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CHAPTER 18

Education Law

§18.1. State aid to parochial schools. Few topics demand as much attention as the education of the young, and for this reason, there is a growing concern for the future of private and parochial schools. The financial pinch of these institutions has become more critical as higher quality education is demanded of these schools, and as rapidly escalating operating costs make it virtually impossible for them to meet even existing standards. In Massachusetts, there can be no doubt as to the seriousness of the economic problem. Consideration must be given to this situation even if these schools continue to operate as they have been, which seems unlikely, or the state decides to take some affirmative action as to their maintenance or their substitution. There were approximately 565 parochial schools in Massachusetts in 1968, with an enrollment of nearly a quarter of a million pupils. If these schools were to be abandoned, the cost to the state just to replace those facilities unfit for continued use would be $1.2 billion. It would cost $212 million annually to educate the surplus of children that would enter the public school system. The tax rate in such towns as Fall River, Lowell and Lawrence would increase up to $44, while those in Boston, Worcester and Holyoke would experience at least a $25 rise.[1] A plan to sustain these schools would no doubt be much less expensive. Connecticut, for example, has funded its program to pay a certain percentage of parochial school teachers salaries at only $6 million for the first year.[2] The economic considerations are indeed formidable, and are without any question a major consideration of those intent upon providing some form of aid to Massachusetts parochial schools. Many constituents are pressing their representatives for action on this problem. The General Court has already voted overwhelmingly for a proposed amendment to the state constitution that would make grants to parochial schools permissible. A second vote is mandatory and is forthcoming in the 1970 session. Most believe that there will be no serious opposition to the proposal when this vote is taken.[3] However, the present crisis in education in Massachusetts has long-term implications as well as immediate economic consequences. How the legislature approaches this problem now will affect the direction Massachusetts will take in the field of education in the near and

§18.1. [1] Report of the Massachusetts Advisory Council on Education, in the Boston Herald Traveler, Sept. 12, 1969, at 48, col. 3.

[2] Public Act 791, §26 (1969).

[3] Interview with George Rogers (D–New Bedford), House chairman on education and member of a special legislative commission (1969 Sess.) to study the aid problem, Sept. 23, 1969.

distant future. It will similarly effect the state's relations with sectarian institutions in general. This comment will attempt to search the development of church-state relations in Massachusetts and then proceed to analyze the legislature's several alternatives in the light of recent pronouncements on the issue by the United States Supreme Court.

As early as 1642 it was the legal duty of town selectmen in Massachusetts to be sure that all children were taught how to read. It was also the legal duty of the master of each family to hold catechism instructions for all children of the family. If any child failed upon trial by the selectman to answer questions from the catechism, he could be taken from his parents and not returned until he reached the age of 21 years.[4] To be taught to read amounted to learning to read the catechism. By 1671 selectmen could not hire a schoolmaster who was not of sound religious standing in the community,[5] and by 1701 a town could be fined for having a schoolmaster not approved by the local minister.[6] The learning process was thus intricately intertwined with the inculcation of theology, and the philosophy of liberty was infused with a sense of moral righteousness.

The state Constitutional Convention of 1777-1778 produced a provision containing two articles that regulated church-state relations. One article declared that no one could be governor, lieutenant governor, a member of the house or senate or a judge who was not a Protestant. The other article stated that free exercise of religion was to be enjoyed by all Protestant denominations.[7] There was no mention of schools or education. This constitution was soundly defeated in the popular election of 1778. A year later another convention met. The constitution it proposed contained an article that sustained the interrelation of secular and religious institutions, affirming the state's right to require towns to provide religious instruction. It also provided that religious societies in lieu of the town officials could have "the exclusive right of electing their public teachers." The last paragraph of Article III provided for equal protection of all denominations of Christians.[8] The proposal also contained a subsection entitled The Encouragement of Literature, which declared, "[it is the duty of the legislature]" to encourage private societies and public institutions, reward and immunities, for the promotion of agriculture, arts, sciences, commerce. . . ."[9] Thus, secular instruction was perforce complimented by the infusion of religious principles in all education in Massachusetts for over a century.

By 1820, religious affiliations in the Commonwealth had grown more diverse. Several amendments to the Constitution were offered

[4] The General Laws and Liberties of the Massachusetts Colony, Chapter on Children and Youth (1642).
[5] Id., Chapter on Schools (1671).
[6] Province Laws, 1701-1702, c. 10, §2 (1701).
[7] Rejected Mass. Const. of 1778, arts. XXIX, XXXIV.
[8] Mass. Const. of 1779, Part the First, art. III.
[9] Id., Part the Second, c. 5, §2.

at that year's constitutional convention, one of which sought to do away with that part of the third article that made it incumbent upon the state to provide places for worship and for religious instruction. This responsibility was to be vested in the individual sects, and members would contribute to support only their own denomination's instruction. The amendment also sought to do away with the relatively anachronistic rule of compulsory attendance at church and religious instruction. It failed to pass by a two-to-one margin in the popular vote. However, by 1833 an amendment was adopted and ratified, accomplishing what the proposal of the 1820 convention had failed to. The Eleventh Amendment also declared that all religious sects and denominations were to be treated equally and none were to be subordinate to another. The great control that the state had maintained over religious affairs was thus extinguished. The greater variety of sects and denominations and the ever-increasing number of members in each required that this control be abandoned in favor of self-determination. Yet the emphasis on religious instruction and morality remained, as the opening clause of the amended third article attests:

> As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government. . . .[10]

In 1835 a system of common schools was established in Chapter 23 of the Revised Statutes. Towns were to levy taxes, appoint instructors and determine the structure of their own school district. A state school fund had also been created from the sale of land in Maine and from the federal money received for services of the Massachusetts' militia. One section of Chapter 23 provided that no books could be used in the common schools that promoted the tenets of any particular denomination of Christians.[11] Thus, in a matter of a few years, the state went from the avid promoter of morality to the stern advocate of a secular school system. Yet in 1846 the school fund was expanded,[12] and in 1847 Amherst and Harvard were granted annuities.[13] Thus, the state had not entirely turned its face from religious affiliated educational institutions.

In 1853 another constitutional convention assembled and the commissioner on education and literature was ordered to inquire into a possible amendment prohibiting sectarian appropriations. This resulted in adoption of the state's first anti-aid amendment. As the commissioner proposed various drafts, problems arose in relation to the meaning of the word "schools." The initial response to this query was that it did not embrace colleges, but only schools at the town

[10] Id., art. III.

[11] Revised Statutes of 1835; c. 11, §13; c. 23, §23.

[12] M.G.L. 1846, c. 219.

[13] Bulletins for the Constitutional Convention, 1917-1918, Vol. II, at 56 (hereinafter cited as Bulletins).

level.[14] Samuel K. Lothrop of Boston, a prime force in support of the measure, declared that:

> . . . This resolution relates simply to the common schools of the Commonwealth . . . we wish to provide against any sectarian or denominational influence being brought to bear in their management. That covers the whole extent of the resolution.[15]

This idea seems to be the genuine basis of the amendment, and it is reiterated at several points in the debates by key personnel in the amendment's adoption.[16] Samuel Parker of Cambridge introduced the resolution that eventually would be passed and ratified. A "thin House" accepted the submitted proposal, but this did not end the debate. Some felt the resolution was not sufficiently inclusive, and Parker, a Harvard professor, was accused of lobbying for that institution's interests. Parker reasserted what he considered the main purpose of the measure, i.e., the safeguarding of the common school system from eventual envelopment by the sectarian schools, which he thought were about to press the state for financial aid. Much of the general dissatisfaction came from those delegates who felt the amendment was simply unnecessary. There had been no indications of future problems regarding the common schools, nor any request for aid from the private schools. The trouble, they felt, would result from the controversy over the proposed amendment. The convention was causing a problem that they ostensibly were attempting to solve.[17] Nevertheless, in November 1853, Proposition 6 was submitted to the people for ratification. It provided:

> All monies raised by taxation in the towns and cities, for the support of public schools, and all monies which may be appropriated for the support of the common schools shall be applied to and expended in no other schools, other than those which are conducted according to the law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such monies shall never be appropriated to any religious sect, for the maintenance, exclusively, of its own schools.

The proposal was defeated at the polls by 411 votes out of a total of more than 130,000 cast. In a special election two years later, however, the resolution of the Massachusetts Convention was ratified and became the Eighteenth Amendment.

In 1866 the Supreme Judicial Court of Massachusetts interpreted the amendment in accordance with its promoters' intentions. The case,

[14] Official Report of the Debates and Proceedings in the State Convention of 1853 at 483.

[15] Id. at 543.

[16] Id. at 547; vol. III, at 618.

[17] Id. at 543; vol. III, at 618-619.

Merrick v. Inhabitants of Amherst,[18] involved a suit by taxpaying townspeople to enjoin the town from issuing bonds or borrowing money for a privately operated agricultural college. The issue, inter alia, was whether this action was in violation of the Eighteenth Amendment. The Court had little difficulty dispelling the petitioner's contention:

> The object of the provision is to regulate the expenditure of money . . . for general educational purposes, and to confine it strictly to the support of the common or public schools . . . the phrases "public schools" and "common schools" . . . are never applied to . . . incorporated academies and colleges.[19]

Colleges were hence judicially excluded from the amendment's prohibitive force. The Court went on to say that the amendment was also intended to disallow appropriations for schools of a "sectarian character." It is notable that the Court mentions this as a secondary purpose of the provision.

Sectarian aid was outlawed to achieve the fundamental aim of the amendment, the preservation the common school system, but by the turn of the century state aid to sectarian schools was looked upon as an evil in and of itself, without regard to this initial objective.

In 1913 the Massachusetts House and Senate requested the Supreme Judicial Court to give an advisory opinion on whether the existing constitutional provisions adequately prohibited sectarian appropriations in any form, and whether the Court felt it necessary to further amend the constitution to so provide. The Court said that although aid was forbidden to sectarian primary and secondary schools, it was not prohibited to schools at the college level. With Chief Justice Rugg apparently not willing to cast a decisive vote, the Court divided evenly on the question of aid to church-related institutions serving other than educational purposes. It declined to express its opinion as to whether an amendment was necessary, deeming this an exclusively legislative concern.[20] The Court's division on this charitable institution question, as well as its response regarding aid to college-level institutions, was sufficient to prod the legislature to consider a more extensive amendment in the area of public aid to private institutions. Of course, since the Fourteenth Amendment to the Federal Constitution was not then considered to make the First Amendment applicable to the states, the issues of contravention of the federal constitution was not before the Court.

