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ABSTRACT

This report on state support for private higher education expands a 1969 survey of national trends prepared for the Southern Regional Education Board. It presents the findings of several empirical studies which: (1) examine various legal constraints and judicial interpretations related to tax appropriations for private schools; and (2) examine the attitudes of Southern education and political leaders toward basic questions in this area. A review of the findings shows there is much more flexibility than generally supposed both in the state support measures that could be adopted and in the respondents' attitudes toward specific types of state aid. The appendices include specific pertinent state constitutional provisions, legal decisions on "The Degree of Entanglement Standard" and purchase of secular services from parochial schools, early cases involving state aid, and the questionnaire sent to political and educational officials. (JS)

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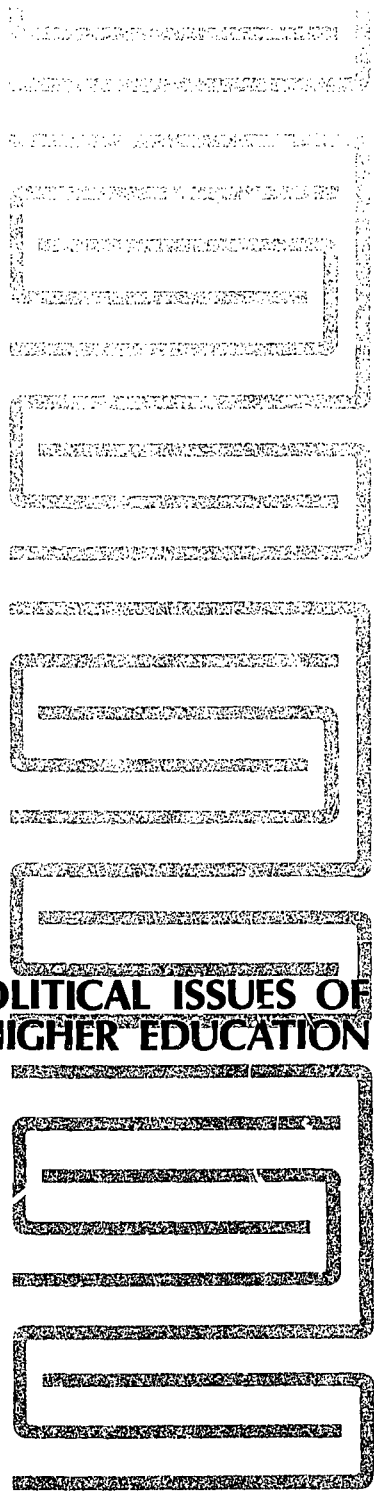
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# LEGAL AND POLITICAL ISSUES OF STATE AID FOR PRIVATE HIGHER EDUCATION

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SOUTHERN REGIONAL  
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**LEGAL AND POLITICAL ISSUES OF  
STATE AID FOR PRIVATE HIGHER EDUCATION**

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## FOREWORD

Higher education in the South, as elsewhere in the nation, is in a period of transition. One of the most noticeable changes is the rapid growth of public institutions. Private college enrollments have slipped from 60 percent to 20 percent of the total in the last 30 years.

Although the quantitative role of private colleges has diminished during this period of transition, their contribution, in many ways, is as great as ever. If their financial position is seriously threatened, should state governments be concerned? This question was explored by William H. McFarlane in a 1969 SREB report, *State Support for Private Higher Education?*

Dr. McFarlane, in co-authorship with Charles L. Wheeler, now pursues the further question, What kinds and what degree of state support are indeed possible under existing legal and political constraints? The analysis is based on examination of up-to-date factual materials and merits careful attention. While the report may not offer solutions to everyone's satisfaction, it offers much substance for deliberation. The review of legal issues reveals that there is much more elbowroom for adoption of specific state support measures—if desired—than is generally realized. The review of educational and political leadership attitudes shows that very few respondents rejected every type of specific state aid to private institutions.

If this paper contributes to further understanding, leads to additional investigation and stimulates discussion, it will serve a worthy purpose in the promotion of relevant higher education for Southern needs.

Winfred L. Godwin  
President

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## Chapter I

### INTRODUCTION

This report on state support for private higher education expands a 1969 survey of national trends prepared for the Southern Regional Education Board. It is concerned primarily with the legal and political issues of private sector subsidies, particularly within the Southern region. Its major purpose is to present the findings of several empirical studies which (1) examine various legal constraints and judicial interpretations relative to tax appropriations for nonpublic institutions of higher learning, and (2) report upon the attitudes of Southern educational and political leaders toward basic questions in this area. A final summary looks at the future implications of these findings.

Although this report is mainly regional in its emphasis, the dimensions of the problem it addresses are national in scope. In most states, fiscal dislocations in higher education's private sector are generating widespread concern among state decisionmakers. The basic questions involve responsibilities of state governments in responding to these concerns.

At the heart of the problem is a developing economic crisis which is imposing excessive pressures on both public and private budgets for higher education.<sup>1</sup> In general, there is a steadily widening gap between the level of costs required to maintain higher education in an inflationary economy and the levels of income that public and private constituencies are able or willing to provide for its support. State governments are in an especially difficult spot as tax productivity reaches a saturation point relative to the costs of governmental services of all kinds. Even so, immediate problems are far more severe in the private sector, for the very survival of private colleges and universities as viable financial enterprises is at stake.

In this respect, one aspect of the general crisis is particularly disturbing. To some extent, inequities generated by the recent massive growth of public higher education are threatening to drive some private colleges out of business. Though public leaders have been

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<sup>1</sup> According to recent estimates of the Carnegie Commission on Higher Education, nearly two-thirds of all U. S. colleges and universities are "in financial difficulty" or "are heading for financial trouble."

slow to acknowledge the facts, state governments have come close to creating a noncompetitive public market in advanced learning. This development has adverse consequences for public and private institutions alike.

For all intents and purposes, higher education is now more than ever an essentially public enterprise. It is increasingly dominated by state-financed systems of public universities, senior colleges and community colleges. Over the past decade especially, state policies have emphasized the massive development of these systems with little or no attention to their possible impacts on existing private institutions. States continue to build and operate new public institutions, or to expand public programs, frequently duplicating resources of nonpublic institutions. Many private institutions, some of which depend heavily and sometimes almost exclusively on tuition income to balance their budgets, are now operating with excess enrollment capacities, while low-tuition public institutions are capturing larger and larger shares of total enrollments. Private educators frequently express alarm at the possibility of an evolving public monopoly in higher education.

Competitive inequities have combined with inflation and stagnation in the private economy to push private institutions toward the brink of insolvency and in some instances over it. This, in turn, increases the demand on public budgets for higher education, for example, to take over faltering private institutions, to accommodate students who might otherwise enroll in private institutions, or to replace high-cost programs which even the more affluent private institutions can no longer finance out of current income. Even without these additional pressures, state systems are desperate for funds to provide opportunities and services which are normally expected of public institutions.

In many states, therefore, the possible collapse of the private structure for higher education is being viewed with concern, especially because the resulting gap might overextend public systems that are already creating heavy pressures on state budgets. At the same time, private colleges and universities are organizing to bring the corresponding aspects of their own plight into clearer public focus. The resulting thrust of these intersecting concerns appears to be a major factor in the spreading emphasis upon state support for private higher education.

Wherever private colleges and universities are concentrated, state subsidies for the faltering private sector already comprise a current or impending issue. The 1969 SREB report (*State Support for Private Higher Education?*) identified expanding subsidy programs in more than 30 states. Since the middle 1960s, the case for additional tax support of the private sector has been advanced in a dozen or more states.

Increasingly, the issues which arise in this connection are being incorporated in the larger problems of governmental planning for adequate statewide systems of higher education. According to one



recent survey,<sup>2</sup> official planning agencies in 14 states have varying degrees of responsibility for the private sector as one component in overall planning for higher education. Other states have involved the private sector in various ways including, for example, statewide studies, advisory groups, and formal or informal consortia of public and private colleges.

In many instances, tax subsidies for the private sector appear to offer an especially promising approach to the fiscal dilemmas in both sectors. For example, tuition equalization scholarships would tend to restore competition between private and public sectors in the student market, utilizing excess enrollment capacities in the one, while reducing overenrollment pressures in the other. Expansion of such arrangements as service contracts between states and private institutions could provide funds needed to balance private operating budgets while reducing the public costs of providing comparable services in fully subsidized state institutions. Overall, appropriate involvement of private institutions in state-financed programs of higher education could restore a reasonable balance between the two sectors in meeting large public needs and expectations.

Changes in this direction would obviously involve closer relationships between state government and independent institutions. One of the more basic concerns would be the extent to which private institutions could become formally involved in public service of this sort, and at the same time maintain their essential independence. Equally important would be the form and substance of financial arrangements that would be administratively feasible as well as legally permissible.

Certain characteristics which are common to the Southern region make the implications of private sector subsidies an especially crucial issue for the future of Southern higher education. Particularly important is the fact that the South's economy does not yet sustain a total structure for higher education which provides comparable opportunities, services or levels of quality with respect to other regions or national norms. Thus, the need to maintain a balanced public-private structure is proportionately more critical in the South than elsewhere.

An examination of the technical requirements for effective state subsidy programs is beyond the scope of this report. Instead, the focus is upon the legal and political uncertainties of the total question. In some states, limited subsidies for private higher education comprise a long-established tradition. In others, the practice is virtually nonexistent. As an integral aspect of state policies for higher educational finance, however, the issue tends to raise vigorous protests everywhere, sometimes involving court challenges of specific subsidy programs. In the Southern region, as elsewhere, increasing efforts to promote broader structures of tax support for private institutions can easily provoke intensified public controversy.

<sup>2</sup>Louise Abrahams, *State Planning in Higher Education* (Washington: The Academy for Educational Development, Inc., 1969).

But if public views on private sector subsidies become polarized in terms of negative political reactions and uncertain legal guidelines, educational and economic needs are certain to be obscured. In other words, the need for comprehensive state action to coordinate balanced public-private structures for higher education is not likely to get serious consideration if the possibility of private sector subsidies is rejected *a priori* as too controversial.

Future state patterns for public-private coordination will, in any event, be largely determined by the prevailing attitudes of state leaders who are in a position to influence the development of governmental policies on higher educational finance. It is not likely that constructive responses will develop if decisions are formulated in an atmosphere of uncertainty and contention. Accordingly, this study was conceived primarily to clarify the legal parameters of the state support issue in terms of constitutional and statutory provisions that prescribe the conditions under which public monies may be channeled into the private sector of higher education. A secondary purpose was to test current political sentiment on state support for private higher education as a partial answer to emerging fiscal difficulties.

To accomplish the major purpose, the inquiry was mainly directed to the history of legal relationships between government and private education; and more especially, to key judicial interpretations of constitutional law at federal and state levels which bear upon the validity and propriety of these relationships. To test political sentiment, an opinion survey was conducted among regional leaders in government and education on various aspects of the state support issue.

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In all important respects, the findings of the study substantiate the authors' initial assumptions that the legal and political case for private sector subsidies is a relatively strong one. The evidence indicates in particular:

1. That historical and judicial interpretations of the First Amendment to the federal Constitution suggest a general framework in which certain types of private sector subsidies are constitutionally appropriate,
2. That judicial interpretations of constitutional provisions among SREB states are sufficiently flexible to permit responsive development of state-coordinated private subsidies,
3. That political and educational leaders in the Southern region, while expressing a variety of reservations about the principle of state support for private higher education, appear to accept the need for state subsidies as a practical matter, in order to maintain a strong public-private structure for higher education.

In sum, the findings on legal doctrine (Chapters II and III) present a contemporary view of constitutional interpretations that are compatible with the principle of state support for private higher education. From this perspective, it appears that the controversy over state support involves political attitudes more than legal un-

certainties. But with respect to political leadership, the findings of the opinion survey in Chapter IV suggest that the question is not as controversial as it seems. In fact, favorable attitudes were expressed toward certain types of subsidies, including student aid and service contracts.

Despite such evidence, there are additional reasons for believing that the issues being considered here are still relatively quiescent throughout the Southern region as a whole.<sup>3</sup> Given the pressing nature of the problem, this report is especially timely in its effort to bring the legal and political issues into focus. Its findings should help SREB states to reevaluate their own internal problems concerning the state support question.

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<sup>3</sup> As noted in Chapter IV, for example, a significant number of elected officials in the SREB region apparently do not regard the financial problems of private higher education as much of a public issue.

## Chapter II

### THE FIRST AMENDMENT AND STATE SUPPORT FOR PRIVATE HIGHER EDUCATION

#### The Basic Issues

Legally, contentions over state support for private higher education tend to center on the difficulties of defining permissible governmental relationships involving any kind of sectarian institution or activity. This chapter will focus on the problem in terms of the First Amendment to the federal Constitution.

The so-called "establishment clause" of the First Amendment is regarded by some to have erected a legal "wall of separation" between government and religion. Many court challenges on the church-state issue arise from protests against fiscal breaches of the wall which involve public support for church-related schools or their students.

The sensitivity of the church-state issue, moreover, tends to make putative legal constraints politically binding on nonsectarian private education as well. For example, proposals for private college aid have sometimes failed to gain legislative approval because they would discriminate against church-related colleges. Accordingly, judicial interpretations of church-state issues are fundamental to the state support issue for all of private higher education, despite the fact that many private colleges are wholly secular in their origins and current status.

Obviously, the "wall of separation" view favors those who hold that tax grants to private colleges are not legitimate for any purpose whatever. But in the opposing legal context of what has been called the "American tradition" of church-state relations, the view emerges that separation is a question of degree. Under this view, state governments have considerably more discretion in supporting private education than would otherwise appear. This chapter first considers the historical substance of the "American tradition," and then the essentials of recent Supreme Court cases which have rather consistently accommodated establishment clause interpretations to the more flexible limitations implied by the "American tradition."

#### The Establishment Clause

The First Amendment to the United States Constitution provides, among other things, that "the Congress shall make no law respecting

an establishment of religion. . . ." This provision is known as the "establishment clause."

The First Amendment, by its own express terms, is applicable only to the Congress of the United States.<sup>4</sup> The Supreme Court, however, has incorporated the "establishment clause" within the meaning of the word "liberty" of the due process clause of the Fourteenth Amendment which prohibits the states from depriving "any person of life, liberty, or property, without due process of law. . . ."<sup>5</sup> The establishment clause, therefore, is applicable to both federal and state involvement in matters of religion and becomes especially important to a consideration of state support of private higher education.

The establishment clause, however, unfortunately provides little guidance for its application to specific current situations. The term is vague and ambiguous in terms of modern American society. But courts have long relied upon contemporaneous construction of constitutional and statutory provisions which were vague or ambiguous.<sup>6</sup> As early as 1819, the United States Supreme Court turned to contemporaneous construction in interpreting the Constitution.<sup>7</sup>

As a first step, therefore, one must look to the history of the time in ascertaining the meaning of the establishment clause. To the framers, based on their contemporary experience, the phrase "an establishment of religion" related to an alliance between the church and state with the following general characteristics:<sup>8</sup>

1. A state church officially recognized and protected by the sovereign;
2. A state church whose members alone were eligible to vote, to hold public office, and to practice a profession;
3. A state church which compelled religious orthodoxy under penalty of fine and imprisonment;
4. A state church willing to expel dissenters from the commonwealth;
5. A state church financed by taxes upon all members of the community;
6. A state church which alone could freely hold public worship and evangelize;
7. A state church which alone could perform valid marriages, burials, etc.

Most of the colonies had "established" churches. The Congregational church was dominant as the state church in New England and the Anglican church in the South. The study just cited is replete with

<sup>4</sup> *Barron v. Mayor and City of Baltimore*, 32 U. S. (7 Petus) 243 (1833).

