62, at 17.



late 1950s and early 1960s.<sup>108</sup> In his writings Friedman opposes virtually all social programs while advocating the importance of market forces and consumer choice.<sup>109</sup> In castigating public education, he argued that it is the only major social enterprise that runs counter to a basic market economy.<sup>110</sup> For Friedman, education is a commodity on the open market and therefore, a consumer good that should not be regulated by government.<sup>111</sup> Accordingly, the individual as beneficiary is responsible for choosing and paying the price for his or her own goods without government involvement.<sup>112</sup>

In attempting to rationalize the use of this economic model with the increasing need of lower-income students to acquire access to postsecondary education, advocates of this approach, primarily private and religious institutions, lobbied intensely for a series of programs based on the high-tuition, high-aid educational funding philosophy.<sup>113</sup> This philosophy maintains that the government should use its funding programs to keep all colleges, public and private, on a high-tuition basis, while operating a vast system of scholarships, loans, and other student financial aid programs.<sup>114</sup> According to this view, these programs should be comprehensive enough so all, or nearly all, needy students are able to attend the institutions of their choice whether public or private.<sup>115</sup> Advocates of this system believe that by leaving higher education to the student, that is, the "consumer," institutions will become more efficient and market-driven while still providing equal educational choices for students from all socioeconomic classes.<sup>116</sup>

The rationale and legal precedent for the student choice argument was established in *Cochran v. Louisiana State Board of Education* in 1930 when the U.S. Supreme Court upheld a lower court ruling supporting the "child benefit theory."<sup>117</sup> In this ruling, the Court determined that public educational resources can be used in private or religious schools when they are perceived by the courts to benefit primarily the students and not the institutions.<sup>118</sup> During the late 1960s and 1970s, student aid, voucher-type programs were perceived by certain court decisions to primarily benefit

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108. MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123, 127-28 (Robert A. Solo ed., 1955); see HOWARD, *supra* note 62, at 54-57.

109. FRIEDMAN, *supra* note 108, at 13-15.

110. *Id.* at 102.

111. *Id.* at 89.

112. *Id.*

113. CHAMBERS, *supra* note 24, at 91-99.

114. *Id.* at 94-98.

115. *Id.*

116. *Id.*

117. 281 U.S. 370, 374-75 (1930).

118. *Id.*

students while neglecting to consider the program's impact on the institutions themselves.<sup>119</sup> Yet, not all states accepted the concept that student aid funds were not an institutional benefit. As late as 1979, a superior court in Alaska ruled in *Sheldon Jackson College v. State*<sup>120</sup> that a tuition grant program is unconstitutional because it provides direct benefits to private educational institutions.<sup>121</sup> The same reasoning that led the *Sheldon* court to conclude that tuition grant programs benefit the private educational institutions would also seem to indicate that they benefit the church that controls the institution as well. However, the victory for public colleges and universities in Alaska was an exception, as many court decisions and state constitutional amendments in the 1970s favored the granting of public resources directly to students, who then convey the funds to religious or other privately controlled institutions.<sup>122</sup>

### VIII. THE *TILTON* PRECEDENT

Until 1970, most aid cases that had reached the U.S. Supreme Court addressed limited forms of public aid, such as transportation and textbooks, to parochial elementary and secondary schools.<sup>123</sup> However, beginning in 1971, the Court decided a line of cases addressing other types of aid programs to parochial schools that would have significant ramifications for future litigation. On June 28, 1971, the Court held in *Lemon v. Kurtzman* that salary supplements paid to teachers of secular subjects in nonpublic elementary and secondary schools were unconstitutional.<sup>124</sup> However, on the same day, in *Tilton v. Richardson*, the Court handed down a decision ruling that the Higher Education Facilities Act's grants to church-related colleges were not unconstitutional.<sup>125</sup> The Court justified this apparent dichotomy by saying that religion does not necessarily "permeate" or "seep into" the use of college facilities.<sup>126</sup> The Court thereby distinguished elementary and secondary education from higher education, making the "wall of separation" much lower for federal and state aid of private colleges and

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119. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746 (1976); *Hunt v. McNair*, 413 U.S. 734, 741-42 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971).