An anti-aid measure had been before the Massachusetts' legislature 14 of the 16 years between 1900 and 1916. It was one of the main reasons for holding the Constitutional Convention in 1917. The fact that this convention was held at all was the subject of much disillusion-

18 94 Mass. 500 (1866).
19 Id. at 508-509.
20 Opinion of the Justices, 214 Mass. 599, 601-602, 102 N.E. 464 (1913).

ment at the time, and the numerous forces that brought it into being are by their nature and complexity beyond the scope of this discussion. These forces were primarily of a political character, political not wholly in the sense of a movement among the body politique, but rather in the sense of a combination of party profiteering and personal ambition.[21] There were important issues to be considered, but the idea of a Constitutional Convention to settle them did not appeal to a majority of the voters.[22] Nevertheless, the convention convened and its first serious debate centered around an anti-sectarian, or anti-aid amendment. What resulted from this debate was the replacement of the Eighteenth Amendment by the Forty-sixth Amendment, popularly known as the Curtis-Lomasney Amendment. Edwin U. Curtis of Boston, speaking for his proposal, declared that if the framers of the Eighteenth Amendment could have known how much money would be spent on private institutions subsequent to 1853, they would have seen to it that no sectarian institution in the state would have been eligible for aid.[23] Actually, of the nearly $7 million that the state paid to educational and charitable institutions from 1860-1899, Catholic charities received $49,000 and Catholic educational facilities received nothing.[24] From 1899 through 1916, even the charities were ignored. During these 56 years, the largest private appropriations went to such charitable institutions as the Perkins Institute for the Blind, the Massachusetts Eye and Ear Infirmary and the Massachusetts Soldiers' Home. The educational institutions receiving aid included Massachusetts Institute of Technology, Tufts University, Williams College, Amherst College, Wesleyan Academy and Mount Holyoke College, all privately operated,[25] with several engaged in the training of sectarian ministers.

Bishop Frederick L. Anderson of the Newton Theological School told the delegates that 100,000 members of various "patriotic orders" supported the amendment.[26] It would, he said, finish the job that was started in 1853.[27] He himself desired a stronger amendment than was initially proposed but his faction accepted the Curtis-Lomasney proposition, albeit with some reluctance. Anderson seems to have been at least genuinely motivated by a constitutional concept and appears to

21 For an interesting, brief, though somewhat opinionated account of the events leading up to the Constitutional Convention of 1917, see R. L. Bridgman, The Massachusetts Constitutional Convention of 1917 (1923).

22 Id. at 9.

23 Debates in the Constitutional Convention, 1917-1918, vol. I, at 67-68.

24 Id. at 176. See also the tables set forth in Bulletins at 60-79.

25 Bulletins at 60-77.

26 R. L. Bridgman, The Massachusetts Constitutional Convention of 1917, at 19 (1923). Among these were the American Minute Men, reputed to be an offshoot of the American Protective Association. Their leader was one Frank Batcheller, who was the man behind the antisectarian amendments proposed to the General Court each year from 1900 through 1916.

27 Official Report of the Debates and Proceedings in the State Convention of 1853, at 77.

have been the only one of the several primary supporters of the amendment so inclined. Doctrinaire as he was, his purpose, unlike that of many of his colleagues, was not substantially political.

Directly opposing the views of Professor Anderson was John W. Cummings. He felt that the Eighteenth Amendment had discriminated against Catholics and that sectarian schools ought to be incorporated into the common school system as a matter of right to those who chose to attend them. (This argument is commanding considerable attention today, as will be illustrated below.) Cummings declared that the parochial schools had not asked the government for any money whatsoever, and that he could only deduce from this that fear and mistrust, chiefly the result of the actions of "patriotic orders," were responsible for the clamor over this issue.[28] Echoing the prophecy of the dissenters at the 1853 convention, he asserted that only further divisiveness and hatred would result from unnecessary action. Following Cummings were those who felt the proposal far too inclusive, as it made all private institutions, charitable as well as educational, ineligible for state aid. Men who, for various reasons, desired an anti-sectarian amendment were against what they considered the proposal's unnecessary overbreadth. However, in their zeal to see the sectarian matter settled "once and for all," a broader amendment, including private educational and charitable institutions, was accepted.[29] If this additional prohibition had not been added, they were warned, they would have to face accusations of bigotry on the school issue.

Among those concerned over the amendment's overbreadth were several who wished MIT and Worcester Polytechnic Institute to continue receiving annual stipends promised by the state several years prior to the convention. After protracted discussion on the topic, these fears were quieted to a degree by Lomasney's declaration that the state's arrangements with these schools were untouched by the amendment because of the federal constitution's bar against a state passing any "law impairing the obligations of contracts."[30] Finally, the convention adopted a resolution inserting into the amendment the right of the state "to carry out legal obligations, if any, already entered into." This kept the annuities safe for five years at least, but more importantly ended an increasingly troublesome debate that could have proven disastrous to the Curtis-Lomasney measure. Hence, though there were many who for various reasons objected to the amendment's sweeping provisions, the poignancy of concern over the private school issue propelled the amendment to acceptance.

The Forty-sixth Amendment was a product of both religious bigotry and sincere belief in the absolute separation of church and state. But it seems that these factors were secondary to a larger force that these causes themselves produced. This was the general attitude of the

[28] Id. at 211.
[29] Id. at 98-101, 153-154.
[30] Id. at 131.

populace — one that was generated by mistrust and misunderstanding and apparently groundless in fact — that "something must be done before it's too late." This mood was probably created by bigots and absolutists, but it engulfed its creators as it became a tide of popular feeling generating rumor and fear. Nevertheless, it was a "movement" of sorts, gathering momentum, however artifically, and reaching fruition in the ratification of the Forty-sixth Amendment.

Several opinions offered during the debate further demonstrate the unmanageability of the issue at the convention. Attorney John Pelletier was one of the foremost Catholic proponents of the amendment. He expressed his feeling that the best work of the state had been done under the impulse of religion, and that the foundation of this society was upon religious principles. Irreligion was the thing to be feared, he said, and fortunately, it was being combatted in the colleges and academies of the Commonwealth. Despite these convictions and the lack of factual data to support the fear of religious infiltration into the state treasury, Pelletier still felt that society had grown too "cosmopolitan" and public opinion too strong to further allow any state aid to private institutions.[31] Roland Sawyer felt that the election of the first Catholic governor in 1913 had frightened many people into believing a papist conspiracy existed. He also compared the movement's secretiveness to that of the Know-Nothing Party of 1853.[32] Another delegate queried as to how the school question even got before the committee on the Bill of Rights instead of before the education committee, and said he could only deduce from this that the convention just did not know what it was doing.[33] Another stated that two-thirds of the amendment was "clap-trap" and accused the ambitious Curtis and Lomasney of being behind the whole scheme.[34] There were numerous other expressions of the doubt and confusion that characterized the debates. In the end, however, it was the unshakable conviction of Professor Anderson and his faction, the political and personal power of Martin Lomasney,[35] and the constant emphasis on the manifest desires of the people that combined to give the amendment its broad appeal.

An epilogue to the convention's acceptance vote is a final demonstration as to the prevalent misunderstanding of the exact scope of the resolution. Nearly a month after the convention voted to submit the amendment to the people, the committee on education reported out an amendment that would have given the legislature power to act in contravention of the provisions of the anti-aid amendment. It provided that:

31 Id. at 97-98.
32 Id. at 183-184.
33 Id. at 110-111.
34 Id. at 113.
35 Lomasney has been described as "conspicuously the most intense personal force in the convention." R. L. Bridgman, The Massachusetts Constitutional Convention of 1917, at 136 (1923).

> [T]he Legislature shall have the power by taxation or otherwise as will . . . insure a complete and efficient system of education, which will afford to everyone an opportunity for full mental, physical, and moral development.[86]

Curtis protested the amendment in behalf of his committee as directly in conflict with their resolution. The education committee, after withdrawing its proposal, resubmitted it for debate, claiming that their measure had been reported before the anti-aid amendment. Strong sentiment was expressed for giving to the legislature the power to direct the educational policy of the state, bringing about a more flexible approach to education than would result from the anti-aid amendment. The issue of tax exemption benefits for religious institutions was then interjected by Professor Anderson, who substituted it for the broad grant of power in the initial education amendment. This further confused matters. Anderson's proposal was attacked as unnecessary and unwise legislative policy by a former judge of the Supreme Judicial Court,[87] and that was sufficient to convince a majority that such an amendment was unwarranted. In June 1918, a proposal similar to the initial education committee measure was introduced but withdrawn two days later with no debate. The anti-aid amendment had already been ratified in November 1917 by a large majority of voters.[88] The convention itself had refused to recommend the amendment's passage, trusting the electoral process to pronounce fair judgment. Amidst accusations and cross-accusations, political and religious exhortations,[89] the Forty-sixth Amendment replaced the Eighteenth Amendment in the Constitution of the Commonwealth.

The forces that had moved the delegates to approve such a sweeping measure amid apprehension and confusion effectively moved the populace as well. This is not to negate the genuine expression of the will of the voters on this issue. It is submitted, however, that the collective will of the people, like that of the convention, was subject to misleading calculations and resulting prejudices that were more responsible for the ratification than any degree of thoughtful deliberation and enlightening discussion that so important and complex an issue warranted. Perhaps it is in the nature of constitutional conventions that they are subject to the prevailing moods of the moment. That these moods prevent crucial issues from being considered with the deliberation and detachment that they require is most unfortunate.

[86] Debates in the Constitutional Convention, 1917-1918, vol. 1, at 288.

[87] Id. at 360-361.

[88] R. L. Bridgman, The Massachusetts Constitutional Convention of 1917, at 40 (1923). The total vote at the election was 394,070. Fifty-two percent of those who went to the polls were for the amendment; 33 percent were opposed to it. The remaining voters left the ballot blank (over 57,000).

[89] Boston Globe, Nov. 4, 1917, at 17-18; Id., Nov. 5, 1917, at 1.

A judgment on such a crucial issue that results from the topical pressures of an era is inevitably challenged by another era, forced to examine that judgment because of its evaluation of the issue. Massachusetts has never ceased considering the issue of public aid to private schools and it now finds itself grappling with the prohibitions of the anti-aid amendment. A bill to amend the Eighteenth Amendment has already passed the General Court on the first reading.[40] This, along with a bill providing for a special commission to study all aspects of the issue indicates a definite trend toward establishing aid programs to private schools. Several of the objects of the commission's study have already been looked into by the Advisory Council on Education and point to the same conclusion. These include the degree of need of such aid by nonpublic schools, the effect on the local tax rates were these schools to cease operating, and the tax increase in the event such aid is granted. Most of the commission's work will be in fact and figure gathering, as economics is unquestionably the primary force behind the move for aid. Yet there are less calculable but perhaps more critical issues that the commission, the legislature, and the people must consider. These are "the implications of certain provisions of the federal constitution and the constitution of the Commonwealth."[41]

As it now reads, the Eighteenth Amendment of the Massachusetts Constitution forbids any kind of direct aid and probably most forms of indirect aid. The bill to amend this provision, which seems relatively certain of passage in its second vote, contains sweeping provisions for the allowance of aid which are analogous in scope, but contrary in nature, to those of the Eighteenth Amendment. There are just two sentences, one prohibiting the use of public money for any institution "which is not publicly owned and under the exclusive control" of the Commonwealth or federal authority. The second sentence allows the legislature to make "grants-in-aid" to private educational institutions in such manner as may be provided by the general court. Such a broad grant of power would seem to be in direct conflict with the prohibitions of the first sentence. In taking this critical step, the legislature is apparently desirous of retaining as much as possible the ideal of separation of church and state, but at the same time trying to meet an economic crisis in its educational system. As far as the literal form of its constitutional provisions are concerned, in desiring to do both things, it may find that it has done neither very well; yet as we have seen this conflict of competing interests is as old as the first Massachusetts Constitutional Convention. Topical crises have, fortunately or unfortunately, altered its fundamental law on this issue several times. Massachusetts must again choose a direction and all indications are that it will reverse the

40 House Bill 1037. See Appendix 1 *infra*.

41 House Bill 4930. See Appendix 2 *infra*. This bill is a conglomeration of a number of bills introduced to deal with the aid issue.

direction chosen 50 years ago by the 1917 convention. However, it has the advantage now of having the past to examine, of benefitting from the realization that the extremes of outright subsidization and absolute alienation have proven unacceptable. Massachusetts' past experience with the issue ought to at least generate an understanding of its complexity and of the importance of looking beyond the moment's crisis.