<sup>5</sup> *Everson v. Board of Education*, 330 U. S. 1 (1947).

<sup>6</sup> 16 C.J.S. 387, "Constitutional Law," sec. 98.

<sup>7</sup> *McCulloch v. Maryland*, 17 U. S. (4 Wheat) 316, 406 (1819).

<sup>8</sup> Chester James Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom From Federal Establishment* (Milwaukee: The Bruce Publishing Company, 1964), p.1.

carefully documented details of their oppression of dissenters, both Protestant and Catholic, of religious limitations on the right to hold public office, of public taxation to support the state church, and of other characteristics of an establishment.<sup>9</sup> The term "establishment of religion" appears clearly to have applied to a state church enjoying a preferred position in relation to all other religions.

### Contemporaneous Construction

The history of the period immediately subsequent to the ratification of the First Amendment is vital to its interpretation. Presumably, if the framers had intended to erect a wall between church and state, this fact would have been reflected in public utterances at the time, in court decisions, and in the actions of sessions of the Congress which immediately followed.

But instead of erecting a wall of separation, the framers apparently intended to discourage preferential treatment of a particular denomination. For example, North Carolina and Rhode Island ratified the Constitution after the Bill of Rights had gone to the President. Both conventions adopted declarations of principle stating in identical language:<sup>10</sup>

No particular religious sect or society ought to be favored or established by law, in preference to others.

Similar attitudes are evident in a court decision relating to acts of 1799 and 1801 in which the Virginia legislature attempted to take away the lands which had been granted to the Episcopal church. These acts were declared invalid by the United States Supreme Court. A unanimous opinion, expressed by Justice Story in the somewhat archaic rhetoric of the time, declares on the one hand that Virginia could not support an established church, but on the other hand should not deny "equal protection" to any sect. The Court gave the following interpretation:<sup>11</sup>

Consistent with the constitution of Virginia, the legislature could not create or continue a religious establishment which would have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form of discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the

<sup>9</sup> *Ibid*, pp. 1-272.

<sup>10</sup> Antieau et al, *op. cit.*, p. 112.

<sup>11</sup> *Terrett v. Taylor*, 13 U. S. (9 Cranch) 43, 49 (1815).

support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead.

These statements and others which could be quoted strongly suggest that the intent of the framers was to prohibit a state church and not to proscribe governmental support for churches in their efforts to improve society. Rather, the requirement was that aid be extended on a nondiscriminatory basis.

#### Implications for Private Education

The above considerations suggest the inherent flexibility of church-state relations under the "American tradition." Subsequent historical developments reinforce this interpretation. For example, after the ratification of the First Amendment, the Congress often made grants of public lands for schools, without the requirement that the schools be public.<sup>12</sup> This course of action was followed with respect to the Ohio Territory in 1803, the Indiana Territory in 1804, the Louisiana Territory in 1811, and the Territory of Michigan in 1818. Townships were set aside for seminaries of learning in the Alabama Territory in 1818 and the Florida Territory in 1827. Not until 1845 did the Congress limit the grant of such lands to public schools.

President Thomas Jefferson in 1803 requested and received ratification of a treaty with the Kaskaskia Indians which provided \$100 toward the support of a Catholic priest to work among the Indians and the sum of \$300 toward the erection of a church. From 1817 to 1825, the War Department gave the mission societies of many of the principal churches thousands of dollars for work among the Indians.

Similar patterns of cooperation between government and churches are reflected in the early development of American colleges. Pfnister points out that "American higher education began as neither public nor private" and that the "distinction between state and private higher education is, in the history of higher education in our country, a comparatively recent distinction," possibly "a 20th century distinction."<sup>13</sup> At the very least, until state universities and other public colleges became a major force on the American higher educational scene, many private institutions were established and sometimes operated with combined grants from public and private sources.

The states continued to support both education and religion during the 19th century. Harvard by 1874 had received more than

<sup>12</sup> Antieau et al., *op. cit.*, pp. 163-74.

<sup>13</sup> Allan O. Pfnister, "Developing Relationships between Public and Private Higher Education," *New Directions in Statewide Higher Education Planning and Coordination*, Proceedings of the 19th SREB Legislative Work Conference (Atlanta: Southern Regional Education Board, 1970), pp. 38-39.

\$500,000 and 46,000 acres of land.<sup>14</sup> Yale, William and Mary, Dartmouth, Columbia, Williams, Bowdoin, Bates, Colby, Middlebury, Union, Hamilton, Rochester, and Cornell are only a few of the private institutions of higher education which received public assistance. State constitutional prohibitions of, or limitations on, state aid to church-related institutions appear to have been a result of the increasing divisiveness and growing competition between religious sects.

In terms of early historical evidence, then, it appears that neither political attitudes nor governmental actions support the view that tax support for private or church-related organizations is absolutely prohibited by the establishment clause. Rather, they clearly imply that the establishment clause requires complete governmental neutrality as between various religious sects, not a position of hostility toward religion as such.

In fact, the framers were accustomed to colonial government support of religion and placed great importance on the role of religion in society. Immediately after the ratification of the First Amendment and for years thereafter, both the federal and state governments supported the religious as well as the educational and philanthropic functions of religious groups. The criterion was that such aid must be available to all religious groups without discrimination. The reduction or cessation of such aid resulted not from constitutional difficulties, but primarily because of bitter competition between church groups for governmental aid.

### **Implications for Legal Doctrine**

As previously noted, Supreme Court decisions are not inconsistent with the "American tradition" interpretation of the establishment clause. In addition, they tend to define specifically what sort of church-state relationships are, or are not, constitutionally appropriate under the establishment clause. The following summary describes the general limits of these relationships. The particular cases are then reviewed in some detail in later sections of this chapter.

At a very general level, for example, the Court appears to be saying that church-state relationships cannot, on the one hand, result in direct governmental support for religious activities, but may, on the other hand, accommodate the "religious needs of the people" in appropriate ways. Of more direct concern to the state subsidy issue are Court decisions from which have emerged the "secular legislative purpose" doctrine as it applies to government support of church-related education. The holdings in these decisions tend, on the whole, to uphold governmental programs which happen incidentally to support religious activities, when the purpose and primary effect of such programs is to promote secular objectives in the public interest.

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<sup>14</sup> Robert O. Berdahl, "Private Higher Education and State Governments," *Educational Record*, Vol. 51, No. 3 (Summer, 1970).



Under this "purpose and primary effect" test, for example, the flow of governmental funds to a church-related institution will survive an establishment clause challenge, if there is a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Such governmental programs will be upheld despite the fact that an incidental benefit to religion or a religious organization may result.

Many advocates of state support for private education (including some respondents to the survey described in Chapter IV of this report) believe such support may be legally valid only if it conforms to what has become known as the "child benefit theory." Such a doctrine may possibly be inferred from favorable decisions in which the facts of the case involved aid to students and not support of the institutions themselves. The evidence indicates, however, that the actual holdings in such cases are based more directly on the "secular legislative purpose" doctrine. But in any event, the underlying theme remains; church-state relationships do not violate the establishment clause when a clear public interest is involved and the benefits conferred upon religion are merely incidental.

The "American tradition," then, embraces governmental neutrality in religious matters as well as governmental accommodation to the religious needs of the people. Additionally, it appears that government may be involved with religious organizations that serve the public interest so long as the resulting benefit to religion is only incidental. This concept of church-state relations effectively denies that an impenetrable "wall of separation" is constitutionally required. Furthermore, the inherently flexible nature of these relations is substantiated by a long historical record of church-state cooperation and by emerging legal doctrine which incorporates such guidelines as secular legislative purpose and child benefit.

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It is noted, however, that precise limits cannot be drawn in these matters. Other concerns bear upon the issue and are also reflected in various court decisions. For example, the celebrated *Horace Mann* case in Maryland (discussed later in this chapter) has asserted that the "degree of religiosity" of a church-related institution receiving government support may affect the legal validity of such support. While the Supreme Court has not yet dealt with this concept, a number of lower court cases have involved challenges to government aid programs based in part on *Horace Mann*. In one of its most recent cases (*Walz v. Tax Commission of New York City*), the Supreme Court has indicated that the "degree of entanglement" can be a decisive factor in determining the propriety of specific church-state relationships.

On the whole, however, judicial precedents support the proposition that government may use church-related organizations to accomplish public purposes without violating the establishment clause. The Supreme Court has long recognized that church-related institutions such as universities and hospitals can be primarily secular in their corporate nature, and that sectarian schools perform secular functions even though founded and operated by religious

sects. These and other relevant issues will be described in the following review of selected court cases, some of which involve other questions than "the wall of separation" imputed to the establishment clause.

### **Direct Support vs. Incidental Benefits**

Supreme Court decisions directly applying the establishment clause to state support of church-related education (but not necessarily higher education) are of relatively recent vintage. Not until 1947 did the Court undertake to examine the limitations of the establishment clause on governmental power in this area.

In three cases between 1947 and 1952, the limitations of the establishment clause are defined in very general terms that (1) prohibit direct governmental support for religion, but (2) permit incidental benefits and (3) declare a position of neutrality as between sects while denouncing a position of hostility toward religion as contrary to the American tradition.

#### *Everson v. Board of Education*

The issue in *Everson* was whether a board of education, acting pursuant to a New Jersey statute, had violated the establishment clause.<sup>15</sup> The procedure at issue was the expenditure of public funds to reimburse the parents of Catholic parochial school students for the cost of sending their children to school on the public bus transportation system.

In speaking for the majority, Justice Black quoted Thomas Jefferson on the "wall of separation" and went on to observe:

The "establishment of religion" clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities of institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

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The force of such remarks seemed to spell trouble for the New Jersey procedure. Yet the majority opinion in *Everson* also stressed, "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." Moreover, in this and other cases, the "wall of separation" is always invoked with reference to governmental involvement in matters of religious dogma.

At any rate, the language of *Everson* seems in some respects to vacillate between opposing views of the establishment clause and has been quoted by both opponents and advocates of public aid programs. But in full context, the clearest impression is that the majority decision prohibits only direct, substantive support of religion *per se*.

<sup>15</sup> See Footnote 5.

For in fact, the Court held that the bus transportation subsidy did not constitute prohibited support of a religious institution. The Court also recognized that the church might benefit indirectly from the subsidy:

It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state.

The basic significance of *Everson* therefore appears to be that incidental benefit to a religious organization does not of itself place a governmental spending program in violation of the establishment clause.

#### *McCullum v. Board of Education*

The next establishment clause case considered by the Court was *McCullum v. Board of Education* in 1948.<sup>16</sup> This case involved a challenge to the "released time" program in Illinois. At issue was a system under which students who desired to participate were released for half an hour each week to attend religious instruction on school premises. The instruction was provided by persons paid by various churches or church organizations in the community.

Speaking for the Court, Justice Black said:

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Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invalid aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

Thus, the Court held that the program fell "squarely under the ban of the First Amendment" because it involved the use of "the tax-established and tax-supported public school system to aid religious groups to spread their faith."

#### *Zorach v. Clauson*

Yet four years later the Court, in *Zorach v. Clauson*, considered New York's "released time" program, with different results.<sup>17</sup> The New York program was similar to that in Illinois, except that the classes were held off public school premises.

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<sup>16</sup> 333 U.S. 203 (1948).

<sup>17</sup> 343 U.S. 306 (1952).

In upholding the New York program the Court said:

We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments in their schedule to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

The opinion is significant because it discussed at length the meaning of separation of church and state. The Court observed that "the First Amendment does not say that in every and all respects there shall be a separation of Church and State." The Court recognized that "the problem, like many problems in constitutional law, is one of degree."

The positive implications of the issue were elaborated in terms of the "American tradition" as follows.

When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their needs.

The Court defined separation of church and state in terms of neutrality:

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 effective scope of religious influence. The government must be neutral when it comes to competition between the sects.

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### **Secular Legislative Purpose**

In the next three cases to be considered (1961 through 1968), the "secular legislative purpose" doctrine emerges clearly. It is to be noted in addition that the Court also reaffirmed the permissibility of incidental benefits and the requirement of governmental neutrality, while confirming again the ideas that church-related organizations can indeed perform important secular functions. Of more general significance is the fact that the first two cases cited (*McGowan v. Maryland* and *Abington School District v. Schempp*), while wholly unrelated to any question of government support for church-related education, appear to have established a precedent for the third case which did involve an educational issue.

### *McGowan v. Maryland*

Maryland's Sunday closing laws were at issue in *McGowan v. Maryland*.<sup>18</sup> The decision made two important contributions to establishment clause doctrine.

The appellants argued that, because Sunday was a day of religious observance for most Christian sects, the purpose of Sunday closing laws was to encourage church attendance and participation. For this reason, they contended that such laws were a prohibited type of aid to religion.

The Court agreed that "the original laws which dealt with Sunday labor were motivated by religious forces." The Court, however, upheld Sunday closing laws:

The present *purpose and effect* of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. [emphasis added].

The "purpose and effect" language quoted above anticipated the constitutional test which has emerged from subsequent decisions. The Court also reaffirmed that a governmental program which has a secular purpose and effect will survive a First Amendment challenge, although it may confer an incidental benefit on religion.

### *Abington School District v. Schempp*

This case involved the constitutionality under the establishment clause of the widespread practice of starting the school day by reading from the Bible.<sup>19</sup> The opinion reaffirmed the requirement of neutrality by government in dealing with religion and held that Bible recitation in the public schools was prohibited by the Establishment clause.

The Court, citing *Everson v. Board of Education*, prescribed the following test:

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

<sup>18</sup> 366 U.S. 420 (1961).

<sup>19</sup> 374 U.S. 203 (1963).

Thus, Bible-reading in the public schools failed to meet this test. But *Schempp* is especially significant because it endeavored to make explicit the partially implicit meaning of public purpose touched upon in prior cases, particularly *Everson*, *Zorach* and *McGowan*. It was, in short, an effort to encapsulate the common meaning of the cited cases. For example, the citation of *Everson* at the end of the passage quoted above almost certainly means that the *Schempp* test would sustain the New Jersey busing statute as having “a secular legislative purpose and primary effect that neither advances nor inhibits religion.”

#### *Board of Education v. Allen*

The test enunciated in *Schempp* was applied to an education question in *Board of Education v. Allen*.<sup>20</sup> At issue was New York’s textbook loan law, under which local school boards were required to purchase textbooks and lend them without charge to all students in grades seven through twelve of both public and private schools in the district.

Citing the “purpose and primary effect” test of the *Schempp* case, the Court held that the statutory purpose of the program was secular, as was its primary effect. Again, in upholding the New York law, the Court recognized that an incidental benefit to religion might result, since “perhaps free textbooks make it more likely that some children choose to attend a sectarian school.”

*Everson* was summarized at some length in the *Allen* case. Concerning *Everson*, (a busing case) the Court stated “We reach the same result with respect to the New York law. . .” (a textbook case), and also observed, “The law merely makes available to all children the benefits of a general program to lend school books free of charge.”

Appellants argued that there was “no such thing as secular education in a sectarian elementary or secondary school.”<sup>21</sup> The Court rejected this argument, concluding that church-related schools “are performing, in addition to their sectarian function, the task of secular education.” The origins of this observation on the dual role of sectarian schools goes back at least as far as 1925 (*Pierce v. Society of Sisters*, 268 U. S. 510). In that instance the conclusions reached clearly implied that the state’s interest in the quality of its children’s education would be adequately served by reliance on secular teaching accompanying religious training in schools supervised by the state but operated by a religious order of sisters.

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#### **Child-Benefit Theory**

Some writers have interpreted the *Everson* and *Allen* cases to mean that aid to the student or his parents will survive an establishment clause challenge but that a program which permits funds to flow

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<sup>20</sup> 392 U.S. 236 (1968).