120. 599 P.2d 127 (Alaska 1979).

121. *Id.* at 132; see MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION* 60 (1989).

122. GA. CONST. art. VII, § 1; VA. CONST. art. VIII, § 11; Mass. amend. art. CIII, *amending* Amendment art. XLVI, § 2. Other states that acted to amend their constitutions were Florida (1977) and Colorado (1973). HOWARD, *supra* note 62, at 16-21.

123. *Board of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (transportation).

124. 403 U.S. 602, 607 (1971) ("Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.").

125. 403 U.S. 672, 689 (1971).

126. *Id.* at 681, 687.

universities.<sup>127</sup>

In conjunction with these federal rulings, states began to amend their own constitutional provisions, and state courts began to change the way that they interpreted their constitutions so that it was no longer unconstitutional to aid religious colleges.<sup>128</sup> Within three years of the *Tilton* decision, Florida (1972),<sup>129</sup> Georgia (1972),<sup>130</sup> Colorado (1973),<sup>131</sup> and Virginia (1971 and 1974),<sup>132</sup> in addition to other states, joined those that previously had amended their constitutions to permit direct, student grant and loan programs to religious institutions.<sup>133</sup> Some of these amendments were adopted to permit more direct forms of aid to private colleges and universities.<sup>134</sup> For example, in 1974, Massachusetts amended its constitution to provide “ ‘grants-in-aids to private higher educational institutions or to students or parents or guardians of students attending such institutions.’ ”<sup>135</sup> Other states in aiding students with grants and loans to attend private institutions completely disregarded their own constitutional restrictions. According to Frank Kemerer, the South Carolina Supreme Court “simply ignored the prohibition in article XI, section 9 of the state’s constitution in upholding a similar tuition assistance program for students attending private colleges in the state.”<sup>136</sup>

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127. *Id.* at 685-89.

128. HOWARD, *supra* note 62, at 16-17.

129. FLA. STAT. § 239.461 (1974). The grant programs were initiated in 1974-75. HOWARD, *supra* note 62, at 207. One grant program provided scholarship aid directly to the student while another program aided public and private institutions directly with grants for students based on need. *Id.* at 207-08.

130. GA. CODE ANN. § 32-39 (1971); *see* 1972 *Ops. Ga. Att’y Gen.* 266, 268 (discussing the constitutionality of the amendment). The decision to uphold the grant program was made by the Georgia Attorney General because the program was found to satisfy the three-part *Lemon* test developed for the federal establishment clause. *Id.*; *see* HOWARD, *supra* note 62, at 222.

131. COLO. CONST. art. IX, § 7. Prior to 1973, Colorado’s constitution had been recurrently interpreted as barring grants or scholarships to students who attend private institutions, whether or not such aid were also available to students at public institutions. *See* HOWARD, *supra* note 62, at 149.

132. VA. CODE ANN. §§ 23-38.11 to -38.18 (Michie 1997). The Virginia Tuition Assistance Grant and Loan Act was directed to assist private sector institutions. *See* HOWARD, *supra* note 62, at 905.

133. HOWARD, *supra* note 62, at 17.

134. *Id.*

135. *Id.* (quoting MASS. CONST. art. XVIII, § 2, *amended by* MASS. CONST. amend. art. CIII).

136. Kemerer, *supra* note 57, at 12-13 (citing *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (per curiam), *appeal dismissed*, 413 U.S. 902 (1973)).