The legislature must also consider the implications of the First Amendment of the Federal Constitution.[42] The interpretation of this amendment is also in a state of uncertainty. An understanding of the Supreme Court's present position and of its possible future movements in the area requires a sketch of the evolution of its present policy. It must also be realized that its position could either be extended in scope or severely constricted in suits challenging state programs similar to those Massachusetts is now contemplating.

In 1924, the Supreme Court in *Pierce v. Society of Sisters*[43] recognized the right of parents to direct the education of their children. If this choice meant that the children were to be sent to sectarian institutions, the state could not deny that freedom of choice without violating the liberty guaranteed in the Fourteenth Amendment. The thrust of the case was that parochial schools were given the right to exist in order to sustain to a class of people their freedom of choice in matters relating to the education of their children. The case takes on additional relevance in the light of the increasing demand for community control of schools. Sectarian schools will probably have a significant role to play in that controversy regardless of whether or not they receive aid. However, if they do receive aid, the question of how much control the state or local community can thus exercise over their policies will be far more poignant. The implications of such developments are far-ranging and beyond the scope of this discussion. One final observation seems appropriate. While the Supreme Court's most recent decision in this area was being considered in the New York Court of Appeals, that court declared that providing textbooks to school children who attended private schools was constitutionally permissible. Judge Van Voorhis dissented, basing his opinion on the interesting observation that this program was a step toward state domination of sectarian education.[44] The judge felt that religion must fear the state's intrusion more than the state ought to fear that of the church.

In 1929 the Supreme Court, in *Cochran v. Board of Education*,[45] affirmed a Louisiana Supreme Court decision that denied injunctive relief sought by the complaint to restrain a local school board from appropriating funds to purchase books for private schoolchildren. No

[42] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

[43] 268 U.S. 510 (1924).

[44] Board of Education v. Allen, 20 N.Y.2d 109, 123, 228 N.E.2d 791, 798 (1968).

[45] 281 U.S. 370 (1929).

First Amendment issue was raised, presumably because its applicability to the states via the Fourteenth Amendment has not yet been fully recognized. The appellants did claim that the appropriations violated the Fourteenth Amendment's prohibition against taking private property for a private purpose. The court accepted the Louisiana Supreme Court's interpretation of the law as benefitting only the children and the state, and as aiding no sectarian purpose since the books were lent to the children and were the same as those used in the public schools. Chief Justice Hughes, writing for the majority, declared that the statute served strictly a public purpose in its concern for the education of all the children of the state.

By 1940 it was made clear that the First Amendment was applicable to the states through the operation of the Fourteenth Amendment.[46] Six years later the Supreme Court handed down its decision in *Everson v. Board of Education*.[47] The court held that a New Jersey statute allowing for local authorization of reimbursement for transportation expenses incurred by parents of parochial schoolchildren did not violate the First Amendment. The Court split five to four, with strong dissenting opinions written by Justices Jackson and Rutledge. Justice Black, writing for the majority, declared that just because a state law that is passed primarily to satisfy a public need incidentally is helpful to those private persons most directly affected, the law is not necessarily objectionable.[48] However, a substantial portion of his argument focuses on the free exercise clause. Justice Black says that it is the duty of the state to secure the welfare of the public, and if it chooses to provide bus transportation for public schoolchildren, ". . . it cannot exclude individual Catholics, Lutherans . . . or members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[49] This may be considered as either indirectly subordinating the establishment clause to the free exercise clause, or reading the First Amendment as a whole and applying the general welfare test to a broad theory of church-state relations. Finally, Justice Black declared, "State power is no more to be used so as to handicap religions that it is to favor them."[50] This could mean that whatever the state does for its public schools, it must also do for the sectarian schools, since in not doing it for the latter the state would handicap a religion and also those who chose to attend its schools. This argument is being advanced with much vigor today in relation to current controversy over extensive aid programs.

Justice Jackson, dissenting in *Everson*, pointed out that only Catholic parents were reimbursed and not parents of other private school children, or parents of children who attended schools of another

[46] Cantwell v. Connecticut, 310 U.S. 296, 303 (1939).
[47] 330 U.S. 1 (1946).
[48] Id. at 6.
[49] Id. at 16.
[50] Id. at 18.

sect. Reading the facts somewhat differently than the majority, Jackson asserted that since the buses were supplied not by the state but by a commercial organization, the reimbursement was a direct subsidy to the Catholic parents with tax money from the entire community. This constituted a direct preference of one religion over another and was hence indistinguishable from aiding the church itself.[51] Justice Rutledge, although he admitted that he could have based his dissent on narrower grounds, attacked the statute on the broad principles of Madison's "Memorial and Remonstrance Against Religious Assessments." He asserted that the majority decision disregarded Madison's warning about becoming bound by dangerous, corrosive precedents on this subject.[52] Rutledge dismissed the public purpose argument as disguising the religious factor and as basically avoiding the issue.[53] He sympathized with those who had chosen to bear the double burden of supporting both schools, but felt it to be a necessary price for religious freedom.[54] Rutledge's logic is sound and he reveals many of the loose ends of the majority opinion. Nevertheless, his argument is based on a premise of strict construction that would seem to necessarily demand a withdrawal of all and any recognition the state gives to religion, including tax benefits and other forms of indirect aid to sectarian charitable institutions. This thesis is not without its adherents today, but it is losing stature as both state and federal governments extend their activities into areas heretofore exclusively of private concern. This trend is making accommodation of religious matters a practical necessity.[55]

The *Everson* case was the court's most important venture into the area of state aid to private schools and has been the basis for arguments both supporting and opposing other aid programs. Continual reference has subsequently been made to Justice Black's dictum:

> . . . 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.[56]

Justice Black felt, however, that the free exercise clause superseded any objections to whatever tax money was expended to pay the cost of busing Catholic schoolchildren. Justice Jackson felt that the majority betrayed this very dictum in ignoring the establishment issue

[51] Id. at 18-24.

[52] Id. at 57-58.

[53] Id. at 50.

[54] Id. at 58.

[55] For example, Sherbert v. Verner, 374 U.S. 398 (1962), held that a state could not deny employment compensation benefits to a citizen who refused a job because it involved working on Saturday, which his religion prohibited.

[56] Everson V. Board of Education, 330 U.S. 1, 16 (1946).

in its holding.[57] This troublesome but persistent divergence in emphasis on the two clauses of the First Amendment manifests itself throughout the next 20 years in decisions concerning church-state relations.

One year after *Everson* the Court decided *McCollum v. Board of Education.*[58] Speaking again through Justice Black, the Court invalidated an Illinois "released time" program. The plan provided for religious instructors, paid by religious groups and approved by the school superintendent, to come into the public schools one day a week to instruct children whose parents had requested the instruction. Students not attending the instruction had to remain on the premises and pursue other school-related duties. The majority cited the use of tax-supported school buildings and the close association of the school authorities with religious groups as objectionable as both an establishment of religion and an inhibition of the free exercise of religion for those who did not attend the instruction.[59] Justice Black did not distinguish *Everson* with regard to particulars but settled for a broad reference to that case's dicta, including the statement quoted in the preceding paragraph. Justice Reed, dissenting, felt that there was no establishment of religion here since all classes of believers and nonbelievers could participate with no restraint on free exercise since there was no evidence of coercion.

In 1951 the Court decided *Zorach v. Clauson,*[60] which involved another "released time" program. However, here the court upheld in a 6 to 3 vote a New York statute permitting public schools to release children during regular class hours to go off the school grounds for religious activity. Students not so released remained in the classroom. Justice Douglas, in the majority opinion, cited the fact that no use of public property was involved as it had been in *McCollum,* nor was there any form of coercion on students to attend the religious classes. To invalidate this program, he declared, would be too extreme an application of the First Amendment and repugnant to the government's accommodating relations with all religions.[61] Black dissented, referring again to the use of the state's machinery and its cooperation with religion as bringing the program within the strictures of the First Amendment.

These two cases, when read together, indicate a tendency by the Court to scrutinize individual fact situations and the question of the degree of interrelationship between church and state officials in each situation. A decisional case by case process has thus evolved as the court confronts varying fact patterns, each with its own degree of state involvement in religious affairs, or vice versa. The court has been involved in a process which is the ineluctable result of consider-

[57] Id. at 19.
[58] 333 U.S. 203 (1948).
[59] Id. at 209-212.
[60] 343 U.S. 306 (1952).
[61] Id. at 313.

ing degree an essential guideline. Justice Douglas' acknowledgement of this "degree" in *Zorach*[62] is a statement of the problem as well as an answer to the dissent's inflexible position on the issue.

In 1961, in *Engel v. Vitale*,[63] the court held unconstitutional by a vote of six to one a state school board's directive that an official prayer be recited at the start of the school day. The prayer was of non-denominational nature, and those who did not wish to join in the prayer could remain silent. The Court, speaking through Justice Black, who did not cite a single case in the opinion, declared that the First Amendment prohibited government from composing prayers to be read in its schools by direction of a state school board. The use of government facilities and prestige to support religion, he said, indirectly exerts coercion upon those present to conform to the established practice. Black also reverted to the relationship argument of his dissent in *Zorach* and his holding in *McCollum*. The purpose of the First Amendment, he said, is to prevent any "union" of church and state.[64] By such "union" Black apparently means any interrelationship that gives recognition to any form of religion.

Justice Stewart, in his dissent, stated that the majority had repudiated a heritage and misapplied a constitutional principle.[65]

The Court handed down *Abington School District v. Schempp*[66] a year later. This case invalidated state laws that required passages of the Bible to be read and the Lord's Prayer to be recited at the start of the school day. Students could refrain with the written permission of their parents. Justice Clark, who wrote the majority opinion, developed further the "primary purpose and effect" test that had sprouted its roots in *Cochran* in 1929. This test had been relied upon heavily in *McGowan v. Maryland*,[67] where the Court upheld a state's Sunday closing laws because the statute's present purpose and effect was not to aid religion but to set aside "a day of rest and recreation."[68] In *Schempp*, Justice Clark stated that if either the primary purpose or effect were "the advancement or inhibition of religion" then the law would be unconstitutional.[69] The primary purpose of the practice here was to require a religious exercise in public schools, and the Court considered this an "advancement of religion."