<sup>21</sup> Brief for Appellants, *Board of Education v. Allen*, p. 16.

directly to the church-related institution must fail.<sup>22</sup> The majority opinion in *Allen*, for example, refers explicitly to the “child benefit” features of the New Jersey statute which had been challenged in *Everson*. But in both these cases, the fact that the challenged aid was to the student or his parents and not directly to the institution is crucial. However, the argument can be made that in referring to “aid to the child” the Court was simply describing the facts of the case and not enunciating a rule of law. This latter view appears to be substantiated by at least one lower federal court which explicitly considered the legal implications of *Allen*.

Specifically, in *Tilton v. Finch*,<sup>23</sup> handed down on March 19, 1970, the United States District Court for the District of Connecticut expressly rejected the child-benefit theory. This case is a challenge under the establishment clause against the Higher Education Facilities Act of 1963 which authorizes grants for the construction of academic facilities to both public and private institutions of higher education. In upholding grants to church-related colleges, the Court said:

We are not persuaded by plaintiffs’ argument that *Allen* establishes some sort of child-benefit theory under which direct government aid to church related educational institutions is not permissible, while government aid to students attending such institutions is permissible because government aid to an institution in the form of student subsidies is not direct. Although the challenged statute in *Allen* authorized aid to parochial school students and their parents rather than to the schools themselves, the Court neither held nor suggested that the identity of the direct recipient of the aid was the critical factor in determining the constitutionality of the statute under the establishment clause. . . [We] view *Allen* as confirming the secular purpose and primary effect test, rather than a child-benefit test. . .

The final view of the district court seems also to hinge in part on the Supreme Court’s heavy emphasis in *Allen* on the right of the state to assure itself of the quality of education provided in sectarian schools, and to take necessary steps to guarantee and enhance that quality. In providing this emphasis, the Supreme Court cited the 1930 case of *Cochran v. Georgia*, (281 U. S. 370). In *Cochran*, the Court concluded that certain appropriations by the state to purchase school books had been made for the benefit of the state’s school children and for the resulting benefit to the state. “Viewing the statute as

<sup>22</sup> For one presentation of this argument see G. La Nove, *Public Funds for Parochial Schools?* (National Council of Churches, 1963).

<sup>23</sup> *Tilton v. Finch*, 312 F. Supp. 1191 (1970).

having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose."

*Allen* and *Cochran* suggest, then, that the "state interest" is different from and served by "child benefit," and thus that both may be viewed essentially as facets of "secular legislative purpose."

### Secular or Sectarian?

In view of the ostensible significance of the "secular legislative purpose" doctrine in defining constitutionally appropriate relationships between church and state, the legal meaning of a secular institution becomes equally important in determining whether such purposes are being served in any particular instance.

Through *Allen*, *Pierce* and *Cochran* the Supreme Court had repeatedly affirmed the secular functions of sectarian schools. Even earlier, around the turn of the century, the Court had ruled that sectarian institutions could be legally regarded as secular corporations, despite their church affiliations. Though somewhat remote from current issues on establishment clause doctrine, the findings in the two cases described below could bear significantly upon the application of secular legislative purpose to church-state relationships.

#### *Bradfield v. Roberts*

In this case, which was decided in 1899, the Supreme Court rejected an attack on a direct federal grant to a hospital owned and operated by a corporation whose members were members of various Catholic orders.<sup>24</sup> Despite the admitted involvement of the church, the Court held that the hospital was a nonsectarian and secular corporation, because it was organized and chartered under an act of Congress:

Assuming that the hospital is a private eleemosynary corporation, the fact that its members according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The statute [incorporating the hospital] provides as to its property and makes no provision for its being held by anyone other than itself. The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all

<sup>24</sup> 175 U. S. 291 (1899).



Methodists, or Presbyterians, or Unitarians, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly-stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence. . . . It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution. All that can be said of the corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to.

*Speer v. Colbert*

The Court specifically applied *Bradfield* in this 1906 case.<sup>25</sup> The question before the Court was whether or not Georgetown University was a sectarian institution. Georgetown was at that time and is now operated by the members of the Society of Jesus.

Citing the act of Congress incorporating Georgetown University, the Court said:

That act must be resorted to as the measure of the powers and duties, as well to define the character, of

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<sup>25</sup> 200 U. S. 130 (1906).

the corporation created thereby. (*Bradfield v. Roberts*, 175 U.S. 291.) Taking the character of the college from the act of Congress, we are of the opinion that it is not a sectarian institution.

It is emphasized that the decisions in both *Bradfield* and *Speer* were based on very narrow and technical grounds. Nevertheless, both cases strongly indicate that the religious affiliations of the personnel who administer a corporation and discharge its obligations, even though they are members of religious orders, do not color the corporation sufficiently (if at all) to impart a religious coloration to its secular activities.

Thus, if a Jesuit institution such as Georgetown University may be legally regarded as a secular institution, the inference is strong indeed that other church-related colleges and universities organized under general federal or state laws occupy the same legal status.

### Degrees of Separation

As noted, *Bradfield* and *Speer* are historically and perhaps legally somewhat distant from the establishment clause issues of *Everson*, *McCullum*, *Zorach* and *Allen*. The earlier cases concerned the corporate nature of institutions founded and operated by religious bodies, and neither invoked the establishment clause in their decisions. The recent cases emphasize the establishment clause requirement to maintain some degree of separation between government and religion.

Two other recent cases, described below, illustrate this latter point. In *Horace Mann League v. Board of Public Works* (1966), the principal question was the "degree of religiosity" of church-related institutions receiving government support. In *Walz v. Tax Commission of New York* (1970), a major concern was the "degree of entanglement" between government and religion.

The *Horace Mann* case was an establishment clause challenge in the Court of Appeals of Maryland to statutes granting funds to four church-related colleges for the construction of academic facilities.<sup>26</sup>

The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the

<sup>26</sup> *Horace Mann League v. Board of Public Works*, 242 Md. 645 (1966), *certiorari* denied and appeal dismissed, 385 U.S. 97 (1966).

governing board as a criterion of whether a college is sectarian); (3) the college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestations in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs; (5) the result or "out-come" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community.

These six criteria constituted, in effect, a measurement of the "degree of religiosity" inherent in a given college's overall organization. It was on this basis that the Maryland Court of Appeals decided that three of the four colleges involved were "of sectarian repute" and hence not eligible for public grants under the establishment clause. The fourth, although church-related, was considered to be a secular college primarily.

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Since the United States Supreme Court denied review of *Horace Mann*, the issues it poses under establishment clause doctrine have yet to be finally adjudicated. In evaluating the possible significance of the case, the fact must be considered from the outset that the degree of religiosity standard of *Horace Mann* would pose many problems in application. The standards are so vague that a private college would not know whether or not it was eligible for support from public funds until its individual status had been adjudicated. Even then a change in board membership, faculty composition, student body, curriculum, or public image in the community conceivably could change the eligibility of the college.

In any event, the *Horace Mann* criteria have evoked largely negative reactions. One commentator has stated that the criteria in the *Horace Mann* case "have no statutory or decisional basis in American law."<sup>27</sup> Despite *Horace Mann*, the Supreme Court of Vermont has upheld assistance to private institutions of higher education

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<sup>27</sup> R. Drinan, "Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases," 1967 *Utah Law Review*, p. 491.

by the Vermont Educational Buildings Financing Agency.<sup>28</sup> (This "building authority" was created by state law to assist institutions in financing and constructing academic facilities.) The court cited with approval and followed the *Schenck* and *Allen* decisions in applying the standard of "purpose and primary effect." Justice Smith, dissenting, relied on the *Horace Mann* decision.

Plaintiffs in *Tilton v. Finch* urged that the criteria in the *Horace Mann* case be applied to determine the eligibility of the four Connecticut private colleges to receive facilities grants.<sup>29</sup> The United States District Court in its decision applied the "purpose and primary effect" test and did not comment on either the *Horace Mann* case or plaintiffs argument based on it.

### Degree of Entanglement

Since September, 1970, one U. S. Supreme Court case and several other cases involving federal district or state courts appear to have generated a new constitutional test under the establishment clause, perhaps best described as the "degree of entanglement." A commentary on the possible implications of these cases for the state support issue is provided in Appendix B.

Particularly significant is that the decision in the Supreme Court case, handed down after the appointments of Justices Burger and Blackmun, confirms the theme of government neutrality under the establishment clause and summarizes national experience with the First Amendment in terms that closely approximate the general meaning of the American tradition and the specific meaning of secular legislative purpose.

### Summary

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Although much of the popular resistance to subsidizing private higher education is predicated upon substantive legal barriers implicit in a "wall of separation," the evidence of this chapter indicates such obstacles are more illusory than real. In the early history of this country, there was no distinction between public and private higher education, and government actually encouraged and supported church organizations in their efforts to improve society through education.

Explicit opposition to providing government support to church-related education appears to have developed around the middle of the 19th century, largely as a result of internal bickering among the various sects over preferential government treatment. Undoubtedly, such opposition was enhanced by the establishment of public land-grant colleges under the Morrill Act, and by the rise to prominence in the late 19th century of the state university and other forms of wholly public higher education.

<sup>28</sup> Vermont Educational Buildings Financing Agency v. Mann, 127 Vt. 262, 247 A. 2d 68 (1968).

<sup>29</sup> Plaintiff's Main Pre-Trial Memorandum on the Issue of Law, *Tilton v. Finch*.

In any event, the “wall of separation” is a keystone of the legal challenge to private sector subsidies. But by examining the patterns of First Amendment interpretations it is possible to show (1) that the framers of the Bill of Rights were largely concerned to guard against the political inequities of a state church, not to perpetuate governmental hostility toward religion itself, including all of its myriad activities; and (2) that relatively recent interpretations of the establishment clause essentially endorse the idea that church–state separation is a matter of degree. At least by implication, and sometimes explicitly, these patterns collectively define the more permissive “American tradition” interpretation of the establishment clause. The “American tradition,” in effect, implies a viable framework in which appropriate relationships between government and the secular aspects of church-related education have been upheld.

The most significant component of this framework is the “secular legislative purpose” doctrine under which direct government grants to private institutions, as well as “indirect” grants to students attending private institutions, are viewed as conforming to the establishment clause. The “child benefit theory,” which would validate indirect subsidies (e.g. student aid) but not direct ones (e.g. institutional support), may also be involved.

More generally, some Supreme Court rulings provide a strong inference that certain types of church-sponsored organizations (e.g. hospitals and universities) may be wholly secular in the eyes of the law. This precedent was established long before the emergence of the “secular legislative purpose” doctrine but would seem to reinforce the impact of the later doctrine. An element of uncertainty remains, however, since the Supreme Court has not yet resolved a related issue posed by the Maryland Court of Appeals. In effect, the Maryland decision asserts that the “degree of religiosity” inherent in a college’s structure, staff, programs, and community image may be used to determine whether such a college is predominantly sectarian or predominantly secular.

One major purpose of this chapter has been to establish a broad context for examining the legal and political issues of private sector subsidies at the state level, particularly among SREB states. The foregoing evaluations of the establishment clause provide such a context. Moreover, while the explicit terms of the establishment clause are applicable only to Congress, they are also binding upon the states in terms of the due process clause of the Fourteenth Amendment. Thus, it seems likely that appropriate forms of private sector subsidies would survive challenges to their legal validity, even in the face of literal constraints incorporated in constitutional or statutory law at the state level. It is to the ramifications of this question that Chapter III of this report addresses itself.

## Chapter III

### STATE LEVEL LEGAL ISSUES ON PRIVATE SECTOR SUBSIDIES

A state level review of relationships between government and church-related organizations reveals a more complex pattern of legal issues than those defined by establishment clause doctrine alone. Not only do Supreme Court interpretations of the establishment clause affect state level relationships, but similar constraints in state constitutions generate additional legal considerations. The fact that explicit constraints vary somewhat among the states complicates the picture still further.

Yet to the extent that establishment clause interpretations support a consistently favorable policy on public subsidies for private higher education, it is of interest to discover whether a reinforcing theme may be found in legal evidence at the state level. The major purpose of this chapter is to present such evidence, supported by relevant data from selected court cases. This theme is focused primarily in terms of the SREB states, although cases from other states in other regions are also considered.

In general, the more significant points to be covered in this chapter include the following:

1. In the absence of explicit constraints, the general rule of law is that states may extend aid to private education, subject to the strictures of the establishment clause; in this connection, it is noted that five of the 14 SREB states have no specific constitutional provisions prohibiting aid to private or sectarian institutions.
2. Legal interpretations of the term "sectarian" are probably crucial in determining the limits of state support in the nine other SREB states whose constitutions contain explicit reference to church-state relationships.
3. There is a pronounced similarity between the "conduit doctrine" which has emerged as a legal guideline at the state level, and the "secular legislative purpose" doctrine of establishment clause interpretations.
4. Other potentially valid church-state relationships are implied by such developments as the "child benefit theory," financial support already afforded by various forms of tax exemption, and the "state authority" mechanism which is used by a number of states to finance capital construction at private colleges, to underwrite revenue bonds, or to guarantee student loans.

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It should be noted, in passing, that these points reflect a pronounced shift in judicial attitudes toward the state support issue from attitudes which prevailed among state courts in the late nineteenth century. In general, earlier decisions were based on strict construction of state constitutional provisions that defined the "wall of separation" between church and state. Appendix C contains a review and commentary on illustrative cases (in South Dakota, Illinois and Louisiana respectively) adjudicated between 1870 and 1900. Each of these cases clearly implies the typical view of strict construction: that legal provisions pertaining to separation of church and state admit of no degree whatever. As a matter of legal philosophy, it is interesting to speculate on the reasons why state courts have since shifted to a more flexible interpretation. For purposes of this chapter, however, it is sufficient to record that the shift has occurred.

Not all state courts of last resort, of course, have ruled expressly as to permissible relationships with church-related institutions of higher education. While the fact must be recognized that some of the state courts might still find the nineteenth century precedents binding, the probability is that the recent case law trends outlined in Chapter III would influence ultimate holdings.

To prevent possible misinterpretations of intent, the authors wish also to record here their recognition that recent discussions in Southern states of "public aid to private education" have often arisen in contexts related to the segregation issue. Indeed, as the record will attest, some Southern states did amend their constitutions to authorize public aid to private schools and/or their students in a not-too-covert effort to delay effective desegregation of educational facilities.

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The point is emphasized, however, that prevailing court decisions have specifically prohibited the use of aid to private education as a means of perpetuating segregation.<sup>30</sup> It thus seems clear that higher institutions practicing segregation would be completely ineligible for state support. In one sense, then, an unanticipated effect of constitutional amendments originally aimed at perpetuating segregation is to provide a flexible legal basis for appropriate forms of state support for more constructive purposes.

In short, the authors regard state support relative to segregation as a dead issue. The following sections of this chapter are concerned exclusively with developing an entirely different argument. This argument involves establishing the legal dimensions of state support for private education relative to pressing economic and educational needs of the Southern region.

#### **SREB States With No Specific Prohibition Of Aid to Private Education**

Five of the 14 states in the SREB area have no specific constitutional

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<sup>30</sup> Griffin v. State Board of Education, 239 F. Supp. 560 (E.D. Va. 1965)

provisions prohibiting aid to sectarian or private educational institutions. These states are Arkansas, Maryland, North Carolina, Tennessee, and West Virginia.