## IX. STUDENT AID MECHANISM PREVAILS

For many state policymakers during this period, establishing partial student aid programs for need-based students was an initial entree into a voucher realm while not constituting a fully funded voucher system.<sup>137</sup> John Silber, former President of Boston University and a vocal proponent of vouchers, proposed that all state higher education funding outlays be allocated to students instead of institutions thereby giving private colleges and universities access to all public funds for higher education.<sup>138</sup>

However, despite the popularity of student aid programs at the state and federal level, some states remained unconvinced that these programs were truly constitutional or would serve their growing educational needs. For example, the Nebraska Supreme Court ruled in 1974 that a law authorizing state grants of up to \$500 to students attending private institutions was unconstitutional,<sup>139</sup> while in other states, such as Arkansas and Colorado, state constitutional provisions aiding private colleges and universities and other enterprises were upheld.<sup>140</sup>

Despite instances where states have refused to entangle educational funding with religion, the federal government's policy and legal shift favoring the student aid funding system benefiting private and religious institutions has significantly influenced policies that states have adopted. With the passage of the 1972 Higher Education Amendments and the creation of the State Student Incentive Grants (SSIG), the federal government sent a clear message to state governments that student aid programs were necessary at both the federal and state levels.<sup>141</sup> The purpose of the SSIG program was to grant incentives and encourage states by allocating federal matching funds to fund or create student aid programs.<sup>142</sup> This was an important policy directive aimed at states that either had not prioritized student aid initiatives or had determined that they were unconstitutional because they gave public tax support to private and religious institutions.<sup>143</sup>

As political pressure from the private sector grew and states coveted more SSIG federal funds, states increasingly adopted student aid policies that

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137. See CHAMBERS, *supra* note 24.

138. Breneman & Finn, *supra* note 59, at 50.

139. State *ex rel.* Rogers v. Swanson, 219 N.W.2d 726, 728-79 (Neb. 1974). *But see* Americans United Corp. v. Rogers, 538 S.W.2d 711, 713-14 (Mo. 1976) (upholding a statute that provided up to \$900 to private or public school students).

140. Lendall v. Cook, 432 F. Supp. 971 (E.D. Ark. 1977); Americans United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982).

141. See CARNEGIE COUNCIL, *supra* note 22, at 34-36 (citations omitted).

142. *Id.*

143. F. King Alexander, *Vouchers in American Education: Hard Legal and Policy Lessons from Higher Education*, 24 J. EDUC. FIN. 153, 168 (1998).

made public funds available to private religious institutions.<sup>144</sup> The impact of the *Tilton* case and the federal government's programmatic incentives to emphasize student aid policies produced a bounty of state and federal aid for private religious institutions. In 1970, fourteen states had adopted need-based student aid policies.<sup>145</sup> By 1985, forty-eight states were allocating public funds to public and private colleges and universities through direct student aid programs.<sup>146</sup> Within the short span of two decades, higher education distinguished itself from elementary and secondary education by hacking down the "wall of separation." The few states that had adhered to their constitutional principle of prohibiting public aid to private institutions, themselves succumbed to federal and state pressures to adopt such programs during the 1980s.<sup>147</sup> The federal government, had thereby, not only instituted funding programs aiding religious institutions, but had induced states to do so as well.

Since the federal and state legal shift toward student aid policies in the 1960s and 1970s, including aid to private institutions, state litigation challenging the constitutionality of these programs has substantially subsided. Only in a few extreme cases where private colleges and universities have clearly violated federal and state constitutional provisions by racially discriminating against students has the federal government sought to withhold federal resources and benefits.<sup>148</sup>

#### X. THE FISCAL CONSEQUENCES

Over three decades have passed since the Higher Education Facilities Act and the Higher Education Act were enacted allowing private colleges and universities to receive public support primarily through their students. This indirect source of institutional revenue has significantly changed the higher education environment. Once the legal barriers to providing public funds to private colleges and universities through student voucher mechanisms were eliminated, first at the federal level and then at most state levels, governmental student aid funding began to rapidly increase. At the federal level in the 1996-97 academic year, over six billion dollars in grants and thirty-two billion dollars in loans were allocated to students through federal direct

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144. *Id.* at 169-70.

145. CARNEGIE COUNCIL, *supra* note 22, at 147-48.

146. *See* NASSGAP, *supra* note 105 (1985-86 data).