Again, Justice Stewart was the lone dissenter. He would have remanded for findings of proof as to the existence or nonexistence of a coercive force operating on those children who did not wish to participate.[70] Justice Stewart's dissent emphasized an argument men-

62 Id. at 314.
63 370 U.S. 421 (1962).
64 Id. at 431.
65 Id. at 444-450.
66 374 U.S. 203 (1963).
67 366 U.S. 420 (1961).
68 Id. at 449.
69 374 U.S. at 222.
70 Id. at 320.

tioned earlier in regard to Justice Black's majority opinion in *Everson*. The occasion was Justice Black's remark that "[s]tate power is no more to be used so as to handicap religions than it is to favor them."[71] Reference to this argument was also made in *Zorach* by Justice Douglas:

> . . . But we find no constitutional requirement which makes it necessary for the government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence.[72]

Justice Stewart expands on this concept in pointing to the free exercise issue that he felt had been ignored by the Court in *Schempp*. His view on "the establishment of a religion of secularism" is worth summarizing at length from his opinion:

> . . . For a compulsory state educational system so structures a child's life that if religious exercises are held be an impermissible activity in schools, religion is placed at an artifical and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.[73]

The argument has also been applied to meet the constitutional objections to school aid programs. It is contended that, as the financial burdens of sectarian schools grow totally overbearing, it will be the state's duty to provide the aid necessary to preserve the free exercise rights of those who wish to attend the schools. At the same time, if the state refuses, it will be fostering a "religion of secularism."

This relatively innovative view of "neutrality" is being advocated by several commentators on the issue, including Wilbur G. Katz, who in 1963 stated that as government activity increased, strict separation of church and state would severely limit religious freedom. Katz feels that government aid may be the only way to maintain a true position of neutrality.[74] This neutrality would permit and perhaps require including religious schools in school funding programs. These sectarian schools could not be aided singularly, Katz asserts, but rather in statewide programs which would be unobjectionable although it could result in indirect aid to religious teaching.[75] Although

[71] 330 U.S. at 18.
[72] 343 U.S. at 314.
[73] 374 U.S. at 313.
[74] W. Katz, Religion and American Constitutions 27 (1963).
[75] Id. at 74.

Katz deems "groundless" the notion that aid to public schools alone could be constitutionally objectionable as a prohibition of the free exercise clause, this is the logical extension of his viewpoint on the aid issue. This latter argument is enthusiastically embraced by Robert F. Drinan, S.J., dean of Boston College Law School. He has applied this interpretation to a criticism of the decision in *Horace Mann League v. Board of Public Works of Md.*[76] There, the Maryland Supreme Court declared unconstitutional three of four state matching grants to private colleges for the construction of nonsectarian facilities. The court, after conceding the "primary purpose" of the grants to be secular, nevertheless held the grants invalid because the "operative effect" was said to aid religion. Dean Drinan notes a logical inconsistency here and queries as to how such a grant, deemed secular and as serving a public purpose, could have a primary effect that advanced religion? His notion of neutrality requires that the state, in awarding appropriations in pursuit of a public purpose, avoid inquiry into one's religious or irreligious background. This idea is a corollary of his main thesis, that a state violates both clauses of the First Amendment if it denies aid designated to achieve a public purpose to an institution that is church-related solely on the ground that is sectarian. It violates the free exercise clause because it inhibits an individual's right to choose the type of education he desires by denying to him benefits he would otherwise obtain had he not exercised that freedom. It violates the establishment clause in sponsoring the inculcation of secularism and basing appropriations on its determination that this approach to religion in education is the only one deserving of aid. As the only workable norm, Dean Drinan would qualify the establishment clause by making any sponsorship of secular values yield to a claim of free exercise of religion.[77] Practically speaking, this means that a state cannot deny a student aid because he exercised this freedom and did not attend the secularist institution that the state supports. If the state wishes to aid secularism, it must guarantee this student's right to choose a sectarian school. Yet, since any state aid must in general be for a public purpose, if secularism is to be treated as a form of religion, then the state could not constitutionally aid public schools since that would be fostering the religion of secularism. To be sure, this is carrying Dean Drinan's argument ad absurdum, and perhaps denying its essential merit, i.e., its emphasis on the free exercise clause. It seems, however, that any attempt to establish a principle by which states can steer a straight course of constitutional accommodation between the competing interests involved must meet with a similar end when extended to its logical extreme. The resultant inflexibility leaves one where he started, with restrictive language to interpret in a multitude of fact situations.

[76] 242 Md. 645, 220 A.2d 51 (1966), cert. denied, 385 U.S. 97 (1966).

[77] Drinan, Does State Aid to Church-Related Colleges Constitute An Establishment of Religion? — Reflections on the Maryland College Cases, 1967 Utah L. Rev. 491, 509-516.

The thesis of Philip Kurland is diametrically opposed to that of Dean Drinan. He postulates that government can not use religion as a standard for positive or negative action because the single principle espoused by the First Amendment "prohibits classification in terms of religion either to confer a benefit or to impose a burden."[78] What does this do to tax exemptions for church-owned property, for government chaplains, and for state recognition of an individual's right not to work on Saturday if his religion forbids it,[79] etc.? Kurland admits the adoption of such "rules of decision" are perhaps outdated. Nevertheless he considers them essential if the vital concept of legal certainty is to be salvaged.[80] As Justice Douglas observed in *Zorach,* and as has been demonstrated throughout constitutional adjudication on preferred liberties, these questions by nature are matters of degree and not of doctrinal categorization.

Efforts to deal with the issue recognize this inherent aspect of degree. These efforts have ranged from an attempt to formulate a flexible standard while retaining a fixed reference point[81] to an outright endorsement of the case by case empirical process.[82] The former theory is espoused by Alan Schwarz, whose reference point is "no imposition of religion." In essence, this "does no more than prohibit government from compelling or influencing religious choice. . . ."[83] Since aid to parochial schools (or universities since Schwarz feels it should not make any difference)[84] will not "ordinarily" induce the adoption of the Catholic religion, then such aid would not violate the no imposition standard.[85] The matter of degree is relevant here if such aid would free church funds to be used for proselytizing efforts. Cases of this type would have to be determined by balancing the possibility of making such funds available with the public purpose to be served. This should not be a problem, however, says Schwarz, if the sectarian schools are in as bad shape as is alleged. Government aid would not reduce the church's educational expenditures but would only supplement them.[86]

Individual states such as Massachusetts could profit by giving attention to this proposed standard. An overreaching program of aid that

78 P. Kurland, Religion and the Law 112 (1961).

79 See note 55 *supra.*

80 P. Kurland, Religion and the Law 112 (1961).

81 Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 Yale L.J. 692 (1968) (hereinafter cited as Schwarz).

82 Valente, Aid to Church Related Education — New Directions Without Dogma, 55 Va. L. Rev. 579, 606 (1969) (hereinafter cited as Valente).

83 Schwarz, 77 Yale L.J. at 727.

84 Id. at 736 n.146. For a contrasting view, see Giannella, Religious Liberty, Nonestablishment and Doctrinal Development Part II — The Nonestablishment Principle, 81 Harv. L. Rev. 513 (1968). Giannella feels that, for the most part, church-related schools are religious at the precollege level but secular at the college level.

85 Id. at 724.

86 Id. at 734-737.

puts church money formerly used for education into activities other than education, instead of merely making it possible to maintain such schools, will not only be less popular among the opposition to such a program, but will provide further evidentiary material for challenging its validity. Also, Schwarz's standard seems attentive to the complexity of the issue and purports to be flexible enough to accommodate varying methods of governmental ventures into religious affairs.

Yet, not all see merit in such a standard. William Valente, advocate of the above mentioned balancing process, considers Schwarz's scheme not only too complicated, but also far too rigid for a problem as unsettled and uncertain as this. Valente subscribes to a balancing technique, one that liberates the courts from the encumbrance of doctrinal priorities.[87] The courts can analyze a given aid situation, determine the relative values of secular and religious effects, and act accordingly. This process can recognize changing values and evolving standards as such without having to make them into doctrines that stifle the development of the law and of society. Valente's answer to the problems of placing too much discretion in the judges and too little certainty in the law is simply that this particular issue is not susceptible to doctrinal compactness and that balancing provides a necessary testing period for embryonic legal developments.[88] The fact is, however, that this issue is subject to doctrinal compactness, and it is only Valente's opinion that it should not be. Notwithstanding his justifications, it seems that Valente is simply acknowledging the problem of the lack of an enunciated direction by the court on the issue, and recommending that it continue. This is an attractive theory since it avoids having to deal intellectually and constitutionally with complex differences in doctrinal approach and leaves to the Supreme Court the task of appraising situations "by a process that tests as it creates."[89] However sufficient this may be for one concerned only with studying the Court's vacillations, it is not sufficient for those in need of direction to enable them to deal with present conditions. These are people who must design, or decline to design, legislation on the aid issue, as well as those most directly affected by such aid or the lack of it. Legislators can not depend on such an approach to critical issues unless they are to settle for hit-and-miss propositions. In deciding upon legislation, they must consider constitutional tenets as such and not as elastic standards that adjust to topical problems. This is what Valente is in effect granting the lawmakers. Professor Schwarz's approach, at least, seems to attempt a theoretical interpretation of the First Amendment, i.e., prohibition of government influence on one's choice of religion in any way. This indicates that anything less is permissible. Yet it recog-

[87] Valente, 55 Va. L. Rev. at 602-603.
[88] Id. at 606-608.
[89] Id. at 603, quoting A. Bickel, The Least Dangerous Branch 39 (1962).

nizes the problem of degree inherent in any attempt to measure the various contours of different types of aid legislation, and provides for a limited balancing process to deal with it.

The Supreme Court is again considering the public aid issue. The Court's most recent pronouncement on the issue is *Board of Education v. Allen*. This case has left many questions unanswered and for the moment unanswerable. The decision held constitutional a New York statute[90] that required local public school authorities to lend textbooks free of charge to all schoolchildren between the grades of 7 and 12, including those attending private and parochial schools. The procedural history of the case is illustrative of the scope of opinion on the subject. The trial court held that the statute violated both clauses of the First Amendment of the Federal Constitution and N.Y. Const. art. 11, §103. The Appellate Division reversed, ordering the complaint dismissed because the plantiffs lacked standing. However, it discussed the merits of the case at some length and declared the law to be completely neutral with respect to religion. The New York Court of Appeals reversed, acknowledging the plaintiff's standing and holding the statute constitutional.[91]

The majority opinion of the Supreme Court of the United States, written by Justice White, applied the primary purpose and effect test last propounded in the *Schempp* case. In the Court's view, the New York statute passed the test since the express purpose of the legislature in enacting the statute was the advancement of educational opportunity to the young. The Court placed the difficult burden of proof as to the religious effect of the statute upon the complainants, and no such evidence had been offered. The books were furnished to the children, not to the schools, and were only those approved by secular boards of education and designated for use in any public school. The Court recognized the dual purpose of religious schools asserted in the *Pierce*[92] case and noted social interest in maintaining equally high standards in parochial schools as well as public schools. The Court could not accept without substantial evidence the complainant's argument that all teaching in a sectarian school is religious or that the educational processes in these schools is so permeated with religious training that secular textbooks would in fact be instrumental in religious instruction. This is the argument that had been used by the complainants in *Horace Mann League v. Board of Public Works of Md.* and adopted by the Maryland Supreme Court in striking down the state aid programs.[93] There the court applied a set of standards to determine the "religiousness" of the schools involved. These standards ranged from the stated purpose of the schools and the composi-

[90] N.Y. Education Law §701(3) (McKinney 1966).

[91] 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1968).