The general rule of law is that, in the absence of a constitutional prohibition, the state may extend financial aid to private colleges.<sup>31</sup> The state constitution is a limitation upon power of the government, and not a grant; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the state constitution, the courts have no power to declare it invalid.<sup>32</sup> One of the clearest expressions of this doctrine is a 1913 Massachusetts case in which the Supreme Judicial Court held that there was no constitutional prohibition in that state against appropriations to institutions of higher education under sectarian or ecclesiastical control.<sup>33</sup>

Relative to private interests, most state constitutions have prohibitions against appropriating money or property to private individuals or organizations, extending credit to them, or assuming their liabilities. Since the provision of higher education is well recognized as a public purpose, however, these sections appear of little relevance. Every state certainly enters into a variety of such commercial transactions with private individuals and organizations in the provision of governmental services. As long as the purpose is public the courts consider the use to which the funds are put, rather than the conduits through which they run.<sup>34</sup>

SREB states without specific constitutional provisions regarding state aid to private higher education, of course, are still subject to the establishment clause of the First Amendment to the federal Constitution. The United States Supreme Court in 1940 held that the free exercise clause of the First Amendment was applicable to the states by the Fourteenth Amendment<sup>35</sup> and in 1947 established a similar ruling on the establishment clause. The judicial constructions outlined in the preceding chapter, then, define the legal constraints on state aid to private higher education in the five SREB states listed at the beginning of this section.

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### **SREB States with Constitutional Restrictions**

The constitutions of the remaining nine states in the SREB area have specific provisions relating to aid to private education. The pertinent sections of these constitutions appear in Appendix A. The wording of these sections varies from one state to another. Many prohibit state aid to "sects," "denominations," "religious societies," or "churches."

<sup>31</sup> 14 C.J.S. "Colleges and Universities," sec. 9.

<sup>32</sup> *State v. Bryan*, 50 Fla. 293, 39 S. 929 (1905), and for extensive citation of cases in point see Vol. 10, Cent. Dig. Constitutional Law, sec. 30, 42, 46.

<sup>33</sup> *Re Opinion of Justices*, 214 Mass. 599, 102 N.E. 464 (1913).

<sup>34</sup> *Kentucky Building Commission v. Efron*, 310 Ky. 355, 220 S. W. 2d 836 (1949).

<sup>35</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).



Since the typical church-related college would hardly meet any of those definitions, the emphasis in this section will be on specific provisions relating to education.

The following excerpts from the constitutional provisions in Appendix A indicate the types of educational institutions for which aid or appropriations are prohibited:

- Alabama . . . . . "sectarian or denominational school"
- Florida . . . . . "sectarian institution"
- Georgia . . . . . "sectarian institution"
- Kentucky . . . . . "church, sectarian, or denominational school"
- Louisiana . . . . . "private or sectarian school"
- Mississippi . . . . . "sectarian" or "school not operated as a free school"
- South Carolina . . . . . "college . . . wholly or in part . . . under the direction or control of any church or any religious or sectarian . . . organization"
- Texas . . . . . "theological or religious seminary"
- Virginia . . . . . "institution . . . wholly or in part . . . controlled by any church or sectarian society."

Based on the wording of its constitution, the Texas provision would appear to be the most liberal of this group, since it relates directly only to theological or religious seminaries. The Virginia and South Carolina provisions are among the most limiting, since they refer to control, wholly or in part, by religious or sectarian organizations.

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### Meaning of Sectarian

Because of the heavy reliance of the drafters of these constitutions on the use of the words "sect" and "sectarian," the definitions of these terms become important to the present inquiry.

The decision in *Gerhardt v. Heid* (North Dakota, 1936)<sup>36</sup> provides an excellent review and restatement of the law with respect to the words "sect" and "sectarian." The following definitions are taken from the opinion and the syllabus by the North Dakota Supreme Court:

"Sect," as applied to religious bodies, refers to the adherents collectively of a particular creed or confession. It has been defined as a party or body of persons who unite in holding certain special doctrines or opinions concerning religion, which distinguish them from others holding the same general religious belief.

<sup>36</sup> 267 N. W. 127, 66 N. D. 444 (1936).

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The term "sectarian," when used as an adjective, means denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; especially marked by attachment to a sect or denomination; and the term in a broader sense, is used to describe the activities of the followers of one faith as related to those of adherents of another. The term is most comprehensive in scope.

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A "sectarian school" is a school affiliated with a particular religious sect or denomination or under the control or governing influence of such sect or denomination.

\* \* \* \* \*

A "sectarian institution" is an institution affiliated with a particular religious sect or denomination, or under the control or governing influence of such sect or denomination; one whose purpose as expressed in its charter, and whose acts, done pursuant to powers conferred, are promotive of tenets or interests of a denomination or sect.

While such definitions may be helpful, they could leave a considerable area for judicial interpretation when applied to a specific institution. One might, for example, select Duke University as a typical private Southern university. Duke University is related to the Methodist church. In terms of these definitions, however, is Duke "devoted to, peculiar to, or promotive of the interest of" the Methodist church? Is Duke University under the "control or governing influence" or the "directing and restraining domination" of the Methodist church? Are Duke University's acts more "promotive of tenets or interests" of the Methodist church, than those of the Baptist, Lutheran, or Catholic church? Or does Duke University provide, in fact, a secular higher education service? The only term in the definitions quoted above which appears to apply to Duke University without question is "affiliated" with the Methodist church. But does that alone make it a "sectarian" institution?

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The Maryland Court of Appeals dealt with this issue in the *Horace Mann* case, cited in Chapter II. The court in that case found that, of four church-related colleges, three were sectarian and one was secular, under a "degree of religiosity" standard. Thus, the decision does imply that not all church-related colleges are "sectarian" and that the issue is a matter of degree. Moreover, as noted in Chapter II, there would be inherent problems in applying such a standard in any particular instance.

In *Speer v. Colbert*,<sup>37</sup> also discussed in the preceding chapter,

<sup>37</sup> 200 U. S. 130 (1906).

the United States Supreme Court held that Georgetown University derived its character from its charter and was a secular institution although church-related. This approach provides another possible standard for determining whether or not an institution is "sectarian."

In any event, the term "sectarian" when applied to modern church-related colleges and universities would appear to be sufficiently vague and ambiguous that the courts have the latitude to construe it.

### The Conduit Doctrine

The conduit or pipeline doctrine has been used by state courts in a number of instances to uphold payments to church-related organizations and institutions against attacks under the establishment clause of the federal and state constitutions. The doctrine is clearly stated in *Kentucky Building Commission v. Efron* (Kentucky Court of Appeals, 1949):<sup>38</sup>

It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended.

Construing the federal establishment clause and similar language in Section 5 of the Kentucky Constitution in the same case, the Court of Appeals said:

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Manifestly, the drafters of our Constitution did not intend to go so far as to prevent a public benefit, like a hospital in which the followers of all faiths and creeds are admitted, from receiving State aid merely because it was originally founded by a certain denomination whose members now serve on its board of trustees.

The Kentucky Court of Appeals in *Abernathy v. City of Irvine*, 1962,<sup>39</sup> again followed *Efron* in upholding the lease of a public hospital for one dollar a year to a Catholic order.

A series of decisions of the Supreme Court of New Hampshire is significant in that they relate the *Efron* doctrine to the field of church-related education. The constitutional language being construed by the New Hampshire court is similar to that in many of the states in the SREB area:<sup>40</sup>

<sup>38</sup> 220 S.W. 2d 836, 310 Ky. 355 (1949).

<sup>39</sup> *Abernathy v. City of Irvin*, 355 S.W. 2d 159 (1962).

<sup>40</sup> Constitution of New Hampshire, Part II, Art. 83.

Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of schools or institutions of any religious sect or denomination.

In 1955, the New Hampshire Court was asked for its opinion on legislation which would provide annual grants of aid to all hospitals offering approved training in professional nursing.<sup>41</sup> The bill required the hospitals to be nonprofit and free of religious or other unreasonable discrimination in enrolling student nurses and specified that the funds were to be used exclusively for the nursing education program.

After declaring hospital care and nursing education to be public purposes, the court said:

The purpose of the grant proposed by House Bill 327 is neither to aid a particular sect or denomination nor all denominations, but to further the teaching of the science of nursing. No particular sectarian hospital is to be aided, nor are all hospitals of a particular sect. . . . A hospital operated under the auspices of a religious denomination which receives funds under the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes.

Also, in a 1969 decision, the New Hampshire court cited with approval the cast just quoted and went on to incorporate both the conduit doctrine and the "purpose and primary effect" test of *Schempp* in its opinion.<sup>42</sup> At issue, among other questions, was the furnishing to students in both public and nonpublic schools of a school physician, nurse, and psychologist. The provision of health, guidance, educational testing and other services deemed necessary or desirable for the well-being of pupils was also involved. Another question under review was the loan or sale of public school textbooks to students in nonpublic schools.

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In upholding these several proposals the court said:

Our state Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental benefit to a religious sect or denomination.

<sup>41</sup> *Opinion of the Justices*, 113A 2d 114, 99 N. H. 519 (1955).

<sup>42</sup> *Opinion of the Justices*, 258 A. 2d 343 (1969).

The Court then went on to quote with approval the “purpose and primary effect” test of the *Schempp* case. At this point the conduit doctrine and the *Schempp* test appear to blend into a holding that aid to a church-related institution can be upheld if it has a primary secular legislative purpose, and if sufficient safeguards are provided to assure no more than an incidental benefit to religion.

### Child-Benefit Doctrine

As pointed out in the previous chapter, some legal authorities argue that aid which goes to a student or his parents and does not flow directly to a church-related institution is the most which will survive a federal establishment clause challenge. A substantial percentage of respondents to the opinion survey reported in the next chapter also reflected this view.

The authors believe that judicial construction of both the federal establishment clause and the pertinent sections of state constitutions have established instead the “purpose and primary effect” test. The fact is recognized, however, that some state courts of last resort might not be willing to move beyond the child-benefit theory. Accordingly a profile of judicial attitudes toward this theory is important to the state support issue.

Several of the leading cases supporting the child-benefit theory originated in the SREB states. In reviewing these cases the fact should be kept in mind that the courts were being called upon to pass upon the constitutionality of programs where the aid went to the student. The question of a direct flow of public funds to a church-related institution was not before the courts.

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The Maryland Court of Appeals said in *Board of Education v. Wheat*,<sup>43</sup> involving the free state transportation of parochial school pupils:

Whether it [the use of public funds] is private within that rule appears to be, finally, a question whether it is in furtherance of a public function in seeing that all children attend some school, and in doing so have protection from traffic hazards. School attendance is compulsory, and attendance at private or parochial schools is a compliance with the law. . . . The danger of perversion to private purposes may be admitted, but the Legislature is primarily entrusted with the care of that, and the courts have no duty in relation to it unless and until a perversion should be obvious. The fact that the private schools, including parochial schools, receive a benefit from it could not prevent the Legislature’s performing the public function.

The Maryland court found a public purpose performed under

<sup>43</sup> 174 Md. 314, 199A. 628, 631

the legislation and upheld it although parochial schools might benefit from this program. This language is very similar to the “secular legislative purpose” and “incidental benefit to religion” holdings of more recent cases adjudicated by the Supreme Court.

The Louisiana Supreme Court decided *Borden v. Louisiana State Board of Education*,<sup>44</sup> a textbook case, on more narrow child-benefit and police power grounds:

In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

*Chance v. Mississippi Textbook Rating and Purchasing Board*,<sup>45</sup> a decision by the Mississippi Supreme Court upholding free textbooks for parochial school pupils, is significant because of its language on the relationship between church and state and on equal protection of the laws:

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There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any requirement that the state should be godless or should ignore the privileges and benefits of the church. Indeed, the state has made historical acknowledgement and daily legislative admission of a mutual dependence one upon the other.

It is the control of one over the other that our Constitution forbids. (Sections 18, 208.) The recognition

<sup>44</sup> 168 La. 1005, 123 So. 655.

<sup>45</sup> 190 Miss. 453.

by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, who, regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state, in discharging its obligation as *parens patriae*, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

\* \* \* \* \*

. . . Even as there is no religious qualification in its public servants for office, there should be no religious disqualification in its private citizens for privileges available to a class to which they belong.

. . . The narrow construction contended for by complainants would compel the pupil to surrender use of his books when and because he elected to transfer from a public school to a qualified parochial school. Such would constitute a denial of equal privileges on sectarian grounds, and would be reminiscent of the language of Roger Williams, who, over a century before our national Constitution was written wrote in the royal charter of Rhode Island, "No person within the said colony at any time hereafter shall be in anywise molested, punished, or called in question for any difference of opinion in matters of religion."

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*Chance* clearly raises the question of equal protection of the laws. College students are a class. Following *Chance* it would be violative of the equal protection clause to deny to church-related college students a public benefit available to those who attended public institutions.

#### Property Tax Exemptions

One form of state aid to private higher education not often considered is property tax exemption. The constitutions of Alabama, Arkansas, Kentucky, Louisiana, South Carolina, and Virginia provide that property used for educational purposes, at least when not held for profit, will be exempt from taxation. The constitutions authorize

the legislatures to grant such exemption in Florida, Georgia, North Carolina, Tennessee, Texas, and West Virginia. Although the constitutions are silent on this subject in Maryland and Mississippi, the custom is to grant such exemptions legislatively in those states.

One noted higher education authority has estimated that property tax exemption is equivalent to approximately fifteen percent of the current income of private institutions.<sup>46</sup> This figure represents indeed a significant state contribution to private higher education, since the result is higher rates on property which remains taxable. It is also, in effect, a subsidy for students attending private schools, in the form of lower tuition than would be necessary if the property were not tax-exempt. In this sense the subsidy also represents a partial return to the students' parents of taxes paid for the support of public institutions not used by them.

#### State Authorities

Probably the best known agency of this type is the New York Dormitory Authority. Typically, such agencies are created by the legislature to issue long-term, tax-exempt bonds to finance the construction of facilities at both public and private institutions of higher education. In the case of a private institution, title to the facility is held by the building authority until the issue is retired and the institution must pledge tuition or other revenue for payment. Among the other states with such programs are Pennsylvania, New Jersey, Connecticut, and South Carolina.

The Supreme Court of South Carolina has just upheld the Educational Facilities Authority in that state, as provided under an act of the 1969 General Assembly.<sup>47</sup> The legislation authorizes the Authority to provide financing for facilities at both public and private institutions of higher education by the issuance of revenue bonds payable solely out of the revenues of the project for which they are issued and secured by a mortgage on the project facilities. Revenue bonds may also be issued to refund obligations on existing facilities.

Baptist College at Charleston applied to the Authority for the issuance of not exceeding \$3.5 million of revenue bonds under the act to refund indebtedness on the existing physical plant. The plaintiff challenged the act on a number of grounds including the contention that it violated the First Amendment to the United States Constitution and Article I, Section 4, of the South Carolina Constitution (see Appendix A) by providing aid to church-related institutions of higher education.

The court held that Baptist College at Charleston was at least in part under the control of the South Carolina Baptist Convention but that the operation of the act did not constitute a gift or loan of the property or credit of the state:

<sup>46</sup> John Dale Russell, "The Finance of Higher Education," in *Partnership for Higher Education*, ed. H. R. Kroepsch and D. P. Buck (Boulder, Colorado: Western Interstate Commission for Higher Education, 1967), p. 13.

<sup>47</sup> *Hunt v. McNair*, Opinion No. 19111, October 22, 1970.