147. New Mexico implemented seven different direct student aid programs during the 1980s. Montana began receiving SSIG resources in 1981. NASSGAP, *supra* note 105 (1995 data).

148. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 578-79 (1983). In this decision the Court upheld the Internal Revenue Service's authority to remove the tax-exempt status of Bob Jones University because of racially discriminatory policies. *Id.* at 605.

student aid programs.<sup>149</sup> Direct student aid programs have become the primary federal vehicle for supporting undergraduate education in the United States.

During the same year, over three billion dollars in state need-based and merit-based grants were awarded to students through 217 various state grant programs.<sup>150</sup> State grants have grown annually as a percentage of state operational expenditures for higher education, from 4.8% in 1976-77 to 6.6% in 1996-97.<sup>151</sup> In a number of states, spending on direct student aid programs as a percentage of state appropriations is considerably higher than the national average of 6.6%. For example, in New York and Vermont, grant program funds constitute over 22% of all state appropriations to higher education.<sup>152</sup> In Illinois and Pennsylvania, grant awards constitute over 14% of all public higher education appropriations.<sup>153</sup> In other states such as Georgia, where a new scholarship program has grown to over 160 million dollars annually, grant program resources have increased from less than 3% of all state appropriations in 1990-91 to over 10% in 1996-97.<sup>154</sup>

For institutional officials and government policy analysts, it would be misleading to view the over forty billion dollars in governmental assistance allocated to student aid programs as primarily a student benefit, without taking into account the economic incentives and disincentives these programs provide as sources of revenue for higher education institutions. As a source of revenue, these tuition-sensitive aid programs have grown along with college costs, becoming an important source of institutional revenue especially since the early 1980s. In order to fully comprehend the consequences of the removal of the legal barriers and the virtual elimination of the "wall of separation" restricting public tax aid to private colleges and universities, it is essential to illustrate how public and private institutions have benefited from student aid programs and whether "student choice" for lower-income students has improved since the 1970s.

During the federal debates of the 1960s and early 1970s, serious reservations about establishing student aid policies at federal and state levels

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149. NATIONAL CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS (1998). Data on student aid programs also obtained from the Illinois regional office of the College Board.

150. See NASSGAP, *supra* note 105, at 1.

151. Alexander, *supra* note 143, at 170-73.

152. *Id.* at 172-73.

153. *Id.*

154. *Id.* at 174-75. In 1998-99, two new state scholarship programs will be initiated in Louisiana and Kentucky, modeled after the Georgia HOPE Scholarship Program. *Id.* Kentucky's HOPE Scholarship uses lottery funds to provide scholarships to students who attend any accredited institution in Kentucky. *Id.* Louisiana's Scholarship Program provides grant or scholarship assistance to students who attend any accredited institution in Louisiana. *Id.* at 174.

were expressed by public university officials.<sup>155</sup> Their concerns emanated from the fear that any philosophical shift in policy toward a voucher system in higher education would jeopardize public colleges and universities by creating an environment favoring higher cost private and religious institutions.<sup>156</sup> After three decades of student aid policies at the federal level and over two decades at most state levels, it is important to note the consequences of these student aid policies.

The aid program formulas have some endemic, deleterious, and inflationary aspects. A fundamental difference between most student aid programs and traditional institutional funding mechanisms is that distinctions between public and private institutions are rare in student aid programs, with one important exception; cost variances are almost always factored into student aid formulas giving high-cost institutions a fiscal advantage.<sup>157</sup> In order to expand student choice in a system with dissimilar higher education expenditures and costs among schools, aid formulas regularly grant students attending high-cost institutions a greater share of the available resources.<sup>158</sup> They also qualify students, who often come from families with comparatively high incomes, for grant awards solely because the students have chosen to attend high-cost institutions.<sup>159</sup>

For the purposes of this article, federal and state student aid data were used to determine how public and private colleges and universities financially benefit from these programs.<sup>160</sup> Due to data limitations, data on private not-for-profit institutions, private for-profit institutions, and private religiously affiliated institutions could not be separated from the available national and state student aid data.<sup>161</sup> However, because private religiously affiliated colleges and universities alone constitute nearly one half of all nonprofit private institutions<sup>162</sup> and nearly forty-five percent of all nonprofit private institution enrollment,<sup>163</sup> cumulative private institution data is an important

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155. CHAMBERS, *supra* note 24, at 91-105.