[92] House Bill No. 1037. See Appendix 1 *infra*.

[93] Horace Mann League v. Board of Public Works of Md., 242 Md. 645, 220 A.2d 51 (1966), cert. denied, 385 U.S. 97 (1966).

tion of its governing board and student body, to the place of religion in the curriculum and the image of the school in the community.[94] The majority in *Allen* concluded that in the absence of evidence about particular schools it could not, on the basis of judicial notice alone, declare the statute unconstitutional as a prohibited involvement of the state in religious instruction.[95] In choosing not to remand for possible findings of such evidence, the Court was either content to rely on the *Pierce* dual purpose theory or was satisfied that the secular purpose served could not, in this particular instance, have a "primary effect" of aiding religion.[96] If the former was the basis of the court's decision, states like Massachusetts that are contemplating programs of private school aid would have had a broader base upon which to draft legislation. Yet the Court gave enough of a warning about the weight that would be given to evidence demonstrating a law's "operative effect" so as to narrow that base substantially. The states must draft legislation carefully to avoid results like those in *Horace Mann*. Hence the issue of state aid to private schools in different situations and in varying forms remains open to constitutional scrutiny. Whether it is colleges or parochial schools that are involved, evidence of an intense religious atmosphere established through standards like those utilized in *Horace Mann* could invalidate a statute that resulted "in unconstitutional involvement with the state in religious instruction."

Since the Supreme Court has developed no fixed set of guidelines, a test of constitutionality offered by a concurring justice is notable. Justice Harlan stated he would examine the purpose of the law involved but would also weigh the possibility of the law so entangling the state within the realm of religion that divisiveness and loss of religious freedom would result.[97] This standard could be the future measuring device for constitutional challenges in the area. Its pragmatic yet fundamentalist approach may appeal to the reorganized court if it felt that more expansive forms of aid than those held valid in *Allen* should be prohibited, even though they might pass the broad qualifications of the purpose and effect test. To be sure, the next test case that comes before the Court will not lack evidentiary material directed at demonstrating religious permeation. The Court may then look for a new standard, and Justice Harlan's criteria of legislative purpose and practical, long-term result could prove the appropriate measuring rod.

The same day that the Court handed down the *Allen* decision, it also announced its decision in *Flast v. Cohen*.[98] This case gave to taxpayers standing to sue in cases where a logical nexus could be established between his status as a taxpayer and the type of legislation being

[94] Id. at 672, 220 A.2d at 65.

[95] Board of Education v. Allen, 392 U.S. 236, 248 (1968).

[96] Drinan, Does State Aid to Church-Related Colleges Constitute An Establishment of Religion? — Reflections on the Maryland College Cases, 1967 Utah L. Rev. 491, 498.

[97] Board of Education v. Allen, 392 U.S. 236, 249 (1968).

[98] 392 U.S. 83 (1968).

attacked. In *Flast,* New York taxpayers challenged the constitutionality of the Elementary and Secondary School Act providing for federal aid to private schools. Since the 1922 case of *Massachusetts v. Mellon,*[99] the Supreme Court had denied that such standing existed, deeming such challenges political questions and stating that without direct injury over and above minute contribution to the taxes that paid for the bill, the complainants had no right to sue. In *Flast,* however, Chief Justice Warren, speaking for eight members of the Court, felt that policy considerations that had grown out of the taxpayer's status had somehow developed into a constitutional tenet.[100] Policy notwithstanding, the Court said that if the law challenged was an exercise of Congressional power under the taxing and spending clause (U.S. Const. art. 1 §8), and if a logical nexus or interconnection could be established between the taxpayer's status and the constitutional transgression alleged, then as such, a taxpayer would have a fundamental stake in the outcome and thus standing to sue. In *Flast,* the law challenged was an exercise of the taxing and spending power of Congress and the constitutional violation alleged was expenditure of public funds so raised in favor of one religion over another. Thus, the alleged violation was of a specific Constitutional limitation on the Congressional power. The taxpayer was contributing to this expenditure, so the nexus was established and standing granted, since the Court felt that the adversity necessary to produce a proper challenge of the constitutionality of a Congressional act was present. *Flast* thus facilitates such challenges and also probably challenges of state laws alleged to be unconstitutional through the operation of the Fourteenth Amendment. Statutes that are open to such attack include the one being contemplated by the Massachusetts legislature. The right to challenge a state law is thus no longer limited to those who demonstrate more than a taxpayer's stake in the outcome of the suit.[101] A Massachusetts taxpayer has standing in federal court to challenge a state law as in violation of the federal constitution. A Massachusetts taxpayer, or rather a group of 24, can also seek to restrain the Commonwealth's expenditure of money that is alleged to be unconstitutional in an equity action in the Supreme Judicial Court or in superior court.[102]

Two bills introduced into the Massachusetts House in the 1969 session, Nos. 4418 and 4419, (see Appendixes 3 and 4) proposed that the state pay the salaries of parochial school teachers of nonreligious subjects. Programs similar to this exist in several states, including Rhode Island,

99 262 U.S. 447 (1922).

100 Flast v. Cohen, 392 U.S. 83, 97 (1968).

101 In Doremus v. Board of Education, 342 U.S. 429 (1952), the Supreme Court held that taxpayers did not offer a justifiable claim in challenging a state law in the federal court because they had not shown a particular financial interest. This decision was based upon Massachusetts v. Mellon, 262 U.S. 477 (1922), which, of course, has been substantially replaced by Flast.

102 G.L., c. 29, §63. Even before this statute was passed in 1937, this right was recognized in Prince v. Crocker, 166 Mass. 347, 44 N.E. 446 (1896). See also Sears v. Treasurer and Receiver General, 327 Mass. 310, 98 N.E.2d 621 (1951).

Pennsylvania and Connecticut. Up to August 1968, there have been over 30 lawsuits challenging aid statutes,[108] the most recent in the Connecticut Federal District Court. The ten plaintiffs in that suit include the American Civil Liberties Union and the Connecticut Branch of the NAACP. In addition to claiming alleged violation of both state and federal constitution, plaintiffs argued that such aid as the subject bill provides would contribute to de facto segregation in the private schools in contravention of the Fourteenth Amendment.[104] This interesting contention is apparently based on the fact that parochial schools are in general almost exclusivley white, due to the low number of urban black Catholics. This de facto argument is also being urged in opposition to the growing demand for community control of schools. Thus, both issues are bound to become intertwined as the public demands their resolution — a situation which should have profound effects on the school system in any state where the electorate is comprised of citizens who will be directly affected by the outcome of either controversy.

As for the First Amendment issues involved, the validity of state payment of the salaries of private school teachers who teach non-religious subjects has not as yet been decided by the Supreme Court. While the *Allen* case, as far as it goes, is in general support of the constitutionality of this type of program, it has several negative implications. First, the child benefit theory will not be available to the program's advocates, although it has been advanced from *Cochran*[105] in 1929 through *Allen*[106] in 1968. In the case of the busing in *Everson* and the book provisions in *Allen,* the parents had previously borne these expenses and the statute was consequently operating to their benefit and not to that of the private school itself. The schools could not be said to be directly aided since it was not being relieved of any expense.[107] However, in the case of a state paying teachers' salaries, the funds will presumably go directly to the school for distribution or for reimbursenment. The child benefit theory is premised on the school's receiving nothing. Second, teachers are considered more crucial in the educational development of the child, and lay parochial school teachers at best may be said to fail to discourage the inclusion of religious materials and discussion in the conduct of even secular studies. Evidentiary matter to this effect will doubtless be presented in suits challenging these appropriations. Third, since the school did once pay for this service, aid may make church funds available for proselytizing efforts. This contention could be negated if it were shown that the individual schools were in such poor fiscal condition that the aid

[108] Monograph 2, ABA Section of Individual Rights & Responsibilities 8 (1968), quoting Dean R. F. Drinan.

[104] N.Y. Times, Oct. 1, 1969, at 34, col. 5.

[105] Cochran v. Board of Education, 281 U.S. 370, 375 (1929).

[106] See Brief for Appellees, 20 L. Ed. 1700-1701.

[107] Board of Education v. Allen, 392 U.S. 236, 244 n.6 (1968).

merely helped them meet operating costs.[108] This could be the case in many areas of Massachusetts. However, it is possible that this state, if it is to aid private schools, will provide aid over and above that which the parish or organization would have had to expend to maintain or increase the standard of education to the level of the state's public schools. Aid in excess of this level would indeed be making funds available for a proselytizing function and hence increase the probability of encountering constitutional hazards. This borderline concern would be obviated if the Supreme Court of the United States decided to accept outright the free exercise argument of aid proponents.[109] This, however, seems unlikely in view of the cautious pace the Court has maintained on this issue in the past. Advocates of the balancing approach to this problem are likely to see this process implemented by, as Valente describes it, "an ad hoc balancing of the competing interests and values under the religion clauses."[110]

The economic argument for Massachusetts to initiate an aid program to parochial schools is indeed formidable and undoubtedly is in large measure responsible for the proposed constitutional amendment's easy passage through the General Court on its initial vote. It is expected to receive as little opposition when taken to a vote the required second time before going to the people for ratification. It seems, however, that the amendment, with its aforementioned defects of contradictory language and questionable overbreadth, is a poorly drafted document that could raise more problems than it solves.[111] The legislature is confronted with a situation that demands a decision on the school aid issue. Yet it should not hasten to adopt an amendment that may not even meet present ills and whose language is certain to cause a considerable amount of unrest in the future. Problems could arise shortly after a program is implemented if the legislature takes the amendment as its reference point and exceeds First Amendment bounds in an expansive aid program. It should consider the mistakes of its forerunners of 1917 who allowed political and personal ambition as well as outright group prejudices to deny themselves an understanding of the complexity of the issue before them. Blind acceptance of proposed bills of great constitutional import reflect legislative immaturity. Such bills may produce temporary relief from the present crisis, but they will not have the clarity and precision that a constitutional provision demands. Professor Paul Freund has stated that the Supreme Court should draw the line of permissible aid to private schools under the federal constitution at those programs held per-

108 See, for example, the Connecticut statute, Public Act 791, §26, which allows only a 20 percent reimbursement of the teacher's allotment (§5). This can go as high as 60 percent in areas where two-thirds of the children are "educationally deprived" (§11). See text at note 2 *supra*.

109 For full explication see materials on Drinan, Pages 476-477 *supra*, text and note 77.

110 Valente, 55 Va. L. Rev. 579, 614 (1969).

111 See Appendix 1 for full text of the bill.

missible in the *Allen* case. This, he suggests, would take the issue out of the political process, thus avoiding dangerous division along religious lines.[112] This is perhaps an overstatement of the manifest inability of some legislatures to avoid such pressures and their repeated failure to examine a delicate question with a requisite concern for its complexity. That concern could perhaps be stimulated in Massachusetts by an understanding of the state's past experience with this issue and also by an appreciation of the current status of the problem on a national as well as on a local level.

Finally, a sense of responsibility for the profound effect that any constitutional action will have on the future of education in Massachusetts must be nurtured if an appropriate response to the problem is to be forthcoming.

APPENDIX I

House Bill No. 1037

Article XVIII of the articles of amendment to the constitution of the commonwealth is hereby amended by striking out section 2 and inserting in place thereof the following section: —

Section 2. No grant, appropriation or use of public money or property of loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private educational institutions in such manner as may be provided by the general court.