It has been made to appear to me that the Baptist College at Charleston is a corporation organized and existing under the laws of the State of South Carolina and in its Charter, the purpose of the said corporation, among other things, is to establish, equip, maintain, conduct and operate a Baptist Liberal Arts College for educational purposes. Further, all the powers of the corporation are lodged in a Board of Trustees consisting of 25 members, all of whom are elected by the South Carolina Baptist Convention. It has been further shown that approximately 60% of the enrollment of the college students of the Baptist College are of the Baptist faith. It has also been shown that this is about the ratio of Baptist to non-Baptists in this area of the State. Under any interpretation of this provision of our Constitution, however, there is no question but that the operation of the Baptist College at Charleston is at least in part under the direction or control of the South Carolina Baptist Convention. Thus, the question is presented whether or not the proposed actions of the defendants would constitute a loan or gift of the property or credit of the State of South Carolina in contravention of the Constitution. I do not find that any property of the State of South Carolina, as such, is involved inasmuch as the State will acquire (at no cost to the State) a title subject to certain conditions, one of which is an option in favor of the Baptist College to reacquire the property so conveyed to the State; and thus the question is limited to whether or not the credit of the State of South Carolina has been given, loaned or contracted for, appropriated or otherwise used directly or indirectly, in aid of the Baptist College. In view of my holding above, that the credit of the State is in no way involved in the proposed actions of the Defendants, I find that the credit of the State can in no way be considered as aiding in any way the Baptist College at Charleston.

This decision apparently turns on the distinction between "full faith and credit" obligations of the state and revenue bonds. Technically, since only revenues from the project are pledged for retirement of the bonds, the credit of the state is not involved. The institution, however, derives a substantial economic benefit from the fact that the bonds are tax exempt. In many cases, the fact that the issue is being handled by a state agency probably would make the bonds more marketable and result in a lower interest rate. The situation is broadly analogous to tax exemptions, in that state action results in cost benefits to the institution that it otherwise could not obtain.

### Summary

Two important conclusions may be inferred from this selective review of legal relationships between government and church-related colleges at the state level. One is that the legal reasoning in state courts parallels closely the reasoning of the Supreme Court on these issues; in particular, the courts seem to emphasize the need for government neutrality in its dealings with church organizations; they recognize also that when funds are appropriated in the public interest, the key issue is what specific purpose is served and not who handles the money; a related issue is the realization that not all church-related organizations are inherently sectarian; it finally appears that fiscal devices which produce cost savings for church-related organizations are not only legally proper, but constitute a significant form of state support for private higher education and its students.

The second conclusion is, in a sense, more fundamental. Just as the Chapter II review of legal doctrine revealed that the "wall of separation" between church and state has not been interpreted by the Supreme Court as the fundamental meaning of the establishment clause, neither have state courts in similar instances typically construed the federal or respective state constitutions in narrowly restrictive fashion. Thus, there is good reason to believe that, in the last analysis, the subsidy issue at the state level is more a political than a legal question.

To say this is not to question the sincerity of those who oppose private sector subsidies as a matter of personal conviction. It is to say, however, that public leaders have a clear responsibility to re-examine their views when important matters of public policy are at stake. Since it can hardly be denied that the future of private higher education (as well as the continuing strength of public higher education) is an important public issue in the current crisis, the time would seem to be at hand for a new look at old attitudes.

The next chapter of this report is an endeavor to take such a look, in terms of current attitudes among political and educational leaders in SREB states on key issues of state support for private higher education. The evidence suggests, moreover, that an atmosphere is developing among public leaders in the South that would be conducive to the development of responsive answers to the problem.

## Chapter IV

### STATE LEVEL POLITICAL ATTITUDES IN THE SOUTHERN REGION: AN OPINION SURVEY

#### Overview

The evidence presented in chapters II and III suggests that legal constraints may not comprise the major question mark in the state support issue. The political attitudes of state leaders are left to be considered. The present chapter reports on a recently conducted opinion survey among governmental and educational leaders in the 14 SREB states.

The survey was designed to elicit views of regional leaders in three areas: (1) social, economic and academic importance of private higher education; (2) financial, legal and philosophical dimensions of the state support issue; and (3) proposals for various kinds of state support programs.

The survey instrument itself (see Appendix D) was designed by the authors with technical assistance from the Southeastern Office of Educational Testing Service. Prospective respondents in the fourteen states were selected in terms of their evident role or potential influence relative to decision-making in higher education at the state level. The categories of individuals polled were governors, attorneys general, key legislators, executive officers of state higher education boards, members of state higher education boards, public college presidents and private college presidents.

Questionnaires were sent to governors as the chief executive officers of their states. The attitudes of the attorneys general were also deemed very important, since state support programs involve significant legal and constitutional issues in most states.

The third political leadership group was the legislators. Here an effort was made to select groups of legislators in each state who would be especially informed regarding higher education and in a strong position to affect legislative outcomes. Questionnaires were sent to presiding officers of legislative bodies, chairmen of standing committees having responsibility for higher education legislation, floor leaders, and members of major interim legislative bodies.

Questionnaires were also sent to members and executive directors of state higher education agencies. These two groups usually have responsibilities at both the political and educational levels and are well informed regarding the needs of higher education in their states.

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The final two groups polled were public college presidents and private college presidents. The respective views of these two groups were deemed important because state support for private higher education necessarily involves a degree of competition for limited resources. Because of the large number of colleges involved, a random sample of presidents was used.

Responses were analyzed initially by state and by category of respondent to determine the rate of return (Tables 1 and 2). Otherwise, the data were mostly arranged to emphasize regional attitudes in the following broad categories of concern:

- Table 3: Importance attributed to private higher education.
- Table 4: Preferential ways of meeting financial needs in private higher education.
- Table 5: Attitudes toward state support as a matter of principle.
- Table 6: Attitudes toward legal, financial and philosophical objections to state support.
- Table 7: Personal views on specific state support programs.
- Table 8: Political feasibility of specific state support programs.

### **General Evaluation of Returns**

Questionnaires were mailed to all SREB governors, attorneys general, and state board members and executives; to categories of key legislators and to samplings of college presidents. A total of 501 individuals were involved in the initial mailing.

Usable responses numbered 161, for a return rate of 32.1 percent (Tables 1 and 2). Responses from the several states ranged from a high of 55.6 percent in North Carolina to a low of 9.4 percent in West Virginia (see Table 1). Response rates for the several categories of respondents (see Table 2) were highest for state board executives (76.9 percent) and public college presidents (76.2 percent), somewhat lower for private college presidents (53.2 percent), and lowest for legislators (11.4 percent.) Relatively few elected officials of any sort were notably responsive, a characteristic shared to a lesser extent by members of state boards.

Although minimal responses were received from the separate categories of elected officials, these individuals exhibited a high degree of agreement in their attitudes on the various aspects of the state support issue. Accordingly, response profiles in the following sections of this chapter portray the answers from elected officials under a single grouping, which is designated "political leaders." Replies from state board members and executives exhibited a similar consistency of attitudes and are likewise reported as a single category. Since the small number of responses from some states did not permit a reliable analysis of prevailing opinions within

individual states, no state profiles are reported at all. (In all instances, the anonymity of individual respondents has, of course, been protected.)

Table 1			
Number of Respondents and Response Rate by State			
State	Questionnaires Sent	Responses Received	Percent Response
Alabama	20	9	45.0
Arkansas	29	4	13.8
Florida	33	15	45.5
Georgia	39	10	25.6
Kentucky	38	18	47.4
Louisiana	33	7	21.2
Maryland	37	15	40.5
Mississippi	37	5	13.5
North Carolina	45	25	55.6
South Carolina	37	8	21.6
Tennessee	35	10	28.6
Texas	49	20	40.8
Virginia	37	12	32.4
West Virginia	32	3	9.4
<b>Total</b>	<b>501</b>	<b>161</b>	<b>32.1</b>

Table 2			
Number of Respondents and Response Rate by Category of Respondent			
Category	Questionnaires Sent	Responses Received	Percent Response
Governor	14	4	28.6
Attorney General	14	5	35.7
Legislator	175	20	11.4
Board Member	160	41	25.6
Board Executive	13	10	76.9
Public College President	63	48	76.2
Private College President	62	33	53.2
<b>Total</b>	<b>501</b>	<b>161</b>	<b>32.1</b>

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### Response Data and Profiles

At the most general level, the overall returns define two significant features of the political climate in the Southern region concerning the state support issue. First, on the basis of returns received, the amount of sympathetic interest in the issues of state support is encouragingly high. For example, an analysis of total responses on specific kinds of state subsidies reveals that only five percent of all

respondents would categorically reject every kind of state support for private higher institutions. Table 5 reveals that 60 percent of all respondents favor, in principle, the extension of state support to church-related institutions. The favorable tone of these findings, however, must necessarily be balanced by the caveat that non-respondents may have been precisely those with hostile views.

As against the generally favorable attitudes of all respondents, the second major feature is the anticipated contrast in attitudes of public college presidents. The fact that public presidents had the second highest response rate (exceeding even the private presidents) is perhaps indicative of the strength of their feeling on the issue. As a group, they tend to place a lower value than other respondents on private higher education's importance: in Table 3, for example, public presidents checked "unimportant" more frequently than other respondents. With respect to most aspects of the legal, financial and philosophical issues, only a minority of the public presidents responded in consistently favorable terms (Tables 4 through 6); and their personal views tend to favor only those types of state support which would not place private colleges in direct competition for outright state appropriations (Table 7). Nevertheless, it is significant that almost one-third of the public presidents view partial state support as one answer to the financial problems of private higher education (Table 4); that 44 percent favor state support for non-sectarian colleges in principle, while 40 percent would also countenance such support for sectarian institutions (Table 5); and that a majority would apparently favor involving private institutions in direct state appropriations through general scholarships, service contracts, support for high-cost programs, and regional or state consortia (Table 7). It is entirely possible, therefore, that favorable attitudes toward state support, or at least acceptance of its practical necessity, are developing among state leaders in the South, including a significant number who have vested interest in the status quo.

The more detailed findings of the survey are shown below. For each area of inquiry (importance of private higher education, financial needs, etc.), the relevant section of the questionnaire is reproduced above a basic table containing tabulations of responses to specific questions, by category of respondent (political leaders, etc.). The accompanying text contains profiles developed from these basic tables, as well as a commentary which endeavors to highlight the more interesting patterns of the basic data.

### **Importance attributed to private higher education**

Response to the questions of importance of private higher education fell overwhelmingly either in the category "important" or "crucially important" (see Table 3). The profile below features the strongest views of private higher education's importance by highlighting the "crucially important" responses:

## IMPORTANCE ATTRIBUTED TO PRIVATE HIGHER EDUCATION

How important is independent higher education in your state for the following goals and services?

	Crucially Important	Important	Unimportant
Educating the leaders in social, political and cultural aspects of state and national life.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Providing opportunity for highest development of individual aspirations and talents.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Meeting manpower needs in health, law, science, engineering, business, education or other specialized fields.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Maintaining academic freedom.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Promoting religious development.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fostering a diversity of educational approaches.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Educating students from other states, regions, countries.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (explain)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Goals and Services	Political Leaders			Board Members and Executives			Public			Presidents Private			Total		
	Cruc. Imp.	Imp.	Un- Imp.	Cruc. Imp.	Imp.	Un- Imp.	Cruc. Imp.	Imp.	Un- Imp.	Cruc. Imp.	Imp.	Un- Imp.	Cruc. Imp.	Imp.	Un- Imp.
Leadership Education	37%	63%	0%	29%	71%	0%	26%	64%	10%	72%	28%	0%	39%	58%	3%
Individual Opportunity	33	82	0	31	69	0	32	57	11	70	30	0	40	57	3
Manpower Training	28	72	0	39	53	8	28	60	17	39	61	0	34	60	6
Academic Freedom	37	56	7	34	46	20	30	48	22	67	30	3	40	45	15
Religious Development	27	50	23	29	46	25	27	50	23	47	47	6	32	48	20
Educational Diversity	50	43	7	31	59	10	38	51	11	73	24	3	45	47	8
Education of Non-Resident Students	8	54	38	10	49	41	9	62	29	21	55	24	11	55	34

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Goal or Service	Percent of Total Responding "Crucially Important"
Education Diversity	45%
Individual Opportunity	40
Academic Freedom	40
Leadership Education	39

Manpower Training	34
Religious Development	32
Education of Non-Resident Students	11

In general, the profile demonstrates that regional leadership places a relatively high value on the contributions of private higher education to social goals such as individual opportunity and leadership education; to academic strengths like educational diversity; and to economic needs for trained manpower. It also regards private colleges and universities as important bulwarks of academic freedom and values the religious dimensions of private higher education, but attaches far less importance to its role in educating students from other states, regions, and foreign countries.

Comparison of responses between categories in Table 3 reveals, not surprisingly, that private college presidents accord the highest ratings to every goal or service. The ratings of the public college presidents, while generally lower or more negative than others, are not always the lowest. Political leaders were at least as generous in their estimate of private higher education as members and executives of state boards.

### Financial Needs

Respondents were asked to check the approaches which should be used in meeting the financial needs of private higher education beyond present funding levels. The results are shown in Table 4.

In terms of overall preference, the following profile indicates "more aggressive fund-raising" leads the list, with "partial state support" not far behind:

Ways of Meeting Need	Percent of All Respondents
More Aggressive Fund-Raising	73%
Partial State Support	60
Increased Federal Support	53
Increased Fees	52
Public Ownership	6

As detailed in Table 4, only 36 percent of private college presidents suggested "increased fees," which were advocated by 65 percent of public college presidents and by 52 percent of the total sample. This fact perhaps reflects a recognition by private college presidents, based upon experience, that the potential of increased fees is limited; it may suggest anxieties about increasing still further the noncompetitive gap between public and private college fees. Private presidents also advocated "increased federal support" to a greater degree than other categories of respondents. Since public college presidents might understandably be reluctant about advocating support of private colleges with state funds, it is noteworthy that almost one-third of the public college respondents checked "partial state support" as a viable approach.



## MEETING FINANCIAL NEEDS OF PRIVATE HIGHER EDUCATION

If independent colleges and universities have needs which cannot be financed at current levels of funding (tuition and fees, voluntary support, etc.), do you feel such needs should be met through one or more of the following? Check any or all that apply.

Increased fees?	<input type="checkbox"/>	Partial state support?	<input type="checkbox"/>
More aggressive fund-raising?	<input type="checkbox"/>	Public ownership?	<input type="checkbox"/>
Increased federal support?	<input type="checkbox"/>	Other? (Explain below)	<input type="checkbox"/>

	Political Leaders	Board Members and Executives	Public Presidents	Private Presidents	Total
Increased fees	52%	49%	65%	36%	52%
More aggressive fund-raising	59	69	83	79	73
Increased federal support	52	47	48	70	53
Partial state support	59	71	31	85	60
Public ownership	0	6	12	0	6

### State Support in Principle

Respondents were asked whether or not, in principle, they did or could favor some degree of state support for (1) private (not church-related) institutions and (2) church-related institutions. Table 5 summarizes the replies.

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## STATE SUPPORT IN PRINCIPLE

In principle, do you or could you favor some degree of state support for:

	Yes	No
private (not church-related) institutions?	<input type="checkbox"/>	<input type="checkbox"/>
church-related institutions?	<input type="checkbox"/>	<input type="checkbox"/>

	Political Leaders	Board Members and Executives	Public Presidents	Private Presidents	Total
For private (not church-related) institutions	76%	75%	44%	88%	68%
For church-related institutions	66	70	34	79	60

Sixty percent of all respondents favored some state aid for church-related colleges, and 68 percent could support such assistance for nonsectarian private colleges. Political leaders, state board members and executives tended to favor state aid for both types of private colleges to about the same degree. Public presidents, however, tended to oppose state support.

Although the questionnaire solicited responses in terms of the distinction between sectarian (church-related) and nonsectarian private institutions, it is relevant to assess the response without regard to this distinction. The profile below does so:

**Proportions of Respondents Who Favor State Support in Principle For All Private Institutions**

Respondent Category	Percent Response
Private College Presidents	84%
Board Members and Secretaries	73
Political Leaders	71
Public College Presidents	39
All Respondents	64

This profile indicates that a significant majority of all respondents does, or could, favor some degree of state support for private higher education *per se*, as a matter of principle. In terms of categories of respondents, only public college presidents constituted a minority category, with the percentage in favor (39 percent) closely corresponding to the percentage of public college presidents (31 percent) in Table 4 who check "partial state support" as one of the preferred ways of meeting financial needs of private higher education.