156. *Id.*

157. Alexander, *supra* note 143, at 174-78. Cost of attendance or COA is frequently used in federal and state direct student aid program formulas.

158. *Id.*

159. F. King Alexander, *College Tuition and Direct Student Aid*, in POLICY FORUM (Institute of Gov't & Pub. Affairs, Univ. of Ill. 1998).

160. NATIONAL CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., NATIONAL POSTSECONDARY STUDENT AID STUDY 1995-96 (Pub. No. NCES 98-073 1997). Data also was obtained from the College Board, Illinois office.

161. Aggregate private college and university direct student aid data does not distinguish between religiously affiliated and nonreligiously affiliated campuses. Student aid data is presented for public and private institution students.

162. NATIONAL CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 1996, at 183 tbl.176 (1996).

163. *Id.*

indicator of financial trends for private religiously affiliated institutions.

When analyzing federal programs, it is evident that private institutions and their students disproportionately benefit from federal grant and loan programs because of the higher cost of attendance. Federal student aid and enrollment data from 1995-96 show that students attending private colleges and universities constitute over 24% of the full-time student enrollment in higher education<sup>164</sup> while receiving nearly 35% of all federal grant dollars and 62% of all federal loan dollars.<sup>165</sup> Average per student grant and loan awards are considerably higher for students attending private campuses than for students at public campuses.<sup>166</sup> Also, over 70% of private college and university students receive federal aid<sup>167</sup> while only 50% of public four-year university students<sup>168</sup> and 30% of public two-year students receive federal aid awards.<sup>169</sup>

At the state level, private college and university students receive nearly 44% of all need-based grant dollars despite enrolling only 31% of all grant aid recipients.<sup>170</sup> Public colleges and universities enroll 69% of all state grant aid recipients while receiving only 56% of all state grant aid funds.<sup>171</sup> This contrast is especially apparent when examining the average state need-based grant award per recipient. The average state need-based grant award for students attending private institutions in 1996-97 was \$2079 while the average award for students attending public institutions was \$1259, 39% lower than their private counterparts.<sup>172</sup>

This disparity between public and private student aggregate and individual awards is not a recent development. Since the inception of state direct student grant programs, private college and university students have traditionally garnered over half of all direct student grant funding.<sup>173</sup> Only during the last decade have aggregate dollar awards for private college

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164. F. King Alexander, *Private Institutions and Public Dollars: An Analysis of the Effects of Federal Direct Student Aid on Public and Private Institutions of Higher Education*, 23 J. EDUC. FIN. 390, 409-10 (1998).

165. *Id.* Comparative federal student aid data for 1997 was not available at the time of this study. NATIONAL CTR. FOR EDUC. STAT., *supra* note 149. Data also was obtained from the College Board, Illinois office.

166. MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME* 10-14 (1988).

167. NATIONAL CTR. FOR EDUC. STAT., *supra* note 162, at F-18 tbl.F.12.

168. *Id.* at F-12 tbl.F.6 (covering undergraduate students at nondoctoral/first-professional institutions); *id.* at F-13 tbl.F.7 (covering undergraduate students at doctoral/first-professional institutions).

169. *Id.* at F-11 tbl.F.5.

170. NASSGAP, *supra* note 105 (as calculated by author).

171. *Id.* at 22-27 (as calculated by author).

172. *Id.* (as calculated by author).