APPENDIX II

House Bill No. 4930

Resolved, That a special commission, to consist of three members of the senate, seven members of the house of representatives, the attorney general or his designee, the commissioner of education or his designee, and nineteen persons to be appointed by the governor, one of whom

[112] Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969).

shall be a member of the Massachusetts Bar Association, one shall be a member of the American Civil Liberties Union, one shall be a member of the Massachusetts Association of School Committees, one shall be a member of the Massachusetts Association of School Superintendents, one shall be a member to the Massachusetts Congress of Parents and Teachers, one shall be a member of the Massachusetts Teachers' Association, one shall be a member of the Massachusetts Federation of Teachers, one shall be a member of the Massachusetts Association of Independent Schools, one shall be a member of the Massachusetts Urban League, one shall be the Superintendent of Schools of the Archdioces of Boston, one shall be a member of the Massachusetts Council of Churches, one shall be a member of the Jewish Community Council, one shall be a member of the Massachusetts Taxpayers Foundation, one shall be a member of the Massachusetts Selectmen's Association, one shall be a member of the Massachusetts Mayors' Association, and four shall be representative of the general public, is hereby established for the purpose of making an investigation and study relative to public financial aid to non-public primary and secondary schools. Said commission shall specifically, but without limiting the generality of the foregoing, consider (1) the degree of need for public aid by non-public primary and secondary schools, (2) the effects on local tax rates in the event of the closing of said non-public schools, (3) the effects on public schools of providing aid to non-public schools, (4) the cost in terms of taxation for providing public aid to non-public schools, (5) the need to impose further public standards and regulations on non-public schools, (6) the implications of certain provisions of the federal constitution and the constitution of the commonwealth, (7) the possible proliferation of non-public schools resulting from public aid, (8) other possible alternatives to financial aid, (9) the results of other states involved with public financial aid to non-public primary and secondary schools, and (9) [sic] any other related matter. Said commission may call upon any department, board, or commission of the commonwealth and any subdivision thereof for such information as it may deem necessary for its purposes. Said commission may require by summons the attendance and testimony under oath of witnesses and the production of books, records and papers. Said commission may travel outside the commonwealth. Said commission shall report to the general court on or before the first Wednesday of January, nineteen hundred and seventy-two.

APPENDIX III

House Bill No. 4418

Notwithstanding any contrary provisions of law, cities and towns, subject to the approval of their school committees, are hereby authorized to pay the salary of each lay teacher in private and parochial schools in the grades of kindergarten to the twelfth grade, inclusive,

provided that their teaching does not include any religious or denominational instruction. The commonwealth is hereby authorized and directed annually, on or before November twentieth, to reimburse such cities and towns for all expenditures made under the provisions of this act.

APPENDIX IV

HOUSE BILL NO. 4419

Notwithstanding any contrary provision of law, the commonwealth, subject to the approval of the board of education, is hereby authorized to pay the salary of each lay teacher in parochial and private schools in the cities and towns of the commonwealth in the grades of kindergarten to twelfth grade, inclusive; provided, that their teaching class does not include any religious or denominational instruction.

MARK LEDDY

§18.2. Due process in the schools. Privately controlled and privately financed educational institutions have long had almost complete discretion to suspend, expel, or refuse to grant a degree to a student.[1] A student who objected to disciplinary action could petition the courts for relief.[2] Traditionally, such cases have been argued solely on common law theories.[3] However, there have been many cases in recent years in which the students have raised constitutional issues under the due process clause of the Fourteenth Amendment of the United States Constitution.[4]

This Comment will review the theories of constitutional law which

§18.2. [1] Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928) (student expelled from university for not being "typical Syracuse girl"; court upheld university's action); Barker v. Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923) (student dismissed without explanation; court upheld the university's action).

[2] Goldman, The University and the Liberty of its students — A Fiduciary Theory, 54 Ky. L.J. 643, 651 (1966) (hereinafter cited as Goldman); 6 Minn. L. Rev. 415 (1922).

[3] Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 755 (W.D. La. 1968); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Golt v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Baltimore Univ. v. Colton, 98 Md. 623, 57 A. 14 (1904); Van Alstyne, The Judicial Trend Toward Academic Freedom, 20 U. Fla. L. Rev. 290 (1968) (hereinafter cited as Van Alstyne, The Judicial Trend); Van Alstyne, Procedural Due Process and State University Students, 10 U.C.L.A.L. Rev. 368, 375 (1963) (hereinafter cited as Van Alstyne, Procedural Due Process); Van Alstyne, Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations, 2 Law in Transition Q. 1, 2 (1965) (hereinafter cited as Van Alstyne, Student Academic Freedom); Comment, Developments in the Law — Academic Freedom, 81 Harv. L. Rev. 1045, 1144 (1968) (hereinafter cited as Comment, Developments); Annot., 58 A.L.R.2d 903, 912 (1958).

[4] Marino v. Waters, 220 So.2d 803 (La. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Van Alstyne, Procedural Due Process, 10 U.C.L.A.L. Rev. at 374.

are relevant in cases where a student is disputing disciplinary action taken against him. In particular, the comment will focus on the Massachusetts case of *Sturm v. Boston Univ.*,[5] decided in the 1969 SURVEY year by the Suffolk County Superior Court.

For the past several decades, private universities have based their power to expel, suspend or refuse to grant a degree to a student on contract law theory.[6] Under contract law, the university was treated as a seller of an educational degree and the student as a buyer.[7] The university enjoyed broad discretion under this theory because the university had the bargaining power to require a student to agree to abide by rules and procedures which favored the university as a condition of enrollment.[8] The reluctance of the courts to interfere in the internal affairs of a college or university further enhanced the advantage of the institution in its relationship with the students.[9]

Commentators have argued against continued use of the contract theory on two grounds: (1) the theory does not sufficiently protect the interests of the students against arbitrary treatment by the institution;[10] (2) the theory does not reflect the true relationship between student and university, which, it is felt, is not similar to that between parties of a contract.[11]

Having had little defense against arbitrary disciplinary actions under common law theory, many student litigants in recent cases have raised the issue of whether the due process clause of the Fourteenth Amendment can be applied to universities which are now treated as private.[12] The possibility of bringing privately controlled and endowed universities under the Fourteenth Amendment is suggested by cases in which the Fourteenth Amendment was applied to tax-supported public educational institutions.[13] The courts once permitted

[5] Equity No. 84433 (Suffolk County Super. Ct., Apr. 18, 1969).

[6] Barker v. Byrn Mawr College, 278 Pa. 121, 122 A. 220 (1923); Goldman, 54 Ky. L.J. at 651; Comment, Developments, 81 Harv. L. Rev. at 1145.

[7] Hoadley v. Allen, 108 Cal. App. 468, 291 P. 601 (1930); Goldman, 54 Ky. L. J. at 651.

[8] Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); Goldman, 54 Ky. L. J. at 653; Note, 35 Colum. L. Rev. 898 (1935); see Boston College University Student Guide 1969-1970, at 14: "The College reserves the right to dismiss at any time a student who fails to give satisfactory evidence of earnestness of purpose and active co-operation in all requirements of academic work."

[9] Barker v. Hardway, 283 F. Supp. 228, 235 (S.D.W. Va. 1968); Blackwell v. Issaquena County Board of Education, 363 F.2d 749, 754 (5th Cir. 1966); Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192 (1965); Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893); Goldman, 54 Ky. L.J. at 661; Comment, Developments, 81 Harv. L. Rev. at 1150.

[10] Goldman, 54 Ky. L.J. at 653; Seavey, Dismissal of Students: Due Process, 70 Harv. L. Rev. 1406 (1957).

[11] Goldman, 54 Ky. L.J. at 652; Comment, 45 Denver L.J. 533 (1968).

[12] Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967).

[13] Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Dixon v.

public universities nearly as much discretion in disciplinary matters as private universities had.[14] However, in 1961, a federal court of appeals started a new trend in the case of *Dixon v. Alabama*.[15] *Dixon* limited the discretion of tax-supported universities in disciplinary matters by requiring them to observe due process of the law as imposed by the Fourteenth Amendment.[16] The Fourteenth Amendment states in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

These words have long been held to govern the actions of states.[17] In addition, the requirements of the Fourteenth Amendment have been applied to non-tax-supported universities on the grounds that such a university is an agency or instrumentality of the state, and therefore actions of the university can fairly be treated as actions by the state.[18] If no contact with the state was found, the Fourteenth Amendment could not be applied because of the line of authority beginning with Civil Rights Cases of 1883, which holds that the Fourteenth Amendment does not govern "merely private action, however discriminatory or wrongful."[19] Many cases have turned on the question of whether the acts of a particular organization or individual could be considered state action within the meaning of the Fourteenth Amendment.[20]

In *Dixon*, the fifth circuit ordered Alabama State College, a tax-supported institution, to reinstate several black students who had been expelled, presumably for their part in off-campus sit-in demonstrations.[21] The court found that Alabama State, as an agent of the state, was required to observe procedural due process in disciplinary actions

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Alabama, 294 F.2d 150 (5th Cir. 1961); Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961).

14 Steier v. N.Y. State Education Commissioner, 271 F.2d 13, 16 (2d Cir. 1959); Hamilton v. University of California, 293 U.S. 245 (1934); Van Alstyne, Procedural Due Process, 10 U.C.L.A.L. Rev. at 369. (Van Alstyne argues that, on the basis of a survey of disciplinary proceedings at state colleges, tax-supported institutions still retain nearly as much discretion in disciplinary matters as private educational institutions.); Comment, Developments, 81 Harv. L. Rev. at 1134.

15 294 F.2d 150 (5th Cir. 1961).

16 Ibid.

17 United States v. Guest, 383 U.S. 745 (1966); Civil Rights Cases, 109 U.S. 3 (1883); Hale, Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals, 6 Lawyers Guild Rev. 627 (1946) (hereinafter cited as Hale).

18 Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); Dixon v. Alabama, 294 F.2d 150 (5th Cir. 1961).

19 Shelley v. Kraemer, 334 U.S. 1, 13 (1948); and see Cooper v. Aaron, 358 U.S. 1 (1958); Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L.Q. 375 (1958) (hereinafter cited as Abernathy, Expansion of the State Action Concept); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960).

20 Shelley v. Kraemer, 334 U.S. 1 (1948); Guillory v. Administrators of Tulane Univ., on rehearing, 203 F. Supp. 855 (E.D. La. 1962), rev'd on rehearing, 212 F. Supp. 674 (E.D. La. 1962).