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**Objections to State Support**

The survey instrument asked for responses to eight commonly stated legal, financial, or philosophical objections to state support for private higher education. The percentages of respondents agreeing with each of these objections are shown in Table 6. The profile below ranks the objections in descending order of agreement by all respondents:

Objection	Percent In Agreement
Large tax impact	58%
Responsibility of private or church philanthropy	55
Church-state issue	50
Public funds for private purposes	46
Threat to institutional autonomy	46
Undesirable competition	43
Too costly for state government	43
Unnecessary duplication	25

## LEGAL, FINANCIAL AND PHILOSOPHICAL OBJECTIONS

Some frequently-voiced criticisms of state support for independent higher education are listed below. Please check the box which most closely reflects your views for each criticism.

	Strongly Agree	Agree	Disagree	Strongly Disagree
Violates constitutional separation of church and state.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Violates legal constraints on appropriating public funds for private purposes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Will deprive independent institutions of their autonomy.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Will lead to undesirable competition between public and non-public institutions for public funds.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Would be too costly for state governments.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Will lead to unnecessary duplication.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Will create large tax impact.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Private or church philanthropy should meet needs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (explain).				

Objection	Political Leaders	Board Members and Executives	Public Presidents	Private Presidents	Total
Church-state issue	54%	44%	73%	21%	50%
Public funds for private purposes	52	39	64	22	46
Threat to institutional autonomy	59	32	63	15	46
Undesirable competition	48	35	75	6	43
Too costly for state governments	46	36	65	18	43
Unnecessary duplication	22	21	44	9	25
Large tax impact	48	56	83	33	58
Responsibility of private or church philanthropy	56	49	78	30	55

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Particularly noteworthy is the fact that only 50 percent of all respondents agreed with the contention that state support for private higher education violates constitutional separation of church and state. It would thus appear that church-state objections are not as pervasive as one might think. This finding seems also to be reinforced by Table 4, where 60 percent of all respondents favored state aid to church-related colleges. (The difference in percentages may be accounted for by those who admitted a constitutional issue but maintained that aid to the student or various types of restricted aid to the institution would avoid the question.)

The only two objections supported by more than half of all respondents were (1) that such aid would create a large tax impact and (2) that private philanthropy should meet the need. Many marginal comments indicated that the first was a finding of fact and the second an expression of philosophy rather than of basic objections.

Only one-fourth of all respondents felt that state aid would

result in unnecessary duplication. Almost half tended to discount presumed threats to institutional autonomy, undesirable competition, or excessive costs to state governments.

In terms of individual categories, political leaders and public presidents saw private institutions losing some autonomy as a result of state aid, while the other kinds of respondents largely rejected the argument. A majority of public presidents thought state aid would lead to undesirable competition between public and private institutions and create excessive costs for state governments.

**State Support Programs: Personal Views**

The views of respondents were solicited with respect to fourteen specific types of state aid to private higher education. The questionnaire was designed to solicit differences in personal views and judgments of political feasibility, respectively. (In the compilation of personal views, “undecided” responses were considered as negatives, so “approvals” are reported as a percent of total responses.)

The authors arranged the fourteen types of state support in what they conceived as an ascending order of complexity, state involvement in private higher education, and possible legal issues. As will be seen, responses did not precisely follow this pattern.

Five types of state support were personally approved by a majority of every category of respondent. Four received mixed reactions, and five were rejected by a majority of every category. In descending order of popularity, the profile for all respondents derived from Table 7 is as follows:

**PERSONAL VIEWS**

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Response	Item No.	Program	Percent Approving (All Respondents)
Favorable:	1	Student Loans	86%
	8	Service Contracts	73
	3	General Scholarships	68
	9	Support For High-Cost Programs	66
	10	Regional or State Consortia	63
Mixed:	4	Tuition Equalization	55
	2	Construction Loans	52
	5	Tuition Grants Plus Supplements	32
	6	Grants for Academic Buildings	25
Unfavorable:	11	Credit/Hour or other Formula Grants	26
	13	Support of Expanded Enrollments	25
	14	Support for Improved Quality	25
	12	Percentagewise Support of Operating Budgets	24
	7	Grants for Dormitories and Student Centers	15

## PERSONAL AND POLITICAL VIEWS ON STATE SUPPORT PROGRAMS

Following is a list of various types of state support programs for non-public higher education which are *in use* or have been proposed in a number of states (with appropriate controls of eligibility and accountability). To the right of each question you are asked to record *first* your personal reactions to each program and *then* your opinion as to its political feasibility in your state.

	PERSONAL VIEW			POLITICALLY FEASIBLE?			
	Approve	Dis-approve	Un-decided	Yes	Possibly	Probably Not	No
State-guaranteed student loans	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Construction loans financed by a public authority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
General state scholarships	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tuition equalization grants to state students at in-state private institutions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tuition grants to students plus cost-of-education supplements to institutions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants for construction of academic buildings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants for construction of dormitories and student centers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contracts with institutions for the performance of selected educational functions (teacher training, social work, library science, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Support for costly and/or highly specialized programs not sufficiently provided by public institutions (medicine, clinical psychology, forestry, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Purchase of selected or specialized services from private institutions through a quasi-public authority supported by state funds (e.g. SREB, other regional or state associations of public and private institutions).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants to institutions on the basis of degrees granted, student hours of instruction delivered, or other objective standard	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
State assumption of a formula-based share of basic educational and general expenses of private institutions (e.g. a predetermined percentage of such expenses)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Assumption of a share of the increased costs for expanded enrollments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Assumption of a share of the increased costs resulting from specific efforts to improve the quality of instruction (e.g. raising faculty qualifications, improving teaching methods, curricular reform, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Table 7  
 Personal Views: Proportions of Respondents Who Favor Various  
 Kinds of Support By Category of Respondent

Type of Aid	Political Leaders	Board Members and Executives	Public Presidents	Private Presidents	Total
1. Student loans	97%	82%	77%	97%	86%
2. Construction loans	43	48	46	72	52
3. General scholarships	65	62	64	88	68
4. Tuition equalization grants	54	53	31	91	55
5. Tuition grants plus institutional supplements	32	26	21	55	32
6. Grants for academic bldgs.	24	16	17	52	25
7. Grants for dormitories & student centers	15	14	04	34	15
8. Service contracts	81	82	64	66	73
9. Support of high-cost programs	67	68	64	64	66
10. Regional or state consortia	70	72	57	55	63
11. Credit/Hour or other Formula Grants	22	25	13	49	26
12. Percentagewise support of operating budgets	15	14	24	46	24
13. Support for expanded enrollments.	22	21	23	33	25
14. Support for improved Quality	20	16	26	39	25

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In the category of mixed responses, tuition equalization (item 4 in Table 7) was favored by a majority of all respondents and by majorities in all categories except public presidents. In contrast, tuition grants plus institutional supplements (item 5 in Table 7) were supported by fewer than a third of all respondents and rejected by majorities in all categories except private presidents. Construction loans (item 2 in Table 7) were approved by 52 percent of total respondents, although narrowly rejected by all categories except private presidents. Grants for academic buildings (item 6) were disapproved by a wide margin by all categories except private presidents.

With respect to academic building grants, many respondents noted that private institutions as a group have excess capacity in physical facilities. This finding is confirmed in a recent report of the Higher Education Construction Programs Study Group of the United States Office of Education.<sup>48</sup> The same study points out, however, that a given private institution may be overcrowded or may desperately need a given type of facility to accommodate its academic program.

In summary, respondents showed a strong personal preference for assisting private higher education through aid to the student and

<sup>48</sup> *Federal Support for Higher Education Construction: Current Programs and Future Needs*, Report of the Higher Education Construction Programs Study Group of Washington: Office of Education, U. S. Department of Health, Education, and Welfare, (July 10, 1969), pp. 125-159.

through contracts for the purchase of educational services which are highly specialized, expensive, or not available in sufficient quantity from public institutions. The approaches which involve more direct support of the instructional programs of private institutions were rejected by a majority of respondents.

**State Support Programs: Political Feasibility**

For each of the fourteen enumerated types of state aid, respondents were asked to express their views regarding political feasibility. Four possible responses were listed; "Yes," "Possibly," "Probably Not" and "No."

Responses to this item, as shown in Table 8, tended to be somewhat cautious. With one exception, the majority of respondents stated pro or con views in terms of "Possibly" or "Probably Not." Only state-guaranteed student loans received a majority of "Yes" replies. No item was given a majority of "No" evaluations.

For purposes of evaluation, the "Yes" and "Possibly" responses were combined and converted to percentages. The resulting figure thus includes all those who think the specific approach would have some chance of enactment in their states.

Inspection of returns indicated that respondents tended to consider politically feasible those approaches which they personally approved.<sup>49</sup>

When the separate percentages of "Yes" and "Possibly" responses in Table 8 are combined, seven of the 14 programs received a majority vote from all respondents. Similarly, the "Probably Not" and "No" responses combine to produce majorities disapproving of the remaining seven programs. The profile is as follows:

<b>POLITICAL FEASIBILITY:</b>			
<b>Response</b>	<b>Item No.</b>	<b>Program</b>	<b>Percent Yes/Possibly</b>
Politically Feasible:	1	Student Loans	94%
	8	Service Contracts	82
	3	General Scholarships	74
	10	Regional or State Consortia	74
	9	Support For High-Cost Programs	68
	2	Construction Loans	61
	4	Tuition Equalization	61
Not Politically Feasible:	7	Grants for Dormitories, etc.	83%
	12	Percentagewise Support of Operating Budgets	76
	6	Grants for Academic Buildings	75
	14	Support for Improved Quality	71
	5	Tuition Grants Plus Supplements	70
	13	Support for Expanded Enrollments	65
	11	Credit/Hour, Other Formula Grants	61

<sup>49</sup> Analysis of the data reveals a nearly perfect positive correlation.

**Table 8**

**Political Feasibility: Proportions of All Respondents  
For and Against Various Kinds of Support**

	Politically Feasible? (Percentages of Total Response)			
	Yes	Possibly	Probably Not	No
1. Student loans	54%	40%	5%	1%
2. Construction loans	23	38	31	8
3. General scholarships	32	42	21	5
4. Tuition equalization grants	23	38	28	11
5. Tuition grants plus supplements	12	18	55	15
6. Grants for academic buildings	8	17	52	23
7. Grants for dormitories and student centers	5	12	47	36
8. Service contracts	34	48	15	3
9. High-cost programs	38	30	23	9
10. Regional or State Consortia	35	39	21	5
11. Credit/Hour or other Formula Grants	6	31	41	22
12. Percentagewise support of operating budgets	4	20	49	27
13. Support for expanded enrollments	5	30	43	22
14. Support for improved quality	5	24	44	27

As noted, this feasibility profile exhibits a high degree of correlation with the profile of personal views. That is to say, state support for private higher education tends to be regarded as politically feasible as well as personally acceptable when aid is channeled to the student or when funds are appropriated for various types of contractual arrangements. Programs involving direct, "across the board" institutional support tend to evoke personal rejections as well as judgments of "not feasible politically."

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### **Limitations of the Survey**

The authors regard this survey as something of a pilot project, with its most serious limitation being the relatively low rate of overall return (32.1 percent). An effort was made to evaluate this limitation, since the attitudes of nonrespondent in surveys of this sort may differ significantly from those of respondents. A selective follow-up inquiry was made to determine why, for example, only 20 out of 160 legislators (11.4 percent) returned completed questionnaires.

Among the responses to the follow-up were that some prospective respondents no longer held public office, others lacked time or secretarial assistance to complete the survey, and still others were unresponsive to opinion surveys in general. The possibility cannot be ruled out, however, that more substantive reasons were also involved. The very sensitivity of the issue may have generated, especially among elected officials, some reluctance to "go on record," even anonymously. The distinct possibility also exists that political and lay leaders in some states do not perceive the so-called financial crisis in private higher education as a critical problem for state government; at least not to the same degree as educators. Because of these limitations, the authors emphasize that the survey



is primarily an illustrative and revealing study, rather than one which is definite or comprehensive.

On the other hand, the survey does plow new ground and, in particular, demonstrates that the regional approach has significant advantages as an opinion-sampling technique. It suggests, for example, that a regional survey can deal with a politically sensitive issue without getting enmeshed in partisan views at the state level. It provides a means by which each state can measure the significance of its own problems in this matter against a background of shared concerns. The internal consistency of the data tends to confirm the validity of the survey design and suggests the desirability of conducting more intensive studies along similar lines, both within the Southern region and elsewhere.

### Summary

Within the foregoing limitations, a number of significant conclusions may be drawn. As an illustrative study of political attitudes toward private sector subsidies among regional leaders in SREB states, the survey tends to share a common ground with the trend in judicial interpretations reported in Chapters II and III. Specifically, personal and political views on student aid for private college enrollments agreed with the "child benefit theory" which can be inferred from some Supreme Court decisions, and which has occasionally been directly invoked by several state courts. Attitudes toward service contracts, state or regional consortia, and support for high-cost programs are compatible with the "secular legislative purpose" and "conduit" doctrines endorsed by courts at both federal and state levels. Other types of direct institutional grants (for academic buildings, dormitories, or operating budgets) might be regarded as legally valid by the courts, but would generally run into political barriers among state decision-makers. Various kinds of student and institutional loans, or other arrangements for financing self-liquidating costs, would appear to have nearly unanimous support in both legal and political opinions.

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At a more general level, the survey suggests that church-state issues represent a serious concern for about 40 to 50 percent of political and educational leaders in the 14 SREB states. While substantial, the amount of concern is probably less than mere intuitive guesses might have forecast and, in any event, appears to be more of a philosophical reservation than a practical barrier to including church-related colleges in appropriate types of state support programs.<sup>50</sup>

Undoubtedly, public college presidents represent consistent and strong views in opposition to many aspects of state support. On the whole, however, it seems unlikely that there are absolute political

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<sup>50</sup> The question may also be raised as to how much of the church-state concern reflects mistaken notions concerning prevailing judicial interpretations of the constitutional issues.

barriers to state support programs which involve aid to the student, which take contractual approaches to the use of secular services in private colleges and universities, or which advance funds for self-liquidating costs.

Taken together, the findings of Chapters II, III and IV comprise, in the authors' view, a promising basis for alleviating the more critical state-level problems of coordinating and financing balanced public-private structures for higher education. The final chapter takes a brief look at the implications of these findings for the future structuring of state-coordinated higher education.

## Chapter V

### A LOOK TO THE FUTURE

In concluding this report, the authors believe a final word of caution is in order. To suggest that certain approaches to state support for private higher education are legally valid or politically feasible is by no means to suggest that these approaches will wholly relieve the complex economic crisis in higher education. Neither will they automatically generate workable solutions to the particular fiscal difficulties confronting any state and its institutions for higher learning, public or private. At best, it can be said that legal and political issues need not comprise insuperable obstacles to the judicious use of the state support approach.

The use of state support programs to strengthen statewide structures for higher education, in the SREB region or elsewhere, must necessarily be the subject of detailed and continuing studies within each state. In other words, the development of effective support programs ought to involve statewide educational planning and coordination in combination with comprehensive management studies of institutional programs in higher education.