173. *Id.* (1980-81; 1985-86; 1990-91; 1995-96 data as calculated by author).



students fallen from over 50% to 44% of all need-based grant dollar awards.<sup>174</sup> Despite this recent decline however, data clearly show why private colleges and universities continue to demand that federal and state governments expand voucher programs and the “student choice” concept. These data show that private colleges and universities disproportionately benefit through their students from student aid policies at the state and federal level.<sup>175</sup>

This inequity and disproportionality is magnified by the fact that the percentage of all lower-income students at private institutions has declined since the inception of these governmental policies.<sup>176</sup> As discussed above, governmental expenditures for student aid programs have increased significantly since the mid-1970s while lower-income enrollments at private institutions have not increased accordingly. According to McPherson and Schapiro,<sup>177</sup> lower-income and lower-middle income freshman student enrollment at all private colleges and universities declined from 1980 to 1994 despite the disproportional amount of direct student aid funding flowing to private institutions.<sup>178</sup> From 1980 to 1994 enrollment of lower-income students at private institutions dropped from 21.2% to 18.5%.<sup>179</sup> During the same period, enrollment of lower-income students at public institutions increased as a percentage of the total lower-income student population from 78.8% to 81.4%.<sup>180</sup> For lower-middle income students, private institutions also experienced a decline in enrollment as a percentage of the total lower-middle income population from 23.1% in 1980 to 21.5% in 1994.<sup>181</sup> Public institutions, once again, experienced an increase in the percentage of lower-middle income students from 76.9% in 1980 to 78.5% in 1994.<sup>182</sup>

These data indicate that despite overall enrollment increases as a percentage of the entering freshman class in all public and private institutional sectors since the late 1970s, lower-income and lower-middle income student enrollments have only increased in public colleges and universities, despite massive amounts of federal and state student-aid program

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174. *Id.*

175. See Alexander, *supra* note 143; Alexander, *supra* note 164.

176. Alexander, *supra* note 143, at 176 fig.3; Alexander, *supra* note 164, at 412 tbl.2; see ALEXANDER W. ASTIN & LINDA J. SAX, THE AMERICAN FRESHMAN SURVEY 1974-1997 (UCLA Higher Educ. Inst. 1997).

177. MCPHERSON & SCHAPIRO, *supra* note 166 at, 42-48.

178. *Id.* at 43-44. McPherson and Schapiro defined lower-income freshman students as those coming from families earning less than \$10,000 in 1980 and less than \$20,000 in 1994. *Id.* at 43. They defined lower-middle income students as those coming from families earning \$10,000 to \$15,000 in 1980 and \$20,000 to \$30,000 in 1994. *Id.*

179. *Id.* at 44.

180. *Id.*

181. *Id.*

182. *Id.*

resources flowing to private colleges and universities. Thus, this demolition of the wall of separation between church and state has done little or nothing to help poor students to attend more affluent private institutions. Meaningful choice for the poor has not been enhanced.

## XI. CONCLUSION

As this article has shown, state governments have followed federal legislative directives in crumbling Jefferson's "wall of separation" by removing many legal barriers that prohibit the provision of aid to private religious colleges and universities and by creating voucher funding schemes for higher education. In most states, the constitutionality of providing significant amounts of public funds to private, including religious, institutions of higher education through student aid programs is no longer a contested issue in the higher education arena. Today, funding of student aid programs at the federal and state levels constitutes an increasing proportion of all funding for higher education. Even with the use of means testing designed to concentrate greater assistance on lower-income students, voucher programs create fiscal disparities by favoring tuition-reliant private and religious colleges and universities while contributing little to the concept of improving student choice, and thus, educational opportunities. If the experience in higher education is a valid indicator, then one can expect that state voucher programs at elementary and secondary education levels will only produce a marginal increase in choice for lower-income students while greatly increasing inequalities in state-funded revenue between public and private schools. As Kemerer recently observed, "The constitutionality of state funded school vouchers is very much a function of a multiplicity of factors, most of which get overlooked in the debate over the efficacy of school choice."<sup>183</sup> The factor that is most overlooked in higher education is how the demolition of Jefferson's "wall of separation" has resulted in substantial financial benefits to private colleges and universities without improving student choice.

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183. Kemerer, *supra* note 60, at 38.