21 Dixon v. Alabama, 294 F.2d 150, 152 (5th Cir. 1961).

taken against the black students, and that it failed to do so.[22] By way of dicta, the court specified the character of the safeguards that would satisfy due process requirements:

> . . . the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the board, or at least to an administrative official of the college, his own defense against the charges and too produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the board directly, the results of the findings of the hearing should be presented in a report open to the student's inspection.[23]

Other procedural safeguards which may or should be required in student disciplinary proceedings have been suggested by various commentators and courts.[24] Among these are the right to appeal,[25] the right to have an advisor present at the hearing at which the student gives his defense,[26] the right to a public hearing,[27] the right to cross-examine witnesses when possible,[28] and the privilege against self-incrimination.[29]

One commentator, in discussing due process in disciplinary actions at tax-supported universities, suggests that the degree of due process required for a particular situation be ascertained by balancing two variables: (1) the degree of harm which could result to the student from the proceedings against him, and (2) the administrative inconvenience and expense of granting specific procedural safeguards.[30] In practice, a student accused of breaking a serious university rule and who might therefore be subject to serious disciplinary measures would be provided more procedural safeguards than a student who is accused of lesser infractions. Procedural safeguards which are expensive and difficult for the university to provide will be required in fewer cases than safeguards which are inexpensive and easy to implement.[31] For

22 Id. at 155.

23 Id. at 159.

24 Van Alstyne, The Judicial Trend, 20 U. Fla. L. Rev. at 295 (extensive treatment of procedure which the author suggests should be used in student disciplinary proceedings).

25 Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 361 (1964) (hereinafter cited as Johnson); Van Alstyne, Procedural Due Process, 10 U.C.L.A.L. Rev. at 386.

26 Id. at 386.

27 Heyman, Some Thoughts on University Disciplinary Proceedings, 54 Calif. L. Rev. 73, 79 (1966) (practical suggestions on ways in which Berkeley could reform its disciplinary procedures); Van Alstyne, Procedural Due Process, 10 U.C.L.A.L. Rev. at 386.

28 Ibid. See also Comment, Developments, 81 Harv. L. Rev. at 1140.

29 Johnson, 42 Texas L. Rev. at 356.

30 Van Alstyne, Procedural Due Process, 10 U.C.L.A.L. Rev. at 381, 383.

31 Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Hannah v. Larche, 363 U.S. 420, 442 (1960); State ex. rel. Ingersoll v. Clapp,

example, notice of charges against the student places so light a burden on the institution that it appears to be required in all but exceptional cases.[32] On the other hand, the formal observance of the rules of evidence, requires the expense of hiring persons trained in law, and has never been required of universities in student disciplinary hearings.[33]

In past cases, the courts have not applied Dixon to private institutions because the requisite state action could not be found. But in the recent case of *Sturm v. Boston Univ.*,[34] the Suffolk County Superior Court found that the due process clause of the Fourteenth Amendment did apply to Boston University, even though Boston University is privately controlled and privately financed.[35]

The case arose from an alleged violation of Boston University exam regulations by Sturm, a sophomore at the university. Sturm left the examination room during an exam without leaving his exam paper with the proctor as required by regulations. He returned after the exam period had ended and tried to hand in his exam. The professor refused to accept his paper. Before Sturm left the room in which the professor was sorting exam booklets, he left his exam on a table with booklets which had been separated and arranged in order for grading. The professor brought charges against Sturm, alleging that he attempted to sneak his paper into a pile for correction in spite of the professor's unequivocal rejection of the paper.[36]

The court did not consider the merits of the charges, but found for Sturm on the grounds that the procedure through which Sturm had been expelled was unfair and unjust, and did not conform to the requirements of procedural due process.[37] Specifically, (1) the rule which Sturm was accused of violating was unpublished;[38] (2) the university had failed to provide adequate notice of the charges brought against Sturm;[39] (3) Sturm had been given no opportunity to arrange to have an advisor present during the hearing at which he made his defense;[40] (4) some members of the Student Academic Conduct Committee, which decided what punishment the university would apply, had not been present during all of Sturm's defense, and some members of the committee were confused about what the charges were;[41] (5) Sturm re-

81 Mont. 200, 263 P. 433 (1928); Comment, Developments, 81 Harv. L. Rev. at 1138 (review of cases concerning witnesses and cross-examination at college disciplinary hearings).

32 Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966).

33 Goldberg v. Regents, 248 Cal. App. 2d 867, 881, 57 Cal. Rptr. 463, 473 (1967); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); Comment, Developments, note 3 *supra*, at 1141.

34 Equity No. 84433 (Suffolk County Super. Ct., Apr. 18, 1969).

35 See Cranney v. Boston Univ., 139 F. Supp. 130 (D. Mass. 1956).

36 Sturm v. Boston Univ., Equity No. 84433, at 1, 2 (Suffolk County Super. Ct., Apr. 18, 1969).

37 Id. at 4.

38 Ibid.

39 Id. at 6.

40 Id. at 10.

41 Id. at 11.

ceived no notice of his expulsion, due to administrative failures, until nearly four months after the action had been taken;[42] and (6) no procedure for appeal or rehearing had been established, and no appeal was provided when requested.[43]

The case of *Sturm v. Boston Univ.* is unique because the court treated the actions of Boston University, a privately endowed and privately controlled institution, as state action within the meaning of the Fourteenth Amendment.

> The requirements of due process with reference to procedural safeguards referred to in paragraphs 1 and 2 above, which have generally been applied only to public universities, so-called, should be applied in this case, particularly with reference to requiring BU to exercise basic fairness and justice toward the plaintiff. Although some courts have limited this requirement, as noted, to public or state-operated universities, and the like, the principle has been extended to quasi-public universities, in some jurisdictions. Examination of these authorities has led me to the conclusion that, in the type of case involved in this litigation, continued non-application of the principle of due process has little, if any, validity.[44]

In order to apply the due process clause of the Fourteenth Amendment, the court had to find a way in which the actions of the private institution could fairly be treated as actions of the state. Courts in the past have found state action in either of two ways. They have either examined the activity itself to determine whether the activity was one which is inherently governmental in nature;[45] or they have sought factors in the relationship between the institution and the state which indicate control[46] and participation[47] of the state in the activities of the institution.

If a court finds that an activity is inherently governmental, it will apply the Fourteenth Amendment regardless of the relationship of the state to the organization carrying on the activity.[48] An inherently governmental function is so closely related to the functions normally carried on by a government that it cannot be carried on in the private realm without the application of the safeguards of the Fourteenth

42 Id. at 12.
43 Id. at 9.
44 Id. at 5.
45 Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).
46 Eaton v. James Walker Memorial Hospital, 261 F.2d 521 (4th Cir. 1958); Mitchell v. Boys Club of Metropolitan Police, D.C., 157 F. Supp. 101, 108 (D.C. 1957); Norris v. Baltimore, 78 F. Supp. 451 (D. Md. 1948); Kerr v. Enoch Pratt Free Library, 149 F.2d 212, 217 (4th Cir. 1945); Abernathy, Expansion of the State Action Concept, 43 Cornell L.Q. at 387-390.
47 Boman v. Birmingham Transit Co., 28 F.2d 531 (5th Cir. 1960) (city directed its police force to enforce seating regulations instituted by private transit company); Shelley v. Kraemer, 334 U.S. 1 (1948).
48 Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

Amendment.[49] In ascertaining whether an activity is inherently governmental, the courts consider the consequences of the activity.[50] If the activity influences the rights of individuals in a way that a state could do only in conformance with the Constitution, and if that influence is related to the major functions of government, such as holding elections,[51] or controlling speech,[52] a court will hold that the activity cannot be carried on without the safeguards of the constitution.

In the *Sturm* case, the superior court apparently found state action in the quasi-judicial power which Boston University's Student Academic Conduct Committee wielded over the students.[53] The committee conducted hearings in which it received accusations and defenses, heard testimony of witnesses and made findings of fact.[54] Its power consisted of the right to recommend to the dean of the university any punishment within the power of the university to inflict.[55]

The superior court found that the punishment of expulsion, which was meted out to Sturm, would have serious and permanent effects upon the life and career of Sturm.[56] The court noted that Sturm's reputation would be damaged, that his chance to attain an education of equal quality would be jeopardized, that his earning power would be impaired, and that the opportunities to pursue the career of his choice would be limited.[57] Such serious disabilities, the court reasoned, should not be inflicted upon a student without the procedural safeguards of due process.[58] The court found that the consequences of the committee's acts were so similar to the consequences of the actions of a court of law that the committee could not conduct its activities immune from the commands of the Fourteenth Amendment.[59]

Two leading Supreme Court cases, *Marsh v. Alabama*[60] and *Terry v. Adams*,[61] rely on the theory that an activity by its governmental nature may be subject to the Fourteenth Amendment regardless of

[49] Evans v. Newton, 382 U.S. 296 (1966).

[50] Terry v. Adams, 345 U.S. 461, 469-470 (1953); Evans v. Newton, 382 U.S. 296 (1966).

[51] Terry v. Adams, 345 U.S. 461 (1953).

[52] Marsh v. Alabama, 326 U.S. 501 (1946).

[53] Sturm v. Boston Univ., Equity No. 84433, at 12 (Suffolk County Super. Ct., Apr. 18, 1969).

[54] Id. at 2.

[55] Ibid.

[56] Id. at 12; and see, Goldman, 54 Ky. L.J. at 659-660.

[57] Sturm v. Boston Univ., Equity No. 84433, at 12 (Suffolk County Super. Ct., Apr. 18, 1969).

[58] Ibid.

[59] Ibid. (Expulsion, therefore, not only affects the student scholastically, but can affect him personally, permanently and economically in his adult life. "[T]his action by SACC and the dean, is a judicial determination with reference to the conduct of the plaintiff. In this area, BU must apply procedures which are basically fair and just, and BU failed to do that in this instance.")

[60] 326 U.S. 501 (1946).

[61] 345 U.S. 461 (1953).

who engages in the activity. Even though *Sturm* relies on the same theory, neither *Marsh* nor *Terry* are cited in the Sturm opinion.

In *Marsh*, a peace officer of a town wholely owned by Gulf Shipbuilding Corporation refused to permit the petitioner, a Jehovah's Witness, to distribute literature on the sidewalk owned by the corporation. The court held that his actions violated the Fourteenth and First Amendments despite the fact that the peace officer was an agent of a private corporation. The court found the fact that all property was owned by a single corporation insufficient to change the public nature of the town, which was for most purposes, exactly like a public town.[62] The court made the argument that the sole owner of all the property in a town open for public use could have no more power to deny constitutional rights to the persons who use the town than could all the property owners of a public town acting in concert.[63] After the *Marsh* decision, it would seem settled that the operation of a privately owned town open to the public is an activity so public in nature that the courts will apply the Fourteenth Amendment to protect individuals in their relations with the town.[64]

In *Terry v. Adams*,[65] the court held that a preliminary primary election run by a private organization was an integral[66] part of the official election process and therefore constituted state action. The Jaybird Democratic Association, which held "white primaries" in advance of integrated official primaries, could not exclude Negroes from voting without violating the Constitution.[67] The court found that the state had transgressed the commands of the constitution in permitting the circumvention of the Fifteenth Amendment through private primaries. This case can stand for the proposition that state action may be found in the failure of the state to act to prevent a wrong it has a duty to prevent.[68] However, more properly, this case may read narrowly as holding that elections of public officials are so basically a governmental function that no private organization will be permitted to exert con-

[62] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[63] Id. at 505.

[64] See, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1969); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1096 (1960).

[65] 345 U.S. 461 (1953).

[66] Id. at 469. "The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the country. The effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids — strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."

[67] Id. at 461 (1953).