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Implicit in this approach is the premise that states should accept some responsibility for coordinating and financing a balanced public-private structure for higher education. Chapters II and III of this report reveal that there is legal and judicial precedent for this premise. Chapter IV suggests that public leaders value the contributions of private higher education, are not unsympathetic to its fiscal predicament, and would countenance appropriate forms of state support to ease its problems. What is not yet generally evident among the public views of political and educational leaders is whether the approach involves goals that are economically and educationally in the public interest.

The authors of this report take the position that state initiatives to develop private sector subsidies do encompass economic and educational goals in the public interest. Economically, such subsidies can promote a more efficient use of tax resources allocated to higher education. Educationally, they can help to blunt the threat of an effective state monopoly in higher education. Without a clear definition of these basic issues, however, ongoing debates on state support tend to degenerate into partisan disputes which divide the constituencies

of public and private higher education into opposing camps. A greater focus on economic and educational needs would help to transcend these partisan differences by emphasizing how state subsidies could encourage public and private institutions to cooperate in serving the larger public interest.

Views such as these have actually been stated and restated in many official and unofficial studies over the past five or six years. But their impact has been diluted by the very fact that they have been presented in many different modes and contexts. Studies of the problem have been typically directed to limited issues within individual states, with correspondingly limited findings.

Yet to anyone who has reviewed these studies, they sound a strikingly common theme. The introductory chapter of this report presented in condensed fashion the common theme reflected in some of the more significant studies. This final chapter briefly reviews their consequences. It emphasizes the imminent threat of an approaching public monopoly in higher education as well as the financial and educational implications of this trend and offers a general evaluation of the advantages and possible pitfalls of the state support approach. The broad outlines of a possible longer range solution to the problem involving federal and private financing as well as state support are also suggested.

### A Public Monopoly?

If one considers the general trend of enrollment distributions over the past several decades, it is evident that mounting concerns about a public monopoly are not without foundation. The table below dramatically portrays what amounts to an accelerating exodus of students from the private sector of higher education to the public sector:<sup>51</sup>

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**Student Attendance at Private and Public Colleges and Universities**

Year	Private		Public	
	Number	Per Cent	Number	Per Cent
1939	638,250	47	726,565	53
1950	1,142,136	50	1,154,456	50
1955	1,180,113	44	1,498,510	56
1960	1,474,317	41	2,135,690	59
1965	1,915,693	34	3,654,578	66
1968	2,054,773	29	4,928,320	71
1975	2,667,000	27	7,105,000	73

<sup>51</sup> Sources: 1939 to 1968, Robert H. Connery, ed. *The Corporation and the Campus*, Proceedings of the Academy of Political Science, Columbia University, Vol. XXX, No. 1, (New York, 1970) p. 98; projection for 1975, Southern Regional Education Board, *Fact Book on Higher Education in the South, 1968* (Atlanta: SREB, 1968).

During the first 30 years of this century, private institutions enrolled six students for every four enrolled in public ones. During the 1940-1950 decade, as the above table indicates, enrollments were almost evenly divided. By 1955, however, the enrollment proportions had gradually shifted to 56 percent public and 44 percent private; and during the explosive growth of the past 15 years, public institutions absorbed about 80 percent of the threefold increase in total enrollments. Today the declining share of private sector enrollments is approaching one-fourth of a seven million total enrollment with further disparities projected for 1975, when total enrollments are expected to reach ten million.

Similar trends are reflected in the Southern region and, if anything, are even more pronounced. By 1950, private institutions in the South accounted for only 38 percent of total regional enrollments, compared with 50 percent nationally. Currently, enrollments in private Southern institutions are slightly above one-fifth of total regional enrollments, and by 1975 they are expected to be considerably less than one-fifth.<sup>52</sup>

### Economic Implications

But enrollment trends, while a cause for concern over the long run, are far less immediate and dramatic as a symptom of approaching monopoly than the relentless fiscal squeeze upon most private institutions. The more visible consequences of the squeeze involve a widening pattern of fiscal imbalances among private sector institutions, including some of the most prominent and affluent. First, there is the spectacle of large budgetary deficits in prestigious national universities as well as in less prominent regional and local institutions, amounting in the aggregate to multiples of millions of dollars.<sup>53</sup> Second, there is the spreading trend among private sector institutions to seek affiliation with public systems of higher education as alternatives to insolvency, or—short of that—to seek new modes of partial public funding. Finally, there is the prospect of accelerating phase-outs of important privately operated schools in such high-cost fields as engineering, medicine and dentistry as their sponsoring institutions seek educational retrenchments to forestall more dangerous trends toward bankruptcy.

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Specific illustrations of these trends are evident in almost every section of the nation, the South included. A well endowed Southern university, for example, reports current budgetary deficits as alarming as those in the Ivy League or the Middle West. The Universities of Houston and Little Rock follow Pittsburgh and Buffalo in relin-

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<sup>52</sup> Southern Regional Education Board, *Fact Book on Higher Education in the South, 1970* (Atlanta: SREB, 1970).

<sup>53</sup> The Association of American Colleges reports that "a rough estimate of the total deficit experienced by all of private higher education over four years (1967-1971) would be near \$370 million." (*The Chronicle of Higher Education*, January 11, 1971, p.1).

quishing private status for stronger positions as state-supported institutions. Private colleges in Southern states like Texas and North Carolina, no less than comparable institutions in Northeastern states like Connecticut or border states like Maryland, announce campaigns to seek partial state funding. Medical schools at Georgetown and George Washington Universities, both of which serve adjacent metropolitan areas of Virginia and Maryland, predict imminent phase-outs unless substantial financial relief is provided soon.

All too frequently, evidence of this sort is interpreted partially—and simplistically—as an indication that private higher education is mired in an anachronistic style of living which ignores the financial constraints of the current economy, the nature of the contemporary market in higher education, or the principles of sound business management. It is generally acknowledged that private colleges can (indeed must) tighten their fiscal belts. Yet there are limits to what private colleges can do to soften the impact of inflated costs without irreversible damage to the quality of their programs. The main point is that there is almost nothing they can do to head off the complicating effects of competitive undercutting by mushrooming public systems. In short, the most basic danger is that official indifference to the unavoidable aspects of the private college plight can very easily transform a current condition of financial stress into an eventual crisis of accelerating deterioration that could extend throughout the entire spectrum of private higher education.

The adverse economic implications of growing public-private imbalances are especially critical in the South. For example, the regional economy as a whole has not yet achieved parity with the national economy in its per capita support of higher education, though exceeding the national average in terms of effort.<sup>54</sup> On the whole, regional disparities suggest that the public economy in the South is becoming comparatively overextended relative to financing of public institutions, at the same time that the private economy of the region is becoming progressively less responsive to the needs of private institutions relative to expanding markets and higher costs.

The situation in the South illustrates how economic realities tend to aggravate the financial squeeze on both public and private institutions, to the detriment of the total enterprise. Up until now, the impacts have probably been more severe among private sector institutions, but the entire trend portends rapidly developing adverse effects on public budgets and the institutions they support. In particular, the decline of the private sector of higher education in almost any state threatens to impose irresistible pressures on hard-pressed state budgets to take over or supplant institutions previously financed by largely private income; concurrently, enrollment projections indicate that the institutional budgets of existing public colleges would have to be increased or stretched still further to accommodate even

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<sup>54</sup> W. H. McFarlane, *State Support for Private Higher Education?* (Atlanta: Southern Regional Education Board, 1969), p. 17.

larger enrollments, often at the cost of critically needed improvements in the quality of existing programs. Public leaders have expressed growing concern that state economies are already strained to the limit simply to accommodate the needs of public institutions.

### **Educational Implications**

The recent growth of public higher education reflects, in one sense, the renaissance of this once neglected segment of the American structure for higher education. But to the extent that it has developed at the expense of the private sector, this apparent strength generates a false sense of security for the future. When one considers the more subtle and intricate forces which sustain the strength and vitality of higher education as a total enterprise, it becomes only too clear that unbalanced growth in one of its segments can lead in the end to an erosion of essential values throughout the whole.

Nowhere are these dangers more evident than in the trend toward a concentration of huge enrollments and expanding programs in public institutions. To consider just one aspect, many professional critics are echoing long-voiced student concerns over the increasing depersonalization of higher education. As the enterprise has grown in size, not only of enrollments but also of faculty, professional staff and corresponding administrative organizations, colleges and universities have tended to become less and less "communities of scholars" and more and more the educational counterparts of large corporate organizations. Emphasis on efficient production of "educational outputs" (i.e., credit-hours, degrees, publications, research discoveries, professional services and similar measurements of so-called academic effort) tends to divert attention from the essential interpersonal equations of collegiate instruction. Obviously, this is a greater danger for public institutions which now enroll an overwhelming majority of students, operate by far the largest physical plants, and manage the most complex range of sophisticated programs staffed by the most impressive aggregation of professionals ever assembled for higher educational purposes. But it is also a danger to the total enterprise, to the extent that it sets the tone of higher educational management for all institutions, public and private.

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The implications of sheer size with corresponding tendencies to monolithic structures is only one dimension of the concern for basic qualitative values which emerge from an overview of current imbalances in the public-private structure. There are other values which could be substantially diminished, if not altogether obliterated, by the emergence of an effective state monopoly in higher education. These include diversity in educational philosophies and styles, and academic freedom in several dimensions. While private sector institutions are subject to increasing criticism for claiming qualitative uniqueness and superiority which objective comparisons of faculties, student bodies or programs fail to justify, they reflect on the whole a greater measure of individualistic approaches to higher education than do their counterparts in public systems. Accord-

ingly, a declining private sector projects a corresponding diminution of the student's freedom to choose the kind of institutional climate in which to pursue his educational goals. More ominously, it raises the spectre of increased governmental control of educational purposes which history demonstrates occurs most frequently in state-dominated systems of higher education, especially during times of political stress and social upheaval.

### A Short-Term View

In total perspective, responsibilities for promoting balanced public-private structures must be shared by educational leadership in the private economy, at the federal level, and among the states as well. Under present conditions, however, the role of state governments in attacking these issues is exceedingly pivotal, especially for the short term.

In particular, present realities in the private economy and at the level of national politics do not promise much in the way of immediate answers. Voluntary private support for private higher education is not expanding as fast as is the gap between earned income and built-in costs; and in any event its volume is momentarily a victim of a slack economy. Increased support from a new breed of federal aid programs has considerable potential for the long run. Yet while federal leadership in higher education is searching for a more effective role, dollar support in many areas is actually declining, and severe competition from other national priorities (as well as a national crisis of public confidence over campus dissent) renders the future directions and financial impact of federal programs wholly uncertain.

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For several compelling reasons, therefore, current initiatives for comprehensive new directions in financing higher education lie squarely at the door of the statehouse. Among the more important of these reasons is that this is precisely where such initiatives belong if states are to maintain their historic central role in determining how public needs in higher education are to be met. Secondly, state governments are obliged to respond to conflicting pressures on their budgets if any sort of order is to be maintained in the planning and coordination of statewide systems for higher education. The demand for private sector subsidies may soon comprise one of the more critical dimensions of these pressures. To evade the problem momentarily is only to increase the eventual difficulties of dealing with the later consequences.

Thus, the private sector could have a significant role to play in state markets for higher education in terms of public policies that promote the involvement of privately owned institutions in publicly financed systems. State subsidies in the private sector incorporate significant steps in that direction, are legally sound, and appear to be gaining in political support. They comprise an especially strategic fiscal advantage when they are used to supplement private funding of existing facilities, enrollments, programs and services that might otherwise require full-cost tax investments for new public facilities



and for 80 percent or more of basic operating costs. Their major potential in this respect is to lower the average statewide costs for sheer expansion of the state systems, thus creating additional margins for the costs of improving quality.

### Possible Problems

State promotion of balanced public-private structures would involve some modifications in the governing modes of prevailing state systems for higher education. Normally state governments exercise varying degrees of supervision over the role, development and general welfare of institutions within the public system through publicly appointed governing boards and, in most instances, statewide coordinating agencies. Participation of independent institutions in this prevalent approach involves, at the very least, inclusion of private institutions in the coordinated aspects of the public system.

Admittedly, state coordination of private institutions raises the specter of more intensive governmental control over all of higher education. Private educators, in particular, are not anxious to relinquish voluntarily any degree of self-determination to the constraints of state coordination or to the requirements of public accountability implicit in acceptance of state subsidies. Public educators, for their part, are not likely to view with enthusiasm the appropriation of state monies to private institutions with any lesser degree of control and accountability than those which apply to public institutions.

Yet there is no substantive evidence to suggest that increased governmental decision-making and higher levels of public funding with respect to public goals have been accompanied by a loss of real autonomy among individual institutions. In fact, the prevailing evidence is quite to the contrary. In a recently published study at the Berkeley Center for Research and Development in Higher Education, Palola concludes that while increased state-level activity in higher education "has meant a formal and legal loss of autonomy for colleges and universities, . . . on an informal level institutions have been able to expand and develop their educational programs in the direction they desire. Informally, then, colleges and universities have been able to maintain or even enhance their autonomy."<sup>55</sup> The long-term history of states which have traditionally subsidized private higher education as partial alternatives to extensive public systems (e.g., New York and Pennsylvania) also tends to confirm the view that the autonomy issue need not be a substantive one. The same may be said in principle of experience with more recent programs of federal aid.

While policy questions of autonomy and self-determination need not undermine the effective development of coordinated public-private structures, administrative problems in setting and enforcing standards of public accountability could more easily develop. In this

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<sup>55</sup> Ernest Palola, "A Challenge for Statewide Planners," *The Research Reporter*, Vol. 5, No. 2 (Berkeley: Center for Research and Development in Higher Education, 1970), p. 3.

respect, use of student aid and service contracts might minimize these difficulties for the state, though they very probably would create additional problems for the institution. For example, if a greater availability of student aid at current tuition levels should generate a large influx of students into private colleges, many of these institutions could not normally absorb the additional per-student costs without (1) increasing tuition, or (2) increasing student-teacher ratios through upward adjustments in faculty work loads and average class sizes, or (3) raising from sources other than tuition the supplements necessary to cover the gap between what the college charges the student and what it costs to educate him. Concerning service contracts, the impact of contractual commitments on the institution's mission, resources, instructional programs and related functions would have to be carefully assessed.

### A Long-Term View

Behind the issue of state support, then, are implications for fundamental changes in the financial structure of higher education. The ultimate need is to preserve the most important values of the enterprise's present structure. Equally effective patterns of financial support in both sectors of higher education should maximize productivity, expand opportunity, stimulate excellence, and protect diversity and freedom.

In the final analysis, therefore, this report has aimed at describing how states can best use their tax resources to promote unity in the welfare of higher education. Comprehensive planning and coordination of a balanced structure can reinforce the complementary academic strengths of public and private institutions instead of aggravating their fiscal weaknesses.

The clarification of legal uncertainties is the key to overcoming political indecision concerning the feasibility of more effective structures. A theme for translating decision into action is admirably expressed in the following statements.<sup>56</sup>

The need for effective service by all institutions must take precedence over any biased commitment to the public or private sector. Each stands to gain from the vigorous health and stimulative challenge of the other.

This suggests that public and private higher education must no longer be viewed as if they were distinct enterprises, differing in aims, purposes and impact simply because of differences in sponsorship and control. Relative to state, regional and national needs, the critically important requirement is more effective coordination of higher educational opportunities, programs and services, with in-

<sup>56</sup> Select Committee on the Future of Private and Independent Higher Education in New York State. *New York State and Private Higher Education*, (Albany: Bureau of Publications, State Department of Education, 1968), p. 13.

stitutions in both sectors and at all levels seeking in their own way to serve the public interest. The financing of such a network should place the emphasis of public policy on the ways in which the total resources of American higher education can be used more effectively for the common good.

The major point, then, is that the time appears to be at hand for state decision-makers to use private sector subsidies not only for immediate problem-solving, but also for long-term benefits. State initiatives seem presently to be the best hope of generating a national trend away from almost exclusive reliance on public universities and colleges to meet public needs. The critical difference is that public and private financing of higher education could then have a reinforcing rather than a divisive impact.

Expanded programs of state support do not necessarily suggest that all states without exception would adopt the approach, or that many private institutions would not choose to go it alone rather than accept the consequences of increased public funding and accountability. It is suggested, however, that states and institutions ought to consider the possibilities on their educational and economic merits; significant changes for the better in the structure of American higher education could be the result.

In sum, the long-term view is that a financially balanced national network of higher education would enable public and private institutions to serve the public interest in ways that are now largely the responsibility of wholly public systems. Advantages would include an expansion of the institutional base for meeting educational needs at lower average costs to the public treasury for plant and operations; a broader spectrum of educational opportunities commensurate with the increased diversity in social and economic backgrounds, educational talents, and career interests of contemporary student populations; and retention in the total network of the more constructive aspects of academic competition that have enabled leading institutions in both sectors to achieve standards of excellence and quality to which all institutions aspire. Considering the immediately visible alternative of a state monopoly in higher education, the development of state support for private higher education is surely worth the effort to surmount remaining political barriers to it.

## Appendix A

### Specific State Constitutional Provisions Relating to State Aid to Private Higher Education

#### Alabama

**Art. 14, sec. 263.** No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.

**Art. 14, sec. 256.** The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

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**Art. 4, sec. 73.** No appropriation shall be made to any charitable or educational institution not under the absolute control of the state other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house.

#### Arkansas

none

#### Florida

**Declaration of Rights, sec. 3.** No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

#### Georgia

**Art. 1, sec. 2-114.** No money shall ever be taken from the public treasury, directly, or indirectly, in aid of any church, sect, or denomi-

nation or religionists, or of any sectarian institution.

**Art 8, sec. 2-7502.** Notwithstanding any other provision of this Constitution, the General Assembly may by law provide for grants of State, county or municipal funds to citizens of the State for educational purposes, in discharge of all obligations of the State to provide adequate education for its citizens.

#### Kentucky

**Sec. 189.** No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to or used by, or in aid of, any church, sectarian, or denominational school.

#### Louisiana

**Art. 4, sec. 8.** No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship. No appropriation from the State treasury shall be made for private, charitable or benevolent purposes to any person or community; provided, this shall not apply to the State Asylums for the Insane, and the State Schools for the Deaf and Dumb, and the Blind, and the Charity Hospitals, and public charitable institutions conducted under State authority.

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**Art. 12, sec. 13.** No appropriation of public funds shall be made to any private or sectarian school. The Legislature may enact appropriate legislation to permit institutions of higher learning which receive all or part of their support from the State of Louisiana to engage in interstate and intrastate education agreements with other state governments, agencies of other state governments, institutions of higher learning of other state governments and private institutions of higher learning within or outside state boundaries.

#### Maryland

none

#### Mississippi

**Art. 4, sec. 66.** No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use.

**Art. 8, sec. 208.** No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropria-

tion is not conducted as a free school.

#### South Carolina

**Art. 11, sec. 9.** The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society, or organization.

#### Tennessee

none

#### Texas

**Art 1, sec. 7.** No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

#### Virginia

**Art. 4, sec. 67.** The General Assembly shall not make any appropriation of public funds, or personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution, which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to nonsectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities or towns from making such appropriations to any charitable institution or association.

**Art. 9, sec. 141.** No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities, and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or

institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial, or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district:

West Virginia:

none

## Appendix B

### **“The Degree of Entanglement Standard” and Purchase of Secular Services from Parochial Schools**

*Walz v. Tax Commission of New York City*. The Supreme Court in this 1970 decision (after the appointment of Chief Justice Burger) upheld the property tax exemption to religious organizations for religious properties used solely for religious worship.<sup>1</sup> The decision further delineates the construction of the establishment clause, and somewhat confirms the intention of the present Court to maintain a posture of governmental neutrality in religious matters while upholding the secular legislative purpose doctrine. At the same time, it introduces a new element of uncertainty, namely, “the degree of entanglement” standard.

With respect to contemporaneous construction, Chief Justice Burger said for the Court:

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It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the “establishment” of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity. . .

Summarizing national experience under the First Amendment, the Court said:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally estab-

<sup>1</sup> *Walz v. Tax Commission of New York City*, 38 L. W. 4347 (1970).



lished religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

\* \* \*

With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight rope" and one we have successfully traversed.

The Court then went on to prescribe a new criterion of "degree of entanglement":

We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree . . . . . In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

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A federal district court in Rhode Island decided a case (*DiCenso v. Robinson*) which invalidated a Rhode Island statute that would have provided state funds for parochial school teachers of secular subjects.<sup>2</sup> The court found that the diocesan school system was an integral part of the religious mission of the Catholic church and essentially a religious enterprise. While following *Schempp* as to the "primary purpose and effect" test, two members of the three judge court found that the program was "sectarian," while the other held that it was "secular." Quoting *Walz* with approval, the court also took note of the fact that only a few denominations operate school systems, and found that aid to them would excite bitter controversy.

The applicability of the *DiCenso* decision to church-related colleges seems unlikely. Obviously, the degree of church involvement in the typical private college is much less than that in the parochial elementary and secondary schools.

In any event, the recent cases involving the state purchase of secular services from parochial schools reflect the degree to which First Amendment construction is as yet unsettled. Such programs

<sup>2</sup> *DiCenso v. Robinson* (USDC RI, 1971), 39 L. W. 2023.

have been rejected in Rhode Island and Connecticut, but upheld in Michigan and Pennsylvania.<sup>3</sup>

By a four-to-three vote, the Louisiana Supreme Court has invalidated a program of salary supplements to teachers of secular subjects in the parochial schools.<sup>4</sup> A bare majority of the court quoted the "degree of entanglement" standard of *Walz* with approval, and applying the *Schempp* test, found that the purpose of the act was to subsidize parochial schools. This case and the other recent ones involving purchase of secular educational services for parochial elementary and secondary schools are highly significant to the present inquiry. Religion is commonly regarded as playing a less conspicuous role in colleges than in these schools, and college students, being more mature, are less subject to the influence of religious indoctrination than elementary and secondary school students.<sup>5</sup>

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<sup>3</sup> *Johnson v. Sanders* (USDC Conn. Oct. 15, 1970), 39 L. W. -2225. *Opinion of the Justices*, Michigan Supreme Court, Oct. 5, 1970. *Lenon v. Kurtzman*, 310 F. Supp. 35 (1969).

<sup>4</sup> *Seegers et al. v. Parker*, No. 50,870, Supreme Court of Louisiana, October 26, 1970.

<sup>5</sup> Department of Health, Education and Welfare, "Memorandum on the Impact of the First Amendment to the Constitution Upon Federal Aid to Education," 50 Geo. L.J. 351 at 377-81 (1961).

## Appendix C

### Early Cases Involving State Aid

As pointed out in Chapter II, governmental aid to private higher education was a common practice in the colonies and in the early history of the United States. In fact, the distinction between state and private higher education has been described as possibly "a 20th century distinction."<sup>1</sup>

Most of the earlier court cases involving state constitutional provisions prohibiting state aid to sectarian institutions strictly construe the language of these sections. A few citations will serve to demonstrate this line of legal doctrine.

A carefully written and often quoted decision from this period is *Synod of Dakota v. State*, handed down by the Supreme Court of South Dakota in 1891.<sup>2</sup> The South Dakota Constitution prohibited state appropriations for the benefit of any sectarian institution. At issue in the case were tuition payments to Pierre University, an institution related to the Presbyterian church, for the training of school teachers.

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The court held that Pierre University was a sectarian institution, found that tuition payments to it were repugnant to the constitutional provision, and rejected the argument that the payments did not constitute "aid" but were for services rendered to the state. On the latter point the court said:

. . . learned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the benefit of or to aid the university, but in payment for services rendered the state, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? . . .

<sup>1</sup> Pfnister, *op. cit.*

<sup>2</sup> *Synod of Dakota v. State*, 25 D. 366, 50 N. W. 632 (1891).

The Supreme Court of Illinois in 1888 had also reached a similar conclusion.<sup>3</sup> State law required that certain female infants be committed to the Industrial School of Chicago. The Industrial School was a corporation, but was conducted in connection with two church-related childrens' homes and appears to have had no real existence apart from them. In response to the argument that payment to the Industrial School for the care of children did not constitute "aid" to the sectarian childrens' homes, the Court ruled:

If they are entitled to be paid out of the public funds, even though they are under the control of sectarian denominations, simply because they relieve the state of a burden which it would otherwise be itself required to bear, then there is nothing to prevent all public education from becoming subjected, by hasty and unwise legislation, to sectarian influences.

In an 1873 case, the Supreme Court of Louisiana held unconstitutional a state appropriation of \$35,000 to Straight University to provide medical school facilities and equipment.<sup>4</sup> In return for the grant, the university was to educate a quota of students tuition-free for ten years. The court found that the university was a private institution over which the state had no control.

As cited in various sections of Chapter III, legal doctrines have developed in many states permitting state relationships with church-related institutions which certainly would have been prohibited under the holdings above.

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The United States Supreme Court, in *Everson v. Board of Education*,<sup>5</sup> sums up state experience in this area and poses the fundamental issue facing state courts:

The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The issue as stated is clearly one of degree. Chapter III outlines several rationales followed by state courts in attempting to define the permissible degree of relationship between the state and church-related institutions of higher education.

<sup>3</sup> Cook Co. v. Industrial School, 125 Ill. 540, 18 N. E. Rep. 183 (1888).

<sup>4</sup> State v. Graham, 25 La. Ann. 440 (1873).

<sup>5</sup> 330 U.S. 14

## Appendix D

### State Support for Independent Higher Education?

#### An Opinion Survey

Southern Regional Education Board  
130 Sixth Street, N.W.  
Atlanta, Georgia 30313

Recent national trends reveal evolving relationships between independent (non-public) higher education and state governments. Because of this quickening of mutual interests, SREB is conducting an opinion survey on state support for private higher education. The enclosed brief questionnaire asks governmental and educational leaders in Southern states to respond to these basic questions:

How do you feel about the educational, legal and political issues of state support for private and/or church-related colleges and universities?

What is your personal reaction and political evaluation relative to proposals for various kinds of state support programs?

The questionnaire does not ask for personal identification, nor will the views of individual be identified in the survey results. Opinion profiles will be published in summary form according to several categories of respondents (e.g. governors, attorneys-general, legislators, college presidents, etc.). Differences in prevailing views among the several states may be summarized when appropriate.

Your cooperation in completing and returning this survey form will be greatly appreciated. Answers to all questions are solicited and additional comments are encouraged. All persons receiving a copy of the questionnaire will also receive a personal copy of the published study, scheduled for completion by late 1970.

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**A. Please fill in the name of your state and check the box which identifies your official position.**

1. Name of your state \_\_\_\_\_

2. Your Position:
- |                      |                          |   |                          |
|----------------------|--------------------------|---|--------------------------|
| (a) Governor         | <input type="checkbox"/> | (d) Member of state higher education board or agency            | <input type="checkbox"/> |
| (b) Attorney-General | <input type="checkbox"/> | (e) Executive officer of state higher education board or agency | <input type="checkbox"/> |
| (c) Legislator       | <input type="checkbox"/> | (f) Public College President                                    | <input type="checkbox"/> |
|                      |                          | (g) Private College President                                   | <input type="checkbox"/> |

**B. How important is independent higher education in your state for the following goals and services?**

	<i>Crucially Important</i>	<i>Important</i>	<i>Unimportant</i>
5. Educating the leaders in social, political and cultural aspects of state and national life.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Providing opportunity for highest development of individual aspirations and talents.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Meeting manpower needs in health, law, science, engineering, business, education or other specialized fields.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Maintaining academic freedom.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Promoting religious development.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Fostering a diversity of educational approaches.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Educating students from other states, regions, countries.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Other. (explain)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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**C. If independent colleges and universities have needs which cannot be financed at current levels of funding (tuition and fees, voluntary support, etc.), do you feel such needs should be met through one or more of the following? Check any or all that apply.**

- |                                   |                          |                            |                          |
|-----------------------------------|--------------------------|----------------------------|--------------------------|
| 11. Increased fees?               | <input type="checkbox"/> | 14. Partial state support? | <input type="checkbox"/> |
| 12. More aggressive fund-raising? | <input type="checkbox"/> | 15. Public ownership?      | <input type="checkbox"/> |
| 13. Increased Federal support?    | <input type="checkbox"/> | 16. Other? (Explain below) | <input type="checkbox"/> |

D. In principle, do you or could you favor some degree of state support for:

	<i>Yes</i>	<i>No</i>
17. private (not church-related) institutions?	<input type="checkbox"/>	<input type="checkbox"/>
18. church-related institutions?	<input type="checkbox"/>	<input type="checkbox"/>

E. Some frequently-voiced criticisms of state support for independent higher education are listed below. Please check the box which most closely reflects your views for each criticism.

	<i>Strongly Agree</i>	<i>Agree</i>	<i>Disagree</i>	<i>Strongly Disagree</i>
19. Violates constitutional separation of church and state.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. Violates legal constraints on appropriating public funds for private purposes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21. Will deprive independent institutions of their autonomy.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22. Will lead to undesirable competition between public and non-public institutions for public funds.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23. Would be too costly for state governments.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
24. Will lead to unnecessary duplication.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
25. Will create large tax impact.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
26. Private or church philanthropy should meet needs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
27. Other. (explain)				

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F. Following is a list of various types of state support programs for non-public higher education which are in use or have been proposed in a number of states (with appropriate controls of eligibility and accountability). To the right of each question you are asked to record *first* your personal reactions to each program and *then* your opinion as to its political feasibility in your state.

<i>PERSONAL VIEW</i>				<i>POLITICALLY FEASIBLE?</i>				
	<i>Approve</i>	<i>Disapprove</i>	<i>Undecided</i>		<i>Yes</i>	<i>Possibly</i>	<i>Probably Not</i>	<i>No</i>
State-guaranteed student loans	28. <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	29.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Construction loans financed by a public authority	30. <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	31.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	PERSONAL VIEW			POLITICALLY FEASIBLE?					
	Approve	Disapprove	Undecided	Yes	Possibly	Probably Not	No		
General state scholarships	32.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	33.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tuition equalization grants to state students at in-state private institutions	34.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	35.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tuition grants to students plus cost-of-education supplements to institutions	36.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	37.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants for construction of academic buildings	38.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	39.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants for construction of dormitories and student centers	40.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	41.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contracts with institutions for the performance of selected educational functions (teacher training, social work, library science, etc.)	42.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	43.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Support for costly and/or highly specialized programs not sufficiently provided by public institutions (medicine, clinical psychology, forestry, etc.)	44.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	45.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Purchase of selected or specialized services from private institutions through a quasi-public authority supported by state funds (e.g. SREB, other regional or state associations of public and private institutions)	46.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	47.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Direct grants to institutions on the basis of degrees granted, student hours of instruction delivered, or other objective standard	48.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	49.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
State assumption of a formula-based share of basic educational and general expenses of private institutions (e.g. a predetermined percentage of such expenses)	50.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	51.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Assumption of a share of the increased costs for expanded enrollments	52.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	53.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Assumption of a share of the increased costs resulting from specific efforts to improve the quality of instruction (e.g. raising faculty qualifications, improving teaching methods, curricular reform, etc.)	54.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	55.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Your additional comments are invited below or on a separate sheet.

Please return completed questionnaire to:  
**SOUTHERN REGIONAL EDUCATION BOARD**  
 130 Sixth Street, N. W.  
 Atlanta, Georgia 30313