[68] Id. at 469. "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment . . . it violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces the equivalent of the prohibited election."

trol over the election process without coming under the control of the Constitution.[69]

Few cases have relied on the inherently governmental theory,[70] probably because the standards of the theory are not well defined.[71] At least two student plaintiffs have argued that "inherently governmental function" includes any activity which is normally carried on by government. They have argued that education itself is inherently governmental, and, therefore, all educational institutions should be brought under the constitution.[72] At least one district judge, in dicta, has voiced support for the idea.[73] In an effort to suggest a narrower definition, one commentator has interpreted inherently governmental functions as those which are indispensable to the maintenance of democratic government.[74] *Marsh v. Alabama*, then, would stand for the proposition that democratic government could not exist without free speech, and *Terry v. Adams* would stand for the proposition that free elections without racial discrimination are essential to democracy, *Sturm v. Boston Univ.* would fit into the scheme on the basis that a fair trial is essential to democracy. The apparent decisiveness of the test is illusory because nearly every individual freedom is arguably a quality without which our democracy could not exist. It might be argued that education is central to democracy because educated people are better able to govern their affairs.

On the other hand, the theory of inherently governmental function has the advantage in that its actual application is self-limiting.[75] For example, the court in *Sturm* did not find that the constitution applied to any part of the university except the Student Academic Conduct Committee, and then only when the committee was acting as a court.[76] In *Marsh*, the court applied the First and Fourteenth Amendments to the Gulf Shipbuilding Corporation, only when it was engaged in preventing freedom of speech in the company town.[77] In *Terry*, the court found that the Jaybird Association was controlled by the Fourteenth and Fifteenth Amendments only when conducting elections.[78] Appar-

69 Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1096 (1960).

70 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

71 Abernathy, Expansion of the State Action Concept, 43 Cornell L. Q. 375 (1958).

72 Grossner v. Columbia Univ., 287 F. Supp. 535, 549 (S.D.N.Y. 1968); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968).

73 Guillory v. Tulane Univ., 203 F. Supp. 855, 859 (E.D. La. 1962) rev'd on rehearing, 212 F. Supp. 674 (E. D. La. 1962); see, Comment, Developments, 81 Harv. L. Rev. at 1060; Sturm v. Boston Univ., Equity No. 84433, at 13 (Suffolk County Super. Ct., Apr. 18, 1969).

74 Abernathy, Expansion of the State Action Concept, 43 Cornell L. Q. at 404.

75 Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1119 (1960); Comment, Developments, 81 Harv. L. Rev. at 1061.

76 Sturm v. Boston Univ., Equity No. 84433 (Suffolk County Super. Ct., Apr. 18, 1969).

77 Marsh v. Alabama, 326 U.S. 501 (1946).

78 Terry v. Adams, 345 U.S. 461 (1953).

ently, if the Jaybird Association held social picnics, the constitution would not demand that blacks be permitted to attend.

Under usual circumstances, before a court turns to the inherently governmental theory, it will examine the institution itself[79] to determine if the state is sufficiently involved in the activity of the institution "through any arrangement, management, funds, or property"[80] to warrant a holding that the state either controls or participates in the activity of the institution. If the court finds sufficient state contacts, it will hold that the activity of the institution is state action and will apply the Fourteenth Amendment to the activity.[81] A contact with the state is any logical connection between the state and the institution.[82] Hence, a federal court of appeals held that the fact that much of the income of a high school athletic association came from ticket sales for games played largely in or on state-owned facilities operated as a contact with the state.[83] Leases,[84] regulatory authority over a private organization,[85] and grants of power by the state to an association[86] have been considered sufficient contacts with the state to support a finding of state action. A case of state tax exemptions to private institutions, however, has not been found to be an adequate contact to support such a finding.[87]

The most usual means through which the state becomes involved in the activities of nonprofit institutions, such as universities, is through financial support.[88] The courts have agreed that the receipt of financial

[79] Pennsylvania v. Brown, 270 F. Supp. 782, 788 (E.D. Pa. 1967); Poindexter v. Louisiana Financial Assistance Commn., 275 F. Supp. 833, 854, 855 (E.D. La. 1967).

[80] Cooper v. Aaron, 358 U.S. 1, 19 (1958).

[81] Cooper v. Aaron, 358 U.S. 1 (1958).

[82] Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968) (employees of the Athetic Association were eligible to receive retirement benefits under the State Teachers Retirement Act); Hampton v. Jacksonville, 304 F.2d 320 (5th Cir. 1962) (reversionary interest in property sold to individual by city).

[83] Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).

[84] Guillory v. Tulane Univ., 212 F. Supp. 674, 681 (E.D. La. 1962); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956) cert. denied, 353 U.S. 924 (1957); Abernathy, Expansion of the State Action Concept, 43 Cornell L.Q. at 394 et seq. (extensive treatment of state action problems arising from the leasing of state property); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1099-1102 (1960).

[85] Public Utilities Commn. v. Pollak, 343 U.S. 451 (1952). This case involves the Fifth rather than the Fourteenth Amendment because it arose in the District of Columbia; but the difference between the Fifth and the Fourteenth is probably not great enough to change the implications of the case. See also Comment, Developments, 81 Harv. L. Rev. at 1057-1058.

[86] Firestone v. First District Dental Socy., 59 Misc. 2d 362, 299 N.Y.S.2d 551 (1969); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Hale, 6 Lawyers Guild Rev. at 631.

[87] Brown v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, 90 N.Y.S.2d 512 (1949); Note 61 Harv. L. Rev. 344, 350 (1948).

[88] Mitchell v. Boys Club of Metropolitan Police, D.C., 157 F. Supp. 101 (D.C.

aid constitutes a contact with the state, but they do not agree as to what quantity of aid is sufficient to invoke state action. The case of *Griffin v. State Board of Education*,[89] which represents a cautious view of the problem, found that the receipt of funds from the state will not invoke state action unless those funds constitute a "preponderance" of the budget of the institution.[90] The *Griffin* court found that tuition grants to students who then paid the money over to ostensibly private schools evoked state action because the grants composed the bulk of the income of the schools.[91] The court suggested that if the grants had made up a smaller portion of the school income, state action would not have been found.[92]

Relying on this dicta, the legislature of Louisiana limited its tuition grants to "applicants attending schools not 'predominately maintained' through state tuition grants."[93] The Louisiana attempt to save its tuition grant system by limiting the magnitude of the grants was unsuccessful. The district court in *Poindexter* held that the preponderance test of *Griffin* was not the true test, and that state action could be found if "significant" financial aid were shown.[94] The court found that the Louisiana tuition grant system, which provided a smaller percentage of the total budget of the schools it aided than was present in *Griffin*, still provided significant aid and, therefore, found state action.[95] Thus, the degree of state involvement in the activity of the schools justified the finding of state action.[96]

Poindexter relies on the case of *Simpkins v. Moses H. Cone Memorial Hospital*,[97] which held that state funding of 17 percent of the cost of construction of a new wing of an existing private hospital brought all the activities of the hospital under the Fourteenth Amendment. The court held that by accepting money from the state for funding a portion of the cost of the new wing, the hospital had become

1957); Norris v. Baltimore, 78 F. Supp. 451 (D. Md. 1948); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1108 (1960).

89 239 F. Supp. 560 (E.D. Va. 1964).

90 Id. at 565; see Comment, Developments, 81 Harv. L. Rev. at 1056 et seq. (treatment of the Griffin case).

91 Griffin v. State Board of Education, 239 F. Supp. 560, 565; and see, Powe v. Miles, 402 F.2d 73 (2d Cir. 1968); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945).

92 Griffin v. State Board of Education, 239 F. Supp. 560, 565 (E.D. Va. 1965).

93 Poindexter v. Louisiana Financial Assistance Commn., 275 F. Supp. 833, 836 (E.D. La. 1967).

94 Id. at 854. "[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up to only 49 percent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause."

95 Id. at 857.

96 Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 So. Cal. L. Rev. 208 (1957). The theory set forth in this article is relative to that upon which Poindexter was decided.

97 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

an instrumentality of the state.[98] The court found that the hospital, by agreeing to build facilities with state money, had performed an obligation which the state owed the federal government in return for a federal grant under a hospital construction program.[99] Perhaps the true basis of the decision was that the state should not be permitted to avoid the equal protection clause of the Fourteenth Amendment by giving federal money to private hospitals, which could practice segregation. If the state had constructed the facility itself, the constitution would require integration. *Simpkins* might be distinguished from *Poindexter* on the ground that in *Simpkins* the state had an obligation which it chose to perform through a private institution. In *Poindexter,* the state had no obligation, although it did have a policy of encouraging segregation.[100]

The reasoning of both *Poindexter* and *Simpkins* relies on the case of *Burton v. Wilmington Parking Authority,*[101] in which the Supreme Court of the United States held that a restaurant which leased premises within a city-owned parking facility constituted sufficient contact with the state to invoke state action. The court held that the rents received under the lease were an integral part of the city plan to finance the facility.[102] The landlord-tenant relationship, in light of the city interest in obtaining rents, was held sufficient to "insinuate" the city into a position of "interdependence" with the restaurant.[103] Such interdependence was held sufficient to bring the restaurant under the commands of the Fourteenth Amendment.

All these cases suggest a new test of state action in the concept of state policy manifested in encouragement of private individuals by the state. The finding of state control or extensive state participation may be greatly facilitated when the state encourages activities which it would not be permitted to engage in itself.

It is possible that the rise of the "state encouragement" theory will affect the outcome of litigation brought by students against a private university. As the court said in *Powe v. Miles*:

> [T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint.[104]

98 Ibid.

99 Ibid; Comment, Deveopments, 81 Harv. L. Rev. at 1059.

100 Poindexter v. Louisiana Financial Assistance Commn., 275 F. Supp. 833, 855, 856 (E.D. La. 1967).

101 365 U.S. 715 (1961).

102 Id. at 719.

103 Id. at 725; see, Statom v. Board of Commissioners of Prince George's County, 233 Md. 57, 195 A.2d 41 (1963) (where public property was used by private boys club without fee, Burton was held to control). See also, Comment, Developments, 81 Harv. L. Rev. at 1058.

104 407 F.2d at 81.

Thus, even if an institution like Boston University has received significant aid from the state, the foregoing language of *Powe* would probably preclude a finding of state action. The student would still be faced with the burden of showing that the Student Academic Conduct Committee's actions were influenced or encouraged by the state. The difficulty encountered by the student petitioner in *Powe* represents the problems involved in applying the logic of cases like *Burton* to private educational institutions.

If the above interpretation is accurate, institutions which receive some state aid but not enough to support a finding of state action under *Griffin* may be brought under the Fourteenth Amendment if the effect of the state aid is to encourage or to involve the state in activities prohibited to the state itself under the Fourteenth Amendment.

The theories of inherently governmental function and state involvement or encouragement broadened the concept of state action to include organizations which regarded themselves as within the private sector. Since many cases decided under these theories concern racial discrimination, the question remains open whether either theory will be extended to nondiscrimination cases and, in particular, whether either theory will control procedural due process cases. Recent cases concerning disciplinary action at tax-supported universities have shown that due process is being more extensively applied to protect individuals from arbitrary treatment by government agents than before. The *Sturm* court decided that persons deprived of due process by private institutions should in some cases be given as much protection by the courts as persons who suffer racial discrimination. In our era of expanding concern for rights of the individual, other courts may come to agree with *Sturm*.

